

“Falling Outside:

Lawyering, Central Americans, and the Boundaries of Political Asylum”

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Prepared for the ASA Historical Comparative Mini-conference,  
San Francisco, CA  
August 12, 2009

ABSTRACT:

Legal advocacy on behalf of Central American asylum seekers in the United States has played a key role in developing U.S. asylum and refugee law and in creating an infrastructure of legal expertise to address the needs of legal and unauthorized immigrants more generally. This talk takes a retrospective look at this advocacy work, considering how attorneys, Central American organizations, and asylum seekers themselves have negotiated the boundaries of political asylum as they have sought to establish Central Americans' eligibility for this remedy. The talk considers three instances when Central Americans have been deemed to fall outside of the category of refugee: (1) the 1980s, when the U.S. government supported repressive regimes in El Salvador and Guatemala, and U.S. immigration officials argued that Central Americans were economic immigrants or victims of generalized violence; (2) the 1990s, when civil wars in El Salvador and Guatemala came to an end, thus making it difficult for Salvadorans and Guatemalans to avail themselves of the protections that asylum could provide; and (3) the 2000s, when some Salvadoran youth who are not U.S. citizens and who are in removal proceedings after having been convicted of crimes have sought to argue that they face persecution due to membership in the social group of perceived or actual gang members. Analyzing the nature and outcomes of legal advocacy in each of these instances suggests strengths and limitations of asylum as a remedy for victims of violence. The talk is based on 1987-2008 fieldwork among and interviews with Central American asylum seekers, legal advocates, and deportees.

In 2006, Pablo, Francisco and Jorge Ramirez were deported from the United States to El Salvador, along with 11,050 Salvadorans who were deported that year (United States Department of Homeland Security 2007). Their parents had immigrated to the United States without authorization in the late 1980s, when El Salvador was at war, and in 1990, had hired an alien-smuggler to bring their seven children, fearing that their oldest son, who was a teenager, would be forcibly recruited by combatants. In the United States, the family applied for political asylum, obtained work permits while their applications were pending, and in 2001, Pablo, Francisco, Jorge and their siblings were awarded legal permanent residency through the Nicaraguan Adjustment and Central American Relief Act or NACARA. Subsequently, the three brothers were (separately) convicted of minor crimes, including driving under the influence of alcohol, carrying a gun without a permit, and drug possession. After short periods of probation or jail time, all three were placed in removal proceedings. Terrified of being deported to El Salvador, which by the mid-2000s, was wracked by gang violence, they applied for political asylum, but, after being detained for a year, agreed to sign deportation papers, believing that by doing so, they would earn the right to return to the United States more quickly. In 2008, when I interviewed them in El Salvador, the three brothers were still hoping that eventually, through U.S. citizen relatives in the United States, they would be able to return to the country legally.

The Ramirez brothers' experiences, which are not unusual, raise a number of perplexing questions. Why wasn't a family that fled a civil war in fear that their children would be forcibly recruited able to obtain political asylum in the United States? How, despite not being deemed eligible for asylum, was this family eventually able to qualify

for legal permanent residency? And why were three of the children ultimately deported, even though they feared being subjected to gang-related violence? Addressing these questions requires excavating the legal history of Central American asylum seekers in the United States, a history that has been seminal in the development of U.S. asylum law and practice (Churgin 1996). My excavation of this history focuses particularly on the political and legal implications of “falling outside” of the category of political asylum. On the one hand, the U.S. government’s treatment of Central Americans as generally undeserving of political asylum gave rise to considerable political and legal advocacy which in turn improved protections for asylum seekers, led to unprecedented legal developments, and contributed to the formation of an infrastructure of immigrant rights organizations in the United States. On the other hand, the failure to award asylum in a timely fashion left Central Americans such as Pablo, Francisco, and Jorge Ramirez without U.S. citizenship and therefore still vulnerable to deportation decades (or, in their case, 16 years) after having entered the United States (Kanstroom 2000, 2007). Furthermore, in countries such as El Salvador, the character of violence has changed from overtly political to seemingly criminal. This change has led to continued renegotiation of the category of political asylum, as youth who fear gang-related persecution seek to avoid deportation (Godoy 2005, Moodie 2006, Zilberg 2004, forthcoming). A retrospective analysis of Central Americans’ efforts to obtain safe haven in the United States sheds light on the complexity of negotiating the meaning and boundaries of political asylum, as well as on the roles that lawyering has played within such negotiations.

In excavating the history of Central American asylum seekers, I have two goals: (1) to examine the persistence and creativity of legal actors – attorneys, paralegals, advocates, and migrants themselves – in staking claims that force law to change, sometimes retroactively, and (2) to highlight the long-term but sometimes unseen legacies of particular legal developments and policy decisions. Regarding the first of these goals, I suggest that legal action includes both the arguments that are made in court by legal practitioners and also the legal strategies pursued by individual migrants as they seek to survive on a daily basis. I thus draw on law and society scholarship focusing on the role of law in everyday life, that is, the ways that individuals who are the targets of particular policies interpret and act on the law in ways that, in turn, have legal effects (e.g., Merry 1990, Engel and Munger 1996, 2003, Yngvesson 1993). Thus, in the case at hand, coalitions of attorneys filed class action suits on behalf of Central American asylum seekers, individual attorneys represented clients who were in deportation proceedings, and individual Central Americans applied for asylum, among other reasons, to obtain work permits while their applications were pending.<sup>1</sup> As I detail below, the cumulative effects of these legal strategies changed U.S. asylum law and procedures in key ways. Regarding the second of these goals, I draw attention to the *embedded* nature of law, that is, to the ways that traces of prior legal regimes, decisions, actions, and events remain and can even be reactivated within subsequent developments. Law thus has an *archaeology*, not only in the sense of Foucault's notion of genealogy (1972), but also in that, much like language (Butler 1993), even legal innovations cite or carry forward meanings that were part of prior historical moments (see also Richland 2008). As a result, devices that permitted unauthorized Central American immigrants to legalize their presence in the

United States bore the trace of earlier denials, thus reproducing disparities between Central Americans from different nations and making numerous Central American youth available for deportation.

