Advocacy or Abuse?: The role of U.S. immigration law in the lives of asylum-seeking Central American women

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by

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Dedicated to: My parents, Jen and Gary Lackmann, and my sister, Grace Lackmann.

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Section I: Introduction, Methods, Structure

Introduction

"Equal and exact justice to all men, of whatever state or persuasion."
– Thomas Jefferson, First Inaugural Address, 4 March 1801

Constitutional scholars have cited the Constitution's use of the words "person" and "people," as opposed to "citizen," as proof that the Bill of Rights, and the rights it guarantees, are extended to immigrants, legal or illegal.[1] Additionally, in the Supreme Court ruling *Reno v. Flores* (1993), Justice Antonin Scalia confirmed that the Fifth Amendment guarantees due process to immigrants in deportation proceedings. The United States was founded on the philosophy of individual rights and uncompromised justice, as specified in the language of the Bill of Rights, and the guarantee of these rights is what makes the United States such a strong democracy. Unfortunately, however, procedural rights do not extend to every sphere in which justice is sought and expected.

The infrastructure of U.S. immigration law – meaning the various administrative entities contributing to its enforcement and regulation – is convoluted even for those the most experienced in navigating it. It spans the Department of Justice, the Department of Homeland Security and, to a lesser degree, the Department of State. The purpose of my thesis is not to explain the intricacies of this system; those are sufficiently documented by articles such as a 2013 piece by Sarah Kliff in the *Washington Post*, titled "the Insanely Confusing Path to Legal Immigration, In One Chart." The American Immigration Council recognizes the complexity of the U.S. immigration law system but boils down its initiatives to four key principles: 1) the

[1] Frazee, Gretchen. "What constitutional rights do undocumented immigrants have?" *PBS.* June 25 2018. Accessed September 6 2018. https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have

reunification of families, 2) "admitting immigrants with skills that are valuable to the U.S. economy," 3) protecting refugees, and 4) promoting diversity.[2] What has not been sufficiently examined is what happens when immigrants and asylum-seekers – some of the most vulnerable populations – attempt to navigate this labyrinth. My thesis research focuses on the process of gaining legal status in the United States: more specifically, how asylum-seeking women from the Northern Triangle, a region of Central America consisting of El Salvador, Honduras, and Guatemala, are processed through U.S. immigration law infrastructure.

Current literature about immigrants from the Northern Triangle consists primarily of documentation of the conditions that drive them away and the precariousness of their journey to the North, which will be covered briefly in the first section of my research. Covered slightly less, but increasingly more, is the treatment of immigrants once they arrive on the border, such as details of sexual abuse,[3] labor trafficking in detention centers[4] and emotionally-charged audio clips of children in juvenile detention centers crying for their mothers.[5] The regressive "child separation" policy of the Trump administration and his Attorney General Jeff Sessions has

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[2] "How the United States Immigration System Works." American Immigration Council. Accessed October 17 2018. https://www.americanimmigrationcouncil.org/sites/default/files/research/how_the_united_states_immigration_system_works.pdf

[3] "Detained and at Risk | Sexual Abuse and Harassment in United States Immigration Detention." *Human Rights Watch*. August 25, 2010. Accessed January 30, 2018. https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention.

[4] Phillips, Kristine. "Thousands of ICE detainees claim they were forced into labor, a violation of anti-slavery laws. *The Washington Post*. March 5, 2017. Accessed January 30, 2018. https://www.washingtonpost.com/news/post-nation/wp/2017/03/05/thousands-of-ice-detainees-claim-they-were-forced-into-labor-a-violation-of-anti-slavery-laws/?utm_term=.cd2e5daa3012

[5] Diao, Alexis and Van Sant, Shannon. "Watch: 6-Year-Old Girl, Alone, Breaks Through Immigration Noise With A Phone Number." *National Public Radio*. June 22, 2018. Accessed August 28, 2018. https://www.npr.org/2018/06/22/622464322/watch-propublica-speaks-with-family-detained-girl-from-audio-recording

recently come under fire, with special attention being paid to the way it is used to dissuade family entry and the entry of unaccompanied alien children (UAC).

More limited attention, however, has been given to what happens once young female survivors of domestic violence and/or other traumas arrive at the border or are released from detention centers: this is not the point at which their struggles are alleviated. In fact, entry into the U.S. immigration law system is where deficits in procedural rights and, therefore, justice, become apparent. Research on this final stage has primarily been conducted by immigration law scholars and advocacy groups. Different reports highlight different aspects of the overall process. "Language Access in Immigration Courts," a 2011 piece by Laura Abel and the Brennan Center for Justice at New York University School of Law, for example, details a major deficit in interpreter access in the Executive Office of Immigration Review (EOIR) immigration courts in the U.S. for limited English proficiency (LEP) immigrants. Abel attests that this lack of accessibility applies not only to in-person hearings but also to forms and websites used by the immigration courts. The piece also critiques the use of telephonic interpreter systems as well as the system for filing claims about particular interpreters themselves.

"Fundamental Fairness: A Report on the Due Process Crisis in New York City Immigration Courts" by the New York Lawyers Guild is a 2011 report that analyzes 414 cases in the New York immigration courts system between October 2009 and November 2010, choosing to focus on the human and social impacts of deportations on immigrant communities in New York City. This report focuses on the lack of access to due process (detention, problematic courtroom procedures, and inadequate access to legal representation), and the issues that mentally impaired immigrants in particular face. Most relevant to this study is that this report

discusses the impossibility of detained immigrants calling the outside (their family, a lawyer, etc.) due to a lack of funds.

J. Lee Koh and K.C. Tumlin wrote “Deportation Without Due Process” in 2011 for the National Immigration Law Council (NILC). This article provides more key insights into U.S. immigration law, primarily because it examines the specificities of procedural conduct in the U.S. immigration courts system. Specifically, their study calls into question the fairness of a process called “stipulated removal,” a procedure in which the federal government can deport immigrants for any minor immigration violation without any time in court. Immigrants are given the option of either staying and fighting the case in the courts (and being detained for a certain degree of time) or accepting the removal and leaving.

A final source I consulted in my preliminary research was “A National Study of Access to Counsel in Immigration Court” by Ingrid Eagly and Steven Shafer for the University of Pennsylvania Law Review. The title is self-explanatory: examining data from 1.2 million deportation cases in EOIR courts from 2007 to 2012, Eagly and Shafer note a number of disturbing trends. First, “only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation.” Two: of those, only around 2% received any pro-bono help. Third, immigrants who were able to obtain counsel were fifteen times more likely to obtain relief from removal than those without counsel. Finally, treatment of immigrants by courts (as measured by amount of time spent detained, likeliness to be released from custody, etc.) was found to improve noticeably once they had lawyers.

While each of these sources pinpoints a very exact step of the process through which immigrants follow and identify justice deficits in each, my thesis explores the entire process as experienced by an asylum-seeking woman; I will broadly examine every step in the process and

obstacles at each. I will focus most on topics that have received relatively little attention within the context of asylum-seeking, including a) the prevalence of *notario* fraud; b) the dearth of low and pro-bono legal aid, and c) the inaccessibility of the immigration courts (Executive Office of Immigration Review, or EOIR).

Research Methods

The purpose of my thesis, as it has been established, is to fill the gap in literature about the interactions between U.S. immigration law and the immigrant population, particularly asylum-seeking women from Central America's Northern Triangle. The majority of my thesis research was conducted in Washington, D.C. and the Northern Virginia area. My primary method of data collection was interviewing legal scholars and immigration attorneys about their experiences, as representatives of my target demographic, with U.S. immigration law. Interviews were conducted by phone, Skype, and in person. In total, I spoke with six legal scholars and immigration lawyers practicing in the D.C.-MD-VA area:

Name	**Organization**	**Years working[6] in immigration law**
Audrey Reiter, BIA Fully-Accredited Representative	Ayuda-Virginia	21
Rebecca Walters, Esq.	Ayuda-Virginia	12
Jayesh Rathod, Esq.	American University Immigrant Justice Clinic	15
Kursten Phelps, Esq.	Tahirih Justice Center	12
Paulina Vera, Esq.	George Washington University Immigration Law Clinic	3
Alberto Benítez, Esq.	George Washington University Immigration Law Clinic	27

I asked each expert a number of questions both to gauge their experience with and understanding of immigration law and asylum policy. As seen in the above table, those I interviewed possess

[6] Note that "working" in this case includes non-attorney work, such as working as a paralegal.

many years of experience doing almost-exclusively pro-bono and low-bono immigration law work.

While I have experience working with the immigrant communities in Raleigh, North Carolina and Columbus, Ohio, I decided to conduct my thesis research and composition within the context of an internship in Fairfax, Virginia at a non-profit immigration and refugee agency called Ayuda. Ayuda serves immigrant clients from Maryland, D.C. and Virginia and has a location in downtown Washington, D.C. as well. After deciding I wanted to expand my geographic understanding of immigration law, I found Ayuda when I began looking at immigration nonprofits in the D.C.-MD-VA area that were hiring undergraduate interns for the summer. My experience as an undergraduate intern at the U.S. Committee for Refugees and Immigrants North Carolina field office made me a strong candidate for Ayuda's undergraduate internship, and I was hired as the only undergraduate intern of the summer, along with three law school students.

It is important for me to mention, however, that although I did complete a certain degree of participant observation in which I played a direct role in helping compose asylum cases of women in my demographic area of focus, my thesis research and work as an intern were maintained separately so as not to compromise the integrity of my thesis and to allow me to focus independently on my work with Ayuda. When I interviewed A. Reiter and R. Walters, both staff at Ayuda, I approached them as an outside student researcher rather than one of their interns. Outside of Ayuda, it was through my new connections in the D.C.-MD-VA immigration law community that I gained the opportunity to interview K. Phelps of Tahirih Justice Center and J. Rathod of the American University Immigrant Justice Clinic. Tahirih's work, in particular, is extremely relevant to my thesis research because their primary focus is providing humanitarian

relief to immigrant women, who are often victims of gender-based violence and domestic violence. Law school clinics are valuable sources of completely pro-bono legal assistance in an educational setting rather than a non-profit, and the presence of immigration law clinics in the D.C.-MD-VA area adds to the uniqueness of the region as a target of research.

The most notable limitation to my methods while writing this thesis is the fact that I did not utilize any single source of aggregate data such as the data Eagly and Shafer (2015) used in their study. In my proposal, for example, I originally had planned to explore data obtained through my casework as an intern, eliminating all possible identifying information of our clients and observing trends through their fact patterns. However, the recent political and social climate of the U.S. in which immigration is becoming a daily debate has rendered the immigrant community even more vulnerable than previously observed, particularly women fleeing violence in their home countries. Accessing recent data about this demographic would not only be extremely difficult but could also possibly have put individuals at risk if identifying information were in any way compromised. Additionally, examining such a high amount of individual cases would have made capturing general trends in immigration law significantly more convoluted. For these reasons, I decided to interview lawyers and legal scholars with vast experience with the immigrant community that are able to speak on experiences they have noticed over time throughout their careers, allowing me a more comprehensive view of the system when combined with data from sources such as Syracuse's Transnational Records Access Clearinghouse (TRAC) immigration data.

Another change from my first proposal was the number of interviews I conducted. I had originally anticipated interviewing between 15 and 20 subjects, but I admittedly underestimated the sheer workload of low and pro-bono immigration law practitioners, particularly in the age of

the Trump administration and enhanced crackdowns on immigration. However, the developments of immigration law under the current administration were at their most dramatic this summer, and working at Ayuda while each development unfolded afforded me the unique opportunity to observe first-hand how non-profit organizations like Ayuda reacted. Through my interviews, I was able to discuss the most up-to-date occurrences in immigration law, such as Attorney General Jeff Sessions' decision in *Matter of A-B-*,[7] with leading scholars and practitioners in the field.

Structure of Thesis

In the next section, I review the conditions in the Northern Triangle from which women are fleeing, in order to better set up the context for their asylum claims. Then, I detail the options they face that they may consider before fleeing to the U.S. or Mexico. Next, I briefly explain the perils they face on their journey. Finally, I will explain the immigration law processes through which they must navigate as they seek legal status and the viability of reforms that have been suggested to make these processes fairer.

