

ARTICLES

UNCONVENTIONAL REFUGEES

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Refugees are a flash point for political divisions in the United States and abroad. The enormous personal, moral, and legal challenges posed by the displacement of refugees around the world reveal the dire inadequacies of our current policies toward refugee protection. Children running to border agents at the U.S. southern border are treated as a security threat to be deterred, instead of a vulnerable population needing some level of protection. The numbers of people seeking safety in the United States, while not objectively high, places further strain on an already under-resourced and heavily burdened immigration system, which at the end of the day, offers only partial hope to some of those seeking safety. Simply put, our current laws are simply not designed to offer meaningful protection that fits the contours of new waves of forced migration.

This Article breaks open a debate that has been caught between the binaries of protection versus deterrence, and instead asks what framework could effectively serve multiple goals, both short-term protection and long-term deterrence and public safety. To do this, it questions our exclusive focus on the protection afforded by the Refugee Convention, and considers what rights to protection might be owed to “unconventional refugees.”

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The Refugee Convention's principle of non-refoulement (or non-return to the persecuting country) imposes significant duties on receiving nations like the United States, while its implementation requires intensive individualized determinations that create great demands on an overstretched immigration system. Its high value comes from the path it creates for refugees to ultimately access U.S. citizenship, and the value necessarily entails a process of great detail and depth. This Article considers whether a complementary form of protection for unconventional refugees is appropriate—protection that is perhaps less valuable, but also less complex to administer and easier for the refugees to access.

The Article examines precedents in U.S. immigration laws for such a reimaged form of protection, and examines a series of justifications, both philosophical and pragmatic, for such protection. The world is undeniably experiencing a moment where even the Refugee Convention meets considerable political opposition, so the project of developing a new framework is a long-term one, but it is a project that merits thoughtful consideration starting now. The principle of non-refoulement was once novel, and now constitutes a powerful principle of international law. A new principle for protecting unconventional refugees may also be possible, but only if we begin the task of imagining it.

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INTRODUCTION

“We can park our chair on the beach as often as we please, and cry at the oncoming waves, but the tide will not listen, nor the sea retreat.”¹

The personal, moral, and legal challenges posed by those seeking refuge in the United States reveal the inadequacies of our current approach to refugee protection, which largely derives from the 1951 Convention Relating to the Status of Refugees,² or the “Refugee Convention.” Current legal and policy responses are not designed to offer protection that fits the contours of current crises, from Syria to Central America.³ While Europe and the Middle East have most closely

1. ZYGMUNT BAUMAN, *STRANGERS AT OUR DOOR* 4–5 (2016) (quoting ROBERT WINDER, *BLOODY FOREIGNERS: THE STORY OF IMMIGRATION TO BRITAIN* xiii (2013)).

2. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

3. See Filippo Grandi, *Refugees Deserve Action and Investment, Not Indifference and Cruelty*, WORLD ECON. FORUM (May 24, 2016), <https://www.weforum.org/agenda/2016/05/refugees-deserve-action-and-investment-not-indifference-and-cruelty> (suggesting that migrants are too valuable to society not to protect and that governments need to do more to offer them protection).

confronted the needs of Syrian refugees,⁴ the United States has similar issues, in smaller scale, connected with the flow of children and families from violence in Central America.⁵ The Central American migrants expose both dilemmas and opportunities and call for a reframing of our ideas of who requires protection—and why and how they get such protection. This Article terms those needing protection “unconventional refugees” because their needs fall beyond what the Refugee Convention itself affords. The Refugee Convention does not protect many forced migrants from Central America because their reasons for migrating likely do not fall into a protected category.⁶ However, this does not mean these migrants do not deserve protection; this Article simply considers them “unconventional refugees.”

This Article is part of an important, longer-term project—nascent but growing in academic scholarship—of thinking beyond the Refugee Convention as we look at the humanitarian needs of unconventional refugees in the twenty-first century.⁷ Those fleeing Syria and certain

4. See Carol J. Williams, *The Conflicts and Failures Behind the European Migrant Crisis*, L.A. TIMES (Sept. 2, 2015, 10:29 AM), <http://www.latimes.com/world/europe/la-fg-european-migrant-crisis-explainer-20150902-story.html> (reporting that the Middle East and Europe have received most of the displaced Syrians).

5. See Adriana Beltrán, *Children and Families Fleeing Violence in Central America*, WASH. OFFICE ON LATIN AM. (Feb. 21, 2017), <https://www.wola.org/analysis/people-leaving-central-americas-northern-triangle> (“Between 2015 and 2016, over 180,000 children and families fleeing violence in Central America were apprehended at the U.S.-Mexico border.”).

6. See *infra* Section III.C.1. (discussing the protected categories under the Refugee Convention and how blanket coverage to certain nations failed in the past).

7. This exploration has been most vibrant in the context of “environmental refugees,” a term that itself challenges the technical limitations of the Refugee Convention, which requires a human persecutor. “While the Refugee Convention may adequately provide protection for the harms that led individuals to seek refugee status in the mid-twentieth century, its refugee definition does not recognize modern forms of harm, such as environmental hazards, that lead many to seek refuge outside the borders of their home state.” Brittan J. Bush, *Redefining Environmental Refugees*, 27 GEO. IMMIGR. L.J. 553, 554 (2013); see also Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENVTL. L. & POL’Y 457, 487–90 (2015) (examining the current legal framework that governs climate change-related migration and offering solutions to fill gaps in current policies). Scholars and other stakeholders are increasingly exploring these gaps in other migration contexts as well. See, e.g., Sanjula Weerasinghe et al., *On the Margins: Noncitizens Caught in Countries Experiencing Violence, Conflict and Disaster*, 3 J. ON MIGRATION & HUM. SECURITY 26, 29–30 (2015) (exploring the effect of several different humanitarian crises on noncitizens’ ability to seek relief because they were not citizens of the countries where the crises occurred); Sharon Stanton Russell, *Refugees: Risks and Challenges Worldwide*, MIGRATION POL’Y INST. (Nov. 1, 2002), <http://www.migrationpolicy.org/article/refugees-risks->

countries in Central America sharply expose the limits of the Refugee Convention, which was designed for a post-World War II context that bears little resemblance to the context driving forced migration today.⁸ In the United States, the Central American migrants particularly expose those limits as government officials hear and decide their claims as part of the U.S. immigration system. By contrast, Syrian refugees arriving in the United States have already secured their refugee status through a lengthy status determination and security vetting process overseas.⁹ Although there are similarities between the needs of these two very different forced migrations, this Article focuses primarily on the Central American migrants.

Thus far, the conversation in the United States about how best to conceptualize the Central American migrants fleeing violence has involved a debate between protection and deterrence, setting those two values in unnecessary opposition to each other.¹⁰ Those who emphasize protection tend to define the displacement as a refugee problem.¹¹ Doing so summons the mandatory protection framework of the Refugee Convention at and within our borders, wherein the United States cannot return people to places where they fear persecution on any one of five protected grounds.¹² Significantly, when the Refugee

and-challenges-worldwide (explaining that the term “refugee,” as defined by the Refugee Convention, “excludes people who move primarily for economic reasons” and people who seek asylum).

8. See Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT’L L. 81, 85, 93–94 (2015).

9. For a thorough explanation of the difference between refugee claims and asylum claims, see Nicole Ostrand, *The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States*, 3 J. ON MIGRATION & HUM. SECURITY 255 (2015).

10. See KEVIN APPLEBY ET AL., CTR. FOR MIGRATION STUD. & SCALABRINI INT’L MIGRATION NETWORK, THE CENTRAL AMERICAN HUMANITARIAN CRISIS AND US POLICY RESPONSES 1–3 (Sept. 2016), <http://cmsny.org/wp-content/uploads/2016/09/CARreport-Galley-Final-New.pdf> (reporting that the United States has struggled with both protection and deterrence strategies to control Central American migration); see also Dara Lind, *The Paradox at the Heart of Obama’s Central American Refugee Policy*, VOX (Jan. 25, 2016, 9:10 AM), <https://www.vox.com/2016/1/25/10826010/refugee-deport-central-america> (portraying the United States’ inability “to balance the humanitarian need to make the right decisions against the deterrent need to deport people” as a “life and death” situation).

11. See Lind, *supra* note 10.

12. See 8 U.S.C. § 1101(a)(42) (2012) (enumerating the five protected grounds as race, religion, nationality, membership in a particular social group, and political opinion); see also Refugee Convention, *supra* note 2, 189 U.N.T.S. at 152 (providing

Convention applies, those in the United States who qualify for its protections may earn a benefit of enormous value: a path to U.S. citizenship.¹³

Within the debate, the protection-side undervalues the limitations inherent in the Refugee Convention itself and focuses on improving access to a form of protection that, despite its malleable edges, is not designed for the breadth of these situations. The Refugee Convention protects those who have been or would be uniquely targeted and persecuted on account of a protected characteristic, such as religion or political opinion,¹⁴ and not those fleeing “generalized violence.”¹⁵ Some of those seeking refuge in the United States from Central America do meet the Convention’s narrow definition, and even more importantly, have the ability to articulate and prove that they do—these are conventional refugees. But many refugees do not fit the definition or have great difficulty proving that they do. Even at its fullest interpretive extent, the Refugee Convention does not encompass all those seeking refuge in the United States, and all those whom this Article argues merit *some* form of protection.

In contrast to those who emphasize the protection imperative, those who emphasize deterrence view these migrations as a security problem for both the migrants and the United States itself, or sometimes as a fiscal burden.¹⁶ For the migrants’ own safety, and for the security of U.S. borders, these voices wish to deter the migrants from taking the trip in the first place.¹⁷ The security concerns for the migrants are undeniable, with a high percentage of migrants reporting rape, assaults, robbery, extortion, and other harrowing experiences along the route, and with many dying along the way.¹⁸ Some security

the international law foundation for refugee protection, including the five categories on which U.S. refugee status relies).

13. See, e.g., 8 U.S.C. § 1159(a)–(b) (establishing a path to lawful permanent residence for refugees and immigrants who satisfy certain criteria).

14. Refugee Convention, *supra* note 2, 189 U.N.T.S. at 152; see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol] (modifying the Refugee Convention’s definition of “refugee” but keeping the same protected characteristics or categories).

15. *Asylum & the Rights of Refugees*, INT’L JUST. RES. CTR., <http://www.ijrcenter.org/refugee-law> (last visited Oct. 23, 2017).

16. See Lind, *supra* note 10.

17. See *id.*

18. Peter Orsi, *Report Paints Harrowing Picture of Central American Migration*, U.S. NEWS & WORLD REP. (May 11, 2017, 9:25 PM), <https://www.usnews.com/news/world/articles/2017-05-11/report-paints-harrowing-picture-of-central-american-migration> (reporting that “heightened immigration enforcement by the United States and Mexico threatens to make more refugees and migrants vulnerable to exploitation”

concerns for the United States are defensible, such as the concerns about specific individuals with close ties to organized crime or drug trafficking. Other concerns, however, are overstated, such as the concern for diversion of law enforcement resources to the border. This resulted in an indefensible policy that treated individual migrants as security risks merely because the migrants as a whole required diversion of law enforcement resources to the border—a policy later struck down by the courts and rescinded by the Obama Administration.¹⁹ Whichever justification for deterrence carries the day, the deterrence emphasis relies on narrow interpretations of an already narrow Refugee Convention, and it ignores the acute need for some form of protection for vulnerable populations.²⁰ The deterrent-side also ignores how these migrants may have claims to protection. Apart from and broader than claims made under the Refugee Convention, these claims are often recognized internationally in situations of mass forced migrations.²¹ In the Central American case, these claims are further strengthened by the history between the

and recognizing that about seven out of ten persons experience violence while fleeing to the United States from the Northern Triangle and Mexico).

19. See *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 189–90 (D.D.C. 2015) (rejecting the government’s “general deterrence” defense to detaining Central American asylum-seekers and stating that “the Court finds the Government’s interest here particularly insubstantial. . . . It claims that such Central American immigration implicates ‘national security interests,’ It argues, in essence, that such migrations force ICE to ‘divert resources from other important security concerns’ The simple fact that increased immigration takes up government resources cannot necessarily make its deterrence a matter of national security,”); *id.* at 188–89 (concluding that the government exceeds its authority to detain “one particular individual” when it does so to “send[] a message of deterrence to other Central American individuals who may be considering immigration”); see also RANJANA NATARAJAN ET AL., REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER 1–2 (Sept. 26, 2014), https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-10-IC-IACHR_Karnes_Report.pdf (critiquing government “insist[ence] on expanding family detention” and exemplifying how family detention at one Texas detention center “violates international and domestic human rights and civil rights protections for the women and children held behind bars”).

20. The dominance of the deterrence paradigm also explains the continued reliance on deterrence as a response to the most recent “crisis,” despite continued calls from scholars and civil society for a more protection-oriented and sustainable response.

21. See U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, ¶¶ 14–15 (Jan. 26, 2007) [hereinafter U.N. Advisory Opinion], <http://www.unhcr.org/4d9486929.pdf>.

United States and the affected countries that is a root cause of this particular migration.²² The deterrent-side too often ignores this distinct claim to protection.

This Article posits that the goals of deterrence and protection have been needlessly set in opposition to each other, perhaps an inevitable result of focusing on the Refugee Convention as the starting *and* ending point of protection. The Refugee Convention has been extraordinarily durable, and even considering the many well-placed critiques and ongoing efforts to improve its implementation,²³ it deserves enormous credit both for lives saved and for integrating international human rights so robustly into many states' domestic laws. It has also, to some extent, adapted through the years to new kinds of persecution.²⁴ Nonetheless, the Refugee Convention's focus on particular, targeted individuals fits uneasily with broader forced migrations of people, and has led to an unfortunate binary between "deserving" asylum-seekers and mere "economic migrants."²⁵ As Professor Ramji-Nogales noted, "Scholars of international migration law recognize that this binary does not adequately capture the range of reasons for migrating. There are many compelling drivers of migration that do not fall within the narrow international legal definition of a refugee."²⁶ We can conceive such non-binary migrants as *unconventional refugees*.

This Article breaks apart this binary by asking what duty the international community, and more specifically the United States, might owe to unconventional refugees. Forced migration encompasses a population broader than those who meet the definition of a refugee, although it certainly *includes* those who have a demonstrable, individualized claim to refugee status under the Refugee Convention.²⁷ This concern for a more-encompassing

22. See *infra* Section II.B.1.

23. See generally Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 231 (1996) (exploring ways that the Refugee Convention, though "incomplete," remains relevant despite criticisms that suggest it is obsolete, too vague, or burdensome to implement).

24. See Schoenholtz, *supra* note 8, at 91, 99–101 (examining whether the Refugee Convention can protect individuals from persecution by non-state actors).

25. Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 611 (2017).

26. *Id.*

27. See Arthur C. Helton & Eliana Jacobs, *What Is Forced Migration?*, 13 GEO. IMMIGR. L.J. 521, 528 (1999) (proposing "*forced migrant*, as a separate and broader legal category with corresponding remedies," which would avoid changing the scope of the Refugee Convention's definition for "refugee").

nomenclature matches this Article's concern for a legal framework that also encompasses more than refugees.²⁸

The Refugee Convention and its limits anchor this discussion, but it is not the only law at play in the forced migrations of the past years. Complementary forms of individualized protection appear throughout U.S. immigration law, past and present.²⁹ In Part I, this Article focuses on the many precedents within U.S. immigration law for providing protection that is more broadly available than protection provided by the Refugee Convention. These are typically nationality-based statuses, and range from the highly valuable protection of the Cuban Adjustment Act³⁰ ("CAA") to the much less durable protection offered by Temporary Protected Status³¹ (TPS) designations for specific countries like Syria. The range in value provides critical insights into a more flexible way of thinking about protection, beyond the all-or-nothing framework.

Having considered the precedents in U.S. law, past and present, this Article turns in Part II to ethical and philosophical justifications for providing broader protections in certain circumstances, looking at vigorous, ongoing philosophical debates surrounding the extent and nature of a nation-state's right to exclude would-be migrants. One branch of the debate flows from philosopher John Rawls's "original position,"³² and has been articulated in the migration context by

28. Sharing Professor Ramji-Nogales's critique of the limitations of the crisis construct, I also avoid the term "crisis migration." Scholars examining "crisis migration" have done important work in showing how vulnerable migrants may or may not fit existing categories within international law. See Susan Martin et al., *What is Crisis Migration?*, 45 FORCED MIGRATION REV. 5–6 (Feb. 2014), <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/crisis/martin-weerasinghe-taylor.pdf> (recognizing that not all migrants are refugees or forced migrants). This Article shares much in common with their important project but eschews the word "crisis," which typically signifies something acute and of short duration; Northern Triangle dynamics are long-term, and we must view them as such. See *infra* Section II.B.

29. See *infra* Part I.

30. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2012)) (placing Cubans on a path to citizenship one year after arrival).

31. 8 U.S.C. § 1254a (declaring no path to citizenship no matter how long TPS lasts).

32. This is discussed further in Section II.A *infra*, but can be summarized at its most basic as answering the question of what laws one would choose for a nation if determining them from behind a "veil of ignorance"—lack of knowledge of one's position in the society whose rules one is attempting to create.

Michael Walzer.³³ This view ascribes higher duties to those within a nation's borders, seeing a fundamental right to community self-determination, with some subsidiary right to determine the pace of cultural change that can be hastened by immigration.³⁴ The other branch of the debate, first forcefully articulated by philosopher Joseph Carens, takes Rawls's "original position" and considers it on a global level, trying to understand what rules of migration would be adopted if the people making the rules had no idea whether they would be citizens of, for this example, the United States or El Salvador.³⁵ This side often justifies open—or more open—borders.³⁶

This Article sits within these two outer positions, in a place sometimes called "weak cosmopolitanism."³⁷ This position recognizes that while our greatest duties may be owed to our co-citizens, we still have duties to people outside our borders when their basic rights—including that of safety—are at stake.³⁸ Contextual factors, like those underlying the causes of Northern Triangle³⁹ migration, also create a responsibility to deal with the predictable effects of those crises.⁴⁰ We likewise have duties to those within our borders, especially as they accrue significant ties within our borders.⁴¹ This middle ground provides a way to thoughtfully consider the often baldly overstated, and

33. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 144 (1983).

34. *Id.*

35. See JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 298 (2013).

36. *Id.* at 255, 288.

37. James Ryerson, *Deep Thinking About Immigration*, N.Y. TIMES (July 26, 2016) (book review), <https://www.nytimes.com/2016/07/31/books/review/immigration-strangers-in-our-midst-david-miller.html> ("A weak cosmopolitan believes in the equal worth of all human beings but sees this as morally compatible with giving special consideration to our compatriots.").

38. See *id.* (explaining that a weak cosmopolitan seeks to protect human rights but "does not have an obligation to accept any would-be immigrants").

39. The Northern Triangle is an area of Central America comprised of El Salvador, Guatemala, and Honduras from which many migrants depart en route to the southern U.S. border. Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/central-americas-violent-northern-triangle> (last updated Jan. 19, 2016).

40. Professor Ramji-Nogales provided a trenchant critique of seeing these migrants as a "crisis," and instead looking at the inevitability of population flows in light of broader U.S. foreign policy. Ramji-Nogales, *supra* note 25, at 620–21, 653–54.

41. Seyla Benhabib, *The Morality of Migration*, N.Y. TIMES: OPINIONATOR (July 29, 2012, 5:00 PM), <https://opinionator.blogs.nytimes.com/2012/07/29/stone-immigration> (asserting that refugees and asylees deserve a path to citizenship if they have assimilated to local culture and formed important relationships in their communities).

racially-tinged, concerns about how refugees hurt Americans; deep within that concern lies a sense of Michael Walzer's articulation of our right to community self-determination. At the same time, by asking us to define when and to what extent we do have duties to those beyond our borders, this approach provides a way to understand why unconventional refugees might call on a nation to respond.

After examining the philosophical terrain that helps us understand the values and choices underlying migration policy, this Article turns in Part III to more pragmatic justifications for offering broader protection. Here, we see how our current system serves none of the multiple goals we might imagine for handling forced migration: deterrence, promotion of the rule of law, short-term security, long-term integration, and administrative efficiency.

Instead, the current patchwork system places heavy demands on the legal system, in part by inhibiting migrants from even claiming the rights available to them under current narrow legal frameworks. As a result, this patchwork system needlessly absorbs governmental and advocate resources alike and offers little to no stability for the migrants, all while siloing the immigration response from the project of addressing root causes.⁴² Here, this Article suggests that our long-term shared interests are better served by focusing intensely on sustainable development and good governance initiatives in the Northern Triangle, and on creating better long-term outcomes for the communities in the United States where forced migrants settle.

