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Shoba Sivaprasad Wadhia
Editor-in-Chief

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For questions about the Editorial Content appearing in these volumes or reprint, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions about Sales, or to reach Customer Service:

Customer Service
Available 8am–8pm Eastern Time
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# Letter From the Editor-in-Chief

Shoba Sivaprasad Wadhia

I am excited to share the spring 2021 issue of the *AILA Law Journal*. Featured in this volume are five articles focused on a humanitarian option in immigration law. These articles offer original ideas for reforming immigration law in compelling and creative ways. The substantive and writing quality of this volume's articles is truly impressive, under truly extraordinary conditions.

In her piece "From China's One-Child Policy to Central America's Gender-Based Violence Epidemic: An Argument for Expansive Application of the 'Coercive Population Control' Political Opinion Ground," Sylvia D. Miller talks about asylum claims based on political opinion with a detailed analysis for why "coercive population control" should be extended to asylum seekers fleeing intimate partner violence or rape. She uses tools of statutory interpretation to show how the statute's text could extend to *any* person subjected to a forced abortion or forced sterilization, beyond just Chinese claims.

In their piece "Considering Asylee Integration: The Unfulfilled Promise of the Refugee Act," Benjamin M. Levey and Rachel C. Zoghlin discuss asylee integration and the discrepancies that exist between resettled refugees and asylees as it relates to access to benefits. They examine the reasons for the gap in benefits over the past 40 years, and offer solutions for ensuring that asylees receive the same treatment as refugees.

In "Present Yet Unprotected: USCIS's Misinterpretation of the T Visa's Physical Presence Requirement and Failure to Protect Trafficking Survivors," Corie O'Rourke, Cory Sagduyu, and Katherine Soltis critique the current application of T nonimmigrant status, a remedy for qualifying victims of human trafficking that requires applicants to show they are "physically present" in the United States on account of the trafficking. Specifically, the authors argue that the "physical presence" requirement has been misinterpreted by U.S. Citizenship and Immigration Services (USCIS), leaving genuine victims of trafficking undocumented and vulnerable.

In her piece "Climate Refugees Are Here: Advocacy Options for Immigration Practitioners," Christine E. Popp discusses the options available for protecting climate refugees at the administrative and executive level. Popp discusses the drivers of "climate flight," examines the limits of options like asylum, and offers creative solutions.

Eva Marie Loney reimagines the remedy of cancellation of removal in her piece "Syncing Law With Psychology: Redefining Cancellation of Removal Hardship." Cancellation is one form of relief in immigration law that requires certain applicants to show that a qualifying spouse, parent, or child would suffer "exceptional and extremely unusual hardship" if the applicant were

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removed. Loney examines the hardship standard and its tension with child psychology and the limitations of existing caselaw. She concludes that the "best interest of the child" should be a primary factor in analyzing hardship in cancellation cases.

As I write this letter, we are nearly one year into a global pandemic, on the heels of a siege on Capitol Hill at which white supremacists marched, and weeks following the inauguration of President Joe Biden and Madame Vice President Kamala Harris. The weight of these events is significant to our personal lives, to our country, and to the future of immigration policy. The first days of the Biden administration have brought renewed energy with the rescission of the "Muslim ban," the reversal of several immigration enforcement policies and restoration of prosecutorial discretion, and a fortification of the Deferred Action for Childhood Arrivals (DACA) policy. In addition to these substantive changes is new hope for how we talk about immigrants and immigration. The Biden administration's choice to replace the word "alien" with "noncitizen" in their early immigration policies, in addition to a prospective immigration bill that would strike the statutory term "alien" and replace it with "noncitizen," is truly transformative. Words matter. We invite you to wrestle with these issues through written words, by submitting an issue for the next volume of the *AILA Law Journal*.

Thank you for reading. And deep gratitude to my editorial board, managing editor Danielle Polen, assistant editor Richard Link, and publisher Morgan Morrissette Wright, without whom the *AILA Law Journal* would not be possible.

Shoba Sivaprasad Wadhia, Esq.
Editor-in-Chief

# From China's One-Child Policy to Central America's Gender-Based Violence Epidemic

## An Argument for Expansive Application of the "Coercive Population Control" Political Opinion Ground

Sylvia D. Miller*

**Abstract:** This article discusses how certain asylum seekers fleeing gender-based violence may be able to assert a claim based on *per se* political opinion under the coercive population control prong of INA § 101(a)(42). This prong was written for—and has been almost exclusively applied to—victims of China's one-child policy. However, this article argues that it could, in some instances, apply to individuals seeking asylum based on gender-based harm, such as intimate partner violence (IPV) or rape committed by non-state actors. Given the difficulty of raising these kinds of cases based on membership in a particular social group—both before and after *Matter of A–B–*—the article discusses the promise and potential hurdles of asserting a claim using the *per se* political opinion ground.

## Introduction

The details vary, but the story repeats. The boyfriend of a young Guatemalan woman starts abusing her when she tells him she is pregnant; he pressures her to get an illegal abortion and attacks her with a knife when she refuses. An indigenous child in a rural village is raped by her family's employer; when he learns she is pregnant he gives her abortifacient herbs and beats her in the abdomen when she refuses to take them. The partner of a young woman in El Salvador threatens to kill her unless she terminates her pregnancy with black market drugs; she complies out of fear. In Honduras, a teenage girl is repeatedly raped and ultimately impregnated by a fellow student; when she gives birth after refusing to terminate the pregnancy, the man who raped her violently attacks her and the child.[1]

These women all fled to the United States and submitted asylum applications in different immigration courts. They alleged past persecution on account of membership in various gender-based particular social groups, but also on account of their political opinion—refusing to abort their pregnancies—using

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the "coercive population control" prong of INA § 101(a)(42). While this provision of the asylum statutes is primarily utilized in the context of China's one-child policy, this article argues that it is a potentially effective strategy for victims of intimate partner violence (IPV)[2] and/or rape who are seeking protection under the United States' ever changing—and often hostile—asylum laws.

First, the article discusses the legal difficulties of the "social group" category and the benefits of alternative theories of relief. Second, the article proposes the "coercive population control" prong of INA § 101(a)(42) as a viable alternative for certain claims. A historical and legal background of the "coercive population control" prong is provided, along with a road map for advocates of how to apply this prong to certain Central American asylum claims. This road map includes a legal argument for applying the "coercive population control" prong to harm committed by non-state actors. It then discusses the link between pregnancy and IPV and rape, which shows that violence against pregnant women is a common form of gender-based violence, and that the "coercive population control" prong has a potentially wide applicability if advocates carefully screen their clients. Finally, the article addresses potential arguments that may be raised by the government in opposition to these claims—namely, that most Central American countries have extremely restrictive abortion laws—and explains how advocates can successfully overcome them.

## The Pitfalls of "Particular Social Group" for Gender-Based Asylum Claims and the Need for Alternatives

Asylum seekers fleeing gender-based persecution at the hands of non-state actors, especially victims of IPV and/or sexual violence, have long struggled to be seen as bona fide refugees.[3] All asylum applicants must show they have a well-founded fear of persecution in their home country and that the feared harm was or will be inflicted on account of a protected ground: race, religion, nationality, political opinion, or membership in a particular social group.[4] Applicants who have suffered harm based on their gender, including victims of IPV and female genital mutilation (FGM), have generally utilized the "particular social group" ground.[5] For IPV-based claims in particular, applicants and their advocates have always had to navigate precarious legal straits.

The harm perpetrated against women in IPV-based particular social group claims is often undisputed; most are denied due to the purported lack of a nexus between the harm suffered and a cognizable particular social group. To be cognizable as a ground for asylum, any particular social group must be: (1) composed of members who share a common immutable characteristic, (2) socially distinct in the society in question, and (3) defined with particularity as to its boundaries.[6] The group also cannot be circularly defined by the harm feared.[7] An applicant must show both that she belongs to a cognizable

social group and that her membership in that group is a central reason for her persecution.

Simple social groups such as "women of [*x*] nationality" have been rejected by some adjudicators as "too broad,"[8] though this group has gained traction in some federal circuit courts.[9] On the other hand, more specific (and increasingly baroque) social group formulations such as "women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,"[10] or "young Guatemalan females who have suffered violence due to female gender"[11] have been deemed circular or otherwise fail any one of the requirements for cognizability. Even if a group is presumed cognizable, adjudicators may deny due to lack of nexus if they believe the persecutor was animated by "personal" motives such as sexual attraction, jealousy, opportunism, or revenge instead of broader misogynistic animus. This is especially common if a persecutor *only* harmed the applicant but no other women in the community.[12] Again and again, adjudicators characterize systemic IPV, femicides, and other gender-based violence in countries such as Guatemala, El Salvador, and Honduras as coincidental repetitions of a personalized form of harm, inflicted on each specific woman for personalized reasons.[13]

Despite these obstacles, years of litigation ultimately culminated in *Matter of A–R–C–G–*, in which the Board of Immigration Appeals (BIA) held that "married women in Guatemala who are unable to leave their relationship" could constitute a cognizable particular social group.[14] This was the first precedential decision issued by the BIA formally recognizing that IPV could constitute persecution as a basis for asylum. The Trump administration reversed this victory when the attorney general issued *Matter of A–B–* to expressly overturn *Matter of A–R–C–G–*.[15] *Matter of A–B–* addressed the claim of a woman alleging persecution on account of her membership in the particular social group "El Salvadoran women who are unable to leave their domestic relationships where they have children in common."[16] The attorney general characterized the harm of IPV as something inflicted by private actors solely on the basis of personal relationships and broadly stated that "[g]enerally, claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum."[17]

Federal courts soon clarified that *Matter of A–B–* did not categorically foreclose all domestic violence or gender-based asylum claims.[18] However, in *Matter of A–C–A–A–*, when an applicant was granted asylum based on persecution she suffered on account of the social group "Salvadoran females," the attorney general again certified the decision to himself and remanded to a three-member panel of the BIA to reassess every element of the woman's claim.[19]

In December 2020, the Trump administration further codified this hostility to gender-based asylum claims by publishing amendments to 8 CFR §§ 208.1 and 1208.1 in the *Federal Register*. These amendments explicitly stated that asylum claims will not be "favorably adjudicate[d]" when based on

"interpersonal disputes [or] private criminal acts" unknown to the authorities,[20] "interpersonal animus," or, most damaging of all, "gender."[21]

Despite the Trump administration's efforts, applicants and advocates have continued to pursue—and win—gender-based claims under the ground of a particular social group, though *Matter of A–B–* and *Matter of A–C–A–A–* undoubtedly further complicated the legal landscape. The post-Trump era offers some hope. President Biden promised as a candidate to "restore asylum eligibility for domestic violence survivors,"[22] and it is anticipated that he will rescind *Matter of A–B–* and eventually reverse much of the Trump administration's devastating regulatory amendments to 8 CFR §§ 208.1 and 1208.1 (though these regulations were enjoined by litigation on January 8, 2021, and may be independently reversed in federal court).[23] While these efforts would remove some of the harshest recent obstacles for many applicants, victims of IPV and other gender-based violence seeking asylum under "membership in a particular social group" have always faced challenges given the seesaw of precedent from the BIA and various federal circuits, shifts between presidential administrations, and the extent to which local adjudicators are sympathetic to or skeptical of these kinds of claims.

For these reasons, many advocates have long attempted to sidestep the increasingly complex and politically fraught "particular social group" morass by asserting claims under other protected grounds, such as political opinion. In the case of IPV, the political opinion may be described as "feminism" or a "belief that women are entitled to be treated as human beings."[24] Yet this ground poses its own challenges. Traditional political opinion claims require that an applicant show: (1) she held a political opinion, or her persecutor believed she held an opinion; and (2) her persecutor harmed her on account of that opinion.[25] While successful under certain fact patterns, in many cases of IPV it is often difficult to obtain evidence of an abuser's awareness of a woman's political opinions about gender equality—she must show how she expressed these opinions and how the abuser interpreted and reacted to them. Many adjudicators ultimately find that an abuser harms his partner due to *his* belief in a woman's inferiority, and not because of any beliefs *she* may or may not hold.[26] If a woman is a member of a disfavored ethnic group, she might bring a claim under race or nationality. However, in many cases her persecutor is a member of the same group, and it is therefore more difficult to show that he was motivated by racial or ethnic animus.

To be clear, many IPV and other gender-based claims can and do succeed under the "particular social group," "political opinion," and/or "race/nationality" categories, depending on the facts and supporting evidence. Advocates should continue to zealously argue for relief under any and all applicable grounds and continue fighting against the myopic legal reasoning in decisions like *Matter of A–B–*. The long history of "resistance and ambivalence"[27] to gender-based asylum claims in U.S. law is stubbornly rooted in antiquated and legally incorrect perceptions of violence against women as a "private matter,"[28]

and this bias permeates the faulty reasoning in many IPV-based asylum cases. This article does not propose abandoning "particular social group" or other grounds for IPV claims. However, as will be discussed below, the "coercive population control" prong of INA § 101(a)(42) can be an additional tool in the advocate's arsenal—and a powerful one that sidesteps many of the thorny issues of cognizability and nexus described above.

## The "Coercive Population Control" Prong of INA § 101(a)(42): An Underutilized Strategy for Victims of Intimate Partner Violence and Other Gender-Based Harm

Given the difficulties described above, asserting a claim under the coercive population control prong of the INA is a potentially effective strategy for certain gender-based asylum claims. This prong resulted from 1996 amendments to INA § 101(a)(42) (also known as "Section 601(a)" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).[29] In Section 601(a), Congress decreed that

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, *shall be deemed* to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance *shall be deemed* to have a well founded fear of persecution on account of political opinion.[30]

By deeming certain forms of harm as *per se* persecution on account of a protected ground, this prong relaxes some of the evidentiary burden that otherwise stymies gender-based asylum claims.

Notably, in the Trump administration's lame-duck amendments to 8 CFR §§ 208.1 and 1208.1, poised to eviscerate a vast number of asylum claims from Central American applicants, extensive changes were made to the scope of traditional political opinion claims. Specifically, the amended regulations specify that only those "ideal[s] or conviction[s] in support of the furtherance of a discrete cause related to political control of a State or unit thereof" could constitute a valid political opinion for purposes of asylum.[31] Meanwhile, the prong relating to coercive population control was left untouched and uncommented upon, and the amendments simply reiterated the statutory language in INA § 101(a)(42), preserving the potential strength of this legal theory in asylum claims based on IPV or gender-based violence. At time of writing, the

Trump administration's regulatory changes have been enjoined nationwide in ongoing litigation and President Biden is expected to reverse them if the courts do not.[32] However, the Trump administration's attempt to further narrow and obstruct the conventional grounds for Central American asylum cases shows the potential power of bringing claims under Section 601(a). It is one of the rare legal provisions left unscathed by the Trump administration's unprecedented overhaul of U.S. asylum law and the many years of fluctuating BIA and federal court caselaw on gender-based asylum claims that preceded it.

## Background of Section 601(a)

The Section 601(a) amendments are a unique subsection of asylum law because they were enacted for a specific historical and geopolitical purpose. The impetus for Section 601(a) was the one-child policy in the People's Republic of China.[33] Under this policy, in effect from 1980 to 2015, Chinese state officials subjected individuals to forced abortions, sterilizations, and other coercive measures to limit the country's birthrate.[34] From 1980 to 1996, Chinese asylum seekers in the United States asserted claims of persecution based on this policy, generally without success. For example, in 1989, the BIA held in *Matter of Chang* that being subjected to generally applicable population control laws did not, by itself, constitute persecution on account of a protected ground.[35] Applicants had to show that the coercive measures were selectively applied to them to punish their political opinions, or that they were subjected to disparate or more severe treatment for publicly opposing such measures.[36]

Congress passed Section 601(a) to expressly reject *Matter of Chang*,[37] and in doing so created "four new and specific classes" of individuals entitled to *per se* refugee status.[38] Those classes are:

1. individuals forced to abort a pregnancy,
2. individuals forced to undergo involuntary sterilization,
3. individuals who have been "persecuted for failure or refusal to undergo" a forced abortion or involuntary sterilization "or for other resistance to a coercive population control program," and
4. individuals who have a well-founded fear that they will be forced to undergo one of the above procedures or persecuted "for such failure, refusal, or resistance."[39]

These *per se* categories mean that applicants under this prong do not have to submit evidence that they hold any broader political opinion about reproductive rights, or that their persecutor was aware of their political views, if any, about reproductive rights. Rather, the persecutor's motive of targeting the individual on account of political opinion is established.[40]

## Uncharted Territory: The Applicability of Section 601(a) to Non-State Actors

Because Section 601(a) was written with a specific purpose in mind—the population control program implemented by China's one-party dictatorship—some advocates have hesitated to argue claims under this prong when coercive reproductive measures are inflicted by non-state actors and a country does not have a state-run population control program. However, while the legislative intent behind Section 601(a) was to address China's one-child policy, the plain language of the statute indicates that eligibility under certain categories does not *require* that a forced abortion or other measure take place pursuant to a state-mandated and state-enforced population control program. Admittedly, there is little guidance in this area, as all of the published case law addressing eligibility under Section 601(a) arises in the context of Chinese asylum claims.[41] Although some of the categories created by Section 601(a) appear to require a state actor, there is a strong argument that most categories do not.

Precedent caselaw suggests that only those seeking asylum under the "other resistance to a coercive population control program" category need to show that "the government was enforcing a coercive population program at the time" the applicant was persecuted.[42] For the other three categories, the plain text of the statute does not reference a "program" and courts have not held that a state-run program is required.[43] The plain meaning of the statute's text clearly states that any individual subjected to a forced abortion or forced sterilization shall be deemed to have been persecuted on account of their political opinion—there is no mention of *who* must have done the forcing, in what country or under what system of government those actions must have taken place, or any other required context.[44] Given that the plain text of the statute is unambiguous, there is no basis to look at the legislative history of Section 601(a) for guidance or assess the meaning of "forced abortion" in light of its proximity to "coercive population control program" (*noscitur a sociis*), as these are tools of statutory interpretation that should be employed only if the statute's text is ambiguous.[45]

Furthermore, in 1996 it was already a well-established legal principle that an applicant could qualify for asylum under any protected ground based on persecution by non-state actors that a government was unable or unwilling to control.[46] It is presumed that Congress intends new legislation to work in harmony with established precedent unless there is a clear and specific indication to the contrary.[47] Once again, Section 601(a) does not expressly state that *only* forced abortions and sterilizations committed by state actors qualify as *per se* persecution. In the only case found to address coercive population measures by a non-state actor, *Tang v. Gonzales*, the Ninth Circuit Court of Appeals held that a Chinese woman whose employer subjected her to a mandatory gynecological exam and forced abortion—without the involvement

of state officials or "pursuant to any official summons"—had suffered *per se* persecution on account of a protected ground.[48] The court found it relevant that the applicant was economically dependent on her employer, and noted that "force" in the context of "forced abortions" includes "compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint."[49] This sort of coercion would likely be a relevant factor in many IPV-based claims as well. The fact that many Central American women are economically dependent on their male partners is a major obstacle to their ability to escape IPV or seek legal protection against their abusers.[50]

Therefore, there is a strong legal argument for applying Section 601(a) to non-Chinese claims in which applicants are fleeing coercive reproductive measures committed by non-state actors. This is also common sense. State-run population control programs draw notoriety, from twentieth-century eugenics programs in the United States and Nazi Germany to more contemporary efforts in China, India, Uzbekistan, Peru, and Brazil.[51] However, it is not difficult to find examples of non-state actors that have inflicted forced abortions or sterilizations upon women under their control. The Revolutionary Armed Forces of Colombia (FARC) armed group,[52] the Islamic State (ISIS) terrorist group in Iraq and Syria,[53] and non-state rebels and militias in the South Sudanese Civil War have all subjected women to these measures, often in concert with systemic rape.[54] In all cases these acts were unequivocally and universally recognized as egregious human rights abuses; it defies imagination that these examples would fall outside the purview of Section 601(a) merely because these groups were not enforcing a government policy. If Section 601(a) was enacted to protect women from being forced to abort pregnancies against their will, there is no reason why it would not protect Central American women who face the specter of forced abortions in the context of rape and/or IPV.

## The Correlation Between Gender-Based Violence and Pregnancy

Section 601(a) is also a potentially effective strategy for gender-based asylum claims because of the frequent intersection between pregnancy and gender-based violence. This means this prong may apply to a surprisingly broad range of gender-based Central American asylum claims, and advocates should engage in careful screening.

There is the obvious correlation between rape and pregnancy; as two of the case studies in the introduction to this article show, men who have impregnated women through rape often have a motive to terminate the pregnancy. In the case of underage victims or family members, pregnancy serves as incontrovertible evidence of statutory rape or incest. This is true even though many countries with high rates of gender-based violence have widespread impunity for rape; for example, in El Salvador, where the age of consent is 15, there were 1,445 reported pregnancies in girls aged 10 to 14, but zero convictions for

statutory rape.[55] Nevertheless, the mere possibility of a criminal investigation or inquiry from social services incentivizes rapists to pressure or coerce their victims into terminating their pregnancies.

Even when women are in consensual relationships, there is a strong correlation between a woman's pregnancy and being subjected to IPV. For example, in the United States and other countries, "intimate partner homicide" or "femicide" is a leading cause of maternal mortality in pregnant women.[56] Across the globe, IPV during pregnancy is such an established phenomenon that it has its own abbreviation in medical and academic literature ("IPV-P" or "P-IPV").[57] The World Health Organization (WHO) found in a multi-country study that 1 percent to 28 percent of women report being physically abused during pregnancy by an intimate partner.[58] And while many women are physically harmed prior to pregnancy, approximately 50 percent of women at certain sites in a separate WHO study reported that they were physically abused by their partners for the first time when they became pregnant.[59] The WHO studies also show that IPV during pregnancy often specifically includes punching or kicking pregnant women in their abdomen.[60] Latin American and Caribbean countries also report particularly highly rates of IPV during pregnancy.[61]

This research shows that the link between pregnancy, rape, and IPV, including increased risk of femicide, is a systemic problem. Given the widespread nature of this phenomenon, practitioners should refine their screening process to specifically assess whether an applicant suffered any threats or harm during their pregnancy or after giving birth. For example:

- Did the persecutor express or demonstrate any desire to terminate the woman's pregnancy? Not all IPV committed against a pregnant woman is necessarily related to a desire to terminate a pregnancy, force her to have an abortion, or punish her for refusing. Advocates should probe for the persecutor's specific reactions upon learning of the woman's pregnancy.
- Did the persecutor specifically force or attempt to force a woman to terminate her pregnancy? Advocates should interpret "force" broadly, as encompassing both physical harm and death threats, as well as any relevant compulsion or coercion via economic "mental, moral, or circumstantial" means.[62] Because gender-based violence can be inflicted out of a variety of misogynistic impulses, advocates should expressly demonstrate the nexus between the persecutor's means (the acts and circumstances constituting the "force") and the persecutor's ends (the "abortion," or the persecutor's desire to terminate the pregnancy).
- If the woman did *not* terminate her pregnancy, how did her persecutor react to the birth of her child? Is there is evidence connecting the harm inflicted after the child's birth to desire on

behalf of the persecutor to punish the woman for carrying the pregnancy to term?

The examples outlined in this article's introduction illustrate only a few examples of how a partner or rapist might attempt to force a woman to terminate a pregnancy or punish her if she refuses: threatening to kill her or beating her if she does not consume black market abortifacient drug or herbs; beating her in the abdomen with the expressed intent of inducing a miscarriage; or attacking her after she resists terminating the pregnancy and gives birth to a child. Given the systemic nature of violence against pregnant women across many countries and cultures, the facts of each case may vary widely. But with a careful screening process that deeply probes the nature of pregnancy-related violence, advocates can identify those cases that would fall under the powerful *per se* asylum eligibility encompassed in Section 601(a).[63]

## Potential Obstacles for Gender-Based Claims Under Section 601(a)

While a claim of *per se* political opinion under Section 601(a) is an underutilized but potentially powerful tool for asylum seekers and their advocates, it comes with its own challenges. Some adjudicators, especially those who are already skeptical of or hostile to claims arising out of gender-based persecution committed by non-state actors, may still find bases to reject claims under this less conventional prong. A primary concern is that while China enforced laws that subjected women to abortions against their will, many Central American countries enforce extremely restrictive abortion laws that criminalize procuring an abortion for oneself or another person. For example, article 135 of the Guatemalan penal code punishes subjecting a woman to an abortion against her will with up to six years in prison, and increases the penalty if violence, threats, or deception was involved.[64] Adjudicators or government attorneys may argue that these laws show that Central American governments are not unable and unwilling to protect women from coercive abortions.

However, this obstacle is not insurmountable. First, there is significant evidence showing that laws banning abortion do not stop abortions—forced or otherwise—from occurring. The FARC performed hundreds of forced abortions on Colombian women, even though abortion is illegal in almost all cases under Colombian law.[65] This shows women can be forced to terminate pregnancies by non-state actors beyond the government's control, in spite of a state's restrictive abortion laws.

Similarly, in all Central American countries with restrictive bans, abortions are commonplace. Guatemala has an almost total ban on abortion, yet illegal abortions are so routine that a 2003 report estimated that one in six pregnancies ended in termination.[66] In Honduras, where abortion is illegal

even in cases of rape and incest, it is estimated that women have somewhere between 50,000 and 80,000 abortions each year.[67] In El Salvador, notorious for a draconian abortion law that has sentenced dozens of women to long prison terms for allegedly terminating their pregnancies, women still procure tens of thousands of illegal abortions each year, often through black market abortifacient drugs purchased over the internet.[68] These statistics show that abortions are possible and even common in countries that have totally banned the procedure. And if consensual abortions are possible, coerced or forced abortions are as well. These restrictive laws also mean that abusive partners and other non-state actors may be *more* likely to attempt to terminate women's pregnancies through violent, extralegal means (such as beatings or murder), given the absence of safe, legal alternatives.

Draconian and punitive abortion laws also serve as a potent argument for why women *cannot* reasonably seek the protection of their governments. Women in countries with total abortion bans can be incarcerated for terminating a pregnancy—or even a "suspicious" miscarriage or stillbirth.[69] Medical providers are often required to report women whom they suspect may have terminated or attempted to terminate a pregnancy.[70] In El Salvador—where there is an impunity rate of 95 percent for femicides and other violence committed against women[71]—over 150 women have been prosecuted for suspected abortion crimes between 2000 and 2014, with dozens sentenced to lengthy prison terms.[72] Violence against women is already vastly underreported and underprosecuted in many of these countries due to women's deep-seated mistrust of the criminal justice system and the (often correct) perception that police and courts do not take women's claims seriously. This distrust and fear can only be exacerbated when a woman knows she faces criminal prosecution and incarceration if the authorities do not believe her account, or if her abuser falsely accuses *her* of trying to terminate her pregnancy of her own accord. Therefore, restrictive abortion laws in the country of persecution should not foreclose an applicant's claim under Section 601(a). Indeed, with sufficient evidence of country conditions, these harsh and unforgiving laws may in fact bolster a woman's claim of why the state will not protect her—and may even prosecute and/or incarcerate her—if she goes to the police.

## Conclusion

For asylum seekers subjected to gender-based violence during or after pregnancy, bringing a claim under the *per se* political opinion prong in Section 601(a) of the INA can be an effective strategy. It has the benefit of simplifying the evidentiary burden for an applicant in demonstrating persecution on account of protected ground. Strong legal arguments support applying this prong outside the context of China's one-child policy, as nothing in the plain text of the statute states that it cannot be applied to harm committed by

non-state actors in countries such as Honduras, Guatemala, and El Salvador. It is a strategy with potentially widespread applicability, as violence against pregnant or recently pregnant women is a systemic global phenomenon spanning many different regions and cultures. This argument can still succeed even where countries enforce total abortion bans, as these laws do not, in fact, prevent abortions from happening, and may actually inhibit women from seeking state protection.

Therefore, advocates should carefully screen victims of IPV and/or rape who were persecuted during or after pregnancy—whether they are from China or any other country—to determine the applicability of this powerful legal theory to the facts of their claim. Despite the limitations and potential obstacles of bringing a claim under Section 601(a) for victims of gender-based violence, it is a powerful option worth exploring for any zealous advocate seeking to provide their client with the most avenues for relief in a precarious legal terrain.

## Notes

* Sylvia D. Miller (sylvia@colectivalegal.org) has been an immigration attorney for approximately nine years and is admitted to practice in New York and Washington. She currently works for Colectiva Legal del Pueblo, a nonprofit law collective in Burien, Washington, that predominantly serves Central American asylum seekers. She graduated *cum laude* from George Washington Law School in Washington, DC, and studied International Human Rights and Refugee Law for one summer at the University of Oxford. After law school she clerked for the New York Immigration Court through the Department of Justice Honors Program. She then ran immigration clinics in New York City public hospitals with the New York Legal Assistance Group (NYLAG), before moving back to the Pacific Northwest.

1. These examples are based on one of the author's clients and the clients of colleagues who shared their experiences with the author. Details have been changed for the purposes of anonymity. Of the four examples listed, two women won their cases on coercive population control grounds, and two hearings are still pending after being reset due to the COVID-19 pandemic.

2. "Intimate partner violence" (IPV) and "domestic violence" (DV) are often used interchangeably. DV may be considered to encompass any violence between members of a family or household, while IPV is generally limited to those who have shared an intimate relationship, whether or not they ever lived together. While both DV and IPV can affect individuals of any sex, gender identity, or sexual orientation, because this article focuses on IPV-based asylum claims involving pregnancy and abortion, the author frequently uses the pronoun "she" under the presumption that most cases will involve cisgender women being persecuted by cisgender men.

3. A detailed history of this legal odyssey can be found at Theresa A. Vogel, *Critiquing Matter of A–B–: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. Mich. J.L. Reform 343, 364–71 (2019).

4. INA § 101(a)(42).

5. *E.g.*, *Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010) (forced marriage); *Matter of A–R–C–G–*, 26 I&N Dec. 388 (BIA 2014) (domestic violence); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996) (FGM).

6. *Matter of M–E–V–G–*, 26 I&N Dec. 227, 237 (BIA 2014).

7. *Id.*

8. *Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 410 (9th Cir. 2018).

9. *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (discussing the social group "Dominican women"); *Ticas-Guillen*, 744 F. App'x at 410 ("women in El Salvador"); *Paloka v. Holder*, 762 F.3d 191, 194 (2d Cir. 2014) ("young Albanian women"); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) ("Guatemalan women"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) ("Somali women").

10. *Matter of R–A–*, 22 I&N Dec. 906 (BIA 1999) (en banc).

11. *Silvestre-Mendoza v. Sessions*, 729 F. App'x 597, 598 (9th Cir. 2018).

12. In December 2020, the Trump administration attempted to codify this in its regulatory amendments to 8 CFR §§ 208.1 and 1208.1, which stated that asylum claims will not be "favorably adjudicate[d]" when based on based on "interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue[.]" Dep't of Homeland Security, Executive Office for Immigration Review, Dep't of Justice, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80386, 80395 (Dec. 11, 2020) (codified at 8 CFR §§ 208.1(f)(2) and 1208.1(f)(2)); *see also Matter of A–C–A–A–*, 28 I&N Dec. 84, 92 (AG 2020) (directing the BIA to review a grant of asylum to a woman on the basis of her membership in the particular social group of "Salvadoran women," and noting that "if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, then the applicant may not satisfy the nexus requirement").

13. *See Matter of A–B–*, 27 I&N Dec. 316, 336 (AG 2018); *Matter of R–A–*, 22 I&N Dec. at 920.

14. *Matter of A–R–C–G–*, 26 I&N Dec. 388 (BIA 2014).

15. *Matter of A–B–*, 27 I&N Dec. at 316.

16. *Id.* at 338–39.

17. *Id.* at 320.

18. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1079 (9th Cir. 2020); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019); *Grace v. Barr*, 965 F.3d 883, 906 (D.C. Cir. 2020).

19. *Matter of A–C–A–A–*, 28 I&N Dec. 84 (AG 2020).

20. 85 Fed. Reg. 80274, 80385, 80394 (Dec. 11, 2020) (codified at 8 CFR § 208.1(c) and 1208.1(c)).