My analysis in this paper draws on over two decades of fieldwork among Central American – and particularly Salvadoran – asylum seekers and immigrants in the United States. From 1986-1988, I did fieldwork within Arizona and California segments of the U.S. sanctuary movement, a network of congregations that declared themselves sanctuaries for Salvadoran and Guatemalan refugees. Fieldwork included observing and participating in sanctuary activities, helping to document Central Americans' asylum claims, and interviewing over 100 movement participants. In the mid-1990s, I examined the evolving legal strategies of Central American advocates as civil wars in El Salvador and Guatemala had come or were coming to a close. As part of that research, I observed the legal services programs of three Central American community organizations, attended immigration hearings, and interviewed advocates, migrants, and legal services providers. In the early 2000s, I analyzed the shifting significance of the U.S. Salvadoran population at a time when migrant remittances had become critical to the Salvadoran economy. For that project, I interviewed policy makers, advocates, and migrants in El Salvador, Washington, D.C., and Southern California. Lastly, I am currently completing a study of the power and limitations of nation-based membership categories in the lives of Salvadorans who were born in El Salvador but who grew up in the United States. This project has entailed interviewing approximately 130 Salvadoran youth and individuals who work with these youth, in both El Salvador and in Southern California, including

some 41 individuals who were deported to El Salvador after having lived the bulk of their lives in the United States.

My talk is divided into three sections. The first section discusses legal advocacy on behalf of Central American asylum seekers during the 1980s. The second section examines legal developments in the 1990s, when, upon the conclusion of civil wars in Central America, asylum became a less viable option for Central Americans. The third section considers the challenges that are faced by Salvadorans who grew up in the United States but who face deportation. Throughout, I attend to the ways that “falling outside” of the category of political asylum impacts individuals who in most cases have experienced extreme forms of violence, including the violence associated with migration itself.

#### The 1980s: Asylum Denied

During the 1980s, the U.S. government generally deemed Central American asylum seekers to “fall outside” of the category of political asylum on the grounds that these migrants were fleeing economic conditions and generalized conditions of violence rather than targeted political persecution, and that they could therefore safely remain within their countries of origin or the Central American region. This government stance was shaped by cold war politics and by the legacy the pre-1980 definition of “refugee,” which in the United States, was limited to individuals from the Middle East or who were fleeing communist countries (Churgin 1996, Kennedy 1981, Zolberg 1990).<sup>2</sup> Although the 1980 Refugee Act had made asylum available to individuals who were fleeing non-communist regimes as well, Salvadorans and Guatemalans, who sought refugee from

governments that the United States supported, were particularly disadvantaged, in contrast to Nicaraguans, who were fleeing a country ruled by the Sandinistas, a leftist force that had ousted right-wing dictator Anastasio Somoza through the 1979 Nicaraguan revolution.<sup>3</sup> The U.S. government's contention that Salvadorans and Guatemalans did not deserve asylum was contested through claims filed by individual asylum applicants, multiple class action lawsuits, lobbying for legislative relief in the form of Extended Voluntary Departure Status or "EVD" (the precursor to "Temporary Protected Status" or TPS), and a broad based solidarity movement. Creative lawyering, the cumulative effects of the onslaught of asylum claims filed by Central Americans, and changed political circumstances in Central America eventually led the U.S. government to take account of these asylum seekers – though not in the way that advocates had originally anticipated.

The 1980s debates over the immigration status of Salvadorans and Guatemalans were occasioned by the rapid deterioration of conditions in El Salvador and Guatemala coupled with a dramatic rise in the numbers of Salvadorans and Guatemalans immigrating to the United States. Although emigration from Central America to the United States had existed for some time, the onset of the 1980-1992 Salvadoran civil war and the intensification of the ongoing civil conflict in Guatemala displaced huge segments of the population of each country. In El Salvador, the government launched bombing campaigns to drive civilians out of areas of guerrilla control, while in Guatemala, indigenous groups, who were particularly suspected of supporting the opposition, were relocated or massacred (Binford 1996; Green 1999, Montgomery 1995, Nelson 1999, Schirmer 1998). In each country, the targets of repression were widespread, as the armed forces "equate[d] the government's critics with the enemy,

repressing trade unionists, campesino leaders, opposition politicians, and student protesters with the same or more force than they use[d] on the real insurgents” (Schwarz 1991:25).<sup>4</sup> By 1984, “within El Salvador there were 468,000 displaced people (9.75 percent of the population), 244,000 in Mexico and elsewhere in Central America, and 500,000 more in the United States, for a total of more than 1.2 million displaced and refugees (25 percent of the population)” (Byrne 1996: 115). When peace accords were signed in El Salvador in 1992, Salvadoran community groups in Los Angeles estimated to me that there were 1 million Salvadorans in the United States alone.<sup>5</sup> The majority of these migrants at entered without authorization.

At the time, advocates who were concerned about widespread human rights violations in Central America sought asylum for Central Americans, but, as noted above, the Reagan administration responded by arguing that Salvadorans and Guatemalans were economic immigrants rather than refugees. At a 1984 U.S. congressional hearing on the status of Salvadorans and Guatemalans, Assistant Secretary of State Elliott Abrams depicted these migrants as indistinguishable from other undocumented immigrants, stating “El Salvador ... is a country with a history of large-scale illegal immigration to the United States” (House of Representatives 1984:67). Immigration and Naturalization Service (INS) executive associate commissioner Doris Meissner agreed, attributing immigration from El Salvador to “the poverty and lack of overall economic opportunity that people in that country face” (House of Representatives 1984:91). Indeed, at the same hearing, INS Commissioner Alan Nelson raised the specter that granting Central Americans safe haven would open the floodgates to the world’s poor. Commissioner Nelson asserted, “Basically everybody in the world would be better off in the United

States” (House of Representatives 1984:110). Consistent with these attitudes, the U.S. State Department, which was required to weigh in on asylum applications, routinely advised INS district directors to deny Salvadoran and Guatemalan asylum cases. These recommendations were generally followed. During the early 1980s, asylum applications filed by Salvadorans and Guatemalans were denied at rates of 97 and 99 percent, respectively (U.S. Committee for Refugees 1986).