Section II: Background Conditions

Life in the Northern Triangle

Any piece that mentions the living conditions of Latin America or any of its comprising regions has to first contextualize present violence and instability. More specifically, when understanding Central America's country conditions as push factors for migration to the United States, we have to establish that the United States has played a central role in the development of these push factors. The longstanding United States tradition of military, political, and economic intervention

[7] *Matter of A-B-* is a landmark case on asylum for Central American women, which I will discuss in detail in Section IV.

in Central America dating back to the 1800s alone could be the subject of an entire thesis project, but Mark Tseng-Putterman summarizes the U.S.' role in destabilization by pointing out that "for decades, U.S. policies of military intervention and economic neoliberalism have undermined democracy and stability in [Central America], creating vacuums of power in which drug cartels and paramilitary alliances have risen."[8]

The Northern Triangle of Central America is regarded by scholars as the most dangerous region in the Western hemisphere, if not the world. A myriad of resources demonstrates the peril of living in the region: studies consistently indicate that the levels of violence in El Salvador, Honduras, and Guatemala bear resemblance to war zones. For example, El Salvador regularly leads the world in homicide rates: in January 2016, its murder rate peaked at 24 homicides per day.[9] A polling study by Vanderbilt University's Latin America Public Opinion Project on crime avoidance in Central America found that 51.2% of respondents avoided buying an item they liked for fear of robbery. 59.6% have avoided leaving their house alone at night for fear of crime, 65.9% have prevented their children from playing in the street, and 21.1% have felt the need to move neighborhoods for fear of crime.[10]

In many regions with active gang communities, like large cities in the United States, gang activity tends to be compartmentalized with the occasional outlying incident in which a nonaffiliated figure is caught in the crossfire. The general population in the Northern Triangle, however, continuously pays for the actions of the violent MS-13 (called the *mara salvatrucha* or

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[8] Tseng-Putterman, Mark. "A Century of U.S. Intervention Created the Immigration Crisis." *Medium*. June 20, 2018. Accessed October 10, 2018.
[9] Folkerts, Lily, Emma Buckhout, and Daniella Burgi-Palomino. "A Look at the Northern Triangle of Central America in 2016: Sustained Violence and Displacement." *Latin America Working Group.* August 15, 2016. Accessed January 30, 2018.
[10] Raderstorf, Ben, et al. "Beneath the Violence: How Insecurity Shapes Daily Life and Emigration in Central America." *The Dialogue*. October 2017. Accessed October 10, 2018.

maras) and MS-18 (called the 18th street gang or *barrio* 18), whose activities are deeply entrenched in nearly all aspects of Northern Triangle societies. "Pay" bears both figurative and literal meaning – "Salvadorans pay more than US$390 million a year in extortion fees" to street gangs.[11] In particular, women and the LGBTQIA community face disproportionate victimization at the hands of gangs. Statistics about "femicide," or homicide against females, demonstrate the harrowing reality of young women in the Northern Triangle: in 2016, Salvadoran authorities reported 1,100 cases of domestic violence and 2,600 cases of sexual violence.[12] Although these numbers alone present an alarming case for a country about the geographical area of New Jersey, the term "reported" indicates that they may just be the tip of the iceberg. Regarding the viability of this type of data, Alberto Arce points out that:

> "Even those who gather statistics say there are no reliable numbers on sexual violence in El Salvador. Threats prevent many from reporting attacks. Others who have grown up amid rampant abuse may not even recognize rape as a crime. Still others flee the country for safety rather than seek justice from a system that more often delivers impunity."[13]

The storylines reported by those fleeing the area are alarming yet consistent: gang members stalk women and ask them to be their "girlfriends." Regardless of whether or not the girl in question accepts or rejects the offer, more often than not she ends up being raped and further brutalized.[14] Even in cases where women are not attacked directly, they and their children are routinely exposed to the effects of violence: A UNHCR report containing reviews from asylum-seeking women from the Northern Triangle reported that 62% had been confronted with dead bodies in

[11] Beltrán, Adriana. "Children and Families Fleeing Violence in Central America." *WOLA*. February 21, 2017. Accessed January 30, 2018.
[12] Ibid.
[13] Arce, Alberto. "El Salvador's Street Gangs Target Women and Girls." *World Politics Review*. November 05, 2014. Accessed January 30, 2018.
[14] Ibid.

their neighborhoods.[15] A Google search can sate any morbid curiosity one has about the conditions of the Northern Triangle, and these conditions significantly impede the ability of young Guatemalan, Salvadoran, and Honduran women to make a future for themselves and their families.

Before Fleeing

Options are limited for young women, especially those with families and young children. If their neighborhood is too dangerous, they may move to another, or an entirely different region of their country, becoming internally displaced peoples (IDP). While fleeing "*al Norte*" (to the United States via Mexico) is highly publicized as the first step to take to avoid violence, Crisis Watch reported that in 2015, more than 324,000 Salvadorans were internally displaced due to gang violence.[16] Fleeing the threats and propositions of local *mareros* can make a young woman a person of interest for gangs, reducing the possibility of remaining unrecognized in her new neighborhood for long.

Consular Processing and Family Petitions

If internal migration is not possible or if someone has been recognized by gang members and/or their abuser in their new neighborhood, fleeing the country is the next step to escaping violence. Some migrants have the good fortune of having family members that are U.S. citizens or lawful permanent residents (LPRs), which opens the doors to becoming a U.S. LPR without having to enter the U.S., legally or illegally. Visas are allocated based on two criteria. First, the relationship the petitioner has with the foreign relative. This relationship is either "Immediate

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[15] "Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico." *UN High Commissioner for Refugees*. Accessed June 26, 2018.
[16] "Crisis Watch 2016." *International Rescue Committee*. Accessed June 26, 2018. http://crisiswatch.webflow.io/

relative" or "family preference." Immediate relative (IR) immigrants have an unlimited number of visas available to them, so there is no wait list:[17]

- IR1: Spouse of a U.S. citizen
- IR2: Unmarried child (under 21 years of age) of a U.S. citizen
- IR3: Orphan adopted abroad by a U.S. citizen
- IR4: Orphan to be adopted in the United States by a U.S. citizen
- IR5: Parent of a U.S. citizen (who is at least 21 years old)

Family preference categories only have a limited number of available visas and enter a waitlist. Family preference priority is as follows:[18]

- First priority
    - F1 (unmarried, adult sons and daughters of U.S. citizens)
- Second priority
    - F2A (spouses and unmarried children [under the age of 21] of permanent residents)
    - F2B (Unmarried, adult sons and daughters of permanent residents)
- Third priority
    - F3 (married sons and daughters of U.S. citizens)
- Fourth priority
    - F4 (brothers and sisters of adult U.S. citizens)

Regardless of under which category (IR or F) the immigrant relative falls, the LPR or USC resident must file the I-130 "Petition for Alien Relative." Once completed and submitted to U.S. Citizenship and Immigration Services (USCIS), the foreign relative enters a waitlist at the Department of State's National Visa Center (NVC) for a visa to become available. The date that the application is filed is called the Priority Date, and this date determines when a visa will be available. Once a visa is available, the form DS-260 Application for Immigrant Visa and Alien Registration is filed with the Department of State, and the alien relative must go to the U.S.

[17] "Immediate Relative Categories." *CitizenPath*. Accessed June 27, 2018. https://citizenpath.com/immediate-relative-categories/
[18] Ibid.

consulate abroad for an interview. If the interview goes well, then the relative will receive a "Visa Packet" to turn into CBP upon arrival to the U.S., then will receive a green card within 45 days of entering the United States.[19]

While obtaining lawful permanent residence in the U.S. without having to travel there first would be ideal for Northern Triangle women, there are a number of significant drawbacks. First, it automatically excludes those who are the first in their immediate family to attempt to flee their country. Despite what popular rhetoric about "chain migration" has claimed, it is impossible to list non-immediate relatives (like cousins) as beneficiaries on I-130 petitions. Second, filling out the I-130 requires a filing fee of $535,[20] and if you contract a lawyer to help you with it, there will be an additional cost. Once approved for a visa, the petitioner in the U.S. must file the I-864 Affidavit of Support and the DS-260, which are a combined $318 in filing fees. For a young mother who has been out of work fleeing gang violence or paying "rent" to the gangs, this is simply an unfathomable cost. Third, it is not a surefire way to obtain a green card: of the 144,730 I-130 family petitions filed in the fourth quarter of FY2017, 11,119 were denied.[21]

The final reason why consular processing is not a viable option for asylum-seekers is the timeline to which applicants must adhere. While decisions on the I-130 petition can be a matter of months, once an application is approved, waiting for an available visa from the NVC for sponsored family members in the family preference category can take years. For example,

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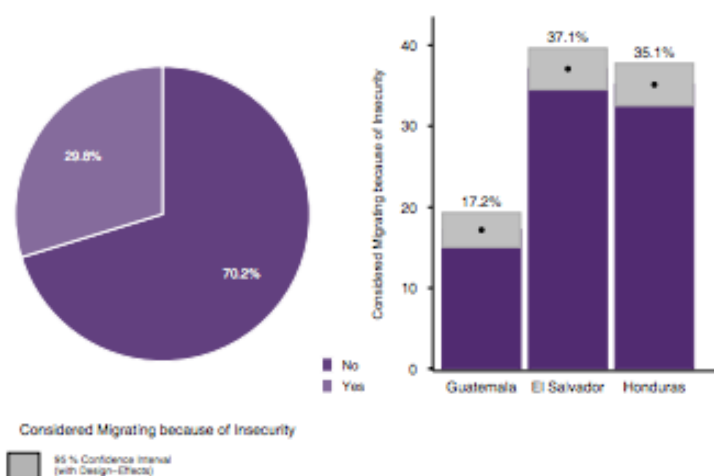
[19] "Green Card Consular Processing." *CitizenPath*. Accessed June 27, 2018.
[20] "I-130, Petition for Alien Relative." *USCIS*. Updated September 11, 2018. Accessed August 3, 2018.
https://www.uscis.gov/i-130
[21] "I-130 Performance Data." *USCIS*. Updated July 17, 2018. Accessed August 3, 2018.
https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-130-petition-alien-relative

someone in the F1 category from Mexico whose priority date was June 1st, 1997 was only able to receive an available visa in June 2018. For F3, that date is pushed back to October 1st, 1995.[22] Wait times of 20+ years are not feasible for those whose lives are immediately at risk in their home countries.

Deciding to flee their home countries without first undergoing consular processing (for financial reasons, urgency reasons, or simply because they lack a LPR or USC relative) is the next choice for young women attempting to escape violence in the Northern Triangle. Survey data compiled by The Latin American Public Opinion Project and the Latin American Dialogue reveals that 29.8% of Northern Triangle adults have considered migrating out of their home country, with El Salvador and Honduras having higher percentages than Guatemala.[23]

FIGURE 8: PRESSURE TO MIGRATE REGIONALLY AND BY COUNTRY

Source: © AmericasBarometer, LAPOP, 2016/17



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[22] "Visa Bulletin for June 2018." *United States Department of State - Bureau of Consular Affairs*. Updated June 2018. Accessed August 3, 2018. https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-june-2018.html

[23] Raderstorf, Ben, et al. "Beneath the Violence: How Insecurity Shapes Daily Life and Emigration in Central America." *The Dialogue*. October 2017. Accessed October 10, 2018.

There are multiple ways for asylum-seekers to flee to the United States, and there is no option that does not carry significant drawbacks.

A common argument utilized by those that advocate for more restrictive immigration policy is the claim that there are countries other than the United States that are other, more appropriate countries in which asylum-seekers could seek refuge. The most frequently-used is the example of Mexico, which separates the Northern Triangle from the United States. However, although Mexican women fare slightly better than those in the Northern Triangle, in 2016 alone, around seven women were killed every day in Mexico.[24] According to the National Citizens' Observatory on Femicide, from January to June 2017, "800 women were murdered in 13 states across Mexico, out of which only 49 per cent of the deaths were investigated as femicide."[25] Additionally, familiar and cultural ties draw Central Americans to the United States, which already has a significant population of Northern Triangle immigrants: according to the Migration Policy Institute, about 1 of 5 Salvadorans lives in the United States.[26]

Section III: Entry and Border Procedures

Entering as a Tourist at an Airport

Americans that have the luxury of traveling domestically without constraints based on our immigration status commonly regard arriving by plane and going through customs at the airport as the primary way of entering a foreign country. International flights, however, are extremely expensive and, again, unattainable for women living in impoverished conditions in their home

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[24] "The long road to justice, prosecuting femicide in Mexico." *UN Women.* November 29 2017. Accessed October 19 2018. http://www.unwomen.org/en/news/stories/2017/11/feature-prosecuting-femicide-in-mexico#notes
[25] Ibid.
[26] Terrazas, Aaron. "Salvadoran Immigrants in the United States." *Migration Policy Institute*. January 5 2010. Accessed October 18 2018.

country. Upon arrival to the U.S., if there is any indication to CBP that the incoming visitor plans to overstay a tourist visa, they risk being immediately sent back to their home country.[27] If they are permitted a tourist visa, all law enforcement agencies are sent their information, putting them in a system that allows ICE and other such organizations to monitor them.

Additionally, if an immigrant arrives at the airport and receives indication that they will be deported, they can argue to the officer that they have a "credible fear" of returning to their home country and request to apply for asylum. Nalbandian Law firm, in a write-up about the asylum process on their website, points out that this route is becoming more and more common, and that "the Asylum Division of U.S. Customs and Immigration Services reports that the agency has been overwhelmed with a surge of credible fear applications from new asylum seekers originating mostly from El Salvador, Honduras and Guatemala... Over the last five years, the Asylum Division says, credible fear claims at the border have increased from just under 5,000 to more than 36,000 claims."[28] Claiming credible fear is also prevalent at land crossings: for Central American asylum-seekers that are arriving via Mexico, credible fear claims are more common at land crossings. [29]

However, beginning the process of applying for asylum in this way presents a significant risk: once they claim to have this credible fear, these women and their children will be transferred to a detention facility run by CBP and then later transferred to ICE detention, the

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[27] Bray, Ilona. "Asylum or Refugee Status: How to Apply." NOLO. Accessed September 6, 2018. https://www.nolo.com/legal-encyclopedia/asylum-or-refugee-status-how-32299.html

[28] "Credible Fear Interview/Parole Process for Asylum Seekers at the U.S. Border." Nalbandian Law. Accessed September 6, 2018. http://www.nalbandianlaw.com/credible-fear-interview-parole-process-for-asylum-seekers-at-the-u-s-border/

[29] "Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers." Human Rights First. May 2017. Accessed Sep 6, 2018. https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf

conditions of which are similar to that of a criminal prison. Afterwards, they are granted a Credible Fear Interview, in which a USCIS asylum officer asks the asylum-seeker a number of questions to determine if they truly do fear persecution in their home country. If the officer is not convinced, they will be deported unless they appeal to an immigration judge. If the judge disagrees with the officer, then the immigrant will be released and have the opportunity to report back to court at a later date to argue their claim to asylum. If the judge agrees, then deportation is inevitable. The Credible Fear process and its implications will be described further in later sections.

Obtaining Refugee Status Determination (RSD) by UNHCR

While it is possible for asylum-seekers to apply for, interview for, and eventually obtain refugee status through the UN High Commissioner on Refugees (UNHCR), that is not the focus of my research.