With these concerns and justifications elucidated, this Article proposes a protection framework in Part IV that supplements asylum protection instead of replacing it. In addition to asylum, with its strong protection and relatively clear commitment to integration,⁴³ the migrants fleeing Central American violence need a broader remedy

42. See DONALD M. KERWIN, MIGRATION POL'Y INST., THE FALTERING U.S. REFUGEE PROTECTION SYSTEM: LEGAL AND POLICY RESPONSES TO REFUGEES, ASYLUM SEEKERS, AND OTHERS IN NEED OF PROTECTION 1, 3–13, 28 (2011), <https://www.migrationpolicy.org/sites/default/files/publications/refugeeprotection-2011.pdf>; see also Ouisa Davis, *Our Patchwork Immigration Laws*, SHREVEPORT TIMES (June 8, 2017, 4:47 PM), <http://www.shreveporttimes.com/story/opinion/columnists/ouisa-davis/2017/06/08/us-patchwork-history-immigration-laws-davis/102644434> (providing a brief history of U.S. immigration laws).

43. Section II.B of this Article, *infra*, acknowledges some of the limitations of this commitment to integration, but nonetheless sees it as an option that performs well vis-à-vis the goal of integration.

that is easier for the United States to administer and easier for migrants to access, but one with less intrinsic value than refugee or asylee status.

This proposed framework comes with two important caveats. First, the framework absolutely requires concurrent attention to and investment in the promotion of security and governance in the Northern Triangle, so that even as we protect people from grave and immediate dangers, we are reducing the conditions that send them seeking such protection in the first place.⁴⁴ The content of that concurrent sine qua non is beyond the scope of this Article and is better left to scholars and experts in the field of international development who have been actively engaged in this work for many years preceding this current migration. But it behooves those who are concerned with the treatment of migrants in the United States to remember that this concurrent work is happening, and that the work profoundly affects the work of immigrant rights domestically.

The second caveat is simply that the proposed framework is intended to provoke conversations and critiques, not to suggest that it is a fully conceived, pragmatically-achievable proposal. The major goal of this Article is to justify doing more. The goal of the framework itself is simply to help break open a conversation about what protection *could* look like, instead of only looking at time-consuming, resource-intensive, slow, never-adequate fixes to the protection system we currently have.⁴⁵ Those changes and fixes are critical, but stepping back to reimagine something different is equally critical. Will a broader program deter those with valid asylum claims from seeking that better status? Will it open the floodgates of migration? How could such a program be administered? Part III acknowledges those questions and good readers will find more risks and issues than this Article identifies. I am modest and realistic enough to know, with certainty, that I alone cannot devise a new system; the goal is therefore

44. See SLAVOJ ŽIŽEK, AGAINST THE DOUBLE BLACKMAIL: REFUGEES, TERROR AND OTHER TROUBLES WITH THE NEIGHBORS 111, 117–18 (2016) (urging a look at root causes of migration into Europe and worker solidarity).

45. See Gabrielle Giffords, *Immigration Reform: The Time is Now*, ARIZ. ATT'Y, July–Aug. 2009, at 29, <http://www.azattorneymag-digital.com/azattorneymag/20090708> (stressing comprehensive reform that addresses temporary workers and crime but opposing amnesty); Lee Ann Russo & Bob Glaves, *Fixing the Immigration System: A Roadmap for Reform, and a Place for the Legal Community to Lead*, CBA REC., OCT. 2011, at 36, 38–39, http://www.jonesday.com/files/Publication/eb887b97-c2be-4f67-a1dc-e78984290d9c/Presentation/PublicationAttachment/be5f57e2-5882-456b-b29a-e88dee2920fb/feature_russo.pdf (proposing a fix that focuses on the economic needs of the United States but allows certain flexibilities for refugees and asylees).

the more reasonable one of breaking open the conversation. The principle of non-refoulement, which forbids a country receiving refugees from returning them to a country where their “life or freedom would be threatened on account of [their] race, religion, nationality, member of a particular social group[,] or political opinion,”⁴⁶ was once novel and now constitutes a powerful principle of international law.⁴⁷ A new principle for protecting unconventional refugees may also be possible, but only if we begin the task of imagining it.

I. PRECEDENTS FOR BROADER PROTECTION IN U.S. HISTORY

At this time in American history, with immigration an explosive factor in national and local politics alike, an article exploring *broader* protection for migrants clearly cuts against the political grain. So much of immigration-related policy in the early twenty-first century has focused on restriction and enforcement; this tendency affects both the somewhat durable asylum regime, and even sympathetic legislation like that offering status to the undocumented young people known as the DREAMers.⁴⁸

And yet, even now, there are examples of broad-scale protection within our current immigration laws. TPS is a countrywide designation limited only by the need for the individual to be admissible and to have arrived and continuously resided in the United States by certain dates.⁴⁹ The CAA is another countrywide designation, and it is even more generous than TPS because it has no date restrictions and leads quickly to lawful permanent residence, which provides a path to citizenship.⁵⁰ This Section’s discussion of both forms of relief considers them with an eye to administrative efficiency and effectiveness, their effect creating or diminishing the migration dynamics, and their impact on root causes of migration. By looking at benefits and criticisms of these programs, this Article extracts principles that could

46. U.N. High Comm’r for Refugees, Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2 (Aug. 23, 1977), <http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>.

47. See U.N. Advisory Opinion, *supra* note 21, at ¶¶ 5–6, 9, 14–15 (defining non-refoulement and identifying the principle as “a rule of customary international law . . . [that] is binding on all States”).

48. See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 103 (2013) (“[T]he DREAM Act . . . has been introduced in Congress every year since 2001 without ever passing both chambers.”).

49. See 8 U.S.C. § 1254a(a)(1), (c)(1)(A) (2012).

50. See Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2012)).

help build a more effective framework for responding to the forced migrations that we see in the twenty-first century.

A. Cuban Adjustment Act

The CAA of 1966, which is still in effect, provides broad and deep relief for one nationality. The Act emerged after a three-year “surge” of Cubans into the United States immediately following the Cuban revolution.⁵¹ As Professors Joyce Hughes and Alexander Alum note, “These individuals left Cuba between 1959 and 1962, and did not expect their exile to be permanent; that is, they expected to return home to Cuba upon the imminent dissolution or overthrow of Castro’s government.”⁵² Smaller numbers followed between 1962 and 1965, with the suspension of air travel between the United States and Cuba, making travel more dangerous for would-be migrants.⁵³ In 1965, many Cubans came through boatlifts, but were only paroled into the United States, and thus in a legal limbo (as described below, with humanitarian parole).⁵⁴ The disorder of the boatlifts and the desire for a more durable and prompt status created the impetus for the CAA.⁵⁵

The CAA created a direct path to lawful permanent residence for these Cubans without needing to qualify under any of the immigrant visa eligibility categories in the Immigration and Nationality Act (INA) or demonstrating that they met the definition of a refugee.⁵⁶ As originally enacted, the law offered permanent residence to any “native or citizen of Cuba . . . who has been inspected and admitted or paroled

51. See Javier Arteaga, Comment, *The Cuban Adjustment Act of 1966: More than Forty Years Later a Proposal for the Future*, 3 FIU L. REV. 509, 509–10, 517–18 (2008).

52. Joyce A. Hughes & Alexander L. Alum, *Rethinking the Cuban Adjustment Act and the U.S. National Interest*, 23 ST. THOMAS L. REV. 187, 194 (2011).

53. See Arteaga, *supra* note 51, at 518 (recalling that more than 70,000 Cubans came to the United States by sea from 1962 to 1965 when travel by air was not possible because of the Cuban Missile Crisis).

54. Note, *The Cuban Adjustment Act of 1966: ¿Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 907, 914 (2001).

55. See *id.* at 908 (highlighting that Congress had four main purposes in enacting the CAA: (1) to further the Cold War objectives by “destabilizing Communist dictatorship[s]”; (2) to lower administrative barriers for Cubans seeking U.S. refuge; (3) to eliminate the need for Cuban refugees to apply for permanent residence outside of the United States; and (4) to create an efficient pathway for Cuban refugees to join the workforce).

56. Hughes & Alum, *supra* note 52, at 188. Attorney Daniel Melo, who has represented numerous CAA clients, notes that at the outset, the applicants must also provide police clearances from jurisdictions where they have lived. Notes from Attorney Melo (on file with author).

into the United States subsequent to January 1, 1959”⁵⁷ with two years of physical presence in the United States.⁵⁸

Cubans benefited from special, more favorable rules concerning adjustment. “Adjustment” means adjusting from some other status like the “nonimmigrant” status of tourist or worker—or under narrow, rare circumstances that of undocumented migrant—to the “immigrant” status of lawful permanent resident, or “green card” holder.⁵⁹ Generally, adjustment has provisions that limit its availability, such as the current availability of an immigrant visa and the requirement of entering lawfully. These and other bars to adjustment do not apply under the CAA.

Professors Hughes and Alum have provided a thorough analysis of the four goals the CAA set out to achieve. Among the goals was protection of Cuban dissidents, alongside the overarching foreign policy goal of embarrassing a Cold War foe and potentially destabilizing the Cuban government by accepting so many exiles.⁶⁰ But the legislative history and the structure of the Act showed attention to other goals as well.⁶¹ Among the goals was integration of Cubans into the U.S. workforce because Cubans who had come prior to the CAA were in a tenuous legal status with limited possibilities for integration.⁶²

Administrative efficiency was another important goal of the CAA. As Hughes and Alum write, “[T]he CAA was passed to alleviate the

57. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2012)) (adjusting the status of Cuban refugees to that of lawful permanent residents of the United States).

58. Congress amended the CAA with the INA Amendments of 1976, requiring only one year of physical presence before offering lawful permanent residence. Pub. L. No. 94-571, § 9, 90 Stat. 2703, 2707 (codified as amended at 8 U.S.C. § 1153 (2012)).

59. “Immigrant” is a term of art in the INA, which divides visas into nonimmigrant visas, generally for temporary purposes, and immigrant visas, which provide lawful permanent residence. *Compare* Immigration and Nationality Act of 1952, Pub. L. 82-414, § 101(a)(15), 66 Stat. 163, 167 (codified as amended at 8 U.S.C. § 1101(a)) (listing the many different visa categories for nonimmigrants), *with* Pub. L. 82-414, § 203, 66 Stat. 163, 178–79 (codified as amended at 8 U.S.C. § 1153) (defining the categories of immigrant visas). Immigrant visas are numerically limited and are subject to per-country quotas, creating wait times for the visas in many categories, and for many countries. *See, e.g.*, U.S. DEP’T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR JANUARY 2017 1 (Dec. 12, 2016), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_January2017.pdf (acknowledging that INA section 201 sets an annual limit for family-sponsored visas).

60. Hughes & Alum, *supra* note 52, at 195–96.

61. *See* Arteaga, *supra* note 51, at 514–17 (noting that the United States implemented the CAA as an effort to destroy Communism in Cuba and to integrate Cubans with professional skills into the workforce).

62. *Id.*

administrative burden on both Cuban exiles who wanted to become U.S. permanent residents, and U.S. diplomatic facilities in Canada and Mexico that lacked the resources to process the visa applications of Cubans paroled into the United States.”⁶³ Attorney Melo captures how this efficiency works in practice, noting that this is “[t]he beauty of humanitarian parole,” which permits entry—barring criminal or terrorism issues detected at the border—and defers more complicated admissibility and deportability issues to the adjustment stage, permitting sound adjudication of cases without further clogging the immigration court process.⁶⁴ Likewise, it removes the processing from consulates overseas and places it within a well-developed adjudicatory framework domestically.

The CAA has provided a clear and administratively less cumbersome path for Cubans. As Professor David Abraham writes,

It has acted as a strong magnet for both humble fishermen and all-star baseball players. Indeed, since its inception, over 770,000 Cubans—130,000 in the Mariel boatlifts of 1980 alone—have come to the United States under its provisions and outside of normal immigration opportunities [such as the Special Cuban Migration Lottery] As we shall see, over time, the iconic rafter has been joined by Cubans travelling more comfortably, including legally to Mexico, who are then welcomed when they appear at the same U.S./Mexican border where Mexicans are turned back.⁶⁵

Abraham criticizes the CAA, however, for its presumption that all those leaving Cuba were political refugees. He draws a comparison between Cuban migrants, who are welcomed, and Haitian migrants, who are presumed to be economic migrants only and who are received far more skeptically, if at all.⁶⁶

The CAA has come under increasing criticism as relations between the United States and Cuba have changed. Among the criticisms are that it creates a powerful magnet for people whom the law was not intended to benefit: those fleeing the Castro regime for political reasons.⁶⁷ This reflects a divide between older and newer Cuban

63. Hughes & Alum, *supra* note 52, at 197.

64. Notes from Attorney Melo (on file with author).

65. David Abraham, *The Cuban Adjustment Act of 1966: Past and Future* (Univ. of Miami Legal Studies Research Paper No. 2015-11, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642451##.

66. *See id.*

67. *See id.* (declaring that “the CAA seems to have become a victim of its own success” and questioning the notion that all Cubans who have entered the United States are political refugees or asylees).

migrants, as reported by Lizette Alvarez of the New York Times: “Many earlier immigrants say the law should only protect Cubans fleeing political oppression. Newer immigrants, who benefit most from the law, are more likely to support its blanket application to all Cuban immigrants. But the Cubans who have been here longest have the most political clout.”⁶⁸ Professor Abraham also comments on this divide, “To their great annoyance, the Miami elites can no longer count on Cuban immigrants to be politically hostile to the Castro government. The reservoir of class or ideological opponents has long been tapped out, and today’s immigrants are increasingly mestizo and at peace with their home country’s politics.”⁶⁹

In 2016, in the wake of the thawing relations between Cuba and the United States, the Miami Herald noted the unintended consequences of the Act:

The prospect of legal residency in the United States is what drives the migration. Once here, they remit hundreds of millions of dollars back home, from which the government takes a cut. U.S. law acts as a safety valve to release internal discontent with conditions in Cuba, and, at the same time, lets the regime continue repressing those who remain behind. This is not what the law ever contemplated.⁷⁰

The editorial goes on to argue, “These days, real dissidents are able to leave Cuba and make a case for political asylum in the United States without relying on the [CAA].”⁷¹

After five decades of implementation, it is perhaps inevitable that the Act no longer meets all of its original goals. Of those goals, critics persuasively show how the foreign policy goal has diminished dramatically and how the goal of providing refuge to dissidents could fit within standard asylum law and processes.⁷² Critics, however, have less to say about the Act’s two other goals: integration and administrative efficiency, both of which remain valuable.⁷³ The changing, sometimes competing, value of any of these goals raises a

68. Lizette Alvarez, *Law Favoring Cuban Arrivals is Challenged*, N.Y. TIMES (Feb. 1, 2015), <http://www.nytimes.com/2015/02/02/us/law-favoring-cuba-arrivals-is-challenged.html>.

69. Abraham, *supra* note 65.

70. Miami Herald Editorial Board, *Repeal the Cuban Adjustment Act of 1966*, MIAMI HERALD (Apr. 16, 2016, 1:00 PM), <http://www.miamiherald.com/opinion/editorials/article72163832.html>.

71. *Id.*

72. *See infra* Section III.C (challenging the accurate, appealing argument by showing how unrealistic it is).

73. *See Alvarez, supra* note 68.

point that this Article will return to: that a good law should have a “fit” between its goals and the value of what it delivers. In the case of the CAA, it delivers an extremely high-value benefit—lawful permanent residence—which may have been appropriate when it was meeting all four articulated goals in its early years of implementation. Increasing recent criticism of the Act, however, suggests that fit between value and goals no longer exists.

B. Nationality-Based Presumptions of Refugee Eligibility

In 1989, Congress passed a law with the Lautenberg Amendment, which created categories of people within several nations who were, without further individual scrutiny, refugees.⁷⁴ Specifically, the provision directed the Secretary of State and the Coordinator of Refugee Affairs to establish categories for nationals and residents of the Soviet Union “who share common characteristics that identify them as targets of persecution in the Soviet Union on account of race, religion, nationality, membership in a particular social group, or political opinion”; a separate part of the Amendment specified that Soviet Jews were one such group.⁷⁵ The provision created that same mechanism for categories of Vietnamese, Laotian, and Cambodians who faced persecution.⁷⁶

As implemented, the Lautenberg Amendment makes it easier for individuals from the selected countries to gain asylum.⁷⁷ Paired with the cap on the total numbers of refugees who could be admitted to the United States in any given fiscal year (FY), the Lautenberg Amendment resulted in these countries receiving eighty-three percent of the available overseas refugee slots.⁷⁸ Congress has extended this provision repeatedly. For example, in 2004, Congress expanded the provision to cover religious minorities within Iran.⁷⁹ The provision continues to have force: in FY 2015, 4180 migrants entered the United States

74. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-167, § 599D, 103 Stat. 1195, 1261-63 (1989) (codified as amended at 8 U.S.C. § 1157 (2012)) [hereinafter Lautenberg Amendment].

75. § 599D, 103 Stat. 1195, 1262.

76. *Id.*

77. ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 9 (2016), <https://fas.org/sgp/crs/misc/RL31269.pdf>.

78. Susan Rauffer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233, 233-34 (1995).

79. Melanie Nezer, *Religion in Immigration Law*, 05-7 IMMIGR. BRIEFINGS 1, 18 (2005).

through the Lautenberg Amendment's provisions with more than half from the former Soviet Union and the rest from Iran.⁸⁰

C. *Temporary Protected Status*

In contrast to the CAA, TPS provides a far less valuable source of broad protection. TPS exists for specific countries that the U.S. government has deemed too dangerous or devastated by natural disaster to be able to absorb those being deported from the United States.⁸¹ Similar programs existed before 1990, including Deferred Enforced Departure (“DED”)⁸² (still in effect for Liberia) and Extended Voluntary Departure (“EVD”)⁸³ (used for Salvadorans), and the Executive Branch still has authority to institute such programs as a form of prosecutorial discretion.⁸⁴ In 1990, Congress created the authority for TPS.⁸⁵ It flowed from “legislative proposals for ‘temporary safe haven,’ as it was then termed, to regularize the procedures for offering protection to individuals who could not safely return to their countries, but who were not covered by existing refugee, asylum[,] or other immigration benefits law.”⁸⁶ The Congressional Research Service in 2016 described TPS as the “statutory embodiment of safe haven for those migrants who may not meet the legal definition of refugee but are nonetheless fleeing—or reluctant to return to—potentially dangerous situations.”⁸⁷

Currently, thirteen countries have a TPS designation, including two of the three Northern Triangle countries: Honduras (designated in 1998) and El Salvador (designated in 2001).⁸⁸ The designation does

80. See Press Release, Adam Schiff, Representative, Rep. Schiff Announces Extension of Lautenberg Amendment for Iranian Religious Minorities Fleeing Persecution Included in Omnibus (Dec. 22, 2015), <https://schiff.house.gov/news/press-releases/rep-schiff-announces-extension-of-lautenberg-amendment-for-iranian-religious-minorities-fleeing-persecution-included-in-omnibus> (announcing Congress’s extension of a program to aid persecuted Iranian Christians via the Lautenberg Amendment).

81. Shoba Sivaprasad Wadhia, *FOIA Response from USCIS on Parole*, PENN ST. L. 12–41 (Oct. 2014), https://works.bepress.com/shoba_wadhia/32/download.

82. *Id.* at 25–26 (describing DED as within the discretionary power of the President).

83. *Id.* at 19 (explaining the origins of EVD as a precursor program to the DED).

84. CARLA N. ARGUETA, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2017), <https://www.fas.org/sgp/crs/homesecc/RS20844.pdf>.

85. *Id.* at 2 & n.5, 4 (referring to section 244 of the INA).

86. Wadhia, *supra* note 81, at 19.

87. ARGUETA, *supra* note 84, at 2.

88. *Id.* at 3–4, 9 (explaining that there is great variance between TPS designated countries in the number of recipients).

not mean that those migrating currently from these two countries can apply for TPS. Hondurans continuously resident since December 1998 are eligible, and Salvadorans continuously resident since February 2001 are eligible. The third Northern Triangle country, Guatemala, has no TPS designation at all.⁸⁹

The program's beauty is its administrative simplicity. The eligibility requirements are discrete with clearly drawn lines and relatively few complicated legal concepts. An applicant needs to prove nationality, continuous presence in the United States as of a particular date, and continuous residence as of a particular date.⁹⁰ The applicants need to answer sixty-nine questions about admissibility which track the inadmissibility grounds found in INA section 212;⁹¹ applicants can cure most issues of inadmissibility by filing a waiver with the application. There are few interpretive ambiguities that would require in-depth legal representation, so many TPS applicants can avail themselves of "clinics" that explain the process and assist with filling in the paperwork, which makes it easier to access than many other immigration statuses and permits greater access to justice than statuses like asylum, SIJS, or crime victim visas.

