

Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge

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INTRODUCTION

From 2006 through 2011, apprehensions of unauthorized immigrants by border patrol agents plummeted.¹ While apprehension rates still remain at a historically low level, authorities have documented an uptick since 2012.² Two categories of unauthorized immigrants have significantly contributed to the rising apprehension rates: those subject to expedited removal who claim to fear persecution and unaccompanied alien children (“UACs”).

Expedited removal is a process created in 1996 that permits immigration authorities to summarily deport certain individuals apprehended at or near the border.³ The major exception to summary deportation is for those who demonstrate a credible fear of persecution or torture.⁴ Thus, “[t]he ‘credible fear’ process is in many cases the only mechanism that stands between an arriving asylum seeker and immediate deportation.”⁵ For UACs, immigration law provides certain processes and protections that curtail authorities’ ability to deport particular UACs quickly.⁶ Any child without a parent or legal guardian is considered a UAC.⁷

¹ JOHN F. SIMANSKI & LESLEY M. SAPP, OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 3 fig.1 (2013), available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. Apprehension rates are different than the number of distinct individuals apprehended because the same person could be apprehended multiple times in a given year.

² U.S. BORDER PATROL, U.S. DEPT OF HOMELAND SEC., TOTAL ILLEGAL ALIEN APPREHENSIONS BY FISCAL YEAR (2014), available at <http://www.cbp.gov/newsroom/media-resources/stats?title=Border+Patrol> (providing apprehension rates in the southwestern border region from FY 1960 through FY 2013).

³ 8 U.S.C. § 1225(b)(1)(A)(i) (2012); see also 8 C.F.R. § 235.3(b) (2014).

⁴ 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(4).

⁵ *Asylum Abuse: Is It Overwhelming Our Borders?: Hearing Before the Comm. on the Judiciary*, 113th Cong. 143 (2013) [hereinafter *Asylum Surge Hearing*] (statement of ACLU et al.).

⁶ See, e.g., 8 U.S.C. § 1232(b)(3) (requiring enforcement agencies to transfer UACs to the U.S. Department of Health and Human Services within seventy-two hours of apprehension).

⁷ The Homeland Security Act of 2002 defines an “unaccompanied alien child” as one who:

(A) has no lawful immigration status in the United States;

After a gradual rise in claims for several years, the number of unauthorized immigrants claiming to credibly fear persecution spiked in the middle of 2012.⁸ The number of claims nearly tripled in fiscal year (“FY”) 2013 and the FY 2014 figures depict a comparably high rate.⁹ The increase in UAC border crossings rode the coattails of the surge in credible fear claims. Immigration authorities started to record a steady rise in UAC border crossings in 2012.¹⁰ By 2014, the staggering surge in UAC border crossings at the southwestern border began to gain national attention.¹¹ The situation has been called a “disaster,”¹² a potential “national security threat,”¹³ and a “humanitarian crisis.”¹⁴

Lawmakers have taken notice of the surges as well. The House Judiciary Committee held a series of hearings to assess whether migrants are abusing the credible fear process and ostensibly to identify the causes for the spike in credible fear claims.¹⁵ The UAC surge has also garnered congressional attention and led to hearings in the House.¹⁶

(B) has not attained 18 years of age; and

(C) with respect to whom—

(i) there is no parent or legal guardian in the United States; or

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2012).

⁸ *Asylum Surge Hearing*, *supra* note 5, at 227.

⁹ *Id.* (documenting 36,035 credible fear referrals in FY 2013, up from 13,880 referrals the previous fiscal year); U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2014 (2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf> [hereinafter USCIS 2014 CREDIBLE FEAR STATISTICS] (documenting more than 20,000 referrals in the first half of FY 2014).

¹⁰ *Southwest Border Unaccompanied Alien Children*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Oct. 9, 2014).

¹¹ *Id.*; e.g., Frances Robles, *Wave of Minors on Their Own Rush to Cross Southwest Border*, N.Y. TIMES, June 4, 2014, at A1; Richard Cowan, *Waves of Immigrant Minors Present Crisis for Obama, Congress*, REUTERS, May 28, 2014, available at <http://www.reuters.com/article/2014/05/28/us-usa-immigration-children-idUSKBN0E814T20140528>.

¹² *An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors: Hearing Before the Comm. on the Judiciary*, 113th Cong. 154 (2014) [hereinafter *UAC Surge Hearing*].

¹³ Lindsey Boerma, *Is the Surge of Illegal Child Immigrants a National Security Threat?*, CBS NEWS (July 7, 2014, 5:42 AM), <http://www.cbsnews.com/news/is-the-surge-of-illegal-child-immigrants-a-national-security-threat/>.

¹⁴ Cowan, *supra* note 11.

¹⁵ See, e.g., *Asylum Surge Hearing*, *supra* note 5.

¹⁶ *UAC Surge Hearing*, *supra* note 12.

Explanations for the causes of these surges vary considerably. Some point to depressed economic opportunities and increased crime rates in the so-called Northern Triangle of El Salvador, Honduras, and Guatemala,¹⁷ which are the countries of origin for most of the migrants.¹⁸ Others fault the enforcement efforts and policy choices of the Obama Administration.¹⁹ Myriad derivations of these potential causes also permeate the discussion,²⁰ adding to the difficulties in discerning the most likely causes of these surges. It is important, however, to identify these causes. The history of immigration is a collection of derivations on cyclical events and arguments presented as if they were entirely unprecedented. Whatever one's beliefs about the optimal level and types of migration, immigration law and policy should be grounded in a greater understanding of the significance of the various push and pull factors that influence migratory patterns.

This Article looks closer at the available data to try to identify the factors that have caused this extraordinary surge in border crossings by credible fear claimants and UACs. Part I provides an overview of expedited removal and the credible fear process before reviewing data on credible fear referral rates. Part II discusses the law that pertains to UACs and provides data to illustrate the extent of the surge in UAC border crossings. Part III will review the main factors that could be contributing to the surges.

In Part IV, this Article will assess holistically the previously discussed causes and identify how several of them have converged to create the current crisis. In short, while individual

¹⁷ See *Asylum Surge Hearing*, *supra* note 5, at 94 (statement of Eleanor Acer, Director, Refugee Protection Program, Human Rights First) (arguing that violence and other “external factors . . . are the drivers of flight”); Tom K. Wong, *Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border*, CENTER FOR AM. PROGRESS (July 8, 2014), <http://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>.

¹⁸ See *Southwest Border Unaccompanied Alien Children*, *supra* note 10; *Asylum Surge Hearing*, *supra* note 5, at 61 (report of Ruth Ellen Wasem, Congressional Research Service).

¹⁹ See *Asylum Surge Hearing*, *supra* note 5, at 2 (statement of Rep. Bob Goodlatte) (opining that “word has gotten out as to the virtual rubberstamping of applications” by the administration); *id.* at 6–7 (statement of Rep. Jason Chaffetz) (blaming the ineffectiveness of immigration enforcement agencies).

²⁰ See Wong, *supra* note 17, at 5–6 (using Mexican UAC migratory rates to negate the significance of the William Wilberforce Trafficking Victims Protection Reauthorization Act to the surge in UAC border crossings); *Asylum Surge Hearing*, *supra* note 5, at 2 (statement of Rep. Bob Goodlatte) (attributing ICE’s “watered down” interpretation of its parole authority to the surge in credible fear claims).

circumstances vary, dire country conditions in the Northern Triangle further deteriorated in certain ways around the time of the surges. The continued deterioration increased the incentive to leave. Concurrently, specific U.S. laws, practices, and immigration policies—along with claims made by nefarious opportunists—led to some accurate and some misinformed perceptions that certain migrants have a greater chance to enter or remain in the United States. When these perceptions spread amidst deteriorating country conditions, it provided the spark that motivated a greater number of credible fear claimants and UACs to make the dangerous journey north.

After reviewing these causes, this Article provides some brief concluding thoughts. Specifically, this Article suggests limited reforms that should not be contentious, and reviews how certain gaps in the available data impugn researchers' ability to more fully discern the causes of migration.

I. THE CREDIBLE FEAR PROCESS

A. Expedited Removal

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").²¹ Prior to IIRIRA, inadmissible individuals apprehended by the government were placed into formal exclusion or deportation proceedings in an immigration court.²² IIRIRA amended the Immigration and Nationality Act ("INA") to create a process to significantly accelerate the removal of many "arriving aliens."²³ Referred to as "expedited removal," the procedure permits immigration inspectors within the U.S. Department of Homeland Security ("DHS") to order that an individual be removed from the United States without providing that individual with an opportunity to have his or her case further reviewed by an immigration judge.²⁴ Specifically, IIRIRA authorizes immigration inspection officers to

²¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

²² *See id.*; *see also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 289 n.2 (2008).

²³ An "arriving alien" is

an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. §§ 1.1(q), 1001.1(q) (2014).

²⁴ 8 U.S.C. § 1225(b)(1)(A)(i) (2012); *see also* 8 C.F.R. § 235.3(b).

summarily order the removal of arriving aliens who are inadmissible because they do not hold valid travel documents or because they obtained or attempted to obtain travel documents by fraud or misrepresentation.²⁵ IIRIRA also provides DHS (as the successor to the Immigration and Naturalization Service on such matters)²⁶ with authority to expand the classes of individuals who are subject to expedited removal.²⁷ Among other expansions, expedited removal now applies to individuals apprehended within 100 miles of certain sectors of the northern and southern borders as long as authorities apprehend such individuals within fourteen days of their unlawful entry.²⁸

The number of individuals subject to expedited removal is significant. Between thirty and forty percent of all annual deportations in recent years have been through expedited removal.²⁹ Between FYs 2010 and 2012, nearly 400,000 people were deported through the expedited removal process.³⁰ In 2012, migrants from Mexico, Guatemala, Honduras, and El Salvador comprised ninety-seven percent of all expedited removals.³¹

B. Fear of Persecution or Torture

If applied without exception, the expedited removal process would thwart the United States' obligation to not return to their home countries individuals with a legitimate fear of being persecuted or tortured. The United States is a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees.³² Known as the principle of non-refoulement, the Protocol prohibits states from repatriating individuals to countries from which they legitimately fear being persecuted.³³

²⁵ 8 U.S.C. § 1225(b)(1)(A)(i) (referring to the grounds of inadmissibility provided under 8 U.S.C. § 1182(a)(6)(C), (a)(7)). “[C]itizens of Cuba arriving at a United States port-of-entry by aircraft” are not subject to expedited removal. 8 C.F.R. § 235.3(b)(1)(i).

²⁶ See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1512(d), 1517, 116 Stat. 2135, 2310–11 (indicating that certain references to the Attorney General in immigration statutes and regulations now pertain to the Secretary of DHS).

²⁷ 8 U.S.C. § 1225(b)(1)(A)(iii) (limiting the agency's expansion authority to aliens who have not been admitted or paroled into the United States and have not been continuously present in the United States for two years).

²⁸ 69 Fed. Reg. 48,876, 48,877–81 (Aug. 11, 2004); 67 Fed. Reg. 68,923, 68,923–26 (Nov. 13, 2002); 8 C.F.R. § 235.3(b).

²⁹ SIMANSKI & SAPP, *supra* note 1, at 5 tbl.6.

³⁰ *Id.*

³¹ *Id.* at 5.

³² United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968).

³³ *Id.* art. 33.

Congress subsequently enacted the Refugee Act of 1980, which codified this obligation.³⁴

The Refugee Act provides that individuals are eligible for asylum relief if they satisfy the definition of a refugee.³⁵ Applicants can establish they are refugees by demonstrating that they fear they will be persecuted on account of race, religion, nationality, political opinion, or social group.³⁶ The definition also requires that asylum applicants demonstrate that the governments in their home countries are either responsible for the persecution, or unable or unwilling to curtail the actions of non-governmental actors.³⁷

Applicants who apply for asylum are also assumed to be applying for withholding of removal.³⁸ The requirements for establishing eligibility for withholding of removal under the INA are largely comparable to the prerequisites for asylum.³⁹ There are, however, several differences.⁴⁰ Withholding of removal implements the government's non-refoulement obligation by requiring that the government does not deport eligible applicants to the countries from which they fear harm.⁴¹ While withholding of removal prohibits repatriation to the persecuting country, it does not provide the applicant with an opportunity to become a legal permanent resident.⁴² Asylum, by contrast, does provide such adjustment benefits, and for that reason it is discretionary; the Attorney General does not have to provide applicants with asylum relief even if they demonstrate eligibility.⁴³

The United States is also a signatory to the Convention Against Torture ("CAT").⁴⁴ In 1999, the Attorney General

³⁴ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

³⁵ 8 U.S.C. § 1158(b)(1)(A) (2012).

³⁶ *Id.* § 1101(a)(42)(A).

³⁷ *Id.*; see also *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732–33 (8th Cir. 2013).

³⁸ See 8 U.S.C. § 1231(b)(3)(A).

³⁹ See *id.*; *id.* § 1101(a)(42)(A); 8 C.F.R. §§ 1208.13, 1208.16(a)–(b) (2014).

⁴⁰ For example, applicants are eligible for asylum if they demonstrate a well-founded fear of persecution, while withholding of removal requires that applicants demonstrate a clear probability of persecution. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32, 450 (1987); *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

⁴¹ 8 U.S.C. § 1231(b)(3)(A); *Castellano-Chacon v. INS*, 341 F.3d 533, 544–45 (6th Cir. 2003). Several statutory exceptions can preclude a grant of withholding of removal, but the ultimate determination is not a matter of discretion. 8 U.S.C. § 1231(b)(3)(B).

⁴² *Castellano-Chacon*, 341 F.3d at 545.