The Journey to the North

From Central America, the most common route of reaching the U.S. border is via land, utilizing transportation including cars, by foot, and train. The network of freight trains in particular that runs from Guatemala's border with Mexico approaching the United States border has become a passenger train in addition to a freight train: Scholars estimate that yearly, up to 500,000 migrants catch a ride The Beast (*La Bestia*) in hopes of reaching the United States.[30] Migrants riding The Beast are not protected from the brutal sun or the elements and often die after falling off the train or trying to board while it is in motion. Photojournalist Keith Dannemiller, who has been living in Mexico documenting the passengers on The Beast, emphasizes that the burgeoning

[30] Sayre, Wilson. "Riding 'The Beast' Across Mexico To The U.S. Border." *National Public Radio*. June 5, 2014. Accessed September 6, 2018. https://www.npr.org/sections/parallels/2014/06/05/318905712/riding-the-beast-across-mexico-to-the-u-s-border

number of undocumented children appearing on the U.S. border is also reflected on The Beast.[31] Other hazards on the trip to the United States include crossing the Suchiate River between Guatemala and the Mexican state of Chiapas[32] and the risk of dehydration and heat stroke that is prevalent in the long trek across the desert with little to no access to medical assistance.[33]

Human trafficking runs rampant, and smaller border smuggling operations are being taken over by drug cartels, such as *Los Zetas*, a Guatemalan drug cartel. In 2010, for example, 72 migrants were lined up on a remote Mexican ranch and executed by the Zetas for refusing to participate in their drug trafficking operations.[34] While the costs of being smuggled to the United States are upwards of $1,500 in some places, migrants are forced into slave labor, sweatshops, and/or prostitution upon arrival to the United States in order to pay off their debts, unable to seek help from authorities due to fear of deportation.[35] While $1,500 may seem inconsequential to some, 6 of 10 rural Hondurans are forced to live on less than $2.50 per day,[36] and more than half the Honduran population lives in poverty.[37]

While, at first glance, sending a child on a perilous journey such as riding *La Bestia* may be unheard of, Rebecca Walters of Ayuda cautions judgments of the parents of these children,

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[31] Ibid.
[32] Schifrin, Nick. "Migrants risk the dangerous trip to the U.S. because it's safer than staying home." *PBS News Hour*. June 20 2018. Accessed October 18 2018. https://www.pbs.org/newshour/show/migrants-risk-the-dangerous-trip-to-the-u-s-because-its-safer-than-staying-home
[33] Larios Villatoro, José Miguel. "The Perils of Emigration from the Northern Triangle." *Harvard Political Review.* April 21 2017. Accessed October 18 2018. http://harvardpolitics.com/world/perilous-journey-northern-triangle/
[34] Ibid.
[35] Ibid.
[36] Totaro, Paola. "Honduras Land Rights Activists Hit by 'Epidemic' of Violence: Report." *NBC News.* January 31 2017. Accessed October 17 2018. https://www.nbcnews.com/news/latino/honduras-land-rights-activists-hit-epidemic-violence-report-n714876
[37] "The World Factbook: Honduras." *U.S. Central Intelligence Agency.* Accessed October 17 2018.

emphasizing that in the areas from which they are fleeing “children especially are used in gang wars and by the gangs to just get money [and] levy taxes,” and that the level of violence in these countries to which Northern Triangle children are exposed is greatly underestimated by the American public. José Larios Villatoro expands on this idea for the Harvard Political Review, explaining that for children “to live in such a place [as the Northern Triangle] is to live in constant fear for one’s life. Escape means either joining one of the local mara gangs or emigrating to another land.”[38] The journey to the U.S. is no simple or easy feat, and the fact that the number of migrants making the trip is actually increasing as conditions grow more perilous shows the true severity of the conditions they are fleeing.

[38] Ibid.

Section IV: U.S. Immigration Law Infrastructure

Legal vs. Illegal Entry

As previously demonstrated, the journey to the United States through Central America and Mexico can introduce new traumas to women fleeing already-traumatic situations in their home countries. Additionally, the children of these women are particularly prone to symptoms of Post-Traumatic Stress Disorder (PTSD), which will continue to plague them throughout their life in the U.S., impeding their attempts at integration.[39] However, this thesis aims to dispel the misconception that entrance, legal or illegal, to the U.S. is the moment when trauma subsides and recovery begins. Instead, introduction to U.S. immigration law, when this population's vulnerability requires legal advocacy and mental health resources, can often signal the beginning of an even more deeply distressing phase in their quest for a better life.

Due to the geographic location of the Northern Triangle, land arrivals are the most common method of entry for Central American immigrants. While sea and air entries are prevalent in other populations, I will only be covering land entries and their potential consequences. *Coyotes*, or career human smugglers, bring immigrants across the border in sweltering tractor trailers,[40] by foot, or in small cars or vans.[41] Upon arrival, immigrants may be

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[39] McCloskey, L. A., Fernández-Esquer, M. E., Southwick, K., & Locke, C. "The psychological effects of political and domestic violence on Central American and Mexican immigrant mothers and children." *Journal of Community Psychology*, 23, 2, 95-115. April 01, 1995. Accessed June 28, 2018.

[40] Almasy, Steve. "Truck driver gets life sentence for role in death of 10 immigrants in Texas." *CNN*. April 20, 2018. Accessed September 6, 2018. https://www.cnn.com/2018/04/20/us/texas-migrants-trailer-deaths-sentence/index.html

[41] Thompson, Ginger. "CROSSING WITH STRANGERS: Children at the Border; Littlest Immigrants, Left in Hands of Smugglers." *The New York Times*. November 3, 2003. Accessed September 6, 2018. https://www.nytimes.com/2003/11/03/world/crossing-with-strangers-children-border-littlest-immigrants-left-hands-smugglers.html

successfully smuggled in without stopping at a Customs and Border Patrol checkpoint for inspection and fingerprinting, officially called Entry Without Inspection, or EWI.[42] The most obvious advantage of EWI is that the immigrant is not placed into any database of any U.S. government agency and, unless they leave and re-enter the U.S. and/or make future contact with any government agency, will remain that way during their time in the United States. However, living completely undocumented has significant disadvantages, the majority caused by having not received the form I-94, Arrival and Departure Record/Proof of Entry, upon entrance to the United States. The I-94 is necessary for obtaining public benefits, such as applying for a driver's license or enrolling children in public schools.[43,44]

The other possibility when entering the U.S. via land is arriving at an officially designated land border crossing. For pedestrian traffic in 2017, the five most common land border crossings between the U.S. and Mexico were:[45]

Port	2017 Pedestrian Entries
San Ysidro, CA	8,279,253
El Paso, TX	6,883,755
Presidio, TX	3,361,489

[42] EWI is pronounced EE-WEE and used informally as a verb in the immigration law community. For example, when describing a client's entry, an attorney may say "client A-R- EWI'ed near Laredo, Texas."

[43] "CBP Makes Online I-94 Application, Payment Available to Travelers Arriving at a Land Port of Entry*." U.S. Customs and Border Protection*. September 29, 2016. Accessed September 6, 2018. https://www.cbp.gov/newsroom/national-media-release/cbp-makes-online-i-94-application-payment-available-travelers

[44] "Official Site for Travelers Visiting the United States: Apply for or Retrieve Form I-94, Request Travel History and Check Travel Compliance." *U.S. Customs and Border Protection*. Accessed September 6, 2018.
https://i94.cbp.dhs.gov/I94/#/home

[45] Data from U.S. Department of Transportation Bureau of Transportation Statistics. Accessed September 6, 2018.
https://explore.dot.gov/t/BTS/views/BTSBorderCrossingAnnualData/BorderCrossingTableDashboard?:embed=y&:showShareOptions=true&:display_count=no&:showVizHome=no

Nogales, AZ	3,349,123
Laredo, TX	3,016,801

This data should *not* be interpreted as statistics on how many immigrants the U.S. is receiving, primarily because a) not all those who cross have the intention of staying and b) it does not account for EWI. When at a land border crossing, contact is first made with Customs and Border Patrol (CBP), which commences inspection of the arriving foreign national. The CBP officer will ask the crossing immigrant questions to determine their true cause of entry to the U.S. and take a full set of fingerprints to cross-check with internal and external databases of threats to national security, including the FBI Terrorist Screening Database and Interpol data.[46]

Credible Fear and the Convention Against Torture

As a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States (signed in 1988 and ratified in 1994) is obligated to uphold standards of human rights in both domestic and international practices.[47] Per Article 3 of the agreement as ratified by the U.S., individuals that are in danger of being subjected to torture in their home country may not be returned to that country, a principle called *non-refoulement*.[48] According to this statute, the U.S. may not deport any asylum-seeking

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[46] "Credible Fear Screening and Fraud Safeguards: Fact Sheet." *Human Rights First*. May 2017. Accessed September 6, 2018. http://www.humanrightsfirst.org/sites/default/files/hrf-credible-fear-factsheet.pdf
[47] "Implementing CAT: Working to Eliminate Torture." *U.S. Human Rights Network*. Accessed September 6, 2018. https://www.ushrnetwork.org/our-work/project/cat-convention-against-torture
[48] Weissbrodt, David and Hortreiter, Isabel. "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties." *University of Minnesota Law School*. 1999. Accessed September 6, 2018. http://scholarship.law.umn.edu/faculty_articles/362.

individual back to their home country if they are determined to have a credible fear of serious torture or persecution.[49]

If an immigrant arrives to the U.S. without proper documentation to enter, they are detained, and an immigration officer can enter them into the process of expedited removal, in which removal proceedings (deportation) are immediately initiated without a hearing in the immigration court. At any point during expedited removal, however, if the immigrant expresses some sort of fear of persecution and/or torture, they are referred to a USCIS asylum officer for a "credible fear interview." While waiting for a credible fear interview, which can be days or even weeks, the immigrant is held in a detention facility, with limited access to telephones to call loved ones or contact a lawyer. However, many detained clients cannot afford an attorney, and even when they can, attorneys may only visit in detention according to the rules of each specific center, "which involve securing clearance to enter the facility and restrictions barring laptops and other electronics."[50] Eagly and Shafer also reported that attorneys oftentimes reported long wait times to enter detention centers.[51]

During the credible fear interview, which alone is not sufficient to constitute an actual application for asylum, the officer asks a number of questions that attempt to establish whether or not the fear of persecution and/or torture is legitimate (as per the Convention Against Torture) and could be proven in front of an immigration judge during formal proceedings.[52] In years past,

[49] "Credible Fear FAQ." *USCIS*. Updated 26 September 2008. Accessed 16 October 2018. https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40231
[50] Eagly, Ingrid and Shafer, Steven. "A National Study of Access to Counsel in Immigration Court." *University of Pennsylvania Law Review*. December 2015. Accessed June 28 2018. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review
[51] Ibid.
[52] "USCIS revises protection screening lesson plans." *Catholic Legal Immigration Network, INC.* February 2017. Accessed June 28 2018. https://cliniclegal.org/resources/uscis-revises-protection-screening-lesson-plans

the burden of proof was relatively low in that the standard of proof was merely that of "significant possibility."[53] Under the John Kelly Department of Homeland Security (confirmed January 2017), Catholic Legal Immigration Network explains, this credibility standard has been raised to "preponderance of evidence," and officers are now required to consider all "relevant evidence." The latter means that any inconsistencies or flaws in the stories of immigrants that are not immediately relevant to the asylum claim may be used as grounds to deem the credible fear claim as not legitimate.[54] In FY 2017, USCIS adjudicated 78,564 credible fear requests, a number that reflects growing displacement and conflict on the world stage, and the approval rate of said requests has been decreasing slowly but steadily: from February 2017 to June 2017, positive credible fear decisions fell 10% from 78 to 68%.[55]

If the asylum officer finds during the interview that the interviewee has not proven credible fear, the decision may be appealed to be reviewed by an immigration judge in a more court-like setting, called a Credible Fear Review (CFR) or credible fear hearing. At this stage, attorneys are allowed to compile evidence and prepare a case as legal counsel to their client, but cannot cross-examine or perform direct representation of their clients. The different sources of evidence that an attorney may compile for their client depend widely on the grounds for asylum they will try to argue: for Central American women, evidence may include expert declarations on a country's conditions that will aid understanding of how that woman is susceptible to violence and persecution based on her gender and/or relationship status. The Center for Gender and

[53] Ibid.
[54] Ibid.
[55] "Credible Fear Screening and Fraud Safeguards: Fact Sheet." *Human Rights First*. May 2017. Accessed September 6, 2018.

Refugee Studies at University of California at Hastings provides these expert declarations at a cost to immigration law practitioners.[56]

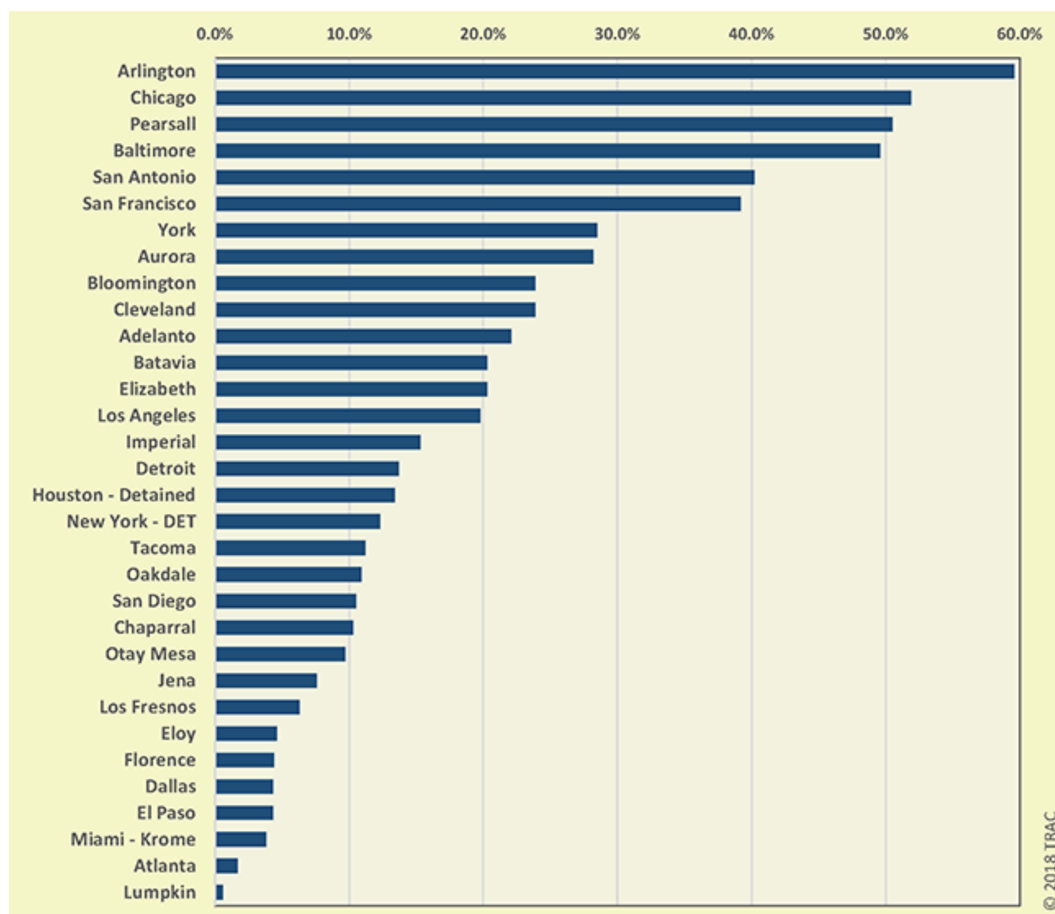
Despite the presence of attorneys in preparing for CFRs, approval ratings are significantly lower when appealed to immigration judges, particularly due to the fact that asylum officers are well-trained in asylum law and that most credible fear interviews are reviewed by two different asylum officers, meaning that it is unlikely that both officers missed a key determining detail that an IJ will not.[57] Syracuse's Transnational Records Access Clearinghouse (TRAC) definitively shows not only a drop-off in approval rating from credible fear interviews to CFRs but also the disparity based on geographic location of the immigration judge, a common theme in most immigration court proceedings. From June 2015 to October 2018, CFRs in the Arlington, Virginia immigration court had around a 60% chance of being positive. In Lumpkin, Texas or Atlanta, Georgia, however, this number dropped to 1% and 2%.[58] Because asylum policy does not change by location, its adjudication varying this significantly by geographic area

[56] Center for Gender and Refugee Studies. *UC Hastings*. https://cgrs.uchastings.edu/

[57] "Preparing for Credible Fear Hearing Before an Immigration Judge." *NOLO*. Accessed October 10 2018. https://www.nolo.com/legal-encyclopedia/preparing-credible-fear-hearing-before-immigration-judge.html

[58] "Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge." *TRAC Immigration*. Accessed October 3 2018. http://trac.syr.edu/immigration/reports/523/

is troubling to immigration advocates and representatives who may have to take drastic measures to change their cases depending on under which court jurisdiction their client falls.