The two main criticisms of TPS focus on the "temporary" nature of the status.⁹² First, those who favor immigration restriction see it as an unintendedly large passageway to status in the United States. Second, those who are concerned with the creation of de facto second-class citizens. The 1990 law creating TPS understood the status to be of relatively short duration—anywhere from a few months to 18 months. The reality is that most countries' TPS designations renew repeatedly, meaning that people can have TPS and work lawfully in the United States for a decade and more. As they work here, they develop stronger ties to the community, and stronger equities against deportation. As noted as early as 1995,

89. *Id.* at 9. TPS marginally relates to current flows because those with TPS are considered qualifying relatives for purposes of the small CAM program discussed below.

90. See *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated May 24, 2017) [hereinafter *USCIS TPS*]. The legal standards differ slightly between continuous presence and continuous residence, but the evidence for both is similar.

91. *Id.*; 8 U.S.C. § 1182(a)(1)–(10) (2012) (providing different grounds for rejecting visa applications or admission into the United States, such as health-related, criminal, national security, or public charge grounds).

92. Claire Bergeron, *Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION & HUM. SECURITY 22, 22 (2014).

Recipients of TPS begin to build their lives outside their country while still unsure whether the INS will eventually retract temporary protection [I]t should be recognized that dangerous conditions in the home country have not been of a temporary nature and that TPS recipients have built up equities in their respective communities.⁹³

For restrictionists, this means that the program has not met its objectives, but instead offers people a de facto unending pass to relatively secure status in the United States, contrary to the rule of law. They also argue that programs like TPS create a magnet for future migration, as migrants may trust that some program will emerge to provide some form of status for them in the future.⁹⁴ This latter argument is merely hypothetical, as a TPS designation is fairly rare, and most often tied to natural disasters, not man-made strife. The first criticism, however, has some validity. TPS designation is intended to be temporary, and never contemplated the situation of countries being re-designated year after year, well past the duration of the precipitating disaster or strife.⁹⁵ Yet, because TPS is valuable to both its recipients and to the designated countries (especially in the form of remittances), the Executive Branch is pressured to re-designate far longer than would seem valid given the justification for the original designation.⁹⁶ The Salvadoran and Honduras TPS designation, for example, came in light of Hurricane Mitch in 1998. Enormous international aid flowed in for recovery efforts, and according to multiple sources, those efforts

93. Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339, 357 (1995).

94. This criticism was thrown with more power at the previous version of TPS, EVD: If it is not particularly difficult for an affected nationality to come to this country, the effect upon illegal immigration of a grant of EVD could be enormous. To, in effect, invite anyone to come to the United States from such a country might stimulate “an ever-growing influx of economic migrants.” W. Scott Burke, *Compassion Versus Self-Interest: Who Should Be Given Asylum in the United States?*, 8 FLETCHER F. 311, 328 (1984) (quoting Elliott Abrams, *Diluting Compassion*, N.Y. TIMES (Aug. 5, 1983), <http://www.nytimes.com/1983/08/05/opinion/diluting-compassion.html>).

95. See Bergeron, *supra* note 92, at 29 (discussing the legislative history that indicates a clear goal of a temporary program that can provide a safe haven).

96. See generally ARGUETA, *supra* note 84, at 9–10 (observing that there has been a consistent rationale in continuing to re-designate various Central American countries, including Nicaragua and El Salvador, for “substantial, but temporary, disruption of living conditions” in those countries).

were largely effective.⁹⁷ Despite that, TPS has been renewed for the three worst-affected countries ever since, on the premise that the countries are unable to “handle the return of its nationals adequately.”⁹⁸ Whatever the justifications, such consistent renewals have provoked ire among immigration restrictionists, who decry TPS as a back-door “amnesty.”⁹⁹

Lurking under the extensions and re-designations are complex foreign policy issues. With each of the countries whose TPS designation has lasted the longest—Liberia, Honduras, El Salvador, and Nicaragua—the United States has had unusually close and/or fraught relations. The United States founded Liberia, and Liberian elites, usually American-Liberian, have long had a close affinity to the United States.¹⁰⁰ The United States has also historically had a complex relationship with Central America. The U.S. role in the region in the 1980s is inextricably linked to the refugee waves fleeing civil war during that time; more recently, the United States’ deportation of gang-members has had a devastating impact, becoming the root cause of current migration from the region.¹⁰¹ Also, for all four countries,

97. See, e.g., JOSHUA LICHTENSTEIN, OXFAM AM., AFTER HURRICANE MITCH: UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT RECONSTRUCTION AND THE STOCKHOLM PRINCIPLES 1–5 (2001), http://pdf.usaid.gov/pdf_docs/Pcaab248.pdf; *Survivors of Hurricane Mitch Have Rebuilt Their Lives*, INT’L FED’N OF THE RED CROSS (Oct. 22, 2008), <http://www.ifrc.org/en/nouvelles/nouvelles/common/survivors-of-hurricane-mitch-have-rebuilt-their-lives>; *Ten Years After Hurricane Mitch, Honduras is Once Again Hit by Natural Disaster*, UNICEF (Oct. 27, 2008), http://www.unicef.org/infobycountry/honduras_45850.html.

98. *USCIS TPS*, *supra* note 90.

99. *Temporary Protected Status*, FED’N FOR AM. IMMIGR. REFORM (Jan. 31, 2016), <https://fairus.org/issue/legal-immigration/temporary-protected-status>.

100. *Id.* (showing the back and forth justifications and terminations between administrations of the TPS for Liberians).

101. Because of the involvement of the United States in Central America,

[t]he United States also bears responsibility to reform and enhance existing policies because Central American states are highly sensitive to a number of U.S. policy decisions that have direct effects on their welfare. These include immigration and trade as well as the approach to illicit drugs, money laundering, and the illegal southward flow of arms. The American demand for drugs, which has remained consistently high, buttresses the case for increased U.S. responsibility. The often unhappy history of U.S. intervention in countries such as Honduras, Guatemala, and El Salvador is yet another argument for a more constructive posture. Regardless of the past, U.S. officials regard the current situation in Central America as of critical concern to U.S. national security, although a sense of moral obligation should inform and contextualize current policy thinking.

emigrant populations in the United States have become forceful advocates for extensions. Part II further examines the extent to which these various factors should be considered.

For immigrant advocates, the lack of temporariness means that people who have steadily integrated into life in the United States have no “on-ramp” to fuller legal and political inclusion. As Claire Bergeron has written,

[E]xtended grants of TPS run contrary to the policy goals of fostering integration and full membership within American society for long-term residents. Lacking many of the benefits that come with [lawful permanent resident] status, long-term TPS beneficiaries effectively find themselves locked in ‘legal limbo’ as *de facto* members of American society who are offered less than full membership.¹⁰²

Bergeron proposes that after ten years, TPS recipients could seek to adjust status to permanent residence.¹⁰³ Such a concept employs Hiroshi Motomura’s concept of immigration as transition, and has deep historical analogs. One example of this in practice is the United States Citizenship and Immigration Service (USCIS) revelation that for the Central American Minor (CAM) program, TPS was by far “the immigration status held by the largest percentage of petitioning Qualifying Parents—approximately eighty-nine percent.”¹⁰⁴ The inclusion of TPS among the qualifying statuses is correct as a legal matter, but it also shows how the liminal status is the basis for a slightly elevated claim on the United States.

Despite these unresolved internal contradictions between unmet intent and unintended consequences, some advocates have pushed for a new TPS program to respond to current Central American violence.¹⁰⁵ TPS provides an interesting set of opportunities and

MICHAEL SHIFTER, COUNCIL ON FOREIGN RELATIONS, COUNTERING CRIMINAL VIOLENCE IN CENTRAL AMERICA 4 (2012), https://www.cfr.org/sites/default/files/pdf/2012/03/Criminal_Violence_CSR64.pdf.

102. Bergeron, *supra* note 92, at 29; *see also* Keyes, *supra* note 48, at 123 (providing the example of DREAMers who, by way of the DREAM Act, would have been given a path to citizenship, if they met certain qualifications).

103. Bergeron, *supra* note 92, at 39.

104. OMBUDSMAN, U.S. DEP’T. OF HOMELAND SEC., ANNUAL REPORT 2016: CITIZENSHIP AND IMMIGRATION SERVICES 18 (2016) [hereinafter DHS OMBUDSMAN REPORT], <https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202016.pdf>.

105. *See* Suzanne Gamboa, *Hundreds of Groups Press for Temporary Protection for Central Americans*, NBC NEWS (Jan. 25, 2016, 10:42 AM), <http://www.nbcnews.com/news/latino/more-200-groups-press-temporary-protection-central-americans-n503786>;

warnings for the possibility of using a broad-scale, administratively simple option for Central American migrants today. As compared to the CAA's goals, TPS scores favorably on administrative efficiency, foreign relations, and providing refuge. It scores poorly on integration, as it provides no path to permanence and full integration, no matter how long the individual with TPS holds that status.

D. Other Nationality-Based Protection Programs

The United States has a lengthy history of providing country-specific immigration routes based on the political conditions of certain countries. There have long been programs to permit “in-country processing,” or application for a humanitarian immigration benefit before leaving the home country, including programs in Vietnam, Cuba, Haiti, and Iraq,¹⁰⁶ and most recently the CAM Program.¹⁰⁷ The Migration Policy Institute studied these programs in its 2015 report, *In-Country Processing: A Piece of the Puzzle*.¹⁰⁸ From this, it is clear that such programs have always shared concerns with (1) the orderliness of migration as a rule of law matter; (2) the need to prevent dangerous forms of migration; (3) the need for administratively efficient forms of protection; and (4) consistency with foreign policy objectives—familiar themes found, to different extents, in both the CAA and TPS.¹⁰⁹

The very name of the Vietnam program—the Orderly Departure Program¹¹⁰—demonstrates the rule of law preoccupation. The program emerged to reduce the foreign policy embarrassment of the large numbers of “boat people” fleeing post-war Vietnam. At first, the Vietnam program applied, for administrative simplicity, to any Vietnamese person whose refugee status was simply presumed. This

Advocacy Letter from Refugees Int'l et al. to President Barack Obama (Jan. 25, 2016), <https://www.refugeesinternational.org/advocacy-letters-1/2016/2/1/northern-triangle-temporary-protected-status-national-letter>.

106. See FAYE HIPSMAN & DORIS MEISSNER, MIGRATION POLICY INSTITUTE, *IN-COUNTRY PROCESSING IN CENTRAL AMERICA: A PIECE OF THE PUZZLE*, 10–11 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/In-Country-Processing-FINALWEB.pdf>.

107. *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/CAM> (last updated Aug. 16, 2017). [hereinafter *CAM Guidance*].

108. HIPSMAN & MEISSNER, *supra* note 106, at 9–11.

109. *Id.* at 12–13.

110. U.S. GEN. ACCOUNTING OFFICE, *REFUGEE PROGRAM: THE ORDERLY DEPARTURE PROGRAM FROM VIETNAM 2* (1990), <http://archive.gao.gov/t2pbat10/141353.pdf>.

broad eligibility criterion narrowed as the years went on—presumably as the capacity to do more individualized determinations increased.

Cuban in-country processing likewise evolved, but in an expansive way as foreign relations with Cuba remained stalemated.¹¹¹ Originally for political prisoners, in-country processing expanded to also cover

- (1) former political prisoners; (2) members of persecuted religious minorities; (3) human rights activists; (4) forced labor conscripts during the period 1965 to 1968; (5) persons deprived of their professional credentials or subjected to other disproportionately harsh or discriminatory treatment resulting from their perceived or actual political or religious beliefs; and (6) others who appear to have a credible claim that they will face persecution as defined in the 1951 UN Convention on Refugees and its 1967 Protocol.¹¹²

It is worth emphasizing here that these categories exceeded the protections of the Refugee Convention—such as those facing discrimination or deprivation of credentials—and that the refugee definition is used only as a catch-all for those who do not fit into the other categories. This, then, is a time the U.S. government has gone beyond the refugee definition in its identification of individuals qualifying for refugee status. For Cubans, the refugee definition was a floor, not a ceiling, for the availability of protection.

The CAM Program is the most recent entrant to this category of options. CAM, available to Northern Triangle countries only, emerged in late 2014 in response to one of the Obama Administration's public justifications for its harsh deterrent message to Northern Triangle migrants.¹¹³ When the migrants, and especially the children, began crossing in larger numbers in 2014, the Administration quickly stated that its opposition was grounded in fear for the safety of children crossing Mexico into the United States: “[W]e are working with our Central American partners, nongovernmental organizations, and other influential voices to send a clear message to potential migrants

111. Note that in-country processing, meaning the acquisition of status before leaving the home country, is in addition to the protections of the CAA discussed in Section I.A, *supra*.

112. U.S. DEP'T OF STATE, REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 1995 24 (1994), http://dosfan.lib.uic.edu/ERC/population/1995_Refugee_report.html (naming the new priority categories for Cuban in-country refugee processing).

113. See HIPSAN & MEISSNER, *supra* note 106, at 1–3.

so that they understand the significant dangers of this journey and what they will experience in the United States.”¹¹⁴

Months later the Administration created CAM in response to these concerns. The program allows those eligible to apply for status “in-country” before embarking on any journey to the United States. The CAM website bills the program as providing “a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States.”¹¹⁵ The 2016 USCIS Ombudsman’s Report to Congress also described the purposes as helping “children avoid this dangerous trip north by affording them an in-country process for safe relocation.”¹¹⁶

The program exists for children who meet the refugee definition and who already have a qualifying parent in the United States.¹¹⁷ The qualifying parent must have some form of status, from permanent residence to the more liminal statuses of deferred action or parole.¹¹⁸ Very few have applied because of the requirement that the qualifying relative have legal status.¹¹⁹ And even among those who applied, the State Department has interviewed very few: a year after the program was launched, the State Department had interviewed only 90 of 3955 applicants.¹²⁰ A few months later, by April 2016, 197 parents and children had entered the United States through the program.¹²¹ Most (fifty-

114. Press Release, White House, Office of the Press Sec’y, Letter from the President—Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border (June 30, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

115. *CAM Guidance*, *supra* note 107.

116. DHS OMBUDSMAN REPORT, *supra* note 104, at 17–18.

117. An in-country parent might also qualify, if the parent meets the refugee definition as well. *See CAM Guidance*, *supra* note 107.

118. *Id.*

119. *See id.* (“Only certain parents who are lawfully present in the United States are eligible to be qualifying parents and request access to the program for their children.”).

120. Elise Foley, *A Program Meant to Keep Kids from Coming to the U.S. Illegally Hasn’t Let Anyone in Legally Yet*, HUFFINGTON POST (Oct. 28, 2015, 6:25 PM), http://www.huffingtonpost.com/entry/central-american-minor-refugee-program_us_563138cfe4b063179910c855.

121. Molly Hennessy-Fiske, *Frustrated by New U.S. Program to Take in Migrants, Central American Parents Turn to Smugglers*, L.A. TIMES (Apr. 21, 2016, 3:00 AM), <http://www.latimes.com/nation/la-na-central-american-migrants-20160420-story.html>.

seven percent) entered with humanitarian parole, not refugee status, which limits their ability to achieve lawful permanent residence and citizenship.¹²²

The U.S. government itself recognized the limitations of the program.

While the 7357 [relative affidavits] received by March 21, 2016 signal a marked increase in program participation, the sustained number of [unaccompanied alien children] arrivals from the Northern Triangle to the southern U.S. border demonstrates that broader protections are needed.¹²³

As a result, the State Department announced in January 2016 that it would work with the office of the United Nations High Commissioner for Refugees (“UNHCR”) to bolster in-country refugee processing in the Northern Triangle, and some of those determined to be refugees would go to the United States, and some to other countries.¹²⁴ In July 2016, the Obama Administration announced a few of the details of this new initiative to help address forced migration from the Northern Triangle.¹²⁵ While the Trump Administration has halted the CAM program, it is unclear as of this writing whether the new State Department initiative will go forward as planned.¹²⁶ It is nonetheless worth examining what the shape of the initiative was to look like.

The plan was to do the initial screening within the Northern Triangle countries, including security screening, and then once processed, to use Costa Rica as a temporary site for those awaiting acceptance as refugees in the United States *or* in other countries willing to accept them.¹²⁷ Costa Rica and the United States entered into a “protection transfer agreement” with UNHCR and the International

122. *Id.* (discussing that those under CAM the program cannot apply for citizenship and must renew their application every two years).

123. DHS OMBUDSMAN REPORT, *supra* note 104, at 20.

124. Press Release, U.N. High Comm’r for Refugees, U.S. Announcement on Central America Refugees Highlights Seriousness of Situation (Jan. 14, 2016), <http://www.unhcr.org/en-us/news/press/2016/1/5697d35f6/announcement-central-america-refugees-highlights-seriousness-situation.html>.

125. See Julie Hirschfeld Davis, *U.S. to Admit More Central American Refugees*, N.Y. TIMES (July 26, 2016), <http://www.nytimes.com/2016/07/27/us/politics/obama-refugees-central-america.html>.

126. David Nakamura, *Trump Administration Ends Obama-Era Protection Program for Central American Minors*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/politics/trump-administration-ends-obama-era-protection-program-for-central-american-minors/2017/08/16/8101507e-82b6-11e7-ab27-1a21a8e006ab_story.html.

127. *Id.* (discussing the procedures for security screening in the applicant’s native country).

Organization for Migration.¹²⁸ Under that agreement, the migrants would only go to Costa Rica—two hundred at a time—once security screening had happened in their home-countries, a process that takes months or years in other refugee settings, such as camps for Syrian refugees in Egypt or Lebanon.¹²⁹

In-country processing has been criticized as an “exception [that] is seriously in danger of swallowing the rule.”¹³⁰ One piece of the Convention definition of a refugee is that the person is outside the country of origin; in-country processing removes that requirement procedurally, as a way of providing assurance that once an individual *is* outside the country of origin, they will have legal status. Another critique of in-country processing, most specifically the CAM program, is the danger it creates for prospective beneficiaries who must wait in dangerous circumstances before a decision is made.¹³¹ Depending on the level of immediate danger, the wait may be a disincentive for availing of in-country processing, and create an incentive for disorderly migration for the purpose of seeking asylum at the U.S. border.

Regardless of the critiques, these programs do reveal a precedent in U.S. law that views people in broad categories of need. In-country processing, TPS, and country-specific refugee protections such as the CAA and Lautenberg Amendment cases, share a common goal of responding efficiently to either emerging or long-standing migration problems, and they all presume, to varying extents, a general underlying reason for the migration problem that is worth a response, while de-emphasizing heavily individualized determinations of the kind required by our asylum process, described in Section III.C, *infra*. Their benefits range from extremely valuable (permanent residence for Cubans) to liminal (TPS) to procedural (in-country processing). They thus demonstrate not only that broad protection has a rich

128. Press Release, U.S. Dep’t of Homeland Sec. Press Office, U.S. Expands Initiatives to Address Central American Migration Challenges (July 26, 2016), <https://www.dhs.gov/news/2016/07/26/us-expands-initiatives-address-central-american-migration-challenges>.

129. See Amanda Holpuch, *US Partners with Costa Rica to Protect Central American Refugees*, GUARDIAN (July 26, 2016, 1:23 PM), <https://www.theguardian.com/world/2016/jul/26/central-american-refugees-costa-rica-obama-administration>.

130. Rauffer, *supra* note 78, at 236.

131. Donald Kerwin, *The U.S. Refugee Protection System on the 35th Anniversary of the Refugee Act of 1980*, 3 J. ON MIGRATION & HUM. SECURITY 205, 206–08 (2015) [hereinafter Kerwin, *35th Anniversary of the Refugee Act of 1980*].

history within U.S. immigration law, but also that there is considerable flexibility in its design and extent.

II. JUSTIFYING BROADER PROTECTION: WHAT DUTY TO THE STRANGER?

Having demonstrated that broad protection is possible in many forms, the Article turns to the essential question of why it is *necessary*. One answer is offered by the quote with which the Article begins: “We can park our chair on the beach as often as we please, and cry at the oncoming waves, but the tide will not listen, nor the sea retreat.”¹³² This Section begins with an exploration of this simple, pragmatic idea that doing nothing is an option unavailable to us. Because such an answer is compelling, but incomplete and unsatisfying, the Section continues by addressing the question of necessity with an exploration of deeper philosophical justifications for some level of duty to the “stranger” in our midst, a hotly contested idea in political philosophy.