⁴³ 8 U.S.C. § 1159(b); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

⁴⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 195 (Dec. 10, 1984).

promulgated regulations to implement CAT.⁴⁵ The regulations prohibit the government from returning applicants to their home countries if the applicants demonstrate that perpetrators are more likely than not to torture them.⁴⁶ Unlike asylum and withholding of removal under the INA, the regulations implementing CAT do not require applicants to establish that they will be tortured on account of race, religion, or any of the other protected grounds.⁴⁷

C. The Credible Fear Interview

To ensure compliance with the United States' non-refoulement obligations, the expedited removal provisions of the INA and immigration regulations prohibit the government from summarily deporting a person who demonstrates a credible fear of persecution or torture. Specifically, the INA provides that an "immigration officer" should not order an alien removed "without further hearing or review" when "the alien indicates either an intention to apply for asylum . . . or a fear of persecution."⁴⁸ In many instances, the onus is on the immigration officer to ask the questions necessary to discern whether the alien may, in fact, have such a fear. Many have criticized this aspect of the process, noting that enforcement agents do not always ask the questions needed to ascertain whether a fear of harm exists, and, in some instances, agents proactively convince aliens to agree to removal even after they express a fear of harm.⁴⁹

If an individual otherwise subject to expedited removal asks to apply for asylum or expresses a fear of being persecuted, that individual is then transferred to U.S. Immigration and Customs Enforcement ("ICE")—a component of DHS—which detains the alien until the credible fear interview. The law provides that an alien must be detained pending the credible fear interview.⁵⁰ The interview is conducted by one of the asylum officers in U.S. Citizenship and Immigration Services ("USCIS")—also a

⁴⁵ 8 C.F.R. §§ 1208.16(c), 1208.18 (2014); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(b), 112 Stat. 2681-821, 2681-822 (directing the agency to issue regulations to implement CAT).

⁴⁶ 8 C.F.R. § 1208.16(c)(2).

⁴⁷ *See id.*; *see also* Lopez de Hincapie v. Gonzales, 494 F.3d 213, 220 (1st Cir. 2007).

⁴⁸ 8 U.S.C. § 1225(b)(1)(A)(i); *see also* 8 C.F.R. § 235.3(b)(4) (referring to fears of "persecution or torture").

⁴⁹ *See, e.g.*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS 50-51 (2005) [hereinafter 1 USCIRF 2005 REPORT] (observing instances in Houston where agents pressured migrants to retract their stated fear).

⁵⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

component of DHS.⁵¹ The officers in USCIS's Asylum Office must assess whether the transferred individual has a "credible fear of persecution."⁵² The transferred individual demonstrates the requisite fear if the asylum officer finds "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."⁵³ The "significant possibility" language was meant to serve as a compromise standard. The original House version mandated a "substantial likelihood" that the alien could establish asylum eligibility, while the original Senate version merely required the asylum officer to determine whether the asylum claim was "manifestly unfounded."⁵⁴ Changes to USCIS's credible fear lesson plan in February 2014, however, have led some to question whether the standard will become more stringent.⁵⁵

The time dedicated to these credible fear interviews demonstrates why it could not possibly be a final determination—and why the credible fear threshold is necessarily low.⁵⁶ Government officials report that, on average, asylum officers interview claimants for about twenty minutes before making a credible fear determination.⁵⁷ The viability of many asylum claims takes much longer to tease out. Aside from the substantive information asylum officers must discern, twenty minutes is hardly enough time to truly assess the credibility of the claim itself—a task that is incredibly challenging for adjudicators even when there is a full hearing on the merits.⁵⁸ Accordingly, as often noted, the credible fear interview is merely

⁵¹ *Id.* § 1225(b)(1)(A)(ii), (b)(1)(B).

⁵² *Id.* § 1225(b)(1)(B)(ii).

⁵³ *Id.* § 1225(b)(1)(B)(v).

⁵⁴ 142 CONG. REC. 25,374 (1996) (statement of Sen. Orrin Hatch).

⁵⁵ Memorandum from John Lafferty, Asylum Div., U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., to Asylum Office Dirs., et al. (Feb. 28, 2014), available at [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/Memorandum-ReleaseofUpdatedADOTCLessonPlan.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Memorandum-ReleaseofUpdatedADOTCLessonPlan.pdf); see also SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 4 (2014).

⁵⁶ *But see Asylum Surge Hearing*, *supra* note 5, at 166 (statement of Leslie E. Vélez, Senior Protection Officer, U.N. High Commissioner for Refugees) (contending that the credible fear threshold is too harsh).

⁵⁷ *Id.* at 189 (statement of Lori Scialabba, Deputy Director, U.S. Citizenship and Immigration Services).

⁵⁸ See generally Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 196 (2008).

a screening device, meant to capture all claims that could reasonably be viable.⁵⁹

D. Credible Fear Determinations and Detention

If an asylum officer determines that a claimant does not have a credible fear of persecution, the claimant is immediately subject to removal.⁶⁰ Although the claimant is not entitled to a full hearing before an immigration judge, he or she can request that an immigration judge review the asylum officer's determination that no credible fear of persecution has been established; the law requires the immigration judge to review the denial within seven days.⁶¹ Conversely, if the asylum officer determines that the claimant established a credible fear of persecution or torture, that individual is placed in formal removal proceedings before an immigration judge, where he or she will have an opportunity to apply for asylum, statutory withholding of removal, and protection under the regulations implementing CAT.⁶²

The immigration courts lack the resources to timely adjudicate all the cases on their dockets. There are about 260 immigration judges spread throughout the immigration courts;⁶³ they review nearly 300,000 immigration matters annually.⁶⁴ As a result, individuals found to have a credible fear of persecution may have to wait years before an immigration judge rules on the merits of their claims.⁶⁵

The long waiting period makes the issue of detention particularly consequential. The law is quite clear that DHS must detain apprehended individuals prior to the credible fear interview.⁶⁶ The time lapse between apprehension and the credible fear interview, however, is typically only a matter of

⁵⁹ See, e.g., Thomas J. White Ctr. on Law & Gov't, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 126-27 (2001); *Asylum Surge Hearing*, *supra* note 5, at 27 (statement of Lori Scialabba, Deputy Director, U.S. Citizenship and Immigration Services).

⁶⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2012).

⁶¹ *Id.* § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1208.30(g) (2014).

⁶² 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.6(a)(1)(ii).

⁶³ *Office of the Chief Immigration Judge*, U.S. DEPARTMENT OF JUSTICE, <http://www.justice.gov/eoir/ocijinfo.htm> (last updated May 2014).

⁶⁴ OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICAL YEARBOOK, at A2 fig.1 (2014); see also *id.* at W1 fig.34 (noting 350,330 pending cases in immigration courts at the end of FY 2013).

⁶⁵ *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRACIMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated June 2014).

⁶⁶ 8 C.F.R. § 235.3(b)(4)(ii).

days or weeks. If an asylum officer—or an immigration judge if the claimant requests further review—finds that the claimant has established a credible fear of persecution, immigration law prescribes certain circumstances that permit ICE to release the individual from custody pending the formal removal proceedings in immigration court. The mechanisms for releasing such persons are based on whether the individual is classified as an “arriving alien.”

1. Parole for Arriving Aliens

Parole is an administrative measure ICE can use to authorize the temporary release of certain detained aliens. DHS’s parole determinations are not subject to review in immigration court.⁶⁷ Additionally, in the credible fear context, DHS’s parole authority is limited to those considered “arriving aliens” because they were apprehended at a port of entry.⁶⁸

In certain instances, DHS may parole an arriving alien who establishes a credible fear of persecution. Immigration regulations prescribe that parole may be justified for “urgent humanitarian reasons or significant public benefit, provided the aliens present neither a security risk nor a risk of absconding.”⁶⁹ Within this framework, the regulations provide five categories of aliens who may be eligible for parole. These five categories are aliens with serious medical conditions, women who are pregnant, select juveniles, witnesses in certain proceedings, and aliens “whose continued detention is not in the public interest.”⁷⁰

In 2009, ICE Assistant Secretary John Morton issued a policy directive to provide guidance to ICE’s “Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider the parole for arriving aliens processed under the expedited removal provisions” of the INA (“Morton Memo” or “Directive”).⁷¹ The Directive sought to clarify when an alien can be paroled under the fifth category of the regulation—that is, when an alien’s “continued detention is not

⁶⁷ See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-01, 48,879 (Aug. 5, 2004) (noting immigration judges’ limited “review of custody determinations”).

⁶⁸ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., ICE POLICY DIRECTIVE NO. 11002.1: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶¶ 1–5 (2009) [hereinafter MORTON MEMO].

⁶⁹ 8 C.F.R. § 212.5(b) (internal quotation omitted); see also *id.* § 235.3(c) (authorizing parole for aliens placed in removal proceedings after a positive credible fear finding in accordance with the decisional framework of section 212.5(b)). *But see* 8 C.F.R. § 235.3(b)(4)(ii) (limiting parole eligibility to medical necessity and furthering a “legitimate law enforcement objective”).

⁷⁰ 8 C.F.R. § 212.5(b)(1)–(5).

⁷¹ MORTON MEMO, *supra* note 68, ¶ 1.

in the public interest.”⁷² Regarding this fifth category, the Directive provides that aliens “should be” paroled if “the alien’s identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.”⁷³ By interpreting its parole authority broadly, the Morton Memo expanded the circumstances under which parole is available to arriving aliens who establish a credible fear of persecution or torture.⁷⁴

2. Release for Aliens Not Apprehended at a Port of Entry

If authorities apprehend an alien in the interior of the United States but the alien establishes a credible fear of persecution, DHS is authorized to release the individual during the pendency of the removal proceeding.⁷⁵ DHS may, however, choose to detain the alien or premise release on a bond. Unlike detention decisions for arriving aliens, DHS’s detention determinations for aliens who are not considered “arriving” are subject to review by an immigration judge.⁷⁶

E. Credible Fear Statistics

Table 1 provides data for credible fear claims adjudicated by USCIS’s Asylum Office from FY 1997 through FY 2013:

⁷² *Id.* ¶ 4.3.

⁷³ *Id.* ¶ 8.3.

⁷⁴ *Cf.* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., ICE POLICY DIRECTIVE NO. 7-1.0: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶ 6 (2007).

⁷⁵ *X-K-*, 23 I. & N. Dec. 731, 731 (B.I.A. 2005); *see also* *D-J-*, 23 I. & N. Dec. 572, 575–76 (A.G. 2003).

⁷⁶ *See X-K-*, 23 I. & N. Dec. at 731–36; *see also* 8 C.F.R. § 1003.19(h)(2)(i) (2014) (providing exceptions to immigration judges’ authority to review custody determinations).

Table 1: Percentage of Claims Where USCIS Finds a Credible Fear⁷⁷

Credible Fear ("CF") Cases	Referrals from ICE or CBP	Total Completed Cases	Completed Cases: CF Found	Completed Cases: CF Not Found	Completed Cases: Closed	% of All Referred Cases Where CF Found
FY 97	1438	1206	922	256	28	76.45%
FY 98	3427	3304	2747	125	432	83.14%
FY 99	6690	6463	5762	144	557	89.14%
FY 00	10,315	9971	9285	150	536	93.12%
FY 01	13,140	13,689	12,932	119	638	94.47%
FY 02	10,042	9961	9179	84	698	92.15%
FY 03	6447	6357	5715	45	597	89.90%
FY 04	7917	7754	7282	32	440	93.91%
FY 05	9465	9581	8469	144	968	88.39%
FY 06	5338	5241	3320	584	1337	63.35%
FY 07	5252	5286	3182	1062	1042	60.20%
FY 08	4995	4828	3097	816	915	64.15%
FY 09	5368	5222	3411	1004	807	65.32%
FY 10	8959	8777	6293	1404	1080	71.70%
FY 11	11,217	11,529	9423	1054	1052	81.73%
FY 12	13,880	13,579	10,838	1187	1554	79.81%
FY 13	36,035	36,174	30,393	2587	3194	84.02%

The figures show that between FY 1997 and FY 2012, the number of individuals claiming to fear persecution or torture fluctuated from 1438 to 13,880. In FY 2013, by contrast, claimants spiked significantly; more than 36,000 expressed (or were found to harbor) a fear of persecution or torture.⁷⁸ The data available for FY 2014 indicates a comparably high number. Through the first six months of FY 2014, DHS referred more than 20,000 claimants to the Asylum Office for credible fear interviews.⁷⁹

⁷⁷ This Article obtained the data for Table 1 from *Asylum Surge Hearing*, *supra* note 5, at 227.

⁷⁸ This figure does not include individuals who may have claimed to fear persecution or torture but were not provided an interview by the initial immigration officer. See HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER 11–12, 30–31 (2014) [hereinafter HRF, HOW TO PROTECT REFUGEES].

⁷⁹ USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

Aside from the number of claims themselves, the figures also indicate the percentage of credible fear interviews that led asylum officers to find a credible fear of persecution or torture. The data can roughly be broken into three distinct time periods. From FY 1998 through FY 2005, between 83% and 94% of claimants received favorable credible fear determinations. A noticeable drop occurred in FY 2006, where the percentage dipped to the sixties and stayed in that range for several years. FY 2010 marked the transition into the third time period; since that time, the Asylum Office determined that claimants had a credible fear in 79%–84% of cases. The preliminary data for the first half of FY 2014 indicates an 80% grant rate by the Asylum Office.⁸⁰

The percentage of individuals found to have a credible fear of persecution is even higher when looking solely at those cases adjudicated on the merits. After claiming a credible fear of persecution, some individuals withdraw their requests for asylum before an asylum officer has an opportunity to adjudicate their claims. In FY 2013, for example, while USCIS found that 84% of individuals claiming to fear persecution or torture did meet the credible fear standard, asylum officers found the credible fear standard was met in 92% of cases assessed on the merits.⁸¹ When excluding administratively closed cases in the first half of FY 2014, the grant rate jumps from 80% to 87%.⁸²

The percentage of individuals subject to expedited removal who claim to fear persecution or torture has also increased. According to DHS, from FY 2000 through FY 2009, between 4% and 6% of individuals subject to expedited removal expressed a fear of persecution or torture if returned to their home country.⁸³ By FY 2013, that figure rose to 15%.⁸⁴

II. UNACCOMPANIED MINORS

A. The Law Regarding UACs

Prior to 2003, immigration officials made little distinction between minors and adults when apprehending and detaining those who entered the country without authorization.⁸⁵ While

⁸⁰ *Id.* (indicating a credible fear of persecution was established in 16,467 of the 20,488 decisions made).

⁸¹ *Asylum Surge Hearing*, *supra* note 5, at 20.

⁸² USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

⁸³ *Asylum Surge Hearing*, *supra* note 5, at 35.

⁸⁴ *Id.*

⁸⁵ *See generally* 6 U.S.C. § 279(g)(2) (2012) (defining an “unaccompanied alien child”).