Defensive vs. Affirmative Asylum

If the Immigration Judge does not find evidence of credible fear, the asylum-seeker is promptly deported due to the nature of expedited removal proceedings. If evidence of credible fear is found in a Credible Fear Interview or Credible Fear Review, however, it does not constitute a grant of asylum but rather a grant of permission to apply. The asylum-seeker is no longer in the expedited removal process, but they are still in removal proceedings and may be kept in

detention (unless bond is met) or required to check-in with ICE periodically until their first hearing in immigration court to ensure attendance.[59]

If an asylum-seeker arrives with a visa and is granted entry without being detained, applying for asylum means submitting the I-589 Application for Asylum to USCIS, which retains jurisdiction over the case until it is approved or denied and sent to the immigration courts. This process is called affirmative asylum. On the other end of the asylum spectrum lies *defensive* asylum. An asylum application is said to be defensive when the asylum-seeker is currently in ICE detention, released on parole, in removal proceedings after an affirmative asylum application is denied or found to be in the country illegally. An immigrant that had an EWI, for example, may be placed in removal proceedings if they are caught in an ICE raid after having been in the country for some time.

While affirmative asylum cases generally must be filed within one year of entry to the U.S.,[60] the processes of defensive and affirmative asylum are initiated in different manners and different agencies have jurisdiction over each. For affirmative applications, the process is initiated simply by submitting the I-589 Application for Asylum to USCIS. Defensive asylum first starts with entry into removal proceedings, commenced by receipt of a Notice To Appear (NTA)[61] in the mail, in which the immigrant is summoned to court at a particular time and date, if they are not currently detained (not previously detained or released). It is important to clarify that an NTA does not necessarily mean that the individual must submit an application for

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[59] "Immigration Detention 101: Information for Detainees' Family and Friends." *NOLO*. Accessed October 10 2018. https://www.nolo.com/legal-encyclopedia/immigration-detention-101-information-detainees-family-friends.html

[60] Certain exceptions to this rule exist, but they are largely determined on a case-by-case basis and have been increasingly rare under the current administration.

[61] In immigration law, NTA has become a passive verb – "Client R-M- was NTA'ed two months ago, but they did not receive the notice due to an address change."

asylum: it is a broad signifier that some form of relief must be sought to avoid deportation. In the case of the Northern Triangle women demographic group, the most common and applicable form of relief is asylum. Once a NTA is issued summoning the asylum-seeker to immigration court, the case becomes the jurisdiction of EOIR, where it will remain until final adjudication of the case.

NTAs have been a hot-button topic in immigration law under the current administration. In June 2018 (with updates/additions in July and August) USCIS issued a memo reflecting a new policy: as opposed to past policy, when ICE was primarily tasked with issuing NTAs, USCIS would begin issuing them upon denial of certain affirmative applications, such as applications for asylum, U visas, T visas, and Temporary Protected Status.[62] The new policy is troubling to immigration advocates for two reasons: first, because it will inundate the already-overspread immigration courts system with new removal proceedings, and secondly because the threat of deportation upon a rejected immigration relief application will likely discourage many asylum-seekers from applying for humanitarian relief, especially those who fled from the most dangerous conditions.[63] USCIS has since announced that it will be delaying implementation of the new policy,[64] but the precedent is nonetheless unsettling to those seeking to apply for humanitarian relief or represent those who seek to do so. Another policy of the Trump

[62]"Practice Pointers, USCIS issues new NTA guidance memo." *Catholic Legal Immigration Network, INC.* Updated July 31, 2018. Accessed October 3 2018. https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Practice-Pointer-USCIS-New-NTA-Guidance-Memo.pdf

[63] Ibid.

[64] "Updated Guidance on the Implementation of Notice to Appear Policy Memorandum." *USCIS.* Updated July 30 2018. Accessed October 3 2018. https://www.uscis.gov/news/alerts/updated-guidance-implementation-notice-appear-policy-memorandum

administration regarding NTAs was struck down 8-1 in the U.S. Supreme Court in July 2018 in *Pereira v. Sessions.*[65]

Because affirmative asylum is adjudicated by USCIS and defensive asylum is adjudicated by an immigration judge in EOIR, my research will be focusing on the deficiencies in defensive asylum as adjudicated by EOIR. The two are not mutually exclusive, however: any affirmative asylum case adjudicated by USCIS can turn into defensive proceedings if they are referred to an immigration court for further review of their eligibility for asylum via a NTA.[66] TRAC data points out that approximately 71% of defensive asylum proceedings are referrals from affirmative processes.[67] Defensive asylum is also the most pertinent to my demographic focus: TRAC data shows that numerically, the vast majority of those in removal proceedings (quantified by those who were issued NTAs) in FY18 so far have been Mexican, Guatemalan, Honduran, and Salvadoran.

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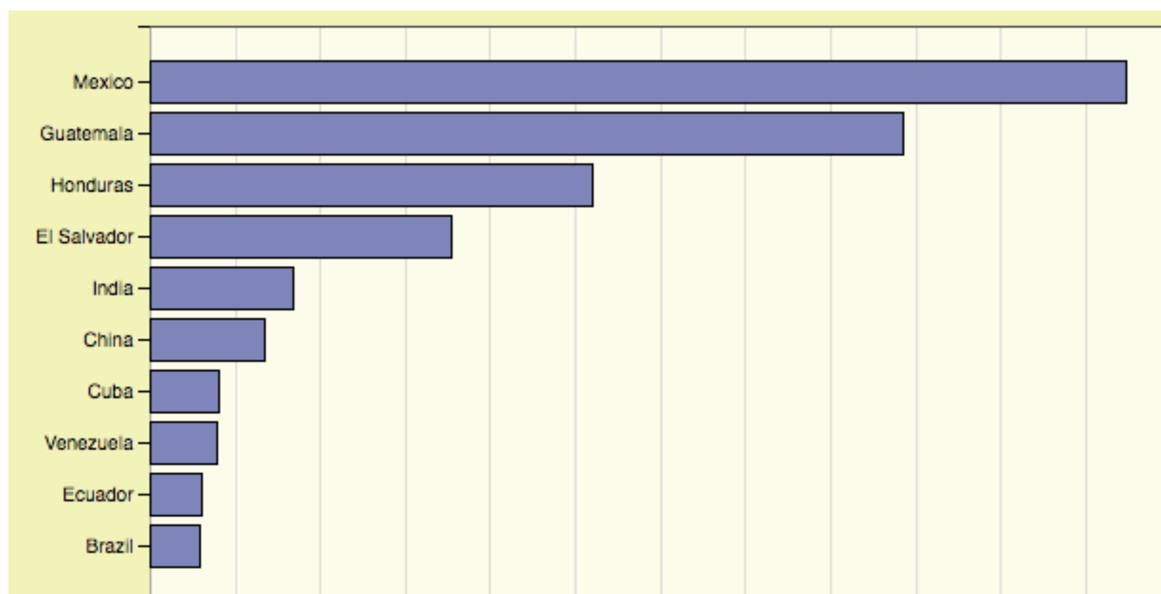
[65] "Supreme Court rules on "stop-time" rule for cancellation of removal." *Catholic Legal Immigration Network, INC.* Updated July 2018. Accessed October 3 2018. https://cliniclegal.org/resources/supreme-court-rules-stop-time-rule-cancellation-removal

[66] "Obtaining Asylum in the United States." *USCIS*. Updated October 19 2015. Accessed October 3 2018. https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states

[67] "The Asylum Process." *TRAC Immigration*. Updated August 7 2006. Accessed October 3 2018. http://trac.syr.edu/immigration/reports/159/

Figure 1: Deportation Proceedings by Nationality, FY18 (TRAC)[68]



Alternative Forms of Relief

Before filing an asylum case, immigration lawyers are obligated to determine if their client may be eligible for other forms of relief. Events or conditions unique to each immigrant may influence what type of case is most viable to pursue in immigration court, and different cases may be filed simultaneously if the attorney believes that there is a significant possibility of relief under multiple statutes. While my thesis attempts to identify deficits in asylum policy and adjudication, it is valuable to understand other forms of humanitarian relief that may be available to my demographic of focus: The U Visa, T Visa, Violence Against Women Act, and Temporary Protected Status.

The U and T Visas are designed to provide relief for victims of serious crimes. The U Nonimmigrant Visa refers to a broader variety of qualifying crimes that occurred in the U.S.,

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[68] "New Filings Seeking Removal Orders in Immigration Courts through August 2018." *TRAC Immigration*. Accessed October 3 2018. http://trac.syr.edu/phptools/immigration/charges/apprep_newfilings.php

such as abduction, domestic violence, trafficking, torture, stalking, or felonious assault.[69] The victim of the crime also must have been reasonably helpful to law enforcement in investigating or prosecuting the qualifying criminal activity, which must be substantiated by a statement from law enforcement or another qualifying agency saying that the victim was helpful (called a U-certification).[70] The main obstacle to obtaining relief based on a U Visa is the current wait time: an I-918 Petition for U Nonimmigrant Status filed at the USCIS Vermont Service Center is estimated to take between 48 to 48.5 months for processing.[71]

The T Nonimmigrant Visa for Victims of Human Trafficking is a form of relief for those who were victims of a "severe form of trafficking," such as sex trafficking or labor trafficking. The victim must have arrived in the U.S. or at a port of entry due to trafficking activity and must be able to prove that they would "suffer extreme hardship" if removed from the U.S..[72] The burden of proof of compliance with law enforcement is less strict than the U Visa due to the nature of trafficking, particularly if the victim is under age 18 or is unable to cooperate due to physical or psychological trauma.[73] The T Visa, while much more restrictive in terms of its qualifying conditions, yields a significantly shorter wait time than the U Visa: An I-914

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[69] "Victims of Criminal Activity: U Nonimmigrant Status*."* *USCIS*. Updated June 12 2018. Accessed October 3 2018.
https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status
[70] Ibid.
[71] "Check Case Processing Times." *USCI*S. Accessed October 3 2018.
https://egov.uscis.gov/processing-times/
[72] "Victims of Human Trafficking: T Nonimmigrant Status." *USCIS.* Updated May 10 2018. Accessed October 3 2018.
https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status
[73] Ibid.

Application for T Nonimmigrant Status filed at the Vermont Service Center is estimated to take 12 to 15 months to process.[74]

U and T Visas provide a path to a green card for victims of crimes in the U.S. but do not offer protections for my demographic of focus unless they are victims of criminal activity both in their home country and on U.S. soil. This situation is, unfortunately, common, and many times asylum cases will be filed in conjunction with a U and/or T Visa application. A. Reiter of Ayuda, for example, has filed a U Visa or VAWA (to be explained) simultaneously with about 20% of her active asylum cases.

The Violence Against Women Act of 1994 (with later amendments) provides protections for survivors of domestic abuse in the U.S. when the perpetrator was a U.S. citizen or Lawful Permanent Resident (LPR). A VAWA petition is particularly relevant in cases where the abuser was prone to use the survivor's immigration status against them, as marriage or familiar relation to a USC or LPR provides a relatively conventional form of immigration relief.[75] Like the U Visa, the qualifying abuse must have occurred in the United States, which of course does not include any domestic violence an asylum-seeker suffered in their home country. Nonetheless, as previously mentioned, there may have been abuse present in both spheres of life.

The last alternative form of humanitarian relief to asylum is Temporary Protected Status (TPS). TPS is designed to protect nationals of countries in which there are qualifying temporary conditions that would make returning safely impossible, such as ongoing armed conflict/civil

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[74] "Check Case Processing Times." *USCIS.* Accessed October 3 2018.

[75] "Chapter 8: Violence Against Women Act (VAWA)." *Kids In Need of Defense (KIND*). Accessed October 3 2018. https://supportkind.org/wp-content/uploads/2015/04/Chapter-8-Violence-Against-Women-Act-VAWA.pdf

war, an environmental disaster, or an epidemic.[76] Of the Northern Triangle countries, Guatemala is currently not designated TPS, Honduras' TPS terminates on January 2020, and El Salvador's terminates in September 2019.[77] TPS requires continuous physical presence (CPP) in the U.S. since the effective date of the most recent designation of each country as well as requiring continuous residence (CR) since the date specified for each. For El Salvador, for example, an applying immigrant must have had continuous residence in the U.S. since February 13th, 2001 and continuous physical presence since March 9th, 2001.[78] While the conditions many current asylum-seekers are fleeing have been present since 2001, recent immigrants do not come close to meeting this qualification.

