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Immigration and Naturalization

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Immigration and Naturalization

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I. Introduction

Our immigration law update for 2017 is particularly practical and controversial, given that it comes on the heels of a number of international crises as well as the inauguration of the Trump Administration, both of which dramatically affect immigration law. We begin with a look at the ongoing refugee crisis from Central America and U.S. actions to stem the tide. We then turn our attention to new California statutes related to criminal convictions, which affect removability determinations. We then diverge into a case study applying historical research to support an asylum application. And, we end with updates on the new Administration's approach to sanctuary cities.

II. Central American Refugee Crisis¹

The Central American refugee crisis, which first attracted attention in 2014, continues unabated. While, historically, Mexico was the country of origin for most irregular migrants to the United States, more Mexicans now leave the United States every year than enter it²; and Mexican migration to the United States is at a fifty-year low.³ Individuals fleeing violence and instability in the “Northern Triangle”—Guatemala, Honduras, and El Salvador—now make up the majority of all migrants crossing the U.S.-Mexico border.

The year 2017 saw a decrease in the number of Central American refugees attempting to enter the United States. The U.S. Department of Homeland Security (DHS) reports that from February to May, illegal border crossings

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1. Nicole Hallett, Assistant Clinical Professor of Law at the University at Buffalo, School of Law.

2. Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RESEARCH CENTER (Nov. 19, 2015), <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s>.

3. Jessica Bolter, *The Evolving and Diversifying Nature of Migration to the U.S.-Mexico Border*, MIGRATION POLICY INSTITUTE (Feb. 17, 2017), <https://www.migrationpolicy.org/article/evolving-and-diversifying-nature-migration-us-mexico-border>.

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fell 60 percent along the U.S.-Mexico Border.⁴ Because there has been no discernible improvement in conditions in the Northern Triangle, the drop is most likely the result of changes in U.S. immigration policy and fear caused by anti-immigrant rhetoric of the new U.S. Administration.⁵ Reports suggest that apprehensions have begun to creep back up in recent months as people grow accustomed to the new administration's policies.⁶ The characteristics of migrants arriving from Central America is also changing. While previously most family units apprehended crossing the border were women traveling with children and unaccompanied minors, advocates have seen an uptick in male-led family units.⁷

A. EXECUTIVE ACTIONS

In January 2017, President Donald Trump assumed office and almost immediately signed three immigration-related executive orders, including one that was aimed at gaining “operational control . . . over the southern border” and stemming the tide of Central American migration.⁸ In addition to promising to build a wall along the entire length of the U.S.-Mexico border, the executive order directed DHS to secure additional detention space for individuals caught crossing the border; to end the policy of “catch and release,” in which asylum-seekers are processed and released with pending court dates; to hire 5,000 additional border patrol officers; and to amend procedures to make it more difficult for arriving migrants to pass initial asylum screenings.⁹ While the other executive orders became the subject of high-profile federal court litigation,¹⁰ the “Border Security” order did not.

Many of these directives—such as the border wall and the hiring of additional border security officers—were unfunded and therefore, unenforceable without further appropriations from Congress.¹¹ But the executive order did lead to certain policy changes. For instance, in February

4. Kirk Semple, *Central Americans, 'Scared of What's Happening' in U.S., Stay Put*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/world/americas/honduras-migration-border-wall.html>.

5. *Id.*

6. Kate Linthicum, *The U.S. and Mexico want to slow migration from Central America. Will mass deportations help?*, L.A. TIMES (Oct. 27, 2017, 5:55 AM), <http://beta.latimes.com/world/mexico-americas/la-fg-mexico-us-security-20171026-story.html>.

7. John Stanton, *So Many Father-Led Families Are Crossing The US Border That Immigration Agents Don't Have Room To Hold Them*, BUZZFEED NEWS (Oct. 23, 2017, 10:17 AM), <https://www.buzzfeed.com/johnstanton/so-many-father-led-families-are-crossing-the-us-border-that>.

8. Exec. Order, *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>.

9. *Id.*

10. *See, e.g., Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

11. Jerry Markon and Lisa Rein, *Why Trump can't simply build a wall along the U.S.-Mexico border with an executive order*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/>

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2017, DHS issued revised lesson plans for officers conducting “credible fear” and “reasonable fear” interviews, which an arriving alien must pass in order to receive the opportunity to seek asylum or other forms of immigration relief in a full hearing before an immigration judge. The use of “parole” to release asylum-seekers has been curtailed and a higher percentage of arriving migrants are detained pending their hearings before an immigration judge. Many asylum-seekers report being turned back at the U.S.-Mexico border without receiving the proper screening.¹² If true, that would likely put the U.S. in violation of its international legal obligations under the 1951 Refugee Convention.¹³

B. DETENTION AND RELATED ISSUES

Detention policies continue to evolve under the Trump Administration. For example, DHS began regularly detaining pregnant women, who previously almost always had been released upon apprehension.¹⁴ This policy has collided with the Trump Administration’s anti-abortion views. In early September, a 17-year-old asylum-seeker from Central America was prevented from obtaining an abortion while in DHS custody. The American Civil Liberties Union (ACLU) filed suit on her behalf; the government argued that she could return to her home country if she wanted an abortion (which was, as it turns out, illegal in her home country). She was eventually able to obtain an abortion after more than a month of litigation and a ruling by the D.C. Circuit Court of Appeals.¹⁵ The ACLU has sought a court ruling that would prevent the U.S. government from denying abortions to other asylum-seekers in U.S. custody.¹⁶

In July 2017, the Ninth Circuit Court of Appeals decided the case of *Flores v. Sessions*, which reaffirmed the government’s obligation to provide bond hearings for detained minors held in unlicensed childcare facilities.¹⁷ The government had entered into a court-approved settlement agreement in 1997 requiring such hearings, but after the Central American surge began in

world/national-security/why-trump-cant-simply-build-a-wall-along-the-us-mexico-border-with-an-executive-order/2017/01/25.

