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Falling Outside: Excavating the History of Central American Asylum Seekers

Susan Bibler Coutin

This article takes a retrospective look at legal advocacy on behalf of Central American asylum seekers, which has been influential in the development of US asylum law and in the creation of an infrastructure to address immigrants' needs. The article considers three time periods when Central Americans have been deemed to fall outside of the category of refugee: (1) the 1980s, when US administrations argued that Central Americans were economic immigrants; (2) the 1990s, when civil wars in El Salvador and Guatemala came to an end; and (3) the 2000s, when some Salvadoran youths in removal proceedings have argued that they faced persecution as perceived or actual gang members. This retrospective analysis highlights the ways in which law can be creatively reinterpreted by legal actors, as well as how legal innovations carry forward traces of prior historical moments.

In 2006, Pablo, Francisco, and Jorge Ramirez were deported from the United States to El Salvador. They were among 11,050 Salvadorans deported in that year (US Department of Homeland Security 2007).[1] Their parents had immigrated to the United States without authorization in the late 1980s, when El Salvador was at war; in 1990, the parents had hired an alien-smuggler to bring their seven children, because they feared that their teenage son would be forcibly recruited by combatants. In the United States, the family applied for political asylum and obtained work permits while their applications were pending, and in 2001, Pablo, Francisco, Jorge, and their siblings were awarded legal permanent residency through the Nicaraguan Adjustment and Central American Relief Act, or NACARA. Subsequently, the three brothers were (separately) convicted of minor crimes, including driving under the influence of alcohol, carrying a gun without a permit, and drug possession. After short periods of probation or jail time, all three were placed in removal proceedings. Terrified of being deported to El Salvador, which by the mid-2000s was wracked by gang violence, they applied for political asylum; however, after being detained for a year, they agreed to sign deportation papers,

Susan Bibler Coutin is Professor in the Departments of Criminology, Law and Society, and Anthropology at the University of California, Irvine. She can be contacted by email at scoutin@uci.edu. Her article draws on research supported by grants from the American Association of University Women, the National Science Foundation (Awards #SBR-9423023, SES-0001890, SES-0296050, and SES-0518011), and the John D. and Catherine T. MacArthur Foundation. She is grateful to all of the individuals and institutions that collaborated in fieldwork and interviews, including Luis Perdomo, Jesús Aguilar, Dan Sharp, CARECEN Los Angeles, CARECEN Internacional, and the Los Angeles and San Salvador offices of Homies Unidos. Previous versions of this article were presented at the conference "Seeking Refuge: Caught between Bureaucracy, Lawyers and Public Indifference" at the School of Oriental and African Studies at the University of London, the American Sociological Association's Historical/Comparative Mini-conference, and the Center for Law, Society and Culture at the University of California, Irvine. She thanks John Campbell, David Cook-Martin, and Mona Lynch for these invitations, Victoria Bernal for suggesting the paper's direct, and Catherine Lee, Rachel O'Toole, and audience members for incredibly helpful comments and suggestions. She is also grateful to the anonymous reviewers for their comments.

1. Unless otherwise noted, pseudonyms have been used for interviewees throughout.

believing that by doing so they would earn the right to return to the United States more quickly. In 2008, when I interviewed them in El Salvador, the three brothers were still hoping that eventually, through US citizen relatives in the United States, they would be able to return to the country legally.

The Ramirez brothers' experiences, which are not unusual, raise a number of perplexing questions. Why wasn't a family who fled a civil war in fear that their children would be forcibly recruited able to obtain political asylum in the United States? How, despite not being granted asylum, was this family eventually able to qualify for legal permanent residency? And why were three of the children ultimately deported, even though they feared being subjected to gang-related violence? Addressing these questions requires excavating the legal history of Central American asylum seekers in the United States, a history that has been influential in the development of US asylum law and practice (Churgin 1996).

My excavation of this history focuses particularly on the political and legal implications of falling outside the category of political asylum. On one hand, the US government's treatment of Central Americans as generally undeserving of political asylum gave rise to considerable political and legal advocacy, which in turn improved protections for asylum seekers and contributed to the formation of an infrastructure of immigrant-rights organizations in the United States. On the other hand, the failure to award asylum in a timely fashion left Central Americans, such as Pablo, Francisco, and Jorge Ramirez, without US citizenship and therefore still vulnerable to deportation many years (in this particular case, sixteen years) after they had entered the United States (Kanstroom 2000, 2007). Furthermore, in countries such as El Salvador, the character of violence has changed from overtly political to seemingly criminal in nature. This change has led to continued renegotiation of the category of political asylum, as youths who fear gang-related persecution seek to avoid deportation (Zilberg 2004, forthcoming; Godoy 2005; Moodie 2006). A retrospective analysis of Central Americans' efforts to obtain safe haven in the United States sheds light on both the power of asylum's promise and the histories through which people are rendered deportable.

In excavating the history of Central American asylum seekers, I attend to law's *archeology*, that is, to the layering of documents, statutes, court cases, notices, and records that take form at particular historical moments (see also Merry 2004).[2] Attention to such layering is critical, I argue, because the documents and texts of which law is composed do not remain confined to a single historical context (or stratum). Rather, these items have ongoing impact in several ways. They can influence subsequent legal innovations; some of them may be retroactively reinterpreted in light of new developments; and, in the case of court decisions and statutes, they are projected into the future in that they are expected to shape or govern events that have not yet occurred.

Law combines the qualities of being produced over time (and thus being a product of history) and moving through time (being a means through which history is produced). Law's complex temporal character is further complicated by the fact that legal

2. Merry defines the archaeology of law as "an historical analysis of layers of legality and the historical contexts of their deposition." She further notes, "the archaeology metaphor suggests simple continguity in chronological order, but in practice each system affects the operation of the others" (2004, 570).

claims are staked in a range of forums. With regard to the status of Central American asylum seekers, coalitions of attorneys filed class-action suits on their behalf, individual attorneys represented clients in deportation proceedings, advocates sought legislative and administrative remedies, and individual Central Americans applied for asylum, seeking, among other things, to obtain work permits while their applications were pending.[3]

Legal artifacts produced in one forum can also reshape the claims being staked in another (see also Mather and Yngvesson 1981), thus enabling legal actors to put forward creative reinterpretations but also potentially foreclosing possibilities or limiting reinterpretation. In the present case, devices that gave unauthorized Central Americans temporary status eventually were reinterpreted in ways that permitted the majority of such persons to become legal residents but that also bore the trace of earlier denials. The carrying forward of this trace reproduced disparities between Central Americans from different nations and made numerous Central American youths available for deportation.

My analysis in this article draws on more than two decades of fieldwork among Central American—and particularly Salvadoran—asylum seekers and immigrants in the United States. From 1986 to 1988, I did fieldwork within Arizona and California segments of the US sanctuary movement, a network of congregations that declared themselves sanctuaries for Salvadoran and Guatemalan refugees. This fieldwork included observing and participating in sanctuary activities, helping to document Central Americans' asylum claims, and interviewing more than one hundred movement participants. In the mid-1990s, I examined the evolving legal strategies of Central American advocates as civil wars in El Salvador and Guatemala had come or were coming to a close. As part of that research, I observed the legal services programs of three Central American community organizations; attended immigration hearings; and interviewed advocates, migrants, and legal services providers. In the early 2000s, I analyzed the shifting significance of the Salvadoran population in the United States at a time when migrant remittances had become critical to the Salvadoran economy. For that project, I interviewed policy makers, advocates, and migrants in El Salvador, Washington, DC, and Southern California. Lastly, I am now completing a study of the power and limitations of nation-based membership categories in the lives of people who were born in El Salvador but who grew up in the United States. This project has entailed interviewing approximately 130 Salvadoran youths and individuals who work with these youths, in both El Salvador and Southern California, including 41 individuals who were deported to El Salvador after having lived the bulk of their lives in the United States.

This article contains four sections. The first section further develops my rationale for examining law's archeology. The second section discusses how legal advocacy on behalf of Central American asylum seekers during the 1980s gave rise to temporary remedies. The third section examines how these temporary remedies fared in the 1990s, when civil wars in Central America concluded. The fourth section considers the long-term effects of temporary remedies on Salvadorans who grew up in the United States but who later faced deportation. Throughout the article, I attend to the ways in

3. Frequently, such applications were prepared by a notary who, unbeknownst to applicants, was not actually authorized to practice immigration law.

which being deemed outside the category of political asylum impacts individuals who, in many cases, have experienced extreme forms of violence, including the violence associated with migration itself.