A. *Contrasting Views*¹³³

As noted above, a common theme in response to forced migrations is that articulated by President Trump when he was campaigning. Asked about helping Syrian refugees, he responded, “I’d love to help. But we have our own problems.”¹³⁴ Leaving aside the argument that this may be a false choice and that helping both populations could be possible, the quote names an intuition that has roots in a deep philosophical debate: to whom do we owe duties? To our fellow citizens? To the stranger? To both in an equal degree, or in varying degrees? This debate is at least as old as the Greeks, where cosmopolitans contested the unique focus on the *polis*. This Section focuses on how those debates have evolved in the modern era.

132. BAUMAN, *supra* note 1, at 4–5 (quoting Robert Winter’s view that mass migration is not likely to stop in the near future).

133. A brief foray into the deep philosophical debates over duties to people outside one’s borders is both necessary and impossible. Fortunately, for those interested in these debates, a wonderful collection of essays is available in *THE ETHICS AND POLITICS OF IMMIGRATION: CORE ISSUES AND EMERGING TRENDS* (Alex Sager ed., 2016) [hereinafter *ETHICS AND POLITICS OF IMMIGRATION*].

134. Ian Hanchett, *Trump on Refugees: I’d Love to Help but We Have Our Own Problems*, BREITBART (Sept. 9, 2015), <http://www.breitbart.com/video/2015/09/09/trump-on-refugees-id-love-to-help-but-we-have-our-own-problems>.

1. *Justifying the right to exclude*

Numerous philosophers find justification for prioritizing, perhaps exclusively, our fellow citizens. In his seminal *Spheres of Justice*, Walzer considers that the right to exclude foreigners is a critical component of the right to self-determination for a community—the nation-state.¹³⁵ In a succinct summary of his position, Amy Reed-Sandoval writes, “According to Walzer, the value and very nature of the goods that get distributed in political communities”—here, note the echoes of Trump’s statement about helping our own people—“is necessarily determined by the members of which these communities are comprised.”¹³⁶ Walzer thus believes that membership is a “good that can be distributed” to be “determined by the existing members of the community.”¹³⁷ As applied to debates of migration in the United States, the idea here is that members of the United States polity—defined by citizenship—should be determining who shares in the polity’s resources (including membership itself). As far as this goes, it simply reflects what is politically true, even in contentious times, namely that migration is a proper subject for legislation and national action, and is subject to limitations as defined by those laws and actions.

Finally, other philosophers have spoken of the right of communities to preserve culture or choose the pace of cultural change. David Miller articulates this, writing that people want to be able to shape the way that their nation develops, including the values that are contained in the public culture. They may not of course succeed: valued cultural features can be eroded by economic and other forces that evade political control. But they may certainly have good reason to try, and in particular to try to maintain cultural continuity over time, so that they can see themselves as the bearers of an identifiable cultural tradition that stretches backward historically.¹³⁸

This idea of the value of cultural preservation certainly animates part of the current immigration debates in the United States, the part expressed when people say “go back to where you came from” to those

135. WALZER, *supra* note 33, at 39.

136. Amy Reed-Sandoval, *The New Open Borders Debate*, in ETHICS AND POLITICS OF IMMIGRATION, *supra* note 133, at 15.

137. *Id.*

138. Christopher Heath Wellman, *Immigration*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/immigration/#PolSelDet> (last updated Mar. 23, 2015) (quoting David Miller, a proponent of closed borders, to explain why some citizens within a state advocate for closing its borders to foreigners to sustain its culture).

perceived as other (oftentimes regardless of whether they came from another country or were born in the United States). Cultural preservation can, in such circumstances, conflate with racism and xenophobia, and is critiqued as a consequence. Apart from preservation, there may equally be a concern, removed from both racism and xenophobia, about wishing, for example, to keep a democratic culture—a culture that increasingly embraces women’s rights, or the rights of people of varying sexual orientations. This philosophical justification for closed borders is agnostic about the content of the culture being preserved (or reasons animating preservation), but acknowledges culture as a value sufficient to justify the idea of exclusion.¹³⁹

However, even these various proponents of what Joseph Carens calls “bounded justice” recognize some level of duty to those beyond borders. Carens, who first powerfully articulated a philosophical defense of open borders, provides a nuanced articulation of those who find that “freedom of movement, equality of opportunity and distributive justice are not moral principles that transcend borders.”¹⁴⁰ He sees how proponents of bounded justice “do not deny that we have some moral duties to people outside our political community For example, they usually acknowledge that we have a duty to address the plight of refugees, at least in part by admitting some of them.”¹⁴¹ Overall, however, he characterizes this view as one where

[t]here may be very significant differences between states in terms of the life chances that they offer their inhabitants, but this fact does not give rise to any strong moral claim for assistance from better off states to those less well off, or to a right for people to move from one state to another where prospects are better.¹⁴²

It is this lack of a strong moral claim that Carens addresses in his body of work, described briefly below.

2. *Justifying opening borders*

The chief case for acknowledging duties to those beyond our national borders comes from the work of Carens, but his work builds from the writing of John Rawls. In *A Theory of Justice*, Rawls argues that fair principles of justice depend on devising those principles from

139. Reed-Sandoval, *supra* note 136, at 15–17.

140. CARENS, *supra* note 35, at 256.

141. *Id.*

142. *Id.*

behind a “veil of ignorance.”¹⁴³ Without knowing whether you were favored or disfavored in the society you were building (in terms of wealth or ability or other factors), what principles would be most likely to advance your interests?¹⁴⁴ Whatever principles people would agree to without knowing their standing in society are likely to be fair. He concludes that two principles would emerge. One would guarantee “equal basic rights and liberties needed to secure the fundamental interests of free and equal citizens and to pursue a wide range of conceptions of the good.”¹⁴⁵ The other demands equality of opportunity.¹⁴⁶

Carens, in his seminal work *Aliens and Citizens: The Case for Open Borders*,¹⁴⁷ considered Rawls’s arguments on a global level: would one choose borders if, *a priori*, one had no idea whether one would be born in a wealthy and/or free society versus a repressive and/or poor society? Using the “original position” view and emphasizing Rawls’s veil of ignorance, borders act as modern “feudal birthright privileges,” locking citizens of certain countries into relative privilege and citizens of other countries into poverty and danger.¹⁴⁸ Carens argues therefore that borders do not meet the test set forth by Rawls. While an extreme idea in modern international relations, important examples do exist internationally and within countries. One is the European Union, which is being severely tested by the freedom of movement across countries within its jurisdiction.¹⁴⁹ The other is the United States itself, which upholds free movement across state borders in its Constitution.¹⁵⁰

Whatever the validity of these philosophical arguments, open borders are simply not part of our political discourse on migration. While useful for establishing a moral and justice-oriented critique of borders, any contribution to a *political* conversation must accept the validity of borders. The next Section looks to ethical viewpoints on the space between bounded justice and open borders, and provides a

143. JOHN RAWLS, A THEORY OF JUSTICE 11 (Harvard Univ. Press rev. ed. 1999).

144. *Id.*

145. Samuel Freeman, *Original Position*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, <https://plato.stanford.edu/archives/win2016/entries/original-position> (last updated Sept. 9, 2014).

146. *Id.*

147. Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 252 (1987).

148. *Id.* at 252, 255.

149. Vince Cable, *Why it's Time to End EU Free Movement*, NEW STATESMAN (Jan. 4, 2017), <http://www.newstatesman.com/politics/uk/2017/01/why-its-time-end-eu-free-movement>.

150. U.S. CONST. art. IV, § 2, cl. 1.

philosophical justification for broader protection, while permitting that protection to be bounded.

B. Middle Ground: Duties to the Sojourner and to Those in Need

There is a range between immigration control that denies all rights and completely open borders with strong incentives for migration. This Article adopts such a position: a pragmatic understanding of the significance of borders with limitations on the power of immigration control to deny fundamental rights. The middle ground between bounded justice and open borders is sometimes labeled moderate or weak cosmopolitanism. Acknowledging that we are citizens of both our nations and the world, this philosophy privileges duties owed to co-nationals, but recognizes a lesser set of duties that may yet be owed to non-nationals, such as these forced migrants.

Immanuel Kant trod this middle ground, famously writing, “A visitor must not be treated in a hostile manner due to her arrival on the soil of another individual. The original inhabitant may, however, expel her, ‘if it can be done without [her] ruin.’”¹⁵¹ Kant’s position is oftentimes described as a variation of “moderate cosmopolitanism” that sees us as both citizens of the world, a source of our duties to the stranger, and citizens of our own locality. In this view, peace in the world depends on respecting the human rights of both groups.¹⁵² Since Kant, a tradition of “moral philosophers and moralists in the wake of eighteenth-century cosmopolitanisms have insisted that we human beings have a duty to aid fellow humans in need, regardless of their citizenship status.”¹⁵³ Philosophers like Seyla Benhabib have inhabited this interesting area, finding value in borders, but articulating the need for “porous[ness]” of those borders.¹⁵⁴ This Section considers two possible justifications for strategic porousness and contemplates the strongest argument *against* such strategies.

151. Gregor Noll, *Why Refugees Still Matter: A Response to James Hathaway*, 8 MELB. J. INT’L L. 536, 545 (2007) (quoting Immanuel Kant’s view on the right of hospitality for a global citizen).

152. Pauline Kleingeld, *Cosmopolitanism*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/cosmopolitanism> (last updated July 1, 2013).

153. *Id.* (discussing the obligation of helping others in need and the history of international organizations serving those in need).

154. See SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 88 (2004).

1. A “causal connection” carve-out

One source of duty relevant to unconventional refugees is the role of the receiving state in creating the harm that individuals are fleeing. Philosopher Shelley Wilcox, a cosmopolitan, has set forth an approach—the global harm principle—which critiques aspects of the Carens open borders viewpoint. She argues that if one pragmatically accepts the premise that immigration controls may be justified in some cases, then there must be a principle for deciding whom states admit or reject.¹⁵⁵ Her principle articulates a state’s duty to compensate those whom the state’s conduct has harmed,¹⁵⁶ defining harm as either “a setback to a person’s basic welfare interests” or as “a human rights deficit.”¹⁵⁷ Per this argument, those harmed should be prioritized in terms of admissions. Joseph Carens agrees that even for those who disagree with his ultimate conclusions about the lack of moral justifications for borders, there is this special duty where there is some causal connection. He writes, “Sometimes we have an obligation to admit refugees because the actions of our own state have contributed in some way to the fact that the refugees are no longer safe in their home country.”¹⁵⁸

Consideration of causal connections has particular relevance in the situation of migrants fleeing Central America, whose migration arises from a specific historical context with American roots. U.S. government support of violent regimes in El Salvador, Guatemala, and Honduras led directly to huge levels of migration from those countries; to this day, those countries also possess extremely weak governing institutions. By contrast, Nicaragua’s history of self-determination—followed by its strong performance in providing security to its citizens—has resulted in lower migration numbers¹⁵⁹ The war on

155. Shelley Wilcox, *Immigrant Admissions and Global Relations of Harm*, 38 J. SOC. PHIL. 274, 274–75 (2007).

156. *Id.* at 279 (clarifying that the state’s conduct must have been a “critically necessary causal factor” in the harm).

157. *Id.*

158. CARENS, *supra* note 35, at 195.

159. See WILLIAM M. LEOGRANDE, *OUR OWN BACKYARD: THE UNITED STATES IN CENTRAL AMERICA, 1977–1992* 505–30 (1998) (offering a comprehensive history of U.S. foreign policy toward Central America during the waning years of the Cold War that ultimately shaped the region’s destiny); see also Arturo J. Viscarra & Michael Prentice, *Children of the Monroe Doctrine: The Militarized Roots of America’s Border Calamity*, ALTERNET (Aug. 11, 2014, 11:12 AM), <http://www.alternet.org/immigration/children-monroe-doctrine-militarized-roots-americas-border-calamity> (arguing that the influx of Central American refugees to the United States can be traced back to the

drugs, rise in gangs, and exportation of gangs to the Northern Triangle are modern actions that implicate the United States in the instability and insecurity of the region.¹⁶⁰

One need only contemplate that the term used to describe the gangs of Central America, *maras*, comes from the streets of Los Angeles, and that the rise of Central American gangs was precipitated by U.S. law enforcement policies that deported convicted gang members even when their lives and criminal histories had been shaped in the [United States].¹⁶¹

Acknowledging this context helps lift any policy responses—from protection to work on root causes—out of the realm of *noblesse oblige*, with the United States as a savior¹⁶² of the Northern Triangle charity-cases, and into a relationship of mutual obligation and, as developed in the next Section, shared interest.¹⁶³ The broader historical context provides additional justification for an elevated U.S. role in providing meaningful refuge for these migrants. It also offers a principled reason why this migration situation might differ from others in the future, where the connection to U.S. policies is more attenuated.

Matthew Lister is also attuned to the importance of context. In his work, he disaggregates forced migration into those who are admitted pursuant to the Refugee Convention, which requires a finding of persecution because of one of the Convention's protected grounds,

1980s when the U.S. military financed, armed, and trained pro-U.S. rebel groups in El Salvador, Honduras, and Guatemala).

160. See Eyder Peralta, *Central American Presidents Say U.S. Shares Responsibility for Migration Crisis*, NPR (July 24, 2014, 2:38 PM), <http://www.npr.org/sections/thetwo-way/2014/07/24/334942174/central-american-presidents-say-u-s-shares-responsibility-for-migration-crisis> (explaining that when the United States drove violent organized crime out of Colombia and Mexico, organized crime groups transferred some of their activity into Central America).

161. Chantal Thomas, *Transnational Migration, Globalization, and Governance: Reflections on the Central America – United States Immigration Crisis 2* (Cornell L. Sch. Res. Paper No. 14-26, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491308##.

162. For insight into this problematic construct, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 219 (2001).

163. See Ramji-Nogales, *supra* note 25, at 619 (explaining that Central American migrants have overwhelmingly characterized their migration as a “crisis,” devoid of context: “[I]n the long-term, the use of the label ‘crisis’ obscures long-term systemic causes of situations of vulnerability and peril, framing them instead as isolated incidents that somehow snuck up on us.”). When discussing the cartel violence in the Northern Triangle, the desire for drugs in American is often ignored. *Id.* Rather than long-term institutions, emergency rhetoric centers around temporary crisis solutions. *Id.* at 624.

and those who flee more generalize violence.¹⁶⁴ Importantly, he connects the nature of harm experienced with the nature of protection afforded by the receiving state. He writes, “the best way to understand the normative point of refugee protection (or the logic of the [R]efugee [C]onvention) is to see that it provides a particularly weighty *remedy* that is only appropriate when certain *special sorts of harm* are faced.”¹⁶⁵ Professor Lister understands that the remedy, which usually entails full membership, or a road to full membership, is highly valuable, just as Walzer posits. And he notes that it is “appropriate when the harm faced is serious, when it is not plausibly expected to be of short term duration, and where other means of addressing the problem are not plausible.”¹⁶⁶

Lister uses these factors to provide justification for granting asylum to those fleeing harms where state authority has been usurped by persecutory actors, such as the criminal gangs in the Northern Triangle.¹⁶⁷ But these same factors do permit a limiting principle for asylum, that it would not be available to all those fleeing difficult environments. By implication, in such circumstances, the plausible “other means” of addressing the problem, something short of the weighty remedy of asylum, would be appropriate. Again, through attention to situational distinctions, political philosophy recognizes both some level of duty to those beyond our borders, and some ability to differentiate the level of duty owed depending on circumstances. This differentiation is the focus of the framework suggested in Part IV of this Article.

2. *Duties to the strangers already here*

Another important differentiation amid debates about borders is the differences between duties owed to persons *at* the border (where the debate swings from rights of admission to sovereign rights to control the border) and duties owed to persons *within* a state’s borders. This is another difficult debate; the importance of political self-determination as a justification for borders, per Walzer’s view, can be

164. Matthew Lister, *The Place of Persecution and Non-State Action in Refugee Protection*, in *ETHICS AND POLITICS OF IMMIGRATION*, *supra* note 133, at 45, 47.

165. *Id.* at 48 (emphasis added).

166. *Id.*

167. *Id.* at 53–54 (providing three justifications for granting asylum when the state has been usurped: (1) when rebel groups hold full control over the territory; (2) when the state is unable to control the activities of gangs or oppose them, and the gangs have countrywide reach; or (3) when the claimant is from a failed state without any functioning government at all).

impacted by the migration of people the state did not choose to become members of its polity.¹⁶⁸ As noncitizens cannot vote, and paths to citizenship require assent by the state, this particular argument is somewhat rebuttable. It is interesting to note, too, that migration among the fifty U.S. states and the District of Columbia also undermines the political self-determination of those jurisdictions, with a constant stream of uninvited new members of the polity. However, this is not generally perceived as problematic.¹⁶⁹

Accepting, *arguendo*, that there is some impact on normatively important political self-determination, the argument for progressive inclusion of noncitizens has a strong, countervailing normative force. As philosopher Onora O'Neill wrote in an early treatment of this topic, "[T]oday questions of transnational justice will arise whether or not we can find the theoretical resources to handle them."¹⁷⁰ She describes a world that is not one "of closed communities with mutually impenetrable ways of thought, self-sufficient economies and ideally sovereign states," and asks the question: "If complex, reasoned communication and association breach boundaries, why should not the demands of justice do so too?"¹⁷¹

Kant believed morality required, at minimum, hospitality to sojourners—with the implication that "sojourn" signified a period of

168. See Walzer, *supra* note 33, at 40. Those people are variously called irregular migrants, unauthorized migrants, and illegal immigrants. See CARENS, *supra* note 35, at 129. I eschew all these terms because the vast majority of people who come under the ambit of this Article's coverage used established, regular procedures to enter (usually through the DHS's parole authority). Once their cases are decided, if the migrants are unsuccessful and nonetheless remain, they would become "unauthorized" immigrants. But for the duration of the process, there is nothing particularly illegal, irregular, or unauthorized. "Uninvited" is a better description.

169. Indeed, some jurisdictions permit noncitizens to vote in local elections. See, e.g., *Voting by Nonresidents and Noncitizens*, NAT'L CONF. ST. LEGISLATURES (Feb. 27, 2015), <http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx> (providing the example that noncitizens in Takoma Park, Maryland, have been voting in city elections since 1993). By contrast, however, migration of "outsiders" does occasionally become a matter of local political contention, even though it is fully legal. See, e.g., Kevin Sullivan, *A Fortress Against Fear*, WASH. POST (Aug. 27, 2016), <http://www.washingtonpost.com/sf/national/2016/08/27/a-fortress-against-fear> (describing an increased flux of end of the world "preppers" to the Pacific Northwest due to fear of government collapse and socioeconomic turmoil).

170. ONORA O'NEILL, *BOUNDS OF JUSTICE* 117 (2000).

171. *Id.* at 121.

limited duration. But as sojourners spend more time in a polity, and develop ties, the moral arguments likewise evolve. Carens writes:

Even if we accept the state's right to control immigration as a basic premise, that right is not absolute and unqualified. Over time an irregular migration status becomes morally less relevant while the harm suffered by the person in that status grows. The state's right to deport irregular migrants weakens as the migrants become members of society.¹⁷²

For "irregular migrants" in particular, Carens sees that "the passage of time also generates membership claims for irregular migrants" and "[t]ime is the crucial variable."¹⁷³ Residence provides a useful, administratively simple proxy for harder-to-measure connectedness; Carens notes that with time comes "a dense network of relationships and associations" which approximate what we mean by membership.¹⁷⁴ Carens acknowledges the difficulty of finding a bright line before which membership claims are weak, and after which they are strong, but ends at the somewhat arbitrary period of five years, a period the framework in Part IV, *infra*, also adopts (also somewhat arbitrarily).¹⁷⁵

Five years is a number seen throughout U.S. immigration law, past and present. In *Americans in Waiting*, Hiroshi Motomura has set forth plentiful examples of the importance of time to immigration status and membership claims, and even in an era of heightened immigration restrictions, the period still shows up in the INA.¹⁷⁶ For example, contemporary green-card holders can naturalize after five years,¹⁷⁷ and it is relevant to deportation whether a noncitizen's crime was committed within the first five years of his or her presence in the United States.¹⁷⁸ Even for the undocumented, time matters. Those without status who have been present ten years or more may benefit (if other eligibility factors are met) from Cancellation of Removal, to receive permanent residence at the conclusion of their deportation proceeding.¹⁷⁹

172. CARENS, *supra* note 35, at 157.

173. *Id.* at 145.

174. *Id.* at 164.

175. *See id.* at 104. Among the examples he considers are France and Spain, which provided legal resident status if someone could document they had lived there 10 years (France) or 5 years (Spain). *Id.* at 151.

176. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 129 (2006).

177. 8 U.S.C. § 1427(a) (2012).

178. § 1227(a)(2)(A)(i)(I).

179. § 1229b(b)(1).