This broader political context played out at the level of individual asylum hearings, where Central Americans’ accounts of persecution were transformed into something other than violence, or into violence that could not be linked to race, religion, nationality, social group membership or political opinion. This transformation was accomplished through a number of devices, including challenging witnesses’ credibility, requiring nonexistent or dangerous documentation (such as copies of death threats), delinking the decision to emigrate from the experience of violence, treating individual experiences as instances of generalized suffering (by arguing that applicants were not “singled out”), defining violence as criminal rather than political in nature, and deeming “indirect” threats, such as the assassination of neighbors or family members, as not rising to the level of persecution (Anker 1992).<sup>6</sup> For instance, at an asylum hearing that I attended in Tucson, Arizona in the mid-1980s, a Salvadoran applicant testified that, as a soldier in El Salvador, his life had been threatened by a sergeant who had been involved in a relative’s assassination and who accused him of being a guerrilla sympathizer. The applicant had deserted and attempted to hide, but, upon being recognized, had fled to the United States. In this case, the attorney for the INS countered that Salvadoran authorities had a legitimate interest in apprehending deserters, that the applicant was at no more risk

than the general population, and that the government had had the opportunity to persecute the applicant when he was in the Armed Forces, if it had desired to do so. This latter argument is something of a catch-22 for asylum seekers: if they escape, then it is difficult to prove that their lives were in danger, but if they are killed, danger is proven but then they are not in the United States applying for political asylum. At one hearing that I attended, an INS attorney asked an applicant who had been threatened by the guerrilla forces, “But they in fact didn’t kill you?” as though merely being alive undermined her claim (see also Coutin 1993:99-102, 2001).

Such attempts to define accounts of persecution as something other than violence were challenged during the 1980s by U.S. religious activists who resorted to declaring their congregations “sanctuaries” for Salvadoran and Guatemalan refugees. Religious workers who provided humanitarian services to migrants had become aware of human rights abuses in Central America in the early 1980s, through the accounts of personal suffering that they heard from migrants themselves. Central Americans who were members of political and refugee committees that supported popular organizations in Central America also sought to mobilize U.S. religious groups. The March 1980 assassination of Salvadoran archbishop Oscar Romero, who had criticized human rights abuses perpetrated by Salvadoran forces, particularly galvanized U.S. religious organizations. In addition to declaring sanctuary, these groups -- over 300 congregations nationwide at the movement’s height – helped Central American refugees enter the United States (without passing through immigration controls, transported them to places of safety around the country, sheltered them within congregations, and publicized refugees’ accounts of war and human rights abuses. These tactics were designed to

demonstrate that US asylum policy was permitting political consideration to influence legal outcomes in violation of both US and international law. To remedy this violation, movement participants asked the U.S. government to grant temporary status to Central Americans either administratively or through legislation. Sanctuary advocates also helped to arrange pro bono legal representation for Central Americans who were in deportation proceedings. Sanctuary activities did not go unchallenged by U.S. authorities. There were several prosecutions of sanctuary workers in New Mexico, Texas, and Arizona, and, in 1986, following a lengthy undercover investigation and criminal trial, eight movement participants were convicted of conspiracy and alien smuggling (Coutin 1993).

The legal initiatives spawned by sanctuary and other Central American advocates included not only providing assistance to individual asylum applicants but also filing class action suits designed to change asylum policies more broadly. One important suit, known as the “young male case,” sought to establish that all young men in El Salvador were at risk of forcible recruitment and were therefore eligible for grants of asylum (*Sanchez-Trujillo v. INS* 1986). An attorney who was involved in this case described the legal strategy:

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

El Salvador as a social group and who the government suspected of being guerillas or guerilla supporters.

Although it was ultimately unsuccessful, this case laid the groundwork for a second class-action suit, *American Baptist Churches v. Thornburgh*, which was filed in 1985 in direct response to the prosecution of sanctuary workers. In the “ABC case,” as it came to be known, plaintiffs argued that the Central American asylum applicants had been denied equal treatment under the law, and sought an award of temporary status to class members as well as a prohibition on future sanctuary prosecutions. A third case, *Orantes-Hernandez v. Meese* (1988), challenged such coercive practices as forcing detainees to stand in the hot Arizona sun all day in order to persuade them to sign deportation papers. A fourth case, *Mendez v. Reno*, challenged the perfunctory nature of asylum interviews, and “alleged that interviewers were not trained and were ignorant of applicable asylum law, interpreters were not provided, and sessions were rushed with little privacy” (Churgin 1996:321). Indeed, an attorney who took depositions from asylum officials for this case recalled,

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

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

I ... was at the Lawyers' Committee [for Civil Rights Under Law] for four years... I organized networks of lawyers in big law firms to provide assistance in political asylum cases, or pro bono cases. That's sort of the Lawyers' Committee's mode of operation. They organize big law firms and their lawyers to do free work.... So I started building coalitions around policy issues. Work that was really not representational and more policy organizing. I got a little money from the Ford Foundation to build these teams up, and we produced 40 policy papers with 40,000 dollars.... Now, at the same time, I'm beginning to work on Central American cases, and as I think I mentioned over the phone, I think I handled the very first political asylum case granted to a Salvadoran. If not the first, then [one of] the first few. A guy named Father A. [named deleted.] who had come to me at the Lawyers' Committee....

Now, that work in the Lawyers' Committee, in my own mind at least, accomplished a couple of things. In addition to the work we actually did, it became the model for lawyers committees and the rights offices around the country. So, Robert Rubin's operation in San Francisco [Lawyers' Committee for Civil Rights of the San Francisco Bay Area], Public Counsel's immigration work in LA, the Immigrant Rights Projects of the Lawyers' Committees in Boston and Chicago all were kind of modeled on what I started here in Washington. And that was great. Because this very significant pretty prestigious civil rights group was

over the course of five, six, eight, ten years institutionalizing its immigrant rights agenda, funding for staff hours, for developing more teams of volunteer lawyers, etc.