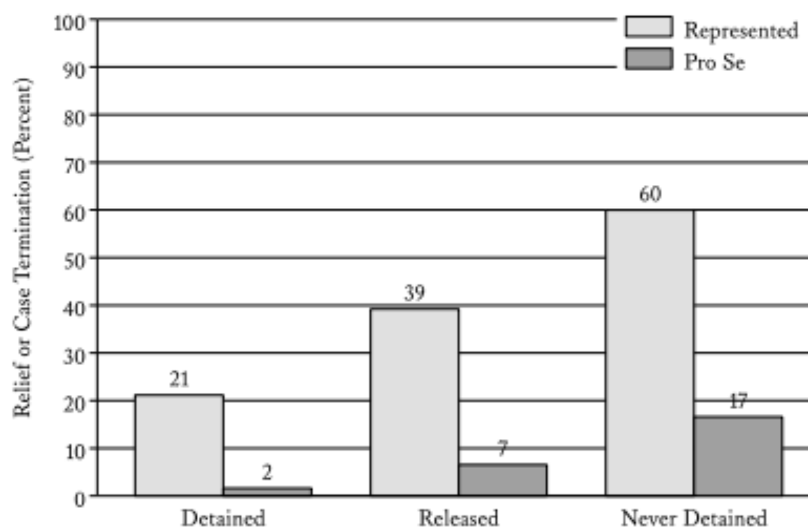
Finding Counsel to File a Defensive Asylum Case

When in removal proceedings, time is of the essence when deciding to file a defensive asylum case. Although obtaining counsel is not required (or guaranteed) by any immigration court proceedings, its results in case outcome are statistically significant and notable. The first ever study on access to legal counsel in immigration courts by Eagler and Shafer for *University of Pennsylvania Law Review* (2015) found that compared with *pro se* cases (where the asylum-

[76] "Temporary Protected Status." *USCIS*. Updated October 4 2018. Accessed October 15 2018. https://www.uscis.gov/humanitarian/temporary-protected-status
[77] Ibid.
[78] Ibid.

seeker has no attorney or accredited representative), "[legal] representation was associated with a nineteen to forty-three percentage point boost in rate of case success."[79]

Figure 14: Successful Case Outcomes (Termination or Relief) in Removal Cases, by Detention and Representation Status, 2007–2012[170]



Of the six immigration law professionals I interviewed for this research project, all of them cited legal representation as the most notable obstacle to immigrant justice. A. Benitez of the George Washington University Immigration Clinic pointed out that finding competent counsel in immigration courts presents another challenge to asylum-seekers going to court. This concern is reflected in other studies of legal counsel in immigration proceedings: in New York, for example, the immigration judges regarded almost half of the immigration attorneys practicing before them as less than adequate, 33% inadequate, and 14% grossly inadequate.[80] The study

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[79] Eagly and Shafer. "A National Study of Access to Counsel in Immigration Court."
[80] "Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings." *Study Group on Immigration Representation, Cardozo Law Review*. December 2011. Accessed October 15 2018.
https://cardozo.yu.edu/sites/default/files/New%20York%20Immigrant%20Representation%20Study%20I%20-%20NYIRS%20Steering%20Committee%20%281%29.pdf

cites the primary culprit of subpar representation as the private bar, as opposed to pro bono, nonprofit, and law school clinic providers.[81]

While not all counsel is created equal, asylum-seekers may not have the opportunity to be picky when deportation is a real possibility. It is this desperation, combined with lack of knowledge of the U.S. legal system, that those posing as legitimate attorneys take advantage of when committing *notario* fraud. K. Phelps of Tahirih Justice Center in Falls Church, Virginia, described *notario* fraud as a significant problem, particularly when immigration is in the news, as fraudulent attorneys "come out of the woodwork" and make promises to individuals about potential immigration benefits for which they may be eligible and even file fraudulent or extremely weak asylum cases that accredited representatives or experienced attorneys would not file.

The D.C.-MD-VA area, in particular, was shocked by a large-scale *notario* fraud case in which non-attorney Rose Sanchez-Canete of the Latino Federation of Tenants Organization in Alexandria (LAFEOTA) was found guilty and sentenced to two years in prison for "falsely promising to help two immigrants in the country illegally obtain legal status."[82] The Washington, D.C. office of Ayuda's Project END (Eradicating Notario Deceit) played a key role in assisting those that paid Ms. Sanchez-Canete for an immigration case. Project END has continued to serve the D.C.-MD-VA area immigrant community by representing clients who had previously lost money to legal services fraud and partnering with the Hispanic Bar Association of the District of

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[81] Ibid.
[82] Olivio, Antonio. "Latino advocate in Virginia found guilty of defrauding immigrants." *The Washington Post.* August 18 2016. Accessed August 8 2018. https://www.washingtonpost.com/local/dc-politics/latino-advocate-in-virginia-found-guilty-of-defrauding-immigrants/2016/08/18/2ca1690c-6588-11e6-8b27-bb8ba39497a2_story.html?utm_term=.74b88b5eb0bb

Columbia to release bilingual videos to teach those in the process of finding counsel how to screen potential practitioners for signs of fraud.[83]

The nature of immigration and the consequences of immigration law make tracking and litigating against *notario* fraud difficult for advocates. Those living undocumented in the U.S. may be reluctant to contact authorities if they believe they have been scammed, particularly under the current administration's pressure on ICE to increase deportations. The story of Brandelia Nuñez, as reported by Nereida Moreno for the Chicago Tribune, is just one form *notario* fraud may take.[84] She reported Norma Bonilla to the Illinois Attorney General's office, who has since filed a lawsuit against Bonilla, for charging upwards of $2,000 to obtain USCIS documents that only cost $35, then filing false information to USCIS for an application for which Nuñez's parents were not technically eligible.[85] The lawsuit has not yet been settled, but Illinois Attorney General Lisa Madigan issued a statement that "it is critical to find honest and legitimate assistance and know the warning signs of immigration fraud," encouraging the public to report any potentially fraudulent activity to her office, which will not ask for the immigration status of those reporting.[86] *Notario* fraud may also take the form of barred attorneys with no experience in immigration law charging for and attempting representation in immigration cases.

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[83] "To Mark International Migrants Day, Advocates Release Notario Fraud Prevention Videos." *Ayuda.* Accessed August 8 2018. https://ayuda.com/project-end-videos/

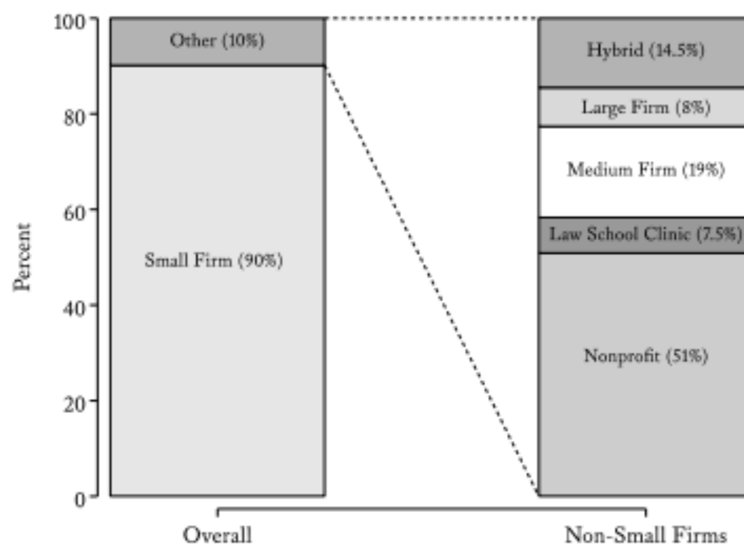
[84] Moreno, Nereida. "Scam artists target immigrant communities, promising legal status for cash." *The Chicago Tribune*. May 30 2017. Accessed October 6 2018. http://www.chicagotribune.com/news/immigration/ct-immigration-notary-fraud-met-20170529-story.html

[85] "Madigan sues woman for providing fraudulent immigration services." *Illinois Attorney General*. April 6 2017. Accessed October 6 2018. http://www.illinoisattorneygeneral.gov/pressroom/2017_04/20170406b.html

[86] Ibid.

The most common types of counsel in removal cases were small firms and solo practitioners, which accounted for 90% of removal representation in the Eagly and Shafer study.[87] Private attorneys tend to have more availability, resources, and staffing and will often take cases that nonprofits or legal clinics cannot, such as cases with criminal charges or custody battles on the side for which nonprofits or legal clinics do not have capacity or specialization.

Figure 5: Types of Attorneys in Removal Cases, 2007–2012[112]



Note: "Small Firms" included 10 or fewer attorneys, "Medium Firms" included 11 to 100 attorneys, and "Large Firms" included more than 100 attorneys. "Hybrid" means more than one organization type represented the respondent.

The most obvious drawback of hiring a private immigration attorney to take a defensive asylum case is the cost. Central American immigrants in particular had higher poverty rates than overall foreign and U.S.-born populations, according to Lesser and Batalova for the Migration Policy Institute: in 2015, 22% of these families lived in poverty, a higher number than both other immigrant families and native-born families.[88] Additionally, many recently-arrived Central

[87] Eagly and Shafer. "A National Study of Access to Counsel in Immigration Court."
[88] Lesser, Gabriel and Batalova, Jeanne. "Central American Immigrants in the United States." *Migration Policy Institute*. April 5 2017. Accessed October 6 2018. https://www.migrationpolicy.org/article/central-american-immigrants-united-states#Income_and_Poverty

American families have incurred debt to *coyotes* who smuggled them into the U.S., whose prices have jumped to between $7,000 and $10,000.[89] Lastly, a study of Latino migrants by Latin American Dialogue showed that in five major cities, migrants sent money home an average of 13 times a year: remittances accounted for 18.4% of El Salvador's GDP in 2017, 19.5% of Honduras', and 11.5% of Guatemala's.[90] An already-low income combined with debt to smugglers and/or remittances sent home make the amount of money available to recently-arrived Central American asylum seekers for a lawyer significantly less than what it would take to comfortably afford a private attorney, which may charge between $1,000-$3,000 for an asylum application, then thousands more for deportation defense and/or adjusting to a green card.[91] A. Reiter of Ayuda, rather than simply rejecting clients if Ayuda's services do not fit their needs, will try to teach clients how to file an asylum case *pro se* (without a lawyer) to save them the cost of a private attorney.

<u>Access to Low-Cost Legal Services in Geographic Area of Focus</u>

Low and pro-bono legal services providers step up to the plate to aid lower-income immigrants in their legal battles as often as resources permit. In the Washington, D.C.-Virginia-Maryland area, the primary providers of low-cost legal services were non-profit organizations and law school legal clinics. While each major city/urban space offers different resources to attempt to meet the needs of varying immigrant communities, my participation in the D.C.-MD-VA

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[89] Cleek, Ashley. "With smuggling costs skyrocketing, parents balance risk and debt for their children's future." *Public Radio International*. February 28 2018. Accessed October 6 2018. https://www.pri.org/stories/2018-02-28/smuggling-costs-skyrocketing-parents-balance-risk-and-debt-their-childrens-future

[90] Orozco, Manuel. "Remittances to Latin America and the Caribbean in 2017." *The Latin American Dialogue*. 2017. Accessed October 8 2018. https://www.thedialogue.org/wp-content/uploads/2018/01/Remittances-2017-1.pdf

[91] Daneu, Liz. "Is An Immigration Lawyer Worth The Cost?" *All Law*. Updated February 3 2016. Accessed October 8 2018. http://www.alllaw.com/articles/nolo/us-immigration/lawyer-worth-cost.html

immigration non-profit sector has led me to focus on this region and its strengths and weaknesses in legal access for a particularly robust immigrant community.