12. Caitlin Dickerson and Miriam Jordan, ‘No Asylum Here’: Some Say U.S. Border Agents Rejected Them, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html>.

13. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Art. 1A(2) (entered into force Apr. 22, 1954), read in conjunction with, United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (together “Refugee Convention”).

14. Alex Zielinski, *Why is ICE Detaining So Many Pregnant Women?*, SAN ANTONIO CURRENT (Sept. 28, 2017, 5:09 PM), <https://www.sacurrent.com/the-daily/archives/2017/09/28/why-is-ice-detaining-so-many-pregnant-women>.

15. Manny Fernandez, *Undocumented Teenager Obtains Abortion After Court Victory*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/us/undocumented-immigrant-abortion.html>

16. *Id.*

17. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

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2014, the government argued that intervening law had overruled the agreement. The Ninth Circuit disagreed and ordered the government to resume bond hearings for all detained minors in DHS custody.¹⁸ A bill introduced in the Texas legislature to license the detention facilities along the southern border as “childcare facilities” in order to circumvent the *Flores* decision failed.¹⁹ None of the family detention centers in Texas are currently licensed.

There have been many complaints regarding the conditions in the detention centers on the U.S.-Mexico border. Ongoing litigation filed in Arizona alleges that detainees are housed in overcrowded, unclean facilities called “hierleras” (iceboxes) because of their freezing temperatures.²⁰ Detainees are forced to sleep on concrete floors and lack access to basic supplies such as diapers or sanitary napkins. Detainees are given inadequate food and water and do not have access to sufficient medical care. The District Court granted Plaintiffs a preliminary injunction in November 2016 regarding some of these issues.²¹ The case is currently on appeal in the Ninth Circuit. Some human rights advocates have argued that detention conditions in facilities on the southern border violate international law.²²

C. INTERNATIONAL PROGRAMS

Various programs aimed at reducing the flow of refugees have been curtailed or ended by the Trump Administration. For example, DHS has announced a variety of changes to the Central American Migrant (CAM) program, which was created in 2014 by the Obama Administration in an attempt to prevent the migration of unaccompanied minors from the Northern Triangle to the United States. CAM gave minors the opportunity to apply for refugee status or parole in their home countries if they met certain requirements, removing the motivation for them to make the dangerous trip up north. In August, DHS announced that it would no longer parole minors into the U.S. under the CAM program.²³ In September, DHS announced it would phase out the whole CAM program in 2018.²⁴

18. *Id.* At 877.

19. S.B. 1018, 85th Leg. (Tex. 2017).

20. *Doe v. Johnson*, No. 15-00250 (D. Ariz. filed June 8, 2015).

21. *Doe v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *16 (D. Ariz. Nov. 18, 2016).

22. Lara Dominguez et al, U.S. DETENTION AND REMOVAL OF ASYLUM SEEKERS: AN INTERNATIONAL HUMAN RIGHTS LAW ANALYSIS (2016), available at https://law.yale.edu/system/files/area/center/schell/document/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

23. United States Immigration and Citizenship Services, *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)*, <https://www.uscis.gov/CAM>.

24. Mica Rosenberg & Yeganeh Torbati, *U.S. Will Phase Out Program for Central American Child Refugees*, REUTERS (Sept. 27, 2017), <https://www.reuters.com/article/us-usa-immigration-minors/u-s-will-phase-out-program-for-central-american-child-refugees-idUSKCN1C234G>.

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The Trump Administration has also signaled that it plans to propose cuts to an economic development program that Mexico and the United States had jointly supported in Guatemala, Honduras, and El Salvador.²⁵ The Obama Administration previously persuaded Congress to approve \$750 million to fund the development efforts as a way to discourage migration out of Central America.²⁶ The future of that program is now in doubt.

While Mexico has historically been a transit country for migrants from Central America, more people from the Northern Triangle are claiming asylum in Mexico instead.²⁷ Many critics have argued that Mexico's asylum system is deeply flawed and not compliant with international law.²⁸ Still, the number of asylum-seekers in Mexico has increased seven-fold since 2013.²⁹ The Trump Administration also announced that it intended to return some asylum-seekers to Mexico while their asylum claims are processed in the United States.³⁰

III. Updates on California Post-Conviction Relief Statutes for Immigrants³¹

There have been recent developments in the form of California criminal statutes designed to mitigate the immigration effects of certain criminal convictions for non-U.S. citizens. Specifically, on January 1, 2015, section 18.5 of the California Penal Code (CPC) went into effect. The aspect of this statute that most directly affects possible immigration consequences of convictions is that it changes the maximum sentence for misdemeanors from 365 to 364 days.³² In fact, it appears that the California legislature intended for this statute to affect the applicability of certain grounds for immigration removal; removal grounds that require at least a possible one-year sentence, including certain aggravated felonies and crimes involving moral turpitude.³³ The statute was also intended to affect forms of relief from removal that might otherwise be unavailable to someone who received such a sentence.³⁴ On January 1, 2017, section 18.5 gained retroactive effect, enabling it to be

25. Gabriel Stargardt, *Trump proposes deep U.S. spending cuts in Mexico, Central America*, REUTERS (May 23, 2017), <https://www.reuters.com/article/us-usa-budget-foreign-aid-mexico/trump-proposes-deep-u-s-spending-cuts-in-mexico-central-america-idUSKBN18J2XJ>.

