

# Introduction

## *Expert Witnessing: A Call to Scholars*

Kimberly Gauderman

The scale and severity of violence in Latin America, and Central America in particular, has grown in the past decade, a trend exacerbated by social and legal norms that subordinate and disempower specific social groups, including women, children, and LGBTQ+ persons; by gangs that exercise territorial control and infiltrate security forces; and by weak governmental institutions and corrupt officials. This deepening violence and lack of state protection has forced new populations to flee their homes and seek safety at the U.S. border. The 2014 surge of mothers with children and unaccompanied minors, originating predominantly from the Northern Triangle of Central America, marked a demographic shift at the U.S.-Mexico border that has only continued to intensify. In 2014, family members and unaccompanied children accounted for 29 percent of apprehensions; in 2018, they accounted for almost 50 percent of apprehensions.<sup>1</sup> In November 2019, more immigrants from Guatemala and Honduras were apprehended than Mexicans, the first time any other country had exceeded the number of Mexican nationals apprehended at the border.<sup>2</sup>

Unlike the majority of immigrants who enter the U.S. from Mexico—many of them single adults seeking economic opportunity—most women, children, and members of other persecuted groups who cross our border do not avoid apprehension but rather seek out and present themselves to Customs and Border Protection (CBP) officers. They are asylum seekers, fleeing physical and sexual assault, kidnapping, torture, and death threats often perpetrated by family members, gangs, and/or security officials. According to both international and U.S. law, migrants on U.S. territory who claim persecution in their home country on account of race, religion, nationality, membership in a particular social group (PSG), or political

opinion (collectively known as “protected grounds”) must be given a “credible fear interview” (CFI) or a “reasonable fear interview” (RFI) by an asylum officer, to determine whether the individual will be allowed to apply for asylum.<sup>3</sup> If an asylum officer determines in this interview that the person seeking asylum would face credible or reasonable fear of persecution upon return to their country of origin, they may be detained or released with a bond to a sponsor, usually a family member, while they initiate an asylum claim.

On March 20, 2020, the Trump administration suspended the right of noncitizens to ask for protection at our southern border, using Title 42, a health provision in U.S. law. Under Title 42, individuals have been expelled with no opportunity to seek asylum.<sup>4</sup> Despite this decline in the proportion of those allowed to apply for asylum, the number of asylum seekers has continued to grow, resulting in a backlog of over 1.6 million cases pending before immigration judges in early 2022; asylum applicants now wait an average of five years for an immigration hearing.<sup>5</sup> Despite this sizable backlog, the government has repeatedly starved the immigration court system of resources, choosing instead to increase funding to agencies involved in immigration enforcement.<sup>6</sup>

Barriers for asylum seekers to access the immigration system and qualify for asylum dramatically increased during the Trump administration, from 2016 to 2020. Following through on a key campaign promise, he sought to reduce if not end immigration at the southern border, including and sometimes explicitly targeting asylum seekers. In all, Trump issued 1,064 restrictive immigration policies between January 2017 and January 2021, or over 5 per week during his term in office.<sup>7</sup> Many of these policies focused directly on stopping immigrants and asylum seekers at the Mexican border, migrants whom Trump declared “aren’t people. These are animals.”<sup>8</sup> Departing from other administrations, Trump’s goal was not only to restrict asylum, but to end it altogether. In a 2019 speech, he told Congress to “get rid of the whole asylum system.”<sup>9</sup> According to Eleanor Acer, senior director of refugee protection at Human Rights First, Trump championed once-extremist views that characterized refugees and asylum seekers as privileged cheaters who jumped the line in front of other immigrants and as criminals.<sup>10</sup> This discursive shift not only portrayed asylum seekers and refugees as unworthy of protection but also attacked a core vision, one that predates the U.S. Constitution, of the U.S. as a shelter for those fleeing persecution.

