HUMAN RIGHTS, BORDERS, AND ASYLUM:
TRANSLATING DISTANT WRONGS INTO DOMESTIC RIGHTS

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ABSTRACT

In *Human Rights, Borders, and Asylum*, I examine the complex and contradictory relationship between the professed universality of human rights and the lived experiences of asylum seekers in our bordered world, a world in which they are routinely subjected to detention, discrimination, deportation, and even death. Through a variety of methods—including legal and documentary analysis, historical research, 120 in-depth interviews, and participant observation at immigration detention centers, asylum offices, and immigration courts in nine U.S. cities—this dissertation looks at how the multitude of actors involved in the process of seeking asylum (or refugee status) declare, recognize, and deny rights claims. To understand how asylum seekers come to be recognized or denied as human rights subjects, I pay particular attention to groups who have been historically excluded from international refugee law and its enactment into U.S asylum and immigration law—namely women and children from Central America as well as sexual minorities—and how these claims interact with and have the potential to transform the law. I refer to this process as *translating distant wrongs into domestic rights*.

While the continual expansion of the international human rights regime plays an important role in advancing certain minimum standards of treatment toward marginalized and vulnerable populations through legislation and enforcement, ultimately this dissertation highlights how normalized states of exception, arbitrary adjudication, and selective implementation leave asylum seekers in a precarious state. Thus, I argue that the juridical idea of dignity—the foundation of the international human rights regime—must be supplemented with recourse to the ethical principle of hospitality, that is, the notion of welcoming the "other" into one's home as a guest. Hospitality can reduce initial apprehensions in the host-guest encounter, constructing a liminal zone that is the starting point for an engaged dialogue between the citizen and non-citizen. From this space, dynamic alliances and transnational solidarities have the potential to emerge and thus stimulate social and political movements and legal strategies to challenge sovereign power and illegal/immoral state policy, recalibrating society's moral compass and pointing us in a direction toward recognizing the dignity of asylum seekers.

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TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

INTRODUCTION

On the morning of Wednesday, September 2, 2015, the lifeless body of three-year-old Alan Kurdi washed up on the shore of Bodrum, a Turkish resort town. Outfitted in a red t-shirt, dark-blue shorts, and tightly laced, water-soaked sneakers, the boy's head was resting to one side as if he were asleep. Turkish photojournalist Nilüfer Demir came across the boy's tiny body, raised her camera, and captured a portrait that would sear the international community's consciousness more than any other in recent memory.

The Syrian Civil War had been raging on for over four years when Alan's parents lifted him and his five-year-old brother into a 15-foot inflatable boat and set sail for the Greek island of Kos during the early morning hours. Their hopes of escaping the brutal violence that millions of others also suffered at the hands of the Bashar al-Assad-led regime, rebel forces, and terrorist organizations were met by a different reality. Within moments of pushing off from the Turkish coast, an unruly wave capsized the boat. The mother and both sons drowned. Alan's story, however, would live on. Demir's photograph would not only be considered "the most heartbreaking photograph of 2015," but one of *Time* magazine's 100 most influential images of all time.[1] "There was nothing to do except take his photograph … and that is exactly what I did," said Demir. "I thought, this is the only way I can express the scream of his silent body."[2]

As is often the case in the gravest human rights situations like Syria, it is not the absolute size of the calamity—the hundreds of thousands of deaths and millions displaced from their homes and forced to seek refuge—but a single story that translates the tragedy

[1] Walsh, "Alan Kurdi's Story."
[2] Griggs, "Photographer Describes Scream of Migrant Boy's Silent Body."

into a language we can all understand. Alan's story is not just about the endless violence in a distant land often overlooked by the media until it is too late; it is also about the plight of asylum seekers and refugees and the international community's responsibility to ensure their protection. After all, the photograph was taken just three miles from Greece, on the doorstep of Europe. The Kurdis only embarked upon this dangerous journey after they were unable to get permission to legally immigrate to Canada, where the father's sister lived and had volunteered to sponsor the family of four. Unable to obtain formal refugee status and denied an exit visa by Turkish authorities, they were left with no other option than to risk traveling across open water to reach Europe and seek asylum. While the image, widely shared over social media and in all the major newspapers, is credited with causing a surge in donations to non-governmental organizations (NGOs) and charities providing assistance to asylum seekers and refugees, government action amounted to little more than words of condemnation.

Individuals that are displaced, uprooted, and left homeless find it increasingly difficult to have their most fundamental human rights respected. They are deprived of adequate food and water and subjected to detention, discrimination, and deportation. Even worse, they are routinely forced into dangerous routes that put them face-to-face with the prospect of death. On the face of it, there is no reason that such individuals should find it so difficult to access human rights protections. The standard definition of human rights—the rights an individual has simply because s/he is a human being—seems ideally suited to preserve their inherent dignity. In the aftermath of the atrocities of World War II, the international community saw an increased concern for the legal protection of human rights as fundamental freedoms. This is most apparent in the establishment of the

United Nations (UN) in October 1945 to promote international peace and cooperation as well as the adoption of the Universal Declaration of Human Rights (UDHR) in December 1948. The UDHR consists of 30 articles that have been elaborated in subsequent international treaties and national constitutions. Article 2 states:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[3]

The universality enshrined in the text appears to embrace everyone, anywhere, and at any time, even those who are homeless and lack the rights of citizenship—rights that correspond to one's membership to a political community. Based on a notion of shared humanity, human rights promise to fill in any gaps in protection for the displaced and uprooted. In fact, Article 14 states that "everyone has the right to seek and to enjoy in other countries asylum from persecution."[4]

Human rights as moral pronouncements like the UDHR are powerful because they advance certain minimum standards of treatment, namely freedom and equality, that should influence state policy. But human rights are not just aspirational. They guide international law and its enactment into domestic laws and policies. As a legal category, rights are relational and establish duties for both individuals and states to respect and protect the rights-bearer. The Convention Relating to the Status of Refugees, signed on July 28, 1951 in Geneva, Switzerland, builds on Article 14 of the UDHR and establishes

[3] United Nations General Assembly, "Universal Declaration of Human Rights," Article 2.
[4] Ibid., Article 14.

a legally binding framework for refugee protection. It grants certain rights to, and legitimizes the presence of, individuals who meet the following definition of a refugee:

> A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[5]

The Office of the United Nations High Commissioner for Refugees (UNHCR), the agency tasked with protecting and assisting refugees, promotes three durable solutions: voluntary repatriation, local integration, or resettlement to a safe third country.

Due to the difficulties of returning home given the likelihood of persecution, most refugees are locally integrated into a neighboring country. Others inhabit refugee camps, which are designed by governments, UNHCR, and NGOs to offer temporary accommodation and services until a refugee can be either repatriated or resettled. To be resettled, an applicant must be registered with UNHCR, complete certain applications, provide specific documentary evidence, undergo an extensive refugee status determination process, reside in regulated spaces, and ultimately be deemed to have a well-founded fear of persecution on account of one or more of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. The screening process can last from a few years to indefinitely. In fact, in 2015, less than one percent of the 65.3 million people forcibly displaced from their homes were approved for resettlement to a third country; life in the camp is becoming the norm for tens of millions of people as countries limit the number of refugees they are willing to resettle.

[5] United Nations High Commissioner for Refugees, "Text of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees," Article 1.

In contrast to a refugee who is situated abroad, an asylum seeker is an individual who crosses one or more borders, arrives at the nation-state's front door without prior authorization, expresses a credible fear of persecution, and requests to have his/her claim assessed. Therefore, an asylum seeker is an individual who is in the process of applying (or has applied) to be recognized as a refugee and is awaiting a decision from the "host" state. Article 33 of the 1951 Refugee Convention states that "no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened," thus ensuring a minimum level of protection for asylum seekers.[6] Yet, the reality that asylum seekers face once they arrive at the border greatly deviates from the international protections states have acceded to during intergovernmental negotiations in Geneva and New York.

Examples of these tensions and contradictions are illustrated throughout this dissertation, which focuses on the experiences of refugees fleeing persecution in their countries of origin and seeking asylum in the United States of America (U.S.). To briefly provide four here, which will be detailed in the following chapters: in July 1980, 27 Salvadorans fled a brutal civil war and tried to seek asylum by trekking across the desert of the Organ Pipe Cactus National Monument in Arizona, leaving 13 dead and 14 hospitalized with severe dehydration (Chapter 1); Cristina, a 26-year-old from Guatemala, sought asylum after crossing the southern border into Texas, was detained for weeks with her son in one of the many immigration detention centers throughout the country, and was finally released once she agreed to wear an ankle monitor that tracks her movements (Chapter 2); Omar, a 40-year-old Syrian doctor, came to the U.S. in 2013 to

[6] Ibid., Article 33(1).

apply for asylum and bring his wife and son who are stuck in a refugee camp in Jordan, but had his asylum hearing pushed back until 2018, thus leaving him with the prospect of being separated from his family for over five years while remaining in legal limbo (Chapter 3); and Maria, a 28-year-old from Guatemala, was denied asylum and ordered deported because the immigration judge presiding over her case did not believe the veracity of the corroborating evidence (letters from a doctor and photographs of her injuries) she provided (Chapter 4). Cases such as these lead us to experience a degree of ethical rupture between human rights and the rule of law as advertised in liberal democratic states and life as it is experienced by our fellow human beings.

Fundamentally, this dissertation is concerned with the right to enter a host state, which encompasses the right to seek and to enjoy asylum and freedom of movement. It is this right that is the starting point for an asylum seeker, who is categorized as an "irregular" migrant, to enjoy other rights. Becoming irregular involves crossing one or more borders without permission or in a way that is outside the established frameworks governing international migration; it involves evading all checkpoints and lacking valid documents.[7] This project conceives of asylum seekers as belonging to a temporary and disenfranchised category of global non-citizenship, and as such, they carry the border wherever they go. Unable and/or unwilling to wait years to obtain refugee status, asylum seekers undertake dangerous journeys to have their claims heard; that is, they are migrating to be *recognized* as fellow human beings. But what can human rights offer to asylum seekers if immigration and border control—a series of laws and policies that make explicit distinctions between the inside and outside, citizen and non-citizen, rights-

[7] Johnson, *Borders, Asylum and Global Non-Citizenship*, 4.

bearing subject and humanity expelled—are accepted as normal state practice? *This project is concerned with the lived meaning, expression, implementation, reproduction, and contestation of these boundaries, distinctions, and hierarchies in the asylum regime.*

In risking life and limb to demand dignity, asylum seekers are the exemplary figure of abstract human rights principles that render "visible the exclusionary practices employed by the state in its attempt to maintain a territorial order."[8] Instead of contemplating whether the right to seek asylum or freedom of movement exists in the abstract, however, we should be asking focused questions such as: What measures do states enact to exclude asylum seekers from accessing their territories? How do asylum seekers navigate government policies and bureaucratic processes? How do immigrants' rights attorneys, refugee advocacy organizations, religious groups, and human rights organizations work together to frame human rights claims? On what basis do adjudicators (asylum officers and immigration judges) grant or deny claims? And how does an applicant's race, religion, nationality, language, culture, gender, age, and sexual orientation affect the outcome of a claim?

Methodology

Through a variety of methods, including legal and documentary analysis, historical research, 120 in-depth interviews, and participant observation, I tell a story of how human rights violations in other countries are/are not converted into human rights protections in the U.S. (a process I refer to as *translating distant wrongs into domestic rights*). Human rights violations no longer concern only distant "others" in far-off

[8] Squire, *The Exclusionary Politics of Asylum*, 3.

countries; rather, through the process of seeking asylum, they become part of everyday political life in which citizens and non-citizens negotiate within and across existing political communities. Ethnography focusing on the non-citizen draws attention to the implementation of policy and law, which produces different insights from focusing narrowly on legislation and documents. To understand how asylum seekers come to be recognized or denied as human rights subjects, I primarily focus on groups who have been historically excluded from international refugee law—women, children, and sexual minorities. This allows us to observe how claims from outside of the law interact with and have the potential to transform the law. Conceiving of human rights as aspirations and claims that contest the unjust order in favor of the oppressed and marginalized, this project is concerned with how excluded individuals and groups initiate social and political movements and formulate legal strategies to enact equality.

While much of the international media attention has focused on the refugee crisis in the Middle East that has resulted in a mass migration to Europe, the context for this study is what the U.S government termed a "surge" in women and children arriving at the Mexico-U.S. border in 2014. These individuals and families were largely escaping violence and persecution from three countries (El Salvador, Guatemala, and Honduras) that rank in the top six of highest murder rates in the world. Criminal organizations, such as the 18th Street Gang and Mara Salvatrucha (MS-13), are so powerful in large parts of the Northern Triangle of Central America that they have supplanted police forces and governments altogether. Furthermore, sexual and gender-based violence (including rape, domestic violence, sexual servitude, and human trafficking) against women and girls in

the region is systemic. El Salvador, Guatemala, and Honduras rank first, third, and seventh, respectively, for rates of femicide (female homicides) globally.[9]

One of the most distressing aspects of this refugee crisis is the number of children fleeing their homes, either alone (unaccompanied) or with their mothers. In 2009, the total number of unaccompanied immigrant children from Central America apprehended by U.S. Customs and Border Protection (CBP) was 19,418. That number reached 38,759 in 2013, but at the height of border crossings in the spring and summer of 2014, the number of unaccompanied immigrant children at the border soared to 68,541—the largest number of children (27 percent of the total) came from Honduras, followed by Guatemala (25 percent), El Salvador (24 percent), and Mexico (23 percent). There was also an increase in the number of families crossing the border at the same time, from 14,855 in 2013 to 68,445 in 2014. This dissertation conveys their multifaceted reasons for flight and the system of immigration and border control they encounter while trying to put forth asylum claims. Moreover, I juxtapose the asylum seekers' testimonials and actions with wide-ranging representations of irregular migration in government documents, policy memos, political speeches, academic publications, mainstream media accounts (newspapers, magazines, and websites), popular culture, NGO reports, think tank documents, and advocacy campaigns and materials. It is my hope that the theoretical and empirical insights generated by this research help create conditions for a reasoned and humane public debate around highly controversial subjects.

Field research for this project took place from March 2015 to March 2016. During this period, I interviewed 120 individuals involved in the process of seeking asylum: 55

[9] Geneva Declaration Secretariat, *Global Burden of Armed Violence 2015*, 7.

asylum seekers, 30 immigration attorneys, 13 asylum officers, 4 immigration judges, 4 religious leaders, 4 social workers, 3 government officials, 3 expert witnesses, 2 clinical psychologists, and 2 immigrants' rights activists. I began my study by contacting immigrants' rights attorneys, refugee advocacy organizations, religious groups, and human rights organizations (a group I refer to as the *human rights community*) in the San Francisco Bay Area. These individuals and organizations provided unparalleled access by allowing me to: attend "know your rights" presentations and workshops; participate in and facilitate legal recruiting presentations; observe attorney-client meetings; accompany asylum applicants to their hearings; and even conduct intake interviews with their clients. Taken together, this gave me an inside look at how human rights abuses and corresponding asylum claims are documented, framed, and translated into a legal and moral language that adjudicators (mis)understand.

Gaining access to U.S. government officials, policymakers, and adjudicators proved to be a much more difficult task. Despite numerous formal requests for interviews going unanswered or declined, I eventually connected with asylum officers through the social networking website LinkedIn. From there, they referred to me to their colleagues in the same office and other offices and put me in contact with government officials. The federal agency that oversees all immigration courts does not allow immigration judges to speak publicly or participate in seminars or conferences unless they receive authorization. Despite this obstacle, immigration court hearings are open to the public, and during my observations, several judges spoke with me off the record (informally) between hearings or in the hallways before/after hearings. A total of four judges (current and retired)

volunteered to be interviewed under the condition of anonymity and openly discussed the challenges and need for reforms in the immigration court system.

The interviews were open-ended and semi-structured. The questions posed to asylum seekers were broader in nature to provide them with the freedom to discuss their personal circumstances, histories of migration, persecution faced in their countries of origin, conditions inside immigration detention, and how the application process has impacted their lives. I generally used questions from immigrants' rights attorneys' intake forms to structure the interviews.[10] Questions for immigration attorneys and adjudicators were more technical and inquired about the participants' qualifications, training and experience, and motivations for undertaking their jobs. I asked the former how they framed applicants' claims to either fit existing case law or expand the refugee definition and the latter how they reached their decisions. Given the sensitive nature of the issues raised, all research undertaken was informed by the principles of confidentiality and voluntary and informed participation. I conducted the interviews in each participant's first language or language of choice, and the names that appear in this dissertation are pseudonyms. Participants are referred to by their job titles (asylum officer, immigration judge, and immigration attorney, among others) or current status (asylum seeker).

After two months of conducting intake interviews, it became clear that to fully understand how the process unfolds I needed to visit an immigration detention center, which is the first step in the process for nearly all asylum seekers who are not immediately deported after arriving at the border. Arrangements were made for me to travel with a team of immigrants' rights attorneys to Dilley, Texas. I chose this site

[10] Text on file with author.

because it is the country's largest family detention center and exclusively holds women and children (overwhelmingly from Central America). I spent three weeks at Dilley in the summer of 2015. In addition to conducting 40 interviews and observing social interactions between asylum seekers, center staff, and government officials, I built rapport with several participants that enabled me to follow-up with their cases as they navigated the complex adjudication system upon release.

Originally published in 2007, *Refugee Roulette* was the first comprehensive empirical study of refugee status determinations (or asylum adjudication) in the U.S. Premised on the notion that Americans "don't like the idea that litigants' lives, liberty, or property could be determined by the predilections of the individual men and women who happen to happen to judge their case," the study's three authors—Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag—analyzed 133,000 decisions at all four levels of the adjudication system between 2000 and 2004 and found exorbitant disparities in the handling of claims with comparable factual circumstances.[11] "Refugee roulette" refers to the arbitrariness in the decision-making process and outcomes of asylum cases, which leads to situations where "one judge is 1,820% more likely to grant an application for important relief than another judge in the same courthouse."[12] Similarly, the U.S. Government Accountability Office in 2008 put out a study that analyzed asylum data between 1995 and 2007 and found that "the likelihood of being granted asylum varied considerably across immigration courts and judges."[13] For example, a Haitian asylum seeker was twice as likely to be denied in Miami than New York. "It is very disturbing

[11] Ramji-Nogales, Schoenholtz, and Schrag, *Refugee Roulette*, 1.
[12] Ibid., 2.
[13] U.S. Government Accountability Office, "U.S. Asylum System," 7.

that these decisions can mean life or death, and they seem to a large extent to be the result of a clerk's random assignment of a case to a particular judge," said Schrag.[14]

To shed light on these drastic inconsistencies in asylum adjudication that run counter to the U.S. Constitution's due process and equal protection principles and undermine the rule of law, I conducted participant observation at asylum offices and immigration courts in nine cities: Arlington, Virginia; Atlanta, Georgia; Boston, Massachusetts; Eloy (and nearby Phoenix), Arizona; Houston, Texas; Los Angeles, California; New York, New York; San Antonio, Texas; and San Francisco, California. I chose these sites because they: contain offices and courts with the largest caseloads; have high caseloads of groups I was particularly interested in (women, children, and sexual minorities); have diverse immigrant communities with several active refugee advocacy and human rights organizations; are geographically dispersed throughout the country; and most importantly, have grant rates that range from the lowest to highest. I obtained grant rates for the affirmative process (eight regional asylum offices) from the U.S. Citizenship and Immigration Services' (USCIS) Asylum Division Quarterly Stakeholder Meetings.[15]

Table 1: Individuals Granted Asylum Affirmatively by Regional Asylum Office [Percent] (2015)

Asylum Office	***% Granted***
New York, NY*	22.6%
Houston, TX*	30.1%
Miami, FL	37.3%
Newark, NJ	38.3%
Chicago, IL	39.0%
Los Angeles, CA*	49.2%
Arlington, VA*	51.4%
San Francisco, CA*	76.7%
National Average	46.5%

[14] Preston, "Big Disparities in Judging of Asylum Cases."
[15] U.S. Citizenship and Immigration Services, "Asylum Division Quarterly Stakeholder Meeting."
* Denotes asylum offices where I conducted participant observation and in-depth interviews.

Defensive process (57 immigration courts) grant rates were found in the Executive Office for Immigration Review's (EOIR) Statistics Yearbooks for 2014 and 2015.[16] The following table displays 34 of the 57 immigration courts throughout the country that had at least 100 asylum merits decisions and were not adjacent to immigration detention centers (which generally have higher denial rates).

Table 2: Individuals Granted Asylum Defensively by Immigration Court [Percent] (2015)

Immigration Court	***% Granted***
Atlanta, GA*	2%
Las Vegas, NV	3%
Dallas, TX	9%
Houston, TX*	9%
Eloy, AZ*	9%
Adelanto, CA	10%
East Mesa, CA	10%
Charlotte, NC	13%
Detroit, MI	14%
San Antonio, TX*	22%
Cleveland, OH	24%
Hartford, CT	24%
York, PA	24%
Omaha, NE	25%
Bloomington, MN	27%
Los Angeles, CA*	27%
Pearsall, TX	29%
Kansas City, MO	32%
Miami, FL	32%
Orlando, FL	34%
Tacoma, WA	35%
Seattle, WA	36%
Baltimore, MD	43%
Chicago, IL	45%
Denver, CO	46%
Portland, OR	46%
Memphis, TN	56%
Philadelphia, PA	57%
San Diego, CA	59%
Arlington, VA*	63%
San Francisco, CA*	74%
Boston, MA*	75%
Honolulu, HI	81%
New York, NY*	84%
National Average	48.3%

[16] U.S. Department of Justice, "Executive Office for Immigration Review FY2015 Statistics Yearbook," Table 12.

* Denotes immigration courts where I conducted participant observation and in-depth interviews.

Chapter Breakdown

CHAPTER 1 examines the complex and contradictory relationship between the professed universality of human rights and the lived experiences of asylum seekers in our bordered world. The first part of the chapter charts the history of the contemporary human rights discourse from the Age of Enlightenment's liberalism and the American and French Revolutions to the UDHR and identifies three reasons why it is so difficult for irregular migrants to access protections, namely the deeply entrenched character of the nation-state, the "schizophrenic" nature of liberal democracy, and the political co-optation of human rights by the state. The second part of the chapter introduces U.S. asylum policy post-World War II and concludes with our current framework that is marked by the criminalization and securitization of migration.