21. *Id.* at 80386, 80395 (codified at 8 CFR § 208.1(f)(1), (2), (8)).

22. Joe Biden Presidential Transition Website, *The Biden Plan for Securing Our Values as a Nation of Immigrants*, https://joebiden.com/immigration/.

23. *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.* ("*Pangea II*"), No. 20-CV-09253-JD, 2021 WL 75756, at *1 (N.D. Cal. Jan. 8, 2021).

24. Vogel, *supra* note 3 at 418.

25. *INS v. Elias-Zacarias*, 502 U.S. 478, 482-84 (1992); *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000).

26. Vogel, *supra* note 3 at 418.

27. Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women's Claims*, 29 Refugee Surv. Q. 46 (2010).

28. Vogel, *supra* note 3 at 373, 406.

29. Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-689, codified at INA § 101(a)(42)(B).

30. INA § 101(a)(42) (emphases added).

31. 85 Fed. Reg. 80274, 80385 (Dec. 11, 2020) (codified at 8 CFR § 208.1(d)).

32. *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.* ("*Pangea II*"), No. 20-CV-09253-JD, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021).

33. *Matter of M–F–W– & L–G–*, 24 I&N Dec. 633, 641 (BIA 2008).

34. *Id. See also* Feng Wang, Baochang Gu & Yong Cai, *The End of China's One-Child Policy*, Brookings (Mar. 30, 2016), https://www.brookings.edu/articles/the-end-of-chinas-one-child-policy/; Joseph Ax, *End of China's One-Child Policy May Slow U.S. Asylum Cases*, Reuters (Oct. 29, 2015), www.reuters.com/article/us-usa-china-asylum/end-of-chinas-one-child-policy-may-slow-u-s-asylum-cases-experts-idUSKCN0SN30U20151029.

35. *Matter of Chang*, 20 I&N Dec. 38, 44 (BIA 1989).

36. *Id.*

37. *See Matter of M–F–W– & L–G–* at 641 ("[T]he language used by Congress to amend section 101(a)(42) of the Act, and thereby reject *Matter of Chang* . . . was clear.").

38. *Matter of J–S–*, 24 I&N Dec. 520, 527, 528 (AG 2008).

39. *Id.*

40. The author notes that because Section 601(a) was partly the result of advocacy by conservative anti-abortion politicians and activists, it only singles out certain forms of reproductive harm persecution as being worthy of protection. *See* Connie Oxford, *Coercive Population Control and Asylum in the U.S.*, 6(4) Soc. Sci. 1, 5 (Nov. 2017). Forced abortions and sterilizations result in *per se* protection, while the millions of women subjected to forced pregnancies via draconian abortion bans—an equally severe human rights violations under international law—have no corresponding relief. *See* Rome Statute of the International Criminal Court, art. 7(1)(g) (defining "crimes against humanity" as encompassing "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"). Such claims, however, could potentially be made under the traditional political opinion ground).

41. *See, e.g.*, *Matter of J–S–*; *Matter of M–F–W– & L–G–* at 641; *Matter of S–L–L–*, 24 I&N Dec. 1, 10 (BIA 2006), *abrogated on other grounds by Matter of J–S–*; *see also He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014); *Fei Mei Cheng v. Att'y Gen.*, 623 F.3d 175 (3d Cir. 2010); *Lin v. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007); *Ding v. Ashcroft*, 387 F.3d 1131 (9th Cir. 2004).

42. *Lin v. Gonzales*, 472 F.3d 1131, 1134 (9th Cir. 2007).

43. In *Qu v. Gonzales*, 399 F.3d 1195, 1200 (9th Cir. 2005), the Ninth Circuit Court of Appeals referred generally (in dicta) to BIA precedent "on forced abortion and involuntary sterilization pursuant to coercive population control policies," suggesting that the first and second categories are presumed to occur in the context of a state policy. However, this aside is not part of the holding of the case, and, as discussed *infra*, the Ninth Circuit later explicitly held that abortions committed by non-state actors fell within the purview of Section 601(a). *Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007).

44. *See, e.g.*, *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) ("The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility.").

45. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012); *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011).

46. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (citing cases dating from 1971 to 1981).

47. *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986) (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979)).

48. *Tang v. Gonzales* at 990–91. The Ninth Circuit did note in this decision that the employer's actions corresponded to China's official state-run policies and could be interpreted as "an implementation" of the state policy. *Id.* at 991. The court also still characterized forced abortions as "unwanted governmental interference" into a woman's reproductive decisions. *Id.* at 992. Yet once again, while a non-state actor's connection to a state-run policy is *relevant* in determining whether an abortion is "forced," these asides do not establish a holding that *only* those abortions that bear a nexus to a state-run policy will be considered "forced abortions" under Section 601(a).

49. *Id.* at 990 (quoting *Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004)).

50. *E.g.*, Cecilia Menjívar & Shannon D. Walsh, *Subverting Justice: Socio-Legal Determinants of Impunity for Violence Against Women in Guatemala*, 5(3) Laws 31, 1–2, 16 (2016) (noting that "women often refuse to use the legal system to address gender violence against them because alimony laws are not enforced and women are often economically dependent on their male partners").

51. Phillip R. Reilly, *Eugenics and Involuntary Sterilization: 1907–2015*, 16 Annual Rev. of Genomics & Human Genetics 351–68 (2015); Jeffrey C. Tuomala, *Nuremberg and the Crime of Abortion*, 42 U. Toledo. L. Rev. 283, 283 (2011).

52. Mathew Charles, *Rape, Forced Sterilisation and Botched Abortions: The Sex Slaves of Colombia's Farc Guerrillas*, The Telegraph (Jan. 4, 2020), www.telegraph.co.uk/global-health/women-and-girls/rape-forced-sterilisation-botched-abortions-sex-slaves-colombias/.

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54. Amnesty Int'l, *"Do Not Remain Silent": Survivors of Sexual Violence in South Sudan Call for Justice and Reparations*, 12, 15 (2017), www.justice.gov/eoir/page/file/986226/download.

55. Anastasia Moloney, *In El Salvador, Girls Under 12 Most at Risk of Getting Pregnant by Rape: U.N. Study*, Reuters (Nov. 24, 2016), www.reuters.com/article/us-el-salvador-girls-rape/in-el-salvador-girls-under-12-most-at-risk-of-getting-pregnant-by-rape-u-n-study-idUSKBN13J1RJ.

56. Agustina M. Buedo, *Pregnancy, Femicide, and the Indispensability of Legalizing Abortion: A Comparison Between Argentina and Ireland*, 34 Emory Int'l L. Rev. 825 (2020); *see also* Penelope K. Morrison et al., *Pregnant Victims of Intimate Partner Homicide in the National Violent Death Reporting System Database, 2003–2014: A Descriptive Analysis*, J. Interpersonal Violence (July 26, 2020), https://doi.org/10.1177/0886260520943726; Maeve E. Wallace et al., *Homicide During Pregnancy*

*and the Postpartum Period in Louisiana, 2016–2017*, 174(4) JAMA Pediatrics 387 (Apr. 1, 2020); Judith McFarlane et al., *Abuse During Pregnancy and Femicide: Urgent Implications for Women's Health*, 100(1) Obstetrics & Gynecology 27 (July 2002).

57. Aja Louise Murray et al., *The Intergenerational Effects of Intimate Partner Violence in Pregnancy: Mediating Pathways and Implications for Prevention*, 21(5) Trauma Violence Abuse 964 (Dec. 2020); Alice Han & Donna E. Stewart, *Maternal and Fetal Outcomes of Intimate Partner Violence Associated with Pregnancy in the Latin American and Caribbean Region*, 124(4) Int'l J. Gynaecology & Obstetrics 6 (Jan. 2014).

58. World Health Org., *Responding to Intimate Partner Violence and Sexual Violence Against Women* 10 (2013), http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595_eng.pdf?ua=1.

59. World Health Org., *Responding to Intimate Partner Violence During Pregnancy Information Sheet*, 3 (2011), https://apps.who.int/iris/bitstream/handle/10665/70764/WHO_RHR_11.35_eng.pdf?sequence=1.

60. *See* World Health Org., *supra* note 58 at 1–3.

61. *See* Han & Stewart, *supra* note 57.

62. *Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004).

63. While this article focuses on the situation of women whose partners or rapists attempt to force them to terminate their pregnancies, HIV-positive individuals from Mexico and Central America might also raise a claim for protection under Section 601(a) if they were coercively or forcibly sterilized by health care providers, a practice reported in countries such as El Salvador, Honduras, Mexico, and Nicaragua, as well as Chile, South Africa, Namibia, and several Asian countries. Tamil Kendall & Claire Albert, *Experiences of Coercion to Sterilize and Forced Sterilization Among Women Living With HIV in Latin America*, 18 J. Int'l AIDS Soc. 19462 (Mar. 24, 2015).

64. Guatemala Penal Code Decree No. 17-73, art. 135 (1999).

65. Julie Turkewitz, *Colombia Court Keeps Restrictive Abortion Law in Place*, N.Y. Times (Mar. 2, 2020), www.nytimes.com/2020/03/02/world/americas/colombia-abortion.html.

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# Considering Asylee Integration

## The Unfulfilled Promise of the Refugee Act

Benjamin M. Levey and Rachel C. Zoghlin*

**Abstract:** In order to win asylum status, asylum seekers must prove that they are, in fact, refugees. Yet, after receiving status, asylees do not receive the same benefits that resettled refugees do—benefits the United States is legally obligated to provide. This article examines this issue, detailing the gaps between the governmental support asylees and resettled refugees receive and arguing that neoliberalism, deterrence, and racism underlie these discrepancies.

> I think Congress is singularly unsuccessful in defining things .... Human conduct is such that oftentimes things don't fit the definitions the way they are tied down sometimes. You know, whether someone is losing their rights in a given situation is an intangible thing. We can't foresee all that now.[1]
>
> —Attorney General Griffin Bell
> Hearings on the Refugee Act of 1979
> The Subcommittee on Immigration,
> U.S. House of Representatives

## Introduction

One morning in April of 2019, Maria, a 35-year-old woman from Honduras, put on the outfit she typically wore to church, a freshly pressed dress and a blazer, and took the train to the Baltimore Immigration Court.[2] She had been waiting for her asylum hearing for three years, and she was worried: nervous that she would become emotional on the witness stand while testifying to the threats she and her family suffered because of her political activism, anxious that she would not appear credible, and fearful, ultimately, that the judge would deny her claim. To win the case, Maria and her attorney had to prove that she met the definition of a refugee: someone who, owing to well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group, is outside her country of nationality and is unable or unwilling to avail herself of the protection of that country.[3] And with a strong argument based upon Maria's involvement with anticorruption political

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activist groups, they did just that. When the immigration judge granted her application for asylum and the Department of Homeland Security (DHS) agreed to waive appeal, Maria was elated. With her legal status secure, she felt that she could breathe deeply for the first time in years: she would no longer have to live in limbo, and her children would soon be able to come join her in the United States as asylees. Gradually, she would build a new life in the suburbs of Washington, DC.

More than a year has passed since Maria won asylum, but her children have not arrived yet; their petitions to derive asylum status from Maria remain pending. Her dream of opening her own business, a small Honduran restaurant, has been deferred. As an asylee, Maria was technically eligible for various types of support to help her integrate into her community, including cash assistance, English classes, health insurance, job training, and more. No one—not the immigration judge overseeing her case, nor the U.S. Citizenship and Immigration Services officer who reviewed the judge's order and provided Maria with her I-94 card (proof of her asylee status), nor her lawyer—told Maria that she was eligible for such benefits. So, she never accessed them. Although Maria is now eligible to apply for lawful permanent residency, and though she works 50 hours a week, she can barely make ends meet. She cannot afford the $1,225 filing fee, and she feels intimidated and dissuaded by the fee waiver process.[4] Maria has already proven that she qualifies for protection and merits assistance, yet the U.S. government has failed to meet her needs and adequately inform her of her rights. And, unless there are significant changes in federal policy, it will continue to fail tens of thousands of asylees like her every year.

This article, one of the first to examine the United States' approach to asylee integration,[5] considers why asylees like Maria do not, and cannot, access the range of benefits that their counterparts, refugees who enter the country through the Refugee Admissions Program, receive after arriving in the United States.[6] The first section of the paper explains that asylees are, in fact, refugees, and as such should be entitled to the same range of benefits and supports as individuals who come through the resettlement program.[7] The article then examines these benefits and supports, reviewing their legal foundations and inventorying the discrepancies between the limited forms of assistance asylees may access and the fuller set of supports that resettled refugees are granted. The article proceeds by historicizing these discrepancies, arguing that they emerged from political motivations of the U.S. government and thus represent a betrayal of the Refugee Act's commitment to nonpartisan, humanitarian concerns. Finally, the article offers a series of policy prescriptions to ensure that asylees receive the assistance to which they are entitled. Given the vast number of asylum seekers waiting to have their claims adjudicated and the recent presidential transition, this marks an opportune moment to advance such prescriptions.[8]

## Asylees Are Refugees

### The United States' Asylum System Prior to the 1980 Refugee Act

In July of 1951, world leaders gathered in Geneva, Switzerland, to draft and sign the 1951 Convention Relating to the Status of Refugees (hereinafter "the Convention"), a promise to protect the human rights and dignity of individuals persecuted for being who they were. The document was initially limited in geographic and temporal scope, intended to protect individuals fleeing "events occurring in Europe" prior to January 1, 1951.[9] One hundred and forty-five nations became party to the Convention, agreeing to abide by its premise and spirit.[10] In perhaps its best-known dictate, the Convention mandates that state parties abide by the principle of *non-refoulement*. Per Article 33 of the Convention, parties may not "expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[11] The Convention focused upon the protection and resettlement of World War II refugees, but various other refugee crises soon emerged across the world. Totalitarianism, decolonization, and other political developments brought about mass displacement and migration the Convention could not accommodate.

Sixteen years later, the United Nations High Commissioner for Refugees (UNHCR) set forth the 1967 Protocol Relating to the Status of Refugees (hereinafter "the Protocol").[12] The Protocol removed the geographic and temporal limitations of the Convention, extending its protections beyond just those individuals persecuted during World War II.[13] The United States signed the Protocol in 1967 and remains party to it today.[14] But instead of creating a formal procedure to implement the Protocol, the United States turned to a hodgepodge of legal mechanisms to admit displaced people.[15] By the mid-1970s, it became clear that such an *ad hoc*, piecemeal approach to the arrival and resettlement of refugees was "haphazard and inadequate," and would not suffice.[16] These shortcomings led Congress toward the passage of the 1980 Refugee Act.

### Asylees Are Refugees: The Promise of the 1980 Refugee Act

Legislative history indicates that, in conceiving of and drafting the 1980 Refugee Act, Congress was well aware of the distinct processes by which persecuted people come to the United States.[17] Experts who testified before Congress made clear that all persecuted people deserve protection, regardless of how they arrive in the United States and seek it. One expert explained to the

House Subcommittee on Immigration, Refugees, and International Law that, although the U.S. legislature would not "want to encourage people to come to the United States" through illegal means, "those who qualify as refugees are so desperate that they use whatever method they can [and] should be covered by the same kind of hearing procedures which the Immigration Commissioner has said are required as a matter of fairness. . . ."[18] Another expert who testified before Congress similarly posited that "the same standards should be applied to those aliens seeking asylum inside our country or at its borders, as would be applied to those seeking refugee status from abroad."[19] Yet another expert provided similar commentary, noting the importance of providing a pathway for persecuted individuals already in the United States to gain refugee protection if they "meet the definition of a 'refugee.'"[20]

In 1980, President Jimmy Carter signed into law the Refugee Act, which provides the foundation for U.S. asylum law as we know it today. The Act established a clear vehicle for recognizing and welcoming into the United States individuals classified as refugees abroad and set forth infrastructure for would-be refugees to access protection from inside the country.[21] The plain language of the Act made clear that refugees and asylees are effectively the same; it incorporated the definition of a refugee as outlined in the Protocol and established that both refugees and asylees must show that they are:

> outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which the person last habitually resided, and who is unable and unwilling to return to, and is unable and unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[22]

Rather than subject asylum seekers to a separate legal standard because of their distinct manner of entry and process of obtaining legal protection, Congress cross-referenced the refugee definition, codifying that to receive asylum status in the United States, an applicant must establish that she meets the statutory definition of a refugee.[23]

In the decades since the passage of the Act, the United States has established distinct mechanisms to evaluate and respond to the needs of individuals seeking humanitarian protection from abroad (refugees) and those seeking such protection from within the United States (asylees). The federal government processes individuals in the former category through the U.S. Refugee Admissions Program (USRAP), which the Department of State manages in cooperation with DHS and the Department of Health and Human Services (HHS). Individuals who arrive through USRAP have first registered with UNHCR in the country to which they initially fled; in that country, UNHCR determined that the best possible durable solution for them was permanent resettlement

in a third country (in this case, the United States). Nonprofit organizations, known as "resettlement agencies," welcome individuals to the United States through USRAP under the auspices of a Department of State–funded program called "Reception and Placement," which helps newly arriving refugees meet their immediate needs.[24]

Asylees, in contrast, come to the United States of their own accord and to gain protection, must prove that they meet the definition of a refugee.[25] The asylum system encompasses two processes, the affirmative asylum process and the defensive asylum process. An individual not in removal proceedings may apply for asylum affirmatively through U.S. Citizenship and Immigration Services (USCIS), a DHS agency. If the USCIS asylum officer does not grant the asylum claim and the applicant does not otherwise have lawful immigration status, USCIS issues a "Notice to Appear," initiating removal proceedings against the applicant before the nation's immigration court system, part of the Department of Justice's Executive Office for Immigration Review (EOIR). In these adversarial proceedings, the asylum seeker may renew their request for asylum through the defensive process and make their claim before an immigration judge. Similarly, asylum seekers who either (1) arrive at a port of entry and indicate their intention to seek asylum, or (2) enter without inspection and are apprehended by DHS officials do not have the opportunity to apply for asylum affirmatively, and generally apply through the defensive process after being placed into removal proceedings.[26]

Although these systems are distinct, both refugees and asylum-seeking populations must meet an identical statutory definition for eligibility for protection. Moreover, much like that of the Refugee Act, the language of the Convention and the Protocol support the notion that asylees are refugees: both documents identify and treat persecuted people the same, regardless of whether they gain protection while abroad or while physically present in the country of refuge. In practice, however, despite these commonalities, the United States treats refugees and asylees markedly differently. Critically, the United States does not provide them with equivalent assistance. In the following section, this article analyzes the discrepancies between the limited forms of assistance asylees are able to access and the fuller set of supports that refugees are granted.

## Analyzing the Supports Refugees and Asylees Receive

### An Overview of the Benefits Available to Refugees and Asylees

The Convention provides a framework for both the initial resettlement and the long-term integration of refugee populations. In addition to defining the word "refugee" and outlining an international system of legal protection, it indicates that signatory states must "accord to refugees treatment as favorable as possible" with regard to the rights to property, self-employment, housing,

public education, public relief, and more.[27] The Convention further details that "[c]ontracting States shall as far as possible facilitate the assimilation and naturalization of refugees," going so far as to say that they must "reduce as far as possible the charges and costs of such . . . proceedings."[28] By signing the Protocol, the United States took on the international legal obligation of affording certain rights to all refugees, including asylees.

In 1980, the United States incorporated these international obligations into federal law. The Refugee Act created the Office of Refugee Resettlement (ORR), a program of the Administration for Children and Families within HHS, and it charged ORR with supporting the successful integration of refugees:

> [T]he Director shall, to the extent of available appropriations, (A) make available sufficient resources for employment training and placement in order to achieve economic self-sufficiency among refugees as quickly as possible, (B) provide refugees with the opportunity to acquire sufficient English language training to enable them to become effectively resettled as quickly as possible, (C) insure that cash assistance is made available to refugees in such a manner as not to discourage their economic self-sufficiency, in accordance with subsection (e)(2), and (D) insure that women have the same opportunities as men to participate in training and instruction.[29]

In the 40 years since the passage of the Refugee Act, ORR has developed myriad programs to achieve this mandate—programs that, as the statutory language suggests, focus on promoting rapid economic self-sufficiency but not necessarily holistic integration. They include, but are not limited to health screenings, cash assistance, mental health support, linkages to health insurance, job readiness and employment training initiatives, case management, and English-language classes.[30] Refugees and asylees may also access mainstream, means-tested benefits, including SNAP (the Supplemental Nutrition Assistance Program, or food stamps), cash assistance through TANF (Temporary Aid for Needy Families), Supplemental Security Income, and Medicaid. ORR collaborates with nine different refugee resettlement agencies to administer these benefits and services.

## Discrepancies in the Supports Available to Refugees and Asylees

### *Unlike Refugees, the Majority of Asylees Do Not Access ORR-Funded Benefits and Services; A Lack of Information and Other Barriers Impede Them From Doing So*

Since the passage of the Refugee Act, refugees who have entered the United States through the resettlement program have automatically had access

to the benefits outlined in the preceding section. In contrast, asylees have never had automatic access to these programs. It was not until the issuance of ORR State Letter #00-12 in June of 2000 that most asylees were even able to access ORR-funded benefits.[31] Still, nearly 20 years since the issuance of that letter, the majority of asylees do not access the benefits and services to which they are entitled. And, in contrast to resettled refugees, the burden falls upon individual asylees to learn of the benefits and services available to them, locate a resettlement agency in their area, and contact that agency to begin the process of applying for benefits.

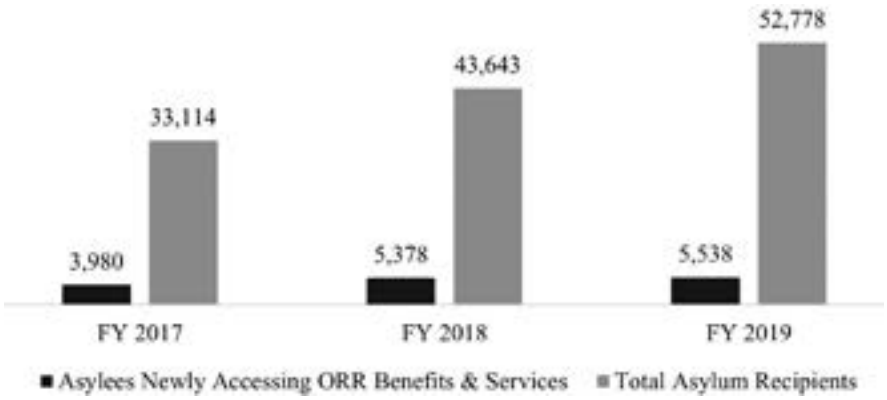
Many asylees are not aware of the resources available to them, and information that describes and explains how to access them is hard to find. No centralized, widely available resource with this information currently exists.[32] Moreover, the nation's asylum offices and immigration courts do not effectively communicate to grantees the benefits available to them.[33] Grants of asylum issued by immigration judges (within EOIR) make no mention of benefits. Although asylum approval packets issued by USCIS *do* mention the existence of possible benefits, they are far from sufficient: the packets, which are exclusively available in English, make only cursory mention of the support asylees can receive before referring readers to an ORR website to learn more information and locate a service provider. That website, which is quite outdated, is similarly available only in English.[34]

Physical distance from service providers presents another barrier to asylees accessing benefits. Refugees, given the structure of the resettlement program, are intentionally resettled near a resettlement agency.[35] Asylees, however, settle where they choose. When they obtain legal status, they may live far away from a refugee resettlement agency that could coordinate the provision of benefits.[36] The Refugee Act mandates that ORR regularly consult with state and local governments and refugee resettlement agencies regarding the geographic distribution and placement of refugees, but there is no similar mandate for asylees.[37] As a result, even if asylees manage to determine which benefits are available to them, they still might be hundreds of miles from an agency that could provide integration services, thereby remaining practically unable to access the support to which they are entitled.[38]

In conjunction, these two barriers—a lack of information and distance from service providers—impede thousands of asylees from accessing benefits. Newly available data from ORR gives a sense of how few asylees access integration support.[39] In FY 2017, ORR began tracking participation in ORR-funded benefits and services (specifically the agency's cash assistance, medical assistance, and social services programs) by immigration status.[40] Based on the data collected, only about 12 percent of individuals that receive asylum in any given year access ORR-funded benefits and services (see Figure 1).[41]

This is in stark contrast to resettled refugees, all of whom access the federally funded integration support to which they are entitled. Without providing adequate information about benefits to every asylee and then surveying large

**Figure 1.** Asylees Accessing ORR Benefits and Services




numbers of asylees, gauging the approximate percentage of asylees who would wish to enroll in ORR's benefits and services is quite difficult. Although many asylees have found employment by the time they receive their asylum status, it stands to reason that the percentage of asylees who might wish to access ORR benefits is far greater than 12 percent. Few asylees and advocates are currently aware of the benefits available to asylees; many asylees continue to struggle with securing employment and housing after receiving status; and many derivative asylees, like many individuals who receive status shortly after arriving in the United States (a somewhat common occurrence since 2018 due to changes in administrative processing of affirmative asylum applications), struggle to meet their basic needs in their initial post-arrival period.[42]

### *Asylees Cannot Receive Reception and Placement Services; the Government Does Not Guarantee Case Management Support for Asylees*

Every year, the Department of State enters a cooperative agreement with each of the nation's nine resettlement agencies to provide basic support to refugees upon their arrival to the United States. This support, known as Reception and Placement (R&P), includes both material assistance (e.g., furniture and toiletries) and personal assistance in the form of case management.[43] Having an assigned case manager proves invaluable as refugees adjust to life in a foreign country and navigate the nation's byzantine systems for public benefits and other administrative processes. The R&P Program provides a per capita grant of $2,175 for each refugee resettled by a local resettlement agency affiliate.[44] The government does not provide for a similar baseline form of case management for asylees. In part as a result, it also does not provide sufficient funding to resettlement agencies to serve asylee clients.[45] This discrepancy extends to follow-to-join cases: unlike refugees, asylees who

join family members in the United States following a derivative petition do not receive R&P benefits.[46]

### *Asylees Do Not Receive Electronic I-94 Forms*

With certain exceptions, Customs and Border Protection (CBP) tracks and provides proof of the arrival of individuals who are not U.S. citizens or lawful permanent residents by means of the Form I-94 Departure/Arrival Record. For refugees and asylees, a Form I-94 demonstrates legal status and work authorization, necessary for all sorts of critical forms of integration: it may be required at the local Department of Motor Vehicles to apply for a driver's license, for example, or a potential employer may request to see it during the hiring process. Upon the arrival of a refugee to the United States, CBP automatically creates an electronic Form I-94.[47] Thereafter, refugees may access their Form I-94 anytime through the CBP website. In contrast, the government does not automatically create a Form I-94 for asylees, nor does it issue asylees electronic Form I-94s. Instead, asylees who receive status from an immigration court generally must make an appointment with their local USCIS office to request a paper Form I-94 in person.[48] Not all asylees are aware of the need to make this appointment, and even those who are aware may not know how to do so, or which documents they may need to bring to the appointment.[49] As such, many asylees never apply for or receive the form. Without it, asylees often struggle to demonstrate their immigration status to government employees when applying for benefits or when seeking employment.

### *Unlike Refugees, Asylees Must Pay Filing Fees, and Do Not Automatically Receive Fee Waivers, When Seeking Lawful Permanent Residency*

Section 209 of the Immigration and Nationality Act (INA) mandates that refugees file an adjustment of status (green card or lawful permanent residency) application one year after their arrival in the United States. Refugees automatically receive a fee waiver when submitting adjustment of status applications; in practice, they do not need to pay the fee that most other applicants must pay when adjusting status. Asylees adjust status under section 208 of the INA and, in contrast to refugees, *are* required to pay this filing fee. Fee waivers are available to asylees, but they are an imperfect solution: navigating the system of fee waivers is difficult, and concerns about being deemed a "public charge" discourage many asylees from applying for fee waivers, despite the fact that the public charge rule does not apply to asylees.[50] Many asylees delay applying for adjustment of status or choose not to adjust status simply because of the high cost associated with doing so.[51] Not adjusting status means that these individuals have fewer rights in the United States, may be vulnerable to removal proceedings, and do not progress toward citizenship.

### Analyzing These Discrepancies

As the opening of this section describes, the United States assumed international legal obligations to afford certain rights to all refugees, including asylees, by signing the 1967 Protocol to the 1951 Convention. It later incorporated these obligations into federal law through the 1980 Refugee Act. In its treatment of asylees, however, the U.S. government fails to meet certain of these minimum obligations. First, though the Convention dictates that signatory nations treat all refugees "as favorabl[y] as possible" with regard to public relief, public education, and other public services, the United States does not meet this standard for asylees.[52] Assuming, for the sake of argument, that the United States meets this standard for resettled refugees, any treatment of asylees inferior to what resettled refugees receive would mean a violation of that standard. With regard to public relief, asylees clearly receive inferior treatment to resettled refugees—the government does not adequately inform asylees of the social services available to them, and it does not provide enough funding to service providers to serve every asylee. Second, the United States fails to sufficiently facilitate the path to naturalization for asylees. As noted previously, the government does not automatically extend fee waivers to asylees seeking to adjust status (the treatment it extends to refugees), thus falling short of the standard established by the Convention, to "reduce as far as possible the charges and costs of such proceedings."[53] Third, and finally, the United States does not accomplish one of the core objectives of the Refugee Act: "to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."[54] There is tremendous variation in how asylees are linked to services: for example, some states fund asylee outreach coordinators to connect asylees to integration support, while other states do little to no outreach to asylees; some USCIS asylum offices host benefits orientations for new asylees, while some do not. This variation is representative of the nation's haphazard, patchwork approach to the integration of asylees.[55] In the following section, this article considers how that patchwork developed, interrogating the political motivations that underlie it and have allowed it to persist without much scrutiny.

## What Underlies the Disparate Treatment of Refugees and Asylees?

Asylees are refugees, yet they do not receive the support to which refugees are entitled and that resettled refugees receive. How did this service gap develop in the 40 years following the passage of the Refugee Act, and why has it persisted for so long? This section moves from the descriptive to the theoretical, arguing that various political motivations underlie the failure of the United States to adequately support asylees. Over the past 40 years, three

such motivations—neoliberalism, deterrence, and racism—have served to justify and mask this failure. These political motivations represent a betrayal of the nonpartisan, humanitarian ideals that animated the Refugee Act.

## Neoliberalism

In January of 1986, ORR published regulations codifying its commitment to supporting asylee clients.[56] Despite the publication of these regulations, asylees, because of certain eligibility requirements, remained largely unable to access ORR-funded benefits for the remainder of the millennium.[57] Indeed, the issue of asylee integration received relatively little attention until the late 1990s. Many of the relevant stakeholders, from asylum seekers to legal advocates to NGO employees, were preoccupied with two major immigration-related developments of the Reagan era: amnesty—more than three million undocumented individuals received legal status following the 1986 Immigration Reform and Control Act—and the development of the nation's nascent asylum system. In 1996, however, the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA, known popularly as welfare reform) put the issue of asylee integration on ORR's radar. IIRIRA and PRWORA prompted the Department of Health and Human Services to form a working group focused on immigrants' access to benefits.[58] ORR then drafted State Letters #00-12 and #00-15, which it published in the summer of 2000. These letters moved the start date of asylees' benefit eligibility windows to their asylum grant dates, thereby enabling most asylees to access ORR-funded benefits for the first time.[59] The authors of State Letter #00-12 cited IIRIRA, and particularly the one-year bar to asylum it established,[60] as their impetus. Because of the one-year bar, they wrote, asylum seekers had begun to

> [m]ove through the asylum process much more quickly and, as a result, [be] granted asylum much sooner after their arrival than in previous years. These early months after the grant of asylum are critical, as asylees attempt to find work, adapt to their new culture and, in many cases, bring their families from countries at war and from other unsafe situations.[61]

Agency staff thus felt it was necessary for the agency to ensure asylees had additional support.