LAW'S ARCHEOLOGY

In attending to law's archeology, I treat law as an artifact that is constructed to a large degree out of preexisting material. Crafting a statute, writing an opinion, creating a file, or issuing a document entails *entextualization*, that is, excerpting elements of other texts, documents, or records to be redeployed in a new case or context (Bauman and Briggs 1990; Richland 2008). Textual redeployments invoke texts that have already been deemed authoritative, make use of agreed-upon language, ensure that a new policy applies to a previously delineated population, and occur as part of corrective law-making cycles (Riles 1998; Halliday and Carruthers 2007). Each instantiation of law builds on prior instantiations, even as redeployment in a new context alters existing law, making it part of a new legal conversation and a new administrative moment (see also Urciuoli 2008). Law can therefore be seen as the residue of prior negotiations, a residue that leads forward as well as into the past.

Archeologically, legal artifacts are defined both synchronically, by their position in relation to other artifacts in a given stratum, and also diachronically, by the place that they occupy in a series. Importantly, though, the elements that make up law do not stay put, but rather move to new strata as they are invoked or cited. Entextualization thus enables law to move forward and backward in time through its redeployment. Law exhibits what Judith Butler describes as the "double-movement . . . where 'to be constituted' means 'to be compelled to cite or repeat or mime'" (1993, 220), as well as what Bruno Latour calls "backward causation," the retroactive creation of something that was always already there (1999).

Attending to law's archeology highlights the role of legal *form* in both producing and precluding legal indeterminacy. Law's indeterminacy, which is often emphasized by critical legal scholars in particular, has been attributed to the contradictory nature of law (i.e., statutes conflict with each other) and to the fact that laws "on the books" must be applied in situations that lawmakers could not have fully anticipated (Kairys 1998; see also Hagan, Ferrales, and Jasso 2008). This indeterminacy is crucial to law's role within political struggles, as meanings are contested by actors and as authorities, according to legal realists, can usually find a precedent to justify a desired outcome (Llewellyn 1962; Collier 1973; Comaroff and Roberts 1981; Greenhouse, Yngvesson, and Engel 1994; Matoesian 1997). At the same time, scholars have noted that, when rights are used as a vehicle for social change, associated notions of property, subjectivity, and agency are simultaneously reproduced. Such reproductions limit law's counterhegemonic potential (Hunt 1990; Hirsch and Lazarus-Black 1994) and also suggest that those who seek to redeploy law are constrained by earlier meanings that are carried forward. The persistence of such earlier meanings limits law's indeterminacy.

My own focus on law's archeology builds on this work by examining how entextualization enables a kind of temporal movement. The reproduction of preexisting legal elements allows law to return to and reconstitute a prior moment but also brings prior

legal moments forward through time. Thus, the future may anticipate the present, or the present may retroactively constitute the past (Yngvesson and Coutin 2006, 2008). The redeployment of legal artifacts creates potential reinterpretations, but it also reproduces a historical trace or shadow (see also Corsín Jiménez and Willerslev 2007). In essence, law's form facilitates innovation while also making it difficult to leave prior moments entirely behind.

In excavating the history of such temporal movements, I also draw on the notion that law is located within a variety of formal and informal legal transactions (see, e.g., Merry 1990; Yngvesson 1993; Engel and Munger 1996, 2003). Filing a class-action suit and applying for asylum through a notary both have legal effects, and the cumulative impact of these effects may reshape law, regardless of actors' legal knowledge and intentions. Focusing on effects makes it possible to examine the senses in which documents themselves become historical actors, not only in that they are capable of temporal movement, but also in that they can be imbued with a kind of authoritative force. For example, the possession of a work permit enables a person to be hired legally, not only because the permit confers legal authority, but also because the document itself *is* the authority. There are, of course, limits to documentary authority, such as when green card holders discover that they can still be deported, or when a work permit fails to authorize travel across national borders. Nonetheless, there are instances in which the mere existence of a document becomes more important than the claim that the document presents or the argument that it is designed to substantiate (see also Valverde 2005).

Excavating law's archeology is particularly instructive in the case of asylum, which was designed to address the exceptional instance of a person who has left his or her country of citizenship due to that country's failure to enforce the minimal human-rights protections that citizenship is supposed to secure (Arendt 1966). With the number of refugees and displaced persons rising worldwide (Zolberg 1990; Churgin 1996), this "exceptional" circumstance has, unfortunately, become all too common, making asylum an area of intense advocacy on the part of human-rights activists as well as a target for restrictionists who contend that it is subject to abuse (Hathaway and Neve 1997; Walters 2002; Fassin 2005; Junker 2006; Bohmer and Shuman 2008). Despite the pervasiveness of political violence, asylum law's grounding in exceptionality requires applicants to make the case that they have been singled out, subjected to a risk of violence higher than that experienced by the population at large, and forced to move (Harris 1999; Coutin 2001). Efforts to make this case also contend with the heightened securitization of immigration laws in a post-9/11 context (Swanwick 2006; Schoenholtz 2007; Settlage 2009; Macias 2010). Understanding how advocates and asylum seekers negotiate the meaning of political asylum in such adverse circumstances requires attending to the possibilities created by law's history, the potential to double-back and to carry forward, and the ways in which the identification of particular individuals or groups as "exceptional" creates bases for future actions.

These temporal movements both make asylum law powerful and leave particular groups outside the category of asylum. Drawing attention to how asylum law has evolved thus also helps to explain the inconsistencies that have plagued this area of law. Analysts have attributed disparate outcomes of asylum claims to various factors, including the indeterminacy of asylum law, political and ideological biases, restrictions on

judicial review, the lack of legal representation, and asylum seekers' more limited due process rights (Legomsky 2007; Ramji-Nogales, Schoenholtz, and Schrag 2007). An archeological approach suggests as well that doubling back to earlier legal moments not only creates the opportunity for reinterpretation, but also enables that which comes before to haunt or shape that which follows, even if earlier iterations are submerged or not visible. These traces of what went before both enable and limit reinterpretation, and thus are not unlike what Scheffer, Hannken-Illjes, and Kozin (2007, 8) refer to as the *binding* nature of earlier statements: "Binding does not resemble determination, pure obedience, or even physical force. It emerges as a growing limitation by involvement."

As we shall see, tensions between the supposedly "exceptional" nature of violence and its widely pervasive presence, between protection and control of migrants, and between expansion and restriction of rights have pervaded Central American asylum seekers' efforts to secure permanent legal status within the United States. These efforts have resulted in a number of important legal developments that, in many instances, prevented deportation but awarded only liminal legality, such as Temporary Protected Status, or the right to remain in the United States while an application was pending (Mountz et al. 2002; Menjívar 2006). At the same time, given both sheer numbers and the fact that increased Central American immigration coincided with the passage of the 1980 Refugee Act (Kennedy 1981; Churgin 1996), Central Americans' experiences have been central to the development of US asylum law more generally.[4] Their story is one of success against great odds but also of success tempered by the fact that many were granted remedies other than asylum and by the redefinition of immigration policy as a matter of security (rather than labor or justice—see Calavita 1992). Central American youths' vulnerability to removal is a product of this history, a history that I will now excavate.

THE 1980S: ASYLUM DENIED

During the 1980s, the primary challenge faced by Central American asylum seekers was the need to establish that the violence they had experienced was exceptional in the ways anticipated by US asylum law. This challenge was exacerbated by political considerations, the prior history of US refugee law, and tensions between inclusive and restrictive asylum policies. Preexisting definitions of "refugee" allowed US officials, when confronted with Central American asylum seekers, to interpret asylum law in ways that precluded granting them status. Thus, during the 1980s, the US government generally denied political asylum to Central American applicants on the basis that these migrants were fleeing economic conditions and generalized conditions of violence rather than targeted political persecution, and that they could therefore safely remain within their countries of origin or the Central American region (Aita 2000). This government stance was shaped by Cold War politics and by the legacy of the pre-1980 definition of "refugee," which, in the United States, was limited to individuals from the Middle East or those fleeing communist countries (Churgin 1996;

4. For example, Shuck and Wang (1992, 166) noted that, between 1985 and 1990, "asylum claimants from El Salvador enjoyed a high success rate in the courts," winning a number of important appeals. These appeals helped to establish precedents that shaped US refugee law more generally.