26. Linthicum, *supra* note 6.

27. Kirk Semple, *A Flawed Asylum System in Mexico, Strained Further by U.S. Changes*, N.Y. TIMES (Aug. 5, 2017), <https://www.nytimes.com/2017/08/05/world/americas/mexico-central-america-migrants-refugees-asylum-comar.html>.

28. *Id.*

29. *Id.*

30. Exec. Order, Border Security and Immigration Enforcement Improvements, *supra* note 8.

31. Christina J. Martin and Sabrina Damast.

32. CAL. PENAL CODE § 18.5(a) (West 2017) ("Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.").

33. See Ingrid V. Eagly, *Criminal Justice In An Era Of Mass Deportation: Reforms From California*, 20 NEW CRIM. L. REV. 12, 25-26, 29-32 (2017).

34. *Id.* at 26.

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applied to convictions that were entered prior to January 1, 2015.³⁵ The Board of Immigration Appeals (BIA) subsequently issued a non-precedential decision on June 29, 2017, and remanded the case in consideration of the retroactivity provision under section 18.5.³⁶ “Although the respondent has been convicted of a crime involving moral turpitude . . . a recent change in California law may affect whether the underlying crime . . . is one “for which a sentence of one year or longer may be imposed,’ as required by [INA] section 237(a)(2)(A)(i)(II).”³⁷

Another California criminal statute, section 1203.43(a)(1) of the CPC, went into effect on January 1, 2016. This statute addresses convictions where the criminal judge entered a deferred entry of judgment and the individual satisfied the requirements attached to that deferred judgment such that the conviction was ultimately dismissed by the criminal court.³⁸ While the deferred entry of judgment process has long been viewed as not resulting in a conviction by the criminal authorities because it ultimately resulted in a dismissal of the pending charges, it was considered a conviction by immigration authorities because it required an admission of guilt. Section 1203.43 seeks to rectify this situation by recognizing that the advisals previously given to defendants that a deferred entry of judgment could not be used to deny the defendant any future benefit were erroneous with respect to immigration benefits, and allowing them to seek a second dismissal on the basis of these erroneous advisals.³⁹

This declaration of invalidity based on faulty court advisals is significant because a vacatur (or dismissal) of a conviction is only recognized by immigration authorities if it is premised on a procedural or constitutional error in the underlying criminal proceeding, and not if it is rehabilitative in nature.⁴⁰ Thus, by specifying that the vacatur is premised on faulty court advisals, the California legislature attempted to define a procedural violation in the underlying proceeding. But, given the recent effective date of this statute, there have been no published court cases assessing its actual impact on immigration proceedings. Notably, section 1203.43 creates a somewhat confusing procedural posture in the criminal court, given that these cases

35. PENAL § 1.5(a)–(b), *supra* note 32 (Effective Jan. 1, 2017, this section shall apply retroactively and “[a] person who was sentenced to a term of one year in county jail prior to January 1, 2015, may submit an application before the trial court that entered the judgment of conviction in the case to have the term of the sentence modified to the maximum term specified in subdivision (a).”).

36. Alejandro Garnica Silva, 2017 WL 4118896, at *8 (BIA June 29, 2017).

37. *Id.*

38. See A.B. 1352, 2015–2016 Reg. Sess. (Cal. 2015) (codified as amended at CAL. PENAL CODE § 1203.43 (West 2016) (deferred entry of judgment)).

39. PENAL § 1203.43(a)–(b), *supra* note 32.

40. See *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (“A conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, while one vacated because of procedural or substantive infirmities does not.”); *id.* (“A conviction is vacated for rehabilitative purposes where state law provides a means for the trial court to enable a Defendant to avoid certain continuing effects under state law from that conviction.”).

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were already dismissed under section 1000.3 of the CPC.⁴¹ But the dismissal under section 1000.3 is a prerequisite for the dismissal under section 1203.43, as clearly stated in the statute.

The third amendment of note to the California criminal code is CPC section 1473.7. Like section 1203.43, this statute pertains to vacatur, or reopenings, of convictions. The statute permits a criminal court to deem a conviction or sentence “legally invalid” if the moving party can demonstrate that his “ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences” of a guilty plea or if “newly discovered evidence of actual innocence exists.”⁴² The statute contemplates the moving party will have been issued a notice to appear in immigration court or a removal order based on the existence of the conviction or sentence at issue.⁴³ This leaves open the question of whether it can be used by a moving party who is not yet in immigration court proceedings, or who is being charged with removability based on a non-criminal immigration violation (such as being present in the United States without legal status), or who is ineligible for an immigration benefit because of the conviction or sentence.

A fourth amendment to the California penal code was adopted through Proposition 64, California’s marijuana legalization provision. Certain provisions of the proposition permit the dismissal of past low-level marijuana offenses (now removed entirely from the penal code) on the ground of “legal invalidity.”⁴⁴ It remains to be seen if a dismissal based on legal invalidity will qualify as a vacatur on procedural grounds (as opposed to rehabilitative grounds), such that it will be recognized by the immigration authorities.