The ethical significance of time argues for programs like the CAA and against TPS. While the CAA offers the enhanced rights after an arguably *too short* period of time (one year), it effectively eliminates immigration uncertainty and promotes integration, thus scoring highly on the advancement of one group of immigrants as prospective citizens. In contrast, TPS, which exists for many years with no likelihood of enhanced rights after *any* period of time, ignores the ethical arguments that Carens sets forth. In addition to the practical problems this indefinite indeterminacy raises, described in Section I.C, *supra*, Carens would criticize this as morally unjustifiable, as it ignores the very real connections that longstanding residents—like those with TPS—have.

3. *Incentives and deterrence*

The response to these middle ground views, offering rights or increasing levels of membership, is often that any aid offered to the stranger creates an incentive for other strangers to arrive. This is inevitably factually correct. Carens acknowledges this problem:

Every human right that is recognized as a legal right to which irregular migrants are entitled can be seen as a cost to the receiving state and as an incentive to more irregular migration. If the costs and incentives are indeed substantial, this might provide reasons for the state to be more diligent in pursuing morally permissible policies for reducing unauthorized migration.¹⁸⁰

His argument continues, but first let us consider the truth of this incentive problem.

The fear of opening the floodgates of migration is a phenomenon with great staying power in immigration legal history. It forcefully counters arguments about even our duty of non-refoulement, let alone arguments for integration or broader temporary relief. In 1984, Assistant Secretary of State for Human Rights Elliott Abrams wrote, “The policy they advocate, that anyone who gets here from El Salvador be permitted to stay, would virtually invite an ever-growing influx of economic migrants to the United States.”¹⁸¹ As prominent refugee scholar James Hathaway has written,

[R]ecent refugee migrations from the less developed world are perceived to be destabilizing the cultural, racial, political, and economic terms. “[T]he desire to help the world’s poor and oppressed clashes with the belief of most Americans that substantial

180. CARENS, *supra* note 35, at 138.

181. Abrams, *supra* note 94.

immigration is undesirable and economically threatening to their interests.” The concern has thus shifted from the facilitation of refugee movements to the deterrence of asylum-seekers.¹⁸²

Similar concerns were on vivid display with the Central American refugees in 2014, as protestors tried to stop buses carrying children from the border to temporary facilities,¹⁸³ or protesting foster care facilities deep in the interior.¹⁸⁴ Opponents of the children’s arrival in the United States spoke of criminality, fiscal burdens, and the lawlessness of illegal immigration.¹⁸⁵ The numbers of unaccompanied minors in 2014 were small relative to overall immigration: some 70,000 unaccompanied minors were apprehended in 2014¹⁸⁶ compared to 1,016,518 receiving lawful permanent residence in FY 2014, and 180.5

182. James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 169–70 (1990) (alteration in original) (citations omitted) (quoting Burke, *supra* note 94, at 311).

183. See, e.g., Matt Hansen & Mark Boster, *Protesters in Murrieta Block Detainees’ Buses in Tense Standoff*, L.A. TIMES (July 1, 2014, 9:39 PM), <http://www.latimes.com/local/lanow/la-me-ln-immigrants-murrieta-20140701-story.html> (describing a protest in Murrieta, California where protestors blocked buses carrying unaccompanied minors from Central America).

184. See, e.g., Halimah Abdullah, *Not in My Backyard: Communities Protest Surge of Immigrant Kids*, CNN (July 16, 2014, 9:46 AM), <http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard> (providing examples of protests across the United States concerning housing for immigrant children); Sam Easter, *Bay City Commission Does Not Vote on Resolution Supporting Immigrant Children, but Protests Go on*, BAY CITY TIMES (Aug. 19, 2014, 2:44 AM), http://www.mlive.com/news/bay-city/index.ssf/2014/08/bay_city_commission_meeting_se.html (reporting on protests over housing unaccompanied minors in Michigan); Samantha Marcus, *Dent Tours KidsPeace, Says Lack of Information Spurs Protests*, MORNING CALL (Aug. 18, 2014, 11:30 PM), <http://www.mcall.com/news/nationworld/mc-kidspeace-dent-refugee-children-20140818-story.html> (concerning similar protests in Allentown, Pennsylvania).

185. See Hansen & Boster, *supra* note 183; see also Cindy Chang & Kate Linthicum, *U.S. Seeing a Surge in Central American Asylum Seekers*, L.A. TIMES (Dec. 15, 2013), <http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215/2> (reporting that fraud has been an issue in the underground asylum industry).

186. See *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) apprehensions FY 14 compared to FY 13*, U.S. CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14.pdf> (last visited Oct. 23, 2017) (providing that 113,039 people arrived to the U.S. southwest border from Northern Triangle countries in FY 2014). During the same time period, a total of 1.36 million migrants moved to the United States. Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Mar. 8, 2017), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

million entering the United States on nonimmigrant visas.¹⁸⁷ Nonetheless, the fact of them coming and the fact of their right to enter the United States to seek asylum created a sense among many that they were an unstoppable wave—indeed the primary word used to describe the influx of migrants was a “surge.”¹⁸⁸ The “surge” led to policies of disincentive or deterrence. Whether the present migration from Central America fits this definition of a flood almost certainly depends on one’s perspective,¹⁸⁹ but it is also irrelevant to an undeniable—not unchangeable, but presently undeniable—fact: the migrants are coming. For a while in 2015, the numbers of people arriving decreased. The Obama Administration credits this reduction to a few strategies: (1) public information campaigns in Central America discouraging migration; (2) the use of detention at the border as a deterrent; and (3) cooperation with Mexico to intercept migrants at Mexico’s southern border.¹⁹⁰ The involvement of Mexico likely accounts for most of the lower numbers, while the first of these only had some impact and the deterrent power of detention has been widely questioned. Yet in 2016, the numbers rose again, a testament to the enduring dynamics forcing migration from the region.¹⁹¹ Despite a deterrent detention strategy, efforts to prevent migrants from reaching our borders in the first place, and consistent messaging about the dangers of the journey, these migrants needed safety and came

187. DEP’T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS tbls. 1, 25 (2016), https://www.dhs.gov/sites/default/files/publications/ois_yb_2014.pdf.

188. See Muzaffar Chishti & Faye Hipsman, *Increased Central American Migration to the United States May Prove an Enduring Phenomenon*, MIGRATION POL’Y INST. (Feb. 18, 2016), <http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon>.

189. See sources cited *supra* note 186.

190. See Chishti & Hipsman, *supra* note 188 (“While apprehensions at the U.S. border fell, apprehensions in Mexico rose significantly, suggesting that outflows from Central America remained fairly stable throughout 2015; many migrants were apprehended by Mexican authorities before reaching the U.S. border.”). This policy has been criticized as restricting migrants’ protection under international law. See GEO. L. HUM. RIGHTS INST., *THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN’S ACCESS TO INTERNATIONAL PROTECTION 2* (2015) [hereinafter *GEO. HUM. RTS. INST.*], http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf.

191. See Chishti & Hipsman, *supra* note 188 (“Despite the fluctuations in flows, the complex set of push and pull factors driving Central American migration has changed very little since 2014.”).

to the United States. That being said, whether effective or not, deterrence is clearly a policy tool available to minimize the incentive problem.

Philosophers explain the appeal of such deterrence strategies. Zygmunt Bauman states,

They are embodiments of the collapse of order, a state of affairs in which the relations between causes and effects are stable and so graspable and predictable, allowing those inside a situation to know how to proceed. Because they reveal these insecurities to us, refugees are easily demonized. By stopping them on the other side of our properly fortified borders, it is implied that we'll manage to stop those global forces that brought them to our doors.¹⁹²

Likewise, Bauman sees deterrence as an attempt to re-establish our sense of agency against uncontrollable forces:

[W]hile we can do next to nothing to bridle the elusive and faraway forces of globalization, we can at least divert the anger they caused us and go on causing, and unload our wrath, vicariously, on their products, close to hand and within reach. This won't, of course, reach anywhere near the roots of the trouble, but might relieve, at least for a time, the humiliation of our helplessness and our incapacity to resist the disabling precariousness of our own place in the world.¹⁹³

Appealing as border-oriented deterrence strategies¹⁹⁴ may be, philosophers also push back against ethical acceptance of such strategies. Carens sets forth a premise that the right to control immigration is tempered by other fundamental rights, and that the incentive problem does not provide sufficient justification to deny them “general human rights.”¹⁹⁵ Such legal rights, in Carens's estimation, do increase the incentives for migrants to come (and at the very least, a system lacking due process and fundamental fairness would provide a disincentive to migration). The fears of deluge, and the accompanying argument about the need for deterrence, are best answered in the United States by the evolution of constitutional norms recognizing some fundamental rights, even where those might create an *incentive* for migration.

192. Brad Evans & Zygmunt Bauman, *The Refugee Crisis is Humanity's Crisis*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/02/opinion/the-refugee-crisis-is-humanitys-crisis.html>.

193. BAUMAN, *supra* note 1, at 17.

194. “Border-oriented” strategies, as opposed to “root cause-oriented” strategies, are discussed in Part IV, *infra*.

195. CARENS, *supra* note 35, at 132.

Indeed, the U.S. Constitution, as interpreted through more than a century of case law, acknowledges that while noncitizens do not, in many instances—particularly as concerns the immigration system itself—have the same rights as citizens, the Constitution does protect certain fundamental rights of all *persons*, and not just citizens.¹⁹⁶ Through cases like *Plyler v. Doe*¹⁹⁷ and the long series of cases affirming noncitizens rights to due process and fundamental fairness, even in their immigration removal hearings, the Court extends constitutional protections to those within—and sometimes beyond—its borders.¹⁹⁸ For instance, birthright citizenship has been criticized as providing a tremendous incentive for illegal migration, and yet the Court’s *United States v. Wong Kim Ark*¹⁹⁹ decision, recognizing birthright citizenship for U.S.-born children of undocumented parents, stands.²⁰⁰ That the Court upholds such rights means that as a practical matter, the United States is at some degree of constitutional peace with the incentive problem. Criticizing a policy or law as an incentive may therefore be factually accurate, but not determinative of the rights owed to the strangers at our door.

196. See *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”) (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). Geoffrey Heeren has studied the “wobbly compromise” made between those, like the early Federalists, who favored excluding noncitizens from constitutional rights, and those who, like the Jefferson Republicans, thought those subject to U.S. jurisdiction had to come under the protection of the Constitution. Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 377 (2013).

197. 457 U.S. 202 (1982).

198. Professor Heeren has also critiqued how rights-based jurisprudence has diminished in popularity, as agency skepticism and federalism arguments took center stage. Heeren, *supra* note 196, at 397.

199. 169 U.S. 649 (1898).

200. *Id.* at 662. For an overview of U.S. birthright citizenship and an argument for why it should continue, see Ediberto Román & Ernesto Sagás, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of U.S. Exclusion*, 66 AM. U. L. REV. 1383 (2017).

III. JUSTIFYING BROADER PROTECTION: PRAGMATISM

*“Historic notions of sovereignty have less real meaning in such circumstances, even if they are often vociferously articulated on both sides of the border. There is a stunning disconnect between quotidian reality and our concepts, policies and rhetoric. We cannot stop immigration by fiat nor can we easily avoid the impacts our society has on our closest neighbors, and that they have on us.”*²⁰¹

Having established a situation that requires a response, and developed a philosophical justification for a broader response, the Article now turns to pragmatic reasons for doing things differently because the world is not currently offering a satisfactory “do nothing” option.

Our current system meets *none* of the diverse goals it is trying to attain, including promoting the rule of law, deterrence, administrative efficiency, accuracy, and well-being. Too often, these goals are set in opposition to each other, but when faced with goals that seem to undermine each other, we can consider changing the contours of the debate, lengthening or shortening the time-frame, or broadening or narrowing the geographic scope of ideas. The case of Central American migration shows how we can rethink these goals to reduce the tensions among them, and generate options that better meet a variety of interests.

A. Deterrence: Short-Term Failures, Long-Term Possibilities

In the wake of Central American migration, the term “deterrence” has taken on specific meanings and political shadings. It is short-hand for efforts to prevent Central Americans from undertaking the journey to the United States, and it happens in two ways. First, a deterrent policy advises migrants, prior to leaving, about the dangers of the journey, and the low likelihood of ultimate legal success in the United States.²⁰² Second, the deterrent policy leverages Mexican migration authorities to stop migrants at Mexico’s own southern border, to cut

201. Abraham F. Lowenthal, *The Underlying Significance of Central American Immigration*, BROOKINGS INST. (Aug. 3, 2014), <https://www.brookings.edu/opinions/the-underlying-significance-of-central-american-immigration>.

202. See, e.g., Valerie Hamilton, *How the US is Trying to Deter Migrants from Central America—with Music*, PRI (July 17, 2014, 10:45 PM), <https://www.pri.org/stories/2014-07-17/how-marimba-beat-helping-us-border-patrol-deter-migrants-coming-border> (explaining that the United States is using print, television, and radio advertisements with messages warning potential immigrants about the dangers of attempting to migrate into the United States).

down on the numbers reaching the United States,²⁰³ and uses detention at the U.S. border as a further disincentive.²⁰⁴ Deterrence is thus set up as being at odds with protection.

This dichotomy, while factually descriptive of existing policies, need not hold true. Consider the goals underlying meaningful deterrence: supporting communities in the Northern Triangle to make those communities safer for all, promoting the rule of law in the Northern Triangle; creating opportunities for orderly migration pursuant to the rule of law, and supporting the safety of the migrants themselves. Many of these goals are long-term projects and considering deterrence in a long-term context, rather than as it is presently, permits both sides of the political spectrum to find points of agreement. It also supports the goals of many of the migrants themselves, who do not wish to leave home or undertake this voyage, but who see no option for themselves or their families.

Short-term deterrent measures, like the use of detention facilities and increasing security at Mexico's southern border, have failed because they do not address the root causes of why people choose to leave their homes.²⁰⁵ Numerous reports have shown epidemic levels of violent crime in the three Northern Triangle countries,²⁰⁶ and the gangs

203. See GEO. HUM. RTS. INST., *supra* note 190, at 17.

204. DHS has stated,

[A]s a result of our new emphasis on the security of the southern border, it will now be more likely that you will be apprehended; it will now be more likely that you will be detained and sent back; and it will now be more likely that your hard-earned money to smuggle a family member to the United States will be seized and will never reach its intended source.

Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Johnson Regarding Today's Trip to Texas (Dec. 15, 2014), <https://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today's-trip-texas>.

205. Professor Rebecca Hamlin states,

It's a realistic recognition that actually deterrence policies don't work They might work when someone's only motivation to migrate is economic, but they really don't work—and this is consistently found all over the world—when it comes to people who are fleeing what they believe to be potentially a life-or-death situation.

Priscilla Alvarez, *Obama's Last Attempt at Immigration Reform*, ATLANTIC (Aug. 8, 2016), <https://www.theatlantic.com/politics/archive/2016/08/immigration-reform-central-american-refugees/494948> (internal citations and quotation marks omitted).

206. See Dennis Stinchcomb & Eric Hershberg, *Unaccompanied Migrant Children from Central America: Context, Causes, and Responses* 9 (Am. Univ. Ctr. for Latin Am. & Latino Stud., Working Paper No. 7, 2014), <https://www.peacepalacelibrary.nl/ebooks/files/388113561.pdf> (providing a chart with a list of violent crimes and the numbers of each

responsible for much of the crime operate in an organized fashion throughout the countries, reducing the effectiveness of an internal relocation option. Moreover, while the dangers of the trip to the United States are known, the imperative of leaving endemic violence paired with the *possibility* of a successful trip overrides that danger. As former U.S. Immigration and Naturalization Service (INS) Commissioner Doris Meissner stated, “The research that we do know about is that people are very aware of the dangers, but they make the decision to try.”²⁰⁷

A meaningful deterrent strategy would reflect an understanding that those root causes cannot change in the short-term and would require a medium-to-long term strategy for success. This herculean task demands serious, sustained investment in foreign aid²⁰⁸ paired with unprecedented commitment to improving governance and accountability in the sending countries, which are notoriously corrupt with entrenched elites who control both the political and economic spheres of their respective countries.²⁰⁹ Former Vice President Biden addressed this conundrum, noting both the importance of addressing such root causes and the political difficulties of doing so.

[Biden] lamented that domestic political concerns were preventing the leaders of those nations, who came to the White House last month to discuss the crisis, from taking the types of steps that Colombia has taken to curb narcotics and corruption under a U.S. assistance program known as Plan Colombia. “Central American governments aren’t even close to being prepared to make some of the decisions the Colombians made, because they’re hard,” Biden said.²¹⁰

Another piece of acknowledging the context goes even deeper than foreign aid and encouraging governance reforms in the region: acknowledging America’s own role in the very conditions that fuel

crime occurring in the Northern Triangle region); Renwick, *supra* note 39 (providing a chart detailing the high murder rates of Central America).

207. Hamilton, *supra* note 202 (internal quotation marks omitted).

208. See Robert Valencia, *Does Central America Need a Marshall Plan?*, WORLD POL’Y (July 28, 2014, 2:52 PM), <http://www.worldpolicy.org/blog/2014/07/28/does-central-america-need-marshall-plan> (arguing that if the United States adopted a Central American funding plan like the Marshall Plan from World War II, the economies of the region would stabilize, and the gangs would die out).

209. Renwick, *supra* note 39 (commenting that corruption, along with low tax revenue in the Northern Triangle, has exacerbated gang violence and extortion issues to the point that outside intervention is likely necessary to address the issues).

210. Associated Press, *Biden on Minors at Border: ‘These are Our Kids,’* DAILY MAIL (Aug. 6, 2014, 4:57 PM), <http://www.dailymail.co.uk/wires/ap/article-2718323/Biden-minors-border-These-kids.html>.

violence in these countries. Three phenomena in particular form this troubling role. First, the United States played a destabilizing role in the region in the 1980s, which is directly connected to the oligarchic, nondemocratic, and unaccountable governance in those countries today.²¹¹ Second, the United States is the destination for much of the drug traffic that passes through the region from drug-producing nations in South America. Third, U.S. deportation policy has had a significant effect on the rise of transnational gangs in the region; the gangs now destabilizing and terrorizing El Salvador, Guatemala, and Honduras developed and strengthened in the United States.²¹² As noted above, such causal connections may justify enhanced responsibilities for the United States, even among those who favor a communitarian approach.

B. Short-Term Well-Being

If past experience with international development and good governance programs is a guide, any policies designed to address these root causes will need a generation or more to flourish.²¹³ If we admit that deterrence is a long-term project, then the next question is what to do in the short term. Again, we see that the status quo serves neither the United States nor the migrants themselves. Because it is easy to see how the migrants' interests would be served by broader protection, the essay briefly addresses the far less intuitive claim that U.S. interests would *also* be served by broader protection.

The first piece of this claim centers on the rule of law. Court delays leave the migrants themselves in harmful limbo, straining to find lawyers, and perhaps not even having authorization to work while awaiting court.²¹⁴ The delays also pose challenges to the governments of the cities,

211. See LEOGRANDE, *supra* note 159, at 44–45.

212. See Sonja Wolf, *Maras Transnacionales: Origins and Transformations of Central American Street Gangs*, 45 *LATIN AM. RES. REV.* 256, 258 (2010).

213. See DOUGLAS FARAH & CARL MEACHAM, *CTR. FOR STRATEGIC & INT'L STUD., ALTERNATIVE GOVERNANCE IN THE NORTHERN TRIANGLE AND THE IMPLICATIONS FOR U.S. FOREIGN POLICY: FINDING LOGIC WITHIN CHAOS* 49–50 (2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150911_Farah_AlternativeGovernance_Web.pdf (deducing that previous U.S. led initiatives in Central America can provide important insight into how the United States should structure its future plans for the region).

214. See Molly Hennessy-Fiske, *Immigration: 445,000 Awaiting a Court Date, Which Might Not Come for 4 Years*, *L.A. TIMES* (May 16, 2015, 4:40 PM), <http://www.latimes.com/nation/la-na-immigration-court-delay-20150515-story.html>

counties, and states where the migrants live because their status may affect their ability to work, pay taxes, access health insurance, and more.²¹⁵

The second piece of the claim centers on public safety, specifically the effect of uncertainty on gang recruitment, radicalization, and violence. The slow pace of the immigration system means many of those who will ultimately prevail live for years in the liminal space between being enforcement priorities and possessing lawful immigration status. This unsettling space pushes these migrants into vulnerable employment situations, puts education beyond the reach of many, and—for younger migrants—creates fertile ground for gang recruitment and attendant public safety issues.²¹⁶ Former Homeland Security Secretary Michael Chertoff commented that “when people do qualify for asylum and are moved into host countries, there has to be a process in place to integrate them, get them educated, make sure they can find work so they become productive members of society and not simply embittered clusters of people who are marginalized.”²¹⁷

Communities benefit by promoting migrant well-being. Worldwide, the costs of poor integration are on their most vivid display in Europe, with the rise in terrorism committed by home-grown terrorists—usually young people who feel alienated and without a meaningful connection to the society they live in.²¹⁸ As a security response,

(explaining that the exceedingly large amount of immigration cases has caused delays for hearings by an average of four years).