CHAPTER 2 provides an in-depth look at life inside an immigration detention facility—the South Texas Family Residential Center—in Dilley, Texas. The first part of the chapter portrays how family detention centers have come to represent Giorgio Agamben's notion of "the camp"—a space where non-citizens are "taken outside" yet governed more tightly, where sovereign power intervenes directly on bodies and individual lives which do not have the normal protection of domestic or international law. The second part of the chapter illustrates that by developing strategies to push back against the ambivalence and antipathy regarding the legitimacy of their claims to be human rights subjects, the women and children held at Dilley and their allies in the human rights community highlight the unjustness of U.S. immigration policy and expand our notions of rights, citizenship, and belonging.

CHAPTER 3 surveys the asylum process that applicants must navigate—lack of legal representation, obscure rules, inadequate staffing, hearing backlogs, aggressive government prosecutors, and indifferent as well as compassionate adjudicators. The first part of the chapter explains why obtaining asylum for those applying from certain countries (the Northern Triangle of Central America) and under the "fifth" and "ambiguous" protected ground of membership in a particular social group is especially difficult. The second part of the chapter conveys how during the 1980s and 1990s, the human rights community played a major role in liberalizing domestic asylum policy and international refugee law by altering the decision-making culture of certain asylum offices and immigration courts, while allowing seminal cases to work their way through the courts that resulted in precedent-setting decisions. However, the contemporary context has seen the government shrink the social group category in the face of new migrations, putting immigrants' rights attorneys in a difficult situation: they must either fit their clients' claims into narrow boxes or stretch the boundaries of the refugee definition to accommodate more applicants.

CHAPTER 4 explores the conditions under which asylum seekers present their claims in the adjudication system, while focusing on the perspectives of immigrants' rights attorneys and adjudicators. The first part of the chapter illustrates that even with an established legal framework to guide assessments, factors outside the legal realm—an adjudicator's background, outlook, and bias—heavily influence asylum determinations. The second part of the chapter conveys how recent restrictionist legislation has led adjudicators to demand excessive corroborating evidence to measure the reasonableness of a claim. However, much of this "objective" documentation is highly politicized, overly

formalistic, and superficial, and it becomes the task of the human rights community to counter these biases with research that is more attuned to the situation on the ground in asylum seekers' countries of origin.

CHAPTER 1: BETWEEN HOMELESSNESS AND SANCTUARY

"We have no middle ground between collaboration and resistance"

Introduction

This preliminary chapter seeks to explain the complex and contradictory relationship between the professed universality of human rights and the lived experiences of irregular migrants (specifically asylum seekers) in our bordered world. The confusion over human rights—what they are, who they apply to, and how they are enforced—stems from the openness of the term. It is truly a "floating signifier" that is evoked by laws (international treaties, national constitutions, court decisions), lawyers, international organizations (UN), declarations (UDHR), heads of state, politicians and government representatives, international bureaucrats, NGOs, media outlets, religious groups, ethnic and cultural organizations, academics, activists, artists, citizens, and those that suffer human rights abuses to refer to numerous and even differing practices and discourses.[17] Affirming that human rights is a discourse that produces a subject, the first part of this chapter attempts to critically assess the way this discourse produces "man" and how this process allows for his embrace and protection as well as his expulsion from humanity.

The emergence of the concept of human rights as articulated in the UDHR is commonly rooted in the Age of Enlightenment's liberalism—a worldview advocating liberty and equality—and the American and French Revolutions and tells a story of progressively achieving human dignity. An initial exploration will convey that the subject

[17] See Douzinas, *Human Rights and Empire*.

of human rights is construed as a legal subject whose rights are respected and protected by a political configuration: the modern state. However, by providing an alternative genealogy of the international human rights and refugee frameworks, we see that liberalism justified Western empires built on political domination and produced a racialized "other," against which its own identity and logic was theorized and defined. This interaction between the other and the centralized Western states ultimately transformed the state from a political entity to one that identifies with a cultural or ethnic identity: the nation-state. In bringing light to this suppressed (darker) history of human rights where freedom and equality were routinely evoked yet deprived to certain subjects, I argue that we not only gain a better understanding of contemporary forms of exclusion—evidenced by the experiences of asylum seekers and refugees—but we also discover counter-narratives of human rights that contain an alternate path through which we can recast the way the human rights discourse is enunciated.

The best way to answer questions like "what are human rights" or "what rights do asylum seekers have" is to look at specific cases of the treatment of people in particular places and times—that is, to examine the gap between *de jure* and *de facto* rights. The second part of this chapter provides a historical overview of U.S. asylum policy from the end of World War II, a time when the country emerged as the dominant actor on the international stage, until the September 11, 2001 (9/11) terrorist attacks. The relationship between the U.S. and international human rights law over the past 70 years has been defined by its engagement/estrangement. No other country played a bigger role in the formation of the international human movement that arose in the mid-20th century, yet no other country has eschewed ratifying major instruments of international human rights law

with the same exceptionalism.[18] The U.S. has accepted more refugees than any other Western liberal democratic state, but at the same time, the U.S. employs some of the most draconian strategies to exclude refugees from attaining asylum. These contradictions are most visible considering the country's long history of immigration. After all, many of the founding fathers were refugees seeking political and religious freedom. On December 2, 1783, first President of the U.S. George Washington declared America a land whose "bosom is open to receive the persecuted and oppressed of all nations."[19] This sentiment was echoed over a century later when Emma Lazarus' sonnet "The New Colossus" (1883) gave voice to the Statue of Liberty, the country's beacon to new arrivals, by inviting the world's "huddled masses yearning to breathe free."

In this chapter, and more broadly throughout this dissertation, I argue that human rights have evolved from a discourse of revolution and dissent to one that is sanctioned and governed by the state. Simply put, the radical potential of human rights has been co-opted by governments. What has emerged in the process is a pronounced dichotomy—human rights as a form of hegemonic state power on one side, and on the other, human rights as a universal moral language that enables individuals and groups (the *human rights community*) to disrupt and overcome domination, exploitation, and exclusion through a variety of strategies. The former views human rights as a strategic calculation and employs human rights to strengthen its sovereign decisions, which range from foreign policy objectives that guide its relations with other states as well as domestically-oriented immigration policies about who to include/exclude from the political community (the state's *gatekeeping function*). The latter conceives of human rights as both an

[18] Anker and Vittor, "International Human Rights and US Refugee Law," 109.
[19] Loescher and Scanlan, *Calculated Kindness*, xiii.

aspiration and vehicle to resist state power and extend protections to those who have been excluded from the nation-state, such as asylum seekers, refugees, and other marginalized groups. It is this human rights community—one that is truly global and incapable of being owned—that has the potential to transform the discourse through building dynamic alliances and transnational solidarities that envision new ways of togetherness (*hospitality*) that go beyond the confines of nation-states. This hospitality is evident in various places and times, ranging from the Revolutionary Haitian Constitution (1805) to the Sanctuary Movement in the U.S. (1980s) to the work of immigrants' rights and human rights activists (today).

Human Rights as Freedom, Human Rights as Equality

Studies of human rights vary widely in their starting point depending on whether one approaches the concept as a topic of history, law, philosophy, politics, or the social sciences. Some draw a common thread between the Mesopotamian Codes of Hammurabi and our current era of globalization,[20] and others locate the concept much more recently in the 1970s under the advocacy of Eastern European dissidents like Václav Havel, Latin American opponents to right-wing dictators, and particularly, U.S. President Jimmy Carter.[21] The starting point for this analysis of the contemporary human rights discourse and its relationship to irregular migration is the mid-1940s, when the international community came together to adopt the UN Charter (1945) that reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal

[20] See Ishay, *The History of Human Rights*.
[21] See Moyn, *The Last Utopia*.

rights of men and women and of nations large and small."[22] Just three years later, the UN General Assembly adopted the UDHR (1948). Article I unambiguously affirms: "All human beings are born *free* and *equal* in dignity and rights. They are endowed with *reason* and *conscience* and should act towards one another in a spirit of *brotherhood* [emphasis mine]."[23] A close reading of the document, which establishes the notion of human rights as we understand it today, reveals the dominant influence of the Age of Enlightenment's liberalism and the American and French Revolutions. The UDHR serves as the spine of the international human rights regime—a set of norms, laws, and institutions that are binding on member-states—and has been enacted at the regional, national, and local levels in every corner of the world.

The philosophical roots of liberalism can be traced back to Enlightenment thinkers of the 17th and 18th centuries, who initiated a shift from abstract natural law that located the origin of rights in God's will or some other transcendental source to a set of concrete rights that are inherent in human nature and must be protected by government. At the time, most European states were monarchies and political power was concentrated in the hands of kings and select aristocrats. The liberal philosophers (Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Thomas Paine, just to name a few), however, challenged this view by arguing that all people were created free and equal, and therefore, political authority cannot be derived from one's professed nobility, a supposed connection to God, or any other criteria that makes one person superior to the rest.

In a rich body of work, the philosophers employed the concept of "the state of nature"—the hypothetical conditions of what life was like before organized societies

[22] United Nations, "Charter of the United Nations."
[23] United Nations General Assembly, "Universal Declaration of Human Rights," Article 1.

came into existence—to theorize the fundamental characteristics of human nature that should be protected. Thomas Hobbes' *Leviathan* (1651) argued that the state of nature is defined by all humans being "equal in the faculties of body and mind" and having the right to do anything to preserve one's life.[24] Unlimited rights, however, give rise to competition, especially when resources are scarce. This led Hobbes to declare that human existence in this anarchic state is "solitary, poor, nasty, brutish and short" because conflicts devolve into "war of every man against every man."[25] Due to this precarious situation, security emerges as the greatest need to preserve one's existence, prompting individuals to rationally construct a social contract, which is constituted by two distinct contracts. First, individuals must agree to establish a civil/political society by collectively ceding some of their unlimited rights. Second, they must instill one person, or a group of persons, who has monopolized violence and is endowed with the authority to enforce the initial contract. In other words, to ensure their escape from the state of nature, individuals must both agree to live together under common laws and create a means to enforce the social contract and laws that constitute it. Writing during a period of upheaval that culminated in the English Civil War, Hobbes viewed an absolute sovereign power as the best way to prevent political instability and war.

In contrast to Hobbes' pessimistic view of human nature, John Locke and Jean-Jacques Rousseau argued that individuals gain civil and political rights in exchange for agreeing to respect the rights of others. In the *Second Treatise of Civil Government* (1689), Locke asserted that "the state of nature has a law of nature to govern it," namely reason, which teaches one that "no one ought to harm another in his life, health, liberty,

[24] Hobbes, *Leviathan*, 86.
[25] Ibid., 89-90.

or possessions."[26] To overcome the occasional transgression of one's rights in the state of nature, individuals willingly come together to form a civil/political society that hands over power to a government that acts a "neutral judge" to protect the contractors' inalienable rights. For Locke, the protection and promotion of individuals' natural rights to life, liberty, and property—rights that cannot be taken away or qualified no matter what—are the sole justification for the creation of government, and therefore, governmental intrusion into the lives of its contractors should be severely limited. This conception of rights is classified as negative because it obliges inaction: these are rights to *not* have one's life, liberty, and property taken away. For these reasons, Locke's writings can be characterized as focusing more on individual liberty than fostering solidarity or social equality.

In his seminal text *The Social Contract* (1762), Jean-Jacques Rousseau outlined a different version of the social contract that stressed collectivism over individualism. He believed that liberty was possible only when there was direct rule by the people to express their best interests: "Each of us places his person and all his power in common under the supreme direction of the general will; and as a body we receive each member as an indivisible part of the whole."[27] The resulting law, which is created by the people acting as a collective entity, is not a limitation on individual freedom, but rather an expression of the "general will." In contrast to Locke's individualism, Rousseau provided more space for equality and fraternity by linking rights with duties. Because individuals directly participated in decision-making, he viewed government in a more positive light and as potentially playing a greater role in the lives of its contractors.

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[26] Locke, *Second Treatise of Government*, 9.
[27] Rousseau, *Of the Social Contract and Other Political Writings*, 20.

In one way or another, liberal philosophers during this period argued that through the formation of a social contract that establishes a civil/political society and an effective government, individuals' natural freedom and equality are transformed into inalienable rights. What was right according to God's will in previous eras emerged during the Enlightenment as individual rights based on the law. As a result, such rights can only be claimed by those who are *members* of this new political configuration—the modern state. The contractors are now considered citizens who enjoy the rights and assume the duties of membership to the state, and the government is tasked with protecting its citizens' inalienable rights (Locke) or satisfying the best interests of the "general will" (Rousseau). If, however, the government fails to uphold the rule of law, then it "forfeit[s] the power the people had put into their hands," according to Locke, and "it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society."[28] This *right of revolution* would have an enormous impact on the history of human rights and the emergence of new liberal democratic states.

Thomas Paine's *Common Sense* (1776), a stirring pamphlet written in persuasive prose, extolled the right of revolution by making an impassioned plea for rejecting the British monarchy that he described as tyrannical. Instead, he advocated independence to people in the Thirteen Colonies and called for the establishment of an egalitarian government. Although the impact of Locke's writings on the American revolutionaries

[28] Locke, *Second Treatise of Government*, 111.

remains unsettled among historians, there is no doubt that the American Declaration of Independence (1776) clearly expressed his liberal thought:

> We hold these truths to be self-evident, that all men are created *equal*, that they are endowed by their creator, with certain *unalienable rights*, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government become destructive of these ends, it is the *right of the people to alter or abolish it* [emphasis mine].

The American Declaration put the liberal philosophers' ideas into practice and effectively transferred sovereignty into the hands of the revolutionaries, justifying it on grounds of natural rights and grievances against King George III. Natural rights would be codified in American law when the Bill of Rights (1791) was included as the first 10 Amendments to the U.S. Constitution. The Amendments, which set clear limits on the government's power as Locke had prescribed a century earlier, enumerate a range of negative civil and political rights ranging from freedom of religion, speech, press, and peaceful assembly (first amendment) to due process of the law (fifth amendment) as well as the prohibition of cruel and unusual punishment (eighth amendment).

Across the Atlantic Ocean around the same time, the National Constituent Assembly at the very start of the French Revolution passed the Declaration of the Rights of Man and of the Citizen (1789) to outline the principles upon which the new constitution of the country was to be based:

> Article 1. Men are born and remain *free* and *equal* in rights. Social distinctions may be founded only upon the general good.
> Article 2. The aim of all political association is the preservation of the *natural and imprescriptible rights of man*. These rights are liberty, property, security, and *resistance to oppression* [emphasis mine].

Influenced by natural rights theorists, notably Rousseau, the French Declaration not only defined a set of individual and collective rights, but it went further than its American counterpart by proclaiming that such rights were universal. "These acts of declaring were at once backward- and forward-looking," writes Lynn Hunt. "In each case, the declarers claimed to be confirming rights that already existed and were unquestionable. But in so doing they effected a revolution in sovereignty and created an entirely new basis for government," that is, governments validated by their guarantee of human rights.[29]

The radical potential of these ideas and principles, however, was not lost on the triumphant revolutionaries, who often turned out to be more oppressive than the rulers they overthrew. The degeneration in France from the Declaration to Reign of Terror in just four years exposed some of the tensions in both the theory and practice of liberal democracy between the commitment to individual rights, diverse and often conflicting demands of popular sovereignty, and the need to uphold social order and security. By the end of the 18th century, the concept of natural rights came under attack from both sides of the political spectrum. Conservatives found it to be too egalitarian and destabilizing of the established order; radicals claimed it endorsed too much wealth inequality. The violence of the French Revolution led the centralized Western states that developed out of the great revolutions to jettison natural rights theory for legal positivism.

For the emergent positivists, the source of a law was strictly the enactment of that law by a government and not some abstract idea hovering above the state. Law was positive in the fact that it was "posited"; no ethical justifications were required for the content of the law. According to the English philosopher Jeremy Bentham, natural rights

[29] Hunt, *Inventing Human Rights*, 115-16.

were too "ambiguous" because they could not be objectively evaluated. "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, —nonsense upon stilts," he proclaimed.[30] For Bentham, the only rights were legal rights, and therefore, he championed a utilitarian mode of thinking that defined the meaning of moral obligation by reference to "the greatest happiness of the greatest number of people" who are affected by the execution of an action. This led him to propose social policies that were evaluated based on their utility, or their effect on the general well-being of society, such as imprisoning a criminal to prevent future deviant acts. The law came to be viewed as a tool to strengthen state sovereignty, especially through social engineering and empire-building. Furthermore, theoretical contributions from the fields of economics and sociology in the late 19th and early 20th centuries hastened the decline of the appeal of natural rights. Karl Marx, Émile Durkheim, and Max Weber sought to understand the larger historical forces behind the massive social changes introduced by modern social capitalism. They viewed society as a natural entity to be studied scientifically through empirical investigation and critical analysis, rather than an artificial construction to be shaped by ethical values. The concept of individual rights endured this era, but not as natural rights espoused by the liberal philosophers; instead, rights were defended as being conducive to the general welfare of society.

The Covenant of the League of Nations, adopted in 1919 at the end of World War I, established the first international organization whose mission was to settle international disputes, maintain peace, and prevent wars through collective security and disarmament. However, no explicit mention of the rights of man were made at this time—with one

[30] Bentham, *Rights, Representation, and Reform*, 330.

notable exception. After World War I, in the wake of the old multinational empires fragmentation that "exploded in[to] a welter of inter-religious and inter-ethnic violence" and led to the independence of several new states, the League "made international recognition of Poland, Czechoslovakia, and the other states of the region conditional upon their guaranteeing their minorities certain collective rights."[31] This measure was added out of a fear that the harsh treatment of minorities in these new states could destabilize the region and ignite another catastrophic war. Yet, the U.S. failure to ratify the Covenant, coupled with the fact that the League "lacked any standing forces of its own or any machinery for enforcing the peace beyond a commitment by its members to submit any disputes among themselves to arbitration," proved to be too much for the organization to overcome when faced with the rise of totalitarian regimes in the Soviet Union, Italy, and Germany that ultimately led to World War II.[32] It took the horrors of Nazism—the slaughter of six million European Jews, displacement and mass movement of refugees, and widespread destruction—to resurrect the concept of natural rights in the mid-20th century and establish stronger institutional protection of such rights. The League of Nations lasted for 26 years until 1946, replaced by the UN at the end of World War II.

In 1942, the three major wartime powers—close allies the United Kingdom and U.S. as well as the Soviet Union—joined forces to devise a format of punishment for those who carried out war crimes. They came up with the Nuremberg trials, which were established by the Charter of the International Military Tribunal (London Charter) in 1945, to prosecute key figures in Nazi Germany charged with planning, executing, or taking part in the Holocaust. The main challenge for the prosecutors was framing the

[31] Mazower, "The Strange Triumph of Human Rights, 1933-1950," 381-82.
[32] Mazower, *Governing the World*, 136.

indictment for crimes that had not yet been addressed or even named by the international community. They fashioned the innovative legal category of "crimes against humanity" to assert that certain atrocious acts (including murder, extermination, enslavement, deportation, and other inhumane acts) as well as persecution on political, racial, or religious grounds are criminal "whether or not in violation of the domestic law of the country where perpetrated."[33] This supranational approach was a bold attack on state sovereignty and was justified by the fact that democracy, national constitutions, and the rule of law do not always prevent large-scale human rights violations, evidenced by Adolph Hitler being appointed Chancellor after winning a series of elections.

Robert Jackson, the Chief American Prosecutor at Nuremberg who helped draft the London Charter and would go on to serve as an Associate Justice of the U.S. Supreme Court, argued that there is a higher legal standard than the laws of states—that standard is international human rights law. This exploded the defendants' positivist defense that they were simply following the laws of Nazi Germany and carrying out state orders. Jackson's internationalist sentiment was echoed in the Tribunal's judgment: "the essence of the Charter is that individuals have international duties that transcend the national obligation of obedience imposed by the individual state."[34] The Nuremberg trials lasted until October 1946 and 19 defendants were found guilty and sentenced to punishments ranging from death by hanging to imprisonment. The introduction of individual criminal responsibility in international law not only weakened state sovereignty, but it constructed a universal jurisdiction for prosecuting and punishing the most heinous assaults on human

[33] International Military Tribunal for Nuremberg, "Charter (London Agreement)," Article 6(c).
[34] International Military Tribunal for Nuremberg, "Judgment."

dignity. A new normative order based on the universal category of "humanity" emerged. Natural rights were officially revived and renamed "human rights."

In her thorough history of the drafting of the UDHR, Mary Ann Glendon points out that "together with the Nuremberg Principles of international criminal law … the UDHR became a pillar of a new international system under which a nation's treatment of its own citizens was no longer immune from outside scrutiny."[35] In June 1946, the less than year old UN established the Commission on Human Rights to draft the first "international bill of rights." Under the chairmanship of First Lady of the U.S. Eleanor Roosevelt, a distinguished group of individuals—including Peng-chun Chang of China, Charles Malik of Lebanon, William Hodgson of Australia, Hernán Santa Cruz of Chile, René Cassin of France, Alexander Bogomolov of the Soviet Union, Charles Dukes of the United Kingdom, and John Humphrey of Canada—navigated cultural and political differences to produce a document that would usher in a new chapter in the history of rights. Weary of imposing a single conduct of rights on the international community, Roosevelt expressed her disdain for proclamations divorced from reality. Such documents expressing mere ideals "carry no weight unless the people know them, unless the people understand them, unless the people demand they be lived," she said.[36] Therefore, the drafters set out to find a common standard that could manifest itself organically in different cultures throughout the world.

John Humphrey, the talented Canadian lawyer and first Director of the UN Division of Human Rights, produced a first draft based on a comparative survey on national constitutions. The UDHR was adopted by the General Assembly on December

[35] Glendon, *A World Made New*, xvi.
[36] Ibid., xix.

10, 1948 by a 48-0 vote with eight abstentions: Saudi Arabia, South Africa, and six communist countries. While most of the member-states signed the UDHR, support was concentrated in Europe, North America, and Latin America. Less than a quarter of the states that signed the document were from Africa and Asia, areas largely still under colonial rule where most of the world's population was concentrated. Thus, despite drawing from the world's major religions, capitalist and socialist states, and developed and developing countries, the UDHR certainly embodies a Western bias: it prioritized rights over duties, emphasized individual over collective rights, and absented any mention of colonialism.[37] Given that it arose in opposition to Nazism and unchecked state violence, it is not unsurprising that the document evinces a Lockean conception of rights that limits state involvement. The change in terminology from natural rights to human rights may have assuaged philosophical and religious differences, but the roots of the document clearly trace back to liberal thought promulgated during the Enlightenment.