I have quoted this passage at length as it demonstrates how efforts to challenge the notion that Central Americans fell outside of the category of political asylum not only addressed the legal situation of these immigrant groups but also created legal expertise, encouraged immigration attorneys to pursue policy changes in addition to representing individual clients, and contributed to creating a network of immigrant rights groups across the United States – groups that could be mobilized for other causes as well.

Attorneys' legal advocacy work still might not have been successful without were it not for the hundreds of thousands of claims filed by individual asylum seekers. Significantly, many of these claims were likely filed without a full awareness of the U.S. government's stance toward Central American migrants, or even an understanding of political asylum. Instead, it was the passage of the 1986 Immigration Reform and Control Act (IRCA), which for the first time imposed sanctions on employers who hired immigrants without work authorization, that created a new demand for employment authorization documents (EADs) and therefore fueled a dramatic rise in asylum applications (Hagan 1994). According to INS data, the number of asylum applications filed peaked at approximately 62,000 in 1981, shortly after passage of the 1980 Refugee Act, declined to less than 25,000 in 1985, and then, with the passage of IRCA in 1986, quadrupled to over 100,000 in 1989 (US Department of Justice 1999).<sup>7</sup> My own interviews with individuals who eventually sought legal assistance from Central American community organizations suggest that many Latin American migrants, who

were not aware that in the United States, notary publics are only authorized to authenticate signatures, approached notaries asking whether or not it was possible to obtain a work permit. These notaries filed asylum applications (which were usually fraudulent or poorly prepared) on their behalf, as applicants were entitled to work authorization while their applications were pending. Cumulatively, these applications created a massive backlog, producing lengthy delays in adjudication. Thus, these applications actually “worked” – they generated work authorization and temporary permission to remain in the United States, even though they harmed individuals who had strong asylum claims and who could have benefited from properly prepared applications.

By the decade’s end, circumstances had changed in ways that made resolution of Central Americans’ asylum claims feasible. The U.S. Immigration and Naturalization Service was under pressure to reform its asylum procedures, the infamous assassination of six Jesuit priests in El Salvador had drawn international attention to human rights abuses and made it more difficult for the U.S. to continue to provide military aid to the Salvadoran government, the war in El Salvador was at a stalemate, migrant remittances had become key to the Salvadoran economy, the Salvadoran government advocated allowing Salvadorans to remain in the United States, and the ABC case was entering the discovery phase, which was likely to prove embarrassing to the U.S. government (Blum 1991). In this context, the U.S. Congress passed the 1990 Immigration Act, which awarded 18 months of Temporary Protected Status to Salvadoran immigrants, and in 1991, the ABC case was settled out of court, thus enabling Salvadoran and Guatemalan asylum applicants to reopen their cases, have de novo hearings on the merits, submit new materials, or apply for the first time. ABC asylum hearings were also to be governed by

special rules designed to ensure fair consideration of applicants' claims. Some 300,000 Salvadorans and Guatemalans registered for the benefits of the settlement agreement. The award of TPS recognized that victims of generalized violence also had a need for safe haven, while the ABC settlement agreement set the stage for a fair adjudication of ABC class members' asylum petitions. But, before the adjudications could occur, events intervened, once again making asylum an unlikely immigration remedy for these migrants.

#### The 1990s: Asylum Avoided

Ironically, as the validity of their claims retrospectively gained greater acknowledgement, asylum became more difficult for Central Americans to obtain. Central American migrants began the 1990s with renewed recognition of their need for safe haven and with new legal mechanisms – TPS and the ABC settlement – designed to meet this need. Yet, bureaucratic delays in the United States and the signing of peace accords in both El Salvador (in 1992) and Guatemala (in 1996) made grants of asylum less likely, even as changes in U.S. immigration law simultaneously eliminated other avenues of legalization. In response, these migrants and their advocates argued that Central Americans deserved legal status in the United States not only due to the persecution and violence that they had experienced in their home countries but also because of the time that they had spent in the United States. The fact that these migrants had been awarded temporary legal status made it possible for them to claim that they were in the country with the knowledge and authorization of U.S. authorities even though, in many cases, their original entries had been without authorization. The legal

mechanisms that were created in the 1980s therefore had complex legacies. On the one hand, the fact that these migrants had not been granted asylum placed them in a position of continued vulnerability to deportation. On the other hand, the persistence and legal ingenuity that had resulted in TPS and the ABC agreement allowed them to depict themselves as a bounded, documented, and “known” population, rather than as mere unauthorized migrants. A complex set of circumstances ultimately allowed the latter depiction to prevail – though not without the continued influence of the cold war politics that had contributed to asylum denials in the first place.

Although the 1991 ABC settlement anticipated that adjudications would begin shortly after the agreement was reached, in fact, hearings on Central Americans’ asylum claims did not begin until 1997. The complexity of the settlement agreement, which required sending particular notices to applicants, made ABC asylum petitions a lower priority for the asylum unit than non-ABC cases. As one asylum official told me during an interview, “The very fact that you’ve got a potential 250,000 [ABC asylum] cases that are on the backlog of the backlog, ... I think, in essence, that doesn’t help but facilitate keeping current [with new asylum receipts] and even being able to begin to dig into your backlog of non-ABC cases.” Additionally, there was some expectation on the part of both the ABC class counsel and at least some immigration officials that an alternative program would be created for ABC class members, making adjudication of their claims unnecessary. One official commented that “around here it was said with jocularly, but with a sense of ‘boy, wouldn’t it be nice,’ and that was ‘amnesty.’ Amnesty.” In the meantime, when the 18 months of Temporary Protected Status that Salvadorans had been awarded in 1990 expired, a new status, “Deferred Enforced Departure” or “DED,” was

created and then extended until 1996, the deadline that was ultimately set for applying for asylum under the terms of the ABC settlement.