Criminal judges in California are increasingly being called upon to understand the complex and ever-changing immigration consequences of convictions. Immigration judges are asked to discern the legislative intent of the California legislature such as: is a particular vacatur statute intended to be rehabilitative (i.e., does it merely reward someone for good behavior, such as successful completion of probation) or does it recognize a procedural or constitutional flaw in the original criminal process? The answers to these questions will determine whether an individual remains convicted of an offense for immigration purposes.⁴⁵

41. PENAL § 1203.43(b), *supra* note 32.

42. *Id.* § 1473.7(a).

43. *Id.* at § 1473.7(b).

44. CAL. HEALTH & SAFETY CODE § 11361.8(b), (c) (West 2017) (permitting dismissal and sealing of certain marijuana-related convictions on the grounds that they are “legally invalid”).

45. This article has been co-authored by Sabrina Damast and Christina J. Martin. Christina J. Martin has written this article purely in her personal capacity. Any opinion expressed in this article is her own and does not reflect the views of the Department of Justice.

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IV. A Well-Founded Fear: Using History and Memory to Support Asylum Seekers⁴⁶

To open ourselves to truth and to bring ourselves face to face with our personal and collective reality is not an option that can be accepted or rejected. It is an undeniable requirement of every society that seeks to humanize its members and be free.⁴⁷

History is a profound and underutilized tool, particularly within the practice of asylum law. The heart of the asylum analysis—persecution and the motives behind it—does not operate within a vacuum, but rather is shaped by complex, deep-seated forces pushing individuals to flee their countries of origin to seek safety in the United States. Viewing asylum claims through a historical lens, therefore, is helpful; but most practitioners limit this approach to the use of experts and country conditions reports. Incorporating history into all phases of the asylum process both empowers our clients and produces a more effective claim by informing the questions we ask our clients during intake, enriching our asylum analysis, and helping us to create a cohesive and powerful narrative when presenting our clients' stories.

This historical approach has been particularly helpful in our law school Immigration Clinic, which represents unaccompanied minors in removal proceedings. The majority of our clients are indigenous Guatemalan children, many of whom are eligible for asylum and/or Special Immigrant Juvenile Status. While these young clients report fleeing Guatemala for a variety of reasons—abuse, neglect, or abandonment by family members, economic deprivation, or gang violence, for example—history informs us that often these harms are not isolated incidents, but rather effects and legacies of systemic persecution.⁴⁸

The case of “Alberto,”⁴⁹ one of our Immigration Clinic's young clients, serves as a blueprint for incorporating history and historical research in the development and presentation of a successful asylum case. Alberto is an indigenous teenager from Guatemala's western highlands who came to the United States as an unaccompanied minor when he was sixteen. Upon his

46. Amelia Steadman McGowan, Adjunct Professor, Mississippi College School of Law. Program Director of the Migrant Support Center at Catholic Charities of the Diocese of Jackson. J.D., M.A. Tulane University, 2010. B.A., University of Southern Mississippi, 2006. The author would like to thank Dr. Michael A. Polushin, University of Alberta, for the inspiration for this article

47. W. GEORGE LOVELL, *A BEAUTY THAT HURTS: LIFE AND DEATH IN GUATEMALA* 155 (2d rev. ed. 2010) (quoting Monsignor Juan José Gerardi Conedera at an April 24, 1998 mass held at the Metropolitan Cathedral of Guatemala City to release a four-volume report, *Guatemala: Nunca Más (Guatemala: Never Again)*, on the victims of the Guatemalan Civil War).

48. United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (Mar. 13, 2014), <http://www.refworld.org/docid/532180c24.html>

49. Child's name has been changed to protect his confidentiality.

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entry into the United States, Border Patrol officials apprehended Alberto and initiated removal proceedings against him. Because he was an unaccompanied minor, Alberto was placed in the care of his father in central Mississippi as he fought for the opportunity to stay in the United States.

Following the initial intake, our law students began researching Alberto's hometown and discovered a long pattern of violent clashes between the state and indigenous communities in the area. Not only had Guatemalan troops massacred many of the area's residents during the armed conflict, but more recently, the Guatemalan government had approved the installation of a mine site in a neighboring town, despite strong opposition and protests by local indigenous groups. Unfortunately, many of these protests (including some led by indigenous youth) turned violent, with private mine security and state forces violently repelling protesters.⁵⁰

The students and I began the second appointment by asking Alberto specific questions about his childhood, hometown, and family. Alberto shared that he grew up with two siblings, and that the family completely depended on crops that they grew on a small plot of land near their home. After periods of drought and extreme hunger, Alberto's father traveled to the United States in an attempt to find work to support the family, while Alberto dropped out of school to tend the crops.

We then turned to an injury on Alberto's arm and the immediate causes for his flight from Guatemala. Returning to his account of being cut "by a miner," we asked Alberto if the miner was connected to the mine that was built in his community. He confirmed that he was. Alberto explained that his family and neighbors opposed the mine because they were afraid that the government would take their land, on which they depended for survival, and give it to the mining company. He added that even if his family did not lose their land, they also feared that the mining would contaminate their crops and water supply.

Having documented this terrifying part of Alberto's own history, our next step was to prepare the asylum analysis, which required us to demonstrate, among other things, that Alberto was "unable or unwilling to return to, and is unable or unwilling to avail [himself] of the protection of" Guatemala "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."⁵¹ Proving this nexus between the persecution and the asylum seeker's identity is often the most difficult step of the asylum analysis, especially when the persecution has deep historical roots about which the asylum seeker may not be aware. Providing significant historical context in these cases is therefore essential and provides a cohesive analysis.