Two particular Trump administration policies—the infamous family separation policy and the equally draconian Migrant Protection Protocols (MPP)—dramatically reduced asylum seekers’ access to due process in U.S. immigration courts. First, in summer 2018, the Department of Justice (DOJ) enacted a “zero-tolerance” policy that criminalized migrant parents and led to the long-term separation of over five thousand children from their parents.<sup>11</sup> According to Trump officials, the goal of this policy was specifically to deter mothers from seeking asylum at the Mexican border.<sup>12</sup> As of February 2021, over one thousand children remained

separated from their parents and the parents of another five hundred children remained missing because the government did not keep adequate records of family relationships and some parents were deported without their children.<sup>13</sup> Then, in 2019, the Trump administration enacted the MPP, a program that removed over seventy thousand asylum seekers in the U.S. to Mexico, where they awaited a hearing with a U.S. immigration judge (IJ).<sup>14</sup> MPP was designed exclusively for individuals from Latin America, and before the program's end in 2020, less than 1 percent of asylum seekers were successful in their cases. The Biden administration initially stopped this program but, due to legal challenges by several border states, restarted MPP in December 2021, and it became known as MPP 2. In its first six months, only 5 percent of those assigned to this program found legal representation and only 2.4 percent were granted asylum or some other form of protection.<sup>15</sup>

After 2016, migrants who made it across the border faced increasingly higher barriers within the asylum system itself. Under the Trump administration, the path to asylum and other forms of relief was substantially narrowed, and the requirements to substantiate a case were increased. Executive orders, decisions by attorneys general, and new rules in the past four years have denied asylum applicants due process and narrowed the grounds of protection. Building on Obama-era responses to increased immigration at the southern border,<sup>16</sup> Trump issued the Border Immigration Enforcement Executive Order on January 25, 2017. This executive order further expanded immigration detention and the use of expedited removal for asylum seekers, effectively foreclosing an individual's ability to meaningfully prepare for a hearing in front of an immigration judge.<sup>17</sup> In 2018 and 2019, Attorneys General Jeff Sessions and William Barr issued decisions that defined gender-based and gang violence as private criminality ineligible for asylum protection, limited protection to family members fleeing violence, and increased the burden on applicants to demonstrate their government's failure to protect them from violence.<sup>18</sup> These decisions had a particularly negative impact on women, children, and LGBTQ+ persons fleeing domestic and gang violence in the Northern Triangle; in fact, some have argued, the changes were designed to target, return, and discourage precisely these populations.<sup>19</sup> In the final month of the Trump administration, December 2020, the DOJ and the Department of Homeland Security (DHS) jointly issued a rule that, among other damaging provisions, allowed immigration judges for the first time to deny asylum claims without holding hearings. Scheduled for implementation on January 11, 2021, this rule was legally challenged by immigration advocacy organizations, and they were granted a preliminary injunction that has, at least temporarily, prevented it from taking effect.<sup>20</sup>

As this volume goes to press, the Biden administration has only just begun to dismantle some of Trump's immigration policies, a process that could take many years to complete. In the meantime, asylum applicants will continue to navigate a system that requires them to articulate and substantiate multiple narrow and

interconnected legal arguments, and to do so without access to legal or social services necessary to sustain an asylum process that can take years to resolve.<sup>21</sup> As discussed below and further in this volume, changes to many of the criteria that establish asylum eligibility can be executed through administrative fiat by the attorney general rather than through Congress or the courts. Asylum seekers, along with immigration rights activists and legal service providers, have had no choice other than to adapt to these politically motivated efforts to dismantle the asylum system, a process that Trump regularly referred to as a “scam.”<sup>22</sup> This handbook provides the tools and resources essential for both the existing asylum process and the changes that will inevitably follow in this contentious and highly vulnerable area of U.S. asylum law.