By 1996, however, the political and legal context in which claims would be adjudicated had changed considerably. As noted above, peace accords were signed in El Salvador in 1992, and in Guatemala in 1996. Although the peace accords did not necessarily put an end to all violence, they did make it more difficult for migrants to argue that they faced persecution if they returned. Furthermore, as Salvadorans and Guatemalans had to have entered the United States prior to 1990 to qualify for the benefits of the ABC settlement, by 1996, a significant amount of time had passed since the events that they described in their asylum applications. Furthermore, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act or IIRIRA made alternative forms of legalization more difficult to obtain. As time passed, advocates had hoped that ABC class members who were denied asylum would be eligible to apply for suspension of deportation, which was available to immigrants who were in deportation proceedings and who could prove good moral character, at least seven years of continuous presence in the United States, and that deportation would pose an extreme hardship on the applicant or on a U.S. citizen or legal permanent resident of the applicant. IIRIRA eliminated suspension, replacing it with cancellation of removal, which required proving at least ten years of continuous presence and that removal would create an extreme and exceptional hardship on a U.S. citizen or legal permanent resident spouse, parent, or child of the applicants. Hardship to the applicant was no longer relevant. Aliens who lacked the requisite ten years or a qualifying relative were ineligible to apply. Additionally, IIRIRA created imposed an annual cap of 4,000 on the number of suspension or cancellation

cases that could be granted, making these an unlikely remedies for the approximately 300,000 ABC class members with pending asylum cases. Finally, IIRIRA created a “stop-time” rule, according to which individual who were issued a Notice to Appear in court could no longer accrue additional time in the country. It was unclear whether Orders to Show Cause (an earlier version of Notices to Appear) that had been issued Salvadoran TPS recipients in 1992 but never mailed would be considered to have “stopped” their immigration “clocks.”

In this bleak legal context and against all advice to the contrary, Central American advocates launched a campaign to grant residency to ABC class members. This effort was assisted by the fact that IIRIRA’s provisions adversely affected not only Salvadoran and Guatemalan ABC class members but also Nicaraguans, who had been permitted to remain in the United States without a permanent status even if they were denied asylum. Salvadorans, Guatemalans, and Nicaraguans joined forces to request relief, and the Central American governments, concerned about reduced remittances and the impact of deportations, pressured the U.S. government to assist their nationals. The Clinton administration responded favorably to these governments’ concerns. At May 1997 summit meeting, U.S. president Bill Clinton told the Central American presidents that it would be problematic for the U.S. to deport Central Americans who had lengthy ties to the United States and who supported their countries through family remittances. In addition, at least some U.S. immigration officials supported restoring suspension eligibility to ABC class members and Nicaraguan Review Program participants. As a result, an unlikely alliance of immigrant rights advocates, U.S. and Central American officials, and Nicaraguans, Guatemalans, Salvadorans and their supporters were able to

secure passage of the 1997 Nicaraguan Adjustment and Central American Relief Act, or NACARA.<sup>8</sup> Passing this legislation was an extraordinary accomplishment, coming only one year after the adoption of highly restrictive immigration measures. Yet, this accomplishment was marred by the fact that the cold war ideology that seemingly had influenced asylum approval rates during the 1980s produced a disparity in the NACARA provisions. This legislation permitted ABC class members, TPS recipients, and certain other Salvadorans and Guatemalans with pending asylum applications to apply for “special rule cancellation of removal” – basically suspension of deportation. In contrast, NACARA allowed Nicaraguan Review Program participants to adjust their status to that of legal permanent residents. The Nicaraguans fared much better, as the remedy created for Salvadorans and Guatemalans was lengthier, more expensive, more cumbersome, and less certain.

The disparity in the treatment that NARACA afforded to Nicaraguans on the one hand and to Salvadorans and Guatemalans on the other was galling to advocates and to Salvadoran and Guatemalan leaders, a fact that gave rise to tremendous pressure to resolve this disparity administratively, through the regulations that would implement NACARA.<sup>9</sup> This pressure focused on three novel issues: (1) could the application process be streamlined by permitting asylum officials to evaluate ABC class members’ claims, even though these claims would be regarding both suspension eligibility and asylum? (2) could immigration officials specify the ways that ABC class members met hardship criteria? And (3), could immigration officials grant ABC class members a blanket finding of hardship, thus virtually guaranteeing a grant in almost every case? Each of these issues was resolved largely in ABC class members’ favor. Over the

opposition of immigration judges, who argued that only they could adjudicate suspension claims, asylum officers were granted authority to assess NACARA applications. One of the regulation's authors explained the rationale for this decision to me during an interview: "[The asylum unit] had the files, and asylum had to do the interviews anyway. Most would lose their asylum cases but be granted NACARA. It was a time-saver to do them together." Likewise, although immigration officials concluded that the hardship criteria were to be defined by relevant case law rather than the particular situation of ABC class members, they nonetheless took the unprecedented step of *specifying* these criteria. The NACARA regulations thus codified case law. Finally, immigration officials determined that they could not grant ABC class members a blanket finding of hardship, as statutorily, suspension had to be evaluated on a case-by-case basis. Nonetheless, officials concluded that ABC class members were sufficiently similarly situated to justify granting them a *rebuttable* presumption of hardship. As an official explained, "[ABC class members] were people we knew, people who had strong equities. They had lived here a long time, they had kids, they were working – they had work authorization.... So we looked at it, and we decided we could do it. The presumption of hardship shifts the burden from the applicant to the INS [Immigration and Naturalization Service]."