UACs are still placed into removal proceedings, the Homeland Security Act of 2002 transferred the shelter and placement of unaccompanied minors to the Office of Refugee Resettlement (“ORR”), which is a component of DHS.⁸⁶ Further protections for unaccompanied minors were created in 2008 when Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”).⁸⁷ Absent “exceptional circumstances,” the TVPRA requires agencies holding UACs in custody to transfer them to ORR within seventy-two hours.⁸⁸ For contiguous countries, DHS must determine, within forty-eight hours, whether the minor is a victim of human trafficking or otherwise establishes a credible fear of persecution.⁸⁹ For non-contiguous countries—such as those of the Northern Triangle—TVPRA requires several agencies to coordinate best practices for repatriation.⁹⁰

TVPRA also altered determinations regarding unaccompanied minors’ custody and eligibility for relief from removal. Regarding custody, TVPRA provides that “an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”⁹¹ As a result, while UACs’ immigration proceedings are pending, federal agencies typically try to place them with a relative or other sponsor.⁹² According to the Migration Policy Institute, “[n]inety percent of these children are released by ORR into the care of a parent, relative, or family friend while they await adjudication of their immigration cases, with foster care the placement for the remainder.”⁹³ For relief from removal, TVPRA provides additional opportunities, such as Special Immigrant Juvenile Status for minors who have been abused, abandoned, or neglected.⁹⁴ Like all unauthorized immigrants, unaccompanied

⁸⁶ *Id.* § 279(b)(1); Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202–03.

⁸⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

⁸⁸ 8 U.S.C. § 1232(b)(3) (2012).

⁸⁹ *Id.* § 1232(a)(4).

⁹⁰ *Id.* § 1232(a)(1), (c)(5)–(6).

⁹¹ *Id.* § 1232(c)(2).

⁹² *See id.* (noting the law’s preference for “a suitable family member . . . to provide care”).

⁹³ Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POLY INST. (June 13, 2014), <http://migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

⁹⁴ 8 U.S.C. § 1232(d); *see id.* § 1101(a)(27)(J) (explaining the requirements of Special Immigrant Juvenile Status); *see also id.* § 1101(a)(15)(J), (U) (discussing eligibility for J and U visas that certain UACs may be able to obtain).

minors who meet the relevant criteria may also be eligible for asylum.⁹⁵

B. UAC Statistical Information

The statistics bear out the extent of the surge in UAC border crossings. Along the southwestern border in FY 2013, border patrol apprehended 31,491 unaccompanied minors.⁹⁶ In the first three quarters of FY 2014, that number spiked to 62,998.⁹⁷ The general surge in border crossings is reflective of the UAC apprehension rate for children migrating from the Northern Triangle:

Table 2: UAC Apprehension Rate for Northern Triangle Countries⁹⁸

Country	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014 (through August 31)
El Salvador	1221	1190	1394	3314	5990	14,591
Guatemala	1115	1517	1565	3835	8068	15,733
Honduras	968	1017	974	2997	6747	17,582
Total	9026	9170	8721	10,146	20,805	47,906

The repatriation rate for minors from the Northern Triangle decreased from 2008 through 2013. Whereas DHS repatriated 2311 minors from the Northern Triangle in 2008, only 469 minors were repatriated in 2013.⁹⁹

III. POTENTIAL CAUSES OF THE SURGE

Most of the causes proffered to explain the surge fall into one of two categories: country conditions in the Northern Triangle and migrants' perception that changes to immigration law and policy favorably impact their chances to remain in the United States permanently or temporarily. Part IV will review both of these potential causes before discussing whether the prospect of immigration reform, border security concerns, and instances of

⁹⁵ See generally *id.* § 1158(a)–(b).

⁹⁶ *Southwest Border Unaccompanied Alien Children*, *supra* note 10 (providing statistics through June 30, 2014).

⁹⁷ *Id.*

⁹⁸ For the source of the data in Table 2, see *id.*

⁹⁹ Chishti & Hipsman, *supra* note 93; see also Robles, *supra* note 11 (noting the decrease in removals of children).

fraud could impact the migratory calculus. The distinct potential causes discussed independently in Part III will be assessed holistically in Part IV.

A. Regional Instability in the Northern Triangle

Looking at the countries of origin of those migrating to the United States during the surges, one finds at the top El Salvador, Honduras, and Guatemala. Many politicians, advocacy groups, and others have proffered that the regional instability in these countries could be a cause of the increased migration flows in the past few years. Advocacy groups have argued that “persecution, violence and war[] are the drivers of flight” and that many reports “have documented the increased violence in Central America.”¹⁰⁰ Others have argued that the “resulting uptick in asylum claims” directly stems from “an increase in violence in Mexico and Central America.”¹⁰¹ Representative Lofgren opined that the surge could be “a brewing refugee crisis in the Western Hemisphere.”¹⁰² Comparable sentiments have been expressed about UACs.¹⁰³

The limited studies that assessed the situation in Central America have indeed found a dire situation in many Central American countries—particularly El Salvador, Honduras, and Guatemala, which comprise the Northern Triangle.¹⁰⁴ In 2006, there were more than 14,000 murders recorded in Central American countries.¹⁰⁵ To put that number in perspective, a World Bank study noted that Spain—with a population comparable to all Central American countries combined—only recorded 336 murders.¹⁰⁶ The countries of the Northern Triangle had some of the highest murder rates. El Salvador led the list in 2006 with 64.4 murders for every 100,000 members of the population.¹⁰⁷

¹⁰⁰ *Asylum Surge Hearing*, *supra* note 5, at 94.

¹⁰¹ *Id.* at 156; *see also* Robles, *supra* note 11 (recounting the administration’s belief that it “seems to be quite clear that what is driving this is what’s happening in their home countries”).

¹⁰² *Asylum Surge Hearing*, *supra* note 5, at 5.

¹⁰³ *See UAC Surge Hearing*, *supra* note 12, at 46 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops).

¹⁰⁴ *A Shared Responsibility—Citizen Security and Counter-Narcotics Initiatives in the Americas: Hearing Before the Subcomm. on the W. Hemisphere, Peace Corps & Global Narcotics Affairs of the S. Comm. on Foreign Relations*, 112th Cong. 57 (2011) (statement of Cynthia J. Arnson, Director, Woodrow Wilson International Center for Scholars Latin America Program).

¹⁰⁵ WORLD BANK, CRIME AND VIOLENCE IN CENTRAL AMERICA: A DEVELOPMENT CHALLENGE, at ii (2011) [hereinafter WORLD BANK, DEVELOPMENT CHALLENGE].

¹⁰⁶ *Id.*

¹⁰⁷ U.N. Office on Drug & Crime, *Intentional Homicide Count and Rate per 100,000 Population, by Country/Territory (2000-2012)*, UNODC, <http://www.unodc.org/documents/>

There are many causes of these high murder rates as well as the high rates of crime in general. Chief among them are drug trafficking and violence associated with gang activity.¹⁰⁸ While drug trafficking is a central cause of violence in all three countries, a larger percentage of the violence in El Salvador can be attributed to gangs.¹⁰⁹ Many of the gangs in Central America have their roots in the United States. The Central American armed conflicts of the 1980s caused hundreds of thousands of Central Americans to flee to the United States.¹¹⁰ Economic marginalization led a small minority of these migrants to join or form gangs.¹¹¹ When some of these individuals were deported back to their home countries in the 1990s, they continued their criminal activities and recruited others to join.¹¹² As a result, gangs in certain Northern Triangle countries “control large neighborhoods in the most important cities.”¹¹³

Additional—and intertwined—causes of the rise in violence in the Northern Triangle include the availability of arms and weak states that are unable to provide a security apparatus and judicial process to sufficiently remedy perceived injustice.¹¹⁴ The availability of arms is a product of the regional conflicts of the 1980s, which created a culture of violence.¹¹⁵ Central America is “awash in weapons,” with an estimated 4.5 million firearms throughout the region in 2007.¹¹⁶ The weakness of the governments in the Northern Triangle exacerbates the level of

gsh/data/GSH2013_Homicide_count_and_rate.xlsx (last visited Sept. 2, 2014) [hereinafter UNODC, Homicide Stats]. *But cf.* WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 1 (noting that the murder rate in El Salvador in 2006 was 58 per 100,000 inhabitants).

¹⁰⁸ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105; *see also* ANDREW SELEE ET AL., WILSON CTR. & MIGRATION POLICY CTR., CRIME AND VIOLENCE IN MEXICO AND CENTRAL AMERICA: AN EVOLVING BUT INCOMPLETE US POLICY RESPONSE 1 (2013) (noting that organized crime gives cover to “unorganized crime”).

¹⁰⁹ Joaquín Villalobos, *Violence in Central America*, in RETHINKING THE “WAR ON DRUGS” THROUGH THE US-MEXICO PRISM 69 (Ernesto Zedillo & Haynie Wheeler eds., 2012); *see also* SELEE ET AL., *supra* note 108, at 4 (reviewing evidence that establishes a connection between transshipment drug routes and homicides). Others have cautioned that ambiguities in data collection and classification make it hard to state definitively the percentage of crime that stems from gang activity. WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 15–16.

¹¹⁰ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 15.

¹¹¹ *Id.*

¹¹² *Id.*; *see also* U.N. OFFICE ON DRUGS & CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN 27 (2012) (discussing the origins of Mara Salvatrucha in the 1980s).

¹¹³ Villalobos, *supra* note 109, at 69.

¹¹⁴ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at ii–iii; SELEE ET AL., *supra* note 108, at 1.

¹¹⁵ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at iii.

¹¹⁶ *Id.*

violence because it permits criminals to act with impunity without significant fear of punishment.¹¹⁷

Quite distinct from the causes of the turmoil in the Northern Triangle, however, is the question of whether these circumstances are a cause of the recent spike in UAC border crossings and claims of persecution and torture among those subject to expedited removal. A potentially useful means to gauge causation is to assess whether a spike in the homicide rate occurred around the time the credible fear claims and UAC border crossings began to increase. As noted above, in 2006, El Salvador's homicide rate was 64.4 for every 100,000 residents. The murder rate in Guatemala was 45.3, and in Honduras it was 44.3. In 2010, the murder rate in Guatemala had fallen slightly to 41.6 homicides per 100,000 inhabitants. In El Salvador, the rate held steady at 64.1, while in Honduras the murder rate spiked to nearly 82, making Honduras's murder rate "the highest in the world."¹¹⁸ In 2012, as the credible fear claims and UAC border crossings began to escalate, the murder rates in Honduras further climbed to 90.4, while the rate in Guatemala held fairly steady at 39.9, and the homicide rate in El Salvador fell significantly to 41.2; the *reported* reduction in the homicide rate in El Salvador correlates with an organized gang truce in early 2012.¹¹⁹

¹¹⁷ See WORLD BANK, CRIME AND VIOLENCE IN CENTRAL AMERICA 90 (2010) [hereinafter WORLD BANK, CRIME AND VIOLENCE] (illustrating stagnant or decreased trust in the justice system and police force in El Salvador, Honduras, and Guatemala from 2004 to 2008); see also Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 163 (2010) (noting the low rate of prosecution against murderers when the victims are female).

¹¹⁸ Villalobos, *supra* note 109, at 64 (providing a murder rate that differs slightly from UNODC's data); see also UNODC, Homicide Stats, *supra* note 107.

¹¹⁹ U.N. OFFICE ON DRUG & CRIME, GLOBAL STUDY ON HOMICIDE, at 45–46, 126, U.N. Sales No. 14.IV.1 (2013) [hereinafter UNODC, 2013 GLOBAL STUDY], available at http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf; COMM. ON MIGRATION OF THE U.S. CONFERENCE OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 3 (2013).

Table 3: Homicide Rates in the Northern Triangle (per 100,000 Inhabitants)¹²⁰

Annual Homicide Rates	2006	2007	2008	2009	2010	2011	2012
Honduras	44.3	50.0	60.8	70.7	81.8	91.4	90.4
Guatemala	45.3	43.4	46.1	46.5	41.6	38.6	39.9
El Salvador	64.4	57.1	51.7	70.9	64.1	69.9	41.2

The increased murder rate in Honduras would seem to support the conclusion that an escalation in homicides could be representative of the general insecurity that provided an impetus for the surges. It would not appear that the same can be said for El Salvador, which actually has the highest number of people subject to expedited removal who claim to fear persecution or torture.¹²¹ Numbers, however, can be misleading, and there are a couple reasons to view the reported murder rate decline with a grain of salt. First, decisions to flee are not made in a macro-statistical bubble. The murder rates in El Salvador were very high in 2011 and prior years, and the decision to flee could be based on the confluence of what residents perceived over the course of the preceding years. Indeed, in surveys administered in 2012 and 2013 in El Salvador, nearly half the respondents did not believe the gang truce reduced crime.¹²² Nevertheless, the available data demonstrates substantially fewer Salvadorian credible fear referrals toward the end of 2010 and throughout 2011, even though the murder rate had been high for many years.¹²³

Second, and more importantly, the drop in recorded murder rates in El Salvador was at best temporary and at worst illusory. Officials in El Salvador have reported a rise in the murder rate

¹²⁰ The data for this table was obtained from UNODC, Homicide Stats, *supra* note 107.

¹²¹ See, e.g., USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

¹²² See UNODC, 2013 GLOBAL STUDY, *supra* note 119, at 46 (noting that 2012 and 2013 surveys indicate that only half the population believed the gang truce reduced crime).

¹²³ U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2011 (2011) [hereinafter USCIS 2011 CREDIBLE FEAR STATISTICS], available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/CredibleFearandReasonableFearWorkload.pdf> (reporting that from October 2010 through 2011, between 100 and 200 Salvadorians were usually referred per month).

since May 2013, which accelerated in 2014.¹²⁴ In December 2013, authorities discovered secret mass graves.¹²⁵ These graves, along with rises in disappearances during the time of the purported truce,¹²⁶ bring into question whether the gang truce significantly reduced the murder rate at any point. Based on this data, it appears that the murder rates now comport to the recorded averages in 2011 and the years immediately preceding. In this respect, the murder rate in El Salvador is not trending in a manner that is substantially distinct from Honduras and Guatemala. Moreover, the reported homicides in Guatemala are under-representative of the actual figures.¹²⁷

Homicide victims, however, are not spread evenly throughout the Northern Triangle countries. More refined data compilations on murder rates indicate that certain pockets of the Northern Triangle contain a disproportionate rate of murders per capita;¹²⁸ for example, in Choluteca, Honduras, the murder rate per 100,000 inhabitants in 2010 was 21.8, while the rate in Atlántida, Honduras during the same year was 131.3.¹²⁹ Studies have indeed shown that UACs are more likely to come from regions within their countries where the murder rates are particularly high.¹³⁰

¹²⁴ See Nelson Renteria, *El Salvador Murders Surge as Gang Truce Fades*, REUTERS, Apr. 4, 2014, available at <http://uk.reuters.com/article/2014/04/04/uk-elsalvador-crime-idUKBREA3302S20140404>; Michael Lohmuller, *El Salvador Murders Fall Slightly for 2013, but Rising Again*, INSIGHT CRIME (Jan. 14, 2014), <http://www.insightcrime.org/news-briefs/el-salvador-murders-fall-slightly-in-2013-but-rising-again>; Alexandra Alper et al., *El Salvador Gang Truce Wobbles as Violent Murders Mount*, REUTERS, July 5, 2013, available at <http://www.reuters.com/article/2013/07/06/us-elsalvador-violence-idUSBRE96501D20130706>.