215. See Dustin Walsh, *Green Card Delays Create Problems for Legal Immigrants, Employers*, CRAIN'S DETROIT BUS. (June 1, 2014, 12:00 PM), <http://www.crainsdetroit.com/article/20140601/NEWS/306019992/green-card-delays-create-problems-for-legal-immigrants-employers> (reporting that delays in issuing green cards is affecting employers in hiring qualified immigrants, and immigrants are unable to secure home loans and other policies while in liminal status).

216. For an in-depth analysis of the recent rise in gang-related violence in many cities in the United States, see Héctor Silva Ávalos, *The MS13 Moves (Again) to Expand on US East Coast*, INSIGHT CRIME (Dec. 2, 2016), <http://www.insightcrime.org/investigations/ms13-moves-expand-us-east-coast>. The phenomenon of Central American gangs has traveled back and forth between the United States, where it started, and Central America through deportations, with ongoing communications between the two regions. See, e.g., CLARE RIBANDO SEELKE, CONG. RES. SERV., RL34112, GANGS IN CENTRAL AMERICA 9 (Aug. 29, 2016), <https://fas.org/sgp/crs/row/RL34112.pdf> (explaining that the deportations of criminals to Central America has increased the region's gang problem).

217. Donald Kerwin, *How Robust Refugee Protection Policies Can Strengthen Human and National Security*, 4 J. ON MIGRATION & HUM. SECURITY 83, 92 (2016) [hereinafter Kerwin, *Protection Policies Strengthen Security*].

218. See, e.g., John Wihbey & Leighton Walter Kille, *France, Islam, Terrorism and the Challenges of Integration: Research Roundup*, JOURNALIST'S RESOURCE (Nov. 16, 2015),

European nations are recognizing the need to address racial justice to combat the rise in terrorism. Zygmunt Bauman writes powerfully about the short-sightedness of demonizing refugees, instead of building bridges to them:

Deceptively comfort-bringing (by chasing the challenge out of sight) in the short run, such suicidal policies store up explosives for future detonation. . . . [T]he sole way out of the present discomforts and future woes leads through rejecting the treacherous temptations of separation; . . . Humanity is in crisis—and there is no exit from that crisis other than solidarity of humans.²¹⁹

The World Economic Forum connected these migrant integration issues with national security concerns, and urged stakeholders in migrant-receiving countries to consider measures, such as “work permits and access to jobs, skills recognition and training, and access to schools and public health services. At the same time, at the global level, the development community could help by focusing more strongly on building resilience and helping refugees to transition into self-reliance.”²²⁰

The societal goods produced by integration are in tension, however, with any vision of these migrants as temporary—a tension that is impossible to resolve, but may be possible to reduce somewhat. The approach suggested in Part IV, *infra*, offers protection of less value and less permanence than the Refugee Convention provides, from concern that something highly valuable and durable would add a large pull factor to the push-factors driving migration now—and possibly undermine the project of Northern Triangle safety. But the approach provides certain short-to-medium term status, permitting migrants to have some freedom and security within the United States, while keeping resettlement as the ultimate goal.

C. (In)Efficiency of Individualized Decisions

Another potential point of general agreement is the desire for administrative efficiency. Both the affirmative asylum system, for those who apply from within the United States, and the defensive system in

<http://journalistsresource.org/studies/international/conflicts/france-muslims-terrorism-integration-research-roundup>.

219. BAUMAN, *supra* note 1, at 18–19.

220. WORLD ECON. FORUM, THE GLOBAL RISKS REPORT 2016: 11TH EDITION 16 (2016), http://www.weforum.org/docs/GRR/WEF_GRR16.pdf. Donald Kerwin comments on this Report: “In other words, its diagnosis (crisis and risk) led it to identify security and protection as complementary needs.” Kerwin, *Protection Policies Strengthen Security*, *supra* note 217, at 92.

immigration courts, for those who have been charged with removability, face extraordinary backlogs.²²¹ In part, these systems are overwhelmed by the kinds of decisions the system must make. Complicated systems demand resources—governmental, private, and otherwise. And the protection mechanisms for many of those arriving from Central America are highly complex. Congress has created several categories within immigration law that offer some form of humanitarian protection to migrants who can establish their individual eligibility. As early as 2004, this set of approaches to protection was described as “piecemeal.”²²² Humanitarian immigration sets out very specific categories: refugees and asylees; crime victims, with special provisions for human trafficking and domestic violence victims; and abused, abandoned, or neglected children. Although not designed with any specific nationality in mind, many of these forms of protection offer possibilities for Central American migrants.

As individualized options, applicants must make highly context- and fact-specific showings of eligibility, matching their situations to the nuances of case law and agency guidance. Once within such a category, these forms of protection generally lead quickly to permanent residence and, ultimately, citizenship, as described below. Such a path to citizenship makes these migration options highly valuable, and this Article suggests that the difficulty and specificity of meeting the eligibility requirements makes sense in light of that value.²²³

1. Protection derived from the Refugee Convention

The first set of humanitarian options all derive from the Refugee Convention itself—asylum, withholding of removal, and CAM status. While the eligibility for each of these does differ, all three require meeting the specific definition of a refugee. The definition of a refugee comes from the Refugee Convention, imported into the INA through the 1980 Refugee Act,²²⁴ covers those who are “unable or

221. Kerwin, *35th Anniversary of the Refugee Act of 1980*, *supra* note 131, at 243.

222. Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 865 (2004).

223. The value/difficulty trade-off shows up in reverse in the more broadly available TPS programs, among others, which have no such path to citizenship and which leave migrants in a liminal status that can last many years. Part III will explore these programs as a contrast to those discussed in the following Sections.

224. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

unwilling to return to, and is unable or 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.”²²⁵ There are thus multiple elements that must be met: someone must (1) have one or more of the five protected characteristics; (2) have experienced persecution in the past or have a fear of persecution in the future; (3) the persecution must be on account of the protected ground (the “nexus” requirement); and (4) the government must be unable or unwilling to protect them from this harm. It is available only through case-by-case determinations. Early efforts to use asylum law to provide blanket coverage to certain nations failed.²²⁶

2. *The valuable protection of asylum*

Asylum, as constituted in U.S. law, is both extremely narrow and relatively generous. The path to the status is narrow, constrained by the very specific definition of a “refugee,” by evidentiary burdens, and by the complexity of the legal process. The reward for obtaining the status, on the other hand, is excellent, with its path to citizenship within approximately five years of being granted asylum. As Jaya Ramji-Nogales has written, “International refugee law’s impressive power benefits only a select group of migrants who can fit within the narrow definition it lays out.”²²⁷

The narrow availability of asylum was by design. As Refugee Convention scholar James Hathaway has written, the states drafting the convention needed to balance protection with pressures for restriction:

The subjectivity of the refugee definition has provided a means of legitimating this restrictionist tendency: the strong political and economic links that exist between the West and many Third World states of origin have led to a predisposition to question the likelihood that those states could reasonably be expected to engage in persecutory behavior. . . . As a result, the persecution-based standard now poses a major political impediment to the recognition

225. Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (codified as amended at 8 U.S.C. § 1101(a)(42)).

226. *Martinez-Romero v. INS*, 692 F.2d 595, 595–96 (9th Cir. 1982) (“If we were to agree with the petitioner’s contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely.”). The *Martinez-Romero* court concluded that relief could only be granted in the presence of “special circumstances.” *Id.*

227. Ramji-Nogales, *supra* note 25, at 613.

of large numbers of refugee claims, humanitarian or human rights concerns notwithstanding.²²⁸

Consider the kinds of impediments that halt the paths of many fleeing violence in Central America. As seen in the definition, fear of generalized violence, no matter how likely, does not make someone eligible for asylum. “Persecution” signifies harm inflicted “in order to punish,” and as the seminal *Acosta*²²⁹ case notes, “the word does not encompass the harm that arises out of civil or military strife in a country.”²³⁰ At the outset, then, those fleeing gang violence *generally* are excluded from the definition of a refugee, unless they can prove that violence is intended to punish them for one of the protected characteristics (a nexus problem). In the context of societies where violence is pervasive, proving the specific intent of the persecutor vis-à-vis a protected characteristic is difficult. The burden of proof is on the applicant²³¹ to demonstrate through testimony and, in most cases, through extensive corroborating evidence,²³² that the harm they fear would be because of a protected characteristic that they have.

Even when applicants understand why the gang or the government is targeting them, that reason may still not fit the definition of a refugee. For example, gangs frequently target girls because of their gender, but U.S. law does not recognize gender as a particular social group because it is too broad.²³³ Likewise, many migrants who run small or family businesses have been threatened with death if they do not make extortion payments to the gangs—and yet “business owner” is not a reliable “particular social group” as courts have found occupations to be changeable.²³⁴ An applicant who is able to find a creative lawyer might be able to develop a definition of their protected category that works, but, as discussed below, this requires a sophisticated synthesis of the facts with the case law, which generally

228. Hathaway, *supra* note 182, at 170.

229. *Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

230. *Id.* at 212.

231. 8 C.F.R. § 208.13(a) (2017).

232. 8 U.S.C. § 1158(b)(1) (2012).

233. This makes the United States an outlier in international law, but the Refugee Convention purposefully permits countries to make their own determinations on matters such as this. See Susan F. Martin, *Gender and the Evolving Refugee Regime*, 29 REFUGEE SURV. Q. 104, 117–18 (2010).

234. See *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005) (rejecting the claim that Colombian business owners who refused demands from gangs or narcotics traffickers are a particular social group).

requires a lawyer well-versed in asylum law.²³⁵ It also often requires time-consuming appeals, as described below, the development of amicus briefs, and litigation in federal circuit courts, all of which takes enormous resources and exacts an often-heavy price. Nonetheless, through this work, people fleeing Central American violence *often win* their asylum cases.²³⁶ The path is narrow, but the path exists.

Once won, asylum is a valuable form of protection, offering as it does a fairly rapid path to citizenship: permanent residence is available after one year, with its date of issuance back-dated one year. Four years later, if no special issues like criminal problems arise in the interim, the individual can apply for citizenship.²³⁷ The status also immediately permits the asylee to work lawfully, to bring family members in to the United States, to travel on a refugee travel document, and to access some medical, job-training, and other benefits for a period of eight months. Although scholars have justly called for improvements to the support system in place for asylees,²³⁸ asylum can be seen rightly as a form of both protection *and* integration, and, as a result, is highly valuable.

Professor James Hathaway has written of the conundrum created by the high value of integration-oriented systems like asylum in the United States, noting that “[r]efugee law is . . . fundamentally a mechanism of human rights protection, not a mode of immigration. By erroneously insisting on an absolutist linkage between refugee status and a right of

235. See *Representation is Key in Immigration Proceedings Involving Women with Children*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/377> (last visited Oct. 23, 2017) (providing data on “women with children” cases, as many of these Northern Triangle cases are classified). Less than thirty percent of “women with children” are able to find representation. *Id.* “Without representation, women with children almost never prevail even after they are able to demonstrate ‘credible fear’ of returning to their own country—only 1.5 percent were allowed to stay. While few decisions have occurred in represented cases, the win rate thus far has been 26.3 percent.” *Id.*

236. See Ilona Bray, *Which Countries Do Most People Granted Asylum in the U.S. Come From?*, NOLO, <http://www.nolo.com/legal-encyclopedia/which-countries-do-most-people-granted-asylum-the-us-come-from.html> (last visited Oct. 23, 2017) (showing that the Northern Triangle countries hold three of the top five spots for most asylum cases won).

237. *Green Card for Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/green-card/green-card-through-refugee-or-asylee-status/green-card-asylee> (last visited Oct. 23, 2017).

238. See, e.g., Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. REV. L. & SOC. CHANGE 29, 37 (2016) (arguing that legal and regulatory reform is needed to improve the asylee system).

permanent immigration, advocates raise the stakes for governments.”²³⁹ Keeping asylum status valuable and narrow, while designing a different form of protection with broader availability but less value may be the satisfactory solution to this conundrum, and the Article suggests precedents and contours for that protection in Part III, *infra*.

3. *Less valuable withholding of removal*

Under INA section 241, withholding of removal shares much in common with asylum, but is dramatically less valuable. In one way, it is harder to obtain: based on the same refugee definition that asylum-seekers must meet, withholding applicants must show not simply a well-founded fear of persecution (a roughly ten percent chance of harm occurring), but show that the harm would be “more likely than not,” or a greater than fifty percent chance.²⁴⁰ At the same time, withholding is more expansive because it is not discretionary like asylum. Someone eligible for asylum might be barred from the relief because they applied more than one year after arriving in the United States or because they have criminal convictions that would put discretionary relief out of reach.²⁴¹ The same is not true for withholding.

If granted withholding, the individual may work lawfully, and may not be removed to the country where he or she faces persecution, unless circumstances in that country change.²⁴² Withholding status, however, means that the individual cannot do many of the other things an asylee can, such as travel, file applications to be reunited with family members, or access the public benefits available to asylum-seekers.²⁴³ Most significantly, there is no path from withholding status to lawful

239. James C. Hathaway, *Why Refugee Law Still Matters*, 8 MELB. J. INT’L L. 88, 96 (2007).

240. Immigration and Nationality Act of 1952, Pub. L. 82-414, § 241, 66 Stat. 163, 204–08 (codified as amended in scattered sections of 8 U.S.C.); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 443 (1987).

241. If an applicant has committed a particularly serious crime (or crimes), the applicant may even be ineligible for withholding. Immigration and Nationality Act § 241(b)(3)(B) (codified as amended at 8 U.S.C. § 1231 (2012)); *see also* 8 C.F.R. § 208.16 (2017). This reflects the Refugee Convention’s concern that states not be forced to accept dangerous refugees. *See* Refugee Convention, *supra* note 2, 189 U.N.T.S. at 176 (Article 33(2)). The Convention’s exclusion clause, Article 1(F), excludes from the definition of a refugee those who have “committed a crime against peace, a war crime, or a crime against humanity” or who have “committed a serious non-political crime outside the country of refuge.” Refugee Convention, *supra* note 2, 189 U.N.T.S. at 156.

242. 8 C.F.R. § 208.16.

243. *Id.*

permanent residence or, ultimately, U.S. citizenship.²⁴⁴ With these limitations, it is significantly less valuable than asylum. It is a close approximation of the non-refoulement principle at the heart of the Refugee Convention; the principle was intended to be a basic form of protection without the more robust protections and integrative features of asylum. The Convention left any such additional features up to individual states to grant or not, in the state's discretion.

4. *Malleability and its costs*

The Refugee Convention, specifically oriented to the aftermath of World War II, has been broadly critiqued as not having the flexibility to respond to the different kinds of migrations the world sees today.²⁴⁵ Such critiques have come powerfully from the environmental scholars, who see its limitations as rising oceans take the place of Refugee Convention persecutors in forcing people's migration.²⁴⁶ Feminist scholars have also sharply criticized the "universality" of a convention that failed to include gender as a protected ground.²⁴⁷ Nonetheless, the definition of a refugee from the Refugee Convention is and always has been malleable at its edges, with national implementing laws and policies, and individual adjudications, adapting to new situations²⁴⁸ and UNHCR sharing these national-level developments with Convention-signatories more broadly.²⁴⁹

244. *Id.*; see also Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1143 (2015) (discussing the limitations to withholding of removal status).

245. See Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 482 (1998) (discussing that the current refugee definition is too limited to accommodate the refugee population); Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, ROYAL SOC'Y, 609, 611-12 (2011) (arguing that the definition of refugee should be expanded to include environmental refugees).

246. U.N. HIGH COMM'R FOR REFUGEES, THE ENVIRONMENT & CLIMATE CHANGE 1, 9 (2015), <http://www.unhcr.org/540854f49.pdf>; see Myers, *supra* note 245, at 483-84, 509 (explaining that migration due to environmental changes, particularly sea level rise, will be more pervasive and problematic in coming years).

247. See, e.g., Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518, 518, 525 (1989) (arguing that women face barriers to relief compared to other members of protected social groups and that there should be a particular social group that better recognizes and protects women).

248. Hathaway, *supra* note 182, at 169 (discussing how the malleable standard for refugee status allows "states to tailor its protection decisions to coincide with perceived national self-interest").

249. Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 137 (2002) ("Generally, the UNHCR tries to synthesize and advance the best practices of states, and mediates among different protection systems . . .

The flexible boundaries of the framework embrace the work of creative advocates, who have expanded the range of claims protected under the Convention across the decades since its implementation. This is especially true with the protected ground of “membership in a particular social group,” in which many gender-based violence and gang-related claims fit.²⁵⁰ It is also true with political opinion (explicit and implied alike), as Debbie Anker and Palmer Lawrence have powerfully argued,²⁵¹ but the focus of this Section is on the developments within a particular social group (“PSG”).

Even in the United States, which has a more limited approach to understanding PSGs than many other countries,²⁵² litigation has expanded the understanding of how PSGs apply to Central American forced migration on at least two fronts. First, in recent years, new PSGs have emerged as viable bases for seeking asylum. We have seen the approval of such PSGs as “married women in Guatemala who are unable to leave their relationship,”²⁵³ “former gang membership,”²⁵⁴ and “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses.”²⁵⁵

Non-binding norms articulated by the UNHCR influence the standards for protection in both legalized and non-legalized settings.”).

250. See, e.g., Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 832 (2008).

251. Deborah Anker & Palmer Lawrence, “*Third Generation*” Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, 14-10 IMMIGR. BRIEFINGS 1, 6 (Oct. 2014).

252. In the United States, PSGs must be innate, socially distinct, and sufficiently “particular”—the third piece of which sets the United States apart from nations like Canada, Australia, and the United Kingdom, as well as from the UNHCR. The UNHCR has noted that the Board of Immigration Appeals’s

application of the “particularity” requirement appears to stem from a general [misplaced] concern about the potential for unlimited expansion of the social group ground . . . “[T]he fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”

UNHCR’s Amicus Curiae Brief in Support of Petitioner at 21, *Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. 2012) (quoting U.N. High Comm’r for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group,” within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶18, U.N. Doc. HCR/GIP/02/02 (May 7, 2002)).

253. A-R-C-G-, 26 I. & N. Dec. 388, 388 (B.I.A. 2014).

254. *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014).

255. *Crespin-Valladares v. Holder*, 632 F.3d 117, 121 (4th Cir. 2011).

Second, litigation has clarified the “nexus” standard for showing that persecution is “on account” of a protected ground.²⁵⁶ While “family” has long been seen as a quintessential social group,²⁵⁷ in *Hernandez-Avalos v. Lynch*,²⁵⁸ the government challenged asylum for lack of evidence that persecution was “on account of” family ties. In that 2014 decision, the Fourth Circuit held that

[t]o prove that persecution took place on account of family ties, an asylum applicant “need not show that his family ties provide ‘the central reason or even a dominant central reason’ for his persecution, [but] he must demonstrate that these ties are more than ‘an incidental, tangential, superficial, or subordinate reason’ for his persecution.”²⁵⁹

Creative lawyers are thus often able to expand the law’s understanding of who might fit within the refugee definition—both through individual litigation, and through advocacy, such as the work to have the federal government issue long-delayed gender guidelines.²⁶⁰ As one example shows, however, the important incremental adaptations of the law come at a significant expense.

In *Martinez v. Holder*,²⁶¹ a case litigated by the University of Maryland Immigration Clinic (led by Professor Maureen Sweeney), the clinic represented a young former gang member, Julio Martinez, whom the United States wanted to remove back to El Salvador. As Mr. Martinez was detained, his first victory was securing representation at all—most detainees do not.²⁶² His second victory was securing the kind of creative, diligent lawyers he did, through the clinic and Professor Sweeney, who prepared his claim for withholding of removal.

The evidence-intensive hearing consumed a great deal of time, and the client lost despite the clinic’s efforts, with the Immigration Judge

256. Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465, 465 (2015).

257. Acosta, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

258. 784 F.3d 944 (4th Cir. 2015).

259. *Id.* at 949 (quoting *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009)).

260. See Schoenholtz, *supra* note 8, at 122–23.

261. 740 F.3d 902 (4th Cir. 2014).