50. See generally Amnesty International, *Guatemala: Mining Rights in Guatemala: Rights at Risk* (2014), <https://www.amnesty.ca/sites/default/files/mining-in-guatemala-rights-at-risk-eng.pdf>; Amnesty International Canada, "My Mother Taught Me How to Fight." *Guatemalan Youth Activists Tell Their Stories* (Feb. 10, 2017), <https://www.amnesty.ca/blog/my-mother-taught-me-how-fight-guatemalan-youth-activists-tell-their-stories>.

51. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42), 1158 (2009).

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When we asked Alberto why he believed the Guatemalan government disregarded his community's wishes and went as far as using arms to defend the miners against his group of indigenous protesters, he responded, "They don't care about us, and I think they just want to take our land because there's nothing we can do about it." I asked him if the Guatemalan military or police had ever physically harmed any other members of his family. Alberto initially reported that he did not know, but Alberto's father, who had not spoken for the entire interview, quickly interjected. He shared that the Guatemalan military killed his own father in the same region in 1981, after rounding him and other neighbors up in a hut and burning them alive. Alberto looked at his father in shock, revealing that he knew that his grandfather had been killed before he was born, but that he never knew how or why.

We used historical sources to link these acts of violence—both of which occurred in the same region—committed and supported by the Guatemalan state, weaving them within the larger narrative of the genocidal civil war and the centuries of exploitation suffered by indigenous Guatemalans. This repression, of course, was not only physical, but as Alberto's interview indicated, also involved systemic deprivations of indigenous Guatemalans' rights to land, legal and environmental protections, and economic opportunity. It was also far more complex than the simple dichotomy of indigenous Guatemalans against the state.⁵² An additional element of persecution arose from Alberto's indigenous mayor, who forced Alberto and other indigenous boys and men in the town to face deadly force "to defend their community." Following the submission of his application, these supporting documents, and a grueling three-hour asylum interview, Alberto finally prevailed.

Alberto's victory is significant on multiple levels. First, it represents newfound freedom, security, and opportunity in Alberto's life, as he is now a Lawful Permanent Resident and is preparing for the GED. More broadly, it also provides a helpful blueprint for asylum practitioners who wish to incorporate historical research effectively into their own cases. A strong historical foundation guided the questions that we asked Alberto and his father, prompted us to look beyond Alberto's initial vague responses, and opened discussions that revealed facts material to his claim. Historical sources also informed our asylum analysis, helping us make key connections between the persecution that Alberto suffered—both from his mayor and the Guatemalan state—and his identity, as well as his inability to seek safety reasonably in another part of Guatemala. Finally, this approach also helped Alberto and his father to reclaim their own experiences and memories that the state long attempted to erase, and empowered Alberto to use that history to attain the freedom and safety he sought.

⁵². See generally GREG GRANDIN, *THE BLOOD OF GUATEMALA: A HISTORY OF RACE AND NATION* (Walter D. Mignolo et al. eds., 2013).

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V. The Battle over “Sanctuary Policies” Illuminates the Clash of Values Underlying Today’s Immigration Policy Debates⁵³

The election of Donald J. Trump as President ensured that “sanctuary”⁵⁴ policies would be hotly contested in the year to come. Trump’s tough-on-immigration platform included a promise to “end the [s]anctuary [c]ities that have resulted in so many needless deaths.”⁵⁵ But beginning the very day after the election, even as stock prices for private prison companies surged on the hope of expanding immigrant detention,⁵⁶ state and local leaders reaffirmed their commitment to sanctuary policies.⁵⁷

The sanctuary controversy is not new.⁵⁸ Waves of sanctuary migration occurred over the last three-to-four decades⁵⁹—a time in which the nature of immigration enforcement was completely transformed. Scholars have described the migration of legal norms and tools from the crime control realm into the migration control realm, beginning with the connection of immigration to President Reagan’s War on Drugs in the 1980s.⁶⁰ The intertwining of crime and migration control systems has resulted in a dramatic rise in deportations over the decades of ever-increasing federal pressure on state and local governments to put their crime control resources

53. Christopher N. Lasch, Associate Professor, University of Denver Sturm College of Law.

54. The term has no fixed definition. I use it to reference disentanglement of states and localities from federal immigration enforcement.

55. *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016) [hereinafter August 31 Speech], <http://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614>.

56. Hanna Kozłowska & Jason Karaian, *The first big winners of Donald Trump’s victory are private prison companies, whose stocks are soaring*, QUARTZ (Nov. 9, 2016), <https://qz.com/832775/election-2016-private-prison-company-stocks-cca-and-geo-group-are-surging-after-trumps-win-cxw-geo/>.

57. E.g., Daniel Beekman, *Seattle will remain ‘sanctuary city’ for immigrants despite Trump presidency, mayor says*, SEATTLE TIMES (Nov. 9, 2016, 9:54 PM), <https://www.seattletimes.com/seattle-news/politics/seattle-will-remain-sanctuary-city-for-immigrants-despite-trump-presidency-mayor-says/>; Alex Dobuzinskis & Joseph Ax, *Mayors of NY and Los Angeles pledge to remain immigrant sanctuaries*, REUTERS (Nov. 10, 2016, 8:13 PM), <https://www.reuters.com/article/us-usa-immigration-sanctuarycities/mayors-of-ny-and-los-angeles-pledge-to-remain-immigrant-sanctuaries-idUSKBN13604P>.