While liberalism made a claim to universality in theory, the Commission on Human Rights sought to put this into practice by obtaining the support of the world's major political powers. In the ensuing years, it became the task of the Commission to develop a body of international human rights law based on the principles enshrined in the UDHR that would be binding on contracting states as well as mechanisms to monitor implementation. This was no easy task with the rising tensions of the Cold War. The two major protagonists, the U.S. and Soviet Union, articulated differing notions of human rights. The U.S. and other Western states endorsed civil and political rights, whereas the Soviet Union favored social and economic rights. The former focused on negative rights

[37] Cassese, "The General Assembly," 31.

derived from liberalism—such as the right to life, freedom of speech, the right to liberty, and procedural fairness in law (including due process)—meaning that states are prohibited from intervening in individuals' most fundamental freedoms. The latter concerned positive rights rooted in the socialist tradition that placed a duty upon states to assist in the realization of a wide array of rights, such as education, healthcare, safe working conditions, and an adequate standard of living (including food and housing).

Liberals argued that social and economic rights were not truly human rights because they could only be claimed by groups and not individuals. Socialists claimed that social and economic rights were more important because individuals need to have basic conditions for survival met before worrying about, for example, freedom of the press. In addition to these deep ideological differences that played out in various international forums, both countries employed their conception of human rights as tools of their foreign policies to score ideological points against one another, while simultaneously committing human rights violations. These differences made the Commission's task to draft a singular international bill of rights that bore the force of law unachievable. State sovereignty, which was undermined by the Nuremberg trials, reemerged and took precedence over universality. Thus, in December 1966, the Commission was forced to produce two separate documents—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—that reflected these two approaches to human rights. The 1960s also saw the UN greatly expand its membership, as the decolonization movement produced newly independent states ready to join the international community after decades and even

centuries under colonial subjugation. These states raised a new set of issues, such as the right to self-determination and minority rights.

The second half of the 20th century saw the proliferation of treaties prohibiting specific types of human rights violations like the Convention on the Elimination of All Forms of Racial Discrimination (1965) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) as well as addressing marginalized populations, including the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and Convention on the Rights of the Child (1989). The 1951 Refugee Convention, which initially limited its protection to European refugees before January 1st of that same year, was amended by the 1967 Protocol Relating to the Status of Refugees to remove geographical and temporal restrictions. These international instruments and their enactment into domestic laws transformed abstract moral pronouncements about the equality of all human beings into concrete entitlements. Before World War II, human rights as a topic of law was hardly mentioned during international negotiations, yet 50 years after the UDHR was adopted, there were "around two hundred assorted declarations, conventions, protocols, treaties, charters, and agreements, all dealing with the realization of human rights in the world."[38]

In addition to seeing the flourishing of treaties as a way of providing stability to prevent another major world war from occurring, one can also view the international human rights regime as a form of positive law. The ratification of human rights treaties—that is, the act of legislating—is the supreme exertion of sovereignty. A state that ratifies an international treaty can declare itself a "civilized" state and guarantor of certain rights,

[38] Morsink, *The Universal Declaration of Human Rights*, 20.

bolstering its legitimacy. Law-making in Geneva and New York has come to be dominated by lawyers, heads of state, diplomats, and "experts." This is far removed from the above-described picture of natural rights as a language of dissent and concrete check on governmental power. Furthermore, states at international forums like the UN are not just making laws, they are pursuing national interests. Ethical values can play a role in a state's foreign policy, as will be evidenced in our case study of the U.S. below. When this happens, significant improvements can be brought about quickly. But more often human rights policy is based on precise calculations: either evoked to criticize an adversary or ignored to turn a blind eye to the abuses of an allied state. This has led many to characterize the international human regime as all declaration and no implementation due to the interests of its primary actors: states.[39] The co-optation of human rights for states' own political aims has undermined the radical potential of rights to a degree and this is most evident in their (lack of) implementation and continued violations.

Whether one believes in an expansive version of human rights grounded in universal morality or a more specific version of human rights as enumerated in specific treaties that have been enacted into domestic laws, surely the common denominator is that no innocent individual should be subjected to death, torture, cruel and unusual punishment, or arbitrary detention. Yet, despite human rights being embraced by a wide range of actors, not only has the number of asylum seekers and refugees reached its highest level ever, but these vulnerable populations are routinely exposed to grave violations. According to UNHCR, the number of people forcibly displaced from their homes because of war or persecution in 2013 exceeded 50 million for the first time since

[39] Donnelly, *Universal Human Rights in Theory and Practice*, 173-81.

World War II. By 2015, that number had jumped up to 65.3 million—40.8 internally displaced persons, 21.3 persons were refugees, and 3.2 million asylum-seekers—which translates to an estimated 24 people being forced to flee their homes every minute.[40]

Let us just briefly look at two human rights that are the foundation of all international declarations: the right to life and the right to liberty (specifically the right to not be arbitrarily detained). In 2015, the International Organization for Migration reported that there were more than 5,350 deaths at borders globally.[41] Approximately 3,771 of those deaths were recorded in the Mediterranean region, as depicted by the image of Alan Kurdi, where individuals and families primarily from the Middle East (Syria, Iraq, and Afghanistan) and Somalia sought to escape the brutality of civil wars, terrorist organizations, pervasive poverty, political repression, and evolving forms of persecution. Across the Atlantic, there were 330 deaths documented along the Mexico-U.S. border, where the largest proportion of individuals seeking asylum are women and children—primarily from El Salvador, Guatemala, and Honduras—fleeing rampant gang violence and recruitment, gender-based violence, trafficking, and enlistment into the drug trade. For those asylum seekers able to make it across the border, they are subjected to either expedited removal (sent back to situations where their lives are in danger) or indefinite detention. The U.S. currently possesses the largest immigration detention system in the world; approximately 34,000 individuals are held in over 250 facilities nationwide on any given day.[42] With a well-developed international human rights regime, why is it so difficult for asylum seekers to access human rights protections?

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[40] United Nations High Commissioner for Refugees, "Global Trends," 3.
[41] International Organization for Migration, "IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015."
[42] Haines and Kalhan, "Detention of Asylum Seekers En Masse," 69.

Human Rights and the Excluded "Other"

Thus far, human rights have been presented as one the most important formulations in the history of ideas and the foundation of liberal democratic states. The evolution of natural rights as ethical values and moral pronouncements during the Enlightenment to human rights as an organizing principle of the international legal order after World War II is nothing short of extraordinary. However, this dramatic shift has meant that "the ontological dimensions of human rights have been ignored largely in favor of the juridical."[43] Hence, in the face of contemporary savagery, apparent in phenomena such as genocide, gang violence, rape, torture, and enforced disappearances, human rights seem to offer the catch-all solution. To offer a solution to a problem, however, suggests that the understanding we have of that particular problem is correct, and our understanding leads us to believe that inhumanity is a consequence of too few institutions and too little state, too much backwardness and too little development. In the previous section, an initial exploration revealed the subject of human rights is construed as a legal subject, whose roots can be traced back to liberal thought premised on freedom, equality, and political rights. However, this section will illustrate the darker side of modernity—when slavery and colonialism were acceptable social practices—and convey the *limits* of universal human rights.

The invention of the Occident (or the West) as the biblical center of the world, where the garden of Eden was located, and projected against the image of a "fantasized" Asia motivated explorers, including Christopher Columbus, to undertake journeys to

[43] Parekh, *Hannah Arendt and the Challenge of Modernity*, 12.

discover strange and exotic lands. In the Occident, it was commonly believed that every man stemmed from God, so when Columbus encountered the Amerindians—the indigenous peoples of the Americas—he was stupefied by their similarities and differences. This encounter would have important and wide-ranging effects to understanding the world, as it led to the construction of modern "Europe."[44] The "discovery" of the Americas in the late 15th century inspired Europeans to ponder the differences between human beings, provided the backdrop for thinking about "man" and rights, and led to the creation of international law.[45] As Enrique Dussel argues, "These discoveries took place within a European perspective interpreting itself for the first time as the center of human history and thus elevating its particular horizon into the supposedly universal one of occidental culture."[46] As a result, European modernity construed all other cultures as peripheral. The Amerindians, characterized as a similar other, came to be the antagonist image of an Occidental self through which the West got its own face. Through this interaction, "Europe constituted other cultures, worlds, and persons as *objects*, as what was thrown before their eyes."[47]

The conceptualization of this strangely familiar other, however, took different forms. In the encounter with the Amerindians, Europeans perceived of themselves as civilized, understood in terms of being propertied, refined, and educated—citizens. This was in stark contrast to the "noble savages," who were wild, natural, passionate, and "homeless."[48] However, since *all men were created equal*—which is the basic premise of

[44] See Dussel, "Europe, Modernity, and Eurocentrism."
[45] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 13-31.
[46] Dussel, *The Invention of the Americas*, 35.
[47] Ibid.
[48] See Kiernan, "Noble and Ignoble Savages."

liberalism—these differences were soon attributed to the Amerindians' "inferior" education and intellectual development, means through which a savage mode of living could be escaped.[49] In other words, a notion of historical teleology was infused in 17th century liberal thought and intellectual maturity became a precondition for progress and political participation. The emphasis on development is apparent in the contractarianism advocated by Locke, who argued that the use and cultivation of reason would enable individuals to escape the state of nature and develop a civil/political society. He believed that a paternalistic attitude should be entertained towards women, children, and the property-less because they had not yet reached the maturity that would allow them to represent themselves in government.[50] This concept of immaturity or infantilism would then be projected onto the inhabitants of the newly discovered non-Western territories.

First, the liberal philosophers asserted that non-Western societies were backward because they did not display a civil/political status. Locke had theorized that the social contract was a prerequisite to the protection of the right to property, which had come into existence by improving or cultivating the land previously held in common. In the Americas, however, he recognized a state of nature because the "noble savages"—like animals merely collecting fruits given to them by nature and slaves to their own desires/appetites—failed to improve and appropriate the lands in his eyes. A failure to display the right form of private property resulted in their political identity not being recognized or acknowledged, and as such, their "irrationality" required them to be colonized.[51] For many of the liberal philosophers, the least well-off would come to

[49] Young, *Colonial Desire*, 31.
[50] Mehta, *Liberalism and Empire*, 62.
[51] Ibid., 147.

benefit from European cultivation and reason, which meant that colonialism was an act of benevolence and integral to the emerging human rights project. Second, non-Western societies were deemed to be legally underdeveloped. Whereas Locke speculated on the forms of the social contract against the background of the Americas, Baron de Montesquieu developed *The Spirit of the Laws* (1748), a pioneering work in comparative law, that contrasted Western democratic republics with "Oriental despotism."[52] According to liberals, the unwritten rules and customs that governed the non-Western societies were discredited and reduced to irrational behavior. The absence of certain legal requirements that constituted political legitimacy induced Europeans to colonize and "civilize" these societies. The civilizing mission justified colonialism as a means of bringing the "wretched of the earth" (borrowing a phrase from Frantz Fanon's revolutionary text of the same name) up to an acceptable standard of humanity.

This moral right to colonization would later be employed by the U.S. in the 1840s under the banner of "manifest destiny," which was motivated by three themes: the supposed special virtues of the American people and their institutions, the concerted mission to spread these ideals, and the proclaimed God-driven destiny to carry out this project.[53] These beliefs encouraged settlement from coast to coast, led to the removal of Native Americans from their lands, and ignited the Mexican-American War (1846-1848). Manifest destiny can both be traced back to many of the early American revolutionaries like Thomas Paine, who in *Common Sense* asserted that "we have it in our power to begin the world over again," and viewed as a forerunner to U.S. imperialism in the early 20th

[52] Hussain, *The Jurisprudence of Emergency*, 47.
[53] See Weeks, *Building the Continental Empire*.

century.[54] This period saw the establishment of colonies in Puerto Rico and the Philippines as well as protectorates in Cuba, Panama, and several other Caribbean and Latin American countries.

Alongside the debates framing the other in political and legal terms, a more pernicious form of categorization was about to emerge: race. Contributions from biology and physical anthropology in the 18th and 19th centuries led to the racialization of man, which meant that it became possible to scientifically determine where someone belonged in the hierarchy of being.[55] In other words, man became part of natural history. The invention of the concept of race greatly contributed to how the world was to be understood and formed the background against which Enlightenment thinkers would theorize their political philosophies. Biological inquiry revealed the hereditary and almost inalterable nature of man's characteristics. In effect, it naturalized man's being and he was bound to the possibilities and limitations of his presumed biological make-up. However, whereas physical markers were important in recognizing racial differences, physiognomic judgments created a hierarchy that racialized inner qualities such as rationality and morality. Deficiencies in political and legal terms were soon ascribed to innate deficiencies, such as stupidity or blackness. Whiteness, however, was indisputably the privileged term and stood for progress, morality, beauty, and intellect, or as Robert Young has noted, "white skin … became both a marker of civilization and a product of it."[56] Thus, the subject of human rights that emerged during the Enlightenment and

[54] Paine, *Common Sense*, 57.
[55] See Eze, *Achieving Our Humanity*.
[56] Young, *Colonial Desire*, 35.

drafting of the revolutionary treatises and declarations was far from universal: it was white, male, and propertied.

Enlightenment was far from a unified mode of thinking and against the grand claims of the rationalizing sciences emerged the tradition of Romanticism, which espoused the idea that geography forms the natural economy of a people and shapes their customs and society.[57] Most notable in this respect are Rousseau and Johann Gottfried von Herder, who provided the intellectual groundwork for the concept of the nation. For Herder, language and cultural traditions are the ties that create a nation; and for Rousseau, man would voluntarily subsume to the rule of law and establish a unified body, not as individual and competing individual property owners, but as equal members of a shared national community. The conceptualization of an exclusive unified social body is furthered by Herder who identifies the essential characteristic of a people—or *volk* (German for "nation")—connected to a natural environment and territory. Although nations are in constant flux, he suggests that they nevertheless maintain a certain nucleus which provides "a grounding that no other category of diversity … offers," and as such, an intimate connection was established between soil, territory, and man.[58]

G.W.F. Hegel elaborated on Herder's ideas and saw nations as being in the process of realizing their essential freedom.[59] In the Hegelian paradigm of world history, it then becomes possible to compare nations based on their stage of development and locate them in a hierarchical order along similar lines as races. Dussel highlights the prevailing Eurocentrism in the following except from *Encyclopedia of the Philosophical*

[57] See Muthu, *Enlightenment Against Empire*.
[58] Ibid., 246.
[59] See Hegel, *The Philosophy of History*.

Sciences (1817), where Hegel conveys his belief that the unstoppable forward march of all-conquering reason moves from East to West with Europe serving as the endpoint of universal history: "Because history is the configuration of the Spirit in the form of event, the people which receive the Spirit as its natural principle … is the one that dominates in that epoch of world history…. Against the absolute right of that people who actually are the carriers of the world Spirit, the spirit of other peoples has no other right."[60] These are early moves in what can be described as the cultural codification of racism, or "culturalism," that sees states identifying with and endorsing a specific cultural or ethnic identity.[61] Since the human rights discourse takes the configuration of the state/nation-state as man's essence in constructing a legal subject, those deemed to be outside the parameters of this narrowly constituted and exclusionary formation are expelled from humanity, left homeless and without the protection of domestic and international law, and vulnerable to human rights abuses.

In *The Origins of Totalitarianism* (1951), Hannah Arendt, writing from the dual perspective of political philosopher and Jewish refugee who had to flee her home at the height of Nazism, reflects on the experiences of minorities, refugees, and stateless people during the first half of the 20th century and exposes a deadly contradiction at the heart of the human rights discourse: the tension between the professed universality of human rights bestowed upon mankind in general, and the reality that an individual's rights can only be protected when s/he is part of a political community. This inescapable link between the nation-state and human rights led her to state that "the calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of

[60] Dussel, *The Invention of the Americas*, 24.
[61] Todorov, "Race and Racism," 70.

equality before the law and freedom of opinion—formulas which were designed to solve problems within given communities—but that they no longer belong to any community whatsoever."[62] Thus, when an individual loses his/her membership to a political community (or citizenship), the "Rights of Man" that are supposed to be there are conspicuously absent.

For Arendt, individuals thrust into this precarious situation cease to be fully human: "Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity."[63] Yet, rather than abandoning the concept altogether, she attempts to reformulate human rights. Arendt broadly conceives of human rights as falling into two categories. There are civil and political rights, like the right to vote and freedom of movement outlined in declarations and international treaties, which require a state for enforcement. But before an individual enjoys those rights, there exists a fundamental right to belong and engage in public life and debate: the "right to have rights." Speech and action, she contends, are fundamental dimensions of the human condition that distinguish us from other animals and are worthy of our protection in this world.

Practically-speaking, Arendt's notion of the right to have rights would entail all states reaching an agreement to take in and naturalize anyone denied or dispossessed of citizenship. After all, speech and action only become meaningful when they are recognized and heard by others. This conception, while powerful, is not something entirely new: it is essentially the right of asylum. Despite Arendt's invaluable critique and engagement, the original tension between rights and state sovereignty still exists. This is

[62] Arendt, *The Origins of Totalitarianism*, 295.
[63] Ibid., 297.

most visible in the UN Charter, which on one hand reaffirms fundamental human rights, and on the other hand states that "the Organization is based on the principle of the sovereign equality of all its Members."[64] This is further embedded when one looks at the permissive nature of "the right to seek and to enjoy asylum" contained in the UDHR and corresponding failure to include a duty on all member-states to grant asylum.

In addition to the deeply entrenched character of the nation-state and its corresponding exclusions based on nationality and race that render the universality of human rights a myth, irregular migrants must also contend with another obstacle: the nature of liberal democratic closure. This study is focused on liberal democracies because such states are legitimized through the values of liberalism—the moral foundation of the current international human rights regime with its emphasis on liberty, equality, and the rule of law. They are also democracies in that they are governed by collective self-rule. As Matthew Gibney points out, these ideals often pull in opposing directions and represent "a kind of schizophrenia" on the issue of asylum.[65] While the liberal side pulls towards the promotion of universal human rights regardless of citizenship, the democratic side judges the admission of non-citizens based on citizens' (the *demos* or electorate) cost-benefit analysis of their own interests (economic, social, and cultural). This tension has become even more pronounced in recent years as heads of state, politicians, and certain media outlets exploit racial anxieties to scapegoat immigrants and devise policies that are fundamentally opposed to the state's liberal foundations to solidify their rule.

Giorgio Agamben radicalizes Arendt's critique in *Homo Sacer* (1995) by arguing that the contemporary human rights discourse, beginning with the French Declaration of

[64] United Nations, "Charter of the United Nations."
[65] Gibney, *The Ethics and Politics of Asylum*, 2.

the Rights of Man and of the Citizen, fortifies sovereign power by politicizing all aspects of life. Article 1 equates the natural life of "man" with the possession of rights ("men are born and remain free and equal in rights"), but Article 2 subsumes natural life into the life of the "citizen" ("the aim of every political association is the preservation of the natural and imprescriptible rights of man"). Article 3 goes on to proclaim that the preservation of the natural life of a state's citizens is the very basis of sovereignty. Thus, man and citizen are not two autonomous beings, he argues, but rather "form a unitary system in which the first is always included in the second."[66] However, the question of which man becomes a citizen is determined by the sovereign. For Agamben (whose theories will be covered in more detail in Chapter 2), the most fundamental aspect of the Western paradigm of politics is the marking of the boundary between citizen and non-citizen, or natural life that is included as political life and natural life that is excluded as "bare life," and hence, exposed to state violence without recourse to human rights and the rule of law.

In addition to cementing the citizen/non-citizen divide, the state may use (that is, co-opt) rights-based language to create different classes of citizenship. For example, the "and" between man and citizen in the French Declaration historically served to mask the exclusion of people who did not meet the definition of full citizenship that was coextensive with gender, race, and class distinctions. Free, property-owning men were the only ones considered to be "active" citizens and afforded the right to vote. Yet, the exclusion of women, slaves, children, and foreigners was not taken lightly and prompted those "passive" subjects to employ the universal ideals of the human rights discourse to expose societal inequality. Some notable examples of individuals and groups mobilizing

[66] Agamben, *Homo Sacer*, 75.

around such ideals are the French playwright Olympe de Gouges' *Declaration of the Rights of Woman and the Female Citizen* (1791) and British philosopher Mary Wollstonecraft's *A Vindication of the Rights of Woman* (1792).

After the French Revolution, de Gouges and other women protested that if they were considered political enough to be sent to the guillotine and subjected to state violence, then they should be given full and equal political rights. According to Jacques Rancière, such claims are the true essence of the politics of human rights:

> Olympe de Gouges' argumentation precisely showed that the border separating bare life and political life could not be so clearly drawn. There was at least one point where 'bare life' proved to be 'political': there were women sentenced to death, as enemies of the revolution. If they could lose their 'bare life' out of a public judgment based on political reasons, this meant that even their bare life—their life doomed to death—was political. If, under the guillotine, they were as equal, so to speak, 'as men,' they had the right to the whole of equality, including equal participation to political life. Of course the deduction could not be endorsed—it could not even be *heard*—by the lawmakers.[67]

Nonetheless, he asserts that through constructing a "*dissensus*," or voicing a common wrong and disputing the given discriminatory order, they sought to enact the political rights not given to them. If these early works of Western feminist philosophy illustrate the false universalism of the human rights declarations with regard to certain European subjects, then to understand how the other has been (and continues to be) excluded from the nation-state system we must turn to movements against racial orders, such as the struggles of indigenous peoples, the anti- and post-colonial pursuits of liberation from imperial domination, and the labors of displaced and uprooted migrants. Unearthing these stories—both past and present—can provide us with a roadmap on how best to actualize the transcendent ideals of the human rights discourse in various places and times.

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[67] Ranciere, "Who Is the Subject of the Rights of Man?," 303-04.