The language of this State Letter is slightly misleading—IIRIRA did not introduce the need for asylees to "find work, adapt to their new culture, and . . . bring their families." What, then, might account for the 14-year gap between ORR's formal statement of intent to serve asylees and the publication of a state letter enabling the agency to do so at scale? Competing priorities, as

suggested in the previous paragraph, are part of the answer. So too is ideology. The Reagan and Clinton years saw a turn away from the Great Society of the 1960s and 1970s toward neoliberalism, an ideology that promoted deregulation, privatization of government services, and the general atomization of society.[62] Soon after his election, President Reagan initiated a decades-long campaign to dismantle the social safety net. The United States' resettlement program developed in this political and ideological context, and, unsurprisingly, efforts to expand services for various refugee populations repeatedly met strong resistance in the 1980s.[63] At the time, ORR's budget was, in the words of a former Director of the Office, "a refugee budget"—that is, one equipped to support the resettlement program and nothing more.[64] Expanding services to asylees would have required additional appropriations, an almost unimaginable proposition in this context.

Today, 40 years after the passage of the Refugee Act, neoliberalism continues to cloak the United States' failure to support asylees. The Refugee Act charges ORR with helping refugees become economically self-sufficient as quickly as possible,[65] and ORR has thus often defined successful integration as ceasing to receive public benefits.[66] This neoliberal mandate to focus on self-sufficiency and minimize the role of the state has helped obscure the failure of the United States to support the integration of asylees. A framework that defines successful integration as ceasing to receive public support cannot adequately understand the struggles and successes of asylees, a population that generally has not received such support. The fact that asylees generally do not access public benefits does not mean that asylees neither want nor need support. As previously noted, low access rates stem largely from barriers to access, not from the successful integration of asylees. In fact, the arduous route to securing asylum status often *prevents* asylees and their families from integrating successfully. Detention, legal fees, filing fees, social isolation, the costs of family members' travel following a derivative petition,[67] and living for months in the United States without valid work authorization take an economic and psychological toll on many asylees. The nation's resettlement infrastructure largely ignores this reality, however. Indeed, the neoliberal focus on self-sufficiency that underpins this infrastructure obfuscates the extent to which asylees struggle even after positive adjudication of their asylum claims.

## Deterrence

In the decades since the passage of the Refugee Act, the United States has gradually transitioned from a refugee regime based on the protection of human rights to one based on skepticism of the legitimacy of claims and deterrence.[68] The Trump administration nakedly accelerated this transition. Through the expansion of immigration detention, the separation of children from their parents at the border, metering, the "Migration Protection Protocols"

program, various other policy measures, and the persistent public denigration of immigrants and asylum seekers, the administration intentionally made the experience of seeking asylum difficult, in part to discourage would-be asylum seekers from traveling to the United States.[69] Theorization of the deterrence paradigm tends to focus on the ways in which states deter individuals from accessing legal protection.[70] From the perspective of an individual migrant, however, deterrence can encompass far more, including both the affective experience of seeking asylum—consider the racism and xenophobia President Trump stoked[71]—and the physical, social, and economic costs seeking asylum exacts on asylum seekers. Understood in this broader manner, the deterrence paradigm can help make sense of the United States' treatment of asylees and flawed approach to asylee integration in two principal ways.

The first of these is perhaps obvious: barriers to the integration of asylees discourage other migrants from seeking asylum. In June of 2020, DHS proposed an administrative rule severely restricting asylum seekers' access to work authorization. The Department justified this rule, which went into effect on August 25, 2020, by citing its purported need to "maintain the very integrity of the asylum system" and noted that the rule would "take all necessary measures to create disincentives to come to the United States."[72] It is unlikely DHS or other agencies would similarly publicly cite a desire to deter migration when restricting access to benefits for asylees who have already proven the legitimacy of their claims. Regardless, such postadjudication restrictions have the same effect: making life incredibly difficult—creating "disincentives," per DHS—and thus deterring as many migrants as possible from coming to the United States, including persecuted people who would qualify for and ultimately win asylum.

In addition to this more standard function of the deterrence paradigm, the paradigm also creates a psychological environment in which many immigrants fear any interaction with the government. As such, barriers before, during, and after adjudication of asylum claims—the trauma of crossing the border and/or being in detention, the trauma of an asylum interview, restrictions on work authorization, the costs of adjusting status, and so forth—function as links in a long deterrent chain, one that includes everything from detention to surveillance to public charge. This chain presents a psychological barrier to asylees who are eligible to receive public support. Why would an asylee turn to a government that has traumatized them and demonized people like them for support?

## Racism and the Narrative of the Bad Immigrant

Soon after the passage of the Refugee Act, advocates began decrying discrimination by race and national origin in the asylum system. In a 1984 article, for example, lawyer and refugee advocate Arthur C. Helton cited the

ease with which individuals fleeing Communist regimes in the 1980s received asylum and the difficulty those fleeing U.S.-allied countries, like junta-led El Salvador, faced in doing so.[73] Concurrently, government actors began noticing that asylum applicants within the United States faced far harsher screening standards than refugees overseas did.[74] The chorus of voices leveling similar criticisms has only swelled since. This section builds on this set of criticisms, arguing that discrimination by race and national origin has shaped not just the granting of status but the provision of social services and other benefits as well.

A long-standing trope in U.S. immigration policy and discourse is the good immigrant/bad immigrant binary, which classifies immigrants as either hardworking and deserving or freeloading and unworthy.[75] Bad immigrants tend to represent racial groups that white power structures deem undesirable, like Eastern European Jews in the 1920s or Latinos in the twenty-first century.[76] The government has frequently turned to this trope to justify the punishment of immigrants, including asylum seekers and asylees, "who do things the wrong way."[77] Today, in the context of humanitarian immigration to the United States, "doing things the wrong way" often means seeking asylum defensively. Government officials have deployed the racist, dehumanizing rhetoric and logic long applied toward Latinx "illegal" immigrants to defensive asylum seekers as a whole.[78] This rhetoric and logic, in turn, have helped standardize patterns of discrimination against all asylees.

In June of 2007, USCIS published a final rule adjusting the fees for immigration benefit applications and petitions. The agency, which opted to exempt refugees from filing fees for adjustment of status applications but chose to continue to charge fees to asylees for adjustment of status applications, invoked a version of the good immigrant/bad immigrant binary when issuing its rule:

> While refugees have been *affirmatively invited* by the United States Government to come to the United States for permanent resettlement, asylees have *sought admission of their own accord* and requested to be allowed to stay. While USCIS agrees that both asylees and refugees should receive full protection from persecution, it is a reasonable policy choice to be more generous in awarding immigration benefits to those who are invited.[79]

What made this choice "reasonable" was not the different needs or financial situations of refugees and asylees. Instead, it was the fact that refugees had been invited, something that, by definition, asylum seekers cannot be. The rule applied an unfair, unwarranted stigma to asylees, impeding their ability to adjust status and eventually become citizens.[80]

With this rulemaking, the federal government used a racist trope to justify its decision to discriminate against asylees. Unsurprisingly, this rulemaking, like the various other restrictions on asylees' access to integration support

described in this article, has had racially disparate effects as well. Individuals from Central and South America constitute less than 5 percent of the individuals admitted through the resettlement program between FY 2008 (the first full fiscal year following this rule's implementation) and FY 2018 (the most recent year for which this nationality data is available) but make up approximately 25 percent of those granted asylum in this period.[81] As such, this rule has disproportionately benefited refugee populations not from Central and South America, leaving behind, for example, asylees who fled oppression in Venezuela or the violence of *las maras* (transnational gangs) in the Northern Triangle.

The decision to charge asylees to adjust status fits into a history of discrimination against Central American asylum seekers[82] and into a pattern of racially motivated restrictions on immigrants' access to benefits.[83] The cumulative effect of disparities like that related to adjustment of status fees has been to foster *de facto* discrimination by national origin and create two categories of refugees—one with full access to integration support and one without. Such discrimination violates both the letter and spirit of the 1951 Refugee Convention, the 1967 Protocol to the Convention, and the 1980 Refugee Act. Moreover, this discrimination has left the United States' protection infrastructure hamstrung by hemispheric bias, ill-equipped to respond to contemporary refugee pressures in the Americas. According to a recent report from the National Conference on Citizenship and the Penn Biden Center for Diplomacy and Global Engagement, there is a "growing mismatch between the populations currently prioritized for resettlement and the most pressing refugee pressures in the region . . . . [A]pproximately 30,000 people from the Latin America and Caribbean region will be in need of resettlement in 2021, with over five million refugees and migrants currently fleeing Venezuela by the beginning of 2020 and more than 380,000 refugees fleeing the Northern Triangle countries in 2019."[84] Just as there is a growing mismatch between the refugees abroad in need of support and those the United States prioritizes for resettlement, so too is there a growing mismatch between the refugees within the United States in need of assistance and those to whom the government provides adequate integration support.

## Policy Recommendations

In the decades since the passage of the Refugee Act, neoliberalism, deterrence, and racism have contributed to the development of a patchwork approach to asylee integration that fails to meet the needs of asylees and falls short of the United States' legal obligations from the 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act. This section offers a series of policy prescriptions aimed at meeting the needs of asylees and positioning the United States to fulfill the aforementioned obligations.[85]

## Reimagine What Happens After a Grant of Asylum

The arrival and integration of a refugee requires the coordination of multiple federal agencies. DHS, the Department of State, HHS, and their grantees work together to coordinate refugee health screenings, create electronic Form I-94s, provide benefits, and more following a refugee's arrival to the United States. Such coordination is lacking for asylees, however. DHS, EOIR, and ORR should work together to ensure newly granted asylees automatically receive proof of status and access to the benefits to which they are entitled. DHS should move to providing all asylees an electronic Form I-94 automatically following an asylum grant or the approval of an I-730 Petition for Refugee/Asylee Relative.[86] Furthermore, EOIR, USCIS, and ORR should collaborate to notify asylees of the supports available to them, and they should do so in the preferred language of asylees.

If USCIS or EOIR were to notify ORR automatically upon the granting of an asylum application, ORR could coordinate with state refugee coordinators and local resettlement agency staff to contact that person, answer any questions they may have about their new status, and let them know about the integration support to which they are entitled.[87] This sort of coordination would enable every asylee to learn about and apply for the various supports available to them. Moreover, such coordination would dramatically reduce the amount of staff time and resources resettlement agencies and state governments need to invest in conducting outreach to asylees. Even for asylees not interested in support, this model would still prove beneficial: should a new asylee eventually have a question about adjusting status, for example, or filling out the FAFSA (Free Application for Federal Student Aid) form for higher education, verifying employment authorization, or another related topic, they would have a trusted resource to contact for advice.

Reimagining the postadjudication experience would require developing informational resources for asylees. As described previously, no centralized resource exists with information on asylee benefits or how to access them. To ensure asylees have the information they need, and to comply with the "comprehensive and uniform" language of the Refugee Act, ORR should re-fund the National Asylee Information and Referral Hotline and award funding for an accompanying website.[88] Currently, each of the nation's immigration courts and asylum offices provides different amounts of information about integration support, an approach far from uniform. By creating a national resource and working with DHS and EOIR to promote it, ORR can ensure every asylee nationwide has the same ability to access information related to integration supports.

ORR should also create a standalone, user-friendly document regarding the support available after an asylum grant and work with USCIS and EOIR to distribute this document to all new asylees. This document should include text in multiple languages, graphics (to ensure asylees who are not fully literate can also access this information), and clear, concise explanations of the various forms of integration support available to asylees. The document should also

direct readers to the re-funded national hotline for guidance on how to access this support. Asylum is a federally recognized status, so asylee outreach requires federal solutions.[89]

## To the Extent Possible, Extend Asylees the Same Treatment and Support as Refugees; Allocate Sufficient Funding to the Relevant Agencies to Make This Possible

As the second part of this article details, resettled refugees receive various benefits that asylees do not. The government should move to provide asylees the same treatment resettled refugees receive. First, USCIS should review its fee schedule and identify any discrepancies between what refugees are required to pay and what asylees are required to pay for filings. The agency should then eliminate these discrepancies, extending the favorable treatment refugees receive to asylees. For example, as discussed earlier, USCIS should grant automatic fee waivers to all asylees adjusting status, the treatment it affords to refugees.

Second, ORR should extend a program equivalent to Reception and Placement (R&P) to asylees following an asylum grant or the approval of an I-730 Petition for Refugee/Asylee Relative.[90] Although ORR currently offers a number of case management programs in which asylees may enroll, there is no guarantee that resettlement agency affiliates will have sufficient capacity, staff, and resources to provide adequate case management to every asylee who requests assistance. There is also no actual obligation that affiliates serve asylee clients. In collaboration with resettlement agency affiliates that serve large numbers of asylees and asylees themselves, ORR should devise an asylee-specific case management program, equivalent to R&P, and provide sufficient funding to resettlement agencies to ensure that every asylee who wishes to do so can access case management. ORR's program for asylees should include remote service offerings for individuals who live outside of the service areas of resettlement agency affiliates and expanded financial support for low- and moderate-income asylees in the post-grant period. Moreover, the design of this program should reflect the lived experience of asylees to inform best practices for integration for future asylees. Lastly, this program should also compel resettlement agencies to provide culturally and linguistically appropriate services; agency staff should receive training in the asylum process and, whenever possible, speak the language of asylee clients.

## Compile More, and Better, Data on Asylees' Experiences

Given the tens of thousands of people who receive asylum annually, establishing an R&P-like program for asylees will likely require Congress to appropriate significantly more funds to ORR. Securing this appropriation may

require substantial political capital because of misguided beliefs about refugees and asylees' use of public benefits. Unfortunately, however, no entity—not ORR, nor any resettlement agency, nor any academic institution—has conducted sufficient research to demonstrate the return on this kind of investment, namely, the significant contributions that asylees make to this country. An HHS study found that refugees brought in $63 billion more in government revenues over the period from 2007 to 2017 than they consumed (in terms of expenditures on public benefits).[91] A similar study showcasing the significant contributions made by asylees could help bolster efforts to establish an R&P-like program for asylees.

Every year, ORR conducts a survey of refugees as part of its annual report to Congress. ORR should add asylees to this survey to gauge the efficacy of their programs for asylees and further establish asylees' personal and economic contributions to the nation. Although expanding the survey may be logistically difficult (ORR may need to collaborate with USCIS to obtain asylees' contact information), it should not prove legally complicated: the relevant statutory language offers sufficient leeway for ORR to be able to issue a state letter announcing its intent to add asylees to future surveys.[92] In conjunction with an updated agreement with the survey's implementing partner (in recent years, the Urban Institute), such a letter should suffice to add asylees to the survey. In addition, given the lack of research on asylee integration, ORR should also commission several separate, longitudinal studies of asylee integration in select locales. These reports would enable the agency to refine its understanding of asylee-specific needs and challenges and thereby improve its case management offerings for asylees.

Beyond expanding the annual survey and commissioning longitudinal surveys, the government should also regularly publish accurate, localized data on asylum determinations, asylee adjustments of status, and other data points of concern. In conjunction with the DOJ and HHS, DHS should improve its annual flow reports by adding additional data related to asylum seekers and asylees.[93] These agencies should also collaborate to develop a public forum to share this data on a regular basis. Such a forum will ensure the impartiality of the country's asylum program and allow the government, asylees, attorneys, and other advocates to identify improvements needed to the nation's system of asylee integration.[94]

## Conclusion

At the time of writing, the nation's asylum system is in a precarious position. The coronavirus pandemic has forced USCIS and EOIR to shutter their doors and postpone most interviews and hearings, worsening the country's already shameful backlog. The Trump administration attempted to use the pandemic as a pretext to apply a categorical ban on asylum seekers for "public

health" and "security" reasons.[95] Meanwhile, other recently published rules and regulations would make both obtaining asylum and living in the United States during the asylum-seeking process far more difficult.[96] In the context of this crisis, recommendations aimed at facilitating the long-term integration of asylees may seem ill timed and ill advised. Yet these recommendations are critical to the current moment: a maximally optimal outcome—in this context, a future in which every humanitarian immigrant has the support they need to integrate successfully in the United States—must inform the response to the Trump administration's efforts to dismantle the asylum system. To work effectively within the world as it is, we must have a vision of the world as it might be.

According to UNHCR, there were nearly 80 million displaced people by the end of 2020, almost double the figure from 10 years prior.[97] Climate change, economic instability, war, and political crises across the globe suggest that refugee crises will only intensify over the next decade. Like other host nations, the United States should help resettle as many refugees through the formal resettlement process as it can. It must also expect that many forcibly displaced people will arrive to the United States outside of the refugee resettlement process and make claims for asylum. When they do, the government should recognize these individuals as the refugees they are, providing the support necessary to help them integrate successfully and allowing them to weave their cultures, their resilience, and their stories into the national fabric, the shared garment of our destiny.

## Notes

* Benjamin M. Levey (benjamin.levey@hias.org), Asylee Outreach Specialist, HIAS; B.A., Northwestern University. Rachel C. Zoghlin (rachel.zoghlin@hias.org), National Pro Bono Technical Legal Advisor, HIAS; J.D., American University Washington College of Law; B.A., Vassar College. We wish to thank Kelly Agnew-Barajas, Miguel Bautista, Stephen Brown, Yana Cascioffe, Smita Dazzo, Yael Fisher, Linda Gorens, Mark Greenberg, Danielle Grigsby, Lindsay Harris, Jordana Narin, Michael Levey, Myat Lin, Basel Mousslly, Jonathon Orta, Yael Schacher, Dipti Shah, Essey Workie, Benson Zoghlin and Mindy Zoghlin for their support and feedback. All mistakes are our own. We write in our capacity as individuals, and the views expressed in this article do not represent those of HIAS or any other organization with which we are affiliated.

1. *See* Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Comm. on the Judiciary, Subcomm. on Immigration, Refugees, and Int'l Law, 96th Cong. 196 (1979) (statement of Attorney General of the United States, the Honorable Griffin B. Bell), https://archive.org/stream/refugeeactof197900unit/refugeeactof197900unit_djvu.txt.

2. "Maria" represents a composite of several of the authors' clients, friends, and acquaintances. Although the specifics of her story are fictional, her experience will prove familiar to asylum seekers and legal advocates alike.

3. INA § 101(a)(42).

4. On August 3, 2020, DHS issued a final rule that would raise the filing fees for applications for adjustment of status for asylees (among other immigrants) as well as prohibit asylees from seeking fee waivers for such applications. *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46788 (Aug. 3, 2020), https://www.federalregister.gov/documents/2020/08/03/2020-16389/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration. On September 29, 2020, the U.S. District Court for the Northern District of California enjoined the implementation and the effective date of this final rule. *Immigrant Legal Resource Center v. Wolf*, 4:20-cv-05883-JSW (N.D. Cal., Sept. 29, 2020, Dkt. No. 98, Order Granting Plaintiff's Motion for Preliminary Injunction and Request for Stay of Effective Date of Rule and Denying Request for Administrative Stay). As of the time of this writing, litigation remains pending.

5. The definition of the term "integration" in this context is evolving among humanitarian actors. When referring to "integration" here, the authors generally refer to the process by which immigrants successfully acclimate to their new communities and country and achieve positive outcomes. *See* Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29, 42–43 (2016).

6. To the authors' knowledge, Professor Lindsay M. Harris's *From Surviving to Thriving?* represents the only previous paper to consider at length the integration of asylees in the United States.

7. Generally, the term "refugee" refers to an individual whose claim is adjudicated abroad and who enters the United States pursuant to that offer of legal protection. The term "asylee" refers to an individual who entered the United States without a formal offer of legal protection, who seeks and is granted protection while inside the country. Although the authors believe the United States fails to meet its legal and humanitarian obligations to asylum seekers (individuals whose claims for legal protection within the United States have not yet been evaluated) as well as asylees (and though both, from the standpoint of international law and common sense, are "refugees"), this article focuses on the integration of asylees, as demonstrating that the United States does not adequately support even those individuals granted full humanitarian protection serves to call the legitimacy of the nation's entire protection infrastructure into question.

8. At the time of writing, the combined backlogs of the nation's immigration courts and asylum offices exceed 1.4 million cases (though the court backlog does not exclusively contain asylum cases). *See* TRAC Immigration, Asylum Decisions, https://trac.syr.edu/phptools/immigration/asylum/; USCIS, Asylum Office Workload, Sept. 2019, www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffirmativeAsylumStatisticsFY2019.pdf. Moreover, despite increasingly disadvantageous caselaw nationwide, the number of individuals granted asylum has increased in recent fiscal years (prior to the outbreak of the coronavirus pandemic). According to data from the Department of Justice and Department of Homeland Security, more than 50,000 individuals received asylum status in Fiscal Year 2019. *See* U.S. Department of Homeland Security, Annual Flow Report, Refugees and Asylees: 2018 (Oct. 2019), www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf.

9. *See* UN General Assembly, Protocol relating to the Status of Refugees, December 16, 1966, A/RES/2198, www.refworld.org/docid/3b00f1cc50.html.

10. The United States is not a party to the 1951 Convention on the Protection of Refugees.

11. UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137, www.refworld.org/docid/3be01b964.html.

12. United Nations High Commissioner for Refugees, States Parties to the 1967 Protocol Relating to the Status of Refugees (Jan. 31, 1967), www.unhcr.org/en-us/5d9ed66a4.

13. *Id.*

14. United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

15. *See generally* Deborah Anker and Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981).

16. *See* Minutes of the House Subcommittee on Immigration, Refugees, and International Law of the Committee of the Judiciary (May 3, 1979), https://babel.hathitrust.org/cgi/pt?id=mdp.39015083098338&view=1up&seq=9.

17. *See generally* Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Comm. on the Judiciary, Subcomm. on Immigration, Refugees, and Int'l Law, 96th Cong. 196 (1979).

18. Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Comm. on the Judiciary, Subcomm. on Immigration, Refugees, and Int'l Law, 96th Cong. 198 (1979) (statement of Irving Kessler, Executive Vice Chairman, United Israel Appeal).

19. Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Comm. on the Judiciary, Subcomm. on Immigration, Refugees, and Int'l Law, 96th Cong. 364 (1979) (statement of the American Jewish Committee).

20. Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Comm. on the Judiciary, Subcomm. on Immigration, Refugees, and Int'l Law, 96th Cong. 170 (1979) (statement of A. Whitney Ellsworth and Hurst Hannum, Amnesty International) ("While it may not be appropriate to spell out in detail the procedures under which an alien may claim asylum, the right to apply for political asylum should be included within the terms of the legislation . . . . It should, however, be made clear that those who meet the definition of a 'refugee' have the right to apply for asylum. Asylum should be available to persons within or outside of the U.S. . . .").

21. *Compare* INA § 207 *with* INA § 208.

22. INA § 101(a)(42)(A).

23. INA § 208(b)(1)(A); *see also* INA § 101(a)(42)(A).

24. U.S. Department of State, About Refugee Admissions, www.state.gov/refugee-admissions/about/.

25. *See generally* INA § 208.

26. *See* INA § 235(b)(1)(A)(ii), (B).

27. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, www.refworld.org/docid/3be01b964.html.

28. *Id.* at art. 34.

29. 8 USC § 1522(a).

30. *See generally* Office of Refugee Resettlement, Resettlement Services, www.acf.hhs.gov/orr/refugees; *see also* Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29 (2016).

31. Before the publication of State Letter #00-12, the eligibility window for benefits for asylees began on the day they entered the United States. The majority of eventual asylees, however, did not have asylum status upon their arrival to the country. As such, many asylees were no longer eligible for many ORR-funded benefits by the time they received status. The State Letter moved the eligibility window's start date to the date of the asylum grant, which enabled many more asylees to access integration services. *See* Office of Refugee Resettlement, State Letter #00-12 (June 15, 2000), www.acf.hhs.gov/orr/resource/state-letter-00-12.

32. From FY 2001 through FY 2012, ORR provided funding to the Catholic Legal Immigration Network, Inc. (CLINIC) to administer the National Asylee Information and Referral Line. The hotline, staffed by interpreters capable of speaking 17 languages, provided information on benefits and other topics to tens of thousands of asylees during its 12 years of operation. *See* CLINIC, Asylee Information Toolkit (Sept. 30, 2013), https://cliniclegal.org/toolkits/asylee-information. Since the hotline ceased operation because of a shift in funding priorities at ORR, asylees have not had a centralized resource describing the benefits available to them and explaining how to access them. See Office of Refugee Resettlement, Technical Assistance to ORR-Funded Refugee Programs and Services for Asylees, 68 Fed. Reg. 47348 (Aug. 8, 2003), www.federalregister.gov/documents/2003/08/08/03-20261/technical-assistance-to-orr-funded-refugee-programs-and-services-for-asylees; Office of Refugee Resettlement, State Letter #01-18: Asylee Information Hotline (July 9, 2001), www.acf.hhs.gov/orr/resource/state-letter-01-18.

33. This lack of information has persisted despite advocacy by the AILA Asylum Committee, resettlement agency staff, and other stakeholders. *See, e.g.*, Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29 (2016).

34. Office of Refugee Resettlement, Find Resources and Contacts in Your State (Apr. 30, 2019), www.acf.hhs.gov/orr/state-programs-annual-overview. The Maryland page, for example, lists four affiliates that shuttered years ago. *See* Office of Refugee Resettlement, State of Maryland—Programs and Services by Locality (Nov. 11, 2015), www.acf.hhs.gov/orr/policy-guidance/state-maryland-programs-and-services-locality.

35. Refugees who are reunifying with family members through the I-730 process may also live far away from a resettlement agency affiliate.

36. In FY 2018, ORR began releasing an annual dataset to many of its grantees with information on asylum grants by ZIP code. This data, when analyzed alongside data on the locations of resettlement agency affiliates, gives a sense of the geographic disconnect between asylees and service providers. In Maryland, for example, 1,158 individuals received asylum in FY 2019. Only 29 percent of them, however, lived in the same ZIP code as a resettlement agency affiliate or in a ZIP code adjacent to a resettlement agency affiliate. USCIS, FY2019 Asylee Arrivals by State and Zip Code (Feb. 2020) (on file with authors).

37. 8 USC § 1522(a)(2)(A).

38. Local public assistance offices can assist with SNAP, Medicaid, TANF, SSI, and other mainstream social safety net programs. They cannot, however, provide

ORR-funded services. There is also no guarantee that the services they offer will be culturally competent and trauma-informed.

39. Historically, tracking the enrollment of refugees and asylees in social services programs has been difficult. *See generally* Hamutal Bernstein, *Bringing Evidence to the Refugee Integration Debate*, Urban Institute (Apr. 9, 2018), www.urban.org/research/publication/bringing-evidence-refugee-integration-debate.

40. Office of Refugee Resettlement, Expanded Data Match Process for Fiscal Year 2018, Dear Colleague Letter 17-08 (Aug. 21, 2017), www.acf.hhs.gov/orr/resource/expanded-data-match-process-for-fiscal-year-2018; Office of Refugee Resettlement, State Arrival and Service Data Collection Process for Fiscal Year 2018, Dear Colleague Letter 19-02 (Nov. 27, 2018), www.acf.hhs.gov/orr/resource/state-arrival-and-service-data-collection-process-for-fiscal-year-2018.

41. DCL 18-05, DCL 19-05, and DCL 20-06 are the source of the "numerator" data in this chart—the 3,980, 5,378, and 5,538 figures. The "denominator" data—the 33,114, 43,643, and 52,778 figures—represent the number of individuals who received asylum in the immigration courts and asylum offices plus the number of people who received asylum status by means of derivative asylum petitions in FY 2017, FY 2018, and FY 2019. DHS's 2019 Annual Flow Report is the source of that data. U.S. Department of Homeland Security, Annual Flow Report, Refugees and Asylees: 2019 (Sept. 2020), www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf; Office of Refugee Resettlement, FY 2018 Refugee Social Services Formula Allocations, Dear Colleague Letter 18-05 (Oct. 1, 2018), www.acf.hhs.gov/orr/resource/fy-2018-refugee-social-services-formula-allocations; Office of Refugee Resettlement, FY 2019 Refugee Support Services Formula Allocation, Dear Colleague Letter 19-05 (Sept. 4, 2019), www.acf.hhs.gov/orr/resource/fy-2019-refugee-support-services-formula-allocation; Office of Refugee Resettlement, FY 2020 Refugee Support Services Formula Allocations, Dear Colleague Letter 20-06 (May 19, 2020), www.hhs.gov/guidance/document/orr-dcl-20-06-fy-2020-refugee-support-services-formula-allocations. The authors acknowledge the limitations of these data sources; there is variation *on the same data points* from year to year in DHS's Annual Flow Reports, for example, and resettlement agency staff have reservations about the quality of ORR's data reporting processes. Moreover, the denominator figures are undercounts, as they do not include derivative asylum recipients who were living in the United States at the time they received asylum status.

42. The authors believe strongly in taking an asset-based approach to legal and social services. Asylees are neither inherently needy nor deficient; they should, however, certainly have access to the support to which they are entitled by domestic and international law. Moreover, though gauging the efficacy of the nation's asylee integration system by the percentage of asylees that access ORR-funded benefits would be reductive and inaccurate, low benefit access rates do serve as a visible symptom of a larger, more insidious problem—a refugee support infrastructure designed to serve resettled refugees, not asylees.

43. ORR's resource library defines case management as "the organization and coordination of a network of formal and informal activities, services, and supports designed to optimize the wellbeing of a person." *See* Office of Refugee Resettlement, Case Management (Mar. 9, 2015), www.acf.hhs.gov/orr/resource/case-management.

44. Of this sum, the affiliate must spend at least $1,175 providing funds to refugee clients or meeting the material needs of refugee clients; the affiliate may spend up to

$1,000 on improving their service offerings for R&P clients. *See* R&P FY 2019 Cooperative Agreement, at 5 (on file with authors).

45. Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29, 101–03 (2016).

46. The lack of R&P support for derivative asylees proves particularly challenging. Following the approval of an I-730 Petition for Refugee/Asylee Relative, a principal asylee often must transition from supporting just herself to supporting an entire family overnight. Many asylees live in major metropolitan areas, including San Francisco, New York City, Miami, and Washington, DC, where the cost of living is very expensive. Lack of R&P support here results in recent asylees and their families struggling to make ends meet while striving to adapt and integrate into their new lives.

47. 78 Fed. Reg. 18457 (Mar. 27, 2013).

48. Asylees granted status through the USCIS asylum offices receive a paper I-94 with the letter informing them of their asylum grant.

49. As of the time of this writing, USCIS has suspended the vast majority of InfoPass I-94 appointments during the COVID-19 pandemic.

50. The continued availability of these fee waivers hinges upon the outcome of ongoing litigation regarding USCIS's August 3, 2020, final rule updating and revising the agency's fee schedule. *See Immigrant Legal Resource Center v. Wolf*, 4:20-cv-05883-JSW (N.D. Cal.).

51. Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29, 55–81 (2016).

52. Notably, the United States fails to meet this standard for other ORR-eligible populations as well. Further research could explore issues in the nation's systems for facilitating the integration of the various other humanitarian immigrant categories, including survivors of trafficking and Cuban and Haitian entrants.

53. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, art. 34, United Nations, Treaty Series, vol. 189, p. 176, www.refworld.org/docid/3be01b964.html.

54. Pub. L. No. 96-212, tit. I, § 101, 94 Stat. 102 (1980) (codified at 8 USC § 1521).

55. This decentralized, state-by-state approach mirrors the (dis)organization of the nation's welfare system as a whole following the welfare policy reforms of the Clinton years. As with refugee resettlement, support for asylees should not be a state but a federal responsibility. *See infra* page 32.

56. Department of Health and Human Services, Grants to States, Child Welfare Services, and Federal Funding for Assistance and Services for Refugees, 51 Fed. Reg. 3904 (Jan. 30, 1986), https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1986/1/30/3900-3917.pdf. These regulations define a refugee as "an individual who meets the definitions of a refugee" and mention the documentation requirements asylees must meet to prove their status.

57. As noted previously, benefit eligibility windows for asylees began on the day they entered the country, but these individuals generally did not have asylum status immediately upon arrival. *See id.*

58. Video interview with AnnaMarie Bena, former Immigration Specialist and Policy Director, ORR, and former Assistant General Counsel in the Office of the General Counsel, HHS, and Eskinder Negash, former Director, ORR (Sept. 30, 2020).

59. State Letter #00-15 clarified that the asylum grant must be final, with no outstanding appeal and with no time remaining in the appeal period.