Kennedy 1981; Zolberg 1990; Swanwick 2006).[5] Although the 1980 Refugee Act had made asylum available to individuals who were fleeing non-Communist regimes as well, Salvadorans and Guatemalans, who sought asylum from governments that the United States supported, were particularly disadvantaged. In contrast, Nicaraguans fleeing a country ruled by the Sandinistas, a leftist force that had ousted right-wing dictator Anastasio Somoza through the 1979 Nicaraguan revolution, received more favorable attention.[6] The US government's contention that Salvadorans and Guatemalans did not deserve asylum was contested through individual asylum claims, multiple class-action lawsuits, lobbying for legislative relief in the form of Extended Voluntary Departure Status, or EVD (the precursor to Temporary Protected Status, or TPS), and a broad-based solidarity movement. These actions sought not only to expand the category of asylee to include Salvadorans and Guatemalans, but also to compel asylum procedures to adhere to principles embedded in notions of due process. Creative lawyering, the cumulative effects of the onslaught of asylum claims filed by Central Americans, and changed political circumstances in Central America eventually led the US government to take account of these asylum seekers—though not in the way that advocates had originally anticipated.

The 1980s debates over the immigration status of Salvadorans and Guatemalans were occasioned by the rapid deterioration of conditions in El Salvador and Guatemala, which resulted in a dramatic rise in the number of Salvadorans and Guatemalans immigrating to the United States. Although emigration from Central America to the United States had existed previously, the Salvadoran civil war (which raged from 1980 to 1992) and the intensification of civil conflict in Guatemala displaced huge segments of the population of each country. In El Salvador, the government launched bombing campaigns to drive civilians out of areas under guerrilla control, while in Guatemala indigenous groups, who were particularly suspected of supporting the opposition, were relocated or massacred (Montgomery 1995; Binford 1996; Schirmer 1998; Green 1999; Nelson 1999). In each country, the targets of repression were widespread, as the armed forces "equate[d] the government's critics with the enemy, repressing trade unionists, campesino leaders, opposition politicians, and student protesters with the same or more force than they use[d] on the real insurgents" (Schwarz 1991, 25).[7] By 1984 there were

5. Through the 1980 Refugee Act, the US definition of "refugee" was brought into conformity with international law, which defined a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (United Nations 1951 Convention Relating to the Status of Refugees, Article 1).

6. Through the Nicaraguan Review Program, created in 1987 by the administration of Ronald Reagan, Nicaraguans who were denied asylum were allowed to remain in the United States, whereas Salvadorans and Guatemalans who did not receive asylum were ordered deported or granted voluntary departure. See Wasem (1997) for further details.

7. FMLN forces also committed human-rights violations, though these were fewer in number. The Commission on the Truth for El Salvador (1993) documented cases of summary executions of mayors, extrajudicial executions, and abductions by FMLN members. The FMLN also reportedly engaged in forced recruitment and forced requisition of food and other material goods. The Commission on the Truth for El Salvador nonetheless attributed 85 percent of human-rights abuses committed during the civil war to the Salvadoran armed forces or to paramilitary death squads (Kaye 1997).

more than 1.2 million displaced Salvadorans—468,000 within the country, 244,000 in Mexico or elsewhere in Central America, and 500,000 more in the United States—representing 25 percent of the total population of El Salvador (Byrne 1996, 115). In 1992, when peace accords were finally signed, Salvadoran community groups in Los Angeles estimated that there were 1 million Salvadorans in the United States alone.[8] The majority of these migrants had entered without authorization.

At the time, advocates concerned about widespread human-rights violations in Central America sought asylum for the victims, but the Reagan administration held that Salvadorans and Guatemalans were economic immigrants rather than refugees. The issues at stake in this debate included whether asylum was an appropriate remedy for victims of generalized violence, whether these migrants were really victims of human-rights abuses, and whether the earlier definition of refugee as a victim of communism still dominated US refugee policy.

US officials were particularly concerned about the potentially unbounded immigration flow that could result from a highly inclusive interpretation of asylum law. At a 1984 US congressional hearing on the status of Salvadorans and Guatemalans, Assistant Secretary of State Elliott Abrams depicted these migrants as indistinguishable from other undocumented immigrants, stating, "El Salvador . . . is a country with a history of large-scale illegal immigration to the United States" (US House of Representatives 1984, 67). Immigration and Naturalization Service (INS) executive associate commissioner Doris Meissner agreed, attributing immigration from El Salvador to "the poverty and lack of overall economic opportunity that people in that country face" (US House of Representatives 1984, 91). Indeed, at the same hearing, INS Commissioner Alan Nelson raised the specter that granting Central Americans safe haven would open the floodgates to the world's poor. Commissioner Nelson asserted, "Basically everybody in the world would be better off in the United States" (US House of Representatives 1984, 110).

Consistent with these attitudes, the US State Department, which was required to weigh in on asylum applications, routinely advised INS district directors to deny Salvadoran and Guatemalan asylum cases (see also Swanwick 2006). These recommendations were generally followed. During the early 1980s, asylum applications filed by Salvadorans and Guatemalans were denied at rates of 97 and 99 percent, respectively (US Committee for Refugees 1986).

This broader political context played out at the level of individual asylum hearings, where government representatives depicted Central Americans' accounts of persecution as something other than the threat of violence, or as a type of violence that could not be linked to race, religion, nationality, or social group membership or to political opinion. The influence of Cold War definitions of "refugee" is visible within this depiction, but the politically neutral language of the 1980 Refugee Act demanded politically neutral rationales for denials. Transformation and reinterpretation of asylum candidates' claims were therefore accomplished through a number of devices, including challenging witnesses' credibility, requiring nonexistent or dangerous documentation (such as copies of death threats), delinking the decision to emigrate from the experience of violence, treating individual experiences as instances of generalized suffering,

8. For additional population estimates, see Aguayo and Fagen (1988), Montes Mozo and García Vasquez (1988), and Ruggles et al. (1985).

defining violence as criminal rather than political in nature, and defining "indirect" threats, such as the assassination of neighbors or family members, as not rising to the level of persecution (Anker 1992; Durst 2000; see also Smith 1989).[9]

For instance, at an asylum hearing that I attended in Tucson, Arizona, in the mid-1980s, a Salvadoran applicant testified that, when he was a soldier in El Salvador, his life had been threatened by a sergeant who had previously been involved in a relative's assassination and who accused him of being a guerrilla sympathizer. The applicant had deserted and attempted to hide, but, upon being recognized, had fled to the United States. In this case, the INS attorney countered that Salvadoran authorities had a legitimate interest in apprehending deserters; that the applicant was at no greater risk than the general population; and that the government, had it wanted to persecute the applicant, would have had the opportunity to do so while he was in the armed forces. This last argument presented a frightening type of catch-22 for asylum seekers: if they escape, then their survival suggests that their lives are not really in danger; if they are killed, the danger is proven—but too late for them to gain asylum. At another hearing that I attended, an INS attorney asked an applicant who had been threatened by the guerrilla forces, "But they in fact didn't kill you?" as though merely being alive undermined her claim (see also Coutin 1993, 99–102; 2001).

Such attempts to undermine accounts of alleged persecution were challenged during the 1980s by US religious activists who declared their congregations "sanctuaries" for Salvadoran and Guatemalan refugees. Sanctuary practices invoked and reinterpreted law in significant ways. As US law has increasingly held individuals legally accountable for the immigration status of those whom they transport or house, sanctuary workers acted in ways that defined Central Americans as refugees rather than as illegal aliens. Specifically, movement participants brought Central Americans across the US-Mexico border without going through immigration inspection points, housed them in religious institutions or congregants' homes, transported them to places of safety around the United States, and publicized refugee "testimonies," that is, public accounts of the circumstances that had led Central Americans to flee their countries of origin. Sanctuary workers in Tucson, Arizona, one of the sites where I did fieldwork, argued that, through their actions, they fulfilled US and international legal requirements that the US government itself was violating.