Sites of Hospitality, Zones of Hostility

In *The Black Jacobins* (1938), C.L.R. James narrates the history of the Haitian Revolution (1791-1804) by focusing on the leadership of Toussaint L'Ouverture, a former slave, who helped transform the most prosperous slave colony at the time into the first free society to explicitly reject racial hierarchies. In contrast to the centrality of the American and French Revolutions in standard accounts of human rights, the absence of this successful anti-slavery and anti-colonial rebellion is unwarranted for two interrelated reasons: not only did Haiti, as the pearl to the crown of the French Empire, form the economic basis of the great bourgeois revolution, but its constitutions contain valuable sources for imagining a hospitable, inclusionary, and deracialized society. Countering Hegel's Eurocentrism, Susan Buck-Morss ardently states that the revolutionary Haitian constitutions "without a doubt, took universal history to the farthest point of progress by extending the principle of liberty to all residents regardless of race, including political refugees who sought asylum from slavery elsewhere."[68]

Categorized as the (colonized) other, black Haitians were initially among the "nothing" against which Western societies emerged as nation-states. Haiti was therefore not a nation or unified body of people sharing a similar background and history. Instead, the revolutionaries embarked upon a utopian project to assert a principle of universal equality in a territory shaped by its difference and diversity. This is apparent when we look at the 1805 Constitution's articles pertaining to skin color:

> Article 12. No white person, of whatever nationality, may set foot on this territory in the role of master or proprietor nor in the future acquire any property here.

[68] Buck-Morss, *Hegel, Haiti, and Universal History*, 94.

> Article 13. The preceding article shall not have any effect on white women who have been naturalized by the government nor on their present or future born children. Included in the present provision are also Germans and Poles naturalized by the Government.
> Article 14. *All distinctions of color will by necessity disappear* among the children of one and the same family, where the Head of State is the father; *all Haitians will henceforth be known by the generic denomination of blacks* [emphasis mine].[69]

In reading these three articles sequentially, one can see how the revolutionaries began their project with an inherited racialized vocabulary and then proceeded to transform and infuse it with new meaning and potential. Article 12 served as a safeguard against the reinstatement of slavery by white foreigners; Article 13 protected whites who were naturalized as Haitians; and, Article 14 fought against racial distinctions by asserting that there was one universal identity in the newly established autonomous space. Not only did the 1805 Constitution ban references to skin color to proclaim a fundamental (racial) equality, but it also granted equal rights to children born out of wedlock, adopted marriage and divorce laws favorable to women, and granted equal access to property when black Americans were counted as three-fifths a person.[70]

Since slavery and colonialism were widespread at the time, the Haitian revolutionaries did not want to confine their emancipatory ideals within the island's borders. However, having endured the absolute terror of colonialism, they were reluctant to intervene and extend their revolution abroad. Thus, to reconcile their aims, the revolutionary constitutions enunciated a transnationalism that provided an explicit asylum provision for all slaves worldwide.[71] Although the revolutionaries were unable to forcefully liberate other slaves, any slave that could free him/herself was welcome in

[69] Fischer, *Modernity Disavowed*, 232.
[70] Grovogui, "Mind, Body, and Gut!," 187.
[71] Fischer, *Modernity Disavowed*, 241.

Haiti as an equal endowed with rights. Article 44 of the 1816 Constitution, which was drafted as a revision to the 1806 Constitution, stated that "All Africans and Indians, and the descendants of their blood, born in the colonies or in foreign countries, who come to reside in the Republic will be recognized as Haitians, but will enjoy the right of citizenship only after one year of residence."[72] This elevated Haiti as a tangible source of freedom and citizenship for any enslaved or colonized subject, regardless of their location, who made it to the territory.

This provision of asylum exemplifies the concept of hospitality—postulated in Immanuel Kant's "Third Definitive Article for Perpetual Peace" (1795)—as a *right* of the foreigner to enter and a *duty* of the host to admit. According to Kant:

> Here, as in the preceding articles, it is not a question of philanthropy but of *right*, so that *hospitality* (hospitableness) means the right of a foreigner not to be treated with hostility because he has arrived on the land of another…. What he can claim is not the *right to be a guest* (for this a special beneficent pact would be required, making him a member of the household for a certain time), but the *right to visit;* this right, to present oneself for society, belongs to all human beings by virtue of the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth.[73]

Jacques Derrida takes the household (or home) as his focal point to deconstruct the Kantian relationship between host and guest (citizen and non-citizen). He asserts that to invite the other into one's home presumes a sovereignty over a concealed space. Such mastery over the home separates inside from outside. Derrida argues that the law of unconditional hospitality is in constant tension with the laws of conditional hospitality.[74]

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[72] Ferrer, "Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic," 43.
[73] Kant, "Toward Perpetual Peace," 328-29.
[74] See Derrida, *Of Hospitality*.

The former refers to the cosmopolitan ideal that everyone should be able to cross borders to have their rights protected, while the later deals with the reality of nation-states' immigration laws that attach criteria for admission. The invitation to the other initiates unsettled terrain—the space between unconditional and conditional hospitality—that shapes encounters, identities, and rights and duties. For Derrida, therefore, hospitality is an inherently self-contradictory concept, but through its constant attempts to reconcile the unconditional with the conditional, it offers the radical potential for protection and belonging in a world divided into nation-states. Hospitality can reduce initial apprehensions in the host-guest encounter, thus constructing a liminal zone that is the starting point for an engaged dialogue between the citizen and non-citizen. From this space, dynamic alliances and transnational solidarities have the potential to emerge.

By declaring independence, Haiti assumed sovereignty over a space outside of the already established exclusionary Western homes that linked membership to nationality and race. However, because of their past experiences of subjection, the revolutionaries refused to draw distinctions between the inside and outside. In doing so, they established a home that was hospitable and inclusionary. The Haitian Revolution was successful because it blended "Enlightenment ideals into a movement which drew its militant, transformative energy from the spirit world of voodoo," and as such, it came to represent one of the first grassroots human rights movements against hegemonic power and influenced the transnational anti-slavery (abolitionist) movement.[75] However tumultuous Haiti's post-independence fate may appear—a story marked by political instability, pervasive poverty, and natural disasters—its story is equally as significant as the

[75] Gilroy, *Darker than Blue*, 69.

American and French Revolutions. Yet, unlike the preceding two upheavals that linked political self-determination to the promotion of a common cultural consciousness, L'Ouverture and his comrades enunciated truly egalitarian ideals without reservations on a global agenda.[76] In doing so, they fashioned a universal and multicultural togetherness.

Despite the lofty goals of the Haitian Revolution, the country's 19th and 20th century trajectory unfortunately could not shed the centuries-old legacies of slavery and colonialism.[77] Haiti's social, economic, and political struggles—attributable in large part to the debt accrued from reparations paid to France (1825-1947) in exchange for national recognition and subsequent U.S. occupation (1915-1934)—took shape in numerous 20th century postcolonial societies that attained independence in largely different historical contexts. In *On the Postcolony* (2001), Achille Mbembe explores questions of power and subjectivity in such societies and states that the postcolony can be categorized as "the site where sovereignty consists fundamentally in the exercise of a power outside the law and where peace is more likely to take on the face of a war without end."[78] It refers to a society whose presence is still rooted in the colonial experience, while simultaneously going beyond the colony. The legacy of colonialism has had a decisive effect on the development of the postcolony in several ways. It produced a distinctive social reality where many new "citizens" regarded the transfer of colonial power to the independent postcolonial regime as exactly that, the *transfer* of power. Yet, the "act establishing sovereign power was never a contract since, strictly speaking, it involved no *reciprocity* of legally codified obligations between state, powerholders, society and individuals."[79]

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[76] See Blackburn, *The American Crucible*.
[77] See Dubois, *Avengers of the New World*.
[78] Mbembe, "Necropolitics," 23.
[79] Mbembe, *On the Postcolony*, 42.

The relationship between the sovereign and citizen was regulated solely by force, rendering the social contract a sham.

Furthermore, the trajectory of civil society in the postcolony was incomparable to its Western counterpart. The colonial administration had distinguished Western legal subjects from racialized groups of native subjects, so when the independent regime took over, the bifurcation between privileged "citizens" and mere "subjects" remained intact.[80] Due to difficulties integrating into the global economy, these privileged citizens, who had come to occupy government positions as clients of the new regime, started to use their professional positions to secure their basic needs, which Mbembe refers to as the emergence of "indirect private government." Since the colony had been a laboratory for sovereign experimentation, especially with respect to warfare and violence, these new forms of indirect private government outsourced violence by relying on paramilitary forces, militias, and criminal gangs to enforce their positions.

As a result of these dynamics, postcolonial society is bound to remain a space of exception. With the "privatization of violence" along racial, ethnic, and tribal lines, the sovereign's position is constantly under threat. To remain in power, he resorts to colonial techniques of regulating society and reproduces unrestricted violence to divide and rule. But whereas the colonial administration was authorized to suspend the rule of law due to its foundational and privileged position in the international legal order, the postcolonial sovereign is prevented from doing so because it undermines his political legitimacy and violates human rights law. In turn, the riotous social reality of the postcolony produces two outcomes: first, continued oppression by the postcolonial sovereign creates mass

[80] See Mamdani, *Citizen and Subject*.

displacement in the form of migrants, asylum seekers, and refugees; and second, neocolonial incursions and humanitarian interventions are undertaken by powerful states to liberalize economies, reform institutions, and build democracies.

With respect to the internal and external tensions that many postcolonial states struggled with during the UN period (starting in the mid-1940s), Antony Anghie states:

> The emergence of Third World societies, as independent sovereign states, was simultaneous with the creation of international human rights law, which significantly conditioned the character of that sovereignty. The sovereign non-European state, then, never possessed the absolute power over its own territory and people that was exercised by the nineteenth-century European state. Further, to the extent that international human rights law and nationalism represent Western ideas of the individual, state, and society they both create the paradox that Third World sovereignty was exercised through, and shaped by, Western structures.[81]

After the international community came together to establish the UN in 1945 and ratify the UDHR in 1948, it then turned its attention the "refugee problem" with the 1951 Refugee Convention. While its adoption appeared to signal the institutionalization of "societal concern for the well-being of those forced to flee their countries," James Hathaway's analysis of the *travaux préparatoires* (official records of a negotiation) leading up to the 1951 Refugee Convention identifies three themes highlighting how powerful states co-opted human rights to further their own agendas and exclude asylum seekers and refugees from non-Western countries.[82] First, the Convention maintained a limited and strategic focus. The Soviet Union's decision to opt out of the deliberations led Western states (primarily France, the United Kingdom, and the U.S.) to construct a framework that prioritized their own objectives and ideologies like providing shelter to exiles from socialist states, while minimizing their overall resettlement capacity.

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[81] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 254.
[82] Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law," 130.

Second, Western states defeated a universalist approach in favor of a Eurocentric legal mandate to prevent refugees from the Third World from arriving at their borders. As Hathaway conveys, "the states that drafted the Convention created a rights regime initially limited to the redistribution of the refugee burden from the shoulders of front-line European states."[83] This meant that only Europeans (specifically white, male, and anti-communist) were the object of the Convention and non-European refugees would be the concern of neighboring states. This is still the case today, as the top five states hosting refugees are: Jordan, Turkey, Pakistan, Lebanon, and Iran. Western states fulfilled their desire to contain Third World refugee flows by declaring UNHCR's mandate to be universal in scope, which meant that the agency could address the needs of large groups at once. This resulted in the creation of refugee camps (mainly in Africa, Asia, and Latin America) that emphasize voluntary repatriation and local integration over resettlement.

And third, states opted to take direct control over the refugee status determination process, thus placing national sovereignty (and political considerations) above independent and impartial adjudication. The current protection framework provides states with the flexibility to mold the refugee definition to their domestic interests; hence, they can exclude those they deem to be undesirable. However, significant for this study, while states are not required to provide asylum, they are obliged to respect the principle of *nonrefoulement*, which affirms protection against return to a country where a person has reason to fear persecution. Thus, the true test between universal human rights and state sovereignty in liberal democratic states emerges once unauthorized migrants arrive at the nation-state's front door and request asylum. Their arrival at the border directly

[83] Ibid., 151.

challenges the sovereign's ability to enforce its gatekeeping function by demanding recognition as human rights subjects and attempting to reshape the established order.

The Protocol Relating to the Status of Refugees, which entered into force on October 4, 1967, removed the geographical and temporal restrictions from the 1951 Refugee Convention to address the next large wave of refugee flows produced during the decolonization era and streamline refugee protection with the nascent international human rights regime. However, state practice in the interim years established a two-tiered system that not only shields Western states from most Third World asylum seekers and refugees but continues to politicize the status determination process of those it chooses to admit. According to Hathaway, "Because international refugee law currently is a means of reconciling the sovereign prerogative of states to control immigration with the reality of forced migrations of people at risk, it does not challenge the right of states to engage in behavior which induces flight, nor conversely the power of states to decide whether to admit victims of displacement."[84] This enables states—as will be conveyed in the rest of this dissertation with respect to the U.S.—to evoke human rights in their domestic and foreign policies while pursuing their *own interests* within a global context.

Thus, while the international community declares that the abstract subject of human rights deserves protection—evidenced by the UDHR, human rights treaties, 1951 Refugee Convention, and 1967 Refugee Protocol—this offer of asylum almost always stops at national borders. Displaced and uprooted individuals are unlikely to show the right passport, required documentation that not so coincidently emerged during the French Revolution. Passports were devised to track the movements of those deemed to be

[84] Ibid., 174.

enemies of the revolution as well as exclude non-nationals from the biopolitical configuration. John Torpey argues that the invention and administrative use of passports and documentary controls of movement—one aspect of border control—has been "essential to states' monopolization of the legitimate means of movement … and that this process of monopolization has been a central feature of their development as states."[85]

Contemporary border control and surveillance measures aim to exclude those individuals whose backgrounds diverge from the norm and are considered an economic, social, or cultural threat to the "unity" of the nation-state. Methods range from (extraterritorial) offshore processing centers in Western Europe and Australia to the militarization of the Mexico-U.S. border to the proliferation of (intraterritorial) immigration detention centers—zones marked by their callous *hostility* and disregard for human life. These exceptional measures not only enable the state to categorize certain individuals and groups as outside of the law—as irregular, undocumented, or even "illegal"—but justify further management and control. A close examination of U.S. asylum policy over the past seven decades will reveal how the three factors outlined in the past two sections—namely the deeply entrenched character of the nation-state, the "schizophrenic" nature of liberal democracy, and the political co-optation of human rights by the state—make it increasingly difficult (although not impossible) for irregular migrants to access human rights protections. In our contemporary world where asylum seekers have become the paradigm of inhumanity through their exclusion from a political community, the lessons of the Haitian Revolution as a site of *hospitality* invite us to envision/demand a more humane world for our fellow human beings.

[85] Torpey, *The Invention of the Passport*, 3.

Introducing U.S. Asylum Policy

As one of the two major superpowers of the Cold War and global hegemon since the dissolution of the Soviet Union in 1991,[86] the U.S. has been the only country with the necessary capacity, power, and interest to pursue a global campaign under the banner of humanity.[87] During the Cold War, it accepted upwards of three million refugees; far more than any other Western country. This is striking considering that the U.S. did not join the international refugee regime in 1951 after the establishment of the Refugee Convention. Rather, it opted to accede to the 1967 Refugee Protocol on November 1, 1968, which was then only enacted into domestic law in 1980. While this inclusiveness is commonly attributed to the country's long history of welcoming immigrants and various presidential administrations' human rights rhetoric, a closer examination reveals that refugee admissions throughout the Cold War were mainly part of a concerted effort to undermine the Soviet Union and hasten the weakening of its communist allies.

Of the roughly three million refugees that received humanitarian relief between 1946 and 1994, more than two-thirds were from communist regimes. The largest groups were Cubans, Indochinese (comprised of individuals from present-day Southeast Asian countries like Vietnam, Cambodia, and Laos), and people fleeing the Soviet Union and Soviet-imposed rule.[88] While the merging of refugee policy and foreign policy resulted in providing protection to millions in need, there was a less admirable flip side to this ideological co-optation of human rights: a cold-hearted indifference and outright hostility

[86] See Hardt and Negri, *Empire*.
[87] Douzinas, *Human Rights and Empire*, 27.
[88] Holman, "Refugee Resettlement in the United States," 3.

to asylum seekers and refugees fleeing right-wing dictatorships and non-communist countries in the Third World (especially El Salvador, Guatemala, and Haiti).

Immigration and border control as a prerogative of the government can be traced back to *Chae Chan Ping v. United States* (1889), better known as the *Chinese Exclusion Case*, which challenged the Scott Act of 1888 that prohibited Chinese laborers located abroad from entering the country, including those who had left and possessed valid return certificates. The first significant wave of Chinese immigration to the U.S. began in the early 1850s, when Chinese workers were initially welcomed in California to work in the gold mines due to labor shortages. Others followed suit to participate in large scale infrastructure projects, such as building the First Transcontinental Railroad, and take up labor-intensive agriculture, factory, and garment industry jobs. Their increased presence (authorized under the U.S.-China Burlingame Treaty of 1868), however, was soon met by a vicious anti-Chinese sentiment among workers who viewed the Chinese not just as competition and threats to their wages, but as culturally incapable of assimilating to American society. Racial antagonism paved the way for restrictionist legislation.

At the state level, California passed measures that ranged from instituting a foreign miners monthly tax, to enacting ordinances that banned Chinese immigrants from living in close proximity typical of Chinatowns, to preventing naturalization. As Hiroshi Motomura writes in *Americans in Waiting* (2006), "Paralleling the campaign against Chinese immigration, the campaign against Chinese naturalization played heavily on racial bias. Its leaders stirred up fear of invasion by Asian hordes and attacked Chinese labor as another form of slavery."[89] At the national level, Congress passed the Chinese

[89] Motomura, *Americans in Waiting*, 73.

Exclusion Act of 1882, which halted the immigration of Chinese laborers for a period of 10 years and required every Chinese person traveling in/out of the country to carry a certificate detailing his/her name, age, occupation, residence, and other descriptors and facts of identification.[90]

In *Chae Chan Ping*, the Supreme Court justified the discriminatory Chinese exclusion acts of the 1880s by asserting that "the power of the legislative department of the government to exclude aliens from the United States is an incident of sovereignty which cannot be surrendered by the treaty making power."[91] Premised on the notion that immigration is a fundamental question of national sovereignty, the plenary power doctrine maintains that the political branches of government are authorized to define the nation-state's borders: Congress (the House of Representatives and Senate) has the power to make immigration policy subject to minimal judicial review and the Executive Branch (President, Vice President, and Cabinet Members like the Attorney General) is tasked with enforcing the country's immigration laws. Three years later in *Nishimura Ekiu v. United States* (1892), the Supreme Court reinforced the plenary power doctrine when it stated, "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[92] Thus, for excluded groups to be recognized as human rights subjects, legislative change must be grounded in domestic activism and

[90] Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882).
[91] *Chae Chan Ping v. United States*, 130 U.S. 581 (SC 1889).
[92] *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (SC 1892).

vibrant support from American citizens that call for Constitutional rights and protections to be extended to non-citizens.

In his comparative analysis of asylum and state sovereignty in liberal democratic states, Christian Joppke illustrates that the history of U.S. asylum policy from World War II until the early 1990s "may be reconstructed as a zigzag of, first, liberating a 'humanitarian' asylum policy from foreign policy tutelage, and, second, closing this sudden opening for mass asylum-seeking."[93] Refugee policy and foreign policy first converged in 1956, when the Soviet Union brutally suppressed a democratic revolution in Hungary. Somewhere between 75,000 and 200,000 Soviet troops entered Hungary and executed, imprisoned, and deported thousands of dissidents. In just two months, 200,000 Hungarians became refugees. Under the newly established UNHCR, Western countries rapidly reached a resettlement agreement, and by the end of 1958, 40,000 Hungarian refugees had made their way to the U.S. President Dwight Eisenhower's success in accommodating the admission of this large group of refugees—without significant backlash from Congress, interest groups, or American citizens—was attributable to the refugees' situation being sympathetically covered by the media as well as the government's sense of obligation because the revolution emerged from student-led protests that were stimulated by a U.S. propaganda campaign aimed at opposing Soviet policies. Prior to authorizing the admission of these refugees, however, the Eisenhower administration faced the difficult task of finding a way to respond to the crisis without violating the country's restrictive immigration laws. Instituted in the 1920s and effective

[93] Joppke, "Asylum and State Sovereignty," 113.

until 1965, the national origins system was a series of laws that placed numerical limits on immigration and established a quota system based on nationality.

The Immigration Act of 1924, for example, limited the number of immigrants who could be admitted from any country to two percent of the number of people from that country already living in the U.S. as of the 1890 census. The law was designed to maintain the ideal of U.S. homogeneity as a nation predominantly comprised of Anglo-Saxon Protestants. Quotas were created to privilege immigration from Northern and Western Europe and curb the immigration of Southern and Eastern Europeans. Furthermore, it restricted immigration from Africa and barred Arabs and Asians who were ineligible for citizenship because they were characterized as being too "backward" to assimilate. In her thorough history of the legal regime that differentiated legal immigrants from "illegal aliens" during this time, Mae Ngai points out:

> The national origins quota system involved a complex and subtle process in which race and nationality disaggregated and realigned in new and uneven ways. At one level, the new immigration law differentiated Europeans according to nationality and ranked them in a hierarchy of desirability. At another level, the law constructed a white American race, in which persons of European descent shared a common whiteness distinct from those deemed to be not white. In the construction of that whiteness, legal boundaries of both white and nonwhite acquired sharper definition.[94]

These discriminatory immigration laws were accompanied by a system of immigration control. Passports (documentary evidence of national identity) would need to be supplemented with visas (documentary proof of permission to enter) to track the allocation of quotas, thus drawing a sharp distinction between regular (authorized) migration and irregular (unauthorized) migration. In fact, the U.S. Border Patrol was established on May 28, 1924, just days after the 1924 Act was signed, to inspect migrants

[94] Ngai, *Impossible Subjects*, 25.

crossing the Mexico-U.S. border. On the floor of the House in 1928, Congressman John Box of Texas pushed for further restrictions by making the case that exclusions should be applied to Mexicans (who were initially exempt because of labor demands); he asserted that "every reason which calls for the exclusion of the most wretched, ignorant, dirty, diseased, and degraded people of Europe or Asia demands that the illiterate, unclean, peonized masses moving this way from Mexico be stopped at the border."[95]

With the Hungarian quota already exhausted under the 1924 Act, government officials began exploring avenues to authorize resettlement. The means they discovered, ironically, came from the Immigration and Nationality Act of 1952, which upheld the national origins system. Section 212(d)(5) provided the Attorney General with the authority to "parole," or temporarily admit, individuals outside of the normal immigration process "for emergent reasons or for reasons deemed strictly in the public interest."[96] However, while the Executive Branch had the power to parole refugees into the country, Congress was entrusted with regularizing their immigration status through supplemental legislation. The Eisenhower administration embraced this power to resettle the 40,000 Hungarians, thus liberating refugee policy from domestically-oriented immigration politics. Such a move allowed the Executive Branch to equate refugee policy with foreign policy to alleviate domestic anxiety over the increase of foreigners. Most of the parolees in the ensuing years were refugees from Cuba who had escaped after Fidel Castro's communist forces seized power in 1959. Between 1959 and 1961, 125,000 Cubans arrived in the country. Many of those early refugees were considered "golden exiles," comprised of doctors, teachers, and other professionals, and it was hoped that admitting

[95] Gutierrez, *To Sin Against Hope*, 4.
[96] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 188 (1952).

them would initiate a transnational movement to overthrow Castro and ultimately weaken the ideological legitimacy of communist regimes throughout the world.

