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Cause Lawyering and Political Advocacy

Moving Law on Behalf of Central American Refugees

SUSAN BIBLER COUTIN

> I've decided that I'm no longer going to work to change laws for immigrants. — I'm only going to work with immigrants to change laws.
>
> Quote from an immigration attorney

> The ABC case actually changed history. — And resulted in the mobilization and increasing space for the mobilization and organizing of Salvadoran refugees.
>
> Quote from an immigration attorney

Relationships between "causes," "law," and "lawyering" are complex. Attorneys who take up particular causes may be inspired by or even participate in broad-based social movements. Their experiences within these movements may produce deep commitments to right social and political wrongs and to make law serve justice. Acting on these commitments may entail representing individual clients, filing class action suits, founding organizations, advocating legislative change, organizing particular constituencies, and negotiating with the officials who interpret and enforce law (Sarat and Scheingold 1998, 2001; Scheingold and Sarat 2004). "Law" and "social movements," may, however, have different life courses. Cases that grow out of social movement activity may take years to be adjudicated and may be transformed as they move through successive procedural steps (Mather and Yngvesson 1980–81; Garth 1992). As legal actions are pending, political and historical circumstances can change both the "cause" and the social movement out of which these actions grew. At the same time, legal developments—whether successes or setbacks—define issues in particular terms, create new demarcations, establish new rules, and set new processes in motion. As Michael McCann (2004: 510) notes, "legal mobilization politics typically involves reconstructing legal dimensions of inherited social relations." Law thus has an "embedded" quality—law references prior conditions, dates, and legal language, but law also can redefine agendas, constituencies, and causes. Cause lawyers, in conjunction with social movements, shape (or attempt to shape) the path of law, even as such pathmaking can redefine social reality in ways that, in turn, redefine causes and reshape activism.

Examining the different life courses of social movements and legal actions contributes to the social movement and cause lawyering literatures by revealing how relationships between law and advocacy unfold over time. To understand these shifts, it is important to note that advocacy takes multiple and overlapping forms, including activism, political mobilization, and social movements. Activism consists of ongoing efforts, often by members of nongovernmental organizations, to influence policy in a particular area. Political mobilization refers to the organizing work entailed in recruiting a "base" of individuals who are affected by particular policies, and who are willing to take actions (such as attending a rally) designed to influence policy makers. Social movements entail both activism and political mobilization, but are distinguished by their broad-based, oppositional character, the scope of the legal, political, and social changes that they seek, and ways that they mark history (McCann 2004). Activism, mobilization, and social movements can engage law both formally, through lobbying and lawsuits, and informally, by taking actions that have particular legal significances (Coutin 1993). Both formal and informal legal actions may influence official law, sometimes in ways that neither cause lawyers nor movement members anticipate.

To examine the relationship between cause lawyering and political advocacy, this chapter analyzes legal and political activism on behalf of Salvadoran asylum seekers from the 1980s to the present. Although this period has generally been described as legally conservative (McCann and Dudas, this volume), cause lawyers were relatively successful in securing immigration rights for Central American asylum seekers. During the 1980s, a broad-based Central American solidarity movement was formed in order to counter US support for right-wing regimes in El Salvador and Guatemala, oppose human rights abuses in Central America, and advocate that Salvadorans and Guatemalans who fled civil war and political violence in their homelands be granted asylum in the United States. Religious activists who declared their congregations "sanctuaries" for undocumented Salvadoran and Guatemalan refugees were key components of this movement. Attorneys also played numerous roles. Lawyers represented individual asylum seekers, founded refugee rights clinics, defended religious activists who were indicted on alien-smuggling charges, and filed class action suits on behalf of Central American refugees. By the late 1980s, following the conviction of eight sanctuary activists in 1986, the solidarity movement began to decline; however, legal initiatives launched by cause lawyers were still very much alive. In 1991, a class action suit known as "*American Baptist Churches v. Thornburgh*" or "ABC" was settled out of court, granting Salvadorans and Guatemalans the right to de novo asylum hearings (Coutin 2001b), and in 1990, Congress created

"Temporary Protected Status" (TPS) and awarded Salvadorans eighteen months of this status. Changed circumstances redefined the significance of TPS and the ABC agreement. Peace accords were signed in El Salvador in 1992 and in Guatemala in 1996, making it harder for ABC class members to win political asylum. Moreover, in 1996, revisions to US immigration laws eliminated or restricted many other avenues through which class members could legalize. In this changed context, a new campaign for legal permanent residency was launched. In 1997, a remedy—the Nicaraguan Adjustment and Central American Relief Act (NACARA)—was approved; however, greater immigration benefits were accorded to Nicaraguans who fled left-wing regimes than to Salvadorans and Guatemalans who fled right-wing ones. This disparity gave rise to renewed activism, which in turn resulted in regulations that virtually guaranteed legal permanent residency to Salvadoran and Guatemalan NACARA applicants.