To remedy what they saw as violations, sanctuary activists asked the US government to grant temporary status to Central Americans either administratively or through legislation. Advocates also helped to arrange pro bono legal representation for Central Americans who were in deportation proceedings. For many of them, such advocacy was part of an effort to prevent further US military involvement in Central America, a goal that, they reasoned, would be furthered by the recognition that Salvadoran and Guatemalan regimes were violating their citizens' rights. Conflicting visions as to whether the US should offer military assistance to Central American governments were at stake in these legal strategies.

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9. In contrast, Janis Jenkins notes that "the systematic deployment of terror as a means of coercion defies distinction between actual violence and the threat of immanent violence. Is not the display of mutilated bodies more than the result of violence or the threat of violence, but a form of violence itself?" (1998, 124).

Sanctuary activities did not go unchallenged by US authorities. There were several prosecutions of sanctuary workers in New Mexico, Texas, and Arizona; in 1986, following a lengthy undercover investigation and criminal trial, eight movement participants were convicted of conspiracy and alien smuggling (Coutin 1993). The convictions were a means of delegitimizing participants' claims to be carrying out US law.

The legal initiatives spawned by sanctuary workers and other Central American advocates included not only assistance to individual asylum applicants, but also legal actions designed to influence how the US government implemented asylum. One important case, known as the "young male case," sought to establish that all young men in El Salvador were at risk of forcible recruitment and were therefore should be eligible for asylum (*Sanchez-Trujillo v. INS* 1986). An attorney involved in this case described the legal strategy in an interview with this author:

> In 1980 when the Refugee Act was passed, they added a category to the act, . . . membership in a particular social group. And there had never been any definition of what that was and we decided that basically, this was what it was meant for, was people who . . . didn't necessarily have their own political opinions but the government suspected them. . . . And so we developed what was really an imputed political opinion theory but couched it in terms of young men of military age from El Salvador as a social group and who the government suspected of being guerrillas or guerrilla supporters.

Although ultimately unsuccessful, this case laid the groundwork for a subsequent class-action suit, *American Baptist Churches v. Thornburgh*, filed in 1985 in direct response to the prosecution of sanctuary workers. In the "ABC case," as it came to be known, plaintiffs argued that Central American asylum applicants had been denied equal treatment under the law. As a remedy, plaintiffs sought an award of temporary status to class members, as well as a prohibition on future sanctuary prosecutions. This case drew on the embedded notion of equal treatment while seeking an expansive remedy, namely, temporary asylum status for a large number of persons.

Another case, *Orantes-Hernandez v. Meese* (1988), challenged such coercive practices as forcing detainees to stand in the Arizona sun all day in order to persuade them to sign deportation papers. Yet another, *Mendez v. Reno* (1993), challenged the perfunctory nature of asylum interviews and "alleged that interviewers were not trained and were ignorant of applicable asylum law, interpreters were not provided, and sessions were rushed with little privacy" (Churgin 1996, 321). Indeed, an attorney who took depositions from asylum officials in the *Mendez* case recalled in an interview,

> I would have them under oath, sitting across the table like this, and say . . . "Okay. Now tell me the grounds on which someone's eligible for and entitled to get political asylum." And they would say, "What do you mean?" And I'd say, "Well, you know, there's five grounds in the statute on which someone's eligible or entitled to get asylum. Can you name them?" "Uh, no I can't do that right now." "Well, take your time. Think about it." They got through the entire deposition, they couldn't say, they didn't know a single thing.

Such efforts on behalf of Central American asylum seekers contributed to the formation of an infrastructure of immigrant-rights organizations. An attorney who played a key role in founding one such group described how his efforts were emulated by others:

> I . . . was at the Lawyers' Committee [for Civil Rights Under Law] for four years. . . . I organized networks of lawyers in big law firms to provide assistance in political asylum cases, or pro bono cases. That's sort of the Lawyers' Committee's mode of operation. They organize big law firms and their lawyers to do free work. . . . So I started building coalitions around policy issues. Work that was really not representational and more policy organizing. I got a little money from the Ford Foundation to build these teams up, and we produced 40 policy papers with $40,000. . . . Now, at the same time, I'm beginning to work on Central American cases, and, as I think I mentioned over the phone, I think I handled the very first political asylum case granted to a Salvadoran. If not the first, then [one of] the first few. A guy named Father A. [name deleted] who had come to me at the Lawyers' Committee. . . .
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> Now, that work in the Lawyers' Committee, in my own mind at least, accomplished a couple of things. In addition to the work we actually did, it became the model for lawyers' committees and the rights offices around the country. So Robert Rubin's operation in San Francisco [Lawyers' Committee for Civil Rights of the San Francisco Bay Area], Public Counsel's immigration work in LA, [and] the Immigrant Rights Projects of the Lawyers' Committees in Boston and Chicago all were kind of modeled on what I started here in Washington. And that was great. Because this very significant pretty prestigious civil-rights group was, over the course of five, six, eight, ten years, institutionalizing its immigrant-rights agenda, funding for staff hours, for developing more teams of volunteer lawyers, etc.

I have quoted this passage at length as it demonstrates how efforts to challenge the notion that Central Americans fell outside of the category of political asylum not only addressed the legal situation of these immigrant groups, but also created new legal expertise, encouraged immigration attorneys to pursue policy changes in addition to representing individual clients, and contributed to creating a network of immigrant-rights groups across the United States—groups that still exist and can be mobilized for other causes as well. Indeed, interviews with attorneys at these and other immigrant-rights groups emphasized the centrality of advocacy on behalf of Central Americans to their own histories and those of their organizations. As an advocate from the National Council of la Raza commented to me, "Most of us have spent practically all of our careers on this [issue]."

The success of attorneys' legal advocacy depended as well on the hundreds of thousands of claims filed by individual asylum seekers. Many of these claims were likely filed without a full awareness of the US government's stance toward Central American migrants, or even an understanding of political asylum. Rather, the passage of the 1986 Immigration Reform and Control Act (IRCA), which for the first time imposed sanctions on employers who hired immigrants without work authorization, created a new demand for employment authorization documents (EADs) and therefore fueled a dramatic rise in asylum applications (Hagan 1994). According to INS data, the number of

asylum applications filed peaked at approximately 62,000 in 1981 (shortly after passage of the 1980 Refugee Act), declined to fewer than 25,000 in 1985, and then, with the passage of the IRCA in 1986, quadrupled to over 100,000 in 1989 alone (US Department of Justice 1999).[10]

My own interviews indicated that many Latin American migrants, unaware that in the United States notary publics are authorized only to authenticate signatures, asked notaries for assistance in obtaining a work permit. These notaries responded by filing asylum applications, which, though often poorly prepared, entitled the migrants to work authorization while their applications were pending. Cumulatively, these applications created a massive backlog, producing lengthy delays in adjudication. Thus, these applications were successful in one sense, in that they secured work authorization and temporary permission to remain in the United States for the applicant, even though the poor quality of the work may have harmed individuals with strong asylum claims who could have benefited from properly prepared applications.

By the decade's end, circumstances had changed in ways that made resolution of Central Americans' asylum claims feasible. The INS was under pressure to reform its asylum procedures (Chen 2006/2007), and the infamous assassination of six Jesuit priests in El Salvador had drawn international attention to human-rights abuses, making it more difficult for the United States to continue to provide military aid to the Salvadoran government. Moreover, the war in El Salvador was at a stalemate, migrant remittances had become a crucial boon to the Salvadoran economy, the Salvadoran government had begun to advocate allowing Salvadorans to remain in the United States, and the ABC case was entering the discovery phase, which was likely to prove embarrassing to the US government (Blum 1991). In this context, the US Congress passed the 1990 Immigration Act, which created TPS and awarded Salvadorans eighteen months of this new status. Also, in 1991, the ABC case was settled out of court, thus enabling Salvadoran and Guatemalan asylum applicants to reopen their cases, have de novo hearings on the merits, submit new materials, or apply for the first time. ABC asylum hearings were to be governed by special rules designed to ensure fair consideration of applicants' claims. Some 300,000 Salvadorans and Guatemalans registered for the benefits of the settlement agreement.