By the early 1960s, calls to reform immigration policy mounted as it became apparent that the quota system was ineffective. Several countries favored under the system failed to attract less than half of their yearly allotments. In contrast, the Executive Branch increasingly employed its parole power and pushed through ad hoc legislation to respond to various refugee crises. Approximately two-thirds of all immigrants who entered the country between 1952 and 1965 did so outside of the quota system and most were admitted as refugees.[97] Moreover, the growing strength of the Civil Rights Movement, coupled with pressure from ethnic and human rights organizations, conveyed the moral shortcomings of immigration policies based on nationality and race. In a June 1963 speech, President John Kennedy described the quota system as "intolerable."[98] Shortly after his assassination, Democrats, who held majorities in both chambers of Congress, began drafting legislation to amend the existing system.

In a ceremony held at the foot of the Statue of Liberty on October 4, 1965, President Lyndon Johnson signed the sweeping Immigration and Nationality Act into law. Standing behind him was the former President's brother, Senator Edward Kennedy, who helped shepherd the legislation through Congress. "This [quota] system violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man," said President Johnson. "It has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these

[97] Soucek, "The Last Preference," 172.
[98] Ludden, "1965 Immigration Law Changed Face of America."

shores even before we were a country."[99] The 1965 Act adopted a norm of non-discrimination by providing nearly an equal chance to immigrants from every corner of the world. It established the framework for our contemporary immigration system—one that prioritizes family members of U.S. citizens and lawful permanent residents (family reunification) as well as immigrants with specialized skills. While the unyielding activism of the Civil Rights Movement created a fertile environment to challenge discriminatory laws, David Fitzgerald and David Cook-Martín argue that the shift in policy was propelled primarily by geopolitical factors.[100] In the era of decolonization, newly independent states in Africa, Asia, and Latin America sought to delegitimize xenophobic immigration policies in the West through the UN and other multilateral institutions. To avoid losing support from these countries and to counteract the growing Soviet influence in the Third World, the U.S. liberalized its immigration policies.

Despite Congress removing discriminatory preferences from the country's immigration laws, refugee policy continued to be guided by foreign policy considerations at the height of the Cold War. Of the seven categories created for immigrants, refugee policy constituted the final "seventh preference category." Section 203(a)(7) allocated up to six percent of the total Eastern Hemisphere immigration quota (10,200 visas) for the conditional entry of refugees. In specifying a set number of visas, Congress' aim was to reassert itself in an admissions process that had been dominated by the Executive Branch's parole power. To fall within the purview of this section, though, an individual must have "fled from any Communist or Communist-dominated country or area, or from any country within the general area of the Middle East, and [was] unable or unwilling to

[99] Johnson, "Remarks at the Signing of the Immigration Bill, Liberty Island, New York."
[100] Fitzgerald and Cook-Martin, *Culling the Masses*, 82-140.

return to such country or area on account of race, religion, or political opinion," thus codifying the ideological bias of U.S. refugee policy in immigration law.[101]

The 1965 Act is notable in that it established "the first permanent statutory basis for the admission of refugees," hence acknowledging the long-term role of the U.S. in responding to refugee crises.[102] However, the law's refugee provisions embraced so many tensions that its permanence was doomed from the start. By only focusing on refugees fleeing communist regimes in the Eastern Hemisphere, it did nothing for the thousands of refugees from the Western Hemisphere arriving in the U.S. This ensured that the Executive Branch would continue to bypass Congress, which was made abundantly clear during the signing ceremony when President Johnson said, "I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it."[103] Some 350,000 Cubans were paroled into the country between 1965 and March 1980. Congress would go on to pass the Cuban Adjustment Act in 1966, which regularized the Cuban parolees' status by offering permanent residence to those who had been present in the country for at least two years, and after 1976, that duration was reduced to one year.

In addition to the law's geographical shortcomings, the low number of allocated annual visas failed to meet contemporary needs. In less than six months, the 10,200 seventh preference limit for 1970 already had been exhausted by Czechoslovakian and Polish refugees. While Indochinese refugees were covered under the ideological (anti-communist) and geographical (Eastern Hemisphere) parameters, the numerical quota was inadequate to address the worsening human rights situation. In April 1975, Saigon was

[101] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965).
[102] Anker and Posner, "Forty Year Crisis," 17.
[103] Johnson, "Remarks at the Signing of the Immigration Bill, Liberty Island, New York."

besieged and conquered by communist forces, pressing the U.S. to confront its failed foreign and military policy in the region. The administrations of Gerald Ford and Jimmy Carter employed their parole power to admit over 200,000 Vietnamese, Cambodian, and Laotian refugees between 1975 and 1979; their resettlement was viewed both as a foreign policy calculation to convey the brutality of communist regimes and moral obligation forged through U.S. military involvement. Just like with Hungarians in the 1950s and Cubans in 1966, Congress passed laws in 1977 and 1978 that adjusted the immigration status of Indochinese refugees. Brian Soucek writes that "in passing such laws, Congress effectively ratified the Attorney General's circumvention of both Congressionally established quotas and the exclusion provisions of ordinary immigration law."[104]

To address the 1965 Act's blatant qualitative and quantitative inadequacies, Senator Edward Kennedy introduced refugee legislation in the Senate throughout the 1970s. Despite the lack of support for such efforts, he finally found a sympathetic ear in the White House with President Carter, who had campaigned for the highest office in the land on a platform of universal morality. "Because we are free, we can never be indifferent to the fate of freedom elsewhere," he proclaimed during his inaugural address on January 20, 1977. "Our moral sense dictates a clear-cut preference for those societies which share with us an abiding respect for individual human rights."[105]

By the end of his first year in office, President Carter established the Bureau of Human Rights and Humanitarian Affairs within the Department of State, which over time added offices for refugee and migration affairs as well as country reports on human rights practices around the world. Furthermore, on March 17, 1980, he signed into law the

[104] Soucek, "The Last Preference," 185.
[105] Carter, "Inaugural Address."

Refugee Act—the first comprehensive amendment of U.S. immigration law "designed to face up to the realities by stating a clear-cut national policy and providing a flexible mechanism to meet the rapidly shifting developments of a troubled world."[106] Based on the human rights principles of non-discrimination and universalism, the law finally liberated refugee policy from foreign policy tutelage by removing any references to ideology or national origin. It also brought domestic law in line with the international standards by adopting the following definition of a refugee that conforms nearly word-for-word to the 1967 Refugee Protocol:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[107]

The 1980 Act also outlined a permanent and systematic procedure for refugee admissions by establishing a federal policy of continuing the program: the annual admissions limit of 17,400 was raised to 50,000 for the first three fiscal years of the program, and thereafter, the President would determine the number each year after consulting with Congress. The law went further by requiring the government to assist state and local communities in resettling refugees through support programs, and hence, the Office of Refugee Resettlement was established to administer social services and help refugees become integrated members of American society.

Most significant for this study, the 1980 Act distinguished between refugees who are situated abroad and asylum seekers who show up at the nation-state's front door

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[106] Roberts, "The U.S. and Refugees," 4.
[107] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

without prior authorization. Previous laws made no mention of asylum and had only conceived of refugee flows as a strictly overseas phenomenon, with individuals screened and chosen for admission while waiting in a third country far removed from U.S. territory. However, as Christian Joppke points out, "the Refugee Act leveled the sharp distinction between 'excludable' aliens at borders, with no statutory and constitutional rights, and 'deportable' aliens on US territory, endowed with constitutional due process protection."[108] Section 208(a) established "a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum."[109] The incorporation of the 1967 Refugee Protocol into law created a duty incumbent on the U.S. to comply with the *nonrefoulement* principle, extending constitutional due process rights like access to federal courts to ensure that asylum seekers would not be turned away without a fair hearing to determine their refugee status. Providing procedures to access asylum in the Act was almost an "afterthought," but the ramifications of this policy change would soon become impossible to overlook.[110]

The Onset of Mass Asylum Seeking

Prior to 1980, there was no formal U.S. asylum policy because very few applicants sought refugee status upon arrival. Haitians were the first national group to come to the country in substantial numbers without prior authorization. In contrast to the warm welcome received by Cuban refugees, the 30,000 Haitian "boat people" who arrived between 1972 and 1980 were labeled *en masse* as "economic" or "illegal"

[108] Joppke, "Asylum and State Sovereignty," 116.
[109] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 105 (1980).
[110] Meissner, "Reflections on the Refugee Act of 1980," 60.

migrants without legitimate claims. Due to the shared anti-communist objectives between the U.S. government and the dictatorships of François Duvalier in the 1950s and 1960s and his son, Jean-Claude Duvalier, in the 1970s and 1980s, the fate of these asylum seekers was essentially predetermined: arrested, jailed, denied asylum, and deported. Subsequent U.S. administrations ignored the rampant human rights abuses at the hands of the Duvaliers—state terror imposed through the establishment of paramilitary forces to repress any political opposition to their rule—in exchange for the use of Haiti's naval bases and close economic cooperation to spread American influence in the region.

President Carter took office in 1977 intent on criticizing regimes that engaged in grave human rights violations as well as encouraging institutional change to include humanitarian concerns. He introduced the possibility of a harsher policy towards the Haitian regime by reducing military aid and conveying to Jean-Claude Duvalier that an improvement in conditions would have a direct impact on the amount of aid the country received. Sensitive to this new moral dimension of foreign policy, Duvalier initiated a temporary relaxation of political repression. Although there were slight improvements in 1977 and 1978, the newly authored Department of State country reports that analyzed human rights practices in 82 countries conveyed that structural barriers to human rights protections in Haiti continued to exist, including a breakdown of the rule of law, no effective independent judiciary, and few legal safeguards to protect all citizens.[111]

Despite the increasing documentation of human rights violations in countries the U.S. was allied with like Haiti, asylum and refugee policy remained detached from President Carter's moral pronouncements in the late 1970s. At the domestic level,

[111] Loescher and Scanlan, *Calculated Kindness*, 73-74.

administration officials were concerned that if Haitians were allowed to stay, then it would send a signal to others in the Caribbean and Central America that they were welcome, hence opening the "floodgates" to unauthorized migration. At the international level, President Carter did not want to undermine the credibility of a key Cold War ally by welcoming the regime's political opponents. Yet, events transpired in the spring of 1980 that forced the Carter administration to adopt a new admissions policy.

Between April and October 1980, Fidel Castro allowed 130,000 Cubans to sail freely on boats from Mariel Harbor to Florida. While the scale of this unauthorized migration from Cuba was unprecedented, it took on an entirely different scope when a concurrent flotilla of 25,000 Haitians arrived in South Florida, forcing policymakers to contemplate a response to two sets of asylum seekers fleeing similarly oppressive governments in the Caribbean. Due to the 1980 Refugee Act's removal of geographical and ideological biases, which was signed into law just one month prior to this exodus, there was no longer a legal argument to be made for the preferential treatment of Cubans fleeing a left-wing, anti-American regime over Haitians escaping a right-wing, pro-American dictator. Furthermore, the Carter administration came under tremendous scrutiny from a variety of actors—ranging from religious groups to human rights organizations to politicians (particularly the Congressional Black Caucus)—who highlighted not just the hypocrisy of U.S. asylum policy, but also its racist underpinnings. After all, the Cubans seeking asylum were mainly white, whereas the Haitians were predominantly black. The Cuban-Haitian comparison ignited political pressure and gave added force to allow for Haitians to stay and present asylum claims.

This mass influx of asylum seekers was a test for the 1980 Refugee Act, which made the summary exclusion of asylum seekers a violation of the *nonrefoulement* principle. For the first time, government officials could not ignore the fact that asylum seekers from non-communist countries and/or the Western Hemisphere had certain rights. Summary exclusion was still an option, but only if the administration was prepared to violate domestic and international law. While the 1980 Refugee Act contained procedures by which the Department of Justice and Immigration and Naturalization Services (INS)—an agency tasked with administering the country's immigration laws—could confer refugee status upon an individual if s/he met the criteria, government officials determined that the sheer numbers of applicants made administrative assessment impossible due to a lack of staff, funding, and bureaucratic development of the program.[112]

Simultaneously unwilling to admit Cubans and Haitians under the 1980 Refugee Act without individualized determinations and reluctant to return them without a hearing, President Carter fell back on the Executive Branch's parole authority on June 20, 1980 to create a new immigration status for those who arrived in the country before that date: "Cuban-Haitian entrant (status pending)." The "entrant" status was initially valid for only six months. President Carter's action enabled both groups to temporarily stay in the country, but it left uncertain their immigration status and denied resettlement funding and benefits. Unable to reach a consensus, Congress responded by repeatedly extending the temporary status. It was only in 1984 that the 1966 Cuban Adjustment Act was amended to place the Marielitos on a pathway to permanent residence. Haitians, on the other hand, were relegated to second class treatment once again and remained in legal limbo for two

[112] Bon Tempo, *Americans at the Gate*, 183.

more years until an adjustment of status provision was included in the Immigration Reform and Control Act of 1986.

While President Carter continued previous administrations' open-door policy toward those fleeing communist regimes, the utility of refugees as a Cold War tool began to fade. Public opinion toward refugees began to sour when it was discovered that Castro, in a strategic move to humiliate the U.S., emptied several jails and sent approximately 8,000 criminals as well as others deemed "undesirable" by the regime as part of the Mariel boatlift. This was compounded by the fact that excluding "Cuban-Haitian entrants" from refugee status decentralized the costs of resettlement, shifting them from a federal priority to a local expense in Florida, one of the key electoral battleground states. Shortly after his failed 1980 campaign for re-election, Jimmy Carter said, "The refugee question has hurt us badly. It wasn't just in Florida, but it was throughout the country. It was a burning issue. It made us look impotent when we received these refugees from Cuba."[113] Still driven by a sense of morality and commitment to human rights that thrust him into the office in the first place, he went on to add: "I think in retrospect we handled the situation properly. We took them in…. I don't see anything we could have done differently, but there was a political cost to how we handled it."[114]

In addition to mass asylum seeking from Cuba and Haiti, the early 1980s saw an increase of "jet-age" asylum seekers—individuals who traveled intercontinentally to claim refugee status upon arrival at airports. Despite the modest number of such applicants, there was a growing sentiment that the country's borders were porous and under siege from Third World migrants. The transition of the U.S. from a country of

[113] Carter, "1980 Presidential Election Remarks with Reporters on the Results of the Election."
[114] Ibid.

refugee settlement to one of first asylum raised fundamental questions about its ability to manage irregular migration. The following administration—under the leadership of President Ronald Reagan who was inaugurated on January 20, 1981—capitalized on this domestic anxiety. He showed little interest in adhering to the nondiscriminatory aspects of the 1980 Refugee Act and strongly reoriented U.S. asylum and refugee policy around Cold War principles, marking a retreat from the human rights–oriented policies and rhetoric of late 1970s.

Between 1981 and 1991, approximately 25,000 Haitians were intercepted by the U.S. Coast Guard, of which only eight were granted asylum. Those fleeing right-wing dictatorships in El Salvador and Guatemala faced the same grim fate. This blatant hostility derived from the fact that President Reagan saw the region as another theater of the Cold War, where the U.S. was forced to stem the tide of Soviet influence and advocate for free markets. Civil strife in El Salvador and Guatemala had been bubbling up for years, as oligarchs backed by corrupt military leaders exploited large portions of the rural population composed mainly of indigenous peoples. As a result, leftist rebel groups with the support of the rural population took to arms to fight back against the repressive regimes. In both these instances, the Reagan administration intervened on behalf of the brutal dictatorships to ensure the defeat of Marxist-led movements.

In El Salvador, where the U.S. government spent more than $4 billion on economic and military aid, armed forces and death squads murdered thousands of leftist activists. A 1982 Amnesty International report identified these forces "as responsible for widespread torture, mutilation and killings of noncombatant civilians."[115] Even suspected

[115] Amnesty International, *El Salvador*, 5.

sympathizers like priests and nuns were targeted, including the March 1980 assassination of Archbishop Óscar Romero (a prelate of the Catholic Church in El Salvador) right after he ordered the military to stop killing innocent civilians as well as the December 1980 murder of four American churchwomen (missionaries). A 1984 Human Rights Watch report described the "aggressive, racist and extremely cruel nature of violations that resulted in the massive extermination of defenseless [indigenous] Mayan communities" undertaken by the Guatemalan military, which received arms and training from the U.S.[116] In Nicaragua, socialist revolutionaries (the Sandinista National Liberation Front) ousted the right-wing dictatorship in 1979, which prompted the U.S. government to provide $1 billion to the contra rebels trying to overthrow the new left-wing government.

President Reagan sold these interventions to the American people by stating that if the U.S. failed to stop the spread of communism in the region, then "we face a flood of refugees and a direct threat on our own southern border."[117] However, the reality was just the opposite: the brutal violence from these conflicts resulted in hundreds of thousands of deaths as well as grave human rights violations that caused many Central Americans to make the dangerous journey to the U.S. Various departments in the Executive Branch pursued discriminatory immigration policies that went hand-in-hand with President Reagan's foreign policy. The Department of Justice aggressively dissuaded Salvadorans and Guatemalans from applying for asylum. Those apprehended near the border were held in overly crowded immigration detention centers and coercively pressured to "voluntarily return" to their countries of origin without obtaining legal advice or appearing before an immigration judge. Given the pervasive human rights violations in El

[116] Navarro, "Guatemalan Army Waged 'Genocide,' New Report Finds."
[117] Bon Tempo, *Americans at the Gate*, 189.

Salvador and Guatemala, such a move was in direction violation of the *nonrefoulement* principle. Furthermore, immigration law endowed the Attorney General and INS with latitude over work authorizations, immigration bonds to be released from detention, and the conditions of detention. Immigration judges received "advisory opinions" from the Department of State based on foreign policy objectives that guided their assessments of asylum claims and were routinely adopted without consideration of the applicants' circumstances. Of course, the only way to determine who qualifies as a refugee is to carefully interview each applicant and evaluate his/her credibility and corroborating evidence (Chapter 4), but this was of no interest to the Reagan administration.

Asylum outcomes during the 1980s, therefore, mirrored the government's priorities: in 1984, 328 Salvadoran claims were granted and 13,045 denied; only 3 Guatemalan claims were accepted and 753 dismissed.[118] Applicants fleeing communist countries or regimes considered hostile to U.S. interests, on the other hand, were much more successful: the success rate that same year for Iranians was 60 percent, 40 percent for Afghans fleeing Soviet invasion, 32 percent for Poles, and 12 percent for Nicaraguans escaping the Sandinistas.[119] The most blatant manifestation of this double standard was the Reagan administration's refusal to grant Salvadorans extended voluntary departure (the predecessor to temporary protected status)—a special provision to temporarily suspend the deportation of people from particular countries because of political strife, natural disasters, or other crises until the situation in those places improve—while authorizing such status to 5,000 Poles during martial law.[120] Taken together, these actions

[118] Ferris, *The Central American Refugees*, 126.
[119] Gzesh, "Central Americans and Asylum Policy in the Reagan Era."
[120] Lindsey, "A Flood of Refugees from Salvador Tries to Get Legal Status."

let "migrants from poor, violent societies" in the Third World know that they were not welcome, according to Elliot Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs.[121] However, as depictions of the frightening conditions in war-torn Central America and inhumane treatment of asylum seekers at the border spread, various actors committed to universal human rights began to stand up in moral outrage.

Sanctuary and Asylum: The Emergence of a Human Rights Community

In July 1980, 27 middle-class Salvadoran men and women, with the assistance of hired Mexican guides, sought to come to the U.S. by trekking across the pathless desert of the Organ Pipe Cactus National Monument on Arizona's southwestern border in the scorching summer heat. When they were found, 13 had died from dehydration. The 14 survivors were transported to a hospital in Tucson, Arizona for medical treatment. As clergy from the Tucson Ecumenical Council provided pastoral care for those who survived, they learned of the death squads, rampant torture, and religious persecution that forced the asylum seekers to flee El Salvador. These harrowing testimonials profoundly affected the church groups, who mobilized the community to begin holding weekly vigils and procure legal representation to stop the deportation orders.

Jim Corbett, a Quaker rancher living in southern Arizona, became familiar with the plight of Central Americans in early 1981 when one of his friends was arrested for picking up a Salvadoran hitchhiker and accused of human smuggling. After INS and Border Patrol refused to provide information on the whereabouts of the hitchhiker, he reached out to a local activist group in Tucson that connected him with Father Ricardo

[121] Abrams, "Diluting Compassion."

Elford, a Catholic priest who had been organizing the weekly vigils with a Presbyterian Pastor named John Fife. Elford and Fife had been protesting the U.S.' heavy-handed foreign policy in the region since the murder of the four American churchwomen in El Salvador. As greater numbers of Salvadorans and Guatemalans made their way across the desert only to be summarily returned without a fair hearing, Corbett knew he had to act immediately "and try to save as many refugees as he could."[122] He and his wife began sheltering asylum seekers in their house. In the meantime, a grassroots organization, the Tucson Refugee Support Group, was already transporting Salvadorans across the border and the Tucson Ecumenical Council was working with refugee advocacy organizations and immigrants' rights attorneys to develop legal aid strategies that would extend due process rights to asylum seekers.[123] These early collaborative efforts addressed detention center conditions and helped develop the new case law of the 1980 Refugee Act.