Throughout this policy-making process, political advocacy fueled and was in turn reshaped by cause lawyering. The Central American solidarity movement was comprised of refugees, religious activists, attorneys, and other advocates. In the 1980s, solidarity workers mobilized around a range of issues, including political change in Central America, US foreign policy, peace, human rights, and refugee rights. Only some of these issues—particularly civil and refugee rights—were addressed through cause lawyering, even though cause lawyers may have been motivated by broader political concerns (Coutin 2001a). The legal remedies that cause lawyers (and others) were able to craft in the early 1990s in turn mobilized a somewhat different constituency, consisting of immigrant- and refugee-rights activists, Central American immigrants, and even some Salvadoran government officials. This constituency mobilized more explicitly around immigration rights, although these rights were of course linked to the political and human rights concerns that had motivated the solidarity movement during the 1980s. Legal developments redefined causes, constituencies, and agendas, even as changed circumstances gave legal developments new meanings.

My analysis of the relationship between social movements and cause lawyering derives from three research projects that I conducted from the mid-1980s to the present. From 1986–88, I did fieldwork within sanctuary communities in the San Francisco East Bay and in Tucson, Arizona. My sanctuary research included volunteer work with community groups that represented Central American asylum seekers, interviews with refugees, sanctuary activists, and attorneys who defended indicted sanctuary activists, and an analysis of the transcripts and press coverage of the 1985–86 Tucson sanctuary trial (Coutin 1993, 1995). From 1995–97, I did fieldwork in Los Angeles regarding Salvadoran immigrants' continued efforts to obtain permanent legal status in the United States. I observed

the legal services programs of Central American community organizations, attended immigration hearings, followed political advocacy efforts, and interviewed immigrants, attorneys, and activists (Coutin 2000). Most recently, from 2000–2002, I did research in Los Angeles, Washington DC, and San Salvador regarding shifts in US and Salvadoran policies regarding the US Salvadoran population. This project entailed interviews with US and Salvadoran policy-makers, advocates (including cause lawyers) who attempted to shape policy, and Central Americans who were eligible to apply for legal permanent residency under NACARA. Through these three projects, I was able to follow (either through interviews or direct observations) a range of cause lawyering activities and political advocacy—and in transnational contexts (see also Sarat and Scheingold 2001).

I begin by analyzing cause lawyers' and solidarity workers' efforts to obtain political asylum for Central American refugees during the 1980s. I continue by describing how Central American peace accords and US immigration reforms led both advocates and cause lawyers to change strategies. I conclude by delineating the realignments that made NACARA possible and that then produced unprecedented regulations. Throughout, I attend to the shifting relationships between causes, lawyers, and law.

Solidarity and Refugee Rights

Efforts to secure legal protection for Salvadoran and Guatemalan refugees began during the early 1980s, as a solidarity movement composed of religious groups, political activists, and legal advocates sought to establish that the US government was discriminating against Salvadoran and Guatemalan asylum seekers due to foreign policy considerations (Coutin 1993; Smith 1996). Because the US government was supporting the governments of El Salvador and Guatemala in their wars against guerrilla insurgents, granting safe haven to nationals of these countries would have tacitly admitted that a US ally was committing human rights violations. Generally speaking, refugees who fled "communist" regimes were welcomed, and Salvadorans and Guatemalans, who fled right-wing regimes, were not (USCR 1986). Legal advocates were outraged at this seeming violation of the Refugee Act of 1980, which had just established that, in contrast to prior US refugee law, which limited "refugee" status to individuals from Communist countries and the Middle East, persecuted aliens who reached US territory could petition for asylum, regardless of country of origin (Kennedy 1981).[1]

To prevent Salvadorans and Guatemalans from being deported, solidarity workers sought to mobilize law. Volunteers connected Salvadorans and

Guatemalans who were in deportation proceedings with attorneys who were willing to represent asylum seekers without charging for services. Lawyers committees and immigrants rights centers began to proliferate in major US cities such as Washington DC, San Francisco, Los Angeles, Chicago, and Boston, and eventually comprised an infrastructure of organizations that engaged in legal advocacy on behalf of immigrants' rights. Much as death penalty attorneys seek to prolong life (Sarat 1998), attorneys who represented Central American asylum seekers sought to delay deportation. A San Francisco attorney who worked with one immigrants rights center recalled, "Our whole expectation was [that] we were going to represent people and string their cases along as far as we could, hoping that the war would end, or we'd win temporary protected status.... Representing individual refugees was tied to the sanctuary movement, which was tied to political events, which was tied to trying to win temporary protected status."