Eligibility for TPS was bounded by a date—applicants had to have entered the United States prior to September 19, 1990—and TPS was incorporated into the settlement agreement, in that applying for TPS defined an individual as an ABC class member (Guatemalans, who were not eligible for TPS, had to register as class

10. The number of asylum applications then dropped back to 1981 levels in 1991, after the INS adopted a "last-in, first-out" asylum adjudication policy and instituted a six-month delay in the issuance of a work permit to new applicants. According to the "last-in, first-out" policy, the most recently submitted asylum applications would be processed before asylum applications that were part of the backlog. Furthermore, asylum applicants had to wait for six months before being eligible for work authorization. The goal of the "last-in, first-out" policy was to adjudicate new asylum applications *before* the six-month waiting period expired, thus preventing individuals who were denied asylum from ever becoming eligible for work authorization. Prior to the last-in, first-out policy, lengthy delays in adjudication had often allowed asylum applicants to obtain work authorization for years, regardless of the merits of their asylum claims. With the new policy, in contrast, it became impossible to apply for asylum simply as a means of obtaining a work permit. (Chen 2006/2007). After 1991, the number of asylum applications again skyrocketed, to more than 150,000 in 1995, as ABC class members rushed to submit their applications before a January 1996 deadline.

members). The award of TPS recognized that victims of generalized violence also had a need for safe haven but did not grant such victims refugee status, while the ABC settlement agreement set the stage for a fair adjudication of ABC class members' asylum petitions. Significantly, TPS built on but renamed EVD status, which had been awarded administratively rather than legislatively (Harris 1999). Although the ABC case was rooted in the 1985–86 prosecution of sanctuary activists, the settlement agreement addressed discrimination against asylum seekers, not future prosecutions of sanctuary workers.

Together, ABC and TPS created a potential remedy and applied this remedy on a mass scale, making all Salvadorans and Guatemalans already present in the United States eligible to apply for benefits. Advocates' goal of obtaining a remedy for victims of large-scale violence had been fulfilled. But this remedy was limited by the temporary nature of TPS and by the need for individual asylum adjudications. Furthermore, the population eligible for benefits was limited by eligibility dates, thus excluding individuals who entered the United States later and who also may have been subjected to persecution (Aita 2000).

TPS and ABC incorporated and redefined preexisting law and legal events, and they also resulted in the production of new documentation, namely, the hundreds of thousands of claims filed by applicants. These claims initiated administrative processes: papers were filed, work permits were issued, records were kept, and databases were constructed. The establishment of TPS and the ABC settlement reflected advocates' hope that peace could be achieved, making TPS unnecessary, or that asylum claims would actually be adjudicated, thus resolving applicants' status. Before the adjudications could occur, however, events intervened, once again making asylum an unlikely immigration remedy for these migrants.

THE 1990S: ASYLUM AVOIDED

During the 1990s, the Cold War meanings of "refugee," the sanctuary prosecutions, the ABC settlement, and TPS were incorporated into new legal developments in ways that brought forward the traces of prior legal decisions while also permitting previous legal moments to be redefined retroactively. Central American migrants began the 1990s with renewed recognition of their need for safe haven and with new legal mechanisms—TPS and the ABC settlement—designed to meet this need. However, the administrative burden created by thousands of ABC asylum applications, all of them governed by a complex settlement agreement, led to delays in adjudications. In addition, the signing of peace accords in both El Salvador (in 1992) and Guatemala (in 1996) made grants of asylum less likely, and changes in US immigration law in 1996 eliminated other avenues of legalization. The temporary status that had been issued to TPS recipients and ABC class members marked these migrants as different from the broader immigrant population, but the meaning of this difference was ambiguous. Were they unauthorized migrants to be expelled once their status expired, or were they in the country with the knowledge and authorization of US authorities, and therefore deserving?

This ambiguity complicated the legal mechanisms that had been created in the 1980s. On one hand, the fact that these migrants had not been granted asylum placed

them in a position of continued vulnerability to deportation. On the other hand, the persistence and legal ingenuity that had resulted in TPS and the ABC agreement allowed them to depict themselves as a bounded, documented, and "known" population, rather than as mere unauthorized migrants. A complex set of circumstances ultimately allowed the latter depiction to prevail and thus retroactively reinterpreted the meaning of Central Americans' presence—though not without the continued influence of the Cold War politics that had contributed to asylum denials in the first place and that were embedded in the asylum laws that US officials would invoke.

Although the 1991 ABC settlement was written in anticipation that adjudications would begin shortly after the agreement was reached, actual hearings on Central Americans' asylum claims did not begin until 1997. The complexity of the settlement agreement, which required sending particular notices to applicants, made ABC asylum petitions a lower priority for the asylum unit than non-ABC cases. As one asylum official told me during an interview, "The very fact that you've got a potential 250,000 [ABC asylum] cases that are on the backlog of the backlog . . . I think, in essence, that doesn't help but facilitate keeping current [with new asylum receipts] and even being able to begin to dig into your backlog of non-ABC cases." The population carved out through TPS and ABC required different administrative treatment. Additionally, both the ABC class counsel and at least some immigration officials anticipated that an alternative remedy would be created for ABC class members, making adjudication of their claims unnecessary. One official commented that "around here [a word] was said with jocularity, but with a sense of 'boy, wouldn't it be nice,' and that was 'amnesty.' Amnesty."

In the meantime, when the eighteen months of TPS awarded to Salvadorans in 1990 expired, a new status, Deferred Enforced Departure (DED), was invented for these migrants. It would later be extended until 1996, the deadline ultimately set for applying for asylum under the terms of the ABC settlement. DED, like TPS, was a legal innovation, but one that incorporated key features of its predecessors, particularly eligibility dates. DED allowed former TPS recipients to remain in the United States with work authorization but introduced greater ambiguity regarding their future; it offered only the deferral of what would otherwise become a forced departure.

By 1996, the filing deadline for ABC class members' asylum applications, the political and legal context in which claims would be adjudicated had changed considerably. DED and pending applications under the ABC settlement agreement were thus redefined by other temporally contiguous legal artifacts. Although the peace accords signed in Guatemala and El Salvador did not necessarily put an end to all violence, they did make it more difficult for migrants to argue that they would face persecution if they returned. Furthermore, as Salvadorans and Guatemalans had to have entered the United States prior to 1990 to qualify for the benefits of the ABC settlement, by 1996 a significant amount of time had passed since the events that they described in their asylum applications.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) also added to applicants' difficulties by making alternative forms of legalization more difficult to obtain. Advocates had hoped that ABC class members who were denied asylum would be eligible to apply for suspension of deportation, which was available to immigrants in deportation proceedings who could prove good moral character, who had

lived continuously for at least seven years in the United States, and who could show that deportation would pose an extreme hardship on the applicant or on the applicant's US citizen or lawful permanent resident relative. Delays in adjudicating ABC asylum claims therefore enabled ABC class members to assemble their documentary files (including work permits, registrations for TPS and DED) as evidence of the requisite years of presence to qualify for suspension. But then the 1996 IIRIRA eliminated suspension and replaced it with "cancellation of removal"; qualification for this remedy required proving at least ten years of continuous presence in the United States and that removal would create an extreme and exceptional hardship on a US citizen or legal permanent resident spouse, parent, or child of the applicant. Hardship to the applicant was no longer relevant; aliens who lacked the requisite ten years of residency or a qualifying relative were ineligible to apply. Additionally, IIRIRA imposed an annual cap of 4,000 on the number of suspension or cancellation cases that could be granted in a single year, making these an unlikely remedy for the approximately 300,000 ABC class members with pending asylum cases. Finally, IIRIRA created a "stop-time" rule, according to which individuals who were issued a Notice to Appear in court could no longer accrue additional time in the country toward the requisite ten years of residence. It was unclear whether Orders to Show Cause (an earlier version of Notices to Appear) that had been issued to Salvadoran TPS recipients in 1992 but never mailed would be considered to have stopped their immigration "clocks"—a retroactive redefinition that could not have been anticipated when the orders were first issued.

In this bleak legal context and against the advice of colleagues who thought that the political climate was not receptive to their concerns, Central American advocates launched a campaign to grant residency to ABC class members. This effort was assisted by the fact that IIRIRA's provisions adversely affected not only Salvadoran and Guatemalan ABC class members, but also Nicaraguans who had been permitted to remain in the United States without a permanent status even if they were denied asylum. Salvadorans, Guatemalans, and Nicaraguans joined forces to request relief, and the Central American governments, concerned about reduced remittances and the impact of deportations, pressured the US government to assist their nationals. The Clinton administration responded favorably to these governments' concerns. At a May 1997 summit meeting, US president Bill Clinton told Central American presidents that it would be problematic for the United States to deport Central Americans who had lengthy ties to the United States and who supported their native countries' economies through family remittances. In addition, at least some US immigration officials supported restoring suspension eligibility to ABC class members and Nicaraguan Review Program participants, who had benefited from a 1987 policy of providing an extra level of INS review for any Nicaraguan who had been denied asylum.