60. INA § 208(a)(2)(B).

61. Office of Refugee Resettlement, State Letter #00-12 (June 15, 2000), www.acf.hhs.gov/orr/resource/state-letter-00-12.

62. British Prime Minister Margaret Thatcher, a staunch ally of President Reagan, offered perhaps the clearest distillation of her and Reagan's shared neoliberal aims in a 1981 interview with the *Sunday Times*: "What's irritated me about the whole direction of politics in the last 30 years is that it's always been towards the collectivist society. People have forgotten about the personal society. And they say: do I count, do I matter? To which the short answer is, yes. And therefore, it isn't that I set out on economic policies; it's that I set out really to change the approach, and changing the economics is the means of changing that approach. *If you change the approach, you really are after the heart and soul of the nation. Economics are the method; the object is to change the heart and soul*." *See* Margaret Thatcher Foundation, Interview for *Sunday Times* (May 1, 1981), www.margaretthatcher.org/document/104475.

63. *See generally* Odessa Gonzalez Benson, *Refugee Resettlement Policy in an Era of Neoliberalization: A Policy Discourse Analysis of the Refugee Act of 1980*, 90 Social Service Rev. (Sept. 2016).

64. Bena and Negash, *supra* note 58.

65. 8 USC § 1522.

66. *See* Refugee Council USA, Center for Migration Studies, *Charting a Course to Rebuild and Strengthen the US Refugee Admissions Program* 29, https://cmsny.org/wp-content/uploads/2020/12/CMS-and-RCUSA-Report-Charting-a-Course-to-Rebuild-and-Strengthen-the-US-Refugee-Admissions-Program.pdf. Whether or not a refugee continues to receive public assistance, of course, is not at all an accurate measure of integration. Although evaluating different standards for "integration" stands outside of the scope of this article, the authors agree with many of the recently leveled critiques of the resettlement program's understanding of integration, particularly those related to an excessive focus on early employment.

67. Asylees generally must "front" 100% of the funds required for the travel of their derivative asylee family members. Refugees, however, are able to receive a loan for this purpose from the International Organization for Migration. *See* U.S. Department of State, Follow-to-Join Refugees and Asylees, https://travel.state.gov/content/travel/en/us-visas/immigrate/follow-to-join-refugees-and-asylees.html.

68. *See generally* Thomas Gammeltoft-Hansen and Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. on Migration and Human Security 1 (2017), https://journals.sagepub.com/doi/pdf/10.1177/233150241700500103; Lisa Hassan, *Deterrence Measures and the Preservation of Asylum in the United Kingdom and United States*, 13 J. of Refugee Studies 2 (June 2000), https://academic.oup.com/jrs/article-abstract/13/2/184/1546685?redirectedFrom=fulltext.

69. *See* Nicole Einbinder, *Trump Says if Asylum Seekers Don't Like Conditions in Detention Centers, "Just Tell Them Not to Come,"* Bus. Insider (July 3, 2019), www.businessinsider.com/trump-asylum-seekers-dont-like-conditions-detention-centers-shouldnt-come-2019-7; *see also* Lindsay M. Harris, *Asylum Under Attack* (on file with authors).

70. *See* Thomas Gammeltoft-Hansen and Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*; Lisa Hassan, *Deterrence Measures and the Preservation of Asylum in the United Kingdom and United States*.

71. *See, e.g.*, Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, The Washington Post (July 8, 2015), www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime ("When Mexico sends its people, they're not sending their best.... They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists."); Ali Vitali, Kasie Hunt, and Frank Thorp V, *Trump Referred to Haiti and African Nations as "Shithole" Countries*, NBC News (Jan. 11, 2018), www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946 ("Trump questioned why the United States would want people from nations such as Haiti while he was being briefed on changes to the visa lottery system. According to the aide, when the group came to discussing immigration from Africa, Trump asked why America would want immigrants from 'all these shithole countries' and that the U.S. should have more people coming in from places like Norway."); Eugene Scott, *Trump's Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, The Washington Post (Oct. 2, 2019), www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/ ("Privately, the president had often talked about fortifying a border wall with a water-filled trench, stocked with snakes or alligators, prompting aides to seek a cost estimate. He wanted the wall electrified, with spikes on top that could pierce human flesh. After publicly suggesting that soldiers shoot migrants if they threw rocks, the president backed off when his staff told him that was illegal. But later in a meeting, aides recalled, he suggested that they shoot migrants in the legs to slow them down. That's not allowed either, they told him.").

72. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020), www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants. As of the date of this writing, this final rule is preliminarily enjoined, pending litigation. *See CASA de Maryland v. Wolf*, 8:20-cv-02118-PX (D. Md. Sept. 11, 2020).

73. Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J. L. Reform 243 (1984).

74. INS, *Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service* 80 (June 1982) (on file with author) ("By law, refugees and asylees must both meet the same statutory definition. However, in many instances the standard appears to be less strict for refugees overseas than it is for asylum applicants in the United States.").

75. *See, e.g.*, Tom Gjetlen, *President Trump's Idea of Good and Bad Immigrant Countries Has a Historical Precedent*, National Public Radio (Jan. 13, 2018); Ivy Teng Lei, *Time to Break the Myth: There's No Such Thing as a "Good" or "Bad" Immigrant*, The Guardian (Dec. 12, 2017); *see also* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 Geo. Immigr. L.J. 207 (2012).

76. *See, e.g.*, Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, The Washington Post (July 8, 2015), www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-

connecting-mexican-immigrants-and-crime/ ("When Mexico sends its people, they're not sending their best.... They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists.").

77. *See, e.g.*, Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020), www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants; Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851 (May 30, 2007), www.regulations.gov/docket?D=USCIS-2006-0044.

78. Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. of Am. Hist. 1051 (Mar. 2016).

79. 72 Fed. Reg. 29851 (emphasis added).

80. Later USCIS fee schedules continued to instantiate financial discrimination against asylum seekers and asylees. In 2020, for example, the Trump administration attempted to impose widespread fee increases for immigration benefits, including an unprecedented filing fee for asylum seekers; they did not propose a fee in the parallel context for refugees. *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46788 (Aug. 3, 2020), /www.federalregister.gov/documents/2020/08/03/2020-16389/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration. The U.S. District Court for the Northern District of California enjoined the implementation of this rule in September 2020. *Immigrant Legal Resource Center v. Wolf*, 4:20-cv-05883-JSW (N.D. Cal. Sept. 29, 2020, Dkt. No. 98, Order Granting Plaintiff's Motion for Preliminary Injunction and Request for Stay of Effective Date of Rule and Denying Request for Administrative Stay). As of the time of this writing, litigation remains pending.

81. Refugee Admissions by Region, WRAPSnet (Aug. 2020), www.wrapsnet.org/documents/Refugee%20Admissions%20by%20Region%20since%201975%20as%20of%208-5-20.pdf; Department of Homeland Security, Refugees and Asylees FY 2018 and FY 2019 Data Tables, accessible at www.dhs.gov/immigration-statistics/refugees-asylees. Given the proximity of Central America to the United States and the political motivations behind many refugee admissions decisions, it is unlikely that the relationship between these proportions would meaningfully change. That is to say, it is likely individuals from Central America will continue to constitute a far higher proportion of individuals who receive asylum in a year than those admitted as refugees. As such, policy decisions that favor resettled refugees and discriminate against asylees will continue to instantiate hemispheric bias.

82. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *American Baptist Churches v. Thornburg*, 760 F. Supp. 796 (N.D. Cal. 1991).

83. *See generally* Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigration Public Benefit Restrictions*, 97 Denver L. Rev. 1 (2019).

84. National Conference on Citizenship and the Penn Biden Center for Diplomacy and Global Engagement, *A Roadmap to Rebuilding the U.S. Refugee Admissions Program* (Oct. 2020), https://global.upenn.edu/sites/default/files/penn-biden-center/Final%20Report%20-%20A%20Roadmap%20to%20Rebuilding%20USRAP.pdf.

85. Generally, these recommendations fit within the current paradigm of integration supports: they do not include suggestions for modifying ORR's existing benefits

and services, nor do they include recommendations for nongovernmental actors. Such suggestions lie outside of the scope of this article. For such suggestions, see Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29, 118 (2016).

86. In 2016, when DHS moved to provide electronic Form I-94s to refugees, it did not address its failure to do so for asylees. The relevant final rule issued by CBP does state, however, "Eliminating the paper Form I-94 option for asylees, certain parolees, and those travelers who request one would not result in a significant cost savings to CBP." 81 Fed. Reg. 91646, 91667 (Dec. 19, 2016). CBP published this rule before the uptick in asylum grants in recent years (and the associated demand on USCIS staff time arising from the increase in appointments requested by new asylees seeking paper Form I-94s). Thus, transitioning to electronic Form I-94s for asylees may provide some cost savings to the agency now.

87. Because of ORR's per capita funding model, resettlement agencies often compete to serve asylee clients. The implementation of a system like the one described here would likely require ORR and the resettlement agencies to devise a means of equitably distributing clients among providers while still upholding client agency.

88. As described in the second section of this article, ORR provided funding to CLINIC from FY 2001 through FY 2012 to administer the National Asylee Information and Referral Line. The hotline provided information on benefits and other topics to tens of thousands of asylees during its 12 years of operation.

89. *See generally* Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. Rev. of L. and Soc. Change 29 (2016).

90. Precedent exists for extending R&P support to new populations. *See* Afghan and Iraqi Special Immigrants Are Now Eligible for ORR Benefits and Services to the Same Extent and for the Same Time Periods of Time as Refugees, Office of Refugee Resettlement, State Letter #10-02 (Dec. 23, 2009), www.acf.hhs.gov/orr/resource/state-letter-10-02. In addition, with respect to derivative asylees, this R&P-like program should provide financial support to principal asylees prior to the arrival of their family members (to ensure asylee families have adequate housing upon arrival to the United States). Providing this additional support would help equalize the support available to follow-to-join asylees and follow-to-join refugees, two populations that often arrive to the United States in similar ways but that receive very different levels of integration support.

91. Julie Hirschfeld Davis and Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, The New York Times (Sept. 18, 2017), www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html. Unfortunately, the Trump Administration dismissed this study and managed to nearly dismantle the resettlement program in spite of it.

92. 8 USC § 1522(a).

93. The annual reports released by the INS in the decade following the Refugee Act contain various categories of data, including information on asylee adjustments of status, that more recent USCIS reports do not. *See, e.g.*, *Statistical Yearbook of the Immigration and Naturalization Service* 142 (for 1984), https://babel.hathitrust.org/cgi/pt?id=mdp.39015011329565&view=1up&seq=142.

94. Although USCIS and EOIR do occasionally release limited data related to asylum seekers and asylees, the data they release are often inaccurate or incomplete. For example, the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which regularly submits Freedom of Information Act requests to EOIR to gather data

about asylum proceedings before the nation's immigration courts, published a report in October of 2019 indicating that it had discovered "gross irregularities" in data sent by EOIR. *See* TRAC, *Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy* (Oct. 31, 2019), https://trac.syr.edu/immigration/reports/580/. In the same period, USCIS similarly failed to post regular data on affirmative asylum adjudications to its website. USCIS aims to release affirmative asylum statistics on a quarterly basis. In FY 2019, however, the agency waited nine months between releases of these statistics. It similarly has released its annual flow reports at irregular intervals. *See* USCIS, Immigration and Citizenship Data, www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data.

95. *See* Executive Office of Immigration Review, Security Bars and Processing, 85 Fed. Reg. 84160 (Dec. 23, 2020), www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-28436.pdf; *see also* Jeffrey S. Chase, *The Next-Level Shamelessness of the COVID Security Regs* (Jan. 3, 2021), www.jeffreyschase.com/blog/2021/1/3/the-next-level-shamelessness-of-the-covid-security-regs.

96. Laurel Wamsley and John Burnett, *Trump Administration Proposes Rules To Sharply Restrict Asylum Claims*, NPR (June 11, 2020), www.npr.org/2020/06/11/875419571/trump-administration-proposes-rules-to-sharply-restrict-asylum-claims; Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (July 15, 2020), www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review. At the time of this writing, several federal courts have enjoined the implementation of these regulations. *See, e.g.*, *National Immigrant Justice Center, et al. v. Executive Office of Immigration Review, et al.*, 1:21-cv-00056-RBW (D.D.C., Order, Jan. 14, 2021); *Pangea Legal Services, et. al v. DHS, et. al.*, 3:20-cv-09253-JD (N.D. Cal., Order, Jan. 8, 2021).

97. UNHCR, *Global Trends: Forced Displacement in 2019*, www.unhcr.org/globaltrends2019/.

# Present Yet Unprotected

## USCIS's Misinterpretation of the T Visa's Physical Presence Requirement and Failure to Protect Trafficking Survivors

Corie O'Rourke, Cory Sagduyu, and Katherine Soltis*

**Abstract:** U.S. Citizenship and Immigration Services (USCIS) has failed to protect trafficking survivors applying for T nonimmigrant status by changing its interpretation of the T visa's "physical presence" requirement. The article reviews the history of the Trafficking Victims Protection Act (TVPA), which Congress passed to provide humanitarian protection to foreign-born trafficking survivors and encourage them to cooperate with law enforcement, and T visa regulatory requirements. The authors conclude that USCIS's recent interpretation of the physical presence requirement conflicts with the TVPA's statutory history and existing T visa regulations. Further, USCIS's misinterpretation of the physical presence requirement combined with other policies enacted by the Trump administration has curtailed protections for trafficking survivors, and the authors advocate for a reversal of these changes under the Biden administration.

## Introduction

The Trump administration enacted sweeping changes making it harder for foreign-born trafficking survivors to obtain legal status in the United States and discouraging trafficking survivors from reporting crimes. One such change involved a sudden and abrupt shift in the U.S. Citizenship and Immigration Services's (USCIS) interpretation of the "physical presence" requirement of the T visa, a nonimmigrant visa that provides legal status to foreign-born human trafficking survivors.

Under the Trafficking Victims Protection Act (TVPA) and federal regulations, applicants for T visas must prove not only that they are victims of trafficking, but also that they are "physically present in the United States . . . on account of such trafficking,"[1] among other requirements. Prior to the Trump administration, USCIS interpreted the "physical presence" requirement broadly and generally found that trafficking survivors satisfied this requirement so long as the applicants had been subjected to trafficking in the United States in the past and had not left the United States since escaping or being liberated from their traffickers. However, under the Trump administration, USCIS changed its interpretation of the physical presence requirement with no public

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announcement or warning. The agency began denying T visa applications if more than a few years had passed since the applicant had escaped the traffickers before applying for a T visa, despite the absence of any explicit T visa filing deadline in the TVPA or federal regulations.

One case illustrates the impact of this narrow interpretation of the physical presence requirement. Anita[2] fled gender-based violence in her home country of Honduras in 2000 and sought protection in the United States. She worked as a waitress in a restaurant from 10 a.m. until 2 a.m. without breaks and was only paid with tips. The manager of the restaurant was physically, verbally, and psychologically abusive. Anita was barred from leaving the restaurant for any reason, and her every move was monitored throughout the day. Anita's manager threatened to call the police and have her deported if she did not obey him. New to the United States, Anita did not know anyone outside of the restaurant, could not speak English, and was terrified. Anita escaped the constant abuse of her employers with the help of a customer in 2001.

For the next 16 years, Anita scraped together a living while struggling with the lasting mental and physical effects of having been subjected to labor trafficking. Anita had never heard the term "human trafficking," and, even though she sought assistance from two immigration lawyers, she was not identified as a trafficking survivor[3] for many years. She lived in constant fear of being deported by immigration officials. She struggled with post-traumatic stress disorder (PTSD), depression, and anxiety, but had not previously heard of these illnesses and was unaware of available mental health services.

In 2017 Anita sought legal assistance at Ayuda, an organization that provides immigration legal representation in the Washington, DC, metropolitan area, and was identified as a labor trafficking survivor.[4] That same year, Anita reported her traffickers to the police, participated in an investigation, and sought protection from USCIS by applying for a T visa. However, while Anita's T visa application was pending, USCIS began narrowing its interpretation of the physical presence requirement and denying relief to applicants who did not come forward for several years after the trafficking occurred. USCIS denied Anita's application, leaving her undocumented, at risk of being put in removal proceedings, and vulnerable to future abuse and exploitation.

USCIS's change in interpretation has affected trafficking survivors nationwide. Appeals to the Administrative Appeals Office (AAO) involving the physical presence requirement rose sharply[5] following this change in interpretation, amounting to nearly one-half of all T visa appeals in 2020. Additionally, there is at least one recent federal court case contesting USCIS's changed interpretation of the physical presence requirement, claiming it constitutes an unlawful interpretation of regulations.[6]

Despite the drastic impact of this change, little has been written about it. This article aims to create awareness of USCIS's harmful misinterpretation of the physical presence requirement and advocate for USCIS, and the Department of Homeland Security (DHS) more broadly, to realign its interpretation

of the physical presence requirement with the federal regulations and the TVPA. First, this article will provide background on the TVPA, which created the T visa to protect foreign-born trafficking survivors and encourage their cooperation with law enforcement. Second, drawing from extensive experience representing T visa applicants and an analysis of AAO decisions, the article will demonstrate how USCIS has been interpreting the physical presence requirement in a way that is contrary to the plain language of the regulations and conflicts with the intent of the TVPA. Third, the article will describe how, in tandem with other policies implemented under the Trump administration, USCIS's change in interpretation has curtailed protections for trafficking survivors and hindered law enforcement's ability to investigate and prosecute trafficking cases.[7] Finally, the article will explain that, despite a handful of promising nonprecedential AAO decisions regarding this requirement, appealing to the AAO is not a viable or realistic option for most trafficking survivors. As a result of these legal hurdles, trafficking survivors nationwide are frequently being denied protection or are discouraged from applying for protection in the first place.

## Background of the TVPA and T Visa

In 2000, Congress created the T visa as part of the TVPA, a comprehensive piece of bipartisan legislation that sought to fight sex and labor trafficking both in the United States and abroad.[8] The TVPA was passed on the heels of and mirrored the primary international legal protection against trafficking, The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children [hereinafter, Palermo Protocol],[9] which was adopted by the United Nations in 2000 and entered into force in 2003.[10] Both the TVPA and the Palermo Protocol adopted a three-pronged approach (often called the "3 P approach") to fight trafficking: prosecution of traffickers, protection of victims, and prevention of trafficking.[11] In line with this three-pronged approach, the main provisions of the TVPA and its subsequent reauthorizations include: increased criminal penalties for traffickers,[12] financial assistance and case management services for survivors from the Department of Health and Human Services (HHS),[13] the creation of the T visa as an immigration remedy for foreign-born trafficking survivors, and a private right of action for trafficking survivors.[14]

The creation of the T visa was a crucial part of Congress's strategy to encourage cooperation between foreign-born trafficking survivors and law enforcement agencies (LEAs). Congress recognized that foreign-born individuals were vulnerable to trafficking due to their unfamiliarity with U.S. laws, inability to speak English, and isolation; however, because of their fear of immigration enforcement, foreign-born trafficking survivors often feared reporting to LEAs and seeking critical assistance when they were victimized.[15]

In response to this problem, Congress created the T visa as a legal remedy to provide legal status to trafficking survivors who cooperate with LEAs.[16]

The T visa provides four years of nonimmigrant status and a path to permanent residency for the principal trafficking survivor and certain family members. To be eligible for a T visa, the applicant must demonstrate that he or she: (1) was a victim of a "severe form of trafficking," as defined in the TVPA, which includes both sex and labor trafficking;[17] (2) is physically present in the United States on account of trafficking; (3) has not unreasonably refused to cooperate with an LEA, with limited exceptions; and (4) would "suffer extreme hardship involving unusual and severe harm upon removal."[18] The TVPA defines a "severe form of trafficking" as:

> sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[19]

Subsequent reauthorizations of the TVPA have consistently expanded the group of potential applicants eligible for T nonimmigrant status.[20] The TVPA places an annual cap of 5,000 visas per year—a cap that has never been reached.[21]

The T visa is very advantageous compared to other forms of immigration relief. Prior to the Trump administration, the processing time for T visas was between six months and a year—much shorter than for most other types of relief.[22] Unlike with the U visa, the annual cap of 5,000 visas has never been met, resulting in much faster processing times. Additionally, upon approval of their T visa application, T visa recipients become eligible for a host of public benefits that allow them to stabilize and heal from the trauma of trafficking. T visa holders can apply to adjust their status to lawful permanent residence either after three years in T nonimmigrant status or after receiving an attorney general certification that the investigation or prosecution is complete; as a result of this provision, many T nonimmigrant recipients can apply for their residency just a few months after receiving their initial T visa, which provides another source of long-term stability.

Since the TVPA's inception, both scholars and practitioners have lamented how the humanitarian goals of the TVPA[23] have been hindered by the U.S. government's competing goal of immigration enforcement and by an overemphasis on trafficking prosecutions. Several articles have found fault with the premise of the T visa altogether, as it limits protections, with few exceptions, to survivors who have cooperated with LEAs rather than being a purely humanitarian form of relief for all trafficking survivors.[24] Other scholars have criticized how LEAs tasked with identifying survivors and investigating and prosecuting perpetrators have primarily focused on sex trafficking and the idea of a "perfect victim," a stereotypical view "involving a trafficking victim who

is under the full control of traffickers … for sex work."[25] Finally, and most relevant to this article, practitioners and scholars have faulted how immigration enforcement efforts have continually impeded the humanitarian goals of the TVPA, with Jennifer Chacón explaining:

> U.S. immigration law and policy unintentionally helps traffickers assert control over victims once those victims are in the United States. Unauthorized peoples are more vulnerable to threats because they know that efforts to seek legal recourse can result in protracted immigration detention, criminal prosecution, and, of course, removal. The legal limbo of unauthorized migrants has left many migrant laborers reluctant to report crimes and labor violations.[26]

Criticism stemming from the competing goals of immigration enforcement and humanitarian protection increased as the Trump administration prioritized immigration enforcement to the detriment of trafficking survivors. By placing applicants whose cases were denied in removal proceedings, issuing substantially more requests for evidence (RFEs) and denials, and creating an overwhelming climate of fear for immigrants, the Trump administration both denied protection to many trafficking survivors and deterred others from applying for relief and reporting to law enforcement. The Biden administration has already taken some initial steps to begin undoing these harms. However, without comprehensive immigration reform, it may take years to undo the damage inflicted by the Trump administration. Below, the article turns to an examination of one of the T visa requirements whose changing interpretation by USCIS has resulted in hardships for both trafficking survivors and LEAs.

## Recent Misinterpretation of the Physical Presence Requirement

USCIS has quietly undermined the federal regulations and the TVPA with its recent interpretation of the physical presence requirement for T visa applicants. USCIS has (1) imposed a de facto filing deadline, (2) ignored a regulatory change that removed the previous requirement that T visa applicants show they did not have an "opportunity to depart" the United States, (3) failed to adopt a trauma-informed approach, and (4) failed to take into consideration key provisions of the physical presence requirement.

### USCIS Began Imposing a De Facto Filing Deadline

Under the federal regulations, an applicant for T nonimmigrant status is physically present in the United States on account of trafficking when the applicant: (1) is present because he or she is currently being subjected to a

severe form of trafficking, (2) was liberated from a severe form of trafficking by an LEA, (3) escaped a severe form of trafficking in persons before an LEA was involved, (4) was subject to a severe form of trafficking "at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons," or (5) is present on account of having been allowed entry into the United States for participation in investigation "or judicial process associated with an act or perpetrator of trafficking."[27]

USCIS previously interpreted the physical presence requirement more broadly. If the trafficking occurred in the United States and the trafficking survivor had not left the United States since the trafficking occurred, USCIS would generally find that the applicant satisfied the physical presence requirement.[28] However, since 2018, USCIS has issued RFEs and denials based on the physical presence requirement in many cases when the trafficking survivor applied for a T visa more than a few years after escaping their trafficker. This interpretation is at odds with both the regulations and the TVPA.

Without any notice or opportunity to comment, USCIS began imposing a de facto filing deadline despite the absence of any such deadline in the TVPA or the federal regulations. Trafficking survivors who had escaped or were rescued from their traffickers more than a few years before filing a T visa application frequently began receiving RFEs and denials in which USCIS questioned whether the applicants were physically present on account of trafficking because of the length of time that had passed before applying for relief.[29] Additionally, in many RFEs and denials, USCIS has inserted *ultra vires* language. For example, RFEs have incorrectly stated that federal regulations require the trafficking survivor to have been "*recently* liberated by an LEA" to meet the physical presence requirement, although federal regulations only state that the person needs to have been "liberated by an LEA," without any time limits or qualifiers.[30]

USCIS's actions in these cases contradict existing law and federal regulations. Congress specifically did not include a statutory filing deadline when creating the T visa. Moreover, DHS initially included a filing cutoff date for T visa applications in the regulations but intentionally removed the cutoff date in 2017 in order to make protections more available to survivors.[31] Federal regulations previously required adults who were victims of trafficking prior to October 28, 2000, to file their T visa application before January 31, 2003, unless there were exceptional circumstances.[32] In removing this cutoff date, DHS sought to make it *easier* for trafficking survivors who had been victimized several years in the past to obtain immigration relief; instead, the opposite has occurred.

Cases like Adele's illustrate this problem. Adele came to the United States as a domestic worker for a foreign dignitary in the 1990s. After Adele arrived in the United States, her employer withheld her passport, prevented her from leaving the home, and forced her to work for 14 hours per day for only $200 per month. Adele sought legal protection in 2016, prior to the change in the federal regulations, and was concerned about applying due to the cutoff date.

However, she decided to apply for a T visa after DHS removed this requirement, as it appeared that she then qualified for relief. Now, given USCIS's imposition of a de facto filing deadline, she has received an RFE regarding physical presence and is nervously awaiting a final decision in her case.

## Although DHS Removed a Requirement That Applicants Show They Did Not Have the "Opportunity to Depart" the United States, USCIS Instead Began Heavily Scrutinizing Why Applicants Had Not Left the United States After Leaving Their Traffickers

Under the Trump administration, USCIS ignored another regulatory change that was intended to make it easier for T visa applicants to satisfy the physical presence requirement. Prior to 2017, the federal regulations required applicants who had escaped their traffickers before an LEA became involved to demonstrate that they had not had an "opportunity to depart" the United States or a "clear chance to leave."[33] Under the previous standard, USCIS could examine "circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers" to determine whether the applicant had a "clear chance to leave."[34] In new regulations that went into effect on January 18, 2017, DHS removed the "opportunity to depart" regulatory requirement, recognizing in doing so that the requirement was "unnecessary and may be counterproductive."[35]

Notwithstanding this change in the federal regulations, which was meant to make it easier to qualify for T status, USCIS shortly thereafter began issuing an increasing number of RFEs on the physical presence requirement. These RFEs seemingly require many T visa applicants—not just those who had escaped their traffickers before an LEA became involved—to show they had not had an opportunity to depart the United States. USCIS has included language in RFEs and denials questioning why T visa applicants lack the resources to leave the United States or are unable to leave, despite the regulatory change four years ago that specifically removed the requirement to provide such evidence.

## USCIS Has Failed to Adopt a Trauma-Informed Approach in Considering Why T Visa Applicants' Physical Presence in the United States Is Directly Related to the Trafficking

In issuing RFEs and denials, USCIS has focused heavily on the fourth of the five ways listed in the federal regulations about how applicants can demonstrate that they meet the physical presence requirement. Under the fourth provision, an applicant will be considered physically present if he or

she was subjected to trafficking "at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons."[36] Drawing from a consideration of the authors' cases and AAO decisions, this section will explore how USCIS has frequently discounted and ignored factors like trauma, lack of awareness of services and rights, financial insecurity, and access to the U.S. justice system in determining whether trafficking survivors' continued presence is directly related to the trafficking.[37]

### *Trauma*

Trafficking often results in a deep sense of mistrust toward others, which may hinder survivors from seeking assistance for many years.[38] Trafficking survivors are frequently unaware of available mental health services. Language and cultural barriers may also delay or prevent trafficking survivors from accessing psychological services.[39] For example, Anita, discussed in the introduction, struggled with PTSD and depression for 16 years due to her trafficking victimization until her immigration attorney referred her to a therapist for mental health services. However, even though Anita submitted a psychological evaluation, a letter from her therapist about her ongoing need for treatment, and a letter from her case manager about the trafficking-specific social services she receives, USCIS still found that her physical presence in the United States was not directly related to the trafficking.

Additionally, instead of recognizing the difficulties trafficking survivors face in accessing mental health services, USCIS has instead cast doubt on the credibility of trafficking survivors who did not seek mental health services for many years after the trafficking. For example, the AAO recently reversed a USCIS decision that concluded an applicant's physical presence was not directly related to trafficking, even when the applicant was receiving mental health care, because the USCIS director believed the applicant "only sought mental health care for the purpose of filing his T application."[40] USCIS should consider how trafficking leads to trauma that may delay trafficking survivors from filing T visa applications earlier, and how receiving mental health services to address trauma that resulted from trafficking is one way a survivor may demonstrate they are still in the United States on account of trafficking.

### *Lack of Awareness of Available Services and Rights*

Many trafficking survivors do not file for T nonimmigrant status or receive trafficking-related services for several years after escaping their traffickers because they are unaware of available services and their rights in the United States. DHS itself has recognized that trafficking survivors may "not identify themselves as a victim."[41] Similarly, a survey of labor trafficking survivors found that "[e]ven though labor trafficking victims are afforded protection under

US law, victims were not aware that (1) the victimization they experienced was labor trafficking, (2) labor trafficking is a crime, and (3) they had rights and protections under the law regardless of their immigration status."[42] For example, in Anita's case, she knew that she had been treated wrongly, but she was not aware that her employers' actions were criminal in nature or that there were legal protections available to her.

It is not only trafficking survivors who lack knowledge about available services and their rights, but also organizations responsible for identifying trafficking survivors, including first responders, social workers, immigration attorneys, and even LEAs. Disturbingly, many survivors have reported trafficking to agencies within DHS itself before coming to Ayuda, yet these agencies frequently have not referred them to legal or social services. For example, several survivors were subjected to labor and sex trafficking by smugglers they initially employed to bring them to the United States. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) had apprehended these trafficking survivors near the border and either put them in removal proceedings or ordered them expeditiously removed. In many of these cases, trafficking survivors assisted CBP and ICE with investigating their traffickers, yet CBP and ICE never identified them as trafficking survivors or referred them to services. When they applied for immigration relief years later, USCIS—also within DHS—issued RFEs stating that the individuals were no longer physically present on account of trafficking because of the intervening years.

USCIS should recognize that a lack of awareness of legal protections in the United States may delay survivors from filing a T visa application. Further, USCIS should recognize that survivors and even LEAs may not properly identify individuals as trafficking survivors, which causes more time to pass before an applicant realizes that they may qualify for a T visa.

### *Financial Insecurity and Debt*

Trafficking survivors often remain in the United States for years after the original trafficking due to financial insecurity and debt resulting from trafficking victimization. Many survivors escape their traffickers with nothing more than the clothes they are wearing. Other survivors have accrued tens of thousands of dollars in debt in order to pay recruitment agencies for jobs that never materialized. Instead, these survivors are often forced into other jobs where they continue to amass debt to their recruiters and employers. Once trafficking survivors have escaped their trafficker, a top priority is generally earning money for basic necessities such as food and housing. As a result of financial insecurity, "some victims … forgo immigration relief and instead remain unauthorized and move to wherever they could find work."[43]

However, USCIS frequently does not consider how "chronic financial insecurity characterizes formerly trafficked persons' lives in the US not only in

the short term, but also years into their resettlement."[44] For example, a recent AAO decision reversed USCIS's decision that a T visa applicant was not physically present as he would "suffer hardships in the Philippines [due to his] . . . fear of the recruiters there, and inability to repay the loans he owes to family members for recruiting fees."[45] Similarly, another trafficking survivor, Marco, borrowed $4,000 from a lender in El Salvador to pay a smuggler to come to the United States, where he was promised employment. However, upon arriving in the United States, Marco's employer forced him to pay for items such as housing and food at extremely high rates. Marco ultimately ended up paying his employer $20,000 over the next four years until he escaped from his employer with virtually no money of his own. USCIS ignored Marco's statements regarding the long-term financial insecurity he experienced after his escape and his fear of his lender in El Salvador, instead issuing an RFE alleging that he was not physically present in the United States on account of trafficking because of the intervening years. USCIS should recognize that financial insecurity and debt caused by trafficking victimization may delay a trafficking survivor from filing a T visa application.