In addition to representing individual asylum seekers, legal advocates filed class action suits. Although each suit focused on a particular legal issue, these class actions were part of a broad attempt to challenge immigration officials' treatment of Central Americans. *Orantes-Hernandez v. Meese*, which was filed in the early 1980s and decided in 1988 (*Orantes-Hernandez v. Meese* 1988), prohibited immigration officials from coercing Salvadorans into agreeing to depart the United States, required officials to inform Salvadorans of their right to apply for asylum, and prohibited immigration agents from transferring detainees to detention centers that were geographically distant from detainees' attorneys (Churgin 1996). *Mendez v. Reno*, which was decided in 1993, challenged the perfunctory nature of asylum interviews (*Mendez v. Reno* 1993). An attorney involved in the *Mendez* case described his depositions of the officials who conducted these interviews:

> I would have them under oath, sitting across the table like this, and say, "Okay. Tell me—" First, asked them about the training. You know, what training? "Well, I watched somebody else do it for ten minutes or an hour, something like that." "Okay. Now tell me the grounds on which someone's eligible for and entitled to get political asylum." And they would say, "What do you mean?" And I'd say, "Well, you know, there's five grounds in the statute on which someone's eligible or entitled to get asylum. Can you name them?" "Uh, no I can't do that right now." "Well, take your time. Think about it." They got through the entire deposition, they couldn't say, they didn't know a single thing.

The so-called "Young Male Case" sought to establish that young Salvadoran men who were at risk of being forcibly recruited by the Salvadoran military

deserved political asylum (See Compton 1987; *Sanchez-Trujillo v. INS* 1986). An attorney who was involved described the theory of the case and the resources that it mobilized:

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

Although it was unsuccessful (cf. Barclay and Fisher, this volume), the young male case is indicative of the growing significance of Central American refugee issues to immigration and human rights networks. As an advocate whom I interviewed in 2001 commented, "Most of us have spent practically all of our careers on this."

In addition to filing class action suits, legal advocates and other activists sought legislative change in the form of "Moakley-Deconcini" (after its sponsors, Joe Moakley and Dennis Deconcini), a bill that would grant Salvadorans a temporary legal status known as "Extended Voluntary Departure" (EVD) (Churgin 1996). The Reagan administration opposed the Moakley-Deconcini legislation, arguing that the asylum system was working, that most Salvadorans had come to the United States in search of jobs rather than safety, and that a grant of EVD would serve as a "magnet" to additional illegal Salvadoran migrants. Proponents of Moakley-Deconcini, in contrast, contended that the asylum system was not able to recognize victims of generalized violence, that EVD would be available only to those already in the United States and not to future migrants, and that no one had proposed that the United States take in the world's poor.[2] Throughout the 1980s, repeated attempts to pass Moakley-Deconcini, including an effort to attach it to the 1986 Immigration Reform and Control Act (IRCA), failed, largely, according to interviewees, due to opposition from the Reagan administration and Senator Alan Simpson, a staunch and influential proponent of restrictive immigration measures.

As the Moakley-Deconcini bill languished in the US Congress, advocates devised a new class action suit on behalf of Central American asylum-seekers. During the 1980s, religious activists had helped Central Americans cross the United States–Mexico border, sheltered these migrants in congregants' homes and congregations, and transported migrants to places of safety around the

United States. US law holds citizens accountable for the immigration status of those they shelter and transport. By treating Central Americans as legal refugees, movement members staked an informal legal claim. Direct action therefore indirectly engaged law (cf. Hilbink; Marshall, this volume). In 1985 the indirect became direct, as the US government filed criminal charges against US religious activists who had declared their congregations "sanctuaries" for Salvadoran and Guatemalan refugees (Coutin 1993, 1995). In response, advocates sued US authorities in civil court. An attorney who was involved in conceptualizing what came to be known as "ABC" (*American Baptist Churches v. Thornburgh*) described the origins of this case:

> ABC in particular was actually conceived of initially as more responsive to the sanctuary prosecutions than it was to the discriminatory treatment of Salvadoran and Guatemalans. When the government started prosecuting church people for assisting Salvadoran and Guatemalans, again, networks of people were talking about how to respond to that and not just always to be put in a defensive position, but to try to do some affirmative litigation to try to stop the prosecutions.... Our central argument was, "You know, Salvadorans were refugees, it was just that the U.S. wasn't recognizing them as refugees. But the U.S. was in violation of both its international and national legal obligations, and consequently, they shouldn't be prosecuting people who were just kind of doing what they were supposed to be doing, which is protecting people from *refoulement* to torture. And persecution." And so we... decided to do this litigation that would focus both on, you know trying to enjoin the sanctuary prosecutions and trying to stop a discriminatory treatment of the refugees.