262. One recent study from New York showed that sixty percent of detained immigrants went unrepresented, and of those transferred to detention centers outside New York seventy-nine percent lacked counsel. PETER L. MARKOWITZ ET AL., STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 1, 9–10 (2011), <https://www.ils.ny.gov/files/Accessing%20Justice.pdf>.

concluding that Mr. Martinez was not in a protected group. Specifically, his proposed membership in a particular social group claim failed because the group needed to have a “common, immutable characteristic” and “voluntary association with a criminal gang” was unacceptable.²⁶³ The clinic appealed the case to the Board of Immigration Appeals, which upheld the judge’s decision in October 2012.²⁶⁴ Undaunted, the clinic appealed to the Fourth Circuit Court of Appeals, briefed the issues, gathered amici, and made oral arguments in October 2013. Mr. Martinez emerged victorious in January 2014 when the Fourth Circuit adopted Professor Sweeney’s legal reasoning.²⁶⁵ Despite this victory, there were additional problems that took even more time to solve.

The process was arduous for client and lawyers alike. Professor Sweeney notes the financial and emotional burdens that the process placed on Mr. Martinez and his family.²⁶⁶ The burden on the lawyers is not insignificant either. Others have identified the significant issue of lawyer burnout and secondary trauma that arises in difficult cases like the Martinez case. There is also a lurking efficiency problem: imagine how many people could have been helped with the same time and energy, if we had laws that required less of a fight.

The efficiency of using litigation to change the law has been long debated, and has found robust support from Justice Oliver Wendell Holmes to Judge Posner.²⁶⁷ Common law has been seen as producing “just rules” and being “elastic and flexible and so could adapt itself to new circumstances while statutes could not change without legislative action.”²⁶⁸ In other scholarship, I have strongly endorsed the flexible discretionary edges of judicial decision-making.²⁶⁹ The point being made here is limited to this: as a way of responding to the immediate needs of a relatively large group of forced migrants, litigation is not

263. *Martinez*, 740 F.3d at 908.

264. *See id.* at 907 (“From the BIA’s final order of removal dated October 24, 2012, Martinez filed this petition for review.”).

265. *Id.* at 906.

266. Email from Maureen Sweeney, Professor, Univ. of Md. Sch. of Law, to Elizabeth Keyes (Sept. 27, 2017, 4:25 PM) (on file with author).

267. *See* Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT’L & COMP. L. 307, 309 (2012).

268. Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 376 (1999).

269. Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 WASHBURN L.J. 129 (2015); 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).

going to be enough—and the nature of the limitations built into the Refugee Convention itself means that even expanded understandings of the “malleable” definitional framework will hit limits as a means of addressing this forced migration.

D. Other Forms of Protection

Other forms of protection supplement the Refugee Convention already and provide protection for some of those fleeing violence in Central America, but even these have important limitations as applied to forced migrants. Even with these options augmenting the Refugee Convention options, our protection patchwork still leaves significant gaps because none was designed with this forced migration in mind. A chart comparing these options is printed at the end of this Section.

1. Special Immigrant Juvenile Status

Many Central American migrant children will qualify for Special Immigrant Juvenile Status (SIJS), a path toward permanent residence for those who, broadly speaking, have been abused, abandoned, or neglected (or similar) by one or both parents, and whose return to their home country would not be in their best interests.²⁷⁰ There is a significant area of overlap between the children fleeing Central America on account of the violence there and the children eligible for SIJS.²⁷¹ Parental abuse, abandonment or neglect increases a child’s vulnerability to violence there. Violence in the home can leave a child with few options but to spend more time on unsafe streets. An abandoned child has less protection from gang predations or, especially with girls, sexual assault (whether gang-related or not).

I have written elsewhere about the complexity of this process, which looks a little bit different in every juvenile court in every sub-state jurisdiction across the country, and which also leads to disparate results that depend on where a child leaves.²⁷² The complexity makes it essential

270. 8 U.S.C. § 1101 (a) (27) (2012).

271. See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 35 (2016) [hereinafter Keyes, *Evolving Contours*] (discussing the intersection of state and federal law that makes SIJS cases especially complex); Theresa Cardinal Brown, *Arrival of Central American Children Resulting in Backlog for Special Immigrant Juvenile Status*, BIPARTISAN POL’Y CTR. (June 24, 2016), <https://bipartisanpolicy.org/blog/central-american-children-backlog-special-immigrant-juvenile-status> (predicting that the number of SIJS cases from Central America will create a years-long delay in acquiring Green Cards).

272. Keyes, *Evolving Contours*, *supra* note 271, at 35, 75.

for the children to have lawyers but also requires those lawyers to possess an unusual set of competencies, which limits the pool of available lawyers.²⁷³

Beyond the practical difficulties of fully implementing SIJS as a protective form of immigration status for children, there is the problem that SIJS was simply not intended to be a broad source of protection, which is creating political backlash from some quarters.²⁷⁴ SIJS had a narrow purpose initially, for a specific subset of noncitizen children in foster care. Expansions over the intervening years have broadened the eligibility considerably, but with significant pushback from the Department of Homeland Security through interpretive memoranda and through the case law emerging from adjudications.²⁷⁵ Advocates for children rightly push for as many of the affected Central American children as possible to benefit from this means of achieving safety, but their collective success has reinforced an idea from DHS²⁷⁶ and more

273.

The work of representing vulnerable children in immigration proceedings required a large number of *pro bono* lawyers to become overnight experts in the intersection of two highly-specialized areas of the law: immigration removal defense, and child custody, guardianship and dependency proceedings. Immigration litigation is always difficult, but the children's cases raise a host of special challenges.

Id. at 36 (internal citations omitted).

274. J. Weston Phippen, *Young, Illegal, and Alone*, ATLANTIC (Oct. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/10/unaccompanied-minors-immigrants/410404> (sharing the views of two congressmen who believe the SIJS program should be drastically limited or eliminated because it is being abused).

275. See Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., & Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Servs., to Field Leadership (March 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (providing field guidance on new legislation affecting adjudication of petitions filed for SIJS); Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs. and Dist. Dirs. (May 27, 2004), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (addressing eligibility issues relating to SIJS, application for adjustment, and express consent); see also Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 227 (concluding that family and state courts "have incredible power of the SIJS statute," often creating hurdles and even contributing to "the shadow population of young, undocumented people").

276. The DHS U.S. Citizenship and Immigration Services Administrative Appeals Office (AAO) has appellate authority over SIJS decisions, and it may issue precedent decisions binding on the adjudicating officers. As documented by Professor Fisher Page, the AAO is not supposed to "look behind" the state SIJS orders if they are facially

recently from Congress,²⁷⁷ that the system is not working as envisaged.

Moreover, many of those fleeing the Northern Triangle simply do not fit within SIJS eligibility. Anyone over the age of either 18 or 21 (depending on an individual state's law) is too old for the program. Those who meet the age requirements may not have a parent who abused, abandoned, or neglected them. A child who fears gang violence

sufficient, yet does so often, with the result that a child who succeeded at the state level fails at the federal level. See Daria Fisher Page, *The Tension Between Deference and Consent: An Analysis of the Jurisprudence of the Administrative Appeals Office in Special Immigrant Juvenile Status Cases, 1998–2014* 38 (unpublished manuscript) (on file with author). Then, on April 12, 2016, the Department of State announced that the numbers available for SIJS visas from the Northern Triangle were over-subscribed, meaning the USCIS essentially stopped accepting applications for the year. U.S. Dep't of State, Bureau of Consular Affairs, *Visa Bulletin: Immigrant Numbers for May 2016*, https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_May2016.pdf (last visited Oct. 23, 2017); see also *Practice Advisory on Updated Procedures for Status Adjustment Filings for Certain SIJS Clients*, KIDS IN NEED OF DEFENSE (Apr. 18, 2016), <https://supportkind.org/wp-content/uploads/2016/04/KIND-Practice-Advisory-ResIJ-Visa-Availability-04.18.16-2.pdf>.

277. Congress periodically considers SIJS. Under its current Republican leadership, it sees the program as a vehicle for fraudulent immigration. In March 2015, the House Judiciary Committee Chair Bob Goodlatte wrote to DHS Secretary Jeh Johnson asking him to address fraud in light of a recently televised investigative report into fraudulent SIJS claims in New York concerning migrants from India. Press Release, Bob Goodlatte, Congressman, Goodlatte to Secretary Johnson: Changes Needed to Reduce Fraud in Immigration System (Mar. 19, 2015), <http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=298>.

Cf. Lindsey Kaley & Kim Susser, *Setting the Record Straight on SIJS*, N.Y. LEGAL ASSISTANCE GRP. (Mar. 23, 2015), <http://nylag.org/blog/2015/03/setting-the-record-straight-on-sijs> (advocating for more judges to relieve the overburdened New York family courts rather than closing the SIJS program); Kirk Semple, *Federal Scrutiny of a Youth Immigration Program Alarms Advocates*, N.Y. TIMES (Mar. 31, 2015), <http://www.nytimes.com/2015/04/01/nyregion/federal-scrutiny-of-a-youth-immigration-program-alarms-advocates.html> (providing examples of advocates who say sufficient safeguards are in place to protect against the alleged scam, but that there was no indication of a scam). USCIS has acknowledged the need for better fraud protection; one motivation behind its decision to centralize adjudications of SIJS claims in 2015 (implementation is still in process) was to reduce fraud. Director Rodriguez noted in testimony to Congress about the work of the Fraud Detection and National Security Directorate ("FDNS"), "Centralization will better leverage and develop the expertise of personnel adjudicating [Special Immigrant Juvenile] benefits, to ensure consistency and better identify fraud indicators and trends." *Written Testimony of USCIS Director Leon Rodriguez for a House Committee on the Judiciary, Subcommittee on Immigration and Border Security Hearing Titled "Oversight of U.S. Citizenship and Immigration Services,"* DEP'T OF HOMELAND SECURITY (Dec. 9, 2015), <https://www.dhs.gov/news/2015/12/09/written-testimony-uscis-director-house-judiciary-subcommittee-immigration-and-border>.

but who has two loving parents will not benefit from SIJS, even when SIJS is applied as expansively as possible. SIJS thus offers only a limited supplement to protection for those fleeing Northern Triangle violence.

2. *Convention against Torture*

In another individualized remedy, Article III of the Convention against Torture (CAT) offers relief from removal for individuals who fear torture in their home countries—so long as the torture would be committed by government agents or with the acquiescence of government agents.²⁷⁸ In FY 2015, 625 individuals received withholding or deferral of removal under the Convention, while 9858 were denied—a 6.3 percent grant rate.²⁷⁹ The low grant rate captures the narrowness of the relief. CAT’s requirement of government participation in or acquiescence to torture sets a high bar for relief. Acquiescence is tightly construed.²⁸⁰ In a typical case denying CAT protection, the First Circuit found that Salvadoran police failure to help in extortion cases did not constitute “acquiescence” to gang extortion.²⁸¹ In some circuits, there is a slightly more expansive reading of acquiescence to include “willful blindness” by the government.²⁸²

Despite the high standard, individuals fleeing gang violence may qualify for CAT protection when the facts of their particular case demonstrate a close connection between the police or army officials and the persecution. Gang infiltration of the police is well

278. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85; *see also* 8 C.F.R. § 208.16(c)(2) (2017).

279. FY 2015 STATISTICS YEARBOOK, U.S. DEP’T OF JUSTICE EXEC. OFFICE FOR IMMIGR. REV. M1 (2016), <https://www.justice.gov/eoir/page/file/fysb15/download> (showing the number of CAT claims that were withdrawn and abandoned, as well as “other” claims that likely include those who filed asylum or withholding applications alongside their CAT claim, and won relief on one of the other grounds).

280. “To demonstrate ‘acquiescence’ by Colombian Government officials, the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must demonstrate that Colombian officials are *willfully accepting* of the guerrillas’ torturous activities.” S-V, 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000) (emphasis added). *But see* Zheng v. Ashcroft, 332 F.3d 1186, 1196 (9th Cir. 2003) (disapproving of the BIA’s S-V decision and expanding the “willful acceptance” standard to include governmental “willful blindness” to torture).

281. Granada-Rubio v. Lynch, 814 F.3d 35, 40 (1st Cir. 2016) (per curiam); *see also* Amouri v. Holder, 572 F.3d 29, 35 (1st Cir. 2009) (denying protection because the government’s failure to control gangs did not amount to “acquiescence” under CAT).

282. *See, e.g.*, Amir v. Gonzales, 467 F.3d 921, 927 (6th Cir. 2006) (joining the Ninth and Second Circuits in accepting the “willful blindness” standard for acquiescence).

documented, especially in El Salvador,²⁸³ and is also a known phenomenon in Honduras and Guatemala.²⁸⁴ If an individual makes a persuasive showing about government involvement or acquiescence, CAT provides limited benefits.²⁸⁵ It is available whether or not the migrant has serious criminal convictions, but a CAT victory only means relief from removal and work authorization. Recipients have no path to permanent residence and citizenship and may be indefinitely detained by DHS if deemed too dangerous for release to the community.

3. *Visas for crime survivors*

Finally, some Central American migrants, once here, may qualify for visas after being victims of a serious crime. Because of the vulnerabilities of new immigrants, and especially undocumented immigrants who have difficulty finding secure employment or safe housing, some percentage of the migrants will be victims of crimes, ranging from assault to robbery to rape to human trafficking.²⁸⁶ Any of these, and more, provide a basis to possible immigration relief through the U visa²⁸⁷ (for victims of a large number of fairly serious crimes) or the T visa²⁸⁸ (for victims of human trafficking). So long as the migrants cooperate with the investigation or prosecution of the crime, and in the case of U visas, they live in a jurisdiction where officials provide the required certification, they may be able to apply for one of these visas, which then puts them on a path toward permanent residence and citizenship.²⁸⁹ Some number of Central American migrants may qualify for these, but the remedy is disconnected from the reason for migration, and eligibility is a happenstance of who is unfortunate enough to be re-victimized by crime once in the United States.

283. Mimi Yagoub, *480 Gang Members Infiltrated El Salvador Security Forces: Report*, INSIGHT CRIME (Feb. 22, 2016), <http://www.insightcrime.org/news-briefs/did-480-gang-members-infiltrate-el-salvador-security-forces>.

284. Renwick, *supra* note 39.

285. See 8 C.F.R. § 208.16 (2017).

286. Garance Burke, *AP Investigation: Feds' Failures Imperil Migrant Children*, ASSOC. PRESS (Jan. 25, 2016), <https://apnews.com/e87200e7361b412fa8c1d5003b7bf357/ap-investigation-feds-failures-imperil-migrant-children>; Mary Turck, *Central American Children Face New Peril in the US*, AL JAZEERA (Jan. 30, 2016), <http://america.aljazeera.com/opinions/2016/1/central-american-children-face-new-peril-in-the-united-states.html>.

287. 8 U.S.C. § 1101(a)(15)(U)(i) (2012).

288. § 1101(a)(15)(T)(i).

289. § 1101(a)(15)(U)(i).

4. *Humanitarian parole*

DHS has the ability to issue humanitarian parole (HP) to temporarily admit someone who has no other lawful way to enter the United States.²⁹⁰ It issues humanitarian parole only under compelling humanitarian circumstances. It is implicitly part of the CAM program,²⁹¹ which relies on the parole authority, but *could* be available to those without the CAM's requirement of a qualifying relative in the United States. Nothing in the parole authority precludes that result. However, in practice, HP is granted extremely rarely.²⁹² Moreover, we have seen from other programs like Deferred Action for Childhood Arrivals (DACA), that delineating clear eligibility criteria inevitably creates clear ineligibility criteria that reduces the likelihood of being granted broader relief (like deferred action, in the DACA context).²⁹³ The CAM program provides clear criteria for those fleeing the Northern Triangle who qualify, and it seems unlikely that those falling outside the criteria could qualify for broader HP absent extremely compelling circumstances. Furthermore, as "parole" signifies, it is not a sturdy immigration status. Indeed, it does not even legally constitute an admission to the United States, as if the border were a rubber band around the individual paroled in.²⁹⁴ There are no benefits attached to parole, except for the intrinsic benefit of achieving temporary safety (in the case of Central American migrants using HP to flee danger).

As Don Kerwin, Director for the Center on Migration, notes, such programs, along with TPS, "rest primarily on executive discretion, fail

290. § 1182(d)(5)(A).

291. *CAM Guidance*, *supra* note 107.

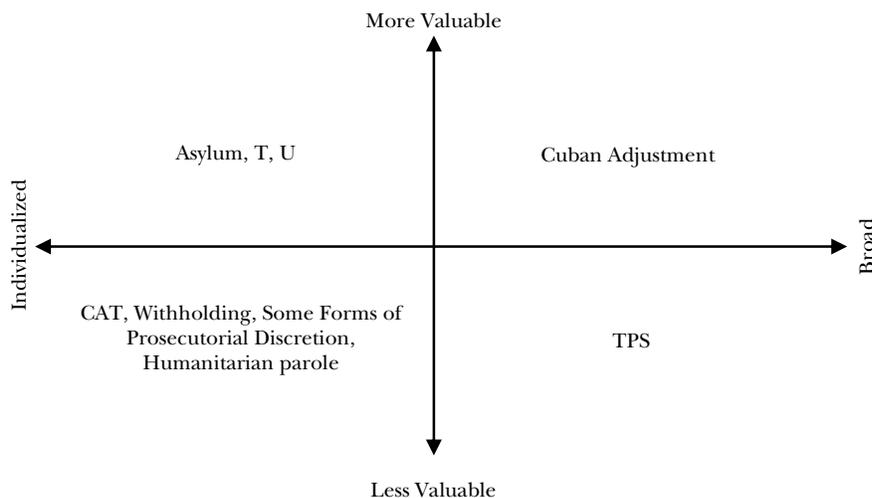
292. USCIS estimates that worldwide, approximately 300 people annually receive humanitarian parole. See U.S. CITIZENSHIP & IMMIGRATION SERVS., REFUGEE, ASYLUM AND INTERNATIONAL OPERATIONS DIRECTORATE: HUMANITARIAN PAROLE PROGRAM (2011), https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/Humanitarian_Parole_Program.pdf.

293. Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 WASHBURN L.J. 129, 132–33 (2015). Moreover, opponents viewed the clear eligibility criteria as executive overreach, bypassing Congress; the opposition generated from this led ultimately to the rescission of DACA. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

294. See 8 U.S.C. § 1182(d)(5)(A).

to cover numerous at-risk populations, and do not typically lead to permanent status or other durable solutions.”²⁹⁵

Figure 1: Showing Where We Are Now



E. High-Stakes Accuracy

In a system reliant on individualized determinations, accuracy of those determinations matter. Where relief is valuable, there is an inevitably a desire to squeeze an individual into a framework not intended for that person’s case. Marc Rosenblum of the Migration Policy Institute has written about the importance of making accurate determinations, despite the challenges of doing so: “[A] fundamental immigration policy challenge is how to protect vulnerable populations while restricting the admission of people who may be fleeing deeply difficult conditions but lack valid claims to humanitarian protection in the United States.”²⁹⁶ Rosenblum’s assessment is descriptively accurate of a system in which protection is individualized.

It is especially true of a system in which the path to eligibility for individualized protection is legally and procedurally complex, as

295. Kerwin, *35th Anniversary of the Refugee Act of 1980*, *supra* note 131, at 207.

296. MARC R. ROSENBLUM, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION, MIGRATION POL’Y INST. 16 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/TCM-Protection-UAC.pdf>.

discussed above.²⁹⁷ With the high-value benefit of asylum comes a stringent screening process that rightly separates out those who qualify from those who do not. Robust implementation of the rules we have now is critical, and the critique that the government lacks resources to do so adequately is both important and accurate.²⁹⁸ Writing about a different context, but one with familiar tensions, one scholar shows how injustices result when complex laws are administered without sufficient resources to make accurate determinations.²⁹⁹ He writes, “[T]he numbers versus rights trade-off is an empirical trend that results from this incoherency, the implications of which challenge the fundamental principles of the international refugee regime.”³⁰⁰

The importance of accuracy in a high-stakes protection regime, beyond being normatively important, also reveals an important underlying premise that this Article challenges: resignation and adaptation to the complex and narrow rules that we have. If a system depends on high levels of resources to function even at the most basic level, a rule of law analysis suggests only two possible answers. One answer is to allocate sufficient resources for the present system to

297. Regarding the earlier Rosenblum quote: First, there is implicit in this dichotomy a notion that humanitarian protection is charity; humanitarian protection, in all its forms, can be seen as rooted in an almost moral contract between the state and the individual receiving state protection, which heightens the need for ensuring a high degree of accuracy that the person receiving protection is eligible for the protection. The United States, understandably, does not want its humanitarian impulses “taken advantage of” by undeserving individuals. Such an idea is normatively appealing, and in large part defensible, but must be challenged by acknowledging the United States’ role in driving the migration—which makes the relationship more complex than savior-suppliant.