### *Access to U.S. Justice System*

Another important factor that should establish that trafficking survivors' physical presence in the United States is directly related to the original trafficking is that trafficking survivors must stay in the United States to cooperate with LEAs and to access the U.S. justice system. However, despite Congress's clearly stated goal of encouraging cooperation between foreign-born trafficking survivors and LEAs in the TVPA, USCIS has instead discounted and ignored this as a manner of establishing physical presence.

In many instances, traffickers use threats of harm to the trafficking survivor and their family members in their country of origin to dissuade the trafficking survivor from cooperating with law enforcement. In these cases, the trafficking survivor must stay in the United States both to assist with the investigation and prosecution and to receive protections from the U.S. justice system that would not be available in their home country. For example, Gina escaped her trafficker by calling the police when her trafficker physically attacked her. Gina received a protective order against her trafficker and was a witness in the prosecution against him.[46] Gina submitted evidence of her cooperation with law enforcement and her ongoing protective order against her trafficker, who she feared would be able to retaliate against her in her home country of Peru. Despite this evidence, USCIS issued an RFE alleging that she had failed to submit sufficient evidence demonstrating that her presence in the United States was directly related to trafficking.

As the U.S. Department of State (DOS) has recognized, the ability to hold their traffickers accountable is imperative for many trafficking survivors in the recovery process:

> While governments cannot undo the pain and indignity victims face, they can seek to right those wrongs through official acknowledgment of injustice and by prosecuting, convicting, and sentencing traffickers and those complicit in human trafficking. In taking these measures, governments provide justice for victims, create more stable societies to keep the vulnerable safe, and work towards a world free from modern slavery.[47]

Additionally, the TVPA requires federal courts to order restitution in trafficking prosecutions in the "full amount of the victim's losses,"[48] which has been recognized by DOS as "key to justice [and] key to rebuilding a life."[49] Similarly, many trafficking survivors nationwide need to remain in the United States to pursue civil suits against their traffickers, and the civil cause of action "has become a potent and essential weapon in the fight against human trafficking . . . [and] has permitted trafficking survivors to hold traffickers accountable who would otherwise have enjoyed total impunity."[50]

By denying T visa applications filed by survivors who wish to remain in the United States to access the U.S. justice system, USCIS is hindering both of the goals of the TVPA. Trafficking survivors are not receiving protection, and as discussed further below, LEAs are unable to investigate and prosecute the perpetrators.

### USCIS Has Ignored Several Provisions in the Regulations That Establish Physical Presence

USCIS has often ignored provisions in the regulations that establish physical presence and instead only focused on the fourth provision in the regulation requiring the applicant demonstrate his or her "continuing presence in the United States is directly related to the original trafficking in persons."[51] However, the reach of the federal regulations is broad in nature, as the regulations include both applicants who "escaped an act of trafficking before an LEA became involved,"[52] and applicants who were "liberated from a severe form of trafficking by an LEA."[53] Read together, these two provisions include all trafficking survivors. However, USCIS has issued several RFEs and denials that supposedly cite the regulations but omit these two provisions, instead focusing solely on one of the five ways to establish physical presence.[54]

## Harmful Effects of USCIS's Interpretation on Trafficking Survivors and LEAs

USCIS's changing interpretation of the physical presence requirement—in tandem with other policies—has had devastating effects on trafficking survivors

and LEAs. Perhaps the most harmful policy for immigrant trafficking survivors enacted by the Trump administration was the implementation of the "NTA Memo" (Notice to Appear) in 2018, which greatly expanded the situations in which USCIS officers were directed to initiate immigration enforcement against individuals whose applications for relief were denied.[55] Prior to this memorandum, an undocumented trafficking survivor could apply for a T visa and not be put in removal proceedings if the application was denied. However, the NTA Memo, coupled with the staggering number of T visa denials under the previous administration, has resulted in trafficking survivors being put into removal proceedings and has discouraged other trafficking survivors from applying for T visas and reporting to law enforcement in the first place.

The Biden administration has issued a recent memorandum directing DHS to conduct a review of its policies and practices concerning immigration enforcement.[56] Part of this memorandum rescinded and superseded several prior DHS memoranda, including the 2018 NTA Memo.[57] Rescinding the NTA Memo was an important first step in removing barriers for trafficking survivors to obtain immigration relief. However, more changes are necessary to address the full scope of the harm inflicted by the previous administration. Trafficking survivors who had a legal consultation during the time that the NTA Memo was in place were often hesitant to apply for a T visa based on the heightened risk created by the NTA Memo, and may have lost years that they could have had legal status. Additionally, some survivors whose T visa applications were denied while the NTA Memo was in effect were placed in removal proceedings. Rescinding the NTA Memo does not have any immediate impact on their cases, and they still have to seek alternative forms of relief in immigration court, or face deportation.

Additionally, even though many trafficking survivors ultimately receive T visas after overcoming RFEs, both survivors and the immigration bar are still negatively affected by USCIS's quiet revision of the legal requirements and increased number of RFEs. For T visa applications USCIS began issuing RFEs almost as a matter of course, many of which involve the physical presence requirement. Data provided by USCIS indicates that 6,027 T visa principal applications and 5,471 derivative applications were received between fiscal year (FY) 2015 and FY 2019, for a total of 11,498 applications.[58] According to data provided by the acting director of USCIS in September 2019, USCIS issued an overwhelming 7,063 RFEs to principal and derivative T applicants between FY 2015 and July 2019.[59] Responding to increased and frequently unnecessary RFEs burdens applicants and their legal representatives, who are often nonprofit legal service providers with limited resources.

Partially as a result of the increased number of RFEs, estimated processing times for T visa applications rose from less than 12 months in 2016 and 2017 to between 19 and 29 months by January 2021.[60] This delay in adjudication leaves trafficking survivors without status for significantly longer periods of time, which affects their ability to obtain employment authorization,

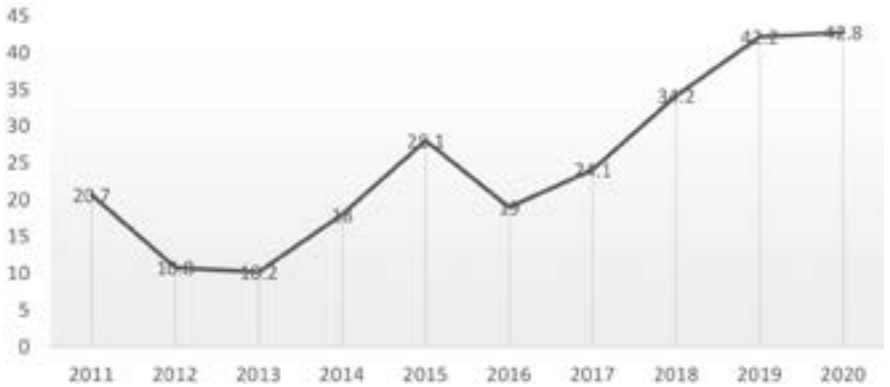
identification documents, and public benefits associated with T visa status. This leaves survivors vulnerable to future abuse and exploitation.

Adjudication delays are particularly problematic when the applicant is in removal proceedings. Starting in mid-2017, Attorneys General Sessions and Barr enacted policies to limit immigration judges' ability to grant continuances and requests for administrative closure in removal proceedings and imposed case completion quotas and time-based deadlines on cases.[61] There have been reports of survivors with pending T visa applications or appeals being removed from the United States.[62] Such actions eliminate their eligibility for T visa status, deny them due process, and leave them vulnerable to additional future abuse.

Of particular concern, the T visa denial rate also began to increase dramatically following the administration change in January 2017. The denial rate of adjudicated cases for survivors of trafficking for FY 2016 was 19 percent. In FY 2017, the denial rate rose to 24.1 percent. The trend has continued, with denial rates of 34.2 percent and 42.2 percent for FY 2018 and 2019, respectively. The denial rate for FY 2020 (the most current data available) is a record high of 42.8 percent (see Figure 1).[63] No explanation for this increase in denials has been provided by USCIS. Further, no published regulations, policies, or programmatic changes explain the increase in denial rates.

The combination of increased denials, the harmful changes mentioned above, and an increasingly hostile immigration environment has resulted in fewer reports by trafficking survivors to LEAs and applications for immigration relief.[64] According to research done by the American Civil Liberties Union and the National Immigrant Women's Advocacy Project, 64 percent of law enforcement officers surveyed said that human trafficking had become more difficult to investigate due to increasing immigration enforcement under the current administration. Additionally, 55 percent of prosecutors surveyed said that human trafficking is now underreported and harder to investigate and/or

**Figure 1.** Percentage of Adjudicated T Visa Cases That Received Denials by Fiscal Year



prosecute due to survivors' increased fear of immigration consequences.[65] The success of prosecutions also depends largely on the cooperation of survivors and their ability to remain in the United States. In human trafficking investigations and prosecutions, "the central piece of evidence is victim testimony. Indeed, often this may be the main or only evidence available. Even when other kinds of evidence are submitted, victim testimony is often necessary to explain them."[66]

The chilling effect of these damaging changes is reflected in a decrease in T visa applications that were filed in 2019 and 2020. Based on the data available from FY 2019 and FY 2020, the number of T visa applications filed has decreased for two years in a row for the first time since 2008, when the available data set begins.[67]

## AAO Decisions

If a T visa application is denied, the trafficking survivor has the option of appealing the case to the AAO. Because of the high number of T visa denials in recent years, particularly denials relating to the physical presence requirement, physical presence has been the subject of many recent nonprecedential AAO decisions.[68] Notably, of the 50 AAO nonprecedential decisions about T visa applications in calendar year 2020, physical presence was mentioned in 26 decisions and was the basis of the appeal in 20 of the cases.[69] Despite several recent promising AAO decisions, many trafficking survivors are unable to obtain protection from the AAO due to the nonprecedential nature of these decisions, other contradictory decisions, a relatively low likelihood of success, and the costly fee.

Several of the AAO's recent nonprecedential decisions on physical presence have been promising. The agency has sustained or remanded several cases to USCIS to readjudicate the case correctly, by considering relevant factors that hinder an applicant's ability to apply for immigration relief, including the applicant's ongoing need for mental health and social services in the United States, financial hardship preventing the applicant from leaving the United States, and whether a delay in filing is due to the applicant's lack of knowledge of available legal services and his or her rights.[70]

However, the AAO's decisions have been inconsistent, with some that appear to misinterpret the regulations[71] and others that do not include an understanding of the lasting challenges that result from trafficking. For example, one decision recognized that the applicant "suffers from Generalized Anxiety Disorder and Posttraumatic Stress Disorder (PTSD) and experienced an increase in anxiety and nightmares with night sweats after his trafficking ended that continues to the present," yet found that the applicant's continued presence was not directly related to the trafficking because the applicant was financially supporting his family and had steady employment.[72]

Based on an overview of data from the past several years, there is a low likelihood of success at the AAO. Between FY 2017 and FY 2020, the AAO adjudicated 152 appeals of I-914s, Application for T Nonimmigrant Status (16 in FY 2017, 47 in FY 2018, 52 in FY 2019, and 37 in FY 2020).[73] Of those appeals, 133 were dismissed (87.5 percent of the adjudicated appeals), one was sustained, and 18 were remanded back to USCIS for readjudication.[74] Additionally, of the 20 AAO decisions that focused on physical presence in calendar year 2020, 15 were dismissed and only 5 were remanded to USCIS.[75] Thus, although some recent AAO opinions have considered the challenges trafficking survivors experience and the need for specialized services, these cases represent only a handful of the hundreds of trafficking cases filed each year.

Further, the filing fee for an AAO appeal as of February 2021 is $675, which is often impossible for a trafficking survivor to pay. While there is a possibility of filing a fee waiver application, the short appeal time frame and uncertainty of whether the fee waiver will be granted deters survivors from trying to get the fee waived. Although fee waivers were routinely granted by USCIS in the past, practitioners began reporting that fee waiver requests for their clients began getting denied with increasing frequency beginning in 2018. Fee waivers were even denied for applicants with no income, such as homeless individuals, minors, and individuals in immigration detention.[76]

Additionally, there is no immigration protection during the T visa appeals process, and, as mentioned above, some T visa applicants have been deported while they were waiting for a decision on their appeal.[77] Given these obstacles, it is important for USCIS to realign its interpretation of the physical presence requirement with the language in the federal regulations and the TVPA so that trafficking survivors are able to obtain the relief they need without unnecessary delay.

## Conclusion

USCIS's increasingly narrow interpretation of the physical presence requirement is contrary to law and regulations, and it erodes protections for trafficking survivors. Congress created the T visa to protect trafficking survivors and encourage them to cooperate with LEAs to hold traffickers accountable. However, USCIS's increasingly narrow interpretation of the physical presence requirement thwarts Congressional intent and exerts a chilling effect on both T visa applications and trafficking prosecutions.

The Biden administration should quickly reverse the harmful policies and practices that have left trafficking survivors vulnerable. Many of the changes made by the Trump administration happened quietly, escaping the attention of the media and the public. However, these insidious changes are preventing one of the most vulnerable populations in the United States—immigrant survivors of trafficking—from accessing the protections they are entitled to under the TVPA.

## Notes

* Corie O'Rourke (corie.orourke@ayuda.com) is a supervising immigration staff attorney at Ayuda. She provides direct representation to immigrants in both affirmative and defensive humanitarian and family-based immigration cases. She regularly presents on domestic violence, child abuse, and human trafficking. Ms. O'Rourke received her juris doctorate from the University of Oklahoma College of Law, as well as her bachelor's degree in International Studies *cum laude* and master's degree in International Studies from the University of Oklahoma College of International Studies. Cory Sagduyu (csagduyu@hrionline.org) represents children in their immigration cases as a children's program attorney at the Human Rights Initiative of North Texas, a nonprofit organization that provides free legal and social services to low-income immigrants in the Dallas area. She previously worked at Ayuda as a Skadden Fellow, where she represented survivors of trafficking, domestic violence, and other crimes in a variety of matters before USCIS, immigration courts, and juvenile and domestic relations courts. She graduated from the University of Virginia School of Law and received her bachelor's degree from the University of Texas at Dallas. Katherine Soltis (katie.soltis@ayuda.com) is a supervising immigration attorney at Ayuda, a nonprofit organization that advocates for low-income immigrants through legal, social, and language access services in the Washington, DC, metropolitan region. She graduated *cum laude* from Harvard Law School and obtained her bachelor's degree from Duke University. She represents both child and adult survivors of trafficking in a variety of matters before USCIS, the Arlington Immigration Court, and Virginia juvenile and domestic relations district courts. She previously served on the steering committee for Freedom Network USA, a national alliance of advocates advancing a human-rights approach to human trafficking.

1. INA § 101(a)(15)(T); 8 CFR § 214.11(g).

2. All names and identifying information have been changed to protect confidentiality.

3. The authors have chosen to use the language of survivor rather than victim, whenever possible. In direct quotes, the authors use the original language from the source.

4. Ayuda is a well-established provider of legal and social services to victims of human trafficking in Washington, DC, Virginia, and Maryland. With funding from the Department of Justice's Office for Victims of Crime (OVC), Ayuda has represented over 300 trafficking survivors since 2015. These survivors come from over 30 countries and include labor-trafficked domestic workers, immigrant youth forced to perform commercial sex or labor by family members, foreign-born women subjected to forced prostitution by gangs and others, and LGBTQ individuals whose traffickers threatened to have them deported to a country where they would face certain persecution.

5. U.S. Advisory Council on Human Trafficking, *Annual Report 2020*, www.state.gov/wp-content/uploads/2020/07/United-States-Advisory-Council-on-Human-Trafficking-2020-Annual-Report.pdf.

6. Complaint, *Doe v. Wolf et al.*, No. 3:20-cv-00481 (W.D.N.C. Oct. 28, 2020) (voluntarily dismissed after USCIS reopened and approved plaintiff's T visa application); Michael Gordon, *Lured to U.S. at 16, She Sought Visa for Trafficking Victims. Now She May Be Deported*, The News & Observer (Sept. 11, 2020), www.newsobserver.com/article245622580.html.

7. *See* U.S. Dep't of State, *Trafficking in Persons Report June 2019*, www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf; Kathryn

Finley, *Access to Justice in a Climate of Fear: New Hurdles and Barriers for Survivors of Human Trafficking and Domestic Violence*, Center for Migration Studies, http://doi.org/10.14240/cmsesy012919.

8. Louis Henkin et al., *Human Rights* 242 (2nd ed. 2009).

9. The United States signed the Palermo Protocol on December 13, 2000, and ratified it on November 3, 2005. *See United Nations Treaty Collection, Status of Treaties, 12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (Nov. 15, 2000), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

10. *Id.*

11. *See* U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, *3Ps: Prosecution, Protection, and Prevention*, www.state.gov/3ps-prosecution-protection-and-prevention/. *See also* Paula Renkiewicz, *Sweat Makes the Green Grass Grow: The Precarious Future of Qatar's Migrant Workers in the Run Up to the 2022 FIFA World Cup Under the Kafala System and Recommendations for Effective Reform*, 65 Am. U. L. Rev. 721, 737 (2016).

12. The TVPA increased the criminal sentences for trafficking crimes that already existed, including: 18 USC § 1581, peonage and obstructing enforcement; § 1582, providing vessels for the slave trade; § 1583, enticement into slavery; § 1584, sale into involuntary servitude; and § 1589, forced labor. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L. Rev. 2977, 2992 (2006). The TVPA added criminal statutes, including: 18 USC § 1590, trafficking with respect to peonage, slavery, involuntary servitude, or forced labor (knowingly recruiting, harboring, transporting, providing, or obtaining any person for labor or services); § 1591, sex trafficking of children by force, fraud, or coercion; § 1592, unlawful conduct with regard to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor (knowingly destroying, concealing, removing, confiscating, or possessing any passport or immigration document in the course of violating any of the prior statutes); and § 1594, attempting or conspiring to violate any of the prior statutes, and it provided for asset forfeiture and witness protection. Jennifer Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 Penn St. L. Rev. 443, 471 n.7 at; Jennifer M. Chacón, at 2992.

13. Louis Henkin et al., at 242.

14. 18 USC § 1595 allows trafficking survivors to sue their traffickers for damages in federal court.

15. 22 USC § 7101(b)(20) ("Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.").

16. *See, e.g.*, Jennifer Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. Penn. L. Rev. 1609 (2010).

17. 22 USC § 7102(11).

18. INA § 101(a)(15)(T).

19. 22 USC § 7102(11).

20. For example, the 2003 reauthorization raised the minimum age at which a trafficking victim is required to assist in investigations and prosecutions from 15 to 18 and broadened law enforcement cooperation to include participation in state and local investigations, rather than only federal investigations. Trafficking Victims Protection Reauthorization Act of 2003 [TVPRA 2003], Pub. L. No. 108-193 § 4(a)(4)(A), 117 Stat. 2875, 2878, codified at 18 USC § 1595. The 2008 reauthorization then added a "trauma exception" for survivors who are unable to participate in law enforcement investigation due to physical or psychological trauma. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 [TVPRA 2008], Pub. L. No. 110-457 § 201, 122 Stat. 5044, 5052, codified at 8 USC § 101(a)(15)(T)(i)(III)(bb). At the T visa adjustment of status stage, the original TVPA allowed for waiver of inadmissibility grounds for acts "caused by or incident to" the trafficking. The 2008 TVPRA built on this, and also allowed for waiver of acts "caused by or incident to" the trafficking when making a determination on the "good moral character" requirement for T visa adjustment of status. The 2013 reauthorization of the Violence Against Women Act (VAWA) increased the types of family members who are eligible to receive status as derivates of T visa holders. Violence Against Women Reauthorization Act of 2013 [VAWA 2013], Pub. L. No. 113-4 § 1221, 127 Stat. 54, 144, codified at 8 USC § 101(a)(15)(T)(ii)(III). *See also* VAWA 2013 at § 809, 127 Stat. at 117 (for purposes of adjustment from T status, physical presence in the Commonwealth of the Northern Mariana Islands considered as equivalent to presence in the United States pursuant to admission in T status).

21. INA § 214(o)(2).

22. *See* https://egov.uscis.gov/processing-times/historic-pt, showing average processing times of 7.9 months in FY 2016 and 9 months in FY 2017.

23. *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000 [TVPA], Pub. L. No. 106-386 § 1513(a)(2)(B), 114 Stat. 1464, 1534 ("providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the Unites States"); *Hearing on the Implementation of the TVPA* (Serial 107-63), 107th Cong. 13 (2001) ("As the statute provides, the visa should be, in the first instance, a humanitarian visa, not one used only as a club to obtain the law enforcement cooperation from frightened and abused.").

24. *See, e.g.*, Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 Stan. L. & Pol'y Rev. 379, 381 (2005); Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 Gender & Soc'y 923 (2003).

25. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. Rev. 158, 161 (2007).

26. Jennifer Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. Penn. L. Rev. 1609, 1615 (2010).

27. 8 CFR § 214.11(g)(1).

28. Matthew Hoppock, *AAO Grants T Visa Approval About Presence "On Account of" Trafficking*, Apr. 7, 2019, www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/aao-grants-t-visa-appeal-about-presence-on-account-of-trafficking.

29. In some cases, USCIS has issued RFEs when only a year had passed from when the applicant escaped until applying for a T visa.

30. 8 CFR § 214.11(g)(1)(ii).

31. 81 Fed. Reg. 92266, 92301-02 (Dec. 19, 2016).

32. Even when imposing this cutoff date, Congress included exceptions: "If the applicant misses the deadline, he or she must show that exceptional circumstances prevented him or her from filing in a timely manner. Exceptional circumstances may include severe trauma, either psychological or physical, that prevented the victim from applying within the allotted time." 8 CFR § 214.11(d)(4) (2002).

33. 81 Fed. Reg. 92266, 92273, 92298 (Dec. 19, 2016).

34. 8 CFR § 214.11(g)(2).

35. 81 Fed. Reg. 92266, 92271, 92295-96, 92301-02 (Dec. 19, 2016).

36. 8 CFR § 214.11(g)(1)(iv).

37. The authors recognize this is a nonexhaustive list of reasons why an applicant may need to remain in the United States, but focus on these as common examples.

38. Colleen Owens et al., *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States* (Urban Institute ed., 2014) ("The lag in time between escape and connection with a service provider may be due to unsuccessful attempts to seek help or attempts by survivors to live hidden lives due to fear of traffickers and fear of being unauthorized.").

39. "[I]n many parts of the United States, victims have limited access to service providers with specialized training in the psychological needs of trafficking victims .... [T]rauma-informed psychological services specifically for this population are still in development and difficult to access." Am. Psychological Ass'n, *Report of the Task Force on Trafficking of Women and Girls* 5, 56 (2014), www.apa.org/pi/women/programs/trafficking/report.pdf.

40. *In Re 6246073* (AAO June 24, 2020).

41. www.dhs.gov/blue-campaign/victim-centered-approach.

42. Colleen Owens et al., *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States* (Urban Institute ed., 2014).

43. *Id.*

44. Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. Pa. L. Rev. 1581, 1601 (2010).

45. *In Re 6246073* (AAO June 24, 2020). *See also, e.g.*, *Matter of D–A–A–* (AAO 2019) (finding that the applicant "continued in a situation of financial instability and debt").

46. Gina's trafficker was prosecuted for assault. Cooperation with an LEA can be in regard to a trafficking charge, or for other charges central to the trafficking such as rape, assault, or kidnapping. *See* 8 CFR § 214.11(b)(3) (an individual is eligible for T-1 nonimmigrant status if she demonstrates that she "has complied with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime …").

47. U.S. Dep't of State, *Trafficking in Persons Report: 2017*, www.state.gov/reports/2017-trafficking-in-persons-report/.

48. 18 USC § 1593(b)(1).

49. U.S. Dep't of State, *Trafficking in Persons Report: 2009*, https://2009-2017.state.gov/j/tip/rls/tiprpt/2009/index.htm.

50. The Human Trafficking Legal Center, *Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action* 30 (2018), www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf.

51. 8 CFR 214.11(g)(1)(iv).

52. 8 CFR § 214.11(g)(1)(iii).

53. 8 CFR § 214.11(g)(1)(ii).

54. *See, e.g.*, *Matter of R–B–A–* (AAO Oct. 31, 2019), "On appeal, the Applicant asserts that 'there exists a strong causal connection between the trafficking and her current physical presence because 1) her traffickers brought her into the United States, 2) her traffickers subjected her to severe sex trafficking while inside the United States and 3) the trauma she suffered as a result of the trafficking relates to, and explains, her current physical presence in the United States.' We acknowledge the psychological and emotional harm the Applicant suffered during her captivity. However, the Applicant's statements do not demonstrate that her continuing presence in the United States is directly related to the original trafficking. While it is understandable that the Applicant suffered emotional and psychological trauma from the abuse, she has not described any direct relationship between her continuing physical presence in the United States and the original trafficking. Rather, the Applicant in her second statement explains that she now has two children and is actively involved with her church. The record contains her children's birth certificates, which show that the Applicant's older son with R-S-1 was born in 1997 and her younger son with R-S- was born in 2005. As stated in the Director's decision, the Applicant has not provided a detailed description of the impact of her mental health conditions on her daily life activities and presence in the United States."

55. USCIS Policy Memorandum, *Updated Guidance for the Referral of Cases and Issuance of Notice to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens* (June 28, 2018), AILA Doc. No. 18070539.

56. DHS Memorandum, *Review of and Interim Revisions to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

57. *Id.*

58. *See* Letter from USCIS Acting Director Ken Cuccinelli to Hon. Dianne Feinstein (Sept. 30, 2019), www.uscis.gov/sites/default/files/document/foia/T_visa_denials_-_Senator_Feinstein.pdf.

59. *Id.*

60. *See* https://egov.uscis.gov/processing-times/.

61. AILA Policy Brief, *Restoring Integrity and Independence to America's Immigration Courts* (updated Jan. 24, 2020), AILA Doc. No. 18092834.

62. One of the authors had a client removed from the United States while their T visa application was pending. Other immigration attorneys have shared similar experiences with the authors.

63. The denial rate is calculated by dividing the number of denied applications for victims of trafficking (not including their family members) by the number of resolved applications (approved plus denied) in the time period considered. The data used is from USCIS, *Number of Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status Fiscal Years 2008-2020*, www.uscis.gov/sites/default/files/document/reports/I914t_visastatistics_fy2020_qtr4.pdf. Figure 1 was created by the authors in Microsoft Excel using the calculations and data identified above.

64. *See* U.S. Dep't of State, *Trafficking in Persons Report* (June 2019), www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf; Kathryn Finley, *Access to Justice in a Climate of Fear: New Hurdles and Barriers for Survivors of Human Trafficking and Domestic Violence*, Center for Migration Studies (Jan. 29, 2019), https://cmsny.org/publications/finley-climate-of-fear/.

65. *Id.*

66. United Nations Office on Drugs and Crime, *Evidential Issues in Trafficking in Persons Cases* (2017), www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf.

67. *See* Letter from USCIS Acting Director Ken Cuccinelli to Hon. Dianne Feinstein (Sept. 30, 2019), www.uscis.gov/sites/default/files/document/reports/I914t_visastatistics_fy2020_qtr4.pdf.

68. Between fiscal year (FY) 2017 and FY 2020, the AAO adjudicated 152 appeals of I-914s, Application for T Nonimmigrant Status (16 in FY 2017, 47 in FY 2018, 52 in FY 2019, and 37 in FY 2020). Of those appeals, 133 were dismissed (87.5% of the adjudicated appeals), 1 was sustained, and 18 were remanded back to the Vermont Service Center. There were 50 AAO decisions on T visa appeals in calendar year 2020 (all were nonprecedential decisions), www.uscis.gov/sites/default/files/document/data/AAO_Data_for_Publishing_Thru_FY20.pdf. All AAO decisions are available at www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions.

69. Of the 2020 appeals, 21 focused on severe form of trafficking, 20 on physical presence, 7 on derivative eligibility, and 2 on inadmissibility issues. All AAO decisions are available at www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions.

70. *See, e.g.*, *In Re 6246073* (AAO June 24, 2020); *In Re 5600239* (AAO June 24, 2020).

71. *See Matter of S–L–H–*, ID# 4572861 (AAO July 29, 2019), which included analysis stating that applicants need to show that they are physically present under both 8 CFR § 214.11(g)(1)(iii) and 8 CFR § 214.11(g)(1)(iv), whereas the regulations state that the requirement reaches applicants who meet 8 CFR § 214.11(g)(1)(i), (ii), (iii), (iv), *or* (v).

72. *Matter of L–O–B–* (AAO 2018).

73. The authors analyzed all published T visa based AAO appeals from 2020 and looked at the outcomes and the subject matter focus of each appeal. This analysis revealed the information shared. All published AAO decisions can be accessed at www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions.

74. *Id.*

75. *Id.*

76. Letter from Cecilia Friedman Levin, ASISTA, to Maureen Dunn, Chief, Family Immigration and Victim Protection Division, USCIS, re: Request for USCIS to Provide Clarification on Fee Waiver Practice for Humanitarian Unit at Vermont Service Center, https://drive.google.com/file/d/1Sq_CtrhuAiiKGayzsT9wQld3ZglmFfFK/view.

77. *See Matter of O–R–H–* (AAO Apr. 2019) (AAO did not address trafficking because applicant was removed from the United States in 2018 while the appeal was pending); *Matter of V–E–M–L–* (AAO Apr. 2019) (although appeal was based on severe form of trafficking, AAO affirmed appeal as applicant was no longer physically present since that person was removed in 2018 after the denial of a withholding of removal).

# Climate Refugees Are Here

## Advocacy Options for Immigration Practitioners

Christine E. Popp*

**Abstract:** The Climate Crisis has forced millions from their homes, and extreme weather will continue to exacerbate this displacement. "Climate Refugees" from Central America and other parts of the globe have arrived at the United States' shores and need protection. This article addresses how immigration practitioners can advocate for these refugees and advocate for expansions through executive and legislative actions. While an international framework would be best, advocates need not wring their hands waiting for such action. In the Immigration and Nationality Act exist legal options that can provide needed protections now.

## Introduction

Isabel[1] is a member of an indigenous tribe in Central America. For the past decade, her tribe has felt pressure from corrupt government officials who are trying to appropriate the tribe's land and natural resources. As a leader and activist in her tribe, Isabel's life, as well as the lives of her family, have been under threat. Her son and her brother were nearly killed before she was kidnapped, beaten, and raped with the intention of forcing her to sign over her tribe's land. After Isabel escaped, her young daughter and many other tribal members were killed in a massacre.

Through one lens, Isabel's case might seem to be a typical asylum case, one involving the persecution of an indigenous minority or activist by government officials. But viewed through another lens, Isabel's situation is emblematic of the pressures on vulnerable populations susceptible to climate change impacts around the world. The pressures on Isabel's tribe are exacerbated by environmental changes her nation is facing, including worsening droughts and stronger hurricanes. The struggling government and powerful interests in her home country want her tribe's land and resources, and the same dilemma is playing out over and over all around the world.

For the past two decades, many climate and human rights activists have been sounding the alarm about the looming climate refugee crisis. No longer, however, can we talk about when or if climate refugees will come to the United States. They are here. They are fleeing the poverty from climate-induced droughts and floods that have ruined their subsistence farms. They are fleeing the pressures caused by millions of rural dwellers flocking to urban areas as they run out of water. They are fleeing the crime exacerbated by these migrations.

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And they are fleeing the corporate, private, and governmental interests that are appropriating (or stealing by force) land and natural resources.

Instead of planning for a future in which the United States will need to accommodate refugees, advocates must examine what options are currently available and where additional advocacy is necessary for expanded reforms.

This article has three goals. First, the article will briefly discuss the drivers of climate flight. Second, the article will address immigration options under current law for climate refugees, with some recommendations at the administrative or executive level. Finally, the article will provide avenues for advocacy to compassionately assist climate refugees. Given that climate refugees are no longer a theoretical possibility but rather a present-day reality, our role as advocates is to help those climate refugees who have already arrived at our borders.