As a result of these factors, an unlikely alliance of immigrant-rights advocates, US and Central American officials, and Nicaraguan, Guatemalan, and Salvadoran immigrants and their supporters was able to secure passage of NACARA.[11] This legislation incorporated earlier eligibility dates and thus allowed the population affected by ABC and TPS to remain in the country. Passing this legislation was an extraordinary

11. Tellingly, this act was originally called the "Victims of Communism Relief Act." See Coutin (2007) for further details.

accomplishment, coming only one year after the adoption of highly restrictive immigration measures. Yet, for advocates, this accomplishment was marred by the fact that the Cold War ideology that seemingly had influenced asylum approval rates during the 1980s produced a disparity within the legislation. ABC class members, TPS recipients, and certain other Salvadorans and Guatemalans with pending asylum applications were to apply for "special rule cancellation of removal"—basically the equivalent of the former suspension of deportation. In contrast, NACARA allowed Nicaraguan Review Program participants to adjust their status to that of legal permanent residents. The Nicaraguans, who had fled the leftist Sandinista government, fared much better, as the remedy created for Salvadorans and Guatemalans, who had fled right-wing governments, was lengthier, more expensive, more cumbersome, and less certain.

This disparity of treatment was galling to advocates and to Salvadoran and Guatemalan leaders, resulting in tremendous pressure to resolve the perceived injustice administratively through the regulations that would implement NACARA.[12] This pressure focused on three questions: First, could the application process be streamlined by permitting asylum officials to evaluate ABC class members' claims, even though these claims would be for both suspension eligibility and asylum? Second, could immigration officials specify the ways in which ABC class members might meet hardship criteria? And, third, could immigration officials grant ABC class members a blanket finding of hardship, thus virtually guaranteeing a grant in almost every case? Each of these issues was resolved largely in ABC class members' favor. Over the opposition of immigration judges, who reportedly argued that only they could adjudicate suspension claims, asylum officers were granted authority to assess NACARA applications. One of the regulations' authors explained the rationale for this decision in an interview with me: "[The asylum unit] had the files, and asylum had to do the interviews anyway. Most would lose their asylum cases but be granted NACARA. It was a time-saver to do them together." The asylum unit's possession of the files that had been opened during the 1980s and 1990s, when ABC class members had filed for asylum, TPS, and DED, thus influenced this outcome. Likewise, although immigration officials concluded that the hardship criteria were defined by relevant case law rather than the particular situation of ABC class members, they nonetheless took the unprecedented step of *specifying* these criteria; the NACARA regulations thus codified case law. Finally, although immigration officials determined that they could not grant ABC class members a blanket finding of hardship (as, under the statute, suspension had to be evaluated on a case-by-case basis), they concluded that ABC class members were sufficiently similarly situated to justify granting them a *rebuttable* presumption of hardship. As an official explained, "[ABC class members] were people we knew, people who had strong equities. They had lived here a long time, they had kids, they were working, they had work authorization. . . . So we looked at it, and we decided we could do it. The presumption of hardship shifts the burden from the applicant to the INS." Under the NACARA regulations, formerly prohibited actions—living and working in the United States illegally—retroactively became grounds for awarding status, and the liminality of

12. There were also efforts to pass legislation that would resolve the disparity. See Coutin (2007, chap. 7) for a discussion of that process.

temporary status was resolved in favor of documentation. Law thus retraced and retroactively redefined Central Americans' histories in the United States.

In an extraordinary turnaround, the passage of NACARA and the drafting of its implementing regulations caused an immigrant group previously defined as economic migrants to be considered deserving of protection, because of the lives that they had created in the United States and the circumstances in which they left their country of origin. NACARA cases were overwhelmingly approved, at a rate of 95 percent (Christian 2004). I had the opportunity to witness this process when I accompanied one Guatemalan applicant to her NACARA interview as an interpreter. When the interview began, it was discovered that the asylum unit had no record of her original registration as an ABC class member. Suddenly, the applicant's status as an ABC class member, and thus her eligibility for NACARA, was unclear. Yet, instead of immediately denying her petition, the asylum official informed the applicant that, because immigration officials had lost numerous records, they were giving applicants the benefit of the doubt. The official advised her to draft an affidavit then and there, describing how she had registered for benefits. When she responded that she did not know how to draft an affidavit, the official helped her compose it—actually helping her create the record that would allow him to approve her request.

The extraordinary benefits that Central American asylum seekers obtained through NACARA came at some cost, as the NACARA regulations did not entirely resolve the disparate treatment of different groups of Central Americans. As a result, most Salvadoran and Guatemalan NACARA beneficiaries did not become legal permanent residents of the United States until the early 2000s, meaning that most were not eligible to naturalize until the late 2000s. And, as some of these migrants learned, until one naturalizes, one can be subjected to deportation. The trace of the 1980s denial of asylum therefore remained, within liminal statuses and bureaucratic delays, to be reactivated by stripping away the legal permanent residency of noncitizens convicted of crimes.

THE 2000S: ASYLUM BEYOND REACH

Salvadorans and Guatemalans who obtained legal permanent residency through NACARA found that their new status—along with their green cards—was once again redefined by other contiguous legal artifacts, specifically those focused on criminal aliens. In 1996, IIRIRA and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) expanded the range of crimes that could result in immigration consequences. These laws also eliminated the 212(c) waivers previously issued to petitioners whose equities (such as evidence of rehabilitation or ties in the United States) outweighed the severity of their crimes (Kanstroom 2000, 2007; Morawetz 2000; Nevins 2002). The population carved out by ABC and TPS and carried forward through NACARA in 1997 was impacted by this 1996 legislation, as were other immigrant populations.

In the case of individuals with certain criminal convictions, IIRIRA and AEDPA's preexisting focus on criminal histories trumped the factors, such as circumstances of departure, work histories, family ties, and period of residency, that allowed most NACARA beneficiaries to be considered deserving. Although noncitizens convicted of

crimes had faced possible deportation prior to the 2000s, IIRIRA and AEDPA created a new class of deportable migrants. This class was new in two senses: (1) the expanded definition of crimes that bore immigration consequences led immigrants who would not previously have faced deportation to be placed in proceedings, and (2) the elimination of waivers meant that many noncitizens who faced deportation were ineligible to apply for relief. Had Central American migrants and their families been granted asylum during the 1980s, when they first fled their countries of origin, or even in the 1990s, when the ABC settlement was reached, then they might no longer have been noncitizens who could become vulnerable to deportation under the 1996 laws. One of the few remedies available to individuals who are facing deportation is asylum, yet Central American noncitizens who had been convicted of crimes and who feared being persecuted in their countries of origin faced obstacles not unlike those that had faced Central American asylum seekers in the 1980s. These would-be asylees feared gang violence and police repression, actions that were pervasive in El Salvador but that differed from the forms of political violence that asylum has traditionally addressed. Once again, it would be difficult for these individuals to define themselves as exceptional or to constitute themselves as a distinct class.

My analysis of the legal circumstances of this new class of potential deportees draws heavily on interviews that I conducted during summer 2008 with forty-one Salvadorans who had immigrated to the United States as children, grown up there, and then been deported. These deportees' experiences of the Salvadoran civil war were much like those of ABC class members and NACARA beneficiaries, suggesting that many could have been eligible for asylum had it been available. For instance, Enrique Lemus, whom I interviewed in El Salvador after he was deported, recounted that, as a child, he and his friends used to climb trees to pick mangos in an area near a guerrilla hideout. He recalled,

> We used to see helicopters from the army actually go down. One time we saw an execution when we were on top of the tree. . . . They put four guys out onto their knees. They had a bag [over their heads]. And they just executed them there. And afterwards, they left on the helicopter, and we got off the tree. We actually went and played with the bodies. . . . I would look at the blood spilled, and sometimes we would see guts spilled out. Something that a normal seven-year-old kid shouldn't be watching. But the environment that I was in, it was kind of becoming normal for me to see that.