Like its predecessor, the Young Male case, the ABC lawsuit mobilized cause lawyers, refugee rights organizations, and even a private law firm that made its resources available to class counsel. Like other "rule-of-law" cause lawyers, the attorneys involved in the ABC case "tend[ed] to identify with rights, legality, and constitutionality as ends in themselves" (Scheingold and Sarat 2004: 19). One attorney said that his organization had joined in this lawsuit out of a concern "that the government was discriminating against individuals based on their nationality in violation of the law.... Whether the system is fair, whether there's undue foreign policy influence on the asylum determination, whether there's a legitimate asylum determination, whether it's a legitimate process; that's critical. Because that's a question of whether the government is complying with the law." The attorneys who litigated the ABC case were motivated by a strong sense that US refugee law was perpetuating injustice:

> The idea that we would discriminate against someone who's fleeing persecution; you know, it was such a complete denial of the principles of the United States,... of refugee protection, of international law.... Not only were we supporting these human

> rights abusers in El Salvador, then we were sort of in a way perpetuating a further terror on that same population in United States by depriving them of their rights under the law. And trying to send them back to the very human rights violators that United States government was supporting. And so that whole sort of system, kind of systematic violation of the law and violation of human rights was just so profoundly offensive. And so at odds with what I think United States ought to be, and how the law ought to operate.... To be a victim of persecution in El Salvador and then a victim of discrimination at the hands of the United States government.

To correct this situation, the ABC lawsuit sought to bar future prosecutions of sanctuary workers, prohibit additional deportations of Salvadorans and Guatemalans, and prevent foreign policy considerations from influencing asylum proceedings. The first two of these claims were dismissed (*American Baptist Churches v. Meese* 1987, 1989), but litigation on the third claim went forward. Then, in 1990, as attorneys in the ABC case prepared for discovery proceedings, the US government suddenly offered to settle. Several factors may have been responsible for officials' change of heart (Blum 1991). First, efforts to reform the asylum unit were already underway. Second, the discovery process was likely to be both financially burdensome and politically embarrassing. Third, this case was connected to a social movement. An attorney involved in the litigation recalled, "Every time we went to court, the courtroom was filled with people from the sanctuary movement. And they would do prayers out front before hand and be there with their habits and collars and everything in court and it was a very powerful statement." Fourth, following the 1989 Salvadoran final offensive, efforts to broker a peace agreement in El Salvador intensified. This changed political scenario may have had repercussions within immigration and asylum policies.

As the ABC settlement negotiations were underway, advocates simultaneously overcame opposition to legislation granting temporary status to Salvadorans. According to a key immigrant rights attorney, advocates persuaded Salvadoran President Napoleon Duarte, who was concerned about the destabilizing effect of deportations, to ask Senator Jesse Helms to support temporary refuge for Salvadorans. At the same time, advocates-related, Senator Simpson agreed to support this legislation in exchange for Senator Moakley's assurance that he would not seek an "amnesty" for Salvadoran TPS recipients.[3] As a result, the 1990 Immigration Act, which was signed by President George Bush, created "Temporary Protected Status" and declared that Salvadorans who had been in the United States prior to September 19, 1991 could receive eighteen months of this status.

TPS was incorporated into the ABC settlement, which established that every Salvadoran and Guatemalan who was in the United States prior to September 19,

1991 (in the case of Salvadorans) or October 1, 1991 (in the case of Guatemalans) had the right to apply or reapply for political asylum and have a de novo hearing on their claims (*American Baptist Churches v. Thornburgh* 1991). Special rules to ensure fair hearings were established, advocates were given the right to train asylum officials regarding conditions in Central America, and immigration officials agreed to publicize the agreement so that Central Americans would be aware of their rights. Salvadoran TPS applicants were deemed to have registered for the benefits of the settlement agreement, and both Guatemalans and Salvadorans were also permitted to register for benefits directly.