## Drivers of Climate Flight

Scientists have warned for decades that we have a short window until our earth faces climate catastrophe. That window is closing. The projections, even the optimistic ones, are not pretty. And many places are already facing that catastrophe. Currently, 1 percent of the earth's surface is uninhabitable because of heat. By 2070, that uninhabitable zone will expand to cover the areas where one-third of the world lives.[2] By 2100, temperatures could be so hot in many areas, including Eastern China and India, that death will come within a few hours, even for the most fit and healthy people.[3]

Heat is not the only harm the world faces. The climate crisis is causing other dramatic changes, with an especially great impact on agriculture and water availability. An estimated 5 billion people could suffer food insecurity by 2050.[4] That is about half of the projected world population. The same number will experience water stress.[5] An estimated 200 million people could be forced to migrate because of climate change by 2050.[6]

Every year since 2008, around 26 million people have been forcibly displaced because of climate disruption.[7] Islands in the Pacific, such as Kiribati and Tuvalu, are losing their habitable land area and fresh water supplies at a fast rate. Those nations are now actively planning for mass relocation of their populations.[8] An estimated 8 million people have already left Southeast Asia for the Middle East and China because the increasingly extreme monsoon rains have made farming impossible.[9]

Most climate refugees in the United States come from Latin America and, specifically, Central America. Climate change has wrought massive changes in the Northern Triangle of Central America (Guatemala, Honduras, and El Salvador), and these changes have driven migrants out of their countryside and, eventually, to U.S. borders.

The prevailing explanation of Central American migration centers on gang violence, poverty, and government corruption or ineptitude.[10] This

explanation, however, does not provide a full picture of what pushes Central Americans to the United States.[11] One of the main drivers is climate related, in that frequent droughts, flooding, and wildly fluctuating weather patterns have made it nearly impossible for small farmers to survive. Likewise, government officials, powerful corporations, and even local gangs want land (for water, timber, or minerals) that farmers, ethnic minorities, or indigenous groups live on, resulting in violent confrontations. Violence drives these landowners to migrate to urban areas in their own countries, and ultimately to the United States.[12]

In 2016, for example, an extreme drought in Central America forced thousands off of their land. Between 50 percent and 90 percent of the crop harvest was lost, and the United Nations Food and Agriculture Organization (FAO) estimated that around 3.5 million people were in need of humanitarian assistance.[13] This drought occurred in an area known as the "Dry Corridor," which stretches from Panama to Southern Mexico. Guatemala, El Salvador, Honduras, and Nicaragua are the hardest hit regions in this corridor.[14] Because the countries are also located between the Pacific Ocean and the Caribbean and are mountainous, they are also at risk of hurricanes and landslides.[15] The United States Agency for International Development (USAID) has noted that Guatemala is one of the "top ten countries most affected by weather extremes."[16]

A project run jointly with USAID[17] and several nongovernmental organizations, including the Rainforest Alliance, World Wildlife Fund, and the Nature Conservancy (among others), called "Climate, Nature, and Communities in Guatemala," found that the western highlands region of Guatemala was particularly vulnerable to climate change.[18] Droughts, frost, and excessive rain, as well as the unpredictability of these fluctuations, meant that farmers could not produce enough food to feed their families. Unsurprisingly, this drove migration to the United States.[19] "Of the ninety-four thousand immigrants deported to Guatemala from the U.S. and Mexico" in 2018, about half came from the western highlands region.[20]

Climate change has also exacerbated political conflicts. It is known as a "threat multiplier,"[21] because it exacerbates poverty, disease, and conflict.[22] One study found that the Syrian War was affected by a severe drought from 2007 to 2010, which sent millions of rural dwellers into cities.[23] Of course, a major civil war like the one in Syria did not have one single cause, but the effects of climate change have been attributed as a cause in many conflicts.

As the climate crisis worsens, the pressure on indigenous, small landowners, and other vulnerable groups also increases. These groups are on the front lines defending and protecting their own lands from degradation, which, in turn, also is a fight against global climate change. Many of these conflicts aim to prevent forest degradation, such as in the Amazon rainforest, which is a key to stopping climate change. These defenders are also fighting against mining

and resource extraction by foreign corporations and governments, as well as criminal elements such as gangs. The statistics are staggering:

- In 2017, the organization Front Line Defenders found that 67 percent of human rights defenders who were killed were working to defend "land, environmental and indigenous peoples' rights," mostly in the face of mega projects, industry, and big business. They were killed either directly by state security forces or by others who acted with impunity.[24]
- In 2019, Global Witness found that more than 212 land and environmental defenders were killed worldwide, which equates to more than four people each week.[25] Many more were jailed.[26]
- Two-thirds of defenders' killings occurred in Latin America.[27]
- Forty percent of defenders who were killed were indigenous.[28]
- Honduras is now the most dangerous country per capita for land and environmental defenders.[29]

What is particularly striking is not merely the number of people who have been killed for defending their land and environment, but how governments are also using the power of the law (and their own corruption) to criminalize activists and defenders. "In a brutally savage irony, killers of land and environmental defenders generally escape punishment while the activists themselves are branded as criminals."[30] Indigenous and environmental activists face powerful families and government officials, and even monied investors and major development banks.[31] A great deal of money can be made from major water development projects, agribusiness, and extraction of mineral resources. Powerful interests, whether governmental or otherwise, will not be thwarted from their goals by environmental or indigenous defenders.

The crisis is now driving many people from all around the world, but particularly from Central America to U.S. borders, and the problem will only worsen as pressures caused by climate change increase. Immigration lawyers and advocates often focus on the distinction between traditional asylum seekers and economic migrants when discussing immigration benefits. Such distinction does not allow for creative thinking about advocacy for climate refugees, who do not often fit into perfect categories. The remainder of this article attempts to define and provide options for advocacy for climate refugees under U.S. immigration law.

## Defining the Climate Refugee

### International Debate on Climate Refugees

The debate about how best to assist climate refugees rages on within international bodies and scholarly literature, and legal experts have written

numerous legal papers and books on the subject. Still, experts cannot agree on the appropriate systems or framework for dealing with this crisis, and most commentary and scholarly writing laments the dearth of legal protections.[32]

Many analysts argue persuasively that an international binding agreement is necessary, given the magnitude and transboundary nature of climate change and migration. These scholars suggest that only a comprehensive international convention or treaty will ensure that climate refugees will be offered necessary assistance or even protection.[33]

Other scholars, such as Jane McAdam, a Professor of Law at the University of New South Wales, Australia, and a frequent collaborator on international climate refugee initiatives, note that the world may not have the stomach for this kind of agreement *at this time*.[34] In fact, the United Nations High Commissioner for Refugees (UNHCR) recommended such an international agreement with itself at the helm, and this was soundly rejected by the international community.[35] In its wake, various international projects, such as the Nansen Initiative and the Platform on Disaster Displacement, formed.[36] These projects focus on recommendations to be implemented at the state or regional level, including legislative solutions for protections, regional and bilateral agreements, and funding measures to assist with mitigation and relocation. Scholars like McAdam believe that these types of initiatives are the best way to ensure protections for climate displaced or refugees.[37]

Finally, some scholars, such as Carmen Gonzalez, Professor of Law at Loyola University Chicago School of Law, lament the lack of international cooperation on this issue, but also, tellingly, reject most of the suggested frameworks as insufficient from a climate justice perspective.[38] Professor Gonzalez argues that most of the proposed options either posit developed countries as "saviors" and those developing countries hardest hit by the effects of climate change as merely "suffering misfortune," or they focus on the security needs of developed countries, which tends to position climate refugees (often black or brown people) as threats to those nations. Professor Gonzalez advocates for a climate justice approach that "recognize[s] that climate change is a form of structural violence caused by emissions of the planet's most affluent inhabitants."[39] The goal of any legal measure must be to prevent displacement in the first place.[40]

Clearly, the world *needs* some form of an international regime to ensure that the people most vulnerable and harmed by climate change can be offered protection and assistance, and that must include efforts to reduce emissions and avert displacement. Despite the real need, such an international agreement is unlikely to happen in the near future.

This article does not engage in the ongoing debate among legal scholars about the merits of various *international* approaches to climate refugees. Instead, this article looks domestically at the United States and offers suggestions for practical actions that immigration lawyers, immigration advocates, and the U.S. government can take *now* to ensure protection for those vulnerable groups who reach our nation's borders.

## Defining a Climate Refugee

Before addressing legal options to protect climate refugees, we must first define whom we seek to help. The topic of climate refugees comes up frequently in international climate and refugee literature. And, within this literature, many different terms are used to describe individuals who are forced or "obliged"[41] to leave their homes due to climate change. Some commonly used terms are climate displaced, climate migrant, environmental refugee, and climate refugee; and they are used interchangeably. This article specifically uses the term "climate refugee."[42]

Unlike "climate refugee," *environmental* refugee can refer to forced migration because of climate change or because of other environmental effects, such as earthquakes, tsunamis, or a nuclear meltdown. The flight or migration is not necessarily related to climate change. The term climate *migrant*, by contrast, connotes a decision or choice and the existence of some sort of agency or planning. Like refugee, climate *displaced* indicates a lack of agency or choice. However, it also refers to internal or transboundary displacement. And it does not express the urgency that comes with the term "refugee."[43] Refugee signifies a flight from a person's country, a lack of agency, and forces beyond a person's control.

But how can the law distinguish a climate refugee from any other person outside of his or her country? A good definition would include the following:

- an element of force or "obligation" to leave—*i.e.*, not by choice;
- recognition of the temporary or permanent nature of climate-change and, thus, the temporary or permanent nature of the flight;
- recognition that the change could have been sudden or gradual;
- inclusion of flight from conflicts over resources caused by climate change.

One definition put forth by Barbara Docherty and Tyler Giannini grasps both the magnitude of the crisis and the urgency of the flight.[44] Docherty and Giannini, in proposing an international agreement on climate refugees, suggest the following definition:

> An individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.[45]

Under this definition, the flight of the climate refugee was not one taken purely of his or her own agency or choice, or even for economic betterment. The forces that caused the flight could result in a temporary or permanent

movement, and the changes caused by the climate crisis could have come about suddenly or gradually. On the other hand, the definition does not include climate change effects like conflict over land and resources.

Similarly, the Climate Displaced Persons Act of 2019[46] proposed the following definition:

> Any person who, for reasons of sudden or progressive change in the environment that adversely affects his or her life or living conditions is obliged to leave his or her habitual home, either within his or her country of nationality or in another country; is in need of a durable resettlement solution; and whose government cannot or will not provide such durable resettlement solution.

The International Organization for Migration's (IOM) working definition for climate migration is similar:

> The movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.[47]

These definitions recognize that climate change can cause sudden or gradual environmental changes. Instead of force they use the term "oblige" to indicate that the need to move was not of the person's own making or free choice. There was no agency, but also less urgency and less compulsion. The IOM's definition (for migration) is broader and includes choice of movement.

Using elements from each of the above definitions, this article proposes the following definition when determining when someone in the United States should get immigration benefits as a climate refugee:

> A person who is obliged to leave his or her habitual home and who relocates temporarily or permanently to the United States as a result of the sudden or gradual environmental disruption consistent with climate change, or as a result of pressures related to the allocation or appropriation of land or natural resources by the government or actors the government cannot or will not control, the underlying cause of which is consistent with pressures due to climate change.

## Immigration Options for Climate Refugees Available Under the Immigration and Nationality Act (INA)

Recognizing that climate refugees are in the United States and in need of legal protection, immigration lawyers are well placed to advocate for them.

Current immigration law offers at least three options that are good, but not perfect, solutions. This section addresses those options that exist and that could be expanded through executive or administrative actions—asylum, temporary protected status, and humanitarian parole or deferred action—and provides some bases for practitioners to advocate for limited expansions in their use to cover climate refugees. The next section discusses legislative options for improving these existing solutions.

## Asylum

Asylum law on its face does not seem like the most appropriate solution for climate refugees. And, in fact, for many climate refugees, it may not be the best choice. However, some refugees do flee their home because of climate-related persecution. As discussed above, climate change is a threat multiplier, aggravating conditions that already drive migration. Many of the thousands of refugees currently at the nation's borders were driven from their homes because of violence exacerbated by climatic forces and pressures on their home nations' natural resources. The world is experiencing the greatest refugee crisis in history and much of the movement has its ties to the climate crisis.

To obtain asylum, an applicant must satisfy several elements.[48] First, a person must fear *persecution*.[49] Second, that persecution must be on account of one of five enumerated grounds: the person's race, religion, nationality, membership in a social group, or political opinion.[50] Third, the persecution must come from the government or an individual or group that the government cannot or will not control.[51] Fourth, the person must not be able to relocate in their home country.[52]

Asylum will not benefit many *climate* refugees. The predominant fear driving them is not *persecution*. Most climate refugees fear death or poverty that extreme weather changes in their country have caused. Yet, for a subset of climate refugees, asylum will, in fact, be the appropriate remedy.

Powerful interests, including multinational corporations, monied families, gangs, and narco-traffickers, want the land and natural resources that have traditionally been owned and managed by indigenous tribes, ethnic minorities, and small-landowning farmers. Furthermore, governments must make decisions on the reallocation of scarce resources, and in many developing countries or countries with corrupt governments, only those with power will get those resources. Within this context, the indigenous, minorities, farmers, and activists (collectively, defenders) face great risk as they fight to protect their land, their resources, and their people.

These groups can request asylum on numerous bases, depending on the facts of their particular case. A member of an indigenous tribe in Honduras may be fighting the Honduran government to stop a major hydroelectric dam-building operation from ruining her tribal land and the environment

surrounding it,[53] and, as a consequence, may face death threats or even death itself from government officials who have a stake in the project.

A Filipina tribal member fighting to protect virgin rainforests against logging, mining, and agribusiness industries may face arrest by the government or even death from military forces.[54] Likewise, an activist fighting land appropriation through mining concessions in Mexico may face death threats.[55]

In these cases, asylum protections could be possible on the grounds of political opinions or ethnicity (race/nationality), and, in many cases, there may also be a claim based on membership in particular social groups.

This article proposes that practitioners advocate for an expansion of the particular social group ground to include climate refugees where appropriate.[56] As asylum practitioners know, defining a cognizable particular social group depends largely on the facts of the case.[57] But adding, where applicable, such a claim, could help expand protections to climate refugees.

For example, a member of an indigenous group defending rich water resources from appropriation in a country where climate change has caused drought could ask to be included in a particular social group of "Lenca tribal defenders against the illegal appropriation of traditional water resources," and a narrower definition might include "from appropriation pressures caused by a climate change induced drought." Other examples include "Guatemalan landowners who are resisting illegal appropriation for resource extraction" or "Mexican farmers who are resisting land appropriation by mining companies."

Some formulations of particular social group might be a stretch in the current climate, but it is worthwhile for those who could obtain protection from persecution to expand the definition to include vulnerable groups who are at risk of harm from climate change.

At this time asylum law may not be the best avenue for many who are hardest hit by climate change, but that could change. Any discussion of asylum for climate refugees would be remiss if it did not discuss the recent case of *Ioane Teitiota v. New Zealand*,[58] decided by the United Nations Human Rights Committee (HRC). This case, which was published early in 2020, laid the groundwork for making asylum an appropriate remedy for climate refugees.

Mr. Teitiota, a citizen of Kiribati, fought deportation from New Zealand, arguing before the UNHRC that because of climate change the pressures on his native island, New Zealand would be violating non-refoulement (return) provisions in the Refugee Convention and Article 6 and 7 of the International Covenant on Civil and Political Rights by deporting him. The HRC determined that Mr. Teitiota did not, at the time, qualify for protection as a climate refugee. But it noted:

> without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states. Furthermore, given

> that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[59]

This case is not binding on the United States, but it reflects a broadened international recognition of the dire risks to life posed by climate change, and one that lawyers should consider when advocating for expanded protections for their clients.

## Temporary Protected Status

Whereas the term "climate refugee" brings to mind asylum, Temporary Protected Status (TPS) is, in the opinion of this author, the best existing option for those climate refugees who cannot show direct persecution. TPS is the one existing U.S. immigration benefit put into place to protect those whose home country has undergone a major environmental disaster.

TPS was created as part of the Immigration Act of 1990.[60] TPS provides temporary status for those whose countries have been devastated by war, environmental disasters, or medical emergencies, such as epidemics.

In fact, most relevant to climate refugees, TPS is available where the government has found that a particular country has been harmed by "an earthquake, flood, drought, epidemic, or other environmental disaster," that foreign country is "unable, temporarily, to handle adequately the return" of its own nationals, and the government of that country has requested a TPS designation.[61] TPS may also be granted to foreign nationals if within their country "there exist extraordinary and temporary conditions" that prevent the country's nationals "from returning to the state in safety."[62] Interestingly, the requirement that the foreign government request TPS designation only applies to environmental disasters, not to civil strife or other extraordinary events.

TPS is granted for between 6 to 18 months and can be extended. Many countries, such as Honduras and El Salvador, have seen extensions over decades, in 18-month increments.

Although many of climate change's effects are gradual,[63] droughts and extreme weather caused by climate change also result in sudden, acute harm. TPS is the perfect remedy to protect climate refugees who cannot return home as a result of these sudden and dramatic climate events.

TPS, however, is not without its limitations. Principally, TPS is available only to those physically present within the United States on the date of designation. In other words, TPS will protect those who were already in the United States when disaster struck, but may not help those who flee in the wake of a disaster.

TPS protections are also limited in duration. A grant of 6 to 18 months is often not enough time for a developing country to rebuild from disasters. Thus, those granted TPS are stuck in a permanent limbo without stability or security and face the requirement of frequently renewing their status. This is not a minimal burden. In many states, a driver's license, for example, will only last as long as the Employment Authorization Document (EAD) that is tied to TPS. A TPS applicant must wait every year to learn whether they can extend their status. And once that status has been extended and an EAD granted, they must then renew their driver's license. Too often, employers misunderstand the TPS extension benefits and fire or lay off TPS applicants whose EAD renewals are pending.

Practitioners can advocate for a quicker and broader use of TPS when climate disasters strike. Even though the number of people who are protected will be limited, advocacy for these populations can bring media—and national—attention to the devastation climate refugees face and their need for protection. As it exists now, TPS is not perfect. But, as discussed in the next section, it has the potential to be a great protector of climate refugees.

## Humanitarian Parole/Deferred Action

The U.S. government may parole individuals into the United States for compelling public interest reasons, such as emergency medical treatment. Humanitarian Parole is granted under INA § 212(d)(5). Before the Refugee Act of 1980, many refugees entered the United States as parolees.[64] Today, the use of Humanitarian Parole is strictly limited.

By contrast, Deferred Action is granted by U.S. Citizenship and Immigration Services (USCIS) or Immigration and Customs Enforcement (ICE) to someone already inside the United States. Deferred Action is not a legal status but is a prioritization for removal. A grant of Deferred Action makes someone a low priority for removal, and, in the process, also provides a mechanism for that person to gain employment authorization. Deferred Action has often been used for those in need of medical treatment (or their caregivers) to reside lawfully in the United States, obtain employment authorization, and obtain other benefits like a driver's license.

While the two options provide similar benefits, they are not interchangeable, and Humanitarian Parole, specifically, permits adjustment of status to permanent residence, whereas Deferred Action does not.

Given the historically protective nature of these two options, their use could easily be expanded to aid climate refugees both outside and within the United States. Parole-in-Place for climate refugees would also be an excellent option.[65] Individuals within the United States should be permitted to apply for protection through Deferred Action or Parole-in-Place if conditions in

their home countries have deteriorated to the point that return would be dangerous. And parole at the border should be granted for those who fit the definition of climate refugee.

An added benefit—expansion of the use of Humanitarian Parole or Deferred Action to cover climate refugees—would not need legislative actions, which can be hard to achieve.

## Legislative Options for Climate Refugee Protections

The previous section discussed three immigration options that currently exist and how, with some advocacy at the executive branch, the United States could extend existing protections to those affected by climate change. This section addresses legislative fixes that could provide even greater long-term protections.

### Planning Holistically for Climate Refugees

Legislative protections for climate refugees must include measures beyond immigration options. Human rights and the environment can no longer be kept in two separate, neat boxes. Human rights are greatly affected by the environment, and a right to a clean and healthy environment must be recognized as a basic, human right. Recognizing such a right is essential for legislative efforts to combat climate change and protect those who are most harmed by its effects. As discussed in the second section, we can no longer look at poverty alleviation, violence reduction, and environmental protection as discrete issues to be tackled individually. These issues are intertwined with climate change, and climate change mitigation must be combined with protection.

Therefore, funding to help developing countries mitigate the impact of climate change must accompany any immigration legislation. Climate change might, in fact, result in many displaced persons. But they might not become refugees under the legal definition of that word. In fact, many displaced because of climate change will choose to stay in their own countries, migrating toward cities, for example, as farmland succumbs to drought or water sources dry up.

Non-industrialized countries need assistance from those, like the United States, that have been the main contributors of greenhouse gas emissions. The United States, despite having only 4 percent of the world's population,[66] contributes 15 percent of greenhouse gases, behind only China, and is fourth in the world for emissions per capita (behind Saudi Arabia, Kazakhstan, and Australia).[67] The United States bears a large part of the blame for climate change and has a moral responsibility toward mitigating the effects.

External migration is not a given, and many refugees, if given the choice, would prefer not to leave their homes or families for a foreign land. With aid and assistance, industrializing countries can help their own populations weather the changes. This might mean infrastructure development to ensure access to water supplies or flood mitigation. It might mean relocating people from uninhabitable land and ensuring they have access to the basics like food and shelter and security.

Under previous administrations, the U.S. government funded pilot programs to assist countries, such as Guatemala, to mitigate climate change impacts, particularly with agriculture. One USAID grantee in Guatemala assisted farmers with planting new crops that could survive in the changing climate, as well as implementing systems to alert farmers to frost or long-range dry forecasts.[68] More often, the United States has funded programs that focused on poverty alleviation and crime reduction.[69] But these programs did not address climate change. And without a focus on this important root cause of poverty and future migration, such programs will ultimately be unsuccessful.

In addition to prevention and mitigation, the United States can assist countries to rebuild from climate disasters. The United States, while providing protection for those who make it to our shores, should also provide additional financial assistance to help struggling countries rebuild their infrastructure. Such funding would go beyond mere emergency aid and would need to be targeted to rebuilding the country and assisting those displaced to move back to their homes or relocate to a safer location within the country.

And, it should go without saying, the United States must be a leader in halting emissions of gases that are contributing to the climate crisis.

Changes to immigration law, alone, will be insufficient. Any legislative fix must take a multi-pronged approach to *combatting* climate change, *mitigating* its effects, *rebuilding* infrastructure, and *protecting* those internally and externally displaced.

## Asylum

Asylum is an excellent option to protect those who fear persecution. But the intention here is *not* to expand or change our asylum or refugee system to include those climate refugees who do not fear persecution.[70] As the massive and unceasing attacks on the U.S. asylum system by the Trump administration demonstrated, the scaffolding of asylum protection already is too shaky to bear significant and potentially controversial change.

Besides, many climate refugees are not fleeing *persecution*. They are fleeing other forces that might harm their life or health.[71] For those who are fleeing *persecution*, our current asylum system, with some expansions of the "particular social group" definition, can provide necessary protections.

Altering asylum law is the wrong way to extend protections to climate refugees. For the United States to once again be a leader in providing protection to refugees and mitigating the harm caused by climate change, we need new solutions.

## Expansion of Temporary Protected Status

A better option than amending asylum law is expanding TPS into both a short-term *and* a long-term solution for climate refugees. Because the effects of climate change are not always permanent, with mitigation and rebuilding assistance many who fled climate-related dangers in their home countries or who were stuck in the United States when a sudden disaster struck, could return to their home countries.

A major limitation of TPS is the "temporality" of the program. TPS is granted for unreasonably short periods, and there is no mechanism to convert it to a permanent protected status, even when it is clear that the status should no longer be temporary.

This author is proposing an expansion of TPS for climate refugees. The effects of climate change, such as drought, can endure longer than the effects of other non-climate-related catastrophes, such as earthquakes or tsunamis. For this reason, the proposed expansion would only apply to climate-related disasters, and a multi-disciplinary expert panel would determine when the expanded TPS would apply.

TPS for climate refugees would have these new components:

1. TPS designation would occur over a longer rolling period to allow incoming refugees to obtain protection;
2. Designation would not require a request from the country's government, but would be determined based on consultation with a multi-disciplinary panel of experts from appropriate agencies and independent climate scientists;
3. TPS would be granted for an initial three-year period;[72]
4. TPS designation would be accompanied by climate funding to rebuild and target new mitigation programs, with the hope that TPS recipients could return home; and
5. A mechanism would be created to convert TPS to a permanent status.

The first step in granting TPS for climate refugees would be determining whether a particular situation was caused by or related to climate change. As part of the designation program, the committee discussed above would make the determination.[73]

Once that determination was made, TPS could be designated with a rolling initial effective date. Climate refugees who were not in the United States at the time of the event in question, but who flee their country later, would thus be given time to arrive in the United States before the period for TPS has closed. Undoubtedly, this would be controversial, as critics would argue it incentivizes climate refugees to come to the United States. In fact, that would be the point. The United States can accommodate an influx of temporary climate refugees fleeing catastrophe in their home country.[74]

The designation of TPS based on climate change would set into motion various funding and grant systems to assist with rebuilding infrastructure and, more importantly, future mitigation efforts, with an eye toward enabling those with TPS to return home.

TPS would be granted for an initial period of three years. This period of time should be sufficient for the affected country to make substantial progress rebuilding and implementing mitigation measures.

If, at the three-year mark, the country has not made substantial progress, and it would still be unsafe for the nationals of the designated country to return home safely, then the law should provide an automatic mechanism to provide permanent residence. Such a law is not without precedent. As recently as 2019, Congress passed the Liberian Refugee Immigration Fairness Act, which permitted Liberians, many of whom had held TPS or been granted Deferred Enforced Departure for many years, to adjust to permanent resident status. This new law would not mean that every person from the affected country would be eligible for benefits. The rules regarding inadmissibility would still apply.

To summarize, the proposal here is to expand TPS to cover the particular and unique needs of climate refugees. Once a weather-related event has been determined to be caused by or related to climate change, the administration would designate a country's nationals as eligible for TPS. The designation date would be a rolling date to accommodate those climate refugees who continue to flee their country. During the subsequent three years, the United States, along with other industrialized countries, would work to help rebuild the country and provide aid and assistance to help mitigate climate effects in the future. If, after three years, the country is still unable to resettle its nationals, the legislation would provide a mechanism to allow eligible individuals to adjust to lawful permanent resident status in the United States.

## Climate Displaced Persons Act

In 2019, a bill was introduced in Congress[75] to address many aspects of climate change, including a provision to resettle climate-displaced persons. This bill was intended to provide a fairly comprehensive solution to certain aspects of climate change, including funding research and mitigation efforts. But a core aspect of the bill is a resettlement provision.

Echoing refugee resettlement provisions, the Climate Displaced Persons Act (CDPA) addresses how the United States can assist individuals displaced by climate-related disasters. A displaced person, according to the CDPA, is someone "obliged" to leave his or her home because of climate-related changes.[76] The resettlement provisions address how displaced persons—whether in their country or outside of it, and presumably also if they are already in the United States—will be resettled. The Act puts a minimum floor of 50,000 resettled displaced persons each year.

This Act provides a welcome opportunity to address future climate displacement. The numbers of displaced are certain to grow exponentially, especially if the countries that are the largest emitters of greenhouse gases do not make great strides in limiting those emissions.

However, the process to build and grow the systems to designate climate displaced persons as such, as well as designating those groups legally as refugees, which is now primarily done by UNHCR, would be slow and tedious. The Act does not provide a quick and efficient way to protect climate refugees who have fled sudden events.

The Climate Displaced Persons Act has potential, but it will not provide the assistance necessary right now to ensure that climate refugees can get immediate protection and security.[77]

## Conclusion

While experts in climate change, international human rights, and environmental justice have discussed managing and aiding climate refugees for many years, this discussion has not been as widespread in immigration law circles. But climate refugees are already at our borders, and immigration practitioners must be prepared to advocate for their clients and explore all legal options available to them.

## Notes

* Christine E. Popp (christie@poppbullman.com) is an immigration lawyer at Popp & Bullman in Bloomington, Indiana, where she focuses on asylum, family-based immigration, naturalization, and international student and scholar issues. She has taught immigration law as an adjunct professor at Indiana University–Maurer School of Law. Before practicing immigration law, she worked as a legal consultant on international water law and policy for the U.N. Food and Agriculture Organization. She has her J.D. and Master of Studies in Environmental Law from Vermont Law School, and a B.A. in Latin American Studies from Indiana University.

1. The name and identifying information of "Isabel" have been changed to protect her identity.

2. Abrahm Lustgarten, *The Great Climate Migration*, NY Times Magazine, July 23, 2020, *available at* https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html.

3. *Id.*

4. Visions of Humanity, Ecological Threat Register, *available at* https://www.visionofhumanity.org/countries-facing-the-highest-number-of-ecological-threats-are-among-the-worlds-least-peaceful-countries.

5. *Id.*

6. Oli Brown, *Migration and Climate Change*, International Organization for Migration (IOM), 2008, *available at* https://publications.iom.int/system/files/pdf/mrs-31_en.pdf.

7. Joanna Apap, *The Concept of "Climate Refugee" Towards a Possible Definition*, European Parliamentary Research Service, February 2019, *available at* https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf.

8. Makereta Komai, *Tuvalu and Kiribati have Different Policies on Relocation*, ReliefWeb, March 19, 2015, *available at* https://reliefweb.int/report/tuvalu/tuvalu-and-kiribati-have-different-policies-relocation.

9. Lustgarten, *supra* note 2.

10. This is an argument that the author typically makes in asylum cases from Central America. *See also* Oliver-Leighton Barrett, *Central America: Climate, Drought, Migration and the Border*, The Center for Climate and Security, April 2019, *available at* https://climateandsecurity.org/2019/04/central-america-climate-drought-migration-and-the-border.

11. Oliver-Leighton Barrett, *Central America: Climate, Drought, Migration and the Border*, The Center for Climate and Security, April 2019, *available at* https://climateandsecurity.org/2019/04/central-america-climate-drought-migration-and-the-border.

12. *Id.*; *see also* Global Defenders, *Defending Tomorrow: The Climate Crisis and Threats Against Land and Environmental Defenders*, July 2020, globalwitness.org.

13. FAO, *Dry Corridor, Central America: Situation Report*, June 2016, *available at* http://www.fao.org/3/a-br092e.pdf.

14. *Id.*; *see also* USAID, *Climate Change Risk Profile: Guatemala, Fact Sheet*, April 2017, *available at* https://www.climatelinks.org/sites/default/files/asset/document/2017_USAID%20ATLAS_Climate%20Change%20Risk%20Profile_Guatemala.pdf.

15. USAID, Guatemala Profile, *available at* https://www.climatelinks.org/countries/guatemala.

16. *Id.*

17. While the initial pilot project had some success, funding ended under the Trump administration.

18. Jonathan Blitzer, *How Climate Change Is Fueling the U.S. Border Crisis*, New Yorker, April 3, 2019, *available at* https://www.newyorker.com/news/dispatch/how-climate-change-is-fuelling-the-us-border-crisis; Rainforest Alliance https://www.rainforest-alliance.org/projects/cncg.

19. *Id.*

20. *Id.*

21. Jim Garamone, *Military Must Be Ready for Climate Change, Hagel Says*, U.S. Department of Defense News, October 13, 2014, *available at* https://www.defense.gov/Explore/News/Article/Article/603441; *see also* Dan Vergano, *Meet The Woman Whose Two-Word Catchphrase Made the Military Care About Climate*, Buzzfeed News,

November 29, 2015, *available at* https://www.buzzfeednews.com/article/danvergano/the-threat-multiplier.

22. Vergano, *supra* note 21.

23. Peter H. Gleick, *Water, Drought, Climate Change, and Conflict in Syria*, Wea. Climate Soc. (2014) 331-340.

24. Front Line Defenders, Annual Report on Human Rights Defenders at Risk in 2017, *available at* https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf.