58. See generally Christopher N. Lasch, et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. (forthcoming 2018) (manuscript at 3 n. 3) (on file with authors).

59. See Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case the Sanctuary City Defunding*, 58 SANTA CLARA L. REV. 539.

60. E.g., Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457 (2013); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015).

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in the service of migration control.⁶¹ Waves of sanctuary policies are best understood as demonstrating resistance to this pressure.⁶²

A. FEDERAL PRESSURE ON STATES AND LOCALITIES TO PARTICIPATE IN IMMIGRATION ENFORCEMENT

President Trump had promised, during his campaign, to deport millions.⁶³ To eclipse the record-breaking deportation numbers of the Obama administration, he would need to step up efforts to enlist local police in the immigration enforcement mission.⁶⁴ An Executive Order issued on his sixth day in office attempted to do just that.⁶⁵ The Executive Order scrapped President Obama's "Priorities Enforcement Program" (under which deportations had dropped) in favor of the more aggressive "Secure Communities" enforcement program,⁶⁶ while defining enforcement priorities "so expansively as to be meaningless."⁶⁷ It demanded the use, "to the maximum extent permitted by law," of "287(g) agreements" deputizing state and local officers to perform immigration functions.⁶⁸ It called for a weekly report publicly calling out those jurisdictions that declined immigration detainer requests.⁶⁹ And finally, the Executive Order directed that "sanctuary jurisdictions" be declared generally ineligible for federal grant funding.⁷⁰

Beyond the Executive Order, the administration deployed all the tools at its disposal to apply downward pressure on states and localities. It stepped up the use of immigration arrests at state and local courthouses (and directly

61. *Removals & Returns, 1892-2015*, CRIMMIGRATION (Feb. 16, 2017, 4:00 AM), <http://crimmigration.com/2017/02/16/removals-returns-1892-2015/>.

62. Lai & Lasch, *supra* note 59 (describing "dialectical progression whereby certain localities have resisted this pressure through waves of sanctuary enactments, and federal actors have responded by ratcheting up the pressure").

63. See Alexandra Jaffe & NBC News, *Donald Trump: Undocumented immigrants 'have to go'*, MSNBC (Aug. 15, 2015, 10:23 PM), <http://www.msnbc.com/msnbc/donald-trump-undocumented-immigrants-have-go> (reporting Trump's promise to deport all undocumented persons); August 31 Speech, *supra* note 55 (promising to deport more than two million).

64. See Brian Bennett, *Obama administration reports record number of deportations*, L.A. TIMES (Oct. 18, 2011), <http://articles.latimes.com/2011/oct/18/news/la-pn-deportation-ice-20111018> (noting third consecutive year of record-setting deportations credited to "programs such as Secure Communities" that rely on state and local law enforcement agencies).

65. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

66. *Id.*

67. Walter Ewing, *Understanding the Dangerous Implications of President Trump's Immigration Executive Order*, IMMIGR. IMPACT (Jan. 26, 2017), <http://immigrationimpact.com/2017/01/26/understanding-dangerous-implications-president-trumps-immigration-executive-order>.

68. Exec. Order No. 13,768, *supra* note 65 at 8800.

69. *Id.* at 8801; August 31 Speech, *supra* note 55 (As candidate, Trump had promised to "issue detainees for all illegal immigrants who are arrested for any crime whatsoever.")

70. Exec. Order No. 13,768, *supra* note 65 at 8801.

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linked this enforcement to sanctuary policies),⁷¹ engaged in retaliatory raids,⁷² and participated in anti-sanctuary litigation.⁷³

**B. PRESSURE EXERTED BY STATES TO ENLIST LOCALITIES IN
 IMMIGRATION ENFORCEMENT: THE CASE OF TEXAS
 SENATE BILL 4**

The sanctuary debate is best understood as a clash of values rather than of legal doctrine. This is most clearly visible when one observes that when it comes to sanctuary, the expected behavior of political actors is often contradicted.⁷⁴ For example, Attorney General Jeff Sessions generally follows the Republican Party's endorsement of local control over policing,⁷⁵ but as to sanctuary policies, Sessions criticizes local decision-making as "endanger[ing] the lives of every American."⁷⁶

Nowhere was this upending of the usual alignments more starkly on display this past year than in Texas. The Lone Star State shed its typical preference for independence and enacted Senate Bill 4, which largely requires Texas law enforcement to march in lockstep with the federal government.⁷⁷ Thus, Texas sheriffs were pressured to participate in immigration enforcement not only by the federal government, but from their own state government as well.

71. Christopher N. Lasch, A COMMON-LAW PRIVILEGE TO PROTECT STATE AND LOCAL COURTS DURING THE CRIMMIGRATION CRISIS, 127 *YALE L.J. F.* 410, 421 (2017).

72. See U.S. Immigration and Customs Enforcement, *ICE arrests over 450 on federal immigration charges during Operation 'Safe City'* (Sep. 28, 2017), <https://www.ice.gov/news/releases/ice-arrests-over-450-federal-immigration-charges-during-operation-safe-city> (describing raids focused on sanctuary jurisdictions).