What began as acts of *hospitality* among several American citizens and a handful of church groups committed to the rights of all human beings, regardless of their immigration status, would soon emerge as a national movement. In October 1981, Jim Corbett submitted a letter to the Elders at Southside Presbyterian Church in Tucson, where John Fife was Pastor. The letter persuasively and defiantly read:

> Because the U.S. government takes the position that aiding undocumented Salvadoran and Guatemalan refugees in this country is a felony, we have no middle ground between collaboration and resistance. When the government itself sponsors the crucifixion of entire peoples and then makes it a felony to shelter those seeking refuge, law-abiding protest merely trains us to live with atrocity.[124]

Despite being threatened with jail time by the government (INS) if the two men pursued

[122] Davidson, *Convictions of the Heart*, 22.
[123] Rabben, *Sanctuary and Asylum*, 151.
[124] MacEoin, *Sanctuary*, 19.

their subversive course of action, Pastor Fife on March 2, 1982 declared Southside Presbyterian Church a public sanctuary for those fleeing persecution. The date was chosen to commemorate the two-year anniversary of Archbishop Romero's assassination. In a letter to the Attorney General the day before his announcement, Pastor Fife wrote: "We take this action because we believe the current policy and practice of the U.S. government with regard to Central American refugees is illegal and immoral…. We believe that justice and mercy require that people of conscience and faith actively assert our God-given right to aid anyone fleeing from persecution and murder."[125] Southside Presbyterian's sanctuary declaration paired with the relentless work of activists along the border sparked the Sanctuary Movement—a moral, religious, and political campaign that began in the early 1980s to provide humanitarian relief as well as extend human rights protections to asylum seekers in direct response to the government's hard-nose exclusionary tactics.

Many of the early religious participants in the movement rooted their activism in the Judeo-Christian tradition of sanctuary, where refugees from the law could go to places of worship and claim the right of asylum. At the movement's peak, over 500 congregations actively participated. With no defined hierarchy, organization, or rules, sanctuary emerged as a "democratic movement" of people transporting, housing, feeding, and assisting asylum seekers.[126] Churches and other religious groups (Christian and non-Christian) were the logical starting point because they had already been providing such assistance to other marginalized and vulnerable groups in the U.S. like the homeless. Moreover, many of the religious leaders involved in the movement had participated in the

[125] Ibid., 20.
[126] See Bau, *This Ground is Holy*.

1960s civil disobedience campaigns against racial segregation. According to Jim Corbett, though, his opposition to the Reagan administration's policies was not civil disobedience, but rather "civil initiative." Civil disobedience, as practiced by Martin Luther King, Jr. and other civil rights activists, entailed purposely violating unjust Jim Crow laws (like eating at separate restaurants or standing in the back of public transportation) that prohibited African Americans from participating as full citizens and assuming the consequences to raise society's consciousness. Such actions proved to be successful with the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965.

Sanctuary activists, on the other hand, did not want to change immigration laws because the U.S. had already aligned its asylum provisions with international standards when it passed the 1980 Refugee Act. However, there was a glaring disparity between the laws on the books and what was happening on the ground as official state policy. Coming to the defense of individuals who had suffered human rights abuses abroad signaled a new use of international human rights norms by American citizens. Activists relied on the Nuremberg principles of personal accountability developed in the post-World War II Nazi tribunals to justify their insistence on a duty to disobey illegal and immoral actions undertaken by the U.S. government. This is precisely what Jim Corbett referenced during the Sanctuary Movement: if nation-states refuse to live up to their human rights obligations under international law, then it falls upon civil society to provide protection to those in need. Civil initiative suggests a praxis based on existing moral obligations to help those facing grave human rights violations, even if that means confronting state power head on, which was enunciated by Hannah Arendt nearly two decades earlier.

In her 1963 report from the trial of Adolf Eichmann, one of the major organizers

of the Holocaust, Arendt tried to comprehend what was unprecedented in the Nazi genocide. Her observations of the man and the crime led her to coin the term "banality of evil," referring to the way that atrocities are carried out systematically without being identified and opposed. Arendt's intention was not to convey how crimes against humanity are unexceptional, but rather how they become "accepted, routinized, and implemented without moral revulsion and political indignation and resistance."[127] As a matter of fact, she points out that Eichmann "not only obeyed *orders*, he also obeyed the *law*"—the expectations of a good citizen.[128] What had become so astoundingly banal in Nazi Germany, she argues, was a failure to think. In a searing testimony of speaking truth to power and standing up in the face of injustice, Arendt emphatically states:

> For the lesson of such stories is simple and within everyone's grasp. Politically speaking, it is that under conditions of terror most people will comply but *some people will not*, just as the lesson of the countries to which the Final Solution was proposed is that 'it could happen' in most places but *it did not happen everywhere*. Humanly speaking, no more is required, and no more can be reasonably asked, for this planet to remain a place fit for human habitation.[129]

A failure to desire to share and exist in the world with others is after all grounds for denying our very own right to exist, and therefore, the existence of humanity.

In addition to connecting their activism with the flourishing international human rights regime, other sanctuary participants traced their work back to 19th century transnational anti-slavery movement as well as the "Underground Railroad," a network of secret routes and safe houses set up to help African American slaves escape from the "peculiar institution" to northern free states and Canada. Many activists would drive

[127] Butler, "Hannah Arendt's Challenge to Adolf Eichmann."
[128] Arendt, *Eichmann in Jerusalem*, 135.
[129] Ibid., 233.

hours into Mexico and pick up asylum seekers from churches with which they maintained regular contact. After driving the Salvadorans and Guatemalans to the Mexican side of the border, they would provide them with instructions on what to say if they were apprehended by either Border Patrol or Mexican authorities. Once safely across the border, asylum seekers were provided with maps listing churches where sanctuary was being offered and a list of organizations that provided a range of services.

Although the movement presented itself as religious in character in the initial years, it operated in the secular realm and quickly spread to all segments of society by the mid-1980s due to the activists' advocacy efforts. The media played a significant role in disseminating the movement's message. On December 12, 1982, "60 Minutes," the popular television program, broadcasted an interview with Jim Corbett and a successful border crossing by a Salvadoran family that provided many American citizens with their first exposure to the situation along the border and the nascent human rights movement. Articles soon appeared in major newspapers and magazines. While media portrayals focused on male clerics and activists as leaders of the movement, it was women who outnumbered men at all levels of participation. Middle-class housewives and nuns effectively mobilized family, church, and community resources to support their efforts.[130]

From 1984 to 1987, more than 20 cities—Chicago, Los Angeles, New York, and San Francisco led the way—adopted resolutions declaring themselves sanctuaries for Central American asylum seekers and emphasizing their noncooperation with federal authorities. On March 28, 1986, Governor Toney Anaya issued a proclamation declaring the State of New Mexico a sanctuary. "It's my hope that this will serve as more than

[130] See Lorentzen, *Women in the Sanctuary Movement*.

solely a symbolic gesture," he said. "I hope that more states will join in with us to put pressure on the national administration to stop persecuting refugees and start living up to our own ideals and laws."[131] Two states legislatures, New York and Massachusetts, approved sanctuary resolutions in the ensuing months, while the movement gained tremendous momentum on university campuses. City sanctuary declarations put forth concrete policies rooted in needs of their communities. As supporters of municipal sanctuary policies point out, "the sensitive nature of police relations with immigrant communities calls for a separation between local policing practices and the technologies of policing and surveillance associated with border control."[132] Immigrant women being abused by their partners, for example, will be less likely to access healthcare and report crimes if there is a chance that they could be deported. Thus, the municipal sanctuary policies that proliferated in the 1980s called for diverting local resources from the federal government's immigration enforcement activities.

San Francisco's "City and County of Refuge" Ordinance (1989), also known as the Sanctuary Ordinance, is one such example of grassroots activism influencing policy. In 1985, the city first passed a sanctuary resolution that was largely a declarative act of solidarity. After a series of INS raids targeting workplaces, apartments, and even nightclubs, public outrage over the racial profiling of Latino communities prompted the San Francisco Board of Supervisors to hold public hearings on the issue of immigration enforcement, particularly the relationship between the local police and INS. Resurrecting some of the lessons from the previously discussed Haitian Revolution, the 1989 Sanctuary Ordinance articulated a far more inclusive vision of political belonging based

[131] "New Mexico is Declared Sanctuary for Refugees."
[132] Ridgley, "Cities of Refuge," 58.

on the idea that all inhabitants of the city, regardless of their immigration status, should have access to the same fundamental human rights.[133] Furthermore, the Ordinance conveyed a transnational vision of belonging and social justice: "The people of the United States owe a particular responsibility to political refugees from El Salvador and Guatemala because of the role that the United States military and other war related aid has played in prolonging the political conflicts in those countries."[134] James Holston and Arjun Appadurai note that as urban social movements challenge prevailing practices and laws, they not only assert new forms of rights and criteria for membership, but also reconstitute the substance and meaning of citizenship in the process.[135] The church, the university campus, and the city, among others, have the potential to operate as sites of resistance, and more importantly, they open up possibilities for imagining alternative futures. In conceptualizing the struggle for human rights as a process of continual contestation, however, it is important to keep in mind, as Monica Varsanyi notes, that "*the legal right to remain* must not be considered insignificant," as legal status has a profound impact on undocumented immigrants' daily lives.[136]

As more and more places declared themselves sanctuaries, the Reagan administration sought to slow down the movement by targeting its leaders. In April 1984, the Department of Justice and INS initiated an undercover investigation called "Operation Sojourner." Federal Bureau of Investigation informants were ordered to infiltrate sanctuary meetings and gather any evidence that could lead to criminal convictions. The investigation reached its climax in January 1985 with the indictment of

[133] Ibid., 70.
[134] Text on file with author.
[135] See Holston and Appadurai, "Introduction: Cities and Citizenship."
[136] Varsanyi, "Interrogating 'Urban Citizenship' vis-à-vis Undocumented Migration," 237.

16 people, including Jim Corbett and Pastor Fife, for conspiring to "smuggle" Salvadorans and Guatemalans into the country. As the Tucson sanctuary trials dragged on from October 1985 to May 1986, costing the government $1.2 million, public outcry echoed around the country and demonstrations at INS facilities became a common occurrence. After nine days of deliberation, however, eight of the 11 defendants were found guilty of one felony or another. After the verdict was delivered, Corbett, who was one of the three acquitted, stated that "we will continue to provide sanctuary services openly and go to trial as often as is necessary to establish the legality, or more directly, to actualize the Nuremburg mandates that the protection of human rights is never illegal."[137] Pastor Fife was one of the eight found guilty. In his sentencing statement, he said, "From the Declaration of Independence to the trials at Nuremberg, our country has recognized that good citizenship requires that we disobey laws or officials whenever they mandate the violation of human rights."[138] Two months later, the judge handed down the sentences: to the government's dismay, the eight defendants were not given jail time, but instead three to five years of probation. All of them resumed their sanctuary activism.

From the earliest days in the movement, a constellation of individuals and groups united in their commitment to the rights of the marginalized and vulnerable—including church groups, religious activists, immigrants' rights attorneys, refugee advocacy organizations, human rights organizations, social workers, educators, and asylum seekers themselves—came together to form a transnational *human rights community*. The aim of this community was not only to pressure the U.S. government to live up to its human rights and refugee obligations, but to break down the barriers between citizens and non-

[137] "6 Convicted, 5 Cleared of Plot to Smuggle in Aliens for Sanctuary."
[138] Davidson, *Convictions of the Heart*, 154.

citizens, between the subject of human rights and the excludable "other." It was the goal of the human rights community to *translate distant wrongs into domestic rights*. Cognizant of the difficulties of achieving legislative reform as well as the Department of Justice's willingness to prosecute activists, this burgeoning human rights community took matters into their own hands by challenging the Reagan administration in court. Several of the government's callous deterrent measures—expedited deportation, indefinite detention, and onerous burden of proof—would be weakened by the judiciary.

Federal courts abandoned their traditional deference to the plenary power of Congress and the Executive Branch and extended Constitutional due process and equal protection principles to asylum seekers. The first major triumph for asylum seekers in the 1980s was *Haitian Refugee Center v. Civiletti* (1980)—a class action suit on behalf of over 4,000 Haitians in South Florida—in which the plaintiffs challenged the INS policy of mass deportations. In a scathing critique of the agency's actions, U.S. District Judge James King for the Southern District of Florida said:

> Those Haitians who came to the United States seeking freedom and justice did not find it. Instead, they were confronted with an Immigration and Naturalization Service determined to deport them. The decision was made among high INS officials to expel Haitians, despite whatever claims to asylum individual Haitians might have. A Program was set up to accomplish this goal. The Program resulted in wholesale violations of due process and only Haitians were affected.[139]

The decision ordered INS to halt deportations until all asylum applications were given a fair hearing and called upon the administration to live up to the terms of the 1980 Refugee Act by outlawing impermissible discrimination based on national origin. The following year in *Rodriguez-Fernandez v. Wilkinson* (1981), a convicted Marielito was

[139] *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980).

released from immigration detention when the Court of Appeals for the Tenth Circuit found that indefinite detention (Chapter 2) constituted cruel and unusual punishment proscribed by the eighth amendment and violated the due process clause of the fifth amendment.[140] There were also several key decisions that recognized new human rights subjects on account of their sexual orientation, gender, kinship ties, and other categories (Chapter 3) as well as eased an applicant's burden of proof (Chapter 4). Moreover, the Supreme Court in *INS v. Cardoza-Fonseca* (1987) handed asylum seekers a huge victory by rejecting the Reagan administration's arduous "clear probability" (higher than 50 percent) standard of persecution. The Court replaced it with a relaxed "reasonable possibility" persecution standard in line with the 1967 Refugee Protocol and UNHCR Handbook and Guidelines on Criteria for Determining Refugee Status (1979), meaning that a one-in-ten chance of facing persecution could qualify as a legitimate asylum claim.

The most significant outcome of the Tucson sanctuary trials was not the guilty verdicts, but the formation of a collaborative strategy to challenge illegal state policy. This strategy centered on putting forth class action lawsuits, which seek to effect change for thousands of claimants simultaneously. In *American Baptist Churches v. Meese* (1985), the human rights community—here in the form of a coalition of religious groups and numerous human rights organizations (the American Civil Liberties Union, Center for Constitutional Rights, National Lawyers Guild, and Boalt Hall Law School at the University of California, Berkeley)—sued administration officials for discriminating against Central Americans. In 1990, attorneys on both sides agreed to settle the case due to practical reasons, including the government expending a significant amount of money

[140] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

and resources over the five years of litigation and the plaintiffs amassing substantial evidence that made victory likely.[141] The January 1991 settlement of *American Baptist Churches v. Thornburgh* (the ABC Settlement Agreement) secured temporary protected status for 150,000 Salvadorans and Guatemalans who were denied asylum between 1980 and 1990 and 350,000 undocumented immigrants from those countries "who never sought asylum because the previous system was so weighed against them."[142] The agreement provided these individuals with new hearings and work authorizations and called for the adoption of new procedures to fairly adjudicate asylum claims.

By the end of the decade, the Sanctuary Movement had turned public opinion against the Reagan administration's policies in Central America and notched several significant legal victories that challenged unbridled state sovereignty over asylum. The incoming administration of George H.W. Bush in January 1989 sought to back away from the preceding administration's overt double standards. The Department of Justice in 1990 drafted new asylum rules to replace the "interim regulations" that guided determinations since 1980. The new procedures instituted a uniform standard for all countries or origin and disentangled asylum from foreign policy by establishing "a corps of professional asylum officers who are to receive special training in international relations and international law" to arrive at politically neutral decisions without following State Department recommendations.[143] With its two-tiered process consisting of non-adversarial interviews with asylum officers as well as adversarial hearings in immigration court (the latter with due process protections) and emphasis on "fair and sensitive"

[141] Blum, "The Settlement of American Baptist Churches v. Thornburgh," 355-56.
[142] Bishop, "U.S. Adopts New Policy for Hearings on Political Asylum for Some Aliens."
[143] Pear, "U.S. to Make It Easier to Gain Asylum."

adjudication, the U.S. asylum system emerged as the most well-structured and balanced among Western liberal democracies. The ABC Settlement Agreement and 1990 rules were the zenith of a decade-long liberalization of asylum that resulted not from the actions of the Executive Branch or Congress, but rather the unrelenting activism of the human rights community that initiated change from the bottom-up.

Asylum Today: The Criminalization and Securitization of Migration

At a time when much of the West was slamming its doors shut on asylum seekers, the U.S. system evolved into one that was non-discriminatory, politically independent, and in line with international standards. In fact, a 1992 report by Harvard Law School's National Asylum Study Project—the first systematic study of the new asylum system based on the 1990 rules—found that applicants' chances of obtaining refugee status had improved. According to the report:

> There appear to be some noticeable changes in approval rates for … Salvadorans, Guatemalans and Haitians, who won asylum under the prior system less than 3% of the time and whose decision were viewed as influenced by foreign policy considerations. The recent approval rate under the new process for Salvadorans was 28%, Guatemalans 21%, and Haitians 31%.[144]

Despite serious shortcomings like the mounting backlog of cases and varying quality and expertise of asylum officers, the higher grant rates were a step in the right direction. Yet, a shift toward leveling the playing field for all asylum seekers did not result in a policy that was more inclusive. Instead, the new system's emphasis on fair adjudication was accompanied by the development of an asylum policy based on three exclusionary

[144] National Asylum Study Project at Harvard Law School, *An Interim Assessment of the Asylum Process of the Immigration and Naturalization Service*, 2.

strategies: the increasing use of deterrent and preventative measures to keep asylum seekers *outside* of U.S. territory; the dismantling of the Cold War system that favored asylum seekers and refugees from communist countries; and the equating of immigration with national security issues like terrorism to restrict the rights of asylum seekers *within* the U.S. As Matthew Gibney describes it, such developments have "resulted in an asylum system that is humanitarian but not generous."[145] The ensuing chapters show that this humanitarianism, however, is applied unevenly.

Shortly after issuing the new asylum rules in 1990, the Bush administration faced its first border control test. The steady stream of Haitians fleeing the brutal Duvalier dictatorships and subsequent military regimes since the 1970s dramatically decreased in December 1990 when the country elected Jean-Bertrand Aristide, a popular Roman Catholic priest, as its first democratic president with 60 to 70 percent of the vote. On September 29, 1991, however, the military led by General Raoul Cédras quickly deposed Aristide in a coup d'état and violently suppressed his supporters. Some 38,000 Haitians immediately fled the country. The Bush administration found itself stepping over a political landmine: while it denounced the coup and placed sanctions on the military regime, it did not want to grant asylum to Haitians and appear weak on immigration.

The initial strategy to deal with this crisis was to intercept all boats heading towards South Florida and transfer the asylum seekers on board to Coast Guard vessels outside of U.S. territorial waters. However, as the vessels reached capacity, containment became unfeasible. Thus, in November 1991, the Bush administration made the decision to resume repatriations. Human rights groups soon discovered that the screenings taking

[145] Gibney, *The Ethics and Politics of Asylum*, 161.

place at sea were dubious. According to a staff attorney at the Haitian Refugee Center, a refugee advocacy organization based in Miami, screenings were conducted in under five minutes and the "INS officers interviewing the Haitians had virtually no knowledge of Haitian politics."[146] Those that were "screened out" were immediately returned to Haiti. The Haitian Refugee Center filed a lawsuit in the U.S. District Court for the Southern District of Florida and successfully gained a preliminary injunction prohibiting the forceful repatriation of Haitians in governmental custody on December 3, 1991.

As the government appealed the decision, the Bush administration sidestepped the court order by building a refugee camp at Guantánamo Bay, a U.S. naval based located on 45 square miles of land and water at the far eastern tip of Cuba, to detain and screen all Haitian asylum seekers. Nearly some 100 years prior, during the 1898 Spanish-American War, the U.S. had briefly assumed rule over Cuba, which had been fighting for independence from Spain. The 1901 Platt Amendment cemented American imperial interests in the Caribbean by recognizing Cuban independence in exchange for the U.S. retaining the right to establish a military base and intercede in the country's economic and foreign affairs.[147] According to the 1903 lease agreement of Guantánamo: "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that … the United States shall exercise complete jurisdiction and control over and within said areas."[148] For over a century, the U.S. has argued that it is exercising "complete jurisdiction and control" over the specified areas

[146] Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay*, 23.
[147] Paik, "Carceral Quarantine at Guantanamo," 144.
[148] Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations.

while recognizing Cuba's "ultimate sovereignty" in order to carve out a space between the juridical limits of each state—a zone of legal ambiguity that resembles Agamben's "camp"—to hold asylum seekers and refugees as well as "enemy combatants" as part of its War on Terror. The refugee camp erected in November 1991 was a series of tent cities surrounded by barbed wired fencing. Soldiers stood guard at the camp as asylum seekers waited for their credible fear screenings and underwent health inspections.

Geographically located between the U.S. and Haiti and, more importantly, proclaimed beyond the jurisdiction of constitutional protections for non-citizens, Guantánamo was the ideal site to screen out those deemed to be "undesirable." However, the refugee camp quickly swelled beyond its capacity holding 12,500 individuals. With the violence in Haiti showing no signs of abating and asylum seekers continuing to set sail in unstable boats, President Bush took drastic action. He signed Executive Order 12,807 (the Kennebunkport Order) on May 24, 1992 directing the Coast Guard to interdict and repatriate all asylum seekers to Haiti without any inquiry into the possibility of persecution. During the 1992 presidential election, candidate Bill Clinton vociferously condemned the Bush administration's "cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing."[149] However, just a week after his inauguration on January 20, 1993, President Clinton broadcasted a radio message announcing the continuation of the Kennebunkport Order. The move came as Haitians built nearly 1,000 boats to cash in on his campaign promise of offering temporary safe heaven until democracy was restored. "Those who leave Haiti by boat for the United

[149] Sciolino, "Clinton Says U.S. Will Continue Ban on Haitian Exodus."

States will be intercepted and returned to Haiti by the U.S. Coast Guard," said President Clinton. "Leaving by boat is not the route to freedom."[150]

From November 1991 to May 1993, 34,000 Haitians were screened at the refugee camp and only 10,500 were transferred to U.S. territory for full asylum hearings.[151] The Bush and Clinton administrations' reliance on forced repatriations enabled them to slowly empty the overrun refugee camps. Yet, in the spring of 1993, 270 detainees remained. They were neither terrorists nor criminals, but rather individuals who tested positive for the human immunodeficiency virus (HIV). The exclusion of HIV-positive asylum seekers, A. Naomi Paik writes, "must be situated not only in the histories of (neo)imperialism in Haiti, but also in long-standing, durable discourses marking not only migrant but also black and particularly Haitian bodies as carriers of contagion."[152]

The human rights community notched a partial victory on June 8, 1993 in *Haitian Centers Council, Inc. v. Sale*, when U.S. District Judge Sterling Johnson, Jr. for the Eastern District of New York ordered the closure of the camp and release of the remaining detainees. He stated that although the government "euphemistically refer[s] to its Guantanamo operation as a 'humanitarian camp,' the facts disclose that it is nothing more than an HIV prison camp presenting potential public health risks to the Haitians held there."[153] Both sides ultimately agreed to settle: the human rights community allowed the judge's orders to be vacated if the Clinton administration complied with the orders and refused to appeal. While this secured the immediate release of the HIV-

[150] Ibid.
[151] Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay*, 25.
[152] Paik, "Carceral Quarantine at Guantanamo," 153.
[153] *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1038-39 (E.D.N.Y. 1993).

positive detainees who required urgent medical attention, it also provided the state with the freedom to revert to its unlawful practices in the future.