25. This is most certainly an underestimate. Global Witness, at 9, *supra* note 12.

26. Global Witness, *supra* note 12.

27. *Id.*

28. *Id.*

29. *Id.*

30. Global Witness, *Enemies of the State? How Governments and Business Silence Land and Environmental Defenders*, at 6, July 2019.

31. *Id.*

32. *See, e.g.*, Elizabeth Keyes, *Environmental Refugees? Rethinking What's in a Name*, 44 NC J. of Int'l L. 461 (2019); Lauren Nishimura, *Climate Change Migrants: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, 27 Int'l J. Refugee L. 107 (2015).

33. *See, e.g.*, Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 Harv. Envtl. L. Rev. 349 (2009); Rana Balesh, *Submerging Islands: Tuvalu and Kiribati as Case Studies Illustrating the Need for a Climate Refugee Treaty*, 5 Earth Jurisprudence & Envtl. Just. J. 78 (2015); Stellina Jolly & Nafees Ahmad, *Climate Refugees Under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice* 14 ISIL Y.B. Int'l Human. & Refugee L. 216 (2014-2015); Nicole Angeline Cudiamat, Displacement Disparity: Filling the Gap of Protection for the Environmentally Displaced Person, 46 Val. U. L. Rev. 891 (2012).

34. Jane McAdam, *From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement*, 39 University of New South Wales L. Jrnl. (2017).

35. *Id.* at 1521.

36. *Id.*; *see also* The Nansen Initiative, *available at* https://www.nanseninitiative.org; *and* The Platform on Disaster Displacement, *available at* https://disasterdisplacement.org.

37. *See* McAdam, *supra* note 34.

38. *See* Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 Wisc. Int. L.J. (2019).

39. *Id.* at 388.

40. *Id.*

41. Obliged is a term commonly used, including in the Climate Displaced Persons Act of 2019 and the International Organization for Migration's definition of a climate migrant.

42. This term is not without controversy in the scholarly literature. Many argue that using "refugee" dilutes the power of the term for those who qualify as refugees under the 1951 Convention, and, in fact, many "climate refugees" are not "refugees" at all. *See, e.g.*, Elizabeth Keyes, *Environmental Refugees? Rethinking What's in a Name*,

44 NC J. of Int'l L. 461 (2019). Nevertheless, it is exactly the urgency that the term connotes that compels the use in this article.

43. *See generally* B. Docherty and T. Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, Harvard Law Review (2009).

44. *Id.*

45. *Id.* at 361

46. This bill was introduced in the Senate as S. 2565 and the House as H.R. 4732 in 2019 as part of the 116th Congress. As of this writing, it has not been introduced again in the new Congress that was seated in January of 2021.

47. International Organization for Migration (IOM), *Key Definitions: Climate Migration*, *available at* https://www.iom.int/key-migration-terms.

48. *See generally* INA § 208; INA § 101(a)(42)(A).

49. INA § 101(a)(42)(A) (defining refugee as a person unable or unwilling to return home "because of persecution or a well-founded fear of persecution").

50. *Id.*

51. *Id.*

52. *Id.*; *see also* 8 C.F.R. § 208.12(b)(1)9i)(B).

53. *See, e.g.*, Nina Lakhani, *Who Killed Berta Cáceres? Behind the Brutal Murder of an Environment Crusader*, The Guardian, June 2, 2020, *available at* https://www.theguardian.com/world/2020/jun/02/who-killed-berta-caceres-behind-the-brutal-of-an-environment-crusader.

54. *See, e.g.*, Global Witness, *supra* note 12.

55. *See, e.g.*, Global Witness, *supra* note 30.

56. This recognizes, of course, that under the Trump administration the "Particular Social Group" came under attack, and it has become difficult in some jurisdictions to make these claims.

57. The American Immigration Lawyers Association (AILA) provides excellent resources on how to create and present a cognizable particular social group. *See, e.g.*, Dree Collopy, AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure, 8th ed. (AILA 2019); *Matter of A–B–*: Case Updates, Current Trends, and Suggested Strategies, (webinar) AILA Doc. No. 19020731. *See generally* AILA's CLEs and Webinars on Asylum, *available at* agora.aila.org.

58. *Ioane Teitiota v. New Zealand*, UNHRC (2019).

59. *Id.* at ¶ 9.11.

60. For background on Temporary Protected Status, *see* American Immigration Council, *Temporary Protected Status: An Overview*, February 2020, *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary_protected_status_an_overview.pdf.

61. INA § 244(b)(1)(B).

62. INA § 244(b)(1)(C).

63. *See* the second section, *supra*.

64. *See* David A. Martin, The Refugee Act of 1980: Its Past and Future, 3 Mich. J. Int'l L. 91, 93 (1982).

65. Parole-in-Place is currently used for families of military service members. It allows USCIS to "parole" in parents, spouses, and children who are physically in the United States, thus providing temporary authorized presence and the ability to adjust status to permanent residence for those who are eligible. More information *available at* https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families.

66. U.S. Census, *available at* https://www.census.gov/popclock.

67. Union of Concerned Scientists, https://www.ucsusa.org/resources/each-countrys-share-co2-emissions.

68. Blitzer, *supra* note 18.

69. Barrett, *supra* note 11; *see also* Obama White House: *Fact Sheet: Support for the Alliance for Prosperity in the Northern Triangle*, March 2015, *available at* https://obamawhitehouse.archives.gov/the-press-office/2015/03/03/fact-sheet-support-alliance-prosperity-northern-triangle.

70. Jane McAdam, a professor and researcher from Australia, has written eloquently on why the international community should not amend existing international refugee law, for reasons that include the already diminishing interest in protecting refugees internationally. Jane McAdam, *Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees,"* Sydney Morning Herald, June 6, 2017, *available at* https://www.smh.com.au/opinion/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees-20170606-gwl8b4.html.

71. *See, e.g.*, *Ioane Teitiota*, *supra* note 58.

72. *See* Docherty and Giannini, *supra* note 33, at 365 (noting that temporary displacement has been defined by some scholars as "lasting up to three years, and permanent as anything longer.").

73. TPS designation is already undertaken in consultation with other government agencies.

74. In fact, those here with TPS would contribute directly and indirectly to rebuilding their country with the additional income tax and their own remittances to their home country.

75. As noted previously, the CDPA was introduced in 2019 in the 116th Congress. As of this writing, it has not been reintroduced.

76. The definition in its entirety is cited in the third section, *supra*.

77. As noted previously, the CDPA was introduced in 2019 in the 116th Congress. As of this writing, it has not been reintroduced.

# Syncing Law With Psychology

## Redefining Cancellation of Removal Hardship

Eva Marie Loney*

**Abstract:** This paper advocates for a reconceptualization of cancellation of removal hardship to recognize the adverse psychological consequences of a parent's removal on a child. This paper details recent advancements in child psychology and argues how these findings may actually work to prejudice a case under the current standard. As such, this paper reimagines the standard in order to integrate the new research and ultimately better protect family unity in the context of immigration law.

## Introduction

Immediately upon assuming office, the Trump administration made an anti-immigrant agenda an immediate priority.[1] Besides a litany of executive orders, agency policy changes, and a politization of the courts, President Trump frequently used rhetoric designed to rouse anti-immigrant sentiment, speaking during his rallies of "killers," "aliens," and "predators," and referring to an "invasion" of immigrants.[2] While acknowledging that there are many diverse realities for noncitizens living in the United States, the following story of a hypothetical family demonstrates the injustices that this paper highlights, injustices that the Trump administration sought to further entrench.

David Gómez and his wife, Fernanda, entered the United States without authorization from their home country of Mexico in the early 2000s. They settled in rural Yolo County, California, where extended family awaited their arrival. They began to work in agriculture. When their two daughters Ana and Rosa were born, Fernanda decided to stay home to take care of them. David continued working, found steady employment on a farm, and was promoted into a managerial position. He purchased a mobile home and provides his family a safe and supportive environment.

David was placed in removal proceedings because of a series of unpaid traffic violations. Specifically, he had been pulled over several times on the way to work and cited for driving without a license.[3] On one such occasion, after detaining David for almost two weeks, local law enforcement released him into the custody of ICE.[4]

Surely David's story is not the story that the Trump administration sought to highlight when aiming to inflame emotions around the presence

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of undocumented immigrants in the United States. Nevertheless, The Trump administration prioritized deportation of all undocumented immigrants, even those in David's shoes.[5] Although the Trump administration is behind us, immigration courts have amassed a current backlog of 1.2 million cases.[6] And while President Biden has ordered a 100-day halt of removals and reconsideration of removal priorities, absent congressional overhaul of immigration law, the removal of undocumented individuals will continue in the future.[7]

This paper seeks to shed light on the legal standard in cancellation of removal, a form of relief from removal for individuals like David, who have long called the United States their home, have no serious criminal record, and have a spouse or child who are permanent residents or U.S. citizens ("qualifying family member").[8] Specifically, David must prove to the immigration judge that his removal would cause his qualifying family member to suffer "exceptional and extremely unusual hardship."[9]

This paper takes issue with the level of "hardship" applicants like David must prove. It demonstrates how statutory ambiguity has led to the creation of a hardship standard that is nearly impossible to meet.[10] The field of child psychology has greatly advanced since the Board of Immigration Appeals (BIA) first drew parameters around the "hardship" standard in 2001.[11] By drawing on emergent but robust findings showing the adverse effects of parental removal on children, this paper seeks to highlight the disjuncture between the BIA's definition of hardship and common understanding from the field of psychology. By demonstrating the tension between psychology and the law, this paper ultimately advocates for a reconceptualization of the "hardship" standard. The solution proposes that "best interests of the child" becomes the main inquiry when assessing hardship, eliminating the comparative nature of the assessment. These changes will bring the standard into conformity with international consensus, well-established tenets of family law, and the constitutionally protected right to family.

The paper proceeds as follows. The next section provides an overview of the cancellation of removal standard to highlight the intent behind the restrictive hardship requirement. Then the paper describes evolutions in the field of psychology as relating to psychological effects of parental removal on children. The paper also describes how the psychological findings can actually undermine, rather than advance, an argument in support of meeting the current hardship standard. The paper then advances a reconceptualization of the standard that would integrate the advances in psychology and better reflect current sensibility around the impact of parental removal on children. The next section provides a counterargument against the solution and then defends the solution on the basis of legislative intent and agency authority to redefine policy in light of new factual findings. Finally, the paper proposes a legislative solution. A conclusion follows.

## Cancellation of Removal Hardship

This part of the paper aims to provide historical context for the current hardship standard to emphasize the legislative intent behind the standard's rigor. It then provides a road map of the modern-day interpretation of the standard by describing the seminal cases that developed the standard. Lastly, it highlights the BIA's flimsy and often paradoxical consideration of the psychological effect of parental removal on children in assessing hardship.

### "Extreme Hardship" Under Suspension of Deportation

Prior to 1997, undocumented immigrants in removal proceedings who sought to remain in the United States could apply for a form of relief called "suspension of deportation."[12] Congress created this form of relief in the 1952 McCarran-Walter Act.[13] Suspension of deportation required the applicant's showing of "good moral character" and seven years of continuous presence in the United States.[14] The original act also required the applicant to establish that his deportation would result in "exceptional and extremely unusual hardship to the alien or his spouse, parent, or child who is a citizen or alien lawfully admitted for permanent residence."[15] Congress established that the remedy "should be available only in the very limited category of cases in which the deportation of [an] alien would be unconscionable."[16] The illusion to unconscionability illustrated intent to disincentivize opportunistic immigrants from entering without authorization and then simply claiming economic hardship to gain lawful permanent residence.[17] However, the stringent hardship standard was widely criticized by opponents once it went into effect.[18]

In a 1962 amendment, Congress changed the wording of the standard from "exceptional and extremely unusual hardship" to "extreme hardship."[19] This change communicated Congress's intent to depart from the unduly stringent standard of the 1952 standard.[20] Consequently, the BIA interpreted the standard as requiring a lower threshold of evidence, though struggled to create concrete parameters to define it.[21] The most extensive evaluation of the hardship standard did not occur until 40 years after the 1962 amendment in the seminal case *Matter of O–J–O–*.[22] In granting the respondent's suspension of deportation claim, the BIA framed him as a model citizen, praising his ability to sustain employment and help his community, and emphasizing how well he had assimilated into U.S. culture.[23] The concurring and dissenting opinions of the Board decision highlighted the members' disparate understandings of the hardship standard.[24] The dissent argued that a deportable person's departure from "ordinary community ties . . . [and] assimilation into American culture" could not rise to an "extreme" level.[25]

Congress met the decision with harsh criticism.[26] Only a year after the decision, Congress enacted the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, overhauling the "suspension of deportation" remedy with new language and a heightened hardship standard.[27]

## "Exceptional and Extremely Unusual Hardship" Under Cancellation of Removal

Dismayed by the Board's lax interpretation of the suspension of deportation requirements in *Matter of O–J–O–*, Congress sought to restrict the class of eligible applicants by replacing "suspension of deportation" with "cancellation of removal."[28] Procedurally, the remedies are nearly identical, resulting in attainment of lawful permanent resident status upon the immigration judge's positive finding.[29] However, cancellation of removal for nonpermanent residents restricts the class of eligible applicants in several ways. First, it requires ten years of continuous physical presence, as opposed to seven.[30] Furthermore, cancellation of removal does not consider hardship to the applicant herself, but only to her U.S. citizen or lawful permanent resident spouse or child.[31] Lastly, rather than "extreme" hardship, the applicant must show the qualifying relative would suffer "exceptional and extremely unusual hardship" if the applicant is removed from the United States.[32]

The statute does not define "exceptional and extremely unusual hardship."[33] And despite its nearly 25 years of application, scant case law has developed it. To date, the BIA has published few cases interpreting its meaning.[34] The cases provide no more than a framework of considerations, highlighting the fact that the hardship determination is a fact-intensive inquiry made on a case-by-case basis.[35] In 2020, the BIA attempted to narrow the hardship standard in the context of cases based on medical hardship, holding that an applicant must establish the qualifying relative has a "serious" medical condition, and that adequate medical care is unavailable in the applicant's country of removal, if the qualifying family member intends to accompany the applicant.[36]

The following section will provide a road map of the development of the standard, with particular attention to the BIA's emphasis (or lack thereof) on the psychological impact of parental removal on the qualifying child.

## The BIA's Pseudo-Articulation of the Hardship Standard

*Matter of Monreal*, published four years after the enactment of the cancellation of removal statute, was the first decision to interpret the "exceptional and extremely unusual" hardship standard.[37] The respondent was a 34-year-old Mexican national who had been living in the United States for more than 20 years.[38] He maintained steady employment since his entry and was the sole financial provider for his two citizen children, ages 12 and 8.[39] The BIA purported to consider "the ages, health, and circumstances" of the qualifying

family members, and emphasized that while high, the hardship standard is clearly "less than 'unconscionable.'"[40] Denial of the applicant's claim centered on the BIA's finding that the applicant was healthy and able to work, and would thus be able to support his children upon their relocation to Mexico.[41] The BIA supported its conclusion that hardship to the 12-year-old did not amount to "exceptional and extremely unusual hardship" by mentioning that the child could read and write in both English and Spanish.[42]

A year later, *Matter of Andazola* similarly resulted in denial of cancellation for failure to meet the hardship standard.[43] The respondent was a 30-year-old single mother from Mexico living in the United States for 17 years.[44] She had two U.S. citizen children, ages 11 and 6.[45] The BIA based its denial on the fact that the respondent was young, able to work, healthy, possessed job skills, and had some financial assets that would aid in establishing a new life in Mexico.[46] Likewise, the BIA found the children were young and healthy and "while they certainly will face some problems adapting to life outside the United States, they will likely be able to make the necessary adjustment."[47]

Scholars have posed the question: If loss of financial assets, separation from children, and removal to a country where one has not lived in 20 years does not meet the hardship standard, what does?[48] The seminal case granting cancellation based on a sufficient finding of hardship, *Matter of Recinas*, draws some further parameters around the standard but does not fully answer the question.[49] Distinguishing from *Monreal* and *Andazola*, the BIA in *Recinas* found the hardship standard satisfied in the case of an unmarried Mexican woman with six children.[50] The Board considered that the respondent was the sole financial provider, lacked family in Mexico, did not speak Spanish, and lacked alternative means for immigrating.[51] The BIA took caution to emphasize that the respondent's case was "on the outer limit of the narrow spectrum of cases" that meet the standard.[52] As such, scholarly understanding is that the Board is unlikely to grant cancellation in the absence of facts as sympathetic as *Recinas*.[53]

In sum, three seminal cases provide some, albeit vague, delineation around what satisfies or fails to satisfy the hardship standard. One takeaway is that negative circumstances (lack of resources, lack of family, poor health) would work in the respondent's favor,[54] whereas positive circumstances (financial assets, good health, family in the home country) would weigh against a finding of hardship.[55] A second takeaway is that the standard is inherently comparative.[56] The judge must assess the respondent's situation against the hypothetical situation of other families facing removal.[57] Only if the respondent's situation renders the hardship to the qualifying family member "well beyond that which is normally experienced in most cases of removal" will the standard be satisfied.[58]

The BIA spoke on the issue of medical hardship in its 2020 decision, *Matter of J–J–G–*.[59] There, the BIA reiterated that the hardship standard is a "cumulative consideration" of all relevant factors, but where based on the

health of a qualifying family member, the applicant must show the qualifying family member has a "serious" medical condition for which they could not reasonably attain adequate medical care in the country of removal.[60] The applicant's daughter suffered from hypothyroidism, his oldest son had received past counseling for "aggressive and defiant behavior," another son had been in counseling for attention deficit hyperactive disorder (ADHD) and anxiety, and the applicant's other child had hypertension.[61] The BIA held that the cumulative harm to the qualifying family members did not meet the standard of "exceptional and extremely unusual" hardship.[62] However, the BIA did not state that the family member's conditions were insufficient to establish hardship. Rather, the BIA's decision turned on findings in inconsistencies in testimony and insufficient evidence in the record to prove hardship.[63]

## The BIA's Gloss on the Psychological Impact of Parental Removal on Children

As early as *Monreal*, the BIA suggested that psychological evidence of the impact of parental removal on the child could be used to strengthen the respondent's hardship argument.[64] Since then, numerous cancellation of removal cases reference the respondent's inclusion of psychological evidence to support a finding of hardship.[65] Most often, this takes the form of a report from an expert psychologist attesting to a child's current psychological condition, such as depression or anxiety, and the risk of exacerbation of the condition should the parent be removed.[66] Respondents have also included general findings about the psychological impact of forcing a child to adapt to a new culture or separate from a parent.[67] Because the hardship factors are considered in the aggregate, it is difficult to assess how much weight immigration judges give to psychological evidence specifically. Additionally, because virtually all of the cases that reach the BIA are appeals of the immigration judge's denial of cancellation, it is nearly impossible to gather data on the successful instances of inclusion of psychological evidence.

However, a brief survey of recent cases both at the BIA and circuit court level reveal several trends. First, the BIA glosses over the realistic psychological effects of removal on children by minimizing their impact.[68] For example, in *Monreal* the respondent's oldest son explicitly communicated a strong desire to have his father remain in the United States and stated that his own relocation to Mexico would cause separation from his grandparents and friends.[69] The Board concluded that such evidence merely amounted to "some hardship" insufficient to meet the standard. Similarly, the BIA in *Matter of C–C–G–* stated that it "acknowledge[s] the emotional hardship the respondent's relatives may experience as a result of their separation from him if they remain in the United States."[70] Without additional reasoning, the decision proceeds to

"agree with the Immigration Judge that it does not rise to the level of exceptional and extremely unusual hardship," noting that the respondent waived any challenge to the immigration judge's finding that his son, who suffered from an anxiety order, would be less anxious if he accompanied his father to Guatemala.[71] Rather than conducting a thorough analysis of the long-term effects of mental stress, the BIA in these cases and others minimized the real impact of removal, merely offering conclusory statement as to the insufficiency of hardship demonstrated.[72]

Second, while a showing of psychological detriment to the child is clearly not required under the hardship analysis, immigration judges use the absence of psychological evidence as evidence of lack of hardship.[73] Furthermore, because the hardship inquiry is inherently comparative, evidence of "typical" psychological issues such as depression and anxiety do not suffice—they are not "exceptional" enough.[74] An extension of this logic would caution against using general findings of psychological impact of parental removal on children to support one's hardship argument. Paradoxically, at least some decisions purport to weigh the general psychological impact of removal on school-age children.[75] One clear observation that emerges from a survey of these cases is that the immigration judge has no criteria upon which to assess psychological evidence.

If a lack of showing of psychological harm works against the respondent, and "typical" conditions such anxiety and depression do not suffice, what then must the respondent show? How can an immigration judge, lacking a base of knowledge in child psychology, make an informed assessment of the impact of a parent's removal on a child? The inquiry remains unanswered by any court to date. The following part describes how important contributions from psychology fail to square with the immigration judge's assessment of hardship under the current paradigm. These findings ultimately support the overhaul of the current standard to lead to more just outcomes for parents in removal proceedings.

## Tension Between Evolutions in the Field of Psychology and the Current Hardship Standard

This section discusses recent findings from the field of psychology as pertaining to lawfully present children with undocumented parents. Then this section demonstrates that the trauma accompanying the removal of a parent may lead a child to develop severe mental and physical health issues, even when the child is otherwise healthy. This section then demonstrates that these new findings may actually undermine, rather than advance the case of an applicant seeking cancellation of removal. This section explains this disjuncture, setting the stage for the last section's reconceptualization of the hardship standard.

## The Emergence of Empirical Research Correlating Parental Removal with Severe Health Outcomes for Children

The detrimental effects of forced and unexpected parent-child separation, even when children are safe and well cared for, have long been documented in psychological literature.[76] However, until quite recently, researchers paid scant attention to the mental health of lawfully present children with undocumented parents.[77] Around 2012, the first studies emerged supporting the conclusion that the actual removal of a parent "causes a level of stress that can lead to aberrant developmental trajectories in otherwise healthy children."[78] Thus, although immigration judges had purported to consider the psychological effects of parental removal on children in cancellation cases for more than 10 years,[79] the period elapsed without concrete recommendations from psychology scholars as to how to best evaluate such effects.

Not only have the past few years seen an uptick in studies on the psychological impact of parental removal on children, scholars are simultaneously using their studies as vehicles to adamantly advocate for immigration reform.[80] Luis H. Zayas' 2015 study built on these earlier findings by specifically concluding that parents' legal vulnerability and experiences of detention and removal were strongly associated with children's depression, anxiety, fears of separation, social isolation, self-stigma, aggression, and withdrawal.[81] The same year, Brian Allen's study confirmed that children separated from a parent as a result of removal will demonstrate more significant externalizing problems (aggression, conduct problems) and internalizing problems (anxiety, depression) than children with lawfully present parents.[82] Both authors concluded their studies with vocal disdain for immigration law's lack of concern for family unity, and recommended a future policy that better protects the child's interests in a family relationship.[83]

Some studies suggest that the daily stressors associated with having an undocumented parent shape mental health prior to direct encounters with immigration enforcement.[84] Citizen-children's health has been shown to be intimately tied to the risks correlated to their parent's undocumented status.[85] For example, poverty, food insecurity, and lack of access to health care, safe housing, and education are tangible examples of such stressors.[86] Furthermore, children with undocumented parents express fear of separation, mixed feelings about their heritage, and an acute awareness of the family's legal predicament.[87] In a 2016 study, L.E. Gulbas and colleagues went further in concluding that while citizen-children who suffer parental removal experience the most severe mental health consequences, mental health issues similarly affect children affected by immigration enforcement policies.[88] Thus, perhaps unsurprisingly, both the child who suffers the removal of a parent and the child threatened by punitive immigration policies targeting their parent are at risk of developing mental health conditions. Gulbas et al. took the opportunity to close their

research with a call for the need to monitor the prevalence and severity of effects of immigration policy on mental health.[89]

A particularly novel 2016 study by Dr. Nadine Burke, CEO and Founder of the Center for Youth Wellness, linked the accumulation of adverse childhood experiences (ACEs) with the development of chronic illness.[90] Dr. Burke's team originally defined ACEs as abuse, neglect, parental divorce or separation, or exposure to a family member's substance abuse, mental illness, or criminal behavior.[91] The study correlated this kind of childhood trauma with a significantly increased risk of ischemic heart disease, cancer, diabetes, asthma and premature death.[92] It found children exposed to early adversity are more likely to develop inflammatory and autoimmune diseases as adults.[93] It also found adolescents exposed to severe adversity have greater incidence of suicidal ideation, suicide attempts, and dysthymia.[94] The study concluded there was a dose-response relationship between the number of ACEs and the aforementioned negative health outcomes.[95] Essentially, the more negative experiences a child has been exposed to, the greater the risk of harm. Reporting four or more ACEs was associated with increased odds of developing six of ten leading causes of death in the United States.[96]

Although the study did not explicitly identify parental removal as an ACE, it follows that parental removal would surely qualify as a risk factor that can activate a child's stress response and lead to changes in the way the brain and body function.[97] In a 2018 interview with Dr. Burke, an NPR journalist suggested "having your parent deported" would be an example of the kind of trauma that leads to the aforementioned illnesses.[98]

All of these findings are significant contributions in their own right. When taken together, their implications are even more impactful. To summarize, we know simply by way of having an undocumented parent, children are more likely to face poverty, lack of access to health care and nutrition, and mental conditions like stress and anxiety.[99] We know early experiences of childhood adversity compound, putting the child at risk to develop serious illness later in life.[100] We know emotional trauma accompanies the actual removal of a parent, and trauma also accompanies the day-to-day fear of simply knowing one's parent is a target of immigration enforcement.[101] Lastly, we are seeing outspoken advocacy from the field of psychology for an immigration policy that better protects the interests of the child.[102]

All of these considerations support a conclusive finding that parental removal causes severe and irreversible harm for the child's health. Countless other recent studies reaffirm the sentiment that parental removal puts children at high risk of mental health issues and implore policy makers to reform the goals of immigration law so as to uphold family unity as much as possible.[103] The following section will describe how this conclusion is at tension with the legal fiction of "exceptional and extremely unusual hardship" as applied in cancellation of removal cases.

## The Disjuncture Between Psychological Research and the Judge's Hardship Standard

The previous subsection substantiated the conclusion that the field of psychology has arrived at an unequivocal stance regarding the detriment of parental removal on the mental health of children. These invaluable contributions will hopefully someday effectuate large-scale reform. However, this subsection explains why it will be difficult for the conclusion that parental removal is universally detrimental for children to be effectively used by advocates in the cancellation of removal context.

The first tension is rooted in the fact that cancellation of removal requires an inherent comparison between the respondent's case and the case of other families similarly situated.[104] *Matter of Recinas*, the seminal case satisfying the hardship standard, demonstrates the BIA's early articulation of the comparative nature of the inquiry.[105] To support their finding of hardship, the BIA distinguished from *Monreal*, which "presented a common fact pattern that was insufficient to satisfy the exceptional and extremely unusual hardship standard."[106] Similarly, the Ninth Circuit later reaffirmed that hardship to the child is not the only factor to be considered—the standard requires comparing the relative strength of the child's interest to other children whose parents face removal.[107] From the court's perspective, any interpretation that required a child's best interests to be weighted more heavily than the comparative assessment would be at odds with the text of the statute.[108] In the narrow context of psychological hardship, the importance of the comparative analysis is clear. In 2016, the First Circuit affirmed the BIA's denial of cancellation of removal, stating that the respondent's psychological issues (anxiety and depression) were "typical," rather than "exceptional and extremely unusual."[109] From the perspective of the immigration advocate, it will be difficult to employ generalized findings of hardship to support their own case, given the comparative nature of the hardship inquiry.

A second disjuncture between recent psychological developments and the current hardship standard is that an absence of current negative conditions weighs against the respondent.[110] In the seminal cases, a finding of good health supported the Board's conclusion that hardship was not met.[111] And although the hardship inquiry is supposed to be prospective,[112] we know "typical" current conditions like depression do not meet the standard.[113] Thus, even despite a wealth of evidence of the future effects of parental removal on children,[114] finding the child is either in a current state of good health or currently suffering a "typical" condition will tip the scale away from a finding hardship. A child's stability and good health depends in large part on a safe and supportive familial environment. When a parent is removed and this environment ceases to exist, even a thriving child may experience severe psychological trauma.[115] Unfortunately, no appellate adjudicator to date has recognized this truth.

A third tension implicates the resources that a family facing parental removal must necessarily expend in order to use psychological research advantageously. Given the comparative nature of the hardship test, a family must show why their hardship is more extreme than other families facing removal. One way to do this could be to deploy Bucci's conclusion, which is that there is a dose-response relationship between the number of instances of childhood adversity and negative health outcomes.[116] In this vein, an immigration advocate could work with a psychologist to quantify the qualifying child's adverse experiences. For example, if the child was ever before exposed to abuse, neglect, divorce, criminal behavior, or mental illness the advocate could show that these instances of adversity would compound with the hardship caused by parental removal. As such, by showing that unique aspects of the child's past put the child at special risk of serious future effects, the advocate could demonstrate why the hardship standard is met in this particular case.

Using psychological evidence in this way avoids the shortcomings of providing generalized findings about the impact of removal on children. This strategy,[117] while plausibly effective, is likely limited to those cases in which the families have the financial means to afford not only immigration counsel, but an expert witness who can perform a psychological evaluation. Thus, despite psychology scholars' intent for a broad application of their research, its most effective use will be unfortunately relegated to the narrow set of classes in which respondents can afford an expert witness to do the kind of comparative analysis the hardship test requires. Furthermore, in deciding how much weight to give a single psychological evaluation, the judge may consider whether the qualifying relative is undergoing whatever treatment the evaluation recommended. Such treatment also likely adds to the expenses on the family.

The aforementioned considerations demonstrate how the evolution of the field of child psychology is at tension with the current cancellation of removal hardship standard. The generalized severe psychological impact of parental removal is at odds with (1) the comparative nature of the legal standard and (2) the overvaluing of the child's current mental state. To use the new research effectively requires the assistance of a psychological expert, a feat unattainable for most immigrant families of limited means. In light of this paradox, the following part proposes a solution that will better sync psychology with the law and lead to more just outcomes for immigrant families.

## Solutions That Sync Psychology and the Law

In light of the disjuncture between evolutions in child psychology and the cancellation of removal hardship standard,[118] this part sets forth several solutions. The section first describes shortcomings at the immigration-court level and highlights suggested reforms. Then this section proposes a long-term solution that the author feels best integrates psychology with the law.

This involves a reconceptualization of the hardship standard, eliminating the comparative inquiry and instead focusing at the outset on the "best interests of the child." This section then explains how such a redevelopment of the standard draws support from international consensus, family law, and constitutional law.

## Reform of the Immigration Courts

While large-scale reform in the immigration system is direly needed, this section first proposes a short-term and easily implemented solution—more robust guidance and training on the latest developments in child psychology for immigration judges handling cancellation cases. This short-term solution is premised on conservation of the current hardship inquiry but argues that increasing training would at least have the effect of bringing the adjudicator enhanced understanding of what parental removal really means for the affected child. As such, it would allow the adjudicator to use her discretion to grant more positive outcomes for families. As the following illustration of training opportunities demonstrates, there is hardly a viable procedure for immigration judges to keep current on trends in immigration law itself, let alone interdisciplinary fields.

In 2006, former Attorney General Alberto Gonzales issued 22 measures to improve the immigration courts and the BIA.[119] One such measure aimed to provide "Improved Training for Immigration Judges and Board Members," through, in part, "ensur[ing] that immigration judges and Board members receive continuing education that is … instructive about current developments in the field of immigration law."[120] In turn, the Executive Officer of Immigration Review (EOIR) implemented aspects of training for new and veteran judges.[121] However, substantive review of legal standards remained cursory, and inclusion of "current developments in the field" remained to be seen. For example, in an annual five-day training for immigration judges conducted in August 2008, the training materials relating to cancellation of removal hardship consisted of just a few pages, mostly reiterating the holdings of the three seminal cases.[122] The materials list as considerations: credibility of respondent and any witness, financial means, presence of children in home country, children in the United States, and separation from family.[123] The most substantive instruction on how to consider emotional harm in the case of parental separation is an instruction to note the "emotional impact on respondent of taking children to native country or leaving them in the United States."[124] Curiously, this language is at odds with *Matter of Monreal*'s interpretation that hardship to only the qualifying family member should be considered, not hardship to the applicant, as well as the words of the statute itself.[125] In terms of health—mental or physical—the materials instruct the judge only to "consider factors reflecting children in good health vs. health

problems."[126] This cursory and legally deficient instruction, taken in context of the tremendous decision to separate a child from their parent, reveals the necessity to substantiate training to provide more guidance for immigration judges.

