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ASYLUM UPDATE

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ASYLUM UPDATE

The Chump Samaritan: The Attorney General's shaggy dog story

In August, Attorney General Jefferson B. Sessions III regaled 44 new immigration judges with a story one might call “The Chump Samaritan”:

Beginning in 2009... [p]owerful incentives were created for aliens to come here illegally and claim a fear of return. In effect, word spread that by asserting [] fear, they could remain in the United States one way or the other.... The number of illegal entrants has surged. Credible fear claims have skyrocketed, and the percentage of asylum claims found meritorious by our judges declined. The reason for the decline is because the vast majority of the current asylum claims are not valid under the law. For the last five years, only 20 percent of claims have been found to be meritorious after a hearing before an Immigration Judge.

This article will discuss several of the policies which the departments of Justice and Homeland Security have pursued based upon their faith in this fable. It will identify the tautology beneath the assertion that “the vast majority of the current asylum claims are not valid,” and suggest ways to discredit it. And it will conclude by summarizing several lawsuits that kindle the hope that Article III judges may thwart at least some of the Trump administration’s efforts to “turn up the pain” on asylum seekers.

Why do they come?

First, a reality check: It’s not as if, 10 years ago, some prankster welded to the border fence a giant sign saying, “Free beer!” If people in faraway places had simply discovered, circa 2009, that “by asserting [] fear, [aliens] could remain in the United States one way or the other,” where were the Nicaraguans, Costa Ricans, and Mexicans among this surge of malingering “illegal entrants”?

The only “powerful incentive” that provoked a refugee crisis on our southern border was an unprecedented epidemic of violent crime in the Northern Triangle of Central America. In April 2010, the U.S. Department of State’s Bureau of Diplomatic Security reported, “The homicide rate in El Salvador for 2009 was 37 percent higher than 2008... an average of 12 homicides per day.” And the danger there has since escalated. In March 2016 the *Los Angeles Times* observed,

This isn't El Salvador's first humanitarian crisis, but it may be the most acute. According to the national Truth and Reconciliation Commission, roughly 75,000 people were

slaughtered from 1981 to 1989, during the civil war... [yet] El Salvador today is more violent than during the worst years of one of Latin America's most vicious conflicts.

In neighboring Honduras things are no better. In June 2012, *The Economist* reported,

Last year Hondurans were about 80 times more likely than Western Europeans to be murdered. For men in their 20s, the odds were four times worse again.... [T]he murder rate has nearly doubled in the past five years. Barring war zones, this makes Honduras by most reckonings the most violent country in the world.

Thus the “powerful incentive” responsible for the surge in asylum seekers that began in 2009 was the same one that brings us back up to the surface of the swimming pool: the will to live.

Yet “The Chump Samaritan” remains posted on the Justice Department’s website.¹ Belief in it drives policies and statutory (re)interpretation intended to deny and dishearten asylum seekers. In brief, the Attorney General seeks to end a system where “[s]aying a few simple words—claiming a fear of return—[] transform[s] a straightforward arrest for illegal entry and immediate return... into a prolonged legal process.”² And he’s making good headway.

How we got to *Matter of A-B-*, and where we go from here

The moral of “The Chump Samaritan” is that the pursuit of any policy *other* than “straightforward arrest for illegal entry and immediate return” incentivizes “thousands of new asylum claims every month from individuals who illegally flood across the border.” Proof of this, Mr. Sessions avers, is that “the percentage of asylum claims found meritorious by our judges [has] declined” since this “flood” began.³

To the extent there is any truth to the claim that “the vast majority of the current asylum claims are not valid under the law” it is *not* because of claims that are, in Mr. Sessions’ words, “blatantly fake.”⁴ If the asylum claims of the tempest-tossed are “invalid,” this is mostly so because of a tautology: they are not “valid under the law” because, beginning in 2008, the Department of Justice began radically reinterpreting the law.

Section 208(b)(1) of the Immigration and Nationality Act (INA) ~~208(b)(1)~~ says that only a “refugee” can receive asylum. INA § 101(a)(42)(A) defines “refugee”:

¹ <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>

² *Id.*

³ *Id.*

⁴ *Id.*

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