At the same time, the legality of the Kennebunkport Order was also questioned. But in a decision that frustrated asylum seekers and their advocates, the Supreme Court on June 21, 1993 ruled that Bush and Clinton administrations' policy of intercepting asylum seekers and returning them without a hearing was not a violation of domestic or international law. In a dubious interpretation of the 1951 Refugee Convention, the Court in *Sale v. Haitian Centers Council, Inc.* (1993) found that while repatriation may "violate the spirit" of the *nonrefoulement* principle, the terms of the treaty "cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory."[154] By absolving the government of any responsibility to asylum seekers who are not within or at U.S. borders, even if they were prevented from arriving by deliberate action, the ruling was a re-assertion of state sovereignty. *Sale v. Haitian Centers Council, Inc.* was one of the few decisions since the 1980 Refugee Act that limited the rights of asylum seekers. However, as previously depicted, there is nothing historically exceptional in the state's disregarding of international human rights and refugee law.

As repatriation continued to be the de facto policy toward Haitian asylum seekers, opposition began to mount. After all, asylum in liberal democratic states is an issue always up for debate and the exclusion of Haitians based on nationality and race sparked outrage. Pressure from the Congressional Black Caucus and TransAfrica Forum, a lobbying organization whose director Randall Robinson went on a widely covered 27-day hunger strike, played a critical role in pressuring President Clinton to announce on May

[154] *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 183 (SC 1993).

7, 1994 that he was resuming screenings on board Coast Guard vessels and outside U.S. territorial seas in safe third countries.[155] Yet, just as he had done in the previous decades, Fidel Castro seized upon the instability caused by the Haitian exodus to test U.S. asylum policy in the post-Cold War era. Amid Cuba's own domestic unrest, including rioting and anti-government protests, Castro proclaimed that "whoever wanted to leave, could go."[156] Thousands of *balseros*—individuals migrating on flimsy rafts composed of wood attached to inner tubes—frantically departed from Cuba in August 1994.

Fearing the *balsero* crisis would reach the same scale as 1980 Mariel boatlift, the Clinton administration adopted tactics unprecedented in their harshness and ended the traditional U.S. welcome for Cubans. Not only was the Cuban Adjustment Act suspended, but President Clinton ordered the prosecution of U.S. captains who picked up Cuban immigrants at sea and requested all asylum seekers intercepted be sent to Guantánamo.[157] Closed for less than a year, the refugee camp was reopened in June 1994. The government's previous foray into extraterritorializing asylum flows enabled it to ramp up its off-shore detention capabilities: 30,000 Cubans and 21,000 Haitians were held there during this wave of mass asylum seeking. Detaining Cubans marked the end of a 40-year-old policy that afforded refugees fleeing communist regimes preferential treatment. At first set on repatriation, the U.S. eventually began a process of screening asylum seekers to ensure orderly, safe, and most significantly, regularized migration from the island. However, the message was loud and clear: unauthorized migration would not be tolerated. While the U.S. declared the Guantánamo experiment a successful form of

[155] Holmes, "With Persuasion and Muscle, Black Caucus Reshapes Haiti Policy."
[156] Taylor, "20 Years After the 1994 Cuban Raft Exodus."
[157] Gibney, *The Ethics and Politics of Asylum*, 161.

migration management, testimonials of those detained convey that such measures were undertaken at the expense of basic human rights, specifically restrictions on individual liberty under militarized circumstances.

The hard-nose measures exacted on Cubans mitigated the Cuban-Haitian double standard and equalized opportunities to asylum. But the thrust behind this harmonization was not a commitment to equality or human rights. Rather, it was a concerted effort to consolidate state sovereignty in asylum policy—an unbridled sovereignty that would extend beyond the borders of the U.S. and into the domestic affairs of the postcolony, namely Haiti. In the face of mass asylum seeking, mounting pressure from a variety of interest groups, and an electorate sensitive to immigration, President Clinton addressed the nation on September 15, 1994 to outline yet another shift in strategy toward dealing with the instability in Haiti: "Tonight I want to speak with you about why the United States is leading the international effort to restore democratic government in Haiti. Haiti's dictators, led by General Raoul Cédras, control the most violent regime in our hemisphere…. They have brutalized their people and destroyed their economy."[158]

While President Clinton rightfully recounted the Haitian regime's politically motivated killings, he omitted four historical facts that have contributed to the country's widespread poverty and abysmal human rights situation and generated the very asylum seekers the U.S. refused to accept. First, the U.S. government propped up the Duvaliers for 30 years in exchange for the dictatorships' support for a (neo)imperial economic program based on a low minimum wage, the suppression of labor unions, no taxes on American private investments, and the right of American companies to repatriate their

[158] Clinton, "Text of President Clinton's Address on Haiti."

profits.[159] Second, the Central Intelligence Agency (CIA) in the mid-1980s trained a secret intelligence unit in Haiti to combat drug trafficking and provide intelligence to the U.S. government, but over time the unit led by Raoul Cédras devolved into an instrument of political terror.[160] Third, Emmanuel Constant, who established a far-right paramilitary group that sought to oust the country's first democratic government, was bankrolled by the CIA because the U.S. government was suspicious of Aristide's left-wing populism. And fourth, the U.S. was in no rush to reinstate democracy in Haiti until Aristide promised to abandon his bold social reform program and accept an economic package supported by the U.S. Agency for International Development, World Bank, and International Monetary Fund that included the privatization of public ventures.[161]

If the first half of President Clinton's speech employed the language of humanitarianism to justify intervention "to restore democratic government in Haiti," the second half was more straightforward in its motivations:

> Thousands of Haitians have already fled toward the United States…. As long as Cédras rules, Haitians will continue to seek sanctuary in our nation. This year, in less than two months, more than 21,000 Haitians were rescued at sea by our Coast Guard and Navy…. If we don't act, they could be the next wave of refugees at our door. We will continue to face the threat of a mass exodus of refugees and its constant threat to stability in our region, and control of our borders.[162]

Anxiety over mass asylum seeking and border control permeate the remainder of the text. Simply put, President Clinton asserted that military invasion to restore democracy was necessary to prevent thousands of "desperate-poor-black people" from coming to the U.S. On September 19, 1994, an unopposed multinational force of 20,000 troops landed in

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[159] Lawless, *Haiti's Bad Press*, 160.
[160] Weiner, "C.I.A. Formed Haitian Unit Later Tied to Narcotics Trade."
[161] Paik, "Carceral Quarantine at Guantanamo," 152.
[162] Clinton, "Text of President Clinton's Address on Haiti."

Haiti to oversee the country's transition to democracy. Aristide was reinstated as President on October 15, 1994, and within a month, most Haitians had been repatriated from Coast Guard vessels, safe third countries, and refugee camps.

For the first three years after the Department of Justice issued new asylum rules in 1990, the issue was viewed primarily in bureaucratic terms: how can the government create a refugee status determination system that grants asylum seekers a fair and impartial hearing, while limiting the number of individuals from accessing the system? The most efficient way to regulate this was to prevent asylum seekers from reaching U.S. soil. The state beefed up its means of exclusion through new forms of control and surveillance: visa requirements, carrier sanctions, immigration detention centers, interdictions at sea, third country processing, and offshore refugee camps. However, the state's emphasis on immigration enforcement and border control meant that insufficient resources were allocated to adjudication, which resulted in a backlog of cases that grew from 300,000 in 1993 to 425,000 in 1994. This posed two major problems: first, asylum seekers were stuck in legal limbo for several years, effectively putting their lives on hold and exacerbating the trauma suffered on account of a well-founded fear of persecution; and second, some individuals put forth fraudulent asylum claims to bypass the lengthy immigration process and obtain work authorization, thus jeopardizing the integrity of a system based on humanitarian need and inflaming immigration restrictionists.

Asylum would come to viewed in a much darker light after February 26, 1993, when a group of terrorists detonated a truck bomb near the World Trade Center in New York that killed six people and injured more than 1,000. One of the suspects charged with plotting the attack arrived at New York's John F. Kennedy Airport, stated his intention to

apply for asylum, and was released with a hearing date because the detention center was at maximum capacity. Asylum quickly moved from the humanitarian realm and became equated with national security interests just as it had been throughout the Cold War. This event, along with the popularity of anti-immigrant legislation (California Proposition 187) and exaggerated and outright manufactured media reports about the "widespread" use of fraudulent immigration documents, sparked public and political skepticism about the asylum process that ultimately led to the shrinking of the rights of asylum seekers within the U.S. In December 1994, INS announced new regulations to reduce the backlog and make the process of applying much more onerous. In addition to doubling the number of asylum officers and interviewing all new applicants within 60 days, which made it nearly impossible to gather corroborating evidence and put forward a successful claim, the most significant reform was requiring applicants to wait at least 180 days before work authorizations would be granted.[163]

Conclusion

As President Clinton's approval ratings plummeted early in his presidency, Republicans won both chambers of Congress during the 1994 midterm elections. Intent on rewriting the country's immigration laws before the next election, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). For many immigrants' rights activists, asylum was destroyed beyond recognition. The law introduced three provisions—summary exclusion (specifically expedited removal), mandatory detention, and filing deadlines—that drastically restricted asylum policy.

[163] Greenhouse, "U.S. Moves to Halt Abuses in Political Asylum Program."

Expedited removal refers to the process whereby an individual without legal immigration status is denied entry to and/or removed from the U.S. without going through removal proceedings (a hearing before an immigration judge). The law entrusted immigration enforcement officers and agents to process individuals at the border, hence allowing them to act as the police, jailor, prosecutor, and judge. Out of concern that this process may result in the deportation of "genuine" asylum seekers, the expedited removal statute required immigration enforcement officers to refer individuals who express a fear of return to an asylum officer for an interview. However, detention was made mandatory during the screening process. To further dissuade asylum seekers from accessing the system, the law introduced a strict one-year filing deadline, which did not take into account asylum seekers' unique circumstances, including the effects of trauma, need for medical and psychological attention, cultural and linguistic differences, limited financial resources, and a lack of legal representation.

IIRIRA continues to serve as the backbone of our current immigration enforcement framework, in which deportation is an overarching and constant threat to non-citizens. The law helped finalize the country's transition to a highly restrictive yet non-discriminatory (in theory) asylum policy, although this has come at a cost to the spirit of the 1951 Refugee Convention, 1967 Refugee Protocol, and numerous human rights instruments. The current asylum system provides humanitarian relief and human rights protections to *select* individuals but is unable and unwilling to address large refugee situations resembling the horrors and atrocities that prompted the international community to come together after World War II. The 9/11 terrorist attacks fixated the country's attention on the adequacy of border control measures. As a result, Congress

passed restrictionist legislation that authorized detaining, deporting, and excluding non-citizens with minimal judicial oversight. The state's co-optation of human rights is visible in the dual effect of justifying the invasions of Afghanistan and Iraq on humanitarian grounds, while rolling back the rights of non-citizens *and* American citizens during the current and indefinite War on Terror. However, this rollback of immigrants' rights had already applied to asylum seekers since 1996.

Although some of IIRIRA's most egregious features have been challenged in the federal courts, the *human rights community* has its work cut out for it now more than ever. Returning to the words of Jacques Derrida, "There is still a considerable gap separating the great and generous principles of the right to asylum inherited from the Enlightenment thinkers and from the French Revolution and, on the other hand, the historical reality or the effective implementation of these principles. It is controlled, curbed, and monitored by implacable juridical restrictions."[164] It is in this context that the field research for this dissertation was carried out. In the following chapters, I investigate some of the key tensions and battlegrounds between state sovereignty and asylum that have only heightened in the wake of IIRIRA. Chapter 2 looks at the conditions inside immigration detention to see whether the radical potential for political contestation exists; Chapter 3 explores the prospects of expanding the refugee definition (formulated in 1951) to allow for the recognition of new human rights subjects; and Chapter 4 examines issues related to overcoming the increasingly arduous burden of proof (credibility and corroboration standards) placed on asylum applicants.

[164] Derrida, *On Cosmopolitanism and Forgiveness*, 11.

CHAPTER 2: INSIDE IMMIGRATION DETENTION

"Just because we are held here doesn't mean we don't exist"

Introduction

Located just about an hour southwest of San Antonio and an hour and a half north of the Mexico-U.S. border is where you will find Dilley, Texas. A sprawling rural town of just 4,000 inhabitants, Dilley was once considered the watermelon capital on the U.S. Throughout the region, people would travel all the way to Dilley to "come get a slice of the good life," as the town's slogan went. However, as with many parts of Texas, a community defined by its agriculture slowly gave way to the commodity that was underneath its fields—oil. The town's residents have grown accustomed to being governed by the whims of big oil, but toward the end of 2014, it was announced that there would be a new business with a plethora of job opportunities arriving in Dilley.

Driving along Interstate 35, the main road connecting Texas and Mexico, is not the most scenic of routes. Looking out of one's car window will reveal flat and featureless terrain, periodically interrupted by small boomtowns and semi-trailer trucks that have been busier since the advent of fracking. However, to make this journey after sunset is a completely different experience. Large swaths of light burn brightly and boldly—reminiscent of baseball stadium at night—and remain visible for miles along the highway. The lights radiating are from Dilley's newest and most controversial business that has placed the small town at the center of the country's heated debate over its immigration policies and practices.

On December 15, 2014, the largest immigration detention center in the country, officially known as the "South Texas Family Residential Center," opened in Dilley. With a maximum capacity of 2,400 beds—slightly more than half of Dilley's total population—the detention center is intended to hold immigrant families, mainly women and their young children, most of whom are seeking asylum or other forms of relief after fleeing unparalleled levels of violence in Central America. The opening of Dilley is the government's direct response to the influx of unaccompanied children and family units from Central America who arrived at U.S. Border Patrol processing stations in Texas' Rio Grande Valley beginning in the spring of 2014.

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By illustrating life inside an immigration detention center for those families fleeing grave human rights violations and left without a nation-state to offer protection, this chapter is concerned with both depicting the limits of the contemporary human rights discourse for asylum seekers and generating insights and possibilities for the future of human rights. The first part of this chapter provides a theoretical framework that views immigration detention as an extension of a criminal justice paradigm centered on incarceration as well as brief history of the U.S. government's policy of family detention. It portrays how mandatory detention epitomizes the exceptional measures that are unleashed in the name of border control and national security by managing populations of "out-of-place" migrants, asylum seekers, and refugees. The second part of this chapter follows immigrant families as they navigate a labyrinthine system that encompasses Customs and Border Protection (CBP) stations, Immigration and Customs Enforcement (ICE) detention centers, and immigration courts within detention centers until their fate is

decided: either expedited deportation, indefinite detention, or conditional release pending the outcome of their asylum hearing before an immigration judge.

Family detention centers have come to represent Giorgio Agamben's notion of "the camp"—a space where non-citizens are "taken outside" yet governed more tightly, where sovereign power intervenes directly on bodies and individual lives which do not have the normal protection of domestic or international law. It is in the camp where the state seeks to reduce certain classes of non-citizens to "bare life," a biopolitical state where an individual or group is stripped of political status and becomes abject: unworthy and excludable. In this case, immigrant women and children are included in the fact they are detained and under constant government surveillance but excluded from accessing due process and legal protections entrusted to American citizens.

This chapter asks the following questions*:* What kind of place is a detention center for the women and children who are held there? What strategies of control are employed, both inside and outside of detention? What, if any, forms of engagement or resistance exist for the families? And what does *mandatory* family detention tell us about the rights of those who are seeking asylum as well as the efficacy of the international human rights regime more generally?

I argue that while on the surface the families fleeing horrific violence in Central America seem to be languishing in camps such as Dilley at the expense of state sovereignty, there are moments in which they have the *potential* to emerge as human rights subjects by resisting the government's tactics that seek to render them inaudible and invisible through spatial exclusion. Thus, while the human rights law may appear to be limited in the remedies is has to offer them, it is the asylum-seeking families—the

women and children themselves—who are further expanding our notions of rights, citizenship, and belonging by pushing back against the ambivalence and antipathy regarding the legitimacy of their claims to be human rights subjects.

From Prison to "The Camp": Theorizing Immigration Detention

While immigration detention in the U.S. can be traced back to the early 20th century at Ellis Island, adjacent to the Statue of Liberty, its current form took shape with the enactment of the Antiterrorism and Effective Death Penalty Act as well as the Illegal Immigration Reform and Immigrant Responsibility Act, both in 1996. These laws brought a criminal justice paradigm that centers on incarceration to the immigration system, swelling the number of individuals in detention from 8,500 in 1996 to nearly 16,000 in 1998. In 2013, over 441,000 individuals were held in facilities ranging from privatized immigration detention centers to state and local jails to juvenile detention centers and shelters.[165] The fact that detention sites can vary to such a great degree illustrates the plasticity of detention as a spatial practice. We see this trend throughout the West, with detention centers proliferating in Australia, the countries of the European Union, and the U.S since the 1990s as well as the funding of offshore processing centers and extraterritorial detention sites. While these liberal democracies consider freedom, equality, and liberty to be intertwined with their national identity, they have developed a complex set of procedures to keep non-citizens from reaching their borders and accessing such rights. To understand how the detention of non-citizens has become the norm, it is helpful to view immigration detention as an extension of incarceration. This section lays

[165] U.S. Department of Homeland Security, "Immigration Enforcement Actions," 1.

out a theoretical framework that begins with Michel Foucault's writings on "the birth of the prison" and transitions to Giorgio Agamben's notion of "the camp" by conveying the social, legal, and political functions of physically separating one group—in this case "unauthorized" migrants and asylum seekers—from the rest of society.

In *Discipline and Punish* (1975), Foucault charts the history of incarceration in the West and argues that the transformation of penal systems during the 18th and 19th centuries from acts of overt violence—public executions, hangings, and torture—to an ordered prison system derived more from changes in sovereign power than humanitarian concerns over excessive brutality. The shift from a centralized sovereign power, "which identified the right to punish with the personal power of the sovereign," to a diffusive disciplinary power resulted in greater control over an individual's mind; the impetus for this shift was a preoccupation with making power operate more efficiently.[166] This new, controlled means of punishment is perhaps best exemplified by the modern prison system, where the behavior of prisoners is highly regulated through the organization of space (architectural structures), time (regimented timetables), and activities (work routines). Thus, incarceration, for Foucault, is not just about physically isolating prisoners from the rest of the social body and inflicting a more "gentle" bodily punishment, but also a mechanism for shaping behavior and creating docile bodies "that may be subjected, used, transformed, and improved" for the state's purpose.[167]

Central to Foucault's analysis of disciplinary power is surveillance. He draws upon Jeremy Bentham's panopticon, an architectural design for a prison where cells are arranged in a circle around a central watchtower that can observe all the individual cells.

[166] Foucault, *Discipline and Punish*, 80.
[167] Ibid., 136.

Through the strategic placement of windows, the effect of light is such that the inmates can never see inside the watchtower, while each inmate's cell is like "so many small theatres … perfectly individualized and constantly visible" to the guard.[168] The true power of the panopticon, however, is not that the inmates are constantly observed from the central watchtower. It is the *possibility* that they may be under continuous surveillance: "the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so."[169] The mere possibility of being watched causes the inmate to modify his/her behavior through self-policing. As such, disciplinary power exerts control upon the individual through an invisible and total gaze, enforced through a complex system of surveillance; it functions on the individual's body and behavior by defining what is normal and what is deviant. For Foucault, the prison "was from the outset a form of legal detention" that was tasked with "both the deprivation of liberty and the technical transformation of individuals."[170]

In his later writings, Foucault extrapolates these ideas from small-scale prisons to the societal level. With the birth of the prison, the sovereign's power "to decide life and death"[171] became supplanted by "an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations, marking the beginning of an era of 'biopower.'"[172] Biopower, according to Foucault, operates at two distinct yet overlapping poles. The first is described as a disciplinary power or an "anatomo-politics of the human body," which sees the body as a machine, and therefore,

[168] Ibid., 200.
[169] Ibid., 201.
[170] Ibid., 233.
[171] Foucault, *The History of Sexuality, Vol. 1*, 135.
[172] Ibid., 140.

the state is concerned with disciplining the body and optimizing its capabilities, simultaneously increasing its docility and usefulness.[173] The second is seen as regulatory controls or a "biopolitics of the population,"[174] which concerns the population as a whole, and accordingly, control is exerted through regulating and tracking the "ratio of births to deaths, the rate of reproduction, the fertility of a population, and so on."[175] Taken together, biopower becomes encoded into human behavior and social practice because the human subject acquiesces to subtle regulations and expectations of the social order.

Foucault's contributions to prison-based research convey that through control and rehabilitation, the individual subject has the potential of returning to society after a period time. This study, however, is concerned with indefinite or permanent forms of exclusion, and for this, Agamben's theorization of the camp provides us with a useful analytical framework to understand detention as an extension of incarceration to non-citizens. By designating the camp, rather than the prison, as the exemplary biopolitical space of modernity, he merges "Foucault's 'control over life' with Carl Schmitt's state of exception,"[176] where the sovereign is the person or institution with the power to suspend the law and then use extralegal force to normalize the situation.[177] Thus, Agamben reintroduces a vertical model of power in the camp, as his conception of biopolitics centers on sovereign power in contrast to Foucault's horizontal model in which power disperses indiscriminately and continuously throughout the social body.

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[173] Ibid., 139.
[174] Ibid., 139.
[175] Foucault, *Society Must Be Defended*, 242-43.
[176] Ranciere, "Who Is the Subject of the Rights of Man?," 300.
[177] Schmitt, *Political Theology*, 5.