¹²⁵ Miriam Wells, *El Salvador Mass Graves Put Pressure on Gang Truce*, INSIGHT CRIME (Dec. 11, 2013), <http://www.insightcrime.org/news-briefs/el-salvador-mass-graves-put-pressure-on-gang-truce>.

¹²⁶ BUREAU OF DIPLOMATIC SEC., U.S. DEP'T OF STATE, EL SALVADOR 2014 CRIME AND SAFETY REPORT 1–2 (2014), available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15771>; see Hannah Stone, *The Murky Question of Disappearances in El Salvador: An El Faro Investigation*, INSIGHT CRIME (Jan. 25, 2013), <https://www.osac.gov/pages/ContentReportPDF.aspx?cid=15771>.

¹²⁷ See BUREAU OF DIPLOMATIC SEC., U.S. DEP'T OF STATE, GUATEMALA 2013 CRIME AND SAFETY REPORT 1 (2013), available at <https://www.osac.gov/pages/ContentReportPDF.aspx?cid=13878> (“In the case of homicides, the [police do] not count homicides if the victim left the crime scene alive and subsequently died as a result of injuries.”).

¹²⁸ INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, FORCED DISPLACEMENT AND PROTECTION NEEDS PRODUCED BY NEW FORMS OF VIOLENCE AND CRIMINALITY IN CENTRAL AMERICA 19–20, 22–23, 25–26 (2012), available at <http://www.nanseninitiative.org/sites/default/files/UNHCR%20Research%20Paper%20May%202012.pdf>.

¹²⁹ *Id.* at 25.

¹³⁰ See Ana Gonzalez-Barrera et al., *DHS: Violence, Poverty, Is Driving Children to Flee Central America to U.S.*, PEW RES. CENTER (July 1, 2014), <http://www.pewresearch.org/fact-tank/2014/07/01/dhs-violence-poverty-is-driving-children-to-flee-central-america-to-u-s/>; see also INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS,

A final potentially relevant issue to assessing the significance of murder rates is whether there are any correlations between short-term changes in the homicide rate and subsequent fluctuations in the rate of claimants. The homicide rate in El Salvador officially began to increase in May 2013.¹³¹ According to reports on the monthly credible fear referral rate of Salvadorians in 2013, there were 749 in March, 947 in April, 1000 in May, 1419 in June, and, in October, the referral rate remained high at 1552.¹³² Since the recorded murder rate continued to increase in June and the credible fear referral rate spiked in June as well, the data does demonstrate a correlation between reported homicides and credible fear referrals. Nevertheless, a confluence of additional factors might have influenced the numbers; further study is needed to ascertain more precisely the significance of the month-to-month credible fear referral trends, as well as the monthly UAC data.¹³³

Insecurity is not simply a product of the murder rate. It could also be based on overall crime rates and a general belief that the state cannot adequately provide protection against criminal elements. Tracking the rates of other violent crimes, however, is hard to accurately accomplish. The available data for violent crimes, such as assault, robbery, and sexual violence, are often incomplete, which makes it difficult to track trends over multiple years.¹³⁴ Additionally, countries and specific localities may diverge in how they classify such crimes.¹³⁵ Further compounding the difficulties, there is extreme underreporting of

supra note 128, at 15–26; Dara Lind, *These Two Maps Show the Violence Driving Central American Children to the US*, VOX (July 1, 2014), <http://www.vox.com/2014/7/1/5861908/child-migrants-are-fleeing-the-most-dangerous-places-on-earth-in-two>.

¹³¹ Lohmuller, *supra* note 124.

¹³² U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2013 (2013), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/July%202013/FY13-CFandRF-stats2013-06-30.pdf> [hereinafter USCIS 2013 CREDIBLE FEAR STATISTICS]; U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2014 (2014), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf>. As of October 2014, USCIS's FY 2013 Credible Fear Workload Summary does not include monthly data from July 2013 to September 2013.

¹³³ For example, the number of credible fear referrals was lower overall in FY 2012, but the month-to-month figures for Salvadorians also show a substantial jump from May 2012 to June 2012. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2012 (2012), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Credible-Reasonable-workloadsFY12.pdf>.

¹³⁴ *See, e.g.*, U.N. Office on Drug & Crime, Robbery at the National Level, Number of Police-Recorded Offences (2013), http://www.unodc.org/documents/data-and-analysis/statistics/crime/CTS2013_Robbery.xls [hereinafter UNODC, Robbery Statistics] (providing no data on the rate of robbery in Honduras from 2003 through 2010).

¹³⁵ *See* WORLD BANK, CRIME AND VIOLENCE, *supra* note 117, at 5.

these crimes because, among other reasons, perceived police ineptitude negates the motivation to seek redress.¹³⁶ Consequently—and paradoxically—in some instances, increased crime rates could be the result of heightened efforts by the State to take the reporting seriously (and perception by citizens that reporting will actually lead to a proactive response).¹³⁷ The data that is available does not demonstrate an overall increase or decrease in crime rates that could confidently account for the impetus to flee and seek refuge in the United States.¹³⁸

Aside from the specific incidents of homicide and other crimes, another potentially relevant cause of migration could be how secure individuals feel in their home countries. The premise here is that widespread perceptions of insecurity could fuel migration even for those who have not been personally victimized. Professors Hiskey, Malone, and Orcés have studied the link between migration and perceptions of insecurity in the Northern Triangle.¹³⁹ The results of their surveys demonstrate that even as rates of violence increased over the last decade within the Northern Triangle, respondents' perception of insecurity actually decreased.¹⁴⁰ The one exception was El

¹³⁶ *Id.* at 10 (finding that, in 2008, between 58% and 73% of the victims of a crime in El Salvador, Honduras, and Guatemala did not report the incident); INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 15 (“[V]ictims interviewed during the development of this study state that they do not denounce their cases before the corresponding bodies for fear of being publicly identified or of being victimized again by [organized crime] . . .”).

¹³⁷ See *UAC Surge Hearing*, *supra* note 12, at 46 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops) (“With the increased efforts by the Honduran government to stem communications from gang-leaders within prisons, there are reports of increased violence as gangs fragment and mid-level criminal operators compete for control.”).

¹³⁸ For the limited data that is available, there does not appear to be a noticeable increase in assault rates around the time when claims began to spike. In El Salvador, the rate of assaults per 100,000 inhabitants was 76.2 in 2005, and 67.1 in 2012. U.N. Office on Drug & Crime, *Assault at the National Level, Number of Police-Recorded Offences* (2013), http://www.unodc.org/documents/data-and-analysis/statistics/crime/CTS2013_Assault.xls. The data available for sexual assaults does depict an escalation in incidents in El Salvador and Guatemala (although the data for Guatemala only covers 2011 and 2012). U.N. Office on Drug & Crime, *Total Sexual Offences Against Children at the National Level, Number of Police Recorded Offences* (2013), https://www.unodc.org/documents/data-and-analysis/statistics/crime/CTS2013_SexualViolence.xls. For robberies, the rates increased until 2009 but subsequently declined. UNODC, *Robbery Statistics*, *supra* note 134. The robbery rates in Guatemala decreased from 2004 to 2009, but there is no data available subsequent to 2009. *Id.* Despite the lack of data UNODC was able to obtain, the World Bank noted in a 2010 report that “[a]necdotal accounts suggest that armed robbery has become increasingly common in Guatemala, El Salvador, and Honduras.” WORLD BANK, *CRIME AND VIOLENCE*, *supra* note 117, at 5, 8. If this were the case and the trend continued subsequent to the report, it would buttress the significance of country conditions as a basis for migrants to flee the Northern Triangle.

¹³⁹ See Jonathan Hiskey et al., *Violence and Migration in Central America*, AMERICASBAROMETER INSIGHTS, 2014, at 1.

¹⁴⁰ *Id.* at 2–3.

Salvador, where respondents' fear of crime remained constant.¹⁴¹ The authors proffer that "Central Americans may have become increasingly desensitized to high levels of crime, or made behavioral adjustments in their daily lives to avoid victimization, and thus are now less likely to feel unsafe in their neighborhoods."¹⁴²

Reports appear to corroborate the professors' desensitization suggestion because, in recent years, organized gangs in the Northern Triangle "have established themselves as an alternative, if not primary, authority in parts of the countries."¹⁴³ A study conducted by the Internacional Centre for the Human Rights of Migrants ("ICHRM") also lends support to the professors' suggestion that citizens in the Northern Triangle are not only altering their daily behavior, but rather that the organized crime syndicates in the Northern Triangle have caused significant internal displacement within the countries.¹⁴⁴ The ICHRM found that within the Northern Triangle, organized criminal enterprises are carving out territory to facilitate their illegal trades, leading to hot zones in the countries where murder, extortion, kidnapping, trafficking, and other crimes are particularly high.¹⁴⁵ As organized criminal enterprises accumulate more territory, citizens' options to relocate within the state diminish. The problem is particularly prominent in Honduras, which

offers very few options for internal forced displacement, since organized crime has appropriated a great quantity of territories in the country. *Maras* or organized gangs are mainly present in the capital cities . . . and the country's commercial capital[,] . . . while drug cartels operate in the east of the countries . . . and in some areas of the west and northwest . . .¹⁴⁶

Of course, migrating to the United States might be seen as more desirable than internal relocation. The potential benefits include family reunification and economic opportunity. Unsurprisingly, studies have shown that depressed economic opportunities and family reunification are also factors that drive migration from the Northern Triangle.¹⁴⁷ The economic outlook in

¹⁴¹ *Id.* at 3 (comparing responses from 2004 through 2012).

¹⁴² *Id.* at 3–4.

¹⁴³ *UAC Surge Hearing, supra* note 12, at 47 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops).

¹⁴⁴ INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 15.

¹⁴⁵ *Id.* at 16–26.

¹⁴⁶ *Id.* at 24.

¹⁴⁷ See U.N. High Comm'r for Refugees, *Children on the Run*, 16–17 (Mar. 12, 2014) [hereinafter UNHCR, *Children on the Run*].

Northern Triangle countries is indeed bleak.¹⁴⁸ While much of the economic turmoil is intertwined with high crime rates, some of the depressed economic conditions that cause individuals to migrate are attributable to general market forces. For example, Guatemalan migrants have been affected by the “demise in the coffee industry in recent years.”¹⁴⁹ Additionally, the global recession spawned by the U.S. financial crisis in 2008 significantly impacted the Salvadorian economy because a substantial percentage of the economy is dependent on remittances from the United States.¹⁵⁰

Surveys on national crime rates and overall perceptions of insecurity do not necessarily account for demographic factors such as age and gender. Violence in the Northern Triangle appears to disproportionately impact younger members of the population.¹⁵¹ The relevance of this disproportionate impact to UACs is intuitive; for credible fear claimants, migrants as a whole tend to be younger than the overall population.¹⁵² Young migrants have conveyed a growing Hobson’s choice because of criminals’ recruitment tactics. Reports indicate that children now face the realization that they have to join gangs or risk victimization because of gangs’ recruitment tactics, which makes the decision to flee their only viable option.¹⁵³ Over the last five years in parts of Honduras, for example, “the number of kids coming through the doors who are victims of violence has

¹⁴⁸ See *Child Poverty: A Priority Challenge*, CHALLENGES (U.N. Int’l Children’s Emergency Fund), May 2010, at 1, 7 (noting the extreme rates of child poverty in Northern Triangle countries); Stephanie Gosk et al., *Desperate Journey: Crime and Poverty Drive Honduran Kids to U.S.*, NBC NEWS (July 7, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/desperate-journey-crime-poverty-drive-honduran-kids-u-s-n150011> (reviewing malnourishment and schooling rates among Honduran children).

¹⁴⁹ COMM. ON MIGRATION OF THE U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 119, at 2.

¹⁵⁰ *Id.*; see Villalobos, *supra* note 109, at 69.

¹⁵¹ See Julie Turkewitz, *Fear Is Driving Young Men Across the U.S. Border*, ATLANTIC (June 20, 2014, 4:07 PM), <http://www.theatlantic.com/international/archive/2014/06/credible-fear-whats-driving-central-americans-across-the-us-border/373158/> (“[G]angs . . . feed on the money and manpower that youths provide, and pursue them with an almost-religious persistence.”).

¹⁵² See Alex Arnold et al., *Who Seeks to Exit? Security, Connections, and Happiness as Predictors of Migration Intentions in the Americas*, AMERICASBAROMETER INSIGHTS, 2011, at 1, 3 (noting that aging members of the population are less likely to “leave their homeland to move to another country”).

¹⁵³ See Turkewitz, *supra* note 151; Moni Basu, *Daniel’s Journey: How Thousands of Children Are Creating a Crisis in America*, CNN (June 19, 2014, 5:42 PM), <http://www.cnn.com/2014/06/13/us/immigration-undocumented-children-explainer/> (noting how “[g]ang members [have] infiltrated public schools” in El Salvador).

tripled,” and pediatricians have “had to become . . . expert[s] at repairing the damage bullets do to children.”¹⁵⁴

A study published by the United Nations in 2014 found that children from Northern Triangle countries have noted security concerns as a basis for fleeing with much greater frequency in recent years.¹⁵⁵ The study is based on interviews the U.N. conducted with children who fled Mexico and the Northern Triangle around the time of the surge. In a previous 2006 study, only 13% of children mentioned “international protection concerns” as a basis for migrating.¹⁵⁶ “International protection concerns” include “violence in society predominantly by armed criminal actors, and abuse in the home.”¹⁵⁷ In the interviews conducted between 2011 and 2013 for the 2014 study, 53% of children voiced comparable reasons for migrating.¹⁵⁸ The numbers were not spread evenly between the three Northern Triangle countries. Twenty percent of children from Guatemala mentioned violence as a basis for fleeing, while 43% from Honduras made similar claims and a staggering 69% of children from El Salvador indicated that violence formed a basis for fleeing.¹⁵⁹ A plurality of those interviewed stated that they had already experienced actual harm or the threat of harm from gangs or other criminals.¹⁶⁰ Boys were more likely to report violence generally while girls were more likely to report actual or threatened sexual violence.¹⁶¹ While the study documents rising security concerns, it also makes clear that family reunification and greater opportunities drive many children to migrate to the United States.¹⁶²

As a final point, regardless of whether depressed economic conditions, deteriorating security concerns, or domestic violence is responsible, the rate of asylum requests by individuals from Northern Triangle countries is also worth mentioning. The U.N. has calculated that since 2009, “Mexico, Panama, Nicaragua, Costa Rica and Belize documented a 435% increase in the

¹⁵⁴ Gosk et al., *supra* note 148; see Robles, *supra* note 11 (noting that the majority of children live in gang-controlled areas); see also James Bargent, *Honduras Extortion Gangs Undergoing Violent Leadership Crisis*, INSIGHT CRIME (June 3, 2014), <http://www.insightcrime.org/news-briefs/honduras-extortion-gangs-undergoing-violent-leadership-crisis> (noting that attempts to crack down on gang leaders in prison has led to the splintering of the organizational structure and increased violence).