The ABC agreement created a new constituency (cf. Gordon, this volume): ABC class members. In order for TPS and the ABC agreement to actually benefit this class, however, eligible Central Americans had to apply for TPS and asylum. Cause lawyers were involved in promoting the application process. One attorney explained that he advised Central American groups

> "Hay que quedarse en el barco grande [You have to stay in the big boat]. You apply for TPS, and when you finish TPS, what happens? Then you apply for ABC. . . . " And I'd call people up from the audience and I'd go place by place by place. "If you stay in the big boat, you're going to be okay. If you don't stay on the big boat, see that sign over there?" And I would point to the exit sign. "Then you get the premio de TACA [the TACA (a Central American airline) prize; presumably a plane ticket home]."

Some 240,000 Salvadorans and Guatemalans did apply, and, when applicants' immediate family members are taken into account, the number of people who benefited from the settlement agreement is actually larger.

Doubts about the wisdom of applying were not unfounded, however, as TPS and the ABC settlement agreement placed Salvadorans and Guatemalans in an ambiguous position: these migrants were granted temporary authorization to remain in the United States, but, as this authorization would evaporate if TPS expired and if asylum claims were denied, ABC class members and TPS recipients remained legally vulnerable. During the 1990s, improved conditions in Central America and legal change in the United States exacerbated this vulnerability.

Peace Accords and Immigration Reform

In the early 1990s, the Central American solidarity movement declined significantly. This decline can be attributed to several factors. By the late 1980s, sanctuary, which had been a key component of the solidarity movement, was no longer perceived as the most appropriate form of advocacy. Increases in

the size and stability of the Central American community made it unnecessary for Central Americans to be housed or transported by US activists. Central Americans who immigrated prior to January 1, 1982 were able to get legal permanent residency through IRCA (see Bean, Edmonston, and Passel 1990; Ulloa 1999), while more recent migrants obtained temporary legal status through TPS and ABC. With legal protection, Central Americans had less need of solidarity workers. Moreover, despite sanctuary activists' resolve to be undeterred by the 1986 conviction of key movement members, government surveillance of and legal action against the movement probably took a toll. With the 1992 peace accords in El Salvador, some members of the solidarity movement turned their attention to other causes. Central American community groups found funding sources drying up, and some activists actually became nostalgic for the sense of urgency that the war had created (Coutin 2000).

Although the Central American solidarity movement declined, cause lawyers and Central American activists continued to seek a permanent immigration remedy for ABC class members and TPS recipients. Both Central American activists and the Bush administration faced the immediate question of what to do when TPS expired after the allotted eighteen months, a question that was complicated by the fact that peace accords were signed in El Salvador in 1992. Central American groups lobbied heavily for an extension of TPS, and new groups and coalitions—such as ASOSAL (the Association of Salvadorans of Los Angeles) and the Salvadoran American National Network (SANN)—grew out of this effort. Bush administration officials were less than enthused about granting an extension. At the same time, they recognized that to deport Salvadorans could destabilize postwar El Salvador. Accordingly, rather than renewing TPS, the Bush administration permitted Salvadoran TPS recipients to register for a new status: "Deferred Enforced Departure" or "DED." DED was in turn extended until January 31, 1996, the deadline that the INS eventually set for Salvadoran ABC class members to file for political asylum under the terms of the settlement agreement. The rationale for temporary status had shifted, however, from migrants' need for safe haven to El Salvador's need for remittances and stability.

As TPS was extended, but in the form of DED, the asylum interviews anticipated by the ABC settlement agreement were delayed (cf. Gordon, this volume), and cause lawyers, Central American activists, and administration officials began to explore a possible blanket grant of legal permanent residency to ABC class members. A member of the ABC class counsel recounted, "For a while it looked promising and then I think it just foundered on all the political dynamics in Washington and all that sort of thing. They said ABC was this big new amnesty,

and it was pre-'96 before Clinton was going to be up for reelection. And all the anti-immigrant stuff." In contrast to this assessment, one of the INS officials in charge of the ABC caseload attributed the difficulty in granting this request to law rather than politics, saying simply, "the plaintiffs' counsel was pushing the INS to consider the ABC class members' cases in a different way. And we just couldn't do it, because of the limitations of the law."