Figure 3: Non-Profit Immigration Legal Services in the Maryland Metro Area

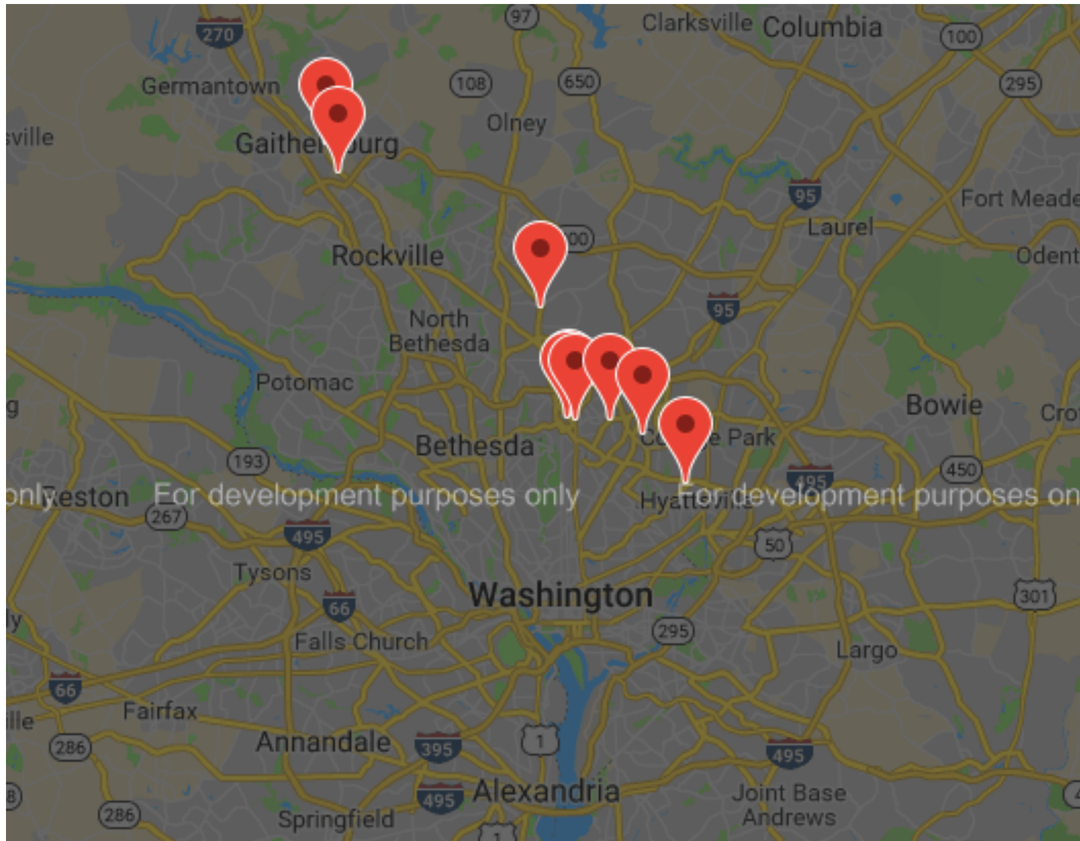
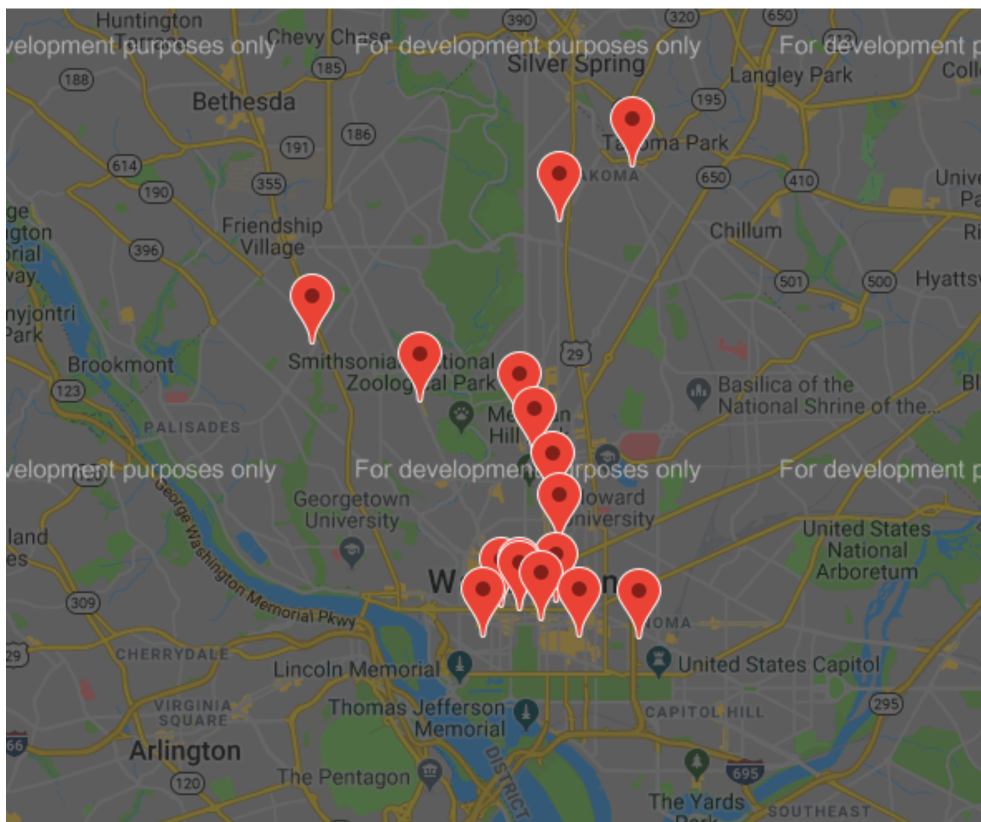


Figure 4: Non-Profit Immigration Legal Services in Washington, D.C.



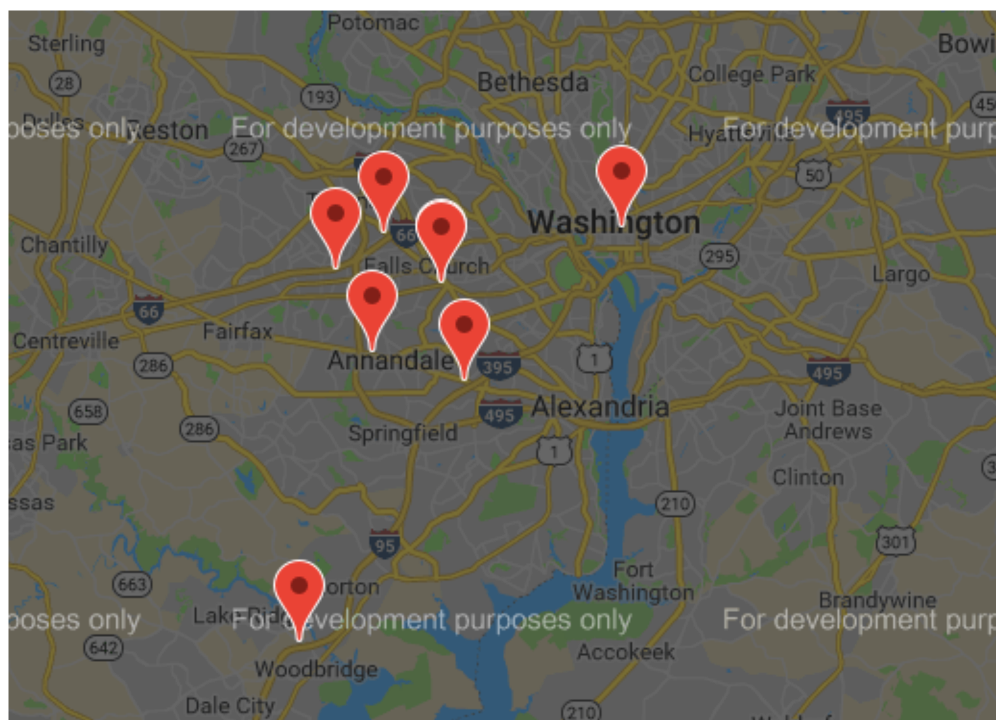


Figure 5: Non-Profit Immigration Legal Services in the Northern Virginia Area

One in seven residents of Washington D.C. is an immigrant, with El Salvador being the most common country of origin (15.3%).[92] With the total immigrant population in D.C. alone being 95,117 in 2015,[93] the non-profit community has played an active role in assisting this community. The National Immigration Legal Services Directory lists sixteen non-profits in the District of Columbia dedicated to serving immigrants, with six in Northern Virginia and nine in the Maryland metro area.[94]

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[92] "Immigrants in the District of Columbia." *American Immigration Council*. October 16 2017. Accessed August 17 2018. https://www.americanimmigrationcouncil.org/research/immigrants-in-washington-dc
[93] Ibid.
[94] "National Immigration Legal Services Directory." *Immigration Advocates Network | Nonprofit Resource Center.* Accessed August 17 2018. https://www.immigrationadvocates.org/nonprofit/legaldirectory/

While obtaining any representation leads almost unequivocally to better case outcomes, success rates for immigrants represented by non-profits or clinics were higher than that of those represented by smaller private firms.[95] Non-profits also oftentimes assume advocacy roles that supersede legal representation. Ayuda, for example, employs social workers/case managers to help clients who have been victims of domestic violence, trafficking, sexual assault, and stalking obtain public benefits, medical care, psychiatric services, and other basic needs. For clients with particularly traumatic backgrounds, K. Phelps of Tahirih Justice Center emphasizes trauma-informed interviewing, in which the attorney takes special steps and precautions to make the interview (where the client may have to recount extremely disturbing events and facts) more productive and less mentally taxing for the client.

In addition to hiring attorneys specializing in immigration law, most American immigration legal services non-profits participate in a program by the Department of Justice's Office of Legal Access Programs designed to increase affordability and accessibility of legal services in the immigration field called Recognition & Accreditation (R&A).[96] R&A creates a standard of certification allowing non-attorneys that currently work in the immigration legal field at qualifying organizations to represent clients before DHS, EOIR, USCIS, and the Board of Immigration Appeals (BIA).[97] Qualifying organizations consist primarily of non-profits and legal clinics at law schools, and to become an accredited representative, an individual must "possess broad knowledge and adequate experience in immigration law and procedure."[98] A. Reiter, the

[95] Eagly and Shafer. "A National Study of Access to Counsel in Immigration Court."
[96] "Recognition and Accreditation (R&A) Program." *The United States Department of Justice Office of Legal Access Programs*. Accessed August 17 2018. https://www.justice.gov/eoir/recognition-and-accreditation-program
[97] Ibid.
[98] "Recognition and Accreditation Program – Frequently Asked Questions." *United States Department of Justice Office of Legal Access Programs*. Accessed August 17 2018. https://www.justice.gov/eoir/file/1096486/download

only fully-accredited representative I interviewed, was accredited in March 2016 but had been working in the field of immigration law since 1997. This experience, combined with her employment at Ayuda, a qualifying non-profit, allows her to practice immigration law in front of BIA, USCIS, EOIR, and matters with ICE. She recognizes that the R&A program is helping combat the issue of lack of affordable counsel but mentions that accredited representatives are only a drop in the bucket and that there are only a small number (<2,000) of fully-accredited representatives practicing in the U.S. today.

Another form of affordable legal help available to the immigrant community in the D.C.-MD-VA area is the law school legal clinic. American University, George Washington University, and Georgetown University all offer entirely pro-bono legal services, with the trade-off that law students are preparing cases under the close supervision of attorneys. J. Rathod of the American University Immigrant Justice Clinic points out that although clients may initially be hesitant to be represented by non-attorneys, the students are duly supervised, and legal clinics provide a valuable opportunity to shepherd students' professional development. As of June 2018, the George Washington University Immigration Law Clinic had 40 active cases, with asylum cases constituting about 50-75%. American University's had 70 active cases, with fear-based cases constituting about 25%. While I was not able to interview those in charge of the Georgetown Law Center for Applied Legal Studies, 100% of their cases are asylum.[99]

The Defensive Asylum Case – Immigration Courts

While an affirmative asylum case simply means submitting the form I-589 to USCIS and appearing in front of an asylum officer for an interview, a defensive asylum case takes place in

[99] "Center for Applied Legal Studies." *Georgetown Law*. Accessed August 17 2018. https://www.law.georgetown.edu/experiential-learning/clinics/center-for-applied-legal-studies/

front of a judge in an adversarial hearing at EOIR. The time and date of the first hearing in the process, called the Master Calendar Hearing (MCH) is specified on the Notice to Appear, and if the asylum-seeker is not detained and does not show up for the hearing, the judge may issue a removal order (final deportation order) *in absentia*. Under the Trump administration, these *in absentia* removal orders are increasing quickly, increasing 26% from 2016 to 2017.[100] Catholic Legal Immigration Network, in partnership with the Asylum Seeker Advocacy Project, cites five common reasons for asylum-seekers not showing up for hearings:

1. Failure to receive a NTA from the government
2. Changing their address with ICE but not EOIR under the assumption that they are the same agency
3. "Incomplete or confusing" instructions from the government about a hearing or how to change a hearing to a different, more accessible venue
4. "transportation, health, or other personal problems"
5. "ineffective assistance of counsel."[101]

The issue of transportation or other personal problems is especially pertinent in my demographic of focus due to the economic status, as previously mentioned, of Central American immigrants. The immigrant community of the D.C.-MD-VA area in particular is fortunate that the Arlington immigration court, in which area defensive asylum proceedings are held, is accessible by Metro at the Crystal City station.[102] The USCIS Virginia-Washington field office at which affirmative asylum interviews, green card interviews, and other immigration appointments

[100] Arthur, Andrew. "New Immigration Court Statistics Released." *Center for Immigration Studies*. May 10 2018. Accessed August 17 2018.
https://cis.org/Arthur/New-Immigration-Court-Statistics-Released

[101] Cruz, Conchita, Mendez, Michelle, Reddy, Swapna, Tegeler, Dorothy and Willis, Liz. "A Guide to Assisting Asylum-Seekers with *In Absentia* Removal Orders." *Catholic Legal Immigration Network, INC.* 2016. Accessed September 6 2018.
https://cliniclegal.org/sites/default/files/resources/asylum/A-Guide-to-Assisting-Asylum-Seekers.pdf

[102] "Arlington Immigration Court." *The United States Department of Justice.* Updated October 18 2018. Accessed September 6 2018.
https://www.justice.gov/eoir/arlington-immigration-court

are held is also accessible by Metro at the Dunn Loring-Merrifield station.[103] However, for in-state immigrants located in cities like Richmond, which account for roughly 10% of the state's foreign-born population,[104] getting to Arlington requires a two hour drive (with light traffic) each way.[105] Undocumented immigrants that do not have a drivers' license are faced with finding a ride from a family member or friend or paying for a taxi or Uber. Even if they can find a ride, additional complications or conflicts may arise, including requesting time off at work and/or arranging for childcare.

Even more dire is the situation of immigrants who have to travel across state lines to reach immigration courts. This inaccessibility is the reality of living in states like West Virginia, South Carolina, and Missouri, where immigrant communities, albeit smaller and sparser than in states like Virginia and California, must travel even further for their asylum hearings in court. An asylum-seeker in Charleston, West Virginia, for example, must travel to Louisville, Kentucky (~4 hours each way, driving[106]) not only for their MCH but also for each subsequent individual hearing in the asylum case. Cases like this one present a unique challenge for finding counsel as well: the attorney or representative, if representing their client in court, must take the time to travel to the immigration courts as well or else provide telephonic representation.[107] However, options to waive the appearance of the Respondent (client) or counsel at the MCH are available,

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[103] "Virginia - Washington Field Office." *USCIS.* Updated May 23 2018. Accessed September 6 2018.
https://www.uscis.gov/about-us/find-uscis-office/field-offices/virginia-washington-field-office
[104] Kebede, Laura. "Foreign-born population has increased rapidly in Va." *Richmond Times-Dispatch*. March 5 2014. Accessed September 6 2018.
https://www.richmond.com/news/local/foreign-born-population-has-increased-rapidly-in-va/article_c50ae2f3-9e81-5a5c-a7e4-b384750814ad.html
[105] Data from Google Maps
[106] Data from Google Maps
[107] "Immigration Court Practice Manual." *U.S. Department of Justice.* December 2016. Accessed September 6 2018.
https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf

but not recommended for a defensive asylum proceeding in which the Respondent is being questioned by opposing counsel, for which they must be present.[108]

An added element of immigration court that is less prevalent in other courts is the aspect of language access. The Department of Justice's EOIR Practice Manual states that "in general, the Immigration Court endeavors to accommodate the language needs of all respondents and witnesses."[109] The landmark study by Laura Abel for the New York University School of Law's Brennan Center for Justice titled "Language Access in Immigration Courts" brings to light many deficiencies in this provision of interpreter services. Abel slams the immigration courts, claiming that they "routinely fail to provide interpretation for parts of court proceedings and critical encounters," and that "there have been many incidents in which interpreters made mistakes and acted unprofessionally."[110] Additionally, she calls into question the true quality of interpreter services if they are being provided remotely through technology with limited capabilities.[111]

Like many other aspects of the immigration courts, quality of language access varies by court. A. Reiter points out that court interpreters have gotten much better, and the interpreters in the Arlington courts are "pretty good." J. Rathod calls attention to the indigenous experience in general, asserting that asylum-seekers from Central America's numerous indigenous communities are marginalized even further in the immigration system. Reports cited in Exclusion of Indigenous Language Speaking Immigrants in the U.S. Immigration System, A

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[108] Ibid.
[109] Ibid.
[110] Abel, Laura. "Language Access in Immigration Courts." *NYU Brennan Center for Justice*. 2011. Accessed September 6 2018. http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf
[111] Ibid.