¹⁵⁵ UNHCR, *Children on the Run*, *supra* note 147, at 24.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 25.

¹⁶⁰ *Id.* at 26.

¹⁶¹ *Id.* at 27.

¹⁶² *Id.* at 7–10.

number of asylum applications lodged by individuals from El Salvador, Honduras and Guatemala.”¹⁶³

On the whole, the numbers indisputably demonstrate a dire situation in the Northern Triangle. Crime rates are high, gangs and other criminal entities run rampant, economic opportunities are limited, and the governments have largely shown themselves incapable of curtailing the violence. Much of the data indicates that the conditions in the Northern Triangle have been grim for many years, while other data suggests that certain circumstances have worsened since the surge commenced.

B. Word of Mouth

A recurring basis asserted to explain the surges has been what can be referred to as the word of mouth effect. Individuals learn about actual or allegedly successful ways to enter the United States and mimic the pattern that has been successful. Recent reports concerning the migrant community from the frontlines of the southwestern border have provided firsthand accounts of how the word of mouth effect is fueling migration from the Northern Triangle.¹⁶⁴ One article reported that “[m]igrants have sent word back home they received a ‘permit’ to remain at least temporarily in the United States, feeding rumors along migrant routes and spurring others to embark on the long journey.”¹⁶⁵ Providing anecdotal support, a migrant explained, “I heard in Guatemala that people were caught by immigration, but then they let them go and gave them a permit.”¹⁶⁶ Representative Henry Cuellar, a Democrat who represents a Texas district that borders Mexico, explained that there is a “perception” among migrants “that if you step on American soil, they will give you a piece of paper, you go to the bus station and you can go anywhere in the United States. You’re free with that permiso.”¹⁶⁷ This

¹⁶³ *Id.* at 4.

¹⁶⁴ See, e.g., *Illegal Immigrant: Reports in Central America Encourage Trek North*, KRGV.COM (June 3, 2014), <http://www.krgv.com/news/illegal-immigrant-reports-in-central-america-encourage-trek-north/> (“[T]he message being disseminated in [Guatemala] is, ‘go to America with your child, you won’t be turned away.’”).

¹⁶⁵ Julia Preston, *Migrants Flow in South Texas, as Do Rumors*, N.Y. TIMES, June 17, 2014, at A1.

¹⁶⁶ *Id.*; see also Basu, *supra* note 153 (“[UACs] make no quarrels about getting caught.”).

¹⁶⁷ Preston, *supra* note 165; see also Lisa Riordan Seville & Hannah Rappleye, *Border Children Tell Their Stories: Why We Came to the US*, NBC NEWS (June 12, 2014), <http://www.nbcnews.com/news/investigations/border-children-tell-their-stories-why-we-came-us-n129646> (noting rumors of “lax enforcement”); Kirk Semple, *Surge in Child Migrants Reaches New York, Overwhelming Advocates*, N.Y. TIMES, June 18, 2014, at A19 (listing a cause of minors fleeing their home countries as “a perceived change in American policy that would favor child immigrants”).

perception can be seen by the fact that more and more migrants have stopped trying to evade Border Patrol agents; rather, they “run toward agents.”¹⁶⁸

The question, then, is what is fueling the word of mouth effect that has led people to believe that their chance to remain in the United States has significantly increased. The suggested potential factors diverge between credible fear claimants and UACs.

1. Credible Fear Claims

In the context of the rise in credible fear claims, some of the most commonly cited reasons for the word of mouth effect are credible fear grant rates, U.S. detention policies, misinformation about the benefits of a favorable credible fear determination, and asylum grant rates. Each will be reviewed in turn.

a. Credible Fear Grant Rates

As noted above, some have asserted that a possible cause of the increase in individuals claiming to fear persecution or torture could be the high rate at which the Asylum Office is finding that individuals have established a credible fear of persecution or torture; a positive finding would make it less likely the government would summarily deport a migrant who is otherwise subject to expedited removal.¹⁶⁹ Proponents of this argument point to the fact that positive credible fear determinations have been fairly high in recent years, averaging between 80% and 85%—and even around 90% when excluding cases not assessed on the merits.¹⁷⁰ Historically, however, there have been many years where the credible fear grant rates met or exceeded those accompanying the current surge in claims, but a comparably high request rate did not materialize. For example, the credible fear grant rate hovered around 90% from 1999 to 2005, but the number of referrals to the Asylum Office never increased by more than a few thousand in any given year.¹⁷¹

¹⁶⁸ Preston, *supra* note 165.

¹⁶⁹ *Asylum Surge Hearing*, *supra* note 5, at 2 (statement of Rep. Bob Goodlatte, Chairman, Comm. on the Judiciary) (attributing, in part, the credible fear surge to the “virtual rubberstamping of applications”).

¹⁷⁰ The grant rates reported by ICE may also not be entirely accurate or representative. Advocacy groups have reported instances where U.S. Customs and Border Protection (“CBP”) did not refer to the Asylum Office individuals who asserted a fear of persecution. *See, e.g., Asylum Surge Hearing*, *supra* note 5, at 141 (statement of American Immigration Lawyers Association); HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 11–12, 30–31. Conversely, others have stated that the high grant rate could be the result of better screenings by CBP.

¹⁷¹ *Asylum Surge Hearing*, *supra* note 5, at 227.

Aside from the grant rate itself, another proffered cause for the surge in claims is the belief that officials have lowered the standard needed to establish a credible fear of persecution.¹⁷² The assertion that the Asylum Office incorrectly applies the credible fear standard, however, is both overly simplistic and irrelevant. The converse argument could also have been made when the grant rate was low because, for many credible fear assessments, the decisions are not based on clear-cut standards that assessors can apply rigidly. Asylum evaluations entail matters of degree, probability assessments, and reasonable disagreements about the merits of claims—in addition to credibility determinations that are difficult to render in a short timeframe. As a result, the credible fear “significant possibility” language often imparts onto decision makers the need to assess the probability of a probability.¹⁷³ For the nexus prong of asylum determinations, the scope of conduct that falls within one of the protected grounds is continuously evolving, and courts even disagree sometimes about the scope of certain protected grounds.¹⁷⁴ Thus, distinctions in grant rates are more likely a product of two possibilities: how much adjudicators choose to err on the side of caution and whether the circumstances in applicants’ home countries altered the viability of the proffered bases for asylum claims.

More relevant than the particular assessment threshold is whether there has been a noticeable shift in the overall grant rate. In a vacuum, the high grant rate in recent years is not itself a significant contributing cause of the surge in claims, but the distinction between the grant rate during the surge and the rate before the surge could play a larger role. From 2006 to 2009, the percentage of claims where the Asylum Office found a credible fear was in the sixties.¹⁷⁵ Subsequently, the grant rate quickly accelerated to the seventies and eighties as the number of credible fear claims began to rise.¹⁷⁶ Thus, the current high grant rates come on the coattails of a period in time in which the grant rates were historically low. It could be argued that it is not so much that the current grant rate is historically anomalous, but

¹⁷² *Id.* at 6 (statement of Rep. Jason Chaffetz) (attributing the grant rate to “the Obama administration’s undermining of the enforcement of our immigration law”).

¹⁷³ 8 U.S.C. § 1225(b)(1)(B)(v) (2012) (providing the credible fear assessment standard); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987) (discussing the likelihood of harm that applicants must demonstrate to establish a well-founded fear of persecution); *id.* at 450 (Blackmun, J., concurring).

¹⁷⁴ *Compare Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (holding that the Board’s particular social group construction is not entitled to deference), *with Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087–88 (9th Cir. 2013) (disagreeing with aspects of the analysis in *Gatimi*).

¹⁷⁵ *Asylum Surge Hearing*, *supra* note 5, at 227.

¹⁷⁶ *Id.*

rather that it jumped significantly in a short period of time—and the migrating public might have taken notice of the grant rate spike. Indeed, the rise in grant rates might have been particularly significant for individuals from the Northern Triangle, as their grant rates in the mid-2000s were particularly low. For example, according to the Congressional Research Service, in FY 2008, the Asylum Office only found that 40% of Salvadorians had a credible fear of persecution or torture—a rate that has since gone up.¹⁷⁷ Noting this potential cause does not necessarily impugn to migrators any nefarious intention. A prospective migrant who learns that grants rates have increased may reasonably factor this information into his or her decision to flee a country with security woes and depressed economic opportunities.

b. The Morton Memo and Detention Rates

The Morton Memo has been cited as a potential cause of the surge in credible fear claims because ICE issued it in December 2009, which is around the time when individuals subject to expedited removal began to assert a fear of persecution or torture with greater frequency.¹⁷⁸ The argument is that claimants are more likely to assert a fear of persecution because the Morton Memo expanded the criteria for parole eligibility. The data does appear to show a rise in the percentage of eligible applicants that ICE releases under its parole authority.¹⁷⁹ ICE provided Human Rights First with statistical data that indicates that the rate of release on parole between FY 2004 and FY 2007 dropped from 41.3% to 4.2%.¹⁸⁰ By FY 2012, the rate of release rose to 80%.¹⁸¹

Despite the increased release rate based on parole, the Morton Memo's limited scope minimizes the potential impact of its change to detention practices. All migrants subject to expedited removal can claim to fear persecution or torture, but only "arriving aliens"—those apprehended at a port of entry—are

¹⁷⁷ *Id.* at 70 (statement of Ruth Ellen Wasem, Congressional Research Service).

¹⁷⁸ *Id.* at 2 (statement of Rep. Bob Goodlatte).

¹⁷⁹ See *infra* Table 4 for a compilation of the available parole data. Even if parole is granted, release from detention may still require the detainee to post bond. See *Asylum Surge Hearing*, *supra* note 5, at 105–06 (statement of U.S. Commission on International Religious Freedom).

¹⁸⁰ HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS 35 (2009) [hereinafter HRF, ASYLUM DETENTION]; see also U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS: DETAINED ASYLUM SEEKERS FISCAL YEAR 2007, at 6 (2008) [hereinafter ICE 2007 DETENTION STATISTICS] (noting that in FY 2007 "67 percent of all aliens found to have met the 'credible fear' screening standard who were detained had 90 or fewer days in detention").

¹⁸¹ *Asylum Surge Hearing*, *supra* note 5, at 107 (statement of U.S. Commission on International Religious Freedom) (recounting information that ICE provided to USCIRF).

potentially eligible for parole.¹⁸² Most individuals subject to expedited removal, however, are not considered arriving aliens. The available data indicates that approximately 75% of individuals claiming to fear persecution or torture are not apprehended at a port of entry.¹⁸³ In the first half of FY 2014, for example, 16,428 of the 20,488 credible fear decisions concerned individuals apprehended inland.¹⁸⁴ Consequently, the detention policies described in the Morton Memo only apply to approximately 25% of individuals subject to expedited removal who claim to fear persecution or torture. Thus, while there does appear to be a substantial increase in the number of individuals released on parole, the relatively low number of claimants to whom ICE's parole authority applies cautions against finding that the Morton Memo's detention policy changes are itself significantly responsible for the increase in credible fear claims. To more accurately assess the true impact of the Morton Memo, DHS would need to provide data on the number of Northern Triangle migrants who qualify as arriving aliens.

Regarding ICE's detention practices more generally, a few cautionary words are in order. The data available for measuring detention rates are far from comprehensive. The information that is available is often the product of formal or informal requests made to DHS by advocacy groups for statistical data that cover delineated time periods—or statistical data provided to the U.S. Commission on International Religious Freedom (“USCIRF”), an independent government agency tasked with assessing DHS's detention practices as they pertain to the expedited removal process.¹⁸⁵ Thus, the obtained data does not cover many years since DHS (and the former INS) began compiling statistics on expedited removal and credible fear cases. Moreover, even for the years when DHS publicized its detention data, the information does not always appear to consistently quantify the detention status of asylum seekers subject to expedited removal. DHS has noted that the “proportions in various outcomes classes are not strictly comparable” to the data compiled in previous years.¹⁸⁶

¹⁸² See MORTON MEMO, *supra* note 68, ¶¶ 1–4.

¹⁸³ See, e.g., USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9; USCIS 2013 CREDIBLE FEAR STATISTICS, *supra* note 132.

¹⁸⁴ USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

¹⁸⁵ USCIRF was established by the International Religious Freedom Act of 1998. See 1 USCIRF 2005 REPORT, *supra* note 49, at 10.

¹⁸⁶ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT' OF HOMELAND SEC., DETAINED ASYLUM SEEKERS: FISCAL YEARS 2009 AND 2010 REPORT TO CONGRESS 3 (2012) [hereinafter ICE 2009 & 2010 DETENTION STATISTICS]; *Asylum Fraud: Abusing America's Compassion?: Hearing Before the Subcomm. on Immigration & Border Sec. of the H. Comm. on the Judiciary*, 113th Cong. 116 (2014) [hereinafter *Asylum Fraud Hearing*] (providing a copy of ICE's FY 2012 report on detained asylum seekers).

Additionally, the methodology DHS uses to classify detention status has changed over the years.¹⁸⁷ Also worth noting, because detention data takes into account the initial detention decision and the ultimate release rates for applicants who might have been detained initially, the detention and custody counts differ from the number of credible fear decisions made in a particular fiscal year. Given the shortcomings in the data, this Article can only use the information obtained to illustrate general detention trends and to assess the proportional use of certain detention and release methods.

Table 4 provides a summary of the available data. The first two columns provide the number of credible fear claimants who were and were not detained. For those who were detained, the remainder of Table 4 lists the reasons why ICE eventually released them.