73. E.g., Brief for United States as Amicus Curiae Supporting Neither Party, Lunn v. Massachusetts, 78 N.E.3d 1143 (Mass. 2017); Brief for Immigration Reform Law Inst. As Amicus Curiae Supporting Defendants-Appellants Cross-Appellees, City of El Cenizo, et al., v. Texas, et al., No. 17-50762, 2017 WL 4250186 (5th Cir. Sep. 25, 2017); State of Indiana's Motion to Intervene for the Limited Purpose of Appeal, Lopez v. Marion Cty. Sheriff's Dept., No. 1:16-cv-02457, 2017 WL 5634965 (S.D. Ind. Aug. 4, 2017).

74. See, e.g., *New Orleans as a Sanctuary City*, C-SPAN (Sep. 27, 2016), <https://www.c-span.org/video/?415928-1/federal-local-officials-testify-new-orleans-sanctuary-city&start=587> (at 10:30, at which Rep. Lofgren (D-Cal.) notes, "It's ironic that my republican colleagues today argue against local [sanctuary] policies in favor of a top-down mandate from Washington").

75. Att'y Gen. Jefferson B. Sessions III, *Memorandum: Supporting Federal, State, Local and Tribal Law Enforcement* (Mar. 31, 2017), <https://www.justice.gov/opa/press-release/file/954916/download> ("Local control and local accountability are necessary for effective local policing. It is not the responsibility of the federal government to manage non-federal law enforcement agencies.").

76. Att'y Gen. Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions, U.S. Dep't of Justice (Mar. 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions>.

77. E.g., TEX. CODE CRIM. PROC. ANN. art. 2.251 (West 2017) (requiring Texas agencies to "comply with, honor, and fulfill" any federal detainer request).

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C. LITIGATION RESISTANCE BY STATES AND LOCALITIES

Sanctuary jurisdictions have gone to court to resist this extreme pressure, raising fascinating legal issues too complex for in-depth coverage here but that will doubtless continue to be scrutinized by courts and scholars.⁷⁸

The first round of lawsuits challenged the Executive Order's threat to cut funding to sanctuary jurisdictions. The Executive Order prompted a number of lawsuits.⁷⁹ Jurisdictions challenged the Executive's ability to add conditions to funding that had not been authorized by Congress,⁸⁰ the lack of any nexus between the threatened funding and the immigration-enforcement conditions attached thereto,⁸¹ and the coercive level of the cuts.⁸² And they challenged the substance of the conditions, claiming that complying with immigration detainers would cause them to violate the Fourth Amendment,⁸³ and challenging a federal statute to which the Executive Order pegged funding.⁸⁴

On April 25, 2017, a federal district court issued a nationwide injunction as to the Executive Order's defunding provision.⁸⁵ The Department of Justice next announced, in July 2017, that it would attach three immigration-enforcement-related conditions to funding disbursed by the Byrne Justice Assistance Grant program, the leading source of federal funding for local law enforcement.⁸⁶ Jurisdictions would be required to certify compliance with 8 U.S.C. section 1373 (which, generally speaking, prohibits localities from forbidding communication between local officers and federal immigration authorities regarding a person's citizenship or immigration status), provide notice to federal immigration officials when certain inmates are released from local custody, and provide immigration officials access to local jails.⁸⁷

78. For a more detailed analysis of the funding cases, *see, e.g.*, Lai & Lasch, *supra* note 59.

79. *E.g.*, *Cty. of Santa Clara v. Donald J. Trump*, No. 5:17-cv-00574 (N.D. Cal. Feb. 3, 2017); *City and Cty. of San Francisco v. Donald J. Trump*, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017).

80. Motion for Preliminary Injunction at 14-17, *Cty. of Santa Clara v. Donald J. Trump*, No. 5:17-cv-00574 (N.D. Cal. Feb. 3, 2017).

81. *Id.* at 13-14.

82. *Id.* at 14-15.

83. Motion for Preliminary Injunction at 13-14, *City and Cty. of San Francisco v. Donald J. Trump*, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017).

84. *Id.* at 16-19 (arguing 8 U.S.C. § 1373 is unconstitutional both facially and as applied).

85. Order Granting the *Cty. of Santa Clara's* and *City and Cty. of San Francisco's* Motions to Enjoin Section 9(a) of Executive Order 13768, *Cty. Of Santa Clara v. Donald J. Trump*, No. 17-cv-00574-WHO (N.D. Cal. Apr. 25, 2017).

86. Lai & Lasch, *supra* note 59 at 559-60.

87. Press Release No. 17-826, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial>.

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Litigation followed,⁸⁸ and federal courts in Chicago and Philadelphia enjoined these conditions.⁸⁹

The Justice Department next turned to Community Oriented Policing Services grants, promising to give “priority consideration” to jurisdictions that comply with the conditions struck down elsewhere.⁹⁰ The City of Los Angeles promptly filed suit.⁹¹

Meanwhile, a number of cities and counties have sued to enjoin enforcement of Texas’s Senate Bill 4.⁹² A federal district court enjoined portions of the bill,⁹³ but the Fifth Circuit, where the case is now pending, stayed portions of the injunction.⁹⁴

D. POLICY RESISTANCE: A “FOURTH WAVE” OF SANCTUARY

Resistance to the Trump administration’s pressure has also been visible in a new wave of sanctuary policies enacted since the election. These policies are unique in the degree to which they embrace diversity, inclusivity, and anti-discrimination norms,⁹⁵ and are responsive to the perception that the candidate and now President Trump’s immigration agenda is shot through with racism and nativism.⁹⁶

88. *Chicago v. Jefferson Beauregard Sessions III*, No. 1:17-cv-05720 (N.D. Ill. filed Aug. 7, 2017); *City and Cty. of San Francisco v. Jefferson B. Sessions III, et al.*, No. 3:17-cv-04642 (N.D. Cal. filed Aug. 11, 2017); *State of California ex rel. Xavier Becerra v. Jefferson B. Sessions, et al.*, No. 3:17-cv-04701 (N.D. Cal. filed Aug. 14, 2017); *City of Philadelphia v. Jefferson Beauregard Sessions III*, No. 2:17-cv-03894 (E. D. Pa. filed Aug. 30, 2017).