Extraordinarily, with the passage of NACARA and the drafting of the regulations, a group of migrants that had previously been prohibited on the grounds that they were economic migrants came to be considered deserving, precisely because of the lives that these migrants had created in the United States coupled with the circumstances in which they left their country of origin. NACARA cases were overwhelmingly approved, at a rate of 95% (personal communication). Indeed, I had the opportunity to witness this

process when I accompanied one Guatemalan applicant to her NACARA interview as an interpreter. When the interview began, it was discovered that the asylum unit had no record of her original registration as an ABC class member. Suddenly, the applicant's status as an ABC class member, and thus her eligibility for NACARA, was in doubt. Yet, instead of immediately denying her petition, the asylum official informed the applicant that because immigration officials had lost numerous records, they were giving applicants the benefit of the doubt. The official advised her to draft an affidavit then and there, describing how she had registered for benefits. When she responded that she did not know how to draft an affidavit, the official helped her compose it. The official thus assisted in creating the record that would allow him to grant her case.

The extraordinary benefits that Central American asylum seekers obtained through NACARA came at some cost. The NACARA regulations did not entirely resolve the disparate treatment of different groups of Central Americans. As a result, most Salvadoran and Guatemalan NACARA beneficiaries did not become legal permanent residents of the United States until the early 2000s, which meant that most were not eligible to naturalize until the late 2000s. And, as some of these migrants learned, until one naturalizes, one can be subjected to deportation.

#### The 2000s: Asylum beyond Reach

By the 2000s, a new group of migrants who feared persecution and who sought to avoid deportation found that they fell outside of the category of political asylum: youth who were placed in removal proceedings after having been convicted of crimes in the United States. Although noncitizens who were convicted of crimes had faced deportation

prior to the 2000s, (Kanstroom 2000, 2007, Nevins 2002, Morawetz 2000), IIRIRA and the Anti-Terrorism and Effective Death Penalty Act or AEDPA, both of which were adopted in 1996, expanded the range of crimes that could result in immigration consequences and eliminated waivers (known as 212(c)) that previously could have been issued to petitioners whose equities (rehabilitation, ties in the United States) outweighed the severity of their crimes. This changed legal context created a new class of migrants who, prior to 1996, either would not have been subjected to deportation or would have been eligible to apply for relief. At the same time, as the forgoing history of Central Americans' efforts to secure asylum suggest, if these migrants and their families had been granted asylum during the 1980s, when they first fled their countries of origin, or even in the 1990s, when the ABC settlement was reached, then they might no longer have been noncitizens who could be subjected to deportation. Of course, not all Central American youth who face removal following criminal convictions were eligible for NACARA in the first place, and some of these youth acquired residency through family visa petitions, the 1986 legalization program that was part of the IRCA legislation, or other means. Nevertheless, denying and avoiding granting asylum to Central Americans in the 1980s and 1990s increased the number of long-time residents who in the 2000s, were still noncitizens, and certainly contributed to the disruption of family relationships – a factor that potentially contributed to youths' offending.

My analysis of the legal circumstances of this new class of potential deportees draws heavily on interviews that I conducted during the summer of 2008 with some 41 Salvadorans who had immigrated to the United States as children, grown up there, and then been deported. These deportees' experiences of the Salvadoran civil war were much

like those of ABC class members and NACARA beneficiaries, in that deportees had been exposed to the horrors of political violence, were at risk of being killed themselves, had in some cases lost relatives, and generally were traumatized by these experiences. For instance, Enrique Lemus, who I interviewed in El Salvador after he was deported, recounted that, as a child, he and his friends used to climb trees to pick mangos in an area that was near a guerrilla hide-out. He recalled,

We used to see helicopters from the army actually go down. One time we saw an execution when we were on top of the tree.... They put four guys out onto their knees. They had a bag [over their heads.] And they just executed them there. And afterwards, they left on the helicopter, and we got off the tree. We actually went and played with the bodies.... I would look at the blood spilled, and sometimes we would see guts spilled out. Something that a normal 7-year-old kid shouldn't be watching. But the environment that I was in, it was kind of becoming normal for me to see that.

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

After fleeing the civil war to the relative safety of the United States, interviewees such as Enrique and Edgar became caught up in the intensification of U.S. deportation and border enforcement policies that occurred during the late 1990s. A number of factors are responsible for this intensification. During the 1990s, U.S. public concern over unauthorized migration grew, even as long-term undocumented residents formed integral

parts of U.S. communities. Targeting criminal aliens was an easy way to increase removal statistics, and, as a government report noted, removing aliens immediately after completion of prison sentences was more efficient than releasing them into the interior, where they would then have to be apprehended (U.S. General Accounting Office 1999). Improved apprehension and record-keeping techniques also gave larger numbers of illicit border crossers criminal and immigration records (Heyman 1999). The attacks of September 11, 2001 increased security concerns and derailed advocates' efforts to create a new guest worker or legalization program for unauthorized migrants. Detention center populations grew, the numbers of individuals removed from the United States increased, and migrants were increasingly prosecuted and sentenced to prison time for immigration violations, such as entry without inspection and reentry following deportation. In fact, a Bureau of Justice Statistics report attributes 14% of the growth in the federal prison population between 1985 and 2000 to increases in the incarceration of immigration offenders (Scalia and Litras 2002), and, by 2005, immigration offenses made up 25% of the caseload of federal prosecutions (Bureau of Justice Statistics 2005).

In this context, individuals who were facing deportation discovered that their understandings of immigration law were out of date. During the 1980s and early 1990s, a simple entry without inspection or reentry was unlikely to lead to prosecution, detention was not mandatory for those who were apprehended on immigration violations, waivers for convicts facing deportation existed, border enforcement was not as stringent, and the fees charged by alien-smugglers were lower. Therefore, noncitizens who pled guilty to criminal offenses found it difficult to believe that their convictions would basically result in irreversible exile from the United States. For example, Roberto Orellana had

immigrated to the United States in 1989 legally, at the age of 7, when his father obtained a family-based visa through Roberto's grandfather. Roberto saw himself as like everyone else: "I was feeling free, I was confident. I feel like an American because I had the same rights. I had no issues going places, like to TJ (Tijuana, in Mexico) or to a bank."