Table 4: Detention and Release Rate Data for Credible Fear Claimants¹⁸⁸

	NOT DET	DET	REASN FOR RELEASE											
			BOND	DEP	DETN	OR	OS	OTHR	PARO	USM	TR	VD	WD	XFER
FY 2006	4461	257	41	143	28	2	4	N/A	16	0	13	3	0	7
FY 2007	605	4614	1502	2031	81	355	68	N/A	207	5	277	23	22	43
FY 2009	5386	5317	1972	1441	487	403	164	254	284	15	N/A	10	28	259
FY 2010	9291	9041	4272	1721	648	415	200	163	1095	31	N/A	13	6	475
FY 2012	816	14,525	≈4969	≈2393	≈881	≈3841	≈242	≈175	1175	25	N/A	26	1	≈793

*NOT DET=not detained; DET=detained; REASN FOR RELEASE=reason why ICE released a detained migrant; BOND=released on Bond; DEP=released for removal from the United States; DETN=detained; OR=released on recognizance; OS=released

¹⁸⁷ Compare U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 333 (2005) [hereinafter 2 USCIRF 2005 REPORT] (defining the categories that comprise "release" and "held" determinations), with ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 46 (defining the terms used in 2009).

¹⁸⁸ For the data used to compile Table 4, see *Asylum Fraud Hearing*, *supra* note 186, at 117, 138 (providing the credible fear statistics in ICE's FY 2012 report on detained asylum seekers); ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 4, 46; ICE 2007 DETENTION STATISTICS, *supra* note 180, at 4 (providing summary data only); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS: DETAINED ASYLUM SEEKERS FISCAL YEAR 2006, at 4 (2007) [hereinafter ICE 2006 DETENTION STATISTICS]. Some of the figures for FY 2012 are estimations because the PDF version of the report in the congressional record blurs some of the release rate numbers. See *Asylum Fraud Hearing*, *supra* note 186, at 138. The definitions of the reasons for release come from the reports. Because ICE modified its release categories, Table 4 includes the notation "N/A" when a certain category is not applicable in a given fiscal year.

on an order of supervision; OTHR=includes escaped, lack of funds to detain, lack of space, and all cases deemed unclassified for release details; PARO=paroled into the United States; TR=released, case terminated; USM=released to U.S. Marshals; VD=released for voluntary departure from the United States; WD=released, alien withdraws application; XFER=transferred between facilities; N/A=category not applicable within that fiscal year.

The available data does not establish a definitive trend for general detention rates. To the contrary, it appears quite haphazard. As Table 4 illustrates, ICE detained very few claimants in FY 2006. By contrast, ICE initially detained nearly all credible fear claimants in FY 2007. In FYs 2009 and 2010, however, ICE only detained approximately 50% of claimants. Changing course once again in FY 2012, ICE initially detained almost all credible fear claimants. The basis for the fluctuation in initial detention determinations is unclear. It could be the result of policy changes or inconsistent methodologies employed by ICE to code the data.¹⁸⁹ Moreover, ICE does not provide any additional data on the release of those who were not detained, which would help to obtain a more accurate understanding of its detention practices.

Perhaps more germane than the general detention rates are the release rates and the average length of detention. In 2001, the government released prior to their hearing date in immigration court 86.1% of claimants found to have a credible fear of persecution or torture.¹⁹⁰ By 2003, the release rate had fallen to 62.5%.¹⁹¹ In FY 2006, ICE released nearly all claimants within ninety days.¹⁹² While not publically available, groups that have seen the release rates for FY 2007 estimate that it dropped to 44.7%, which would coincide with ICE's incredibly low use of its parole authority in FY 2007.¹⁹³ In FYs 2009, 2010, and 2012, ICE again released almost all detainees, and the vast majority were released within ninety days.¹⁹⁴ Thus, the data shows that generally low release rates in FY 2007 increased thereafter and remained consistently high through FY 2012. The data also

¹⁸⁹ For instance, since authorities must detain migrants subject to expedited removal prior to a credible fear determination by the Asylum Office, it is possible that ICE has modified how it accounts for detention during this time period. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012).

¹⁹⁰ 2 USCIRF 2005 REPORT, *supra* note 187.

¹⁹¹ *Id.*

¹⁹² ICE 2006 DETENTION STATISTICS, *supra* note 188, at 6.

¹⁹³ HRF, ASYLUM DETENTION, *supra* note 180, at 35.

¹⁹⁴ *Asylum Fraud Hearing*, *supra* note 186, at 136; ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 44.

generally shows that most claimants were not detained for very long.

In sum, based on the available data, it appears that release rates have significantly increased for arriving aliens. More generally, it also appears that release rates have increased since FY 2007, but given the lenient detention practices in FY 2006, the current detention practices are not unprecedented.

c. The Implications of Credible Fear Grants

As reviewed above, the credible fear screening standard is much lower than the ultimate standard adjudicators use to determine if an applicant is entitled to asylum. Nevertheless, media reports and political organizations have incorrectly stated that credible fear grants constitute “temporary asylum” or otherwise imply that a credible fear grant provides an opportunity to obtain benefits greater than what it actually provides.¹⁹⁵ Advocacy groups have noted, however, that “[t]his kind of misinformation can then be circulated through social media and word of mouth, potentially encouraging people to make decisions based on inaccurate information.”¹⁹⁶ Accordingly, reports on the perceived benefits of credible fear grants might contribute to the word of mouth effect in this context.

d. Asylum Grant Rates

A final potential contributor to the word of mouth effect concerns asylum grant rates and whether an increased likelihood of success could incentivize individuals from the Northern Triangle to migrate to the United States and express a fear of persecution. Table 5 provides the grant and denial rates in immigration court for Northern Triangle asylum seekers. There are, however, numerous additional categories not provided here, such as the number of applicants who abandon their claims.

¹⁹⁵ See, e.g., *Immigration: Claims for Asylum Soar in 2013*, UNITED PRESS INT'L (Dec. 13, 2013), http://www.upi.com/Top_News/US/2013/12/13/Immigration-Claims-for-asylum-soar-in-2013/UPI-12891386944160/; Brian Bennett, *Immigration Claims for Asylum Soar*, L.A. TIMES (Dec. 12, 2013), <http://articles.latimes.com/2013/dec/12/news/la-pn-immigration-asylum-claims-soar-20131212>.

¹⁹⁶ HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 17.

Table 5: Asylum Grant Rate for Northern Triangle Countries¹⁹⁷

Year	El Salvador		Guatemala		Honduras	
	Granted	Denied	Granted	Denied	Granted	Denied
FY 2009	100	1049	123	1034	34	347
FY 2010	123	923	131	894	56	321
FY 2011	137	1141	145	851	58	421
FY 2012	158	971	192	823	77	388
FY 2013	181	1186	153	829	92	575

For all three countries, the data establishes that the grant rates are exceptionally low. Additionally, the figures show little to no escalation in the grant rate immediately preceding or during the surge. Accordingly, it does not appear that asylum grant rates have contributed to the surge.

2. UAC Border Crossings

For UACs, many suggest that the word of mouth effect is the product of several recent legislative and policy changes to immigration law and enforcement, as well as accompanying attempts by criminal organizations to exploit real and perceived changes to the law.¹⁹⁸ TVPRA and the Deferred Action for Childhood Arrivals are the two changes considered most responsible for spreading word that deportation is less likely to occur or not likely to happen at all.

a. Trafficking Victims Protection Reauthorization Act

As noted above, TVPRA provides that “an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”¹⁹⁹ For children from noncontiguous countries such as those of the Northern Triangle, TVPRA—for quite legitimate reasons—diminishes the

¹⁹⁷ To view the source from which Table 5’s data is derived, see OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, IMMIGRATION COURTS ASYLUM STATISTICS FY 2009–2013 (2014), available at <http://www.justice.gov/eoir/efoia/FY2009-FY2013AsylumStatisticsbyNationality.pdf>.

¹⁹⁸ See, e.g., Chishti & Hipsman, *supra* note 93; Carle Hulse, *Migrant Surge Traced to Law on Trafficking*, N.Y. TIMES, July 8, 2014, at A1.

¹⁹⁹ 8 U.S.C. § 1232(e)(2)(A) (2012).

government's ability to quickly deport minors. The premise of these repatriation hurdles is to protect victims of human trafficking.²⁰⁰ The surge in UAC border crossings, however, might be "classic unintended consequences" of the desire to protect potential victims of human trafficking.²⁰¹ Interviewed migrants and immigration officials have indicated that the lower rate of deportation of minors over the past few years has indeed created the perception that DHS's deportation policy toward UACs has changed.²⁰²

b. Deferred Action for Childhood Arrivals

The second basis cited as a potential reason for the UAC surge is DACA—the Deferred Action for Childhood Arrivals.²⁰³ DACA is an administrative policy issued by DHS in 2012 that instructs officials to defer the removal of certain minors who may benefit from the previously proposed DREAM Act.²⁰⁴ DACA, however, does not apply to minors crossing the border during the current surge.²⁰⁵ Studies have suggested that the migratory rates of UACs from the Northern Triangle immediately following the creation of DACA actually decreased.²⁰⁶ Nevertheless, there have been reports that smuggling organizations may be employing misinformation about legal remedies, including DACA, to convince young migrants to attempt the often dangerous journey to the United States.²⁰⁷ The evidence regarding the significance of DACA as an incentive to migrate, however, is largely anecdotal.

3. Smuggling Organizations

Politicians, researchers, and news reports often note the possibility that those who facilitate unauthorized border crossings or physically take part in smuggling migrants are

²⁰⁰ *Id.* § 1232(a)(1).

²⁰¹ Hulse, *supra* note 198; *see also* Chishti & Hipsman, *supra* note 93 (noting the potential perception since TVPRA that the United States treats UACs differently).

²⁰² Chishti & Hipsman, *supra* note 93 (providing the reduced deportation rates); Robles, *supra* note 11 (noting the perception).

²⁰³ *UAC Surge Hearing*, *supra* note 12, at 5–6.

²⁰⁴ *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf>.

²⁰⁵ *Id.*

²⁰⁶ *See* Wong, *supra* note 17, at 4–5.

²⁰⁷ Chishti & Hipsman, *supra* note 93; *see also* Caitlin Dickson, *How Mexico's Cartels Are Behind the Border Kid Crisis*, DAILY BEAST (July 9, 2014), <http://www.thedailybeast.com/articles/2014/06/23/how-mexico-s-cartels-are-behind-the-border-kid-crisis.html>; Seville & Rappleye, *supra* note 167.

responsible for communicating information that has contributed to both surges.²⁰⁸ Unlike the potential causes previously discussed, such communications are not a root cause of the surge but rather a means to further spread word about the actual and perceived changes to law and policy that were previously discussed.²⁰⁹ It is in smugglers' interest to spread word because heightened interest in migrating contributes to the industry's multi-billion dollar enterprise and can even help facilitate smugglers' narcotics trade.²¹⁰ Smuggling organizations often take advantage of perceived weaknesses in the entry process and help migrants exploit them;²¹¹ right now, the credible fear process and UAC laws could be perceived as potential weaknesses.²¹² As to why the surge took years to materialize, migration experts have suggested that "[i]t took a little time for word to get back to Central America and other countries about those protections, as well as for criminal organizations to develop smuggling infrastructure around them."²¹³ It is likely that smuggling organizations have played some role in facilitating the surge. The extent of that role, however, is not readily discernible.

C. The Prospect of Immigration Reform

For both UACs and those claiming to credibly fear persecution or torture, another basis could potentially be

²⁰⁸ See, e.g., Eyder Peralta, *Central American Presidents Say U.S. Shares Responsibility for Migration Crisis*, NPR (July 24, 2014), <http://www.npr.org/blogs/thetwo-way/2014/07/24/334942174/central-american-presidents-say-u-s-shares-responsibility-for-migration-crisis> (relaying the President of Honduras's belief that one of many contributors to the surge is "human smugglers telling families in Honduras that they could stay in the U.S. if they make it past the border").

²⁰⁹ E. Eduardo Castillo & Christopher Sherman, *Migration Spotlights Mexican 'Coyote' Smugglers*, ASSOCIATED PRESS, July 21, 2014, available at <http://bigstory.ap.org/article/migration-spotlights-mexican-coyote-smugglers> (noting how some have suggested that coyotes help spread word that it is now easier to enter and remain in the United States).

²¹⁰ U.N. OFFICE OF DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, at 59, U.N. Sales No. E.10.IV.6 (2010) (estimating that the annual income for smugglers is \$6.6 billion); Dickson, *supra* note 207 (discussing how traffickers use migrants as diversions).

²¹¹ See Daniel González, *Immigrants from India Surge Across Arizona Border*, REPUBLIC (Sept. 8, 2013), <http://www.azcentral.com/news/politics/articles/20130907immigration-arizona-border-indian.html> (noting a sharp rise in similar credible fear claims that experts believe may be attributable to smuggling organizations).

²¹² See *Asylum Surge Hearing*, *supra* note 5, at 186 (statement of Michael J. Fisher, Chief, U.S. Border Patrol).

²¹³ Suzanne Gamboa, *Too Many, Too Fast: Border Children Swamping Agents*, NBC NEWS (June 9, 2014), <http://www.nbcnews.com/news/latino/too-many-too-fast-border-children-swamping-agents-n126751> (recounting the sentiments of Marc Rosenblum, deputy director of the Migration Policy Institute's U.S. immigration program); see also *Asylum Fraud Hearing*, *supra* note 186, at 71 (statement of Hipolito M. Acosta, former District Director, U.S. Citizenship and Immigration Services) (discussing the link between UACs, smugglers, and drug cartels).

contributing to the surge in claims and border crossings: the possibility of immigration reform in the near future.²¹⁴ Many migrants might well be aware that current U.S. immigration law does not provide them with a legal basis to remain in the United States permanently. They may believe, however, that prospective immigration reform could provide them with a path to legal status. In this respect, they are willing to ride it out and wait to see if immigration reform materializes—even though a path to legal status may be premised on a certain length of continuous residence in the United States that they likely cannot satisfy.²¹⁵

D. Border Security and Fraud

Some appear to partially attribute the surge to perceived lax security at the southwestern border.²¹⁶ The data, however, does not support this claim. Border enforcement spending has increased, as have the number of border patrol agents.²¹⁷ More importantly though, credible fear claimants and UACs do not typically try to evade border patrol agents.²¹⁸ Consequently, while many of the above-discussed potential causes may have impacted the surge, perceived lax border security does not appear to be a relevant factor.