As efforts to obtain a blanket grant of permanent residency for ABC class members foundered, anti-immigrant sentiment in the United States grew, resulting in legislation that dramatically changed the climate in which ABC class members' cases would be adjudicated. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), both of which were approved in 1996, were devastating for ABC class members (Wasem 1997). In the event that their asylum claims were denied, ABC class members had planned to apply for suspension of deportation, a status awarded to aliens who could prove seven years of continuous presence, good moral character, and that deportation would be an extreme hardship. IIRIRA abolished suspension of deportation and replaced it with cancellation of removal, which required proving ten years of continuous presence, good moral character, and extreme and exceptional hardship. Those class members who could not prove ten years of continuous presence or meet the higher hardship standard would not be eligible for cancellation. Moreover, IIRIRA capped the number of suspension or cancellation cases that could be approved in a single year at 4,000. Even if they *were* permitted to apply for suspension or cancellation, the 4,000 cap made these unlikely remedies for the 240,000-plus ABC class members.

In April 1997, in this changed legal context, the INS finally began to interview ABC class members on their asylum claims. As Central American nations braced for what they feared would be mass deportations, Central American advocates and community groups in the United States launched a new campaign for legal permanent residency for ABC class members.

Unlikely Alliances and Unprecedented Regulations

After IIRIRA made it appear that many ABC class members would eventually join the ranks of the undocumented or the deported, Central American advocates sought to establish that in fact, ABC class members were long-term residents whose legal status, though temporary, made them much more like permanent residents than like recent entrants petitioning for the right to stay. At first, this effort seemed doomed to failure. A Los-Angeles-based advocate recalled

that shortly after NACARA passed, she and a colleague met with Washington DC attorneys who, she said, had been "aware of these issues for their entire careers and who were very sympathetic," but who advised them that Congress would not approve a remedy for the ABC class. The Clinton administration was not, however, uninterested in creating such a remedy. In May 1997, at a summit meeting with the Central American presidents, Clinton stated that it would be problematic to return Central Americans, who had lengthy ties to the United States and who supported their countries financially through remittances, to countries where they could be a destabilizing force. Clinton remarked, "These Central American countries are in a rather special category. After all, the United States Government was heavily involved with a lot of these countries during the time of all this upheaval" (Clinton 1997: 571).

Following Clinton's 1997 visit to Central America, the INS drafted legislation that restored the suspension eligibility of ABC class members and participants in the Nicaraguan Review Program, and that exempted these migrants from the 4,000 annual cap. In a bipartisan effort, this legislation was introduced by Senators Bob Graham (Democrat) and Connie Mack (Republican) of Florida. As an immigration measure, this legislation faced difficulty. Some, such as Lamar Smith, a staunch proponent of restricting immigration, regarded it as another amnesty (Wasem 1997). Others, who regarded the Contras as "freedom fighters" and the Salvadorans and Guatemalans as illegitimate economic immigrants, were only interested in creating a remedy for the Nicaraguans. So, Salvadorans, Guatemalans, and Nicaraguans (with the support of Cuban activists) joined forces to lobby for this legislation. The Salvadoran government hired Rick Swartz, a Washington DC political consultant specializing in "left-right coalitions" and immigration advocacy. Central American activists organized vigils, fasts, and rallies, and former Contra supporters held joint press conferences with advocates who had participated in the Central American solidarity movement.

These strategies paid off, and NACARA was approved in 1997. Nonetheless, the cold war ideology that secured support from legislators who were lukewarm on immigration matters gave rise to a disparity within the legislation. Nicaraguans who were in the United States prior to 1995 were given the right to automatically adjust their status to that of legal permanent residents, whereas Salvadorans and Guatemalans who had received TPS or had applied for asylum prior to 1991 were given the right to apply for suspension of deportation, a lengthier, more complex, and less certain process. The disparity within NACARA was galling to Salvadoran and Guatemalan activists and officials, who immediately sought to restore parity. Advocates proposed legislation that extended NACARA

benefits to Hondurans and Haitians, moved the eligibility date to 1995 rather than 1991, and granted all the same remedy: adjustment of status. Efforts to pass parity legislation were derailed by partisan politics prior to the 2000 presidential elections. There was also considerable pressure to create parity administratively, by interpreting NACARA in ways that would equalize treatment of Salvadoran, Guatemalan, and Nicaraguan NACARA beneficiaries. In fact, during a 1999 trip to Central America, Clinton promised Central American leaders that he would minimize disparity in treatment. A Department of Justice official recalled that when Clinton returned, "he gave us our marching orders. These were to be as equitable as possible in reconciling the disparity but to be consistent with the law."

The process of issuing the regulations that would govern NACARA's implementation created opportunities for advocates to mobilize supporters. During the comment period that followed the approval of NACARA, advocates submitted thousands of recommendations. An attorney who helped to coordinate this effort described the process:

> There was a massive outpouring of comments. They said they'd never received so many . . . .They were looking at thousands! . . . We had comments that were signed by refugees. I'd never seen that happen before. I mean, they didn't write them of course. But they were in English and Spanish, and they signed them, and then we organized mailings. I think we got about, hundreds and hundreds of comments by the refugees themselves.