Unfortunately, even these attempts to provide continuing education were deprioritized under the Trump administration.[127] The Department of Justice eliminated EOIR's only formal annual training in April 2017.[128]

For an immigration judge expected to complete at least 700 cases per year—the equivalent of roughly three per day[129]—there is clearly little room for peripheral educational development. And since EOIR has not substantially implemented the 2006 measures to provide instruction at the very least on developments in the adjudicators' own field,[130] it seems a long shot to imagine the incorporation of interdisciplinary development.

However, there are cost-effective and time-effective ways to educate judges on the important findings of Zayas, Allen, Gulbas, Burke, and the many others who contribute to the discussion about the impact of parental removal on children.[131] For example, revising the *Immigration Judge Benchbook*[132] to highlight psychological research in the cancellation of removal context would be a way to provide consistent education for judges without undue burden on time or resources. The *Benchbook* currently provides a template for an immigration judge deciding a cancellation of removal case where the parent intends to leave the children in the United States.[133] To assess the psychological harm of parental separation on the children, the template provides nothing more than an instruction to "consider the hardship from emotional separation to both the parents and the children."[134] Again, the *Benchbook* provides no concrete guidance on what should inform this tremendous decision, and contradicts the common understanding of the legal standard.[135]

With increased pressure on immigration judges to churn through more adjudications than ever before, it is of utmost importance that their decisions are informed and based on the latest developments in research. Enhancing training and education, at the very least in the form of manuals and written instructions, is one way to do this in the short-term.

With a hopeful eye toward the Biden administration, discussions of large-scale reform are underway. The American Immigration Lawyers Association (AILA) urges President Biden to take immediate and concrete steps to reform the immigration courts to ensure independence, integrity, and due process by stating a commitment to these values via executive order, and by undoing harmful policies like case completion quotas and unrealistic performance metrics.[136] However, recognizing that real reform can be achieved only through legislation, AILA, along with the American Bar Association, the Federal Bar Association, and the National Association of Immigration Judges, urge Congress to pass legislation creating an Article I court system independent of the Department of Justice, envisioning a system that is not subservient to a prosecutorial agency nor motivated by political motivated leadership.[137]

## Reconceptualization of the Hardship Standard to Elevate "Best Interests of the Child" and Eliminate Comparison

Ultimately, the best way to integrate the latest findings in psychology on the harm of parental removal on children is to redefine the standard used to determine hardship under cancellation of removal. Rather than force a family to prove why their hardship so greatly surpasses the hardship of other families facing parental removal, this section proposes eliminating the comparative inquiry and focusing instead on the "best interests of the child." This solution is supported by international consensus, family law, and constitutional law.

The United Nations Convention on the Rights of the Child (CRC) provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[138] The text of the treaty affirms the responsibility of the government in any of its functional roles to protect the child's best interests. More countries—192—have ratified the CRC than any other human rights treaty in history.[139] Parties to the treaty are bound to it by international law.[140] As such, it informs immigration law internationally to the extent that the "best interests of the child" becomes a principal concern, rather than one of many factors to consider.[141] For example, in removal proceedings in the United Kingdom, the government takes the citizen child's interests into account in their own regard to argue against deportation.[142] In other words, immigration law in the United Kingdom elevates the best interests of the child to an initial consideration and then the government must introduce other evidence to rebut a presumption of action consistent with those interests.[143]

Only two nations—Somalia and the United States—are not parties to the CRC.[144] By signing the Convention, the United States has signaled its intention to ratify, but has yet to do so.[145] In this vein, adopting a "child's best interest" test in the context of cancellation of removal would merely bring the United States into conformity with the rest of the international community. While the Immigration and Nationality Act articulates our own nation's priorities, there is no reason why adherence to an international standard would be necessarily inconsistent. In the cancellation of removal context, aligning the United States with the rest of the world would simply mean affording more weight to the interests of the child.

Furthermore, the United States' own family law and constitutional law principles support the adoption of a "best interests of the child" determination. A deeply established tenet of family law is that a court considering questions of child custody "must make every effort to determine 'what is for the best interest of the child, and what will best promote its welfare and happiness.'"[146] The best interests of a child are determined by considering a number of factors, including the child's age, sex, mental and physical health, the established lifestyle of the child (home, school, church), emotional bonds

between the parents and the child, the effect of a change on the child, and the child's preferences.[147] Absent parental unfitness, a basic principle of family law is that the state will not interfere with parents' decisions about where their children live.[148]

Similarities between family law and immigration law abound.[149] Both bodies of law set parameters on where children live, often at the expense of the wishes of one or both parents. Cancellation of removal in its current form focuses not on what is best for the child, but on how the potential removal of their parent may or may not be really bad for the child. In other words, the current hardship standard plays out like the inverse of the "best interests test." While appreciating that child custody law and cancellation of removal have distinct objectives, we should recognize that the outcome may be practically the same: the child is forcibly removed from the care of a parent. Acknowledging the psychological harm of parental removal on a child regardless of the law governing the case, "best interests of the child" should carry great weight in any proceeding that separates a parent from a child.

Lastly, analyzing the parent-child relationship under the protections granted by the U.S. Constitution also supports the use of a "best interests" test in the cancellation of removal context. Although the word "family" is not mentioned in the U.S. Constitution, the Supreme Court has found families to be within the reach of the Constitution, defending family integrity by protecting the parent-child relationship from state interference.[150] *Moore v. City of East Cleveland* stands for the proposition that the Constitution protects family unity because the institution of family is deeply rooted in the history and tradition of the United States.[151] Discussion of the right to family tends to focus on adults rather than children, recognizing that children lack the capacity to make certain decisions because of their youth.[152] The framework operates with the presumption that decisions regarding family are best made by the parent, as the adult with the most intimate relationship to the child.[153] The framework, however, is not dismissive of children's rights. Rather, it merely recognizes that parents are responsible for protecting children's interests.[154] Thus, absent extenuating circumstances, such as the unfitness of a parent as demonstrated in the child custody context, it is not the role for the state to remove children from the care of their parents.[155]

The current cancellation of removal standard does not protect the right to family protected by the Constitution. Indeed, judges, scholars, and advocates have lamented the abrogation of right to family under the current paradigm.[156] As such, elevating the "best interests of the child" to a principal determination in the hardship inquiry more rigorously protects children's constitutional right to remain in the care of their parents.

In conclusion, the reconceptualization of the "exceptional and extremely unusual hardship" inquiry is warranted in light of international consensus as well as well-established tenets of family law and the constitutionally protected right to family unity. Elevating the "best interests of the child" to the forefront

of the determination and eliminating the need to compare one applicant against another will improve the rate of families that can remain together legally in the United States.

## Defending the Solution in the Absence of Congressional Directive

Opponents of this paper's solution may argue that eliminating the comparative inquiry and placing greater weight on "best interests of the child" undermines Congress's intent to restrict the number of immigrants able to qualify for cancellation of removal.[157] Since the "best interests of the child" test would generally command the upholding of the family unit,[158] it follows that more applicants would be granted cancellation of removal under the proposed standard. It also follows that eliminating the comparative inquiry would have the same effect, since the judge would consider the facts of each case in isolation. Opponents will argue Congress desired that the rigor of the standard hinge on the judge's discretionary ability to disqualify people from relief by determining hardship is not met.[159] Opponents will argue that elevating "best interests" and eliminating comparison essentially nullifies the requirement of showing "exceptional and extremely unusual hardship."[160]

However, even conceding that Congress intended the class for whom cancellation of removal is available to be narrower than that under suspension of deportation, relaxing the standard does not necessarily undermine legislative intent. It should not be overlooked that rephrasing the hardship language was not the only substantive change made to the statute in 1996.[161] Congress also accomplished their intended narrowing by increasing the number of years the applicant must be physically present in the United States, reducing the yearly quota to 4,000 grants, and only considering hardship to a qualifying family member rather than the applicant themselves.[162] Thus, even with a relaxation of the hardship determination, the pool of eligible applicants is narrower at the outset than under the suspension of deportation framework.

Additionally, one could logically surmise that Congress made an intentional decision to write the statute vaguely such that the agencies tasked with enforcing immigration law could adapt their interpretation according to the salient policy concerns of the particular moment. *FCC v. Fox Television* stands for the proposition that in the adjudicative context an agency is free to depart from their previous interpretation of a statute, as long as they acknowledge they are changing course and give rational reasons for doing so.[163] The agency must justify its decision with a substantial explanation when the new policy rests on different factual findings than the old policy.[164]

Under *Fox Television*, it is thus a completely legitimate exercise of agency authority to deviate from a prior interpretation of the hardship standard based on the evolution of psychology as it pertains to the harm of parental removal on the child. One can only wonder, adhering to the *Fox Television* standard, if any

factual findings underlaid the first articulation of the standard in *Monreal*. In any case, the BIA can point to the robust evidence from psychology discussed in this paper to support their redefinition of the hardship standard.[165] The *Fox Television* rule allows for agencies to respond exactly to the kinds of advances in science at issue in this paper, without waiting for congressional action.

Thus, there are two distinct responses to the argument that the new standard undermines legislative intent to further restrict eligibility. The first response acknowledges that Congress aimed to decrease the pool of eligible applicants when replacing suspension of deportation with cancellation of removal, but argues that Congress substantially accomplished this narrowing through the other changes in the eligibility requirements. The second response has broader implications and reflects the obligation of agencies to redefine their outdated statutory interpretations in light of developments in science and society. This paper recognizes that the hardship standard articulated in *Matter of Monreal* was considered reasonable in 2001, long before the findings highlighted in this paper were published. However, current consensus in the scientific community about the harm of such an onerous standard demonstrates the need for change.

## Alternatively, Congress Should Amend INA § 240A(b)

Alternatively, Congress should amend the cancellation of removal statute itself by codifying a "best interests of the child" standard and doing away with the hardship standard at INA § 240A(b)(1)(D). The new standard would also lead to interpretation by the BIA, but with stronger safeguards in place for the qualifying relative.

A second legislative solution would be to amend the statute to create a rebuttable presumption of "exceptional and extremely unusual hardship" when the qualifying relative is a child. This is already the standard for certain Salvadorans, Guatemalans, and Eastern Europeans who are eligible to apply for "special rule cancellation of removal," pursuant to section 203 of the Nicaraguan Adjustment and Central American Relief Act.[166] These applicants, having proven other eligibility requirements, "shall be presumed to have established that deportation or removal from the United States would result in extreme hardship to the applicant or to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[167]

## Conclusion

An individual seeking cancellation of removal may make the difficult decision to leave their children in the care of family in the United States should the applicant be removed. This may be the case for an individual like David,

described in the Introduction. Perhaps gang violence and political instability plague his home country. Perhaps educational and employment opportunities are scant. And there is the real possibility that his children could be kidnapped for ransom by people who equate U.S. citizenship with wealth.[168] For these reasons, in the case of David's removal, he will leave his children in the care of his wife, Fernanda, and her extended family in California, where they have safety, stability, and opportunities to excel emotionally, socially, and economically.

When David goes before the immigration judge, he will need to show his removal would cause his daughters to suffer "exceptional and extremely unusual hardship."[169] This paper has demonstrated that the rigor of the standard as developed by the BIA renders cancellation of removal meaningless for most. For example, David's daughters are currently in good health and do not exhibit behavioral problems. These facts would work against a finding of hardship,[170] even though research demonstrates the high likelihood these problems would develop upon David's separation from his children.[171] Additionally, since the current standard is a comparative inquiry, David's case would be weighed against the case of another family the judge saw yesterday.[172] Perhaps the respondent yesterday was a single parent with six children, several of whom require constant medical attention.[173] In the judge's eyes, the hardship to David's children is comparatively less, and thus she should deny his claim.

In light of a wealth of emergent research indicating the irreversible damage on children forcibly separated from their parent in any case,[174] it is high time for the BIA to redefine their understanding of cancellation of removal hardship. This paper proposes that the BIA elevate the "best interests of the child" to be a primary consideration and eliminate the comparative inquiry of the test.[175] This change would bring the cancellation of removal standard into conformity with the rest of the international community under the CRC.[176] Additionally, it is supported by the U.S. Constitution's protection of family, as evidenced through well-established principles of family law.[177]

Opponents will argue that the new standard will allow too many grants of cancellation of removal, at odds with congressional intent to restrict the eligible class when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[178] However, the intended narrowing was already accomplished by revising the time requirements, reducing the yearly quota, and eliminating consideration of hardship to anyone other than the qualifying family member.[179] Additionally, and most importantly, the change reflects the BIA's obligation to evolve their standards in adherence with new factual findings that inform societal understanding of important issues in child psychology.[180] Our law promotes the redefinition of agency policy for the reasons articulated in this paper. Alternatively, the most robust solution is for Congress to amend the statute. Doing away with the "exceptional and extremely unusual hardship standard" in exchange for a "best interests of the child" inquiry would signify movement toward an immigration policy that truly values unity of families.

## Notes

* Eva Loney is an immigration staff attorney at Centro Legal de la Raza in Oakland, California, where she represents children and families in their petitions for immigration relief before USCIS and EOIR. At Centro Legal she works primarily on humanitarian forms of relief, including asylum and special immigrant juvenile status. She is a graduate of UC Davis School of Law, where she was a student advocate in the law school's immigration law clinic and held positions as an immigration clerk at California Rural Legal Assistance Foundation and Considine, Sorensen & Trujillo PC. The author extends gratitude to Professor Amagda Pérez for her mentorship in the UC Davis Immigration Law Clinic, and for exemplifying the values of kindness and compassion in the practice of law. She also extends gratitude to Professor Rose Cuison-Villazor, who provided comments on an earlier draft of this paper, and to the editors of the *AILA Law Journal* for their thoughtful suggestions and attention to detail.

1. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (Protecting the Nation from Foreign Terrorist Entry into the United States (the Muslim Ban)).

2. *See* John Fritze, Trump Used Words Like "Invasion" and "Killer" to Discuss Immigrants at Rallies 500 Times: USA TODAY Analysis, USA Today (Aug. 8, 2019), www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/.

3. Undocumented immigrants can obtain driver's licenses in California. *See* dmv.org, AB-60 Driver's License in California, www.dmv.org/ca-california/ab-60-drivers-license.php.

4. The facts in this hypothetical are inspired by a family with which the author worked in the UC Davis Immigration Clinic, but names and some details have been changed.

5. *See* Tal Kopan, How Trump Changed the Rules to Arrest More Non-Criminal Immigrants, CNN Politics (Mar. 2, 2018), www.cnn.com/2018/03/02/politics/ice-immigration-deportations/index.html.

6. A Vision for America as a Welcoming Nation: AILA Recommendations for the Future of Immigration, AILA Doc. No. 20110933.

7. Featured Issue: First 100 Days of the Biden Administration, AILA Doc. No. 21011407.

8. INA § 240A(b) (defining cancellation of removal for nonpermanent residents).

9. *Id.*

10. *Matter of Andazola*, 23 I&N Dec. 319, 334 (BIA 2002) (Osuna, Bd. Member, dissenting) (cautioning that adopting an overly strict reading of the statute carries the danger of rendering cancellation of removal meaningless for all but a very small number of people).

11. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

12. Congress has enacted immigration statutes governing the termination of deportation for deportable people since 1940. *See* Lucy Y. Twimasi, Hardship Reconstructed: Developing Comprehensive Legal Interpretation and Policy Congruence in INA § 240A(b)'s Exceptional and Extremely Unusual Hardship Standard, 34 Chicana/o-Latina/o L. Rev. 35, 39–45 (2016) (describing the evolution of the hardship standard since 1940).

13. 8 USC §§ 1–1557 (1976).

14. Twimasi, *supra* note 12, at 41.

15. *Id.*
16. *Id.*
17. *Id.* at 41–42.
18. *See, e.g.*, Will Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 Colum. L. Rev. 309, 343 (1956). However, the decisions interpreting the "exceptional and extremely unusual hardship to the alien or his spouse, parent or child who is a citizen or alien lawfully admitted for permanent residence" deployed a more generous interpretation of the standard than *Matter of Monreal* and its progeny. *See e.g.*, *Matter of Z–*, 7 I&N Dec. 253 (BIA 1956); *Matter of M–*, 7 I&N Dec. 147 (BIA 1956); *Matter of B–*, 6 I&N Dec. 713 (BIA, AG 1955); *Matter of W–*, 5 I&N Dec. 586 (BIA 1953); *Matter of J–*, 5 I&N Dec. 509 (BIA 1953); *Matter of M–*, 5 I&N Dec. 448 (BIA 1953); *Matter of Z–*, 5 I&N Dec. 419 (BIA 1953); *Matter of H–*, 5 I&N Dec. 416 (BIA 1953); *Matter of S–*, 5 I&N 409 (BIA 1953).
19. *See* Twimasi, *supra* note 12, at 42.
20. *See* *Wang v. INS*, 622 F.2d 1341, 1345 (9th Cir. 1980) ("[I]t is generally agreed that Congress intended to lessen the degree of hardship required for suspension of deportation."); Twimasi, *supra* note 12, at 43.
21. *See Matter of Anderson*, 16 I&N Dec. 596, 597 (BIA 1978) (enumerating factors that will be assessed when the evaluating hardship in suspension of deportation proceedings, including: "age of the subject; family ties in the United States and abroad; length of residence in the United States; condition of health; conditions in the country to which the alien is returnable—economic and political; financial status—business and occupation; the possibility of other means of adjustment of status; whether of special assistance to the United States or community; immigration history; position in the community"); Twimasi, *supra* note 12, at 43.
22. *Matter of O–J–O–*, 21 I&N Dec. 381 (BIA 1996); Twimasi, *supra* note 12, at 43.
23. *Matter of O–J–O–* at 381–82; Twimasi, *supra* note 12, at 43–44.
24. *See Matter of O–J–O–* at 411–12.
25. *Id.* at 411.
26. *See* Twimasi, *supra* note 12, at 44.
27. *See* INA § 240A(b); Twimasi, *supra* note 12, at 43–44.
28. Twimasi, *supra* note 12, at 43–44.
29. INA § 240A(b); Twimasi, *supra* note 12, at 45.
30. *See* Monreal-Aguinaga, 23 I&N Dec. 56, 58 (BIA 2001) (describing the differences between cancellation of removal and suspension of deportation).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
35. *See Matter of Monreal.*
36. *Matter of J–J–G–*, 27 I& N Dec. 808 (BIA 2020).
37. *Matter of Monreal.*
38. *Id.* at 57.
39. *Id.*
40. *Id.* at 57, 60–61.
41. *Id.* at 64–65.

42. *Id.* at 64.
43. *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).
44. *Id.* at 320.
45. *Id.*
46. *Id.* at 324.
47. *Id.*
48. *See, e.g.*, Twimasi, *supra* note 12, at 45.
49. *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).
50. *Id.* at 467.
51. *Id.*
52. *Id.* at 470.
53. Patrick Glen, The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings, 30 Berkeley J. Int'l L. 1, 17 (2012).
54. *See Matter of Recinas*, at 467.
55. *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
56. *See Matter of Andazola*, at 323 (concluding that hardship "must necessarily be assessed, at least in part, by comparing it to the hardship others might face").
57. *Id.*
58. *See Matter of Recinas*, at 472.
59. 27 I&N Dec. 808 (BIA 2020).
60. *Id.*
61. *Id.* at 809–10.
62. *Id.* at 814.
63. *Id.* at 811–13.
64. *See Matter of Monreal*, 23 I&N Dec. 56, 72 (BIA 2001) (noting lack of evidence in the record to corroborate the respondent's hardship argument, and suggesting such evidence could have taken several forms, including "individual medical and psychological reports by expert witnesses").
65. *See, e.g.*, *Pandit v. Lynch*, 824 F.3d 1 (1st Cir. 2016); *Rendon v. Holder*, 588 F.3d 669 (9th Cir. 2010) (remanding to the immigration judge to give the respondent opportunity to obtain all evidence, including a full assessment of the respondent's child recommended by the psychologist); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1008 (9th Cir. 2005) (referencing a note from the petitioner's son's teacher stating that the child "would suffer emotional and psychological harm" if separated from his father).
66. *See, e.g.*, *Tinizaray-Narvaez v. Att'y Gen.*, 353 F. App'x 758, 759–60 (3d Cir. 2009) (unpublished).
67. *De Jesus Chete Juarez v. Ashcroft*, 376 F.3d 944, 949 (9th Cir. 2004) (generalizing psychological harm to school-aged children forced to adapt to a new culture and separate from a parent).
68. *See* Twimasi, *supra* note 12, at 48, 53.
69. *See Matter of Monreal*, at 64.
70. *See Matter of J–J–G–*, 27 I&N Dec. 808, 814 (BIA 2020).
71. *Id.*
72. *See, e.g.*, *Jimenez v. Att'y Gen.*, 358 F. App'x 355, 356–57 (3d Cir. 2009) (unpublished) ("The IJ determined, after weighing the relevant factors, that although Jimenez's children might suffer emotional, psychological and economic deprivations if

she is removed to Ecuador, 'there is nothing in this record to suggest that the hardship that these children would suffer … is anything other than the hardship that would be present in the vast majority of cases'.").

73. *See* Rendon v. Holder, 588 F.3d 669, 671 (9th Cir. 2010) (noting that the respondent's psychologist witness indicated the child may have been suffering from ADHD, but this did not mean he would not be able to receive speech therapy in Mexico, thus undermining the hardship argument).

74. *See, e.g.*, Pandit v. Lynch, 824 F.3d 1 (1st Cir. 2016).

75. *See, e.g.*, De Jesus Chete Juarez v. Ashcroft, 376 F.3d 944 (9th Cir. 2004) (concluding that removal of a parent for a school-aged child is "especially serious," and citing a study that a school-aged child is subject to rejection to peers if forced to adopt to a new culture).

76. *Id.*

77. *See* Luis H. Zayas et al., *The Distress of Citizen-Children with Detained and Deported Parents*, J. Child Fam. Stud. 11 (2015).

78. *Id.*

79. More than a decade elapsed between the first mention of psychological evidence to support a hardship finding and the first psychological studies discussing the severe detriment a child faces when a parent is removed. *See Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

80. *See, e.g.*, Brian Allen et al., The Children Left Behind: The Impact of Parental Deportation on Mental Health, J. Child. Fam. Stud. 390 (2015) (recommending that attempts be made to preserve parent-child relationships during instances when undocumented parents are apprehended by the government); Zayas, *supra* note 77, at 5 (emphasizing that immigration enforcement policies should be concerned with the well-being of citizen-children during the detention and removal of their parents).

81. Zayas, *supra* note 77, at 3.

82. Allen et al., *supra* note 80, at 386–87.

83. *Id.* at 390; Zayas, *supra* note 77, at 5.

84. L.E. Gulbas et al., Deportation Experiences and Depression Among U.S. Citizen-Children with Undocumented Parents, Child Care Health Dev. 220, 221 (2016).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 228.

90. Monica Bucci et al., *Toxic Stress in Children and Adolescents*, 63 Advances in Pediatrics 403-28 (2016).

91. *Id.* at 405.

92. *Id.* at 403.

93. *Id.* at 418.

94. *Id.*

95. *Id.* at 406.

96. *Id.*

97. *See* Cory Turner, What Do Asthma, Heart Disease and Cancer Have in Common? Maybe Childhood Trauma, NPRed (Jan. 23, 2018), www.npr.org/sections/ed/2018/01/23/578280721/what-do-asthma-heart-disease-and-cancer-have-

in-common-maybe-childhood-trauma (using the example of parental deportation as an "adverse childhood experience" that puts a child at risk of developing a chronic illness).

98. *Id.*

99. Gulbas et al., *supra* note 84, at 221.

100. *See generally* Bucci et al., *supra* note 90 (describing how adverse childhood experiences compound to put children at greater risks of long-term mental and physical illness).

101. *See* Gulbas et al., *supra* note 84, at 221.

102. *See* the third section, *supra* (describing how psychology scholars use their empirical studies as vehicles to simultaneously advocate for immigration reform).

103. *See, e.g.*, Schuyler W. Henderson & Charles D.R. Baily, *Parental Deportation, Families, and Mental Health*, 52 J. Am. Acad. Child & Adolescent Psychiatry 451 (2013); Human Impact Partners, *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families* (2013), https://humanimpact.org/wp-content/uploads/2017/09/Family-Unity-Family-Health-2013.pdf.

104. *See* Pandit v. Lynch, 824 F.3d 1 (1st Cir. 2016); Cabrera-Alvarez v. Gonzales, 423 F.3d 1006 (9th Cir. 2005); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

105. *See Matter of Recinas*.

106. *See id.* at 469.

107. *Cabrera-Alvarez v. Gonzales*, at 1012.

108. *Id.*

109. *See Lynch*, at 5.

110. *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

111. *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

112. *See* Alvarez Figueroa v. Mukasey, 543 F.3d 487 (9th Cir. 2008) (reversing the BIA's decision because the immigration judge misconstrued the hardship standard by assessing current, rather than future hardship).

113. *See Lynch*, at 5.

114. See the third section, *supra*.

115. Allen et al., *supra* note 80, at 386–87.

116. *See generally* Bucci et al., *supra* note 90; see the third section, *supra*.

117. The author believes this is a novel suggestion that has not been utilized in immigration advocacy.

118. *See* the third section, *supra*.

119. Dep't of Justice, *Measures to Improve the Immigration Courts and the Board of Immigration Appeals* (2006), http://trac.syr.edu/immigration/reports/194/include/Gonzales22ImprovementMeasures.pdf.

120. *Id.* at 2.

121. Bush Administration Plan to Improve Immigration Courts Lag, TRAC Immigration (Sept. 8, 2008), http://trac.syr.edu/immigration/reports/194/ (noting that while EOIR implemented aspects of training for new and veteran judges, it also reduced the quality or extent of other training components, such as an annual conference).

122. *See* Alan Vomacka, Cancellation o[f] Removal, Suspension of Deportation 212(c) Waiver, and Voluntary Departure, 9–10, 65–71 (2008), http://trac.syr.edu/immigration/reports/211/include/III-17-training_course_cancellation_of_removal.pdf

(providing instruction on cancellation of removal for nonpermanent residents as part of a five-day training for immigration judges in August 2008).

123. *Id.* at 67–71.

124. *Id.* at 70.

125. INA § 240A(b)(1)(D); *Matter of Monreal*, 23 I&N Dec. 56, 58 (BIA 2001) ("[U]nder the new statute, hardship to the applicant for relief is not considered; only hardship to the alien's United States citizen of lawful permanent resident spouse, parent, or child may be considered"); *see* Vomacka, *supra* note 122, at 10 (reiterating Monreal's interpretation).

126. Vomacka, *supra* note 122, at 71.

127. Paul Wickham Schmidt, DOJ Eliminates U.S. Immigration Judges' Only Annual Training, immigrationcourtside.com (Apr. 17, 2017), http://immigrationcourtside.com/2017/04/13/its-true-doj-eliminates-u-s-immigration-judges-only-annual-training-quality-professionalism-de-prioritized-in-trump-era-billions-for-enforcement-incarceration-crumbs-for-du/.

128. *Id.*

129. Tal Kopan, Justice Department Rolls Out Case Quotes for Immigration Judges, CNN Politics (Apr. 2, 2018), www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html.

130. Measure #4 ("Improved Training for Judges") was considered to be only "Partially Completed or Opaquely Implemented" in 2008. See Bush Administration Plan to Improve Immigration Courts Lag, *supra* note 121.

131. *See* the third section, *supra*.

132. In response to a FOIA request, the *Immigration Judge Benchbook* was made public in April 2018. For an archived version, see www.justice.gov/eoir/archived-resources.

133. *See id.* (including among the materials a PDF template for a cancellation of removal decision and order).

134. *Id.*

135. *See supra* note 125 and accompanying text.

136. *See* AILA Doc. No. 20110933, *supra* note 6.

137. Gregory Chen, The Urgent Need to Restore Independence to America's Politicized Immigration Courts, Just Security (Nov. 12, 2020), www.justsecurity.org/73337/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/.

138. Convention on the Rights of the Child art. 3, Nov. 20, 1989, U.N. Doc. A/RES/44/25.

139. Convention on the Rights of the Child, Frequently Asked Questions, UNICEF (Nov. 30, 2005), www.unicef.org/crc/index_30229.html.

140. *See* Patrick Glen, *supra* note 53, at 21 (discussing the reluctance of the courts of the United States to consider the CRC since the treaty does not legally bind countries that are not parties to the agreement).

141. Contrast the United Kingdom Supreme Court's consideration of the best interests of the child as an initial consideration in determining the removability of a noncitizen parent with the cancellation of removal factors, among which the best interests of the child are given no more weight than financial or health considerations. *See id.* at 24.

142. *Id.*

143. *Id.*

144. *See* Convention on the Rights of the Child, Frequently Asked Questions.

145. *Id.*

146. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171 (N.Y. Ct. App. 1982).

147. Child custody laws, Encyclopedia of Children's Health, www.healthofchildren.com/C/Child-Custody-Laws.html.

148. *See* David B. Thronson, Choiceless Choices: Deportation and the Parent-Child Relationship, 6 Nev. L.J. 1165, 1178 (2006).

149. *See id.* at 1165 (analogizing family law to immigration law).

150. *Id.* at 1174.

151. *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977).

152. *See* David B. Thronson, *supra* note 148, at 1175.

153. *Id.*

154. *Id.* at 1179.

155. *See id.*

156. *See, e.g.*, *Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006, 1014 (9th Cir. 2005) (Pregerson, J., dissenting) ("Our cancellation of removal statute does not honor the concept of family values and the need to keep families together.").

157. *See* the second section, *supra* (describing Congress's restriction of the eligible class of applicants in replacing "Suspension of Deportation" with "Cancellation of Removal" in 1996).

158. *See* David B. Thronson, *supra* note 148, at 1178.

159. *See Matter of Monreal*, 23 I&N Dec. 56, 62 (BIA 2001) (discussing legislative intent to make cancellation of removal available only in the most compelling cases).

160. *See id.* ("The new standard requires a showing of hardship beyond that which has normally been required in suspension of deportation cases.... Cancellation of removal under section 240A(b) of the Act is limited to 'truly exceptional' situations.") (citing legislative history).

161. *See id.* at 58.

162. *See id.*

163. *FCC v. Fox TV Stations*, 556 U.S. 502, 515 (2009).

164. *Id.*

165. *See* the third section, *supra*.

166. 8 CFR § 1240.64(d).

167. 8 CFR § 1240.64(d)(1).

168. *See* Doug Stanglin, Mexico Travel Warning: U.S. Urges Citizens to Avoid 5 Mexican States, USA Today (Jan. 11, 2018), www.usatoday.com/story/news/world/2018/01/11/mexico-travel-warning-u-s-urges-citizens-avoid-5-mexican-states/1023620001/ (discussing the State Department's 2018 issuance of a "do not travel" advisory for U.S. citizens regarding five Mexican states).

169. INA § 240A(b) (defining cancellation of removal for nonpermanent residents).

170. *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *see* the third section, *supra*.

171. *See* the third section, *supra* (describing how parental removal puts children at severe risk for mental and physical illness).

172. *See Matter of Andazola*, at 323 (concluding that hardship "must necessarily be assessed, at least in part, by comparing it to the hardship others might face").

173. These facts resemble those in the seminal case Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), the only seminal case where the hardship standard was satisfied.

174. *See* the third section, *supra*.

175. *See* the fourth section, *supra*.

176. *See id.*
177. *See id.*
178. *See* the fifth section, *supra*.
179. *See id.*
180. *See id.*

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