Conversely, and seemingly paradoxically, some have partially attributed the surge to *heightened* enforcement efforts at the border.²¹⁹ The premise is that a larger border patrol presence has caused migrants to seek alternate means to gain entry to the United States. For credible fear claimants, the government's increased use of expedited removal could cause more migrants to allege a fear of persecution or torture, since a credible claim provides one of the only means at migrants' disposal to avoid deportation when they are otherwise subject to expedited removal.²²⁰

²¹⁴ Jim Dwyer, *A 12-Year-Old's Trek of Despair Ends in a Noose at the Border*, N.Y. TIMES, Apr. 20, 2014, at A1 ("The prospect of immigration reform in the United States is also enticing . . . because of the belief that anyone already in the country illegally will be allowed to stay.").

²¹⁵ For example, the proposed 2013 Senate bill would only authorize a path to citizenship for certain unauthorized immigrants who resided in the United States before December 31, 2011.

²¹⁶ See, e.g., *UAC Surge Hearing*, *supra* note 12, at 2; see also DAN RESTREPO & ANN GARCIA, CTR. FOR AM. PROGRESS, *THE SURGE OF UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: ROOT CAUSES AND POLICY SOLUTIONS* 3 (2014) (recounting the border security argument proffered by several lawmakers).

²¹⁷ See U.S. BORDER PATROL, U.S. DEPT OF HOMELAND SEC., *BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2013)*, available at <http://www.cbp.gov/sites/default/files/documents/U.S. Border Patrol Fiscal Year Staffing Statistics 1992-2013.pdf>.

²¹⁸ See Preston, *supra* note 165.

²¹⁹ See HRF, *HOW TO PROTECT REFUGEES*, *supra* note 78, at 1.

²²⁰ See *Asylum Surge Hearing*, *supra* note 5, at 143 (statement of ACLU et al.).

This potential cause raises numerous questions about the meaning and extent of “fraud” in the surge. Critics of the current surge often allege rampant fraud, stating that migrants “abuse”²²¹ and “game the system.”²²² But are these migrants committing fraud? There are several categories that have to be distinguished. First are those who take advantage of U.S. laws and policies that apply to them and plan to pursue their claims in accordance with the law. For example, if a prospective migrant fears, or has experienced, unspeakable harm in his home country and learns of a process that can more readily allow him to stay in the United States on the basis of this harm, he is not engaged in fraud simply because he takes advantage. Second are those who have no viable claim and purposefully choose to game the process. For example, some internal CBP reports allege “Mexican drug cartel members are abusing the credible fear process to bypass regular immigration checks in order [to] get into the country.”²²³ Other reports have noted how gang members are trying to enter the United States as UACs.²²⁴ Migrants falling within the second category are unequivocally committing fraud.

There are many other categories between these two extremes. Some migrants have experienced hardships in their home countries, but their experiences may not unequivocally fit within a legally permissible box, so they alter their stories. Others might have viable claims that could permit them to remain in the United States, but they have no intention to adhere to the requirements the law imposes on them. Indeed, a percentage of migrants released into the country do not show up for their subsequent immigration hearings.²²⁵ There are many derivations of the above-mentioned categories.

To be sure, a certain amount of fraud is typically a byproduct of any government program.²²⁶ Accurate data on the extent of

²²¹ *Id.* at 6 (statement of Rep. Jason Chaffetz).

²²² *Id.* at 3 (statement of Rep. Bob Goodlatte).

²²³ *Id.* at 6 (statement of Rep. Jason Chaffetz); *see id.* at 186 (statement of Rep. Ted Poe); *see also id.* at 3 (statement of Rep. Bob Goodlatte) (recounting reports that claimants are being coached to game the system).

²²⁴ James Bargent, *Flood of Child Migrants into US Could Include MS13 Gang Members*, INSIGHT CRIME (July 14, 2014), <http://www.insightcrime.org/news-briefs/flood-of-child-migrants-into-us-could-include-ms13-gang-members>.

²²⁵ Chishti & Hipsman, *supra* note 93 (“[A]n estimated 30 percent of unaccompanied minors are ordered removed in absentia because they fail to appear at their initial or later hearings.”).

²²⁶ *See Asylum Surge Hearing, supra* note 5, at 191 (statement of Rep. Luis V. Guterrez) (noting that the government would not end unemployment compensation simply because there are instances of fraud); *see also Asylum Fraud Hearing, supra* note 186, at 11 (statement of Louis D. Crocetti, Jr., Principal, Immigration Integrity Group) (noting that internal DHS studies found conclusive evidence of fraud in about 12% of cases).

actual fraud as a contributor to the surge, however, is not currently available.²²⁷ To illustrate, conservative news outlets have purportedly obtained from immigration agents “cheat sheets” near the border that provide migrants with lists of commonly asked questions and suggested answers to make out a viable claim.²²⁸ Determining the authenticity of such documents, however, is difficult to do. Although it purportedly came from a federal law enforcement official, there appears to be infighting within DHS components that is leading to the dissemination of contradictory information.²²⁹ This infighting, along with DHS’s general reluctance to make public information regarding ongoing investigations or politically sensitive topics, undermines the ability to accurately assess the data. Thus, this Article’s causal conclusions in Part IV are premised on the concession that a greater understanding of the extent of any fraud could alter the calculus.²³⁰

IV. ASSESSMENT OF COLLECTIVE CAUSES

This Article concludes that the word of mouth effect and, to a lesser extent, changes in country conditions in the Northern Triangle, have primarily caused the surge in crossings by credible fear claimants and UACs. Regarding the country conditions in the Northern Triangle, economic and crime data certainly paint a bleak picture,²³¹ but the region-wide data does not itself indicate that the overall circumstances deteriorated significantly around the time of the surge. For instance, the murder rates in Guatemala actually decreased as the United States began to record a spike in credible fear claims.²³² Regarding Salvadorians, credible fear referral rates remained

²²⁷ See *Asylum Surge Hearing*, *supra* note 5, at 5 (statement of Rep. Zoe Lofgren) (noting the inability to decipher at this stage whether fraud is responsible for the surge).

²²⁸ See Sara Carter, *This Is a ‘Cheat Sheet’ Found at the Border to Coach Illegals on How to Stay in the U.S.*, BLAZE (June 26, 2014), <http://www.theblaze.com/stories/2014/06/26/this-is-a-cheat-sheet-found-at-the-border-to-coach-illegals-on-how-to-stay-in-the-u-s/>.

²²⁹ See, e.g., *Asylum Surge Hearing*, *supra* note 5, at 178–79 (statement of Michael J. Fisher, Chief, U.S. Border Patrol) (disputing the National Border Patrol Council’s assessment of agency policy on certain matters).

²³⁰ As a final point on potential causes, it appears that apprehension rates are not a contributing factor. Ruth Ellen Wasem of the Congressional Research Service noted that apprehension rates of migrants from the Northern Triangle were also high in 2005, but there was no accompanying surge in claims. *Asylum Surge Hearing*, *supra* note 5, at 69–70.

²³¹ See WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 4–9; see also UNODC, Homicide Stats, *supra* note 107.

²³² UNODC, Homicide Stats, *supra* note 107 (listing the murder rates in the Northern Triangle countries from 2006 through 2012); *Asylum Surge Hearing*, *supra* note 5, at 227; see *supra* Table 1 (providing credible fear referral data); *supra* Table 3 (listing the murder rates in the Northern Triangle countries from 2006 through 2012).

relatively low in 2010 and 2011, even though El Salvador's homicide rate was consistently high during the preceding years.²³³

Nevertheless, despite the countrywide data on countries in the Northern Triangle, there are several signs of deteriorating conditions on the ground around the time of the surges. First, there are indications that the situation has gotten worse for certain segments of the population such as children.²³⁴ Researchers who have studied migratory patterns have found that a younger age significantly correlates to expressed intentions to migrate, which would impact both UACs and credible fear claimants.²³⁵ Second, the hometowns and regions from which many migrants fled have murder rates well above the country averages, which supports the conclusion that inter-country regional crime distinctions can trump national figures or exacerbate their deleterious consequences.²³⁶

Third, there are indications that gangs and other criminal entities are accumulating more territory, which decreases citizens' ability to relocate internally.²³⁷ Fourth, since the beginning of the surge, migrants from Northern Triangle countries have requested asylum from countries other than the United States at a higher rate.²³⁸ If migrants' reasons for departing their home countries were solely attributable to U.S. policy rather than country conditions, then one would not expect a concurrent spike in asylum requests in other countries.²³⁹ Fifth, there is some indication that fluctuations in murder rates correlate with migrants subject to expedited removal expressing a fear of persecution. For example, the credible fear data depicts a noticeable increase in Salvadorian claimants subsequent to the apparent failing of the truce between rival gangs.²⁴⁰ The failure

²³³ USCIS 2011 CREDIBLE FEAR STATISTICS, *supra* note 123.

²³⁴ See UNHCR, *Children on the Run*, *supra* note 147, at 24.

²³⁵ Hiskey et al., *supra* note 139, at 5. The researchers, however, have only found a correlation for children sixteen and older, which shows that other factors account for the rise in border crossings by minors who are younger than sixteen. *Id.*

²³⁶ Gonzalez-Barrera et al., *supra* note 130; see also INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 15–26; Lind, *supra* note 130.

²³⁷ INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 24.

²³⁸ UNHCR, *Children on the Run*, *supra* note 147, at 15 (reporting a 432% increase in neighboring countries since 2009); see also *UAC Surge Hearing*, *supra* note 12, at 47 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops) (noting that since 2008, there has been a 712% increase in asylum claims filed by Northern Triangle citizens in countries that surround the Northern Triangle).

²³⁹ Unless, of course, a change in the pull factors in these countries around the time of the surge also incentivized prospective asylum seekers to attempt to migrate there.

²⁴⁰ USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9; USCIS 2013 CREDIBLE FEAR STATISTICS, *supra* note 132.

of the truce also correlates with the rise in claims by Salvadorian UACs (though not at a level that significantly distinguishes it from other Northern Triangle countries).²⁴¹

Sixth, unlike the official national murder rates in the region, the data on countrywide perceptions of insecurity since the time of the surge appear to correlate with the rate at which migrants claim to fear persecution if returned to their home countries.²⁴² Referring back to the homicide data, unlike in Honduras, the murder rate in El Salvador reportedly decreased from 2011 to 2012.²⁴³ Nevertheless, since the time when credible fear claims began to spike, El Salvador has consistently been the primary country of origin for individuals subject to expedited removal who claim to fear persecution or torture.²⁴⁴ At the same time, El Salvador is the only country in the Northern Triangle where citizens' perceptions of insecurity did *not* decrease when the surge began.²⁴⁵ Thus, the connection between the number of claimants at the border and perceptions of insecurity support the conclusion that a security deterioration may have contributed to the rise in claims. Regarding this sixth point, there are, however, additional factors that may also contribute to the particularly high number of Salvadorian claims. For instance, there is a strong connection between remittance networks and intentions to migrate.²⁴⁶ As noted above, El Salvador is also the country with the highest remittance rate—a staggering one-third of the country.²⁴⁷ Other Northern Triangle countries also have high remittance rates.²⁴⁸

More generally, considering the six aforementioned signs collectively, the data does point to several circumstances that changed around the time of the surge, which demonstrates that country conditions have played a role in the escalation. While security concerns are undoubtedly a contributing factor, family reunification and depressed economic conditions fully or partially

²⁴¹ See *Southwest Border Unaccompanied Alien Children*, *supra* note 10.

²⁴² This correlation, however, does not apply as readily to the surge in UAC claimants. See *id.*

²⁴³ UNODC, Homicide Stats, *supra* note 107.

²⁴⁴ See, e.g., USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9 (reporting that in some months Salvadorians had nearly three times as many credible fear referrals as claimants from the next country on the list).

²⁴⁵ Hiskey et al., *supra* note 139, at 3.

²⁴⁶ *Id.* at 5 (reviewing the “friends and family effect”).

²⁴⁷ Villalobos, *supra* note 109, at 69.

²⁴⁸ See Daniel Reichman, *Honduras: The Perils of Remittance Dependence and Clandestine Migration*, MIGRATION POLY INST. (Apr. 11, 2013), <http://www.migrationpolicy.org/article/honduras-perils-remittance-dependence-and-clandestine-migration> (noting that 17% of Honduras's economy is based on remittances).

motivated some migrants to leave the Northern Triangle, particularly those coming from Guatemala.²⁴⁹

While country conditions have likely contributed to the surge, those who claim they are solely responsible for the rise in these particular types of claims are incorrect.²⁵⁰ The conditions in the Northern Triangle are simply not analogous to situations in countries such as Syria, where the destabilization of the government and escalation in violence caused millions to flee the country irrespective of the conditions that awaited them in refugee camps.²⁵¹ Rather, the word of mouth effect appears to have impacted the migratory spike for credible fear claimants and UACs.

Starting with the rise in credible fear claimants, this Article reviewed several potential reasons why word has spread in the Northern Triangle that migrants could more easily obtain permission to enter the United States: increased credible fear grant rates, decreased detention rates, the characterizations of credible fear grant benefits by smugglers and others, and higher asylum grant rates. The high credible fear grant rates since the time of the surge do not, in and of themselves, appear to provide a significant basis to account for the rise in claims. As mentioned above, comparably high grant rates in the past did not result in concurrent spikes in claims.²⁵²

The credible fear grant rates, however, were substantially lower for several years prior to the rise in claims.²⁵³ Thus, the *rise* in the grant rate could be a contributing factor, particularly because the grant rate was notably low for certain Northern Triangle claimants prior to the escalation.²⁵⁴ For the rising grant rate to be impactful, however, claimants must actually obtain asylum (or related relief) or be released during the pendency of

²⁴⁹ For example, a significant percentage of children interviewed by the U.N. listed “family or opportunity” as a reason why they decided to leave. UNHCR, *Children on the Run*, *supra* note 147, at 7–10. The data shows that children from Guatemala, in particular, are much more likely to migrate because of family or greater opportunities than violence in society. *Id.* at 10.

²⁵⁰ See Wong, *supra* note 17, at 1.

²⁵¹ See U.N. High Comm’r for Refugees, Syria Regional Refugee Response, <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Aug. 21, 2014) (stating that approximately 3 million refugees have fled Syria since 2012); see also Miguel Almaguer & Elisha Fieldstadt, *Is Trek of Undocumented Immigrant Children Safer than Staying Home?*, NBC NEWS (July 6, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/trek-undocumented-immigrant-children-safer-staying-home-n149151> (“Countries surrounding Syria have welcomed 2.5 million refugees, but ‘we get 90 thousand immigrant children and we start talking about expedited removal.’”).