Likewise, Edgar Ramirez, a deportee who later became a gang member in Los Angeles, recounted that as a child, he had seen "buses on fire. Shots everywhere. Headless bodies. . . . And on the way to school, I saw two or three dead bodies thrown there. . . . Psychologically, I was traumatized."

After fleeing to the relative safety of the United States, interviewees such as Enrique and Edgar became caught up in the securitization of US deportation and border enforcement policies that occurred during the late 1990s, and that also redefined political asylum as a weak point within border control practices. Several factors are responsible for this intensification. During the 1990s, US public concern over unauthorized migration grew, even as long-term undocumented residents formed

integral parts of US communities. This concern over immigration intersected with the war on drugs and other criminal-justice policies that subjected youths of color and low-income neighborhoods to intensified policing (Simon 2007). Targeting criminal aliens was an easy way to simultaneously increase removal statistics and "fight crime," and, as a government report noted, removing aliens immediately after they had completed their prison sentences was more efficient than releasing them into the interior, where they would then have to be apprehended (US General Accounting Office 1999). Improved apprehension and record-keeping techniques also saddled larger numbers of illicit border crossers with criminal and immigration records (Heyman 1995). The attacks of September 11, 2001, increased security concerns and derailed advocates' efforts to create a new guest worker or legalization program for unauthorized migrants. Detention center populations grew, the numbers of individuals removed from the United States increased, and migrants were increasingly prosecuted and sentenced to prison time for immigration violations, such as entry without inspection and reentry following deportation. In fact, a Bureau of Justice Statistics report attributed 14 percent of the growth in the federal prison population between 1985 and 2000 to increases in the incarceration of immigration offenders (Scalia and Litras 2002), and by 2005, immigration offenses made up 25 percent of the caseload of federal prosecutions (US Department of Justice, Bureau of Justice Statistics 2005). Deportations to El Salvador skyrocketed from 4,736 in 2000 to 20,045 in 2007 (US Department of Homeland Security 2007).

The deportees whom I interviewed in El Salvador in 2008 had lived through this transformation. During the 1980s and early 1990s, when the securitization of US immigration law was just beginning, a simple entry without inspection or reentry was unlikely to lead to prosecution, detention was not mandatory for people apprehended on immigration violations, waivers could be granted to convicts facing deportation, border enforcement was not as stringent, and the fees charged by alien-smugglers were lower. Noncitizens accustomed to these earlier practices found it difficult to believe that, after 1996, criminal convictions would result in irreversible exile from the United States.

For example, deportee Roberto Orellana had immigrated to the United States in 1989 legally, at the age of seven, when his father obtained a family-based visa through Roberto's grandfather. Roberto saw himself as like everyone else: "I was feeling free, I was confident. I feel like an American because I had the same rights. I had no issues going places, like to TJ (Tijuana, Mexico) or to a bank." Roberto planned to become a US citizen. He joined a gang, however, and, after getting into a fight, was charged with assault and battery. He pled guilty to the charges in exchange for a reduced prison sentence of one month. After being released, he was caught riding in a stolen car, and, under pressure from his public defender, again pled guilty.

Believing that, because his father had naturalized when Roberto was underage, he had automatically become a citizen himself, Roberto did not anticipate that his conviction would affect his immigration status. Conversations with his fellow inmates convinced him otherwise. Roberto explained, "They told me that if I did more than a year, I qualified for deportation. I told them, 'No, man, I've got papers.' They said that it doesn't matter, that if you've got a criminal record, you've got felonies . . . 'Okay, that's it . . . You're going back!' I couldn't believe I was going back."

The 1996 changes to US immigration law left noncitizens who had been convicted of crimes with few means of challenging their deportation. Detention was mandatory in most cases. As there is no right to a state-appointed attorney during immigration proceedings, detainees' families had to shoulder the costs of legal counsel. Detainees who sought to appeal a judge's ruling had to remain in detention while the appeal was considered, and detention center practices seemed designed to convince them that they had no hope of prevailing. One deportee, Mario Lopez, described his experience in detention as follows:

> They wouldn't even let me see the judge. I requested it so many times. . . . When the detective, officer, from INS took me to the headquarters of INS in Baltimore, I told him, "I'm married to a US-born citizen." He said, "We don't care. That's not the way we work." And we got there, [he] fingerprinted me. He said, "Would you like to see a judge?" I say, "Yes." He said, "If my supervisor approves it, you're able to see [the judge]." He did not. They denied it. I would send letters from the detention center requesting a judge or a trial or something to fight the case. They would never respond. They would just be a pain to us. They even made you sign the papers without you [being] willing to sign the paperwork. I remember that, when I got in the detention center, they said, "We're gonna transfer you into Phoenix." I said, "I want to fight the case." They said, "No, you can't fight the case." And they just literally woke me up one day and said, "You're getting transferred." You didn't get notice or anything. They would make new fingerprints, they would make copies of it, if you didn't want to sign the papers. They would force you to sign your own deportation, saying that you are agreeing to get deported. . . . So that's what they'd say. "Okay, if you don't want to sign, just stay here. You're going to be here 12 years, if you want to." Sometimes they would just make copies of fingerprints. You would just ask them a question, say, "Can I file this? Can I file that?" They would just say, "I don't know." They would never give you an answer. And the treatment when you get deported is like you're a dog. To them, it is like we are clowns. Almost like we are from another planet. That's how they treat you.

As this passage suggests, the combination of mandatory detention and officials' continual predictions of failure undercut migrants' abilities to fight or appeal their cases.

In this limited legal context, asylum once again emerged as a possible avenue through which to challenge removal. One interviewee who tried to utilize this option was César Rojas, who faced deportation after being convicted of riding in a stolen car, credit card theft, drug possession, and violating his parole conditions. César had entered the United States at age three when his parents, like many ABC class members, had fled the onset of the Salvadoran civil war. At age eight he had obtained legal permanent residency through his father. César recounted, "I knew I was Salvadoran but I thought I was from the United States. Because I got there so little." Terrified of returning to El Salvador, César spent a year in detention fighting deportation. He explained, "See, in prison, you get a lot of tattoos. They're not gang-related, just art. I have tattoos on my arm, my leg. . . . But over here [in El Salvador], they don't look at it as art. They look at it as like you're a gang member." César's applications for political asylum and withholding of deportation were denied, and he was ordered deported by a judge who, to his horror, reportedly told him, "I don't care if they are going to kill you when you get

off the plane, you are still going back." César appealed this decision but was again denied. Deeming further appeals pointless, he agreed to the deportation.

In El Salvador, where "zero tolerance" gang policies have been imported from the United States, César's fears of persecution proved well founded. There he was arrested for attempting to kidnap a taxi driver, a charge that he says was fabricated. He experienced continual harassment from police and private security guards who demanded that he lift his shirt so that they could inspect his body for tattoos. César lived in continual fear of being mistaken for a gang member and killed, either by security forces or by gangs themselves. As further evidence that such fears were justified, Manuel Urquilla, another deportee, told me of two friends who had been murdered following their deportation. One was killed at a party and the other while he sold CDs at a street stand. Presumably both were killed by gang members.