#### WHY WE NEED A HANDBOOK FOR PRACTICING ASYLUM

Although this handbook was created in the context of the Trump administration’s wholesale assault on asylum, it goes beyond these changes to address the long-standing and continuing need for readily available and effective expert witness testimony in the asylum system. Even as many researchers in anthropology, history, political science, and sociology have regularly supported the work of immigration lawyers and intervened as experts in public debates on immigration reform, the academy contains untapped scholarly expertise that can contribute productively to the fair adjudication of asylum claims in the United States. Country conditions expert witnesses are positioned to provide critical support, through written affidavits and live hearing testimony, that may confirm on what grounds the applicant may seek protection, based on evidence of the types of violence that exist in the country of origin. In particular, over the past ten to fifteen years, scholars and legal professionals have increasingly collaborated to defend the rights of women, children, LGBTQ+ persons, and others who have experienced gender-based, sexuality-based, and gang violence in their home countries. Observing almost daily the lack of trained expert witnesses for this important work, the collaborators in this volume set out to compile a record of best practices for engaging, training, employing, and increasing the efficacy of the work of academics as expert witnesses in order to respond effectively to the ever-increasing number of asylum cases and to the heightened burden for applicants to document their status and vulnerability to persecution in their home countries. What followed were a series of conversations, held in multiple academic and legal professional venues, and a lengthy workshop and editing project led by Kimberly Gauderman.<sup>23</sup>

Our objective in this volume is to build on the ongoing cooperation between legal service providers and scholars engaged in asylum work and to offer an interdisciplinary, scholarly, and practical guide to current and future practitioners in this growing field. We center the practice of expert witness testimony within the

exigencies of the academy, which requires scholars to exercise disciplinary rigor in their fields of expertise and to navigate institutional standards that recognize scholarly achievement and determine criteria for promotion. Acknowledging these tensions inherent in community-engaged scholarship, the book's chapters address how to establish expertise as a country conditions witness through teaching and research; how disciplinary expertise intersects with legal argumentation; and how our labor as expert witnesses balances with and fulfills institutional requirements for teaching, research, and service.

This volume also offers practical instruction for drafting affidavits, communicating with legal professionals, preparing for oral testimony in hearings, and handling the specific challenges of working with applicants in detention centers. The appendixes offer guidance for affidavits and agreements between expert witnesses and legal service providers. Finally, the volume offers an analysis of gender-based, sexuality-based, and gang violence in Latin America; a discussion of persecution on account of gender identity and/or sexual orientation; a history of U.S. immigration and asylum laws; and discussion of the emotional challenges and secondary trauma that may have an impact on expert witnesses and legal professionals working with individuals who have experienced high levels of violence in their home countries. These topics provide a context for expert witness testimony that will allow practitioners to adapt to shifting criteria for refugee status and present a multidisciplinary perspective on how the normalization and dismissal of gender-based and sexuality-based violence not only forces people to flee their homes, but continues to endanger them within the asylum system itself.

The *Practicing Asylum* handbook is divided into three sections. In Part 1, “The Professional Is Political: Life Stories in Asylum Work,” three scholars who have served as country conditions expert witnesses for decades discuss their motivations for engaging in expert witnessing, the disciplinary expertise they bring to asylum work, and how they have balanced expert witnessing with the rigors and requirements of academic life. The first chapter provides an oral history with Thomas M. Davies Jr., a don of expert witness testimony who worked on hundreds of Latin American LGBTQ+, gang violence, and domestic violence cases from Latin America, inspiring other scholars—including several contributors to this volume—to work as expert witnesses. Davies, whose energies focused on asylum throughout his retirement up to his death in 2019, was renowned for his 2000 testimony in *Hernandez-Montiel v. INS*, a groundbreaking case before the Ninth Circuit that for the first time affirmed transgender women’s right to asylum. In the next two chapters, M. Gabriela Torres and Kimberly Gauderman offer very different perspectives on the disciplinary and professional challenges they have faced in their work as country conditions experts. In her chapter, Torres analyzes how an anthropologist as expert can assess the failures of Guatemala’s current legal and social protections for women in marital arrangements (including common law unions), which drive many women to seek refuge in the United States to

escape forced, violent marriages. In her chapter, the historian and handbook editor Kimberly Gauderman argues that expert witness testimony is not only crucial to the success of asylum claimants but also builds on and strengthens the profile of academics in their institutions and professional disciplines. Taken together, the three chapters in part 1 provide different models for how scholars engaged in expert witnessing can integrate expert witnessing into their academic work, advancing both research and legal strategies for asylum defense and strengthening their professional trajectories.