Roberto planned to become a U.S. citizen. He joined a gang, however, and eventually was charged with assault and battery after getting into a fight. He pled guilty to the charges in exchange for a reduced prison sentence of one month. After being released, he was caught riding in a stolen car, and, under pressure from his public defender, again pled guilty. Believing that, because his father had naturalized when he was underage, he had automatically become a citizen himself, Roberto did not anticipate that his conviction would affect his immigration status. Conversations with his fellow inmates convinced him otherwise. Roberto explained, "They told me that if I did more than a year, I qualified for deportation. I told them, 'No, man, I've got papers.' They said that it doesn't matter, that if you've got a criminal record, you've got felonies ... 'Okay, that's it... You're going back!' I couldn't believe I was going back."

When facing deportation, immigrants with criminal convictions had limited legal options. The 1996 changes to U.S. immigration law made detention mandatory in most cases. Aliens with criminal convictions did not have the right to apply for waivers of deportation, and, as there is no right to a state-appointed attorney during immigration proceedings, detainees' families had to shoulder the costs of legal counsel. Detainees who sought to appeal a judge's ruling had to remain in detention while the appeal was considered, and detention center practices seemed designed to convince them that they had no hope of prevailing. One deportee, Mario Lopez, described his experience:

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

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

In this legal context, asylum emerged as a possible avenue through which to challenge the removal of noncitizens with criminal convictions. One interviewee who tried to utilize this option was Cesar Rojas, who faced deportation after being convicted of riding in a stolen car, credit card theft, drug possession, and violating his parole conditions. Cesar had entered the United States at the age of 3, when his parents fled the onset of the Salvadoran civil war. When he was 8, he obtained legal permanent residency through his father. Cesar recounted, "I knew I was Salvadoran but I thought I was from the United States. Because I got there so little." After eventually being detained by Immigration, Cesar fought his case for a year. Cesar was terrified of returning to El Salvador. He explained, "See, in prison, you get a lot of tattoos. They're not gang-related, just art. I have tattoos on my arm, my leg.... But over here [in El Salvador], they don't look at it as art. They look at it as like you're a gang member." Cesar's applications for political asylum and withholding of deportation were denied, and he was ordered deported by a judge who, to his horror, told him, "I don't care if they are going to kill you when you get off the plane, you are still going back." Cesar appealed this decision, but was again denied. Deeming further appeals pointless, Cesar agreed to the deportation. In El Salvador, Cesar's fears of persecution proved not to be unfounded. There, he was arrested for attempting to kidnap a taxi driver, a charge that he says was fabricated. In El Salvador, Cesar experienced continual harassment from police and private security guards who demanded that he lift his shirt so that they could inspect his body for tattoos. Cesar lived in continual fear of being mistaken for a gang member and

killed, either by security forces or by gangs themselves. Again, Cesar's concerns appeared to be well founded. Manuel Urquilla, another deportee, told of the murders of two friends who had also been deported. One was killed at a party, presumably by gang members, and another was murdered at a street stand where he sold CDs, presumably also by gang members.

Although most detainees, like Cesar, found asylum to be beyond their reach, the success of Alex Sanchez (not a pseudonym), director of the gang violence prevention group Homies Unidos (which means Homies United), suggests that such cases may be at the cutting edge of asylum work in the United States. Alex's family had immigrated to the United States when Alex was still in elementary school. Finding the transition difficult, Alex joined a gang, the Mara Salvatrucha. In 1994, after being convicted of car theft and gun possession, Alex was deported to El Salvador, where he found himself targeted by a death squad, the Sombra Negra, which was dedicated to "cleansing" El Salvador of gangs. After seeing fellow gang members killed, Alex opted to return to the United States without authorization. There, he found himself targeted yet again, this time by members of Los Angeles' infamous CRASH unit, a police group that has been charged with planting false evidence in order to arrest suspected gang members. At the same time, Alex assumed a leadership position in the newly formed organization, Homies Unidos. His conflict with the Los Angeles police came to a head when Alex was arrested following his public denunciations of police harassment. Due to his position in the community and the suspect nature of his detention, Alex received an outpouring of support from community activists, California state senator Tom Hayden's office, and his family. Even the Chief of Police of San Salvador came to the United States to testify

about the risks that Alex would face in El Salvador. After a protracted legal battle, Alex Sanchez became the first person in the United States to receive asylum based on having a well-founded fear of being persecuted as a former gang member who was actively trying to forestall gang violence. This outcome opened the door for other migrants, such as Cesar, to pursue similar strategies.<sup>10</sup>

Yet, despite Alex's success, most other applicants who base their asylum petitions on the fear of gang-related persecution fail. Few can mobilize the resources that Alex had at his disposal, and all face the problem of defining a gang as a social group and defining gang-related violence as persecution. Lacking legal protections in both their countries of origin and residence, deportees comprise an excluded class, essentially forbidden to exist anywhere. In the United States, they face prosecution, detention, and deportation. In their countries of origin, they also face discrimination from the general population, and harassment or worse from security forces and gangs themselves. Pushed underground either figuratively, in that they must live as fugitives, or literally, in that they are subjected to violence that can lead to their deaths, these migrants become "expendable." Their experiences provide some portent of the future that could await more "useful" migrants in the event that even the minimal human rights protections that are afforded to them are further eroded.

## Conclusion

This excavation of the histories of Central American asylum seekers in the United States demonstrates both the promise and peril of asylum in immigration contexts that are increasingly defined by security concerns. On the one hand, Central Americans were

able to carve out extraordinary exceptions to the more restrictive immigration policies that were adopted in the U.S. in 1996, exceptions that resulted in awards of legal permanent residency for Salvadoran, Guatemalan, and Nicaraguan populations that had entered the United States during civil conflicts in Central America. These exceptions were linked to the reform of U.S. asylum procedures and to a number of legal innovations, including Temporary Protected Status, the codification of hardship criteria, and the rebuttable presumption of hardship. On the other hand, the cold war concerns that initially led Salvadoran and Guatemalan asylum claims to be denied also detracted from these remedies. Awards of status were long in coming, leaving numerous Central Americans vulnerable to insecurity, prolonged family separations and eventual deportation. Asylum holds out the promise of safe haven, human rights protections, and the rule of law, but, when security concerns raise suspicion regarding the validity of asylum claims, the desire to close borders, limit legal access, and keep out undesirables may trump the promise of protection.