Through a process that one participant described as "torturous," regulations that created unprecedented solutions to a series of debates were crafted. One debate concerned who should adjudicate NACARA claims. To date, only immigration judges had heard suspension claims. However, most ABC class members had asylum petitions pending with the asylum unit of the INS. ABC class members were more likely to win suspension than asylum, but the only way for them to come before an immigration judge was first to be interviewed by an asylum official on the merits of their asylum claims. Such a cumbersome process could produce lengthy delays. Advocates therefore encouraged the INS to streamline the NACARA process by granting asylum officers the authority to adjudicate applicants' suspension claims. After some debate, the Attorney General did so. One of the regulations' authors explained, "We [the asylum unit] had the files, and asylum had to do the interviews anyway. Most would lose their asylum cases but be granted NACARA. It was a time-saver to do them together. Moreover, the issues in the asylum claim and in the suspension claim were interconnected."

A second debate concerned the enumeration of hardship factors. Like other cause lawyers, who generally oppose leaving matters to officials' discretion

(McCann 2004), advocates urged the INS to specify ways that the ABC class met the hardship criteria. Immigration judges, on the other hand, stressed the importance of adjudicating NACARA claims according to established case law. One of the regulations' drafters summarized this issue: "Should the hardship factors come from the case law that has been developed around suspension cases, or from the particular situation of ABC class members? The NGO community wanted the hardship factors to be defined by the particular situation of ABC class members. And the view that prevailed was that the hardship factors were defined by the relevant case law." The regulations nonetheless took the unprecedented step of *specifying* these hardship criteria. Case law was codified through the NACARA regulations.

Finally, a third debate focused on whether or not the INS could grant a blanket finding of hardship to ABC class members. In their comments on the NACARA legislation and on the first published version of the NACARA regulations (i.e., the proposed rule), advocates urged the INS to find that the ABC class had met the extreme hardship standard according to suspension law. Such a finding would virtually guarantee a grant in almost all NACARA cases (except, for instance, those in which the applicant had become statutorily ineligible, e.g., due to criminal convictions) and could make individual interviews of NACARA applicants unnecessary, thus greatly speeding adjudication. The Department of Justice balked, arguing that case-by-case adjudications were required, and that to grant a blanket finding of hardship would go beyond the authority of the statute. Gradually, however, the idea of granting *certain* NACARA beneficiaries—primarily, the ABC class—a *rebuttable* presumption of hardship emerged. An official who was involved in drafting the regulations recounted, "We felt that most officers could adjudicate without the presumption. But the advocacy community really wanted it. So we looked at it, and we decided we could do it." The interim rule, published on May 21, 1999, stated that "*ABC* class members . . . will be presumed to satisfy the requirements for extreme hardship" (Department of Justice 1999: 27866).

The cause lawyers who had represented Central American asylum seekers, filed class action suits, negotiated with US immigration officials, and advised Central American community organizations regarded the NACARA regulations as a victory for Salvadoran and Guatemalan refugees. One attorney, who had worked on Central American refugee issues since the early 1980s, described the regulations as "amazing." During the 1980s, US officials had denounced Salvadorans and Guatemalans as economic immigrants undeserving of political asylum. In contrast, without conceding any wrong-doing on the part of the

INS, the NACARA regulations explicitly recognized the conditions that brought Salvadorans and Guatemalans to the United States:

> These individuals fled circumstances of civil war and political violence in their homelands during the 1980s, and some applied for asylum in the United States. In 1985, advocates for Guatemalan and Salvadoran refugees, church groups, and refugees themselves brought suit against the United States Government for allegedly discriminatory treatment of Guatemalan and Salvadoran asylum applicants. The Department settled the litigation in 1990, following significant developments in its asylum and refugee law and procedures, including the creation of a professionally trained asylum officer corps and Congress's grant of TPS to Salvadorans (Department of Justice 1999: 27865).

Although the NACARA regulations attempted to minimize disparity between NACARA beneficiaries, NACARA contributed to renewed activism in favor of a broad-based legalization program. One cause lawyer incorporated community organizing within public outreach regarding NACARA. This attorney stated that when he did NACARA trainings, he invited his audience to analyze the case of a nineteen-year-old Salvadoran:

> She doesn't qualify. She was here, didn't file for ABC or TPS. So I've had her speak at NACARA trainings. We do a mock interview. I go through the interview and I say [to the audience], "Well, what's she eligible for?" "Nothing." "I guess we just have to tell her, 'There's nothing you can do.' Is that what you're doing, Gloria?" She says, "No! I'm active in Centro Latino Cuzcatlan. I led a delegation of young people to Washington D.C."