89. *City of Chicago*, No. 1:17-cv-05720, Document 78 (filed Sep. 15, 2017) (memorandum opinion and order in support of preliminary nationwide injunction as to the notice and access conditions, but allowing the condition as to 8 U.S.C. § 1373 to stand); *City of Philadelphia*, No. 2:17-cv-03894, Document 74 (filed Nov. 15, 2017) (preliminary injunction as to 8 U.S.C. § 1373 condition, applied to Philadelphia only).

90. Press Release No. 17-976, U.S. Dep’t of Justice, Department of Justice Announces Priority Consideration Criteria for COPS Office Grants (Sept. 7, 2017), <https://www.justice.gov/opa/pr/department-justice-announces-priority-consideration-criteria-cops-office-grants>.

91. *Los Angeles v. Jefferson B. Sessions, III, et al.*, No. 2:17-cv-07215 (C.D. Cal. Sep. 29, 2017).

92. *E.g.*, *El Cenizo, Texas, et al. v. Texas, et al.*, No. 5:17-cv-404 (W.D. Tex. June 8, 2017).

93. *Id.*, Order 17-01 (filed Aug. 30, 2017).

94. *City of El Cenizo, et al. v. Texas, et al.*, No. 17-50762 at *1 (5th Cir. Sept. 25, 2017) (per curiam).

95. *See, e.g.*, R. 31370, 2017 Seattle City Council, § 1(A) (Jan. 30, 2017) (emphasizing “inclusion for all”) *available at* http://murray.seattle.gov/wp-content/uploads/2017/01/2017_013017_reso_welcoming_city.pdf; Exec. Order 17-01, State of Washington, Office of the Governor, Exec. Order 17-01 (Feb. 23, 2017), *available at* http://www.governor.wa.gov/sites/default/files/exe_order/eo_17-01.pdf (emphasizing inclusivity and diversity).

96. *See, e.g.*, Beekman, *supra* note 57 (reporting Seattle mayor’s remarks that Trump has “demonstrated outright misogyny, demonstrated xenophobia and homophobia, nationalism, racism and authoritarian tendencies”); *see also, e.g.*, *New York, et al. v. Donald Trump, et al.*, 1:17-cv-5228 (E.D.N.Y. Sep. 6, 2017) (raising claim that administration is motivated by anti-Mexican animus); Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 *NEW ENG.*

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Denver provides an example. Mayor Hancock unveiled a sanctuary ordinance in August 2017. “In January,” Mayor Hancock said, “Denver and cities across the country were faced with a new reality. The White House, right from the start, sought to bully us into turning against certain residents in our community.”⁹⁷ Later in his remarks, Mayor Hancock invoked Charlottesville (which by then had raised serious questions about the President’s commitment to racial equality⁹⁸) as a backdrop against which to situate Denver’s resistance to those who “seek to pit us against each other.”⁹⁹ It was impossible not to hear in these remarks a repudiation of racism.

VI. Conclusion

There is much in the sanctuary debate that is old. The narrative of immigrant criminality perpetuated by the administration is a decades-old trope.¹⁰⁰ And Dean Kevin Johnson’s observation that issues of race in immigration enforcement are subsumed by “dry,” technical legal issues¹⁰¹ has largely been true in 2017’s sanctuary litigation. But as the intensity of the battle over sanctuary policies rends new fissures in old structures, the racial equality and anti-subordination norms that are finding expression in fourth-wave sanctuary policies may yet work their way into the law.

J. ON CRIM. & CIV. CONFINEMENT 159, 171 (2016) (addressing the use of race during Trump campaign to promote anti-sanctuary measures).

97. Erica Meltzer, *Denver “won’t be bullied or blackmailed,” mayor says as city officials propose limiting cooperation with ICE*, DENVERITE (Aug. 16, 2017, 6:50PM), <https://www.denverite.com/denver-wont-bullied-blackmailed-mayor-says-city-official-propose-limiting-cooperation-ice-41123/>.

98. See, e.g., Luis V. Gutierrez, *Trump’s Most Dangerous and Damaging Act Yet*, U.S. NEWS AND WORLD REPORT (Sep. 5, 2017, 11:20 AM), <https://www.usnews.com/opinion/op-ed/articles/2017-09-05/ending-daca-is-donald-trumps-ugliest-act-so-far> (arguing that “weak and insincere response to racist violence in Charlottesville, Virginia” was part of “evidence that his administration is now on a very dangerous trajectory towards the full-throated endorsement of white supremacy”).

99. Meltzer, *supra* note 97.

100. See, e.g., Vázquez, *supra* note 60, at 637–42 (locating the origins of the “criminal alien” label).

101. E.g., Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012) (describing how preemption and federal supremacy, rather than civil rights frames, have been used in addressing local immigration measures).

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