Technical Review, by Blake Gentry, show widespread instances of indigenous asylum-seekers being mischaracterized as Spanish-speakers and court interpretation of indigenous languages being "insufficient, incorrect, or absent."[112] When deportation is a potential consequence of a misinterpretation in Immigration Court, Gentry suggests that "identification of indigenous languages from the onset [of court proceedings], and not in the middle of court sessions, is a more viable path to equitable access [to legal proceedings in immigration court]."[113]

Social Groups and Asylum: From *A-R-C-G-* to *A-B-*

To make a proper claim to asylum, it is the job of the immigration attorney/representative or asylum-seeker (in a *pro se* setting) to establish a connection or link, called a nexus, between a well-founded fear of persecution perpetuated by the government or an entity the government cannot or will not control on account of one of the five protected grounds of asylum.[114] Each element of a successful asylum case, such as "well-founded," "fear," and "persecution" has decades of case law contributing to its definition and application, but for the purposes of my research I will be focusing primarily on one of the five protected grounds for asylum: social group standing.

The first three protected groups – race, religion, and nationality – have been well-defined and accepted. The latter two – political opinion and particular social group – have been up to interpretation more frequently, resulting in controversy and varying applications.[115] National Immigrant Justice Center describes the concept of a social group as "broad and evolving," but

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[112] Blake Gentry. "Exclusion of Indigenous Language Speaking Immigrants in the U.S. Immigration System, A Technical Review." *Ama Consultants.* September 4 2015. Accessed September 6 2018. http://www.amaconsultants.org/uploads/Exclusion_of_Indigenous%20Languages_in_US_Immigration_System_19_June2015version_i.pdf

[113] Ibid.

[114] Cruz, Conchita et al. "A Guide to Assisting Asylum-Seekers with *In Absentia* Removal Orders." 2016. Accessed September 6 2018.

[115] Ibid.

generally understood "as a group of people who share or are defined by certain immutable characteristics such as age, geographic location, class background, ethnic background, family ties, gender, and sexual orientation."[116] The U.S. Seventh Circuit case *Cece v. Holder* (2013) clarified that a group "defined by gender plus one or more narrowing characteristics" qualifies as a particular social group under asylum law.[117]

When determining asylum claims of victims of domestic violence before June 2018, the Board of Immigration Appeals and the immigration courts followed precedent from the August 2014 BIA case Matter of A-R-C-G-, which found that the respondent, who suffered severe abuse by her husband, belonged to the particular social group (PSG) "married women in Guatemala who are unable to leave their relationship."[118, 119] BIA found that "a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation," and that "married," "women," and "unable to leave the relationship" have commonly accepted definitions in Guatemalan society, therefore creating "a group with discrete and definable boundaries."[120] This case law was accepted and used in asylum decisions until June 2018, when Jeff Sessions' Department of

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[116] "Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings." *National Immigrant Justice Center.* May 2016. Accessed September 6 2018. http://www.immigrantjustice.org/sites/default/files/NIJC%2520Asylum%2520Manual_05%25202016_final.pdf
[117] Ibid.
[118] "Matter of A-R-C-G- et al., Respondents" *U.S. Department of Justice.* August 26 2014. Accessed September 6 2018. https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf
[119] "Asylum Practice Advisory: Applying for Asylum after *Matter of A-B-*." *National Immigrant Justice Center.* June 2018. Accessed September 6 2018. https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf
[120] Ibid.

Justice overturned years of case law, including *Matter of A-R-C-G-,* in its decision on *Matter of A-B-*.

Matter of A-B- is a ruling by Sessions on a case that had been bounced between the Board of Immigration Appeals and the Charlotte EOIR court in which Sessions overturned the viability of women unable to leave their relationships as a particular social group (and therefore their qualification for asylum).[121] The ruling "touched on several aspects of asylum law, but most notably domestic violence, as a basis for asylum"[122] and raised the burden of proof in defining harm by a private actor, stating that the "applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims."[123] *A-B-* also worked to dissolve the established nexus between this PSG and the harm, holding that if the persecutor (in this case, the abuser) is not aware of the existence of the PSG, then it becomes more difficult to prove that the harm happened based on membership in the group.[124] Lastly, despite gang activity not having any relation to neither the subject matter of *A-B-* nor *A-R-C-G-,* Sessions establishes that gang violence will no longer be grounds for asylum.[125]

For practitioners of immigration law that are working on cases for asylum-seeking Central American women, *A-B-* presents a seemingly insurmountable hurdle. Policy groups such as the National Immigrant Justice Center[126] and the American Immigration Lawyers Association

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[121] Ibid.
[122] "Attorney General issues precedent decision, Matter of A-B-, seeking to limit protection for asylum seekers." *Catholic Legal Immigration Network, INC.* 2018. Accessed September 6 2018. https://cliniclegal.org/resources/attorney-general-issues-precedent-decision-matter-b-seeking-limit-protection-asylum
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] "Representing Asylum Seekers After *Matter of A-B-*." *National Immigrant Justice Center.* July 12 2018. Accessed September 6 2018. https://www.immigrantjustice.org/sites/default/files/content-type/page/documents/2018-07/07.12%20Matter%20of%20A-B-%20powerpoint%20-%20to%20print.pdf

(AILA)[127] have been leading efforts to preserve asylum protections and release guides to help immigration attorneys litigate domestic violence asylum cases in the post-*A-B-* legal sphere. K. Phelps explained that Tahirih Justice Center will be taking a similar course of action, poking holes in the legal language of *A-B-* and litigating every possible grounds for asylum. A. Reiter admitted that the decision left her feeling discouraged, but that "we're going to have to work harder" to pursue qualifying cases in the courts by compiling as much evidence as possible.

Reiter, among other immigration law practitioners, has adjusted how she prepares asylum cases. When fitting a client into a situation where her membership in a PSG was socially visible, Reiter preferred to use the social group "women viewed as property." As an example, Reiter explains that "[this PSG] is easier because the community *knows* that she's Fulano's[128] girl, and you don't deal with her… Because if you mess with her, that's like stealing Fulano's T.V. or messing with his car." She clarifies that obtaining affidavits that demonstrate the abuser viewing the client as property make the social visibility component significantly more prevalent. Rebecca Walters of Ayuda has a similar approach, explaining that she will become a more aggressive lawyer and "throw everything and the kitchen sink into [these asylum cases]." She expresses faith that the immigration judges will see through *A-B-* as Sessions' attempt to "impose his worldview over all these types of cases," and that the language is not as legally binding as some may think, meaning that it may not necessarily be strictly applied to every applicable case in the immigration courts.

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[127] "ICE Guidance on Litigating Domestic Violence-Based Persecution Claims Following *Matter of A-B-*." *American Immigration Lawyers Association.* July 11 2018. Accessed October 4 2018. https://www.aila.org/infonet/ice-guidance-on-litigating-domestic-violence

[128] Reiter uses "Fulano" as a generic name of a Central American man, such as how "Joe" would be used as a generic name of a United States man.

While *A-B-* has made the domestic violence/gang-violence asylum case much more difficult to litigate, there are still available social groups into which many female Central American asylum-seekers can be placed. In addition to the group used by Reiter, NIJC gives the examples of "[nationality] females who lack parental/male protections," "[nationality] who have witnessed [and reported] gang activities," and more broadly "[nationality] females."[129] Additionally, it encourages strengthening the nexus between the harm and the PSG, demonstrating that "the persecutor's awareness of [the client's] PSG or at least, the immutable characteristic she shares with others."[130] Each client has a different background, despite common threads of experiences typical of the Northern Triangle, and attorneys will continue to work to fit their clients into the most viable PSG. As of October 2018, no immigration judge has issued a ruling on an asylum case with a fact pattern that brings into question the language and precedent of *Matter of A-B-*, but attorneys and representatives eagerly await to see what the first ruling of this type will bring.

The Defensive Asylum Hearings in Court

After the Master Calendar Hearing (MCH), the asylum-seeker receives a date and time for a second hearing, called the Individual Hearing or Merits Hearing. Before the second hearing, the attorney (if applicable) and asylum-seeker must submit an I-589 Application for Asylum and all supporting documentation and evidence to USCIS, EOIR, and DHS/ICE, who will bring the opposing counsel.[131] Asylum applications may be submitted at the MCH itself, at the immigration court window, or by mail prior to the Merits Hearing.[132] The Merits Hearing may be

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[129] "Representing Asylum Seekers After *Matter of A-B-*." *National Immigrant Justice Center.* July 12 2018. Accessed September 6 2018.
[130] Ibid.
[131] "Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings." *National Immigrant Justice Center.* May 2016. Accessed October 4 2018.
[132] Ibid page 41

anywhere from a few months to three years from the MCH unless the attorney requests an expedited date, which may be 45 days from the MCH.[133]

The Merits Hearing is conducted similarly to adversarial hearings in other courts, complete with opening statements, direct examination, cross-examination by opposing counsel (DHS), and closing statements.[134] Like in the MCH, the court provides interpreters in the native language of the Respondent, but the NIJC recommends that attorneys bring their own interpreter to call attention and object to potential errors in interpretation.[135] The same obstacles in interpretation and geographical accessibility of the immigration courts apply to the Merits Hearing due to its identical location and setting as the MCH.

Another obstacle that becomes particularly trenchant in the Merits Hearing that is not applicable to the MCH is the psychological factor of the asylum-seeker recounting their traumas in a high-pressure setting. While the attorney has an obligation to prepare the client for what may arise in the examination of a Merits Hearing, and the testimony was previously unpacked by the asylum-seeker and the attorney while assembling the full asylum application, the varying levels of trauma experienced by the asylum-seeker may impede their ability to recount information about their case, either partially or completely.[136] My demographic of focus, in particular, may be forced to speak about their own sexual assault, extreme physical and/or emotional abuse, and/or the assault or abuse of their children or family members.[137] This element only further emphasizes the need for a comprehensive advocacy system, like Ayuda's social services division

[133] Ibid page 46
[134] Ibid.
[135] Ibid page 50
[136] Ibid.
[137] Beltrán, Adriana. "Children and Families Fleeing Violence in Central America." *Washington Office on Latin America.* February 21 2017. Accessed October 4 2018. https://www.wola.org/analysis/people-leaving-central-americas-northern-triangle/

working in conjunction with its legal team to help reduce the re-traumatization of first and second-hand survivors of violent crime.

The Ruling - Favorable

After the Merits Hearing runs its full course, the IJ often issues their ruling verbally, either immediately or after a brief recess.[138] In the case of a favorable decision (the IJ grants a final order of asylum), USCIS will send a form I-94 stamped "asylum granted indefinitely" and an Employment Authorization Document (EAD, Form I-766).[139] After one year, the refugee may adjust to Permanent Resident (green card) and later naturalize to become a U.S. Citizen. At the time of filing the asylum case, any of the asylum-seeker's children (defined as being unmarried and under 21) may be listed as dependents on their asylum case, and if the petitioner is granted asylum, then their dependents will be eligible for the same benefits and opportunities.[140]

The Ruling – Unfavorable

An unfavorable ruling in a defensive asylum case is not the end of the story for asylum-seekers, but continuing to fight for relief through appeals is costly and time-consuming with a significantly limited payoff. When issuing a denial of asylum, an IJ gives their reasoning based on their interpretation of laws and evidence presented,[141] and attorneys have the option of appealing the IJ's basis of denial to the Board of Immigration Appeals (BIA), located in Falls

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[138] "Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings." *National Immigrant Justice Center.* May 2016. Accessed October 4 2018.
[139] "Granted Asylum Status in the U.S.: When You'll Get Your Asylum Documents." *NOLO.* Accessed October 4 2018.
https://www.nolo.com/legal-encyclopedia/granted-asylum-status-the-us-when-youll-get-your-asylum-documents.html
[140] "When and How to Include Dependent Family Members on Your Asylum Application." *NOLO.* Accessed October 4 2018.
https://www.nolo.com/legal-encyclopedia/when-how-include-dependent-family-members-your-asylum-application.html
[141] "Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings." *National Immigrant Justice Center.* May 2016. Accessed October 4 2018.

Church, VA, within 30 days of the decision in the court. However, it is common for the BIA to deny asylum appeals.[142] The next step would be appealing to a Court of Appeals in the circuit corresponding to the hearing in Immigration Court within 30 days of BIA's decision. In the case of a hearing in Arlington EOIR, the case would be appealed to the U.S. Court of Appeals for the Fourth Circuit.[143] While an appeal to the BIA is pending, asylum-seekers may remain in the United States. However, if the BIA denies the appeal, they may order removal, even if it falls within the 30 days the asylum-seeker has to go to the appellate courts. [144]

What Are Their Chances?