Another advocate commented on the empowering lessons of NACARA: "NACARA . . . opened a crack for the rest of us . . . . That made it possible to say, 'If you did it for the Cubans, you can do it for the Salvadorans. If you do it for the Salvadorans, you can do it for the Hondurans. If you do it for the Hondurans, you can do it for the Mexicans.' That opened the door."

Conclusion

Advocacy on behalf of Central American asylum seekers was deeply significant to immigration and refugee rights attorneys. One member of the ABC class counsel described the settlement agreement as "pretty much an overwhelming victory for half a million people . . . . We got every single decision since 1980 that got denied overturned. And set up a whole process by which people could apply again for asylum."[4] Another attorney, who had argued cases before the US supreme court, described the ABC suit as one that "stands out among a handful

that were just profoundly significant." A third attorney described the impact of the ABC case as follows:

> I think that people felt that it was a really important landmark, or sort of you know moment of recognition, a demarcation, I guess, between a whole system that was premised on the use of discriminatory and illegal criteria in the adjudication of claims to a time when you could sort of really start walking down a path where at least there was the hope that adjudications were going to be based on more universal and neutral criteria.

Social movements, political organizing, and cause lawyering on behalf of Central American asylum seekers were integrally connected, yet the nature of these connections changed over time. During the 1980s, cause lawyering grew out of a solidarity movement that was rooted in Central America. Cause lawyers were mobilized by solidarity workers, Central American asylum seekers, and religious activists who were concerned about US military aid to the Salvadoran and Guatemalan governments, human rights abuses in Central America, and the fate of Central American refugees. Cause lawyers were inspired by Central Americans' accounts of persecution and injustice, sanctuary activists' willingness to take legal risks on behalf of refugees, and Central American activists' pursuit of social change in Central America. To make law serve justice, cause lawyers represented individual asylum seekers, established organizations and networks that have continued to advocate for immigrant and refugee rights, filed class action suits, negotiated with US officials, and pursued legislative change. In short, the Central American solidarity movement mobilized and created legal remedies and infrastructures whose significance extends beyond the "cause" out of which they originated.

During the 1990s, the legal remedies—TPS, the ABC settlement, and NACARA—that cause lawyers and others obtained in turn redefined struggles for immigrant and refugee rights. Although the solidarity movement declined in the late 1980s and early 1990s, Central American activists and immigrants themselves mobilized to demand legal permanent residency, equal treatment of people who immigrated for similar reasons, and a permanent legalization program. The ABC case and the NACARA legislation and regulations not only reshaped refugee law and procedures but also empowered immigrants in several senses. By continuing to live and work in the United States, Salvadorans and Guatemalans were able to support postwar reconstruction in their homelands. Organizations and campaigns dedicated to securing legal permanent residency formed in response to TPS, DED, and ABC. Each of these remedies carved out new sets of constituents and established legal precedents to which other immigrant

groups could appeal. Finally, NACARA's limitations—for example, the lengthy application process, the need for individual adjudications, and the boundaries around those eligible for this remedy—contributed to calls for a broad-based legalization program. Clearly, law's movements can themselves mobilize.

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Notes

1. This neutral adjudication standard was tested almost immediately, with the arrival of large numbers of Cubans, who were paroled into the United States, and Haitians, who were generally denied asylum (see Kennedy 1981; *Haitian Refugee Center v. Smith* 1982; Churgin 1996). According to Gregg Beyer (2000), a "control" orientation characterized initial implementation of the 1980 Refugee Act. Examiners, who had no particular training in asylum or refugee law, were given responsibility for adjudicating affirmative asylum applications at District Offices.

2. For a fuller account of these debates, see House of Representatives (1984).

3. An interviewee who was present during these negotiations stated, "Moakley promised that he would not support an amnesty for the Salvadorans who were getting Temporary Protected Status. And then Simpson agreed to support the bill. I was there when he said it. And then we went out into the hall and there were cheers! "

4. This policymaking process was not without ironies. The ABC case might not have been filed if the US government had not prosecuted sanctuary workers, NACARA would probably not have been proposed were not for IIRIRA, and the NACARA regulations might not have granted applicants a presumption of hardship were not for the disparity between Nicaraguans, Guatemalans, and Salvadorans.

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