298. As one scholar noted about a different forced migration context, “An interdependency however between the lack of proper legal framework and overburdening in cases where the institutions are obviously running out of capacities to perform their mandate as anticipated can lead to tragedies as the one in Cairo,” where twenty asylum-seekers were killed in 2005 while protesting the lengthy process in harsh conditions for hearing their claims. Maja Smrkolj, *International Institutions and Individualized Decision-Making: An Example of UNHCR’s Refugee Status Determination*, 9 GERMAN L.J. 1779, 1780–81 (2008); Brian Whitaker, *20 Killed as Egyptian Police Evict Sudanese Protesters*, GUARDIAN (Dec. 30, 2005, 8:33 PM), <https://www.theguardian.com/world/2005/dec/31/sudan.brianwhitaker>.

299. Meher Talib, *Numbers Versus Rights: State Responsibility Towards Asylum Seekers and the Implications for the International Refugee Regime*, 27 GEO. IMMIGR. L.J. 405, 419–21 (2013) (using Greece as a case study to show how countries respond to increased migrants with greater restrictions to deter asylum seekers or by mistreating asylum seekers).

300. *Id.* at 405.

function as designed—something that has thus far failed as a political matter with the resulting strain on multiple government agencies. The other answer is to imagine a new system that could function well within the resources available. It is to this task that the Article now turns.

F. Rule of Law Arguments and Counter-Arguments

Respect for the rule of law underlies aspects of the debates over what to do with unconventional refugees, and yet the rule of law concerns push and pull toward different policy goals. Generally, fair and accurate implementation of laws is a fundamental aspect of respecting the rule of law, which encompasses such ideas as orderly entrance, due process rights, and—at opposite ends of the current political spectrum—legalization and enforcement.³⁰¹ Congress, in implementing the Refugee Convention and in defining procedural due process at the border, has defined the rules that apply to migrants—from definitional³⁰² to the procedural.³⁰³ Our Constitution delegates implementation and administration of these laws to the Executive, imbuing everything from administrative decision-making to detention policy with the validity of the “rule of law” mantle.³⁰⁴

Recent Central American migration illustrates the inherent tensions within rule of law concerns. On the one hand, the rule of law at the

301. As early as 1983, the Select Commission on Immigration and Refugee Policy noted the difficulty of agreeing on principles of the rule of law in the immigration context. Of three principles of immigration reform, including international cooperation and the open society, the rule of law has been seen as the most powerful, yet the most controversial. Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 438–39 (1983). “It was the principle of the rule of law that had the most significance in forming the recommendations of the Commission, and yet was the most difficult to translate into recommendations.” *Id.* Two articles about President Obama’s DACA policy highlights the political debate about what constitutes the rule of law in immigration. Compare Ross Douthat, *The Great Immigration Betrayal*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/ross-douthat-the-great-immigration-betrayal.html> (arguing that the White House’s reliance on prosecutorial discretion is “persuasive only if abstracted from any sense of precedent or proportion or political normity”), with Ilya Somin, *Obama, Immigration, and the Rule of Law*, WASH. POST: VOLOKH CONSPIRACY (Nov. 20, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law> (contending that President Obama’s actions on immigration are within the scope of his authority).

302. Consider, for example, that the Refugee Act incorporates the Refugee Convention’s definition and protections into domestic law.

303. For example, the Trafficking Victims Protection Reauthorization Act of 2008 provides certain right and processes to unaccompanied minors at the border.

304. U.S. CONST. art. II, § 1, cl. 1.

border requires that government officials handle the case of each individual at the border in certain ways. For example, current law requires that unaccompanied minors (from countries other than Mexico) be transferred to Department of Health and Human Services (HHS) custody while their cases are heard.³⁰⁵ Likewise, children and adults expressing fear of return at the border are entitled by law to have those claims heard.³⁰⁶ By availing themselves of protections written into our laws and policies, those migrants who express a fear of returning are complying with the rule of law. And officers hearing these claims and permitting entrance are upholding a core principle underlying the rule of law: congruence between the law and official action.³⁰⁷

On the other hand, large numbers of individuals arriving without visas at the border strain resources throughout the various agencies involved, and also create a sense of immigration chaos, both of which undermine the rule of law.³⁰⁸ Both those favoring protection and those favoring restriction see the lack of resources as a significant problem in this regard.³⁰⁹ As a rare point of agreement across the spectrum, it is worth elucidating exactly how the under-resourcing of these agencies undermines both protection and enforcement.

Consider the various agencies involved in this process. First, Border Patrol: The numbers alone would strain resources, but that strain is compounded by the complexity of laws the Border Patrol agents must administer as the “first responders” at the border, determining whether expedited removal is appropriate, transferring unaccompanied minors

305. 8 U.S.C. § 1232(a)(4), (5) (2012).

306. 8 C.F.R. § 208.31(c) (2017) (providing the regulation for reasonable fear interviews); § 235.3(b)(4) (providing for credible fear interviews in expedited removal proceedings).

307. See LON FULLER, *THE MORALITY OF LAW* 209–10 (rev. ed. 1969) (articulating that the congruence of official action with declared law is essential to the rule of law). As with H.L.A. Hart’s response to Fuller, this Section of the Article does not assume the justness of the laws and procedures. See H.L.A. Hart, *Book Review: Lon Fuller, The Morality of Law*, 78 HARV. L. REV. 1281, 1284, 1286 (1965). Instead, the Article momentarily accepts the Fuller premise that the rule of law requires rules be justly promulgated and enacted. Even on these terms, the result as concerns immigration is indeterminate.

308. See, e.g., Bill O’Reilly, *Why Does Illegal Immigration Chaos Continue in the U.S.?*, FOX NEWS (June 9, 2016), <http://www.foxnews.com/transcript/2016/06/09/why-does-illegal-immigration-chaos-continue-in-us> (transcribing an O’Reilly Factor segment where Bill O’Reilly criticized Democrats’ immigration policy).

309. Josh Siegel, *Most in Surge of Child Border Crossers Aren’t Leaving, Authorities Say*, DAILY SIGNAL (June 26, 2014), <http://dailysignal.com/2014/06/26/surge-child-border-crossers-arent-leaving-authorities-say>.

toward HHS custody, or sending other migrants toward USCIS for interviews to determine whether they have a credible fear of returning.

Second, USCIS: USCIS's obligation to have asylum officers conduct these interviews³¹⁰ has required detailing officers from asylum offices across the country to the border. This has resulted in tremendous backlogs at regional asylum offices, where individual asylum-seekers may now wait multiple years before having an initial asylum interview.³¹¹

Third, Immigration Courts: Because the Administration has determined that these are priority cases for removal,³¹² Immigration Courts must schedule initial hearings within twenty-one days of receiving a Notice to Appear,³¹³ which creates the need to reschedule other lower-priority cases, and results in extremely crowded courtrooms, unpredictable dockets, lower-priority cases being delayed, and so forth.

The rule of law arguments therefore do not themselves lead toward one particular policy solution: deterrence would reduce the strain on the immigration system at the border and in the interior, yes, but potentially at a cost to legal obligations. Increased resources would also reduce the strain at the border and in the interior, while complying with international legal obligations, but at a fiscal cost during a time when loud and powerful factions within the United States demand fiscal restraint.

We have seen the philosophical justifications for doing more, especially—if not exclusively—in the context of unconventional refugees. We then added to those justifications the practical import of providing a better response that looks at root causes, short-term well-being, administrative efficiency, and respect for the typical arguments against doing more: deterrence and rule of law. The final consideration is simply that there is a reality to migration patterns that we cannot deny. As we turn to a new framework, it is worth heeding the words of philosopher Ulrich Beck:

310. 8 C.F.R. § 208.30(d).

311. ASYLUM IN THE UNITED STATES, AM. IMMIGR. COUNCIL 4 (Aug. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf (reporting that the average asylum-seeker waits at least two years for an initial interview with an asylum officer).

312. See Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (expanding the pool of undocumented immigrants who officials should consider a priority for removal).

313. See generally Letter from Am. Immigration Lawyers Assoc., et al., to Juan Osuna, Dir., Exec. Office for Immigration Review (Feb. 9, 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf.

We have been already cast (without having been asked) into a cosmopolitan condition of universal, humanity-wide interdependence. But we are still missing, and have not yet started in earnest to compose and acquire, an accompanying cosmopolitan awareness. . . . [Refugees] may well remain the collateral victims of this lack of understanding until such time that we try in earnest to attend to that lag's institutional, state-based foundations.³¹⁴

The final Section of this Article attempts to attend to those foundations.

IV. CONCEPTUALIZING BROADER PROTECTION FOR TODAY'S FORCED MIGRANTS

*"[Refugees] make us aware, and keep reminding us, of what we would dearly like to forget or better still to wish away: of some global, distant, occasionally heard about but mostly unseen, intangible, obscure, mysterious, and not easy to imagine forces, powerful enough to interfere with our lives while neglecting and ignoring our own preferences."*³¹⁵

In this Part, the Article suggests a framework that takes into consideration the moral, historical, and pragmatic justifications for responding. Given the array of competing interests and tensions laid out already in this Article, it is clear that a perfect solution is simply not possible. The host of impossible contradictions leaves us with only two options: do nothing, or do something satisfactory but less-than-perfect. Philosopher Oona O'Neill confronts this reality, noting that in the need to confront the world we do live in, the only place to viably start is with the Kantian question of what receiving countries can do, and not the question of what would-be migrants are owed: "In beginning with the traditional, Kantian question 'What ought I (or we) do?', rather than with the recipients' question 'What ought I (or we) get?', we face realities more forthrightly and pose a question that we can address, even if only by beginning the task of constructing institutions."³¹⁶ The political environment that this particular situation confronts also makes many of these goals, even if feasible as a policy-matter, unobtainable politically.

This Article, however, is more concerned with changing and broadening the norms and discourse around protection by

314. Evans & Bauman, *supra* note 192.

315. BAUMAN, *supra* note 1, at 16.

316. O'NEILL, *supra* note 170, at 199.

contributing to the growing recognition that protection means more than refugee protection, and that our current patchwork system creates untenable resource strains that undermine *all* the possible goals of a protection regime, from humanitarian goals to self-interested goals.

Countries around the world have long looked for local and regional approaches to population displacements.³¹⁷ Generally, the United States has been geographically removed from the need for such regional efforts, with the exception of a major, ongoing commitment to Cuban migrants, and a much less concerted effort for Central Americans in the 1980s. The depth of the governance and safety problems in the Northern Triangle, and the strong historic patterns of migration that lead toward the United States, now make the United States part of the need for a regional solution, one piece of which could be the framework offered below.

A. *Necessary Preconditions*

A focus on root-causes must be the centerpiece to any policy response. If Central American patterns are ongoing, and driven by deep-rooted conditions of poor governance, a critical response to that reality is prevention, through long-term, serious investment in changing the root causes of forced migration. Since 2014, root causes have entered the dialogue, but at first in only a limited, window-dressing way (when a miniscule percentage of the budget for addressing the situation went toward governance in the Northern Triangle, and the overwhelming majority went to detention of the migrants). More can and will be done, and may already be having a positive impact.³¹⁸ But in the meantime, as migrants continue to arrive, we must respond and we must respond in ways that work and fit this particular migration problem.

Necessary work on root causes, while the ultimate antidote to the fears of ongoing, large-scale migration from the Northern Triangle to the United States, is no short-term answer. Again, the situation exists, and needs to be addressed instead of wished away. With necessary work on root causes being a long-term proposition, the policy response to

317. Hathaway, *supra* note 182, at 159.

318. See Sonia Nazario, *How the Most Dangerous Place on Earth Got Safer*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/14/opinion/sunday/how-the-most-dangerous-place-on-earth-got-a-little-bit-safer.html> (identifying the reduced crime rate in Honduras's Rivera Hernandez neighborhood, resulting from U.S. funding for violence prevention).

forced migration must, at the very least, work on a short-to-medium term approach. Such an approach, as suggested in the following Section, may entail protection of less value and less permanence than the Refugee Convention provides, from concern that something highly valuable and durable would add a large pull factor to the push-factors driving migration now.

B. One Example of a New Framework

The migration is happening; we can wish it would not, or we can respond to it. Because the means of wishing it would not happen are, at best, a medium-term proposition, the foremost principle of a broader protection system is to promote short-term well-being through a system that fits the migration flows.

This system shares some similarities with the sojourner status being implemented in Europe, for those who “would face a real risk of suffering serious harm”—a standard short of fearing persecution.³¹⁹ Subsidiary protection provides broader protection than that available for those found to be refugees.³²⁰ However, the proposal in this Article differs in two important ways. First, unlike Europe’s subsidiary protection, this system emphasizes administrative efficiency by embracing a per-country approach to the status, wherein people would be presumed eligible by virtue of their specific country of origin (like TPS),³²¹ and only eliminated from eligibility on an individualized showing of harm to the United States by permitting them to remain. Second, the subsidiary protection in Europe goes through the same system that determines whether someone has an asylum claim, and the goal of this Article’s proposal is to reduce the burden on that asylum-adjudication system by creating a separate and more easily administered alternative.

The status envisioned by this Article would be akin to a sojourner status for individuals from designated countries, and would be based on simple criteria like those of TPS, which are country-based, and from which only unfavorable factors would disqualify an individual.³²² The status would last for five years with a possibility of renewal unless the

319. Directive 2011/95, art. 2(f), 2011 O.J. (L 337) 5 (EU).

320. See generally Ostrand, *supra* note 9, at 261.

321. See *supra* Section I.C.

322. For example, under INA section 212, individuals may be disqualified for a range of reasons, including a history of persecution of others, significant criminal convictions, national security risks, and more.

government declares that conditions have sufficiently improved in the designated country to allow return. If a country is designated sufficiently safe, the migrants would have the option to apply for a new form of cancellation of removal in court, available for those who can demonstrate strong ties to the United States—a concept defined with sufficient specificity that it would provide an off-ramp from the time-limited status to permanent residence. This off-ramp honors the concerns laid out by Joseph Carens about the ethical insufficiency of permanent temporary status: “Democratic states cannot keep people indefinitely in ‘temporary’ status. That is the clear lesson of the European experience with guest workers in the mid-twentieth century. States that are not committed to democratic principles behave differently”³²³

This simple framework flows from the principle of fitting the response to the actual migration flow. Within this principle of “fit” are the related principles of administrative efficiency and access to justice: a system with simple criteria will be easier, faster, and less costly to administer. The complexity of the highly-individualized remedies, including asylum,³²⁴ put remedies beyond the reach of those needing protection, and consume governmental and private resources out of proportion to the actual benefit offered. A simpler system will be far more accessible to migrants through community education, legal workshops, and lower-cost legal services, and will demand fewer governmental resources to adjudicate and manage.

Related to the question of fit is an effort to limit the benefit, by connecting it to U.S. history with the designated country or countries. Only those with a parent, grandparent, sibling or child already living in the United States could apply for this benefit. This recognizes that the migrants are coming to the United States in many cases because of existing connections, like relatives who have been here in many cases since the 1980s. Those without such relatives have less reason to favor the United States as a destination for protection, and could (and do) seek refuge in other countries like Nicaragua and Costa Rica.³²⁵ If they came to the United States, they would need to qualify for the higher

323. CARENS, *supra* note 35, at, 113.

324. *See supra* Section III.C.

325. *Cf.* Lindsay Fendt, *Costa Rica to Refugees: Come, Stay Awhile*, U.S. NEWS & WORLD REP. (Jan. 31, 2017, 10:13 AM), <https://www.usnews.com/news/best-countries/articles/2017-01-31/costa-rica-becomes-an-alternative-for-refugees> (“In 2016, more than 30,000 undocumented migrants crossed into Costa Rica, and the country is now receiving 100 migrants a day at its southern border.”).

standard of asylum.³²⁶ But limiting the broadly available protection to those with existing ties mirrors and responds to the historical migration patterns. Already people with ties are choosing the difficult travel to the United States, and many of those without such ties are instead going to neighboring Costa Rica, Mexico, or Nicaragua.

Those without such relatives do not benefit from the same historical and context-driven responsibilities and should not be able to access the benefit. For them, the narrower paths of asylum or SIJS would still be available, and with many migrants diverted from those narrower paths through this new status, it would be more possible to serve and adjudicate those individuals' claims quickly and fairly.

Another important aspect of fitting protection to this situation is framing it as a short-term response, where effective repatriation—not citizenship in the United States—is the long-term goal for most migrants, and integration into the United States is the goal for only a smaller subset of the migrants. Repatriation and integration exist in vivid tension, with one vision competing forcefully against the other. Successful integration of long-term migrants is in the interests of the United States.³²⁷ Forces moving toward integration in the United States are particularly strong once U.S. born children become a factor in a family's decisions (although other ties may be ethically significant as well). However, with decades of experience and study of this issue, UNHCR has developed principles for repatriation that would be helpful.³²⁸ U.S. citizenship is not the only ultimate success of a migrating population; for many, success would include safe return to their home countries if the possibility of economic and physical security exists there.

326. See *Five Facts About Migration from Central America's Northern Triangle*, WASH. OFFICE ON LATIN AM. (Jan. 15, 2016), <https://www.wola.org/analysis/five-facts-about-migration-from-central-americas-northern-triangle> (explaining that ongoing violence and general danger motivates individuals who live in the Northern Triangle to leave their countries for the United States).

327. See *supra* Section III.B.

328. See generally U.N. HIGH COMM'R FOR REFUGEES, POLICY FRAMEWORK AND IMPLEMENTATION STRATEGY: UNHCR'S ROLE IN SUPPORT OF THE RETURN AND REINTEGRATION OF DISPLACED POPULATIONS (2008), <http://www.unhcr.org/en-us/partners/guides/4c2203309/policy-framework-implementation-strategy-unhcrs-role-support-return-reintegration.html> (explaining UNHCR's reintegration principles and practices: national responsibility and ownership; rights, justice, and reconciliation; participatory and community-based approaches; situational analysis; early preparation and planning; pragmatism and flexibility; and recovery programs and funding).

A policy that strictly limits repatriation to a time when the United States could be sure of the migrant's safety upon return supports, rather than acts in tension with, the longer-term project of rebuilding those countries. A high-quality repatriation project would turn the historical norm on its head; a norm where, for example, the United States sent back gang-involved felons without any coordination or communication with Northern Triangle governments, planting the seeds for today's gang violence in the region.³²⁹ By contrast, limiting repatriation once the region's safety improves would focus on helping people settle in safe areas, find adequate housing, return with economic (and language) skills that would promote economic growth, and so forth. For decades, immigrant advocates have defined citizenship as success and deportation as punishment. The resettlement paradigm offers an alternative definition of success: effective resettlement not as punishment, but as pragmatic and offering the possibility of good long-term outcomes.

By emphasizing the goal of repatriation from the outset, the clear expectation is that most of those receiving protection should always have in mind plans and a strategy for an eventual return. There are lessons the United States can learn from the best practices of humanitarian relief globally to do advanced repatriation planning, and to work with the receiving countries on such diverse issues as housing and safety planning.

CONCLUSION

This Article has shown how our current system of protection fails the unconventional refugees who comprise a large part of the contemporary migrant population, which is the result of the nature and reality of modern forces causing migrant flows around the globe. The Article identifies an ethical duty and policy imperative to build support for the politically difficult notion of doing more, at a time when loud, insistent voices clamor instead for restriction and doing less. The existing protection is based on the Refugee Convention which hails from a post-World War II context and fails to fully apply to the forces driving migration today; asylum and other protection options fail to correspond to the full realities of Central American, Syrian, and other forced migrations, and reveal how reliance on individualized protection fails these migrants. Even at its fullest interpretive extent, the Refugee Convention cannot protect all those

329. *See supra* Section II.B.

currently seeking refuge in the United States, and this Article argues that all do merit some form of protection.

Existing protection options have stretched governmental and private actors to a breaking point, leaving important systems at our borders exhausted. The payoff for this border and resource exhaustion is, at the same time, paltry at best, and harmful at worst: we are not offering meaningful protection to so many who are in need of it, and while migrants dwell in the drawn-out uncertainties of our existing system, we fail at both integration *and* repatriation, and we devote too few resources to truly improving the security of the countries from which they flee. This Article seeks to balance the two values of protection and deterrence which are in constant battle within the immigration debate in the United States.

The broader framework envisaged in this Article is only a starting point for a conversation aimed less at making much needed improvements in the existing system, and more at thinking beyond existing options to devise a solution that fits the actual problem. The solution replaces costly individualized adjudications with broader, simpler protection that is easier to access. It privileges investment in the security and governance of the sending countries as the only durable way to change migration patterns in the long-term. And it balances the medium-term goals of repatriation with American interests in fully integrating immigrants who may be here longer term.

As Europeans deal with the exponentially greater challenges posed by the millions of Syrian migrants seeking protection, the American experiment, on a smaller scale, may provide a vital testing ground for confronting the new realities of unconventional refugees in ways that promote well-being for the migrants themselves, for the nations the migrants are fleeing, and for the nation in which they seek protection. The challenges will be with us for many years to come; the need to develop a new framework must begin now.