²⁵² *Asylum Surge Hearing*, *supra* note 5, at 227.

²⁵³ *Id.*

²⁵⁴ *Id.* at 70 (statement of Ruth Ellen Wasem, Congressional Research Service).

their claims; otherwise, a favorable credible fear determination would produce little inherent benefit. Regarding the asylum relief issue, the data produced in Table 5 demonstrates that adjudicators consistently grant very few asylum claims filed by Northern Triangle applicants. Accordingly, the grant rate would not produce any perceived inherent benefit.

As to the detention issue, migrants could be incentivized by the belief that the government would not detain them or would, at the very least, quickly release them into the country. Absent misinformation, migrants would not believe DHS would release them if DHS detained individuals found to have a credible fear of persecution during the pendency of their claims. Thus, it appears that the primary significance of the rise in grant rates may be inexorably linked to the significance of any change in detention policy. (To say that detention rates may be a contributing cause is quite different than advocating for increased detention, and by analyzing the former this Article is by no means advocating the latter.) The link between U.S. detention policies and migration rates has some historical backing. For instance, immigration officials working in South Texas in the 1980s noted how a similar surge in border crossings immediately followed the government's decision to "institute[] a policy of releasing on recognizance aliens from Central America who claimed they were fleeing violence and persecution in their homeland."²⁵⁵ In 2005, DHS implemented a policy of detaining Brazilians crossing the southwest border without authorization and the rate of migration by Brazilian nationals dropped considerably.²⁵⁶

Regarding the current surge, the data does suggest some changes in detention policy. There is undoubtedly a greater chance that DHS will release arriving aliens because of the Morton Memo.²⁵⁷ For detention more generally, in recent years the rates of release have been high and the average length of detention has been relatively short.²⁵⁸ As previously noted, however, the release rates and lengths of detention are not historically anomalous, which cautions against attributing to them freestanding blame for the surge, wholly divorced from other converging factors.²⁵⁹ Nevertheless, the data does appear to

²⁵⁵ *Asylum Fraud Hearing*, *supra* note 186, at 28 (statement of Hipolito M. Acosta, former District Director, U.S. Citizenship and Immigration Services).

²⁵⁶ *Asylum Surge Hearing*, *supra* note 5, at 64 (statement of Rep. Bob Goodlatte) (recounting the sentiments of former DHS Secretary Michael Chertoff).

²⁵⁷ *Id.* at 107 (statement of U.S. Commission on International Religious Freedom) (noting that in FY 2012, 80% of eligible claimants received parole).

²⁵⁸ *See, e.g., Asylum Fraud Hearing*, *supra* note 186, at 136; ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 44.

²⁵⁹ *See, e.g., ICE 2006 DETENTION STATISTICS*, *supra* note 188, at 34.

show that detention standards were somewhat relaxed after FY 2007, and this relaxation, combined with detention policy changes for arriving aliens and increased credible fear grant rates, could have all converged to impact external perception. Indeed, regarding the current situation, the administration appears to concede that its detention practices have likely contributed to the current surge in migrants from Central America.²⁶⁰

Unclear, however, is the extent of smugglers' role in facilitating migrants' perceptions about the credible fear process. Their role could be limited. Conversely, smugglers could have more regularly spread word that the United States significantly relaxed its detention practices for credible fear claimants based on a misunderstanding of the limited scope of the Morton Memo. Further still, smugglers could have intentionally misinformed migrants about U.S. detention practices to convince them to incur the cost of migrating—deteriorating country conditions would more readily entice prospective migrants to embark northward.²⁶¹ Actual and perceived descriptions of the credible fear process by politicians, news outlets, and others could also be contributing factors.²⁶² In short, a credible fear screening standard that is necessarily low appears to have converged with several factors to produce the word of mouth effect for credible fear claims. These factors include relaxed detention standards generally, detention policy changes for arriving aliens, credible fear grant rates that rose after historically low levels, and groups that facilitate the dissemination of real and perceived changes to the credible fear process.

As to the UAC surge, perceptions about changes to law and policy appear to more concretely account for the word of mouth effect. As noted above, TVRPA has been cited as a reason why UACs have migrated to the United States in greater numbers. TVRPA did change the law in a manner that applies to UACs currently crossing the border,²⁶³ and the repatriation rate has declined since FY 2008.²⁶⁴ Reports indicate that these actual changes, combined with a general administrative policy to defer UAC deportations, have indeed contributed to the word of mouth

²⁶⁰ Preston, *supra* note 165 (quoting Cecilia Muñoz, director of the White House Domestic Policy Council).

²⁶¹ Some smugglers, however, depend on referrals, which may dissuade them to intentionally provide false information.

²⁶² See HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 17.

²⁶³ See 8 U.S.C. § 1232 (2012).

²⁶⁴ See Chishti & Hipsman, *supra* note 93.

effect.²⁶⁵ In this respect, TVRPA's causal relevance is not that people are necessarily aware of the Act by name, but rather that they are aware of the changes in detention and deportation practices that can partially be attributed to TVRPA.²⁶⁶ Smugglers appear to have contributed to prospective migrants' heightened awareness,²⁶⁷ but, for the reasons already discussed, the precise extent of their role is uncertain. The impact of TVRPA on migration levels is particularly notable because the law favors placing UACs with friends or family.²⁶⁸ Researchers have noted a strong correlation between intentions to migrate and "individuals who have migrant friends or relatives already living abroad."²⁶⁹ Most UACs have family members or family friends in the United States with whom they plan to reside;²⁷⁰ many acknowledged that family reunification was a reason why they decided to migrate.²⁷¹

Unlike TVRPA, DACA does not directly apply to UACs who recently migrated. The DACA program, however, has been an alleged catalyst for UACs to migrate to the United States.²⁷² Assessing the relevance of DACA requires unpacking two distinct issues. The first is whether DACA incentivizes UACs to travel to the United States because these UACs believe DACA applies to them. While not definitive, the decrease in overall apprehension rates in the months following the creation of DACA could support the conclusion that UACs do not believe DACA applies to them.²⁷³ Nevertheless, there could very well have been lag time

²⁶⁵ See Ron Allen, *Fate for Most Kids Who Cross the Border? Staying in the U.S.*, NBC NEWS (July 14, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/fate-most-kids-who-cross-border-staying-u-s-n153706> (observing in immigration court that no UACs "appear[] to be ordered out of the country any time soon"); Robles, *supra* note 11 (reporting that TVRPA has led to fewer deportations of minors, and immigration officials in the Northern Triangle took note); Hulse, *supra* note 198 (noting that the administration believes that TVRPA "is partly responsible for tying its hands in dealing with the current influx of children"); see also Brian Bennett, *Deportation Data Won't Dispel Rumors Drawing Migrant Minors to U.S.*, L.A. TIMES (July 5, 2014), <http://www.latimes.com/nation/la-na-deport-children-20140706-story.html#page=1>.

²⁶⁶ *But see* Wong, *supra* note 17, at 5–6 (arguing that TVRPA has not contributed to the surge).

²⁶⁷ See Peralta, *supra* note 208.

²⁶⁸ See 8 U.S.C. § 1232(c)(2).

²⁶⁹ Hiskey et al., *supra* note 139, at 5.

²⁷⁰ See, e.g., Chishti & Hipsman, *supra* note 93 ("Ninety percent of [UACs] are released by ORR into the care of a parent, relative, or family friend . . ."); Hannah Rappleye, *Undocumented and Unaccompanied: Facts, Figures on Children at the Border*, NBC NEWS (July 9, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/undocumented-unaccompanied-facts-figures-children-border-n152221> (estimating that eighty-five percent of UACs "are reunified with their immediate or extended families").

²⁷¹ UNHCR, *Children on the Run*, *supra* note 147, at 7–10.

²⁷² *UAC Surge Hearing*, *supra* note 12, at 18–20 (statement of Ronald D. Vitiello, Deputy Chief, U.S. Border Patrol).

²⁷³ See Wong, *supra* note 17, at 4.

between the administration's announcement of the program and UACs' (or their families') decision to act on that information. Additionally, UACs might believe that DACA applies to them because numerous reports indicate that smuggling rings are disseminating inaccurate information.²⁷⁴ Reviews of Central American news coverage of DACA, however, indicate that the coverage has accurately explained the applicability of the program.²⁷⁵ Unsurprisingly then, reports have not indicated that migrants list DACA's applicability to them as a reason why they chose to migrate; rather, migrants are more likely to refer to a general belief that they can obtain a permit—or *permiso*—to stay.²⁷⁶

More germane, perhaps, is the second reason why DACA may be relevant: it fosters greater migration not based on its applicability to recent UACs, but rather because of what it represents. Specifically, DACA provides an indication that U.S. immigration policies might provide to future categories of unauthorized immigrants additional opportunities for reprieve from deportation (or possibly a legal means to stay). In this respect, DACA is part of the general immigration reform uncertainty that could, quite understandably, further incentivize prospective migrants to come to the United States. It is highly unlikely that DACA itself is responsible for the surge, which is why it is necessary to look at all the potential factors collectively. In this respect, the prospect of future reprieve that DACA represents must be considered against the backdrop of dire country conditions in the Northern Triangle and U.S. laws and policies that do actually decrease the chances of expedient deportation.

Considering all the factors likely contributing to the surge, it appears that as a general matter, the climate of violence, insecurity, and depressed economic opportunities in the Northern Triangle is the powder keg and, along with certain indications of worsening conditions, the word of mouth effect has provided the spark.²⁷⁷ The following anecdote aptly illustrates this conclusion:

²⁷⁴ Chishti & Hipsman, *supra* note 93; Dickson, *supra* note 207; Seville & Rappleye, *supra* note 167.

²⁷⁵ Roque Planas, *Don't Blame Central American Newspapers for Influx of Undocumented Children*, HUFFINGTON POST (June 12, 2014), http://www.huffingtonpost.com/2014/06/12/central-america-daca_n_5488329.html.

²⁷⁶ Preston, *supra* note 165; *see also* Seville & Rappleye, *supra* note 167; Semple, *supra* note 167.

²⁷⁷ Against the backdrop of all these factors are the general reasons why people want to migrate to the United States—such as family reunification and greater opportunity—and the established migratory networks in the Northern Triangle that facilitate

At the church, some women said the talk about an entry permit, which has intensified in the last two months, had prompted them to set out on the risk-filled journey across Mexico. But the women said they were moved mainly by desperate worries about their children, with poverty unrelenting in their countries and warring street gangs expanding their control.²⁷⁸

Although the migrants in this illustration indicate that deplorable country conditions were their main reason for leaving the Northern Triangle, the powder keg/spark analogy encapsulates the causes of the surge better than attempts to assign specific percentages to each contributing factor.

To be sure, while the powder keg/spark analogy might represent the general phenomenon that appears to account for the surge, it would be overly simplistic to assume that the factors driving all migrants during the surge are uniform. Delving into individual cases would undoubtedly yield a range of divergent circumstances.²⁷⁹ Certain migrants would have traveled to the United States even if they did not hear about any changes in policy. Others living in less violent regions could be opportunists who want to take advantage of the perceived changes in policy. Some of these opportunists could have nefarious intentions while others simply desire to reunify with family or pursue greater economic and educational opportunities.²⁸⁰ And of course, there are others with legitimate bases for seeking refuge who never make it to the United States because of the dangerous journey and the nefarious actions of smuggling rings who take advantage of migrants when they are most vulnerable. The amalgamation of these divergent circumstances is an inevitable byproduct of the country conditions in the Northern Triangle and U.S. immigration policy.

CONCLUSION

This Article has shown how Northern Triangle country conditions, U.S. immigration policy, and smuggling organizations collectively created the surge in credible fear claimants and UACs. How the United States should respond to the surge is a question beyond the scope of this Article. Nevertheless, one

migration. Hiskey et al., *supra* note 139, at 5 (noting the link between migratory networks and intentions to migrate).

²⁷⁸ Preston, *supra* note 165.

²⁷⁹ See UNHCR, *Children on the Run*, *supra* note 147, at 7–11 (reviewing the results of its interviews with UACs); see also Semple, *supra* note 167 (recounting the multitude of reasons UACs expressed for leaving their home countries).

²⁸⁰ See *Asylum Surge Hearing*, *supra* note 5, at 3, 6, 186 (attributing nefarious intentions to some migrants, including drug cartel members who may attempt to take advantage of the asylum process).

potential response is worth mentioning because it should not be contentious: substantially increasing adjudicatory capacity. There has been a significant increase in resources provided for enforcement efforts.²⁸¹ Conversely, the number of immigration judges tasked with adjudicating immigration cases has remained fairly stagnant.²⁸² The extraordinary imbalance creates a bottleneck in the system and causes cases to languish for significant periods of time.²⁸³ From a humanitarian perspective, greater funding for immigration judges would decrease the length of detention for some migrants. For those who believe that the years migrants often spend in limbo while their cases pend is a security risk, shorter wait times would help alleviate that concern. Even from an economic perspective, shorter detentions and monitoring responsibilities would offset the resources needed to hire additional immigration judges. In short, increased funding for immigration judges and other adjudicators should be a no-brainer.

As noted repeatedly, the conclusions reached in this Article are based on the available data. Unfortunately, however, the available data is incomplete. Generally, DHS does make publically available a considerable amount of immigration-related data. The agency, however, does not consistently provide to the public the panoply of immigration data at its disposal, nor does it always disseminate in a timely manner the data that it does provide. Aside from disseminating that which is at its disposal, DHS is also not taking advantage of the extent of immigration data it could be collecting and analyzing. The agency should significantly increase its database capabilities and coding practices to allow enhanced research into migratory patterns and other immigration-related issues. DHS should also create a central location where all this data is published rather than having it spread throughout the websites of various agency components. Providing researchers with accurate, robust, and easily obtainable data would help inform policy.

The current surge and the rhetoric surrounding it are an apt illustration of the importance of more fully understanding the root causes of migration. Policymakers and other stakeholders would be well-served to observe how recurrent push and pull factors influence migratory patterns. Without a greater

²⁸¹ See, e.g., U.S. BORDER PATROL, *supra* note 217.

²⁸² See *Office of the Chief Immigration Judge*, *supra* note 63.

²⁸³ OFFICE OF PLANNING, ANALYSIS & TECH., *supra* note 64, at A2, W1.

understanding of the causes of migration, future legislative and policy decisions will inevitably lead to unintended consequences.