TRAC data between 2012 and 2017 shows a steep drop-off in asylum denial rate between unrepresented and represented asylum seekers. Between FY2012 and FY2017, 95.9% of unrepresented Salvadoran asylum-seekers were denied asylum in the Immigration Court, whereas only 73.1% of represented respondents were denied. These numbers for Honduras and Guatemala are 94.5% and 70.7% and 95.1% and 68.4%, respectively.[145]

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[142] Ibid.
[143] Ibid.
[144] "Can I Be Deported Before Filing Appeal on a Denied Asylum Case?" *NOLO.* Accessed October 4 2018.
https://www.nolo.com/legal-encyclopedia/can-wait-the-us-decision-asylum-appeal.html
[145] "Asylum Representation Rates Have Fallen Amid Rising Denial Rates." *TRAC Immigration.* November 28 2017. Accessed October 4 2018.
http://trac.syr.edu/immigration/reports/491/

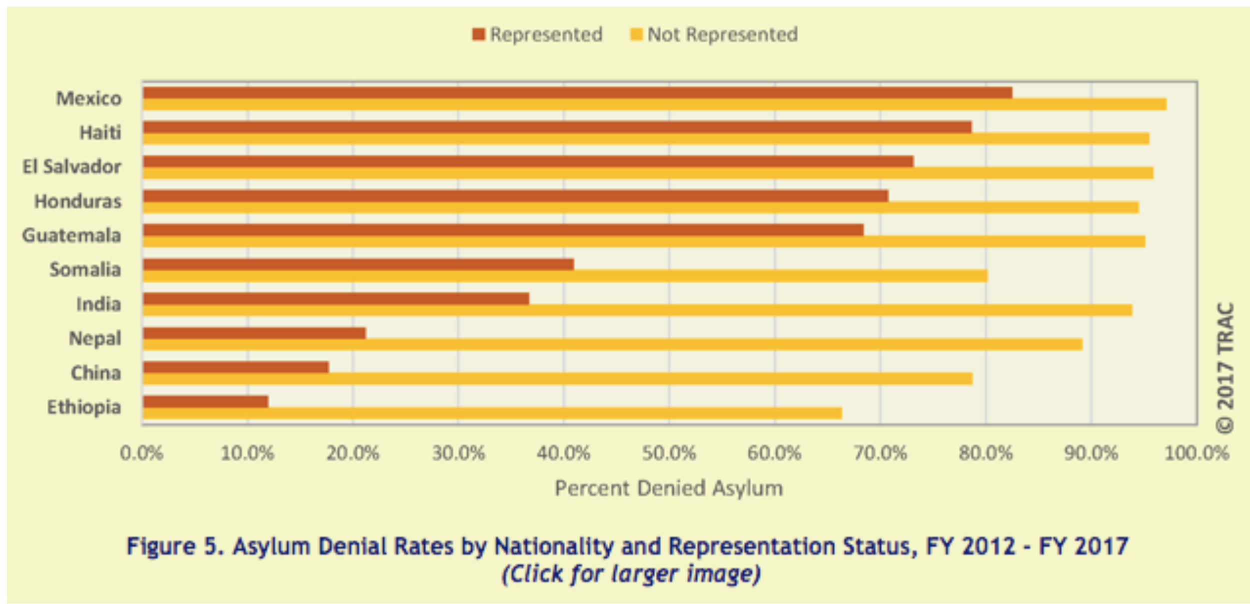

Figure 5. Asylum Denial Rates by Nationality and Representation Status, FY 2012 - FY 2017
(Click for larger image)

An added element of TRAC's data is the disparity between nationalities in asylum denial rates. Despite the lethal conditions of the Northern Triangle, as established in Section 1, Salvadoran, Honduran, and Guatemalan asylum-seekers are being denied asylum at significantly higher rates than Somali, Indian, Nepalese, Chinese, and Ethiopian asylum-seekers.

Section V: Possible Reforms

Introduction to Proposed Reforms

By far the most fascinating aspect of my interviews with legal scholars was hearing their proposals for reforming the system, which all of them acknowledged was in serious need of change. More specifically, each interviewee said that lack of effective, affordable counsel in the immigration courts system was the most serious obstacle to immigrant justice and addressed proposals for reforming that particular aspect of the immigration law system. I will be addressing the viability of two principal reforms: universal appointed counsel (such as in criminal courts) and, more broadly, reforming the Executive Office for Immigration Review, either by overhauling it entirely or moving it to a different branch of government.

Universal Access to Counsel

P. Vera and A. Benítez of the GWU Immigration Clinic have a combined 30 years of experience practicing immigration law and are both proponents of universal appointed counsel in immigration cases due to the severity of the consequences of losing a case and being deported. They mention that deportation, under current case law, should not be viewed as a punishment, but, in practice it is, and oftentimes a final removal order is life-threatening. K. Phelps of Tahirih Justice Center cited universal appointed counsel as one of multiple reforms she would propose. R. Walters of Ayuda narrows down the proposal of truly universal access to counsel, suggesting universal representation for children in the immigration courts instead. Walters points out that although truly universal access to counsel is not yet attainable, "since 2014, a lot of the cases [in immigration court] are children," and many slow-downs in EOIR are caused by children having to represent themselves or not showing up to court, making universal representation for children a viable starting point to expanding access to counsel.

A coalition of non-profits, titled the New York Immigrant Family Unity Project (NYIFUP) and spearheaded by the Vera Institute of Justice has brought free legal representation to all those in New York immigration courts, provided that they are 1) financially eligible, 2) detained, and 3) in removal proceedings. NYIFUP had already brought universal representation to qualifying immigrants in the Varick Street New York City immigration court in 2014 (the Varick Street is one of two NYC immigration courts, but it is where the detained immigrants have their first hearings), but increased funding has allowed them to expand representation to the upstate courts as well.[146] In November 2017, the Vera Institute released a report analyzing the effectiveness of the Varick Street project: the study found that previously, only 4% of unrepresented, detained cases at Varick Street resulted in successful outcomes. However, estimates show that after implementation of NYIFUP's work, 48% of cases will end successfully, presenting a 1,100% increase.[147] Additionally, clients represented by NYIFUP were parents to 1,859 children, 86% of which had legal status (primarily consisting of citizenship).[148]

Economic costs and benefits are a forefront of many concerns regarding reforms to immigration law, and NYIFUP raises a fascinating statistic concerning the economic viability of their access to counsel: undocumented immigrants contributed $1.1 billion in state and local taxes in New York in 2012, and "if all undocumented immigrants in New York were to have lawful permanent residence and work authorization, they would pay an additional $200 million

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[146] "New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation." *Vera Institute of Justice.* April 7 2017. Accessed October 10 2018. https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation

[147] "Evaluation of the New York Immigrant Family Unity Project." *Vera Institute of Justice*. November 2017. Accessed October 10 2018. https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation

[148] Ibid.

in state and local taxes."[149] NYIFUP's work directly contributes to undocumented immigrants in New York gaining legal status and work authorization, generating more revenue for the state and localities.

In a landmark study for NERA Economic Consulting, Dr. John Montgomery attempted to quantify the true cost of "a program, entirely funded and overseen by the Federal government, to provide counsel to every respondent in immigration removal proceedings under 8 U.S.C. § 1229a who qualifies as indigent."[150] While he admits that his findings could be more significant if more immigration data were available, Montgomery found that:

1. "[Immigration] detention costs borne by the Federal government would decline by at least $173 to $174 million per year, and likely substantially more."[151]
2. "Other Federal outlays, including payments for legal orientation programs, transportation, and foster care would decline by between $31 and $34 million per year… [total savings may end up being] between $204 and $208 million per year."[152]
3. "Fiscal savings could exceed the costs of providing publicly funded counsel, and the Proposal would pay for itself."[153]

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[149] Ibid.

[150] Montgomery, John. "United States: Cost Of Counsel In Immigration: Economic Analysis Of Proposal Providing Public Counsel To Indigent Persons Subject To Immigration Removal Proceedings." *NERA Economic Consulting.* Updated June 3 2014. Accessed October 10 2018. http://www.mondaq.com/unitedstates/x/318120/general+immigration/Cost+Of+Counsel+In+Immigration+Economic+Analysis+Of+Proposal+Providing+Public+Counsel+To+Indigent+Persons+Subject+To+Immigration+Removal+Proceedings

[151] Ibid.

[152] Ibid.

[153] Ibid.

Montgomery also found that universal counsel would make many processes in immigration court "more accurate and efficient," due to the involvement of attorneys in drafting cases for the courts.[154]

However, there are non-economic constraints on a proposal such as universal free counsel, as brought up by A. Reiter of Ayuda, who asks, "how are they going to find people who want to do it? If they're paying the same way, they're [not being paid much] to do a lot of work." The issue of *who*, and not *how much*, comes into play especially with immigration law, the specific statutes and processes of which cannot be picked up in a day or two by a lawyer skilled in practicing other fields of law. She recommends that in order to be viable, access to counsel would have to be accompanied by some sort of incentive to practice immigration law, such as better loan forgiveness programs and more funding for agencies that would carry out the legal representation.

Judicial Immigration Courts

As previously mentioned in discussions of the peculiarities of the Immigration Courts system, the Executive Office for Immigration Review is currently under the Executive Branch, as a subsection of the Department of Justice, meaning that procedural rights granted to defendants in judicial courts (such as right to counsel and a speedy trial) do not apply. Some advocates and immigration officials alike have proposed changing this jurisdiction by moving EOIR out from under the the Executive. The National Association of Immigration Judges has been a vocal opponent of the lack of independence immigration courts have from the Executive branch, taking particular issue with the ability of top-level Trump administration officials (like Jeff Sessions) to

[154] Ibid.

sway immigration law proceedings based on anti-immigrant political views.[155] For example, the Attorney General has the power to re-open past cases and refer them to themselves, then issuing a decision on the case in a process called "certification."[156] Over the eight years of the Obama administration, Attorney Generals Loretta Lynch and Eric Holder only used certification four times. Jeff Sessions, however, certified six cases and issued five decisions in his first year, dramatically overturning years of established immigration case law.[157]

The American Immigration Lawyers' Association (AILA) issued a resolution in winter 2018 calling on Congress to create an "Article I court, modeled after the U.S. Bankruptcy Court [system]."[158] Such a model would have qualities such as its own trial and appellate courts and judges with fixed terms of at least ten years, "appointed by the U.S. Court of Appeals for the federal circuit in which the immigration court resides."[159] An Article I Immigration Court system would maintain a certain degree of independence from both the Legislative and Judicial branches, existing more as a tribunal than a true court.[160] AILA's proposal calls attention to the lack of access to counsel in immigration court but does not propose how access to counsel would change (if at all) under an Article I court.[161]

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[155] Sacchetti, Maria. "Immigration judges' union calls for immigration court independent from Justice Department." *The Washington Post*. September 21 2018. Accessed October 10 2018. https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?noredirect=on&utm_term=.59d80bedd94f

[156] "AILA - AILA Calls for Independent Immigration Courts." *American Immigration Lawyers Association.* October 3 2018. Accessed October 10 2018. https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts

[157] Ibid.

[158] Ibid.

[159] Ibid.

[160] "Article I tribunal." *BallotPedia*. Accessed October 10 2018. https://ballotpedia.org/Article_I_tribunal

[161] "AILA - AILA Calls for Independent Immigration Courts." *American Immigration Lawyers Association.* October 3 2018. Accessed October 10 2018.

Another proposed reform has been moving EOIR to become an independent judiciary court, like any courts in which criminal trials are held. K. Phelps of Tahirih Justice Center praised this idea because it would prevent the Attorney General from stepping in and undoing decades of precedent, cushioning the process from the whims of presidential administrations. Like with universal access to counsel, however, A. Reiter of Ayuda expressed skepticism at this plan's feasibility. First of all, she points out, all partially and fully-accredited representatives would no longer be authorized to practice in immigration courts, removing a source of low-cost representation for immigrants. Additionally, and perhaps more relevant to asylum law, she mentions that the rules of evidence of judiciary courts would apply, meaning that the majority of immigration cases, which are based primarily on the asylum-seeker's testimony and the affidavits of other people, would be rendered ineffective under stricter rules of evidence. She puts this problem simply: "If rules of evidence were to apply, no one would ever win a case."

Other Reforms

K. Phelps of Tahirih Justice Center, which focuses exclusively on gender-based asylum and humanitarian cases, suggests adding gender as one of the explicit grounds for asylum. She brings up that many fear that this reform would open "floodgates" but that the case must still establish both the nexus (link between grounds for asylum and persecution) and proof of the persecution itself. Other countries have adopted gender-based grounds for asylum more specific than the social group interpretation used in U.S. asylum law – Canada, for example, has issued guidelines for gender-based asylum that state that "persecution resulting from certain circumstances of severe discrimination based on gender could be seen as reasonable grounds for persecution."[162] J.

[162] Heitz, Aimee. "Providing a Pathway to Asylum: Re-Interpreting "Social Group" to Include Gender." *Indiana International & Comparative Law Review: Robert H. McKinney School of Law.* January 10 2014. Accessed October 10 2018.

Rathod of the American University Immigrant Justice Clinic suggested a different approach to reform: detention centers. More specifically, Rathod expressed the most concern with the way immigrants are funneled into the detention centers and how restraints on liberty are operationalized for noncitizens. He expressed a need to remove the focus on detention and incarceration due to the significant barriers to obtaining counsel it poses.

Conclusion

This thesis has sought to expose the labyrinthine system of U.S. immigration law and asylum policy through which asylum-seeking Northern Triangle women are processed. Although, like other judicial systems, the Immigration Courts are supposed to deliver justice through due process, there are three primary aspects of U.S. immigration law that cause justice to fall short: 1) *Notario* fraud, which can cause already-impoverished immigrants to pay thousands for a fraudulent immigration case and deportation order, 2) insufficient interpretation services, which may result in inefficient hearings and undue deportations, and 3) a dire lack of low-bono and pro-bono legal representation, which drastically reduces the chances of the average asylum-seeker of winning their case, slows down case processing times in immigration courts, and leads to greater backlogs in the immigration system. I have explained the advantages and drawbacks of the most commonly proposed methods of reform that some have proposed.

When asked what they wish the general public knew about asylum, each one of the attorneys, representatives, and legal scholars I interviewed said one or both of the following:

1. Drafting and winning an asylum case is extremely complicated and time-consuming, meaning that obtaining asylum in the United States is not nearly as easy as some proclaim or believe it to be
2. The United States is legally bound to providing asylum, as per the Refugee Convention and Convention Against Torture: it is not a matter of if the U.S. should grant asylum or not

Those I interviewed for my research have a combined total of around 90 years of immigration law experience, whether it be paralegal work or work as an attorney: despite their different paths to their involvement with immigration law, those two points were what they would shout off the mountains for the whole world to hear, if they could.

In the process of my thesis research, I have gained irreplaceable knowledge of the immigration law system. This knowledge, combined with my experiences at Ayuda and USCRI,

will help me to further my studies of immigration law and asylum policy. Some may suspect that my findings would discourage me in my fight for procedural justice in immigration, but, instead, they have only reinvigorated my drive and passion. I have recently begun work as a Paralegal at a private immigration law firm in Columbus, Ohio, and I will apply to law schools after taking at least one year off to work in the field and volunteer with the immigrant community in Franklin County.