Although the risks of gang-related persecution appear frightfully real, few asylum applications relying on this argument have been successful.[13] Beyond the difficulty of securing competent legal representation, these applicants face two more challenges: showing that a gang should qualify as a "social group" and defining gang-related violence as persecution. In *Matter of Acosta*, a 1985 decision involving a Salvadoran asylum seeker, the term "social group" was defined broadly as "a group of persons all of whom share a common, immutable characteristic . . . one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." This broad decision has recently been eroded in a series of Board of Immigration Appeals (BIA) opinions that added new criteria of "social visibility" and "particularity" to the definition of a social group (see *In re C- A-* 2006, *In re A- M- E and J- G- U-* 2007, *Matter of E- A- G-* 2008, and *Matter of S- E- G- et al.* 2008), and stated explicitly that gangs cannot meet these criteria. In *Matter of E- A- G-*, for example, the BIA defined social visibility as "the extent to which members of society perceive those with the characteristic in question as members of a social group" and concluded that a Honduran man who sought asylum on the grounds that

13. The story of Alex Sanchez (not a pseudonym), director of the gang violence prevention group Homies Unidos (which means Homies United), suggests that such cases may be at the cutting edge of asylum work in the United States. Alex's family had immigrated to the United States when Alex was still in elementary school. Finding the transition difficult, Alex joined a gang, the Mara Salvatrucha. In 1994, after being convicted of car theft and gun possession, Alex was deported to El Salvador, where he found himself targeted by a death squad, the Sombra Negra, dedicated to "cleansing" El Salvador of gangs. After seeing fellow gang members killed, Alex opted to return to the United States without authorization. There he found himself targeted yet again, this time by members of Los Angeles's infamous CRASH unit, a police group that has been charged with planting false evidence in order to arrest suspected gang members. At the same time, Alex assumed a leadership position in the newly formed organization Homies Unidos. His conflict with the Los Angeles police came to a head when Alex was arrested following his public denunciations of police harassment. Due to his position in the community and the suspect nature of his detention, Alex received an outpouring of support from community activists, California State Senator Tom Hayden's office, and his family. Even San Salvador's chief of police came to the United States to testify about the risks that Alex would face in El Salvador. After a protracted legal battle, Alex Sanchez became the first person in the United States to receive asylum due to his fear of being persecuted as a former gang member actively trying to forestall gang violence. This success story must be tempered by the fact that, on June 24, 2009, Alex Sanchez was rearrested and charged with conspiracy to murder a police officer (Glover and Winton 2009). Community groups have once again rallied to his support. See Zilberg (forthcoming) for further discussions of this history.

"persons resistant to gang membership" were persecuted in Honduras was not dealing with "a socially visible group within Honduran society" (2007, 594).

Additionally, social groups must now demonstrate "particular and well-defined boundaries" and must be "discrete" (*Matter of S- E- G- et al.* 2008, 582, 584). The BIA therefore determined that, in El Salvador, a group made up of "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment" is too "amorphous" to demonstrate the requisite particularity (585). Only very narrowly defined groups, such as a family, can meet the definition of a social group for asylum purposes (see *Lopez-Sosto v. Ashcroft* 1985). Once again, a risk of becoming a victim of violence is deemed outside the protections promised by political asylum. Furthermore, distinctions between political and criminal violence are used to make case law regarding political opinion irrelevant to these cases.

Clearly, the challenges faced by noncitizens convicted of crimes are shared by a broad swath of migrants, not only the Salvadorans and Guatemalans who were denied asylum due to Cold War politics in the 1980s. Nonetheless, it is precisely this seeming commonality that makes an excavation of law's archeology necessary. Individuals are not intrinsically deportable or removable; rather, they are made removable by particular histories, policies, moments, and movements. In the case at hand, the illegality that tainted the status of Pablo, Francisco, and Jorge Ramirez and their families at earlier moments in their lives was reactivated at the moment of their deportation. Cold War definitions of "refugee" that rendered Salvadorans and Guatemalans "merely" economic immigrants resulted in liminal legal statuses such as TPS and DED, and also influenced the disparity within NACARA, which in turn delayed adjudication of NACARA applications. When legal permanent residency is stripped away, individuals' earlier liminality and alien status reemerges. Individuals who fear being persecuted as suspected or actual gang members find that, once again, the violence they seek to escape is defined as something other than political, classes of people turn out to be something other than social groups, and legal statuses other than citizenship become markers of undeservingness rather than steps on the way to inclusion (Motomura 2006). Current deportation policies retrace prior denials.

DISCUSSION

This excavation of the histories of Central American asylum seekers in the United States demonstrates both the promise and peril of asylum in immigration contexts that are increasingly defined by security concerns. On one hand, Central Americans were able to carve out extraordinary exceptions to the more restrictive immigration policies adopted in the United States in 1996, exceptions that resulted in awards of legal permanent residency for Salvadoran, Guatemalan, and Nicaraguan populations who had entered the United States during civil conflicts in Central America. These exceptions were linked to the reform of US asylum procedures and to a number of legal innovations, including TPS, the codification of hardship criteria, and the rebuttable presumption of hardship. On the other hand, the Cold War concerns that had initially led Salvadoran and Guatemalan asylum claims to be denied also detracted from these

remedies. Numerous Central Americans with long histories as US residents became vulnerable to insecurity, prolonged family separations, and eventual deportation. Asylum holds out the promise of safe haven, human-rights protections, and the rule of law, but, when security concerns raise suspicion regarding the validity of asylum claims, then the desire to close borders, limit legal access, and keep out undesirables trumps the promise of protection.

As we have observed, legal artifacts both bring forward prior legal meanings and return to and reconfigure the past. In the situation at hand, Central Americans were issued work authorization in the 1990s, through TPS and pending asylum applications. Documents that originally promised merely a temporary authorization to work were retroactively reconfigured as a tacit authorization of presence. At the same time, the details of the ABC settlement were designed in anticipation of asylum adjudications that, for the most part, did not occur. Nonetheless, the complexity of these procedures (which included requirements to mail particular notifications to applicants) contributed to delays that lengthened the period of time in which applicants lived in the country with legal authorization.

Temporal movements (in which the future anticipates the present or in which the past is redefined retroactively) can result from both formal and informal legal actions. Many ABC class members submitted applications through notaries who may have had a limited understanding of asylum law or through organizations that, to facilitate mass submissions, prepared only skeletal applications. In the end, the act of filing often proved more important than the content of applications, as filing defined one as a class member, and as most cases were decided according to suspension rather than asylum criteria. Each instantiation or iteration of law—the filing of an application, the firing of an individual who lacks a work permit, the deportation of a noncitizen following a criminal conviction—gives rise to new potentialities and foreclosures.

Attention to how law's form facilitates and precludes temporal movement demonstrates that exceptionality eventually conferred US residency on many asylum seekers but also kept a significant portion outside of the protections promised by asylum. Central Americans' efforts to obtain asylum were continually hampered by the legacy of the Cold War, which had defined these applicants as economic immigrants and undeserving. In the 1990s, when legal remedies were created, the delays occasioned by earlier denials had weakened Central Americans' asylum claims, while Cold War politics were reproduced through the disparate treatment of Nicaraguan, Salvadoran, and Guatemalan asylum seekers. In the 2000s, even though most NACARA petitions were ultimately approved—with the important exception of individuals with criminal convictions—processing delays and the lack of availability of asylum during the 1980s and 1990s left a number of Central American youths without US citizenship and therefore, as noncitizens, vulnerable to potential deportation. Like their parents, who struggled to define wartime violence as grounds for political asylum, some of these youths have struggled to define police repression and gang violence as reasons to approve asylum petitions.

As the meaning of violence in formerly war-torn countries shifts from explicitly political to criminal in nature, asylum law itself may need to shift in recognition of the risks that security policies themselves create. In Central America, for example, gang activity has increased at least in part due to the deportation of gang members from the

United States (Zilberg, forthcoming). It remains to be seen whether asylum can be retooled for new situations of widespread "criminal" violence whose political implications are as yet unclear.

The archeological approach developed in this article to identify connections between asylum policies during the 1980s and deportations in the 2000s can be fruitfully employed to understand other legal phenomena as the residue of prior contests, decisions, and administrative actions. Examining how law is constructed over time reveals the multiple ways in which law not only seeks to address the present but also reconfigures the past and haunts the future. Attention to such temporal movements sheds light on the mechanisms that produce and preclude innovation, making it possible to see the histories that are present on law's surface. Treating law as an artifact refocuses law's meaning within its material and textual form, within documents, actions, opinions, statutes, rulings, and regulations. Such a focus also overcomes distinctions between law and implementation, between inert books and active judicial or enforcement practice.

Indeed, this case study suggests that the potential for movement is embedded in law's form, in the deployment of excerpted elements that come from and lead somewhere else. Law itself *acts*, through the accumulation of documents, files, and records that not only are interpreted by others, but also make assertions through their mere presence. Thus, the database of ABC class members, the records created by asylum applicants, and the work permits issued by immigration authorities helped to produce NACARA. Excavating histories denaturalizes the present—people are not intrinsically deportable; rather they have to be *made* deportable. Such excavations not only reveal hauntings (such as the continued influence of Cold War politics, long after this war was over), but also hold out hope, namely, the possibility that pasts will be reformulated in ways that promote just futures.

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