This case study also reveals the creativity of both lawyering and of the legal actions taken by non-lawyers. Lawyers played a central role in securing legal rights for Central Americans in the United States. Lawyers advised the sanctuary activists who challenged the U.S. government's interpretation of asylum law, represented individual asylum seekers, and launched multiple class action suits, including the tremendously successful ABC case. Not only did these legal actions require ingenuity and constant adjustment to shifting circumstances, in addition, advocacy on behalf of Central American asylum seekers had the side effect of producing an infrastructure of immigrant rights organizations in major U.S. cities. These organizations are available to respond to

additional immigration challenges, such as the recent increased use of workplace raids to apprehend unauthorized migrants. This infrastructure and these legal developments could not have been created if it were not for the involvement of migrants themselves, who analyzed their own legal possibilities and opted to apply for TPS, DED, asylum, and the benefits of the ABC settlement agreement. The approximately 300,000 asylum applications filed by Salvadorans and Guatemalans encouraged Central American authorities to advocate on behalf of this large block of citizens, and pressured U.S. immigration officials to devise streamlined resolutions of these claims. Clearly, even when they are not explicitly coordinated, the interplay between formal and informal legal strategies is key to legal change.

Finally, this case study demonstrates that law is historically embedded such that each legal action potentially carries forward traces of prior historical moments. Thus, Central Americans' efforts to obtain asylum were continually hampered by the legacy of the cold war, which had defined these applicants as economic immigrants and undeserving. In the 1990s, when legal remedies were created for Central American migrants, the delays occasioned by earlier denials had weakened Central Americans' asylum claims, while cold war politics were reproduced through the disparate treatment of Nicaraguan, Salvadoran, and Guatemalan asylum seekers. In the 2000s, even though most NACARA petitions were ultimately approved, the delay and avoidance of asylum during the 1980s and 1990s left a number of Central American youth without U.S. citizenship and therefore vulnerable to deportation. Like their parents, who struggled to define war-time violence as grounds for political asylum, some of these youth struggle to define police repression and gang violence as reasons to approve asylum petitions. As

the meaning of violence in formerly war-torn countries shifts from explicitly political to seemingly criminal in nature, asylum law itself may need to shift in recognition of the risks that security policies themselves create. In Central America, for example, gang activity has increased at least in part due to the deportation of gang members from the United States (Zilberg, forthcoming). Lawyers are likely to be at the forefront of efforts to retool asylum for the realities of the 21<sup>st</sup> century, a period when at least some conflicts take untraditional forms. Retooling asylum may also require securing public support for restoring the protections that are promised by this human rights instrument.

## Acknowledgements

This paper draws on research supported by grants from the American Association of University Women, the National Science Foundation (Awards #SBR-9423023, SES-0001890, SES-0296050, and SES-0518011), and the John D. and Catherine T. MacArthur Foundation. I am grateful to all of the individuals and institutions that collaborated in fieldwork and interviews, and most recently, to Luis Perdomo, Jesús Aguilar, Dan Sharp, CARECEN Los Angeles, CARECEN Internacional, and the L.A. and San Salvador offices of Homies Unidos. A previous version of this paper was presented at the conference “Seeking Refuge: Caught between Bureaucracy, Lawyers and Public Indifference” at SOAS, and I thank John Campbell for the invitation and conference participants for their comments. I am also grateful to David Cook-Martin for inviting me to participate in the ASA’s Historical/Comparative Mini-conference.

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## NOTES

<sup>1</sup> Frequently, such applications were prepared by a notary who, unbeknownst to applicants, was not actually authorized to practice immigration law.

<sup>2</sup> Through the 1980 Refugee Act, the U.S. definition of “refugee” was brought into conformity with international law that defined a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (UNHCR, Convention Relating to the Status of Refugees, Article 1)

<sup>3</sup> Through the Nicaraguan Review Program, created in 1987 by the administration of Ronald Reagan, Nicaraguans who were denied asylum were allowed to remain in the United States, whereas Salvadorans and Guatemalans who did not receive asylum were ordered deported or granted voluntary departure. See Wasem 1997 for further details.

<sup>4</sup> FMLN forces also committed human rights violations, though these were fewer in number. The Commission on the Truth for El Salvador (1993) documented cases of summary executions of mayors, extrajudicial executions, and abductions by FMLN members. The FMLN also reportedly engaged in forced recruitment and forced requisition of food and other material goods. The Commission on the Truth for El Salvador nonetheless attributed 85% of human rights abuses committed during the civil war to the Armed Forces or to paramilitary death squads (Kaye 1997).

<sup>5</sup> For additional population estimates, see Aguayo and Fagen 1988, Montes Mozo and García Vasquez 1988, and Ruggles et al 1985.

<sup>6</sup> In contrast Janis Jenkins notes that “the systematic deployment of terror as a means of coercion defies distinction between actual violence and the threat of imminent violence. It is not the display of mutilated bodies more than the result of violence or the threat of violence, but a form of violence itself” (1998: 124).

<sup>7</sup> The number of asylum applications then dropped back to 1981 levels in 1991, after the INS adopted a “last-in, first-out” asylum adjudication policy and instituted a six-month delay in the issuance of a work permit to new applicants, thus making it impossible to apply for asylum as a means of obtaining a work permit. After 1991, the number of asylum applications again skyrocketed, to over 150,000 in 1995, as ABC class members rushed to submit their applications before a January 1996 deadline.

<sup>8</sup> Tellingly, this act was originally called the “Victims of Communism Relief Act.” See Coutin 2007 for further details.

<sup>9</sup> There were also efforts to pass legislation that would resolve the disparity. See Coutin 2007, chapter 7, for a discussion of that process.

<sup>10</sup> For more detailed analyses of this case, see Zilberg forthcoming.

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