The second part of *Practicing Asylum*, “Enhancing Expertise: Legal, Conceptual, and Practical Guidance for Scholar-Experts,” offers specific advice for scholars presenting expert testimony in gender-based and sexuality-based claims. Chapter 4, by the legal scholar J. Anna Cabot, describes the complex history of asylum law and demystifies current policies, such as asylum eligibility requirements and immigration court procedures, which were transformed by the Trump administration’s attempts to eviscerate asylum protections, especially for women fleeing gender-based violence. In chapter 5, Gauderman and Torres together analyze how rape contributes to establishing the basis for the persecution critical to the definition of particular social groups (PSGs), in particular, contrasting the experience of cisgender, heterosexual women and LGBTQ+ individuals in the asylum process. By examining how testimonies presented by refugee claimants in U.S. immigration courts narrate rape and the PSGs that are devised to support such asylum claims, the authors reveal how rape and human subjectivities are constructed differently through individual narratives and legal arguments. The part’s final chapter, by Gauderman, offers detailed, practical advice for scholar-experts and the legal service providers they work with, including how to strengthen the expert-legal service provider relationship; decide which cases an expert should take on; structure, revise, and finalize an affidavit; and prepare for and testify in hearings. The chapter provides a list of resources for expert witnesses, including U.S. governmental and nongovernmental organization (NGO) guides on immigration and asylum practice, guides on framing and writing country conditions affidavits, and online resources for country conditions research. Addressed primarily to scholars considering or already working as country conditions experts, the chapters in “Enhancing Expertise” shed light on how when legal service providers and experts clearly understand and communicate their respective roles, they collaborate more effectively to achieve positive outcomes in asylum cases.

While the previous chapters focus on experience and practice, Part 3, “Learning the System: Tools for Context and Support in Asylum Work,” offers additional insights and resources necessary to initiate and sustain the work of expert witnessing. In chapters 7 and 8, Gauderman and the immigration attorney Natalie Hansen provide an overview of the role of expert witnesses in the history of immigration, asylum law and policy, and immigrant detention in the United States, with particular emphasis on significant and recent shifts affecting asylum claims by women,

families, and unaccompanied minors. These chapters help explain why, even though congressional overhauls of the Immigration and Nationality Act (INA) are infrequent, the ongoing impact of political agendas and corporate interests may substantially change the asylum process in ways that affect the work of expert witnessing. Following Gauderman's comprehensive review of U.S. immigration law and its application in the changing landscape of asylum, Hansen provides practical guidance to experts working on asylum cases for individuals who are detained, including discussion of the bond/parole process. The final chapter in this part, by a leading asylum law practitioner and scholar, Maria Baldini-Potermin, addresses the human dimension of expert witnessing, offering guidance to practitioners on how to recognize and respond to secondary trauma that may be triggered through engagement with applicants' experiences with extreme and sustained violence, including torture. Baldini-Potermin's chapter helps asylum practitioners recognize the anxiety, depression, preoccupation with suffering, and compassion fatigue that characterize secondary trauma and identifies some of the practices that ameliorate the impact of this work, to the benefit of asylum seekers, their legal advocates, and expert witnesses.

Our intention in this volume is to provide tools and orientation that will serve this and successive generations of expert witnesses, because neither the executive mandates shaping asylum policies nor the legal strategies appropriate to support asylum seekers nor the country conditions shaping their claims are fixed. In this fluid system, scholar-witnesses must adapt to changing circumstances to provide accurate and effective testimony, and in some cases they must intervene (as did Thomas Davies) to enhance the courts' ability to recognize asylum claims, thereby easing human suffering and living up to the promise of asylum in international and U.S. law.

## NOTES

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