In *Homo Sacer* (1995), Agamben undertakes a "historico-philosophical" analysis to locate the roots of the current relationship between sovereign power and human life in an obscure figure in Roman law who commits a certain type of crime, and in turn, is removed from society by having his rights as a citizen revoked. His conception of *homo sacer* (sacred man) rests on Aristotle's and Hannah Arendt's distinction of two forms of life: *zoê* (natural life or life prior to language and community) and *bios* (qualified life or political life). Sovereignty, for Agamben, is the power which determines who qualifies to participate in political life (the citizen) by means of the foundational (or originary) exclusion of who remains outside of the political body ("bare life"). The life of *homo sacer,* fully devoid of the legal protections and civil liberties granted to citizens due to his/her expulsion from the *polis* (a body of citizens or the political realm), comes to represent bare life—life that "is included in the juridical order solely in the form of its exclusion (that is, of its capacity to be killed)" by the sovereign power.[178] In other words, bare life is at once inside *and* outside of the law; it becomes the object of a controlling and delineating politics.

Banished from political life, bare life is left to occupy "zones of indistinction"—designated parts of the national territory where the rule of law and claims to freedom, equality, and liberty are effectively suspended.[179] According to Agamben, it is through this "inclusive exclusion" that the state itself is constituted: the political realm composed of citizens depends upon the exclusion of certain human beings that are disenfranchised as bare life. It is here where Agamben diverges from Foucault by arguing that the biopolitical state is not simply a modern phenomenon but can be traced back to

[178] Agamben, *Homo Sacer*, 12.
[179] Downey, "Exemplary Subjects," 121.

Antiquity. A second major difference between the two theorists is that Agamben is less interested in the "positive effects" that might ensue from the dispersion and diffusion of power into many areas of life that Foucault described in smaller spaces like prisons, clinics, and mental institutions, and as such, he pays special attention to large-scale sites like camps. Such sites, either temporary or permanent, are created in response to "emergency" situations. Agamben maps out the history of the camp from times of war, when there was a professed national emergency, to our current era when national emergencies are increasingly constructed by the state to gain extralegal power to exclude those it considers a threat. "*The camp is the space that is opened when the state of exception begins to become the rule*," Agamben states. "In the camp, the state of exception, which was essentially a temporary suspension of the rule of law on the basis of a factual state of danger, is now given a permanent spatial arrangement, which as such nevertheless remains outside the normal order."[180]

His theses on the state of exception and the production of bare life find a horrifying historical reality with the rise of the concentration camp, where biopolitical terror reached unprecedented levels and led to the absolute destruction of political subjects; after all, it was in the concentration camp that "the executioner and the victim, the German body and the Jewish body, appear as two parts of the same 'biopolitical' body."[181] While Nazi extermination camps like Auschwitz and Treblinka represent a very extreme version of this larger construction whose brutality prompted the formation of the international human rights regime in the mid-20th century to prevent such atrocities from happening again, camps can take many forms and be located in a variety of contexts.

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[180] Agamben, *Homo Sacer*, 96.
[181] Ranciere, "Who Is the Subject of the Rights of Man?," 301.

While camps may be more or less restrictive with respect to physical and biological control, their commonality is simply the "inclusive exclusion" of bare life from the *polis*. A few notable examples are the Guantánamo Bay detention camp for "enemy combatants" (non-citizens suspected of involvement in terrorist activities) as part of the U.S.-led War on Terror as well as refugee camps, offshore processing centers, and immigration detention centers where individuals are detained, fingerprinted, screened, and have their (immigration) "status" determined. Therefore, it can be posited that these exceptional spaces do not represent a fundamental break with the political rationality of modernity, but rather reveal, as Agamben puts it, "the hidden matrix and *nomos* of the political space in which we are still living."[182]

Today, there is no figure more than the asylum seeker/refugee who better illustrates the limits of universal human rights. Our contemporary *homo sacer* uncovers the manner in which the sovereign exception and spaces of sovereign power function with a hard-nosed efficiency to define and delineate the life of its citizens from non-citizens. According to Agamben:

> Refugees represent such a disquieting element in the order of the modern nation-state, this is above all because by breaking the continuity between man and citizen, *nativity* and *nationality,* they put the originary fiction of modern sovereignty in crisis. Bringing to light the difference between birth and nation, the refugee causes the secret presupposition of the political domain—bare life—to appear for an instant within that domain.[183]

Asylum seekers—despite their claims to be human rights subjects grounded in domestic and international law—are thrust into camps in the form of immigration detention centers because their unannounced and unauthorized presence threatens to upend the political

[182] Agamben, *Homo Sacer*, 95.
[183] Ibid., 77.

order. Through the creation of zones where it is exempt from operating, sovereign law maintains and perpetuates itself and the norm of citizenship, while bare life becomes the casualty of politicized life.

Such zones of indistinction point clearly, as Alex Murray writes, "to the fragility of the nation-state, and to the erosion of its sovereignty which can only be shored up with a draconian reinforcing of sovereignty that, in the process, reveals its strange processes of exclusive inclusion."[184] Simultaneously through their exclusion, asylum seekers and refugees in the camp have all aspects of their lives governed tightly by the state. Liissa Malkki illustrates that after World War II, concentration camps and military complexes were transformed into centers to house refugees because their architectural design was suited to controlling an entire population. Their models of spatial concentration and ordering would serve as blueprints for the newly established refugee camps, which became vital sites of power through a variety of processes:

> The segregation of nationalities; the orderly organization of repatriation or third-country resettlement; medical and hygienic programs and quarantining; 'perpetual screening' and the accumulation of documentation on the inhabitants of the camps; the control of movement and black-marketing; law enforcement and public discipline; and schooling and rehabilitation were some of the operations that the spatial concentration and order of people enabled or facilitated.[185]

The confined refugee camp exerts control upon this population in several ways, including restricting movement, disciplining and rehabilitating bodies, producing knowledge about the subject through the creation of statistics, and discursively representing this population as a threat to national security and national identity to justify their continued exclusion.

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[184] Murray, *Giorgio Agamben*, 73.
[185] Malkki, "Refugees and Exile," 498.

This can be seen with the U.S. government's framing of the arrival of Central American women and children at the southern border as a "surge" rather than an urgent humanitarian crisis. This disingenuous narrative revives long-established discourses pertaining to border security and criminal and illegal invasion that justify exceptional measures. The repeated use of the descriptor "surge," as will be shown, regurgitates U.S. political discourse related to military operations in Afghanistan and Iraq, enabling the women and children crossing the border to be equated with terrorists and insurgents. Judith Butler, in discussing the military tribunals set up at Guantánamo for enemy combatants post-9/11 as part of the never-ending War on Terror, states:

> The decision to detain, to continue to detain someone indefinitely is a unilateral judgement made by government officials who simply deem that a given individual or, indeed, a group poses a danger to the state. This act of 'deeming' takes place in the context of a declared state of emergency in which the state exercises prerogatory power that involves the suspension of law, including due process for these individuals.[186]

Deeming individuals to be outsiders not only allows for exceptional measures like mandatory immigration detention to be undertaken, but it also gives consent to racialized ways of viewing, treating, and policing certain groups. Just like after 9/11 how any individual perceived to be Muslim—whether the defining characteristic be brown skin, a beard, an Islamic headscarf, or even a Sikh turban—was a potential terrorist, immigration detention serves to further the characterization of Latinos (and those who appear to be foreign) as illegal regardless of their citizenship status. The racist refrain "Go back to your country!" picks up traction in this context.

Therefore, unlike incarceration with its retrospective focus on disciplining an individual after a "deviant" act has been committed, the transition to extralegal detention

[186] Butler, *Precarious Life*, 58-59.

is based upon claims that the unknown individual poses a threat. Detention centers like Dilley that contain these unauthorized migrants and asylum seekers, it will be argued, exist as a tool of state power to maximize the "otherness" of non-citizens,[187] convey that "otherness" to its citizens, and exclude those "others" at the nation-state's fortified border.[188] Through this process of differentiation, the non-citizen can then be depicted as an economic migrant, illegal immigrant, criminal alien, and bogus asylum seeker on one hand, and on the other a genuine refugee worthy of the state's "benevolent" humanitarian assistance—each term overlaid with meanings of race, gender, and class. Some may be granted asylum and placed on a pathway to permanent residence and citizenship, but for most of the individuals in camps, the situation is dire: they will remain in the camp indefinitely or be deported to their countries of origin or a third country.

In his study of the Lukole refugee camp in Tanzania, Simon Turner writes, "Although there are undoubtedly similarities between refugee camps, asylum centers, mining compounds, concentration camps, and slave plantations … we must also explore the particularities that often emerge if we change our perspective a little and explore the camp from within."[189] The remainder of this chapter takes Foucault's and Agamben's historical theorizations of disciplinary and sovereign power and particularizes them through an examination of the largest immigration detention center in the U.S. On the surface, Dilley appears to be just one of the numerous camps in the modern system of nation-states where the declared universal and inalienable rights of mankind show themselves to lack potency in precisely the moments they are most needed. This is

[187] See Said, *Orientalism*.
[188] See Wacquant, "Enemies of the Wholesome Part of the Nation."
[189] Turner, "Suspended Spaces," 313.

encapsulated by a 2014 Human Rights Watch report examining U.S. screening procedures at the border; the report quotes a recently deported Honduran man who, while trying to put forth an asylum claim, was explicitly told by a Border Patrol agent that, "*You don't have rights here*."[190]

While the concepts of bare life and the camp are powerful and thought-provoking, this study departs from Agamben's work by arguing that the asylum seekers held at Dilley are not merely bare life—life that is completely powerless and devoid of agency in relation to sovereign power. Through their own movements, actions, speeches, and alliances, the detained women and children are engaging the state and putting it on the defensive. And while the families join the U.S. government in viewing the detention center as an exceptional space, they also "strive to inhabit it and give it social and political meaning."[191] Thus, despite the state's attempts to void Dilley of politics, the asylum seekers participate in a myriad of political acts that resonate beyond the barbed wire. What ensues is a contested relationship between state sovereignty and the human rights community that is marked by confrontation, power, and resistance and disruption. It is precisely in those moments of disruption, though, that our notions of rights and citizenship are broadened, and new human rights subjects have the *potential* to emerge.

"Lock 'em up": A Brief History of Family Detention

The mandatory detention of family units encountered at the southern border has not always been official U.S. policy. Prior to 2006, the U.S. employed a strategy of "catch and release," where individuals who were caught at the border without legal

[190] Human Rights Watch, "You Don't Have Rights Here," 8-9.
[191] Turner, "Suspended Spaces," 332.

immigration status were released while they waited for a hearing in front of an immigration judge. That policy came to an end in August 2006, when President George W. Bush and Department of Homeland Security (DHS) Secretary Michael Chertoff sought to ramp up efforts to curtail "illegal" immigration with the government's new policy of "catch and detain." "There is a real deterrent effect to this policy," Chertoff said, in declaring that mandatory detention would result in a drastic reduction of individuals and families arriving at the border.[192]

While mandatory detention became the latest solution proffered to stem the tide of immigration, primarily from Central America, the policy has generated significant problems from a human rights perspective. One such problem is that the women and children being held in family detention centers are overwhelmingly asylum seekers—a protected status recognized by the 1951 Refugee Convention. According to government collected data, when given a chance to convey their situations, over 88 percent of the detained family units have passed an initial credible fear screening, which means they are considered refugee populations eligible to apply for asylum and have a full hearing.[193] Passing this initial screening means that an individual has established "that there is a 'significant possibility' that he or she could establish in a full hearing before an Immigration Judge that he or she has been persecuted or has a well-founded fear of persecution or harm" on account of one or more of the five protected grounds mentioned earlier: race, religion, nationality, membership in a particular social group, or political opinion.[194] As will be discussed later in this chapter, the women who pass credible fear

[192] Jordan, "U.S. Ends 'Catch-And-Release' at Border."
[193] U.S. Citizenship and Immigration Services, "Family Facilities Reasonable Fear (FY2015 2nd Quarter)."
[194] U.S. Citizenship and Immigration Services, "Credible Fear FAQ."

screenings are highlighting some of the most grave human rights abuses imaginable—rape, assault, murder, and extortion—at the hands of transnational criminal groups in the Northern Triangle of Central America.

With no protection in their countries of origin, the families flee to shield themselves from violations that clearly present the need for international protection. Yet, by processing these families for deportation instead of providing them with valid credible fear screenings and subsequent asylum hearings that are guaranteed under both domestic and international law, the U.S. government is "sending asylum seekers back to the threat of murder, rape, and possible death, just months or even days after their return," said an immigration researcher at Human Rights Watch.[195] This amounts to a complete violation of the principle of *nonrefoulement*—the cornerstone of international refugee law—which is a refugee's right to be protected against forcible return "to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group, or political opinion."[196] There are a few nascent investigations into the consequences of this expedited removal, including one academic study based on local newspaper reports that has identified as many as 83 U.S. deportees who have been murdered immediately after their return to El Salvador, Guatemala, and Honduras since January 2014.[197]

Another noteworthy consequence of mandatory family detention is that it separates families. While the family units at Dilley are composed of women and children, many of them had traveled throughout Central America with their partners, parents,

[195] Immigrants' rights activist, interview by author, April 3, 2015.
[196] United Nations High Commissioner for Refugees, "Text of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees," Article 33(1).
[197] Brodzinksy and Pilkington, "U.S. Government Deporting Central American Migrants to their Deaths."

siblings, or other relatives. Upon apprehension at the border, however, immigration authorities separate families, often transporting the men to detention centers as far as Florida and New Jersey without notifying the other family members. And more recently, children are being separated from their mothers, as documented in this recent report by several refugee advocacy and human rights organizations:

> In some instances, the U.S. government affirmatively renders children 'unaccompanied' by physically separating and transferring children away from their accompanying family members. These cases are sometimes the result of inadequate government systems and practices to protect families, and in others they are the result of an intentional focus on enforcement, deterrence, and punishment. There is no agency-wide policy defining what constitutes a family, no traceable documentation of those familial relationships, nor a requirement for documentation of all family separation incidents.[198]

The separation of family units further erodes their chance of presenting a comprehensive asylum claim, as they are arbitrarily assigned to different courts and different judges. And as will be discussed in Chapter 4, asylum outcomes are heavily dependent on adjudicators' backgrounds, temperaments, and biases, leading to instances where one family member may be granted asylum, while the rest of the family is ordered deported.

Prior to 2006, it was government policy that while immigrant parents were held in detention centers, children were placed in the custody of Office of Refugee Resettlement shelters within the Department of Health and Human Services, which were originally intended to house unaccompanied children who made the journey to the U.S. without parents or relatives. Congress immediately expressed concern "about reports that children apprehended by DHS, some as young as nursing infants, continue to be separated from

[198] Women's Refugee Commission, Lutheran Immigration and Refugee Service, and Kids in Need of Defense, "Betraying Family Values," 3.

their parents."[199] Thus, DHS was directed to stop separating children from their parents and Congress designated a single detention facility for families to avoid such separation.

DHS' solution was the T. Don Hutto Residential Center. Converted from a former medium-security state prison in Taylor, Texas, Hutto was the first federal, large-scale immigration detention center to house women alongside their children. The center, with a capacity of 512 beds, became operational in May 2006. However, immediately after it began housing family units, Hutto came under attack from various actors in the human rights community. Two organizations—the Women's Refugee Commission and Lutheran Immigration and Refugee Service—released a report in February 2007 based on interviews with detained families as well as former detainees at Hutto and Berks County Family Shelter in Pennsylvania (the only other family detention center at the time). At Hutto they found a "formal criminal facility" that provided substandard medical care and education programs for the children, and a place "that still looks and feels like a prison, where every woman spoken with in a private setting cried."[200] The conditions at these facilities were contrary to the explicit intent of Congress, which had directed DHS—only if detention was necessary—"to house these families together in non-penal, homelike environments until the conclusion of their immigration proceedings."[201]

As the human rights community continued their documentation and advocacy around the issue, there was a growing public outcry about the prison-like conditions that families, especially the children, were subjected to. After learning about the appalling conditions at Hutto, Congress urged DHS to avoid detaining families. Moreover, the

[199] Talbot, "The Lost Children."
[200] Women's Refugee Commission and Lutheran Immigration and Refugee Service, "Locking Up Family Values," 2.
[201] Ibid., 6.

American Civil Liberties Union (ACLU) filed a lawsuit against ICE in March 2007 on behalf of 10 juvenile plaintiffs housed at the facility, citing that "Hutto is structurally and functionally a prison, [where] children are required to wear prison garb [and] are detained in small cells for about 11 or 12 hours each day."[202]

The lawsuit claimed that such prison-like standards were not in compliance with the government's detention standards—as outlined under the terms of the 1997 settlement in *Flores v. Meese*—for this population. The *Flores* settlement was the result of over a decade of litigation objecting to the government's policy of detaining unaccompanied immigrant children, the majority of whom had fled civil conflict in Central America in the 1980s. The settlement asserts that children who cross the border separate from their parents ought to be released to the custody of relatives or a foster program. If there is reason to detain a child, *Flores* establishes minimum standards and conditions for the housing and release of all unaccompanied children in federal immigration custody. According to the settlement, immigrant children can only be held in non-secure facilities licensed to care for dependent (as opposed to delinquent) minors in the least restrictive settings appropriate to their age and special needs. It also states that the government must "release a minor from its custody without unnecessary delay."[203]

Over the past decade there has been a fierce debate over whether the protections that guarantee certain rights of unaccompanied immigrant children also apply to children who travel with their parents. During the 2007 ACLU case, the government took the stance that the keeping family units together was an integral part of its mandatory family

[202] American Civil Liberties Union, "Case Summary in the ACLU's Challenge to the Hutto Detention Center."
[203] *Flores v. Reno*, No. CV 85-4544-RJK(Px), 9-10 (C.D. Cal. 1997).

detention/deterrent policy. The U.S. District Judge who presided over the case, however, sided with the ACLU when he said, "It would not be a good idea for [the government] to hog-tie [immigrant families] and hang them up in lockers while they did it. The truth of the matter is there are ways to do it that are right and there are ways to do it that are wrong."[204] Judge Sam Sparks, a 68-year-old from Texas, went on to state that the management of family detention centers has been absolutely disastrous and that if the government was going to continue detaining families, it would have to establish clear rules in line with the *Flores* settlement that are safe and humane.

In August 2009, under the leadership of President Barack Obama who was inaugurated on January 20, 2009, DHS announced that Hutto would no longer house family units. This was a huge victory on the part of the human rights community, whose continued advocacy and litigation highlighted that the conditions at Hutto were not just entirely inappropriate for children and their mothers, but morally and legally shameful. After the closing of Hutto, the only center for detaining immigrant families was Berks (with a capacity of 100 beds). During the five-year period from 2009 to 2014, the government routinely released those families who had passed their initial credible fear screenings, had ties to the community, and did not pose a security threat. However, in response to the influx, or "surge," of adults with children and unaccompanied children beginning in the spring of 2014, the government reverted to policies deemed to be unlawful and inhumane by indefinitely detaining immigrant families, as well as separating family units, at the border in prison-like facilities that it refers to as "residential centers."

[204] Talbot, "The Lost Children."

Table 3: "Surge" Apprehensions at the Southern Border (2013-2016)[205]

	2013	***2014***	***2015***	***2016***
Unaccompanied Children	38,759	68,541	39,970	59,972
Family Units	14,855	68,445	39,838	77,674

In an effort to draw attention to the nation's heightened border control measures, DHS Secretary Jeh Jonson traveled to South Texas in December 2014 for the opening of the nation's largest family detention center. Addressing both those from within the U.S. who want tougher immigration restrictions as well as potential migrants and asylum seekers who may be embarking upon the difficult and dangerous journey from Central America, Johnson said, "Frankly, we want to send a message that our border is not open to illegal migration, and if you come here, you should not expect to be simply released."[206] His tone reflected the government's renewed emphasis on the mandatory detention and rapid deportation of women and children crossing the border.

In total, from 2014 to 2015, the U.S. saw a nearly 40-fold increase in family detention beds, from just under 100 to over 3,700 beds and growing. From June 2014 through April 2015, over 4,800 family units had been booked into one of the following family detention centers: Artesia, New Mexico (operational from June to December 2014); Berks County, Pennsylvania; Dilley, Texas; and Karnes City, Texas. Artesia was the first facility to open, and in a statement before the Senate Committee on Appropriations on July 10, 2014, Secretary Johnson said:

> Critically, DHS is also building additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children. For this purpose, DHS has established a temporary facility for adults with their children on the Federal Law Enforcement Training Center's Campus at Artesia, New Mexico. The establishment of this temporary facility will help CBP process those encountered at the border

[205] U.S. Customs and Border Protection, "United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016."
[206] Preston, "Detention Center Presented as Deterrent to Border Crossings."

> and allow ICE to increase capacity to house and *expedite the removal* of adults with children in a manner that complies with federal law. Artesia is one of several facilities that DHS will use to increase our capacity *to hold and expedite the removal* of the increasing number of adults with children illegally crossing the southwest border [emphasis mine].[207]

These words make it crystal clear that the government set up Artesia as a "deportation mill," a term used by immigrants' rights attorneys and human rights activists, that was enabling a rapid deportation process with little to no judicial oversight. In that sense, facilities such as Artesia serve as national borders on the interior and resemble Agamben's camp, where people are included as bare life but excluded from political life and the rights-bearing community.

During the first five weeks that Artesia was operational, more than 200 women and children were detained, deported, and sent back to Central America within days. Expedited removal without consideration of their asylum claims is essentially a one-way ticket back to a life of violence, persecution, and potentially death. The government's "lock 'em up" approach not only violates the families' fundamental human rights, but it also severely limits their ability to put forth an asylum claim, a process which is covered in the following two chapters.

Going Inside: Behind the Barbed Wire

It was in this climate that I travelled to the Dilley detention center in the summer of 2015 with a team of CARA Pro Bono Project volunteers from all over the country whose purpose was to shed light on the conditions of family detention centers and provide assistance and representation to the families in their removal proceedings. The

[207] U.S. Department of Homeland Security, "Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations."

CARA Pro Bono Project is composed of volunteers from the Catholic Legal Immigration Network, American Immigration Council, Refugee and Immigrant Center for Education and Legal Services, and American Immigration Lawyers Association. The weeklong shifts began on Sunday, where the only permanent (supervising) attorney on the ground trained us in the basics of asylum and immigration law over a communal dinner. Each day at Dilley was arduous and long, beginning at six in the morning and going well past midnight, with volunteers working in the Days Inn lobby—one of the less than a handful of places to stay—sharing notes, trading tips, helping with translations, and assisting with whatever needed to be done. The cycle repeats itself every Sunday, when the next batch of volunteers arrive—anywhere from a handful to 15.

While the majority of volunteers at Dilley are immigrants' rights attorneys, there are also pro bono attorneys, social workers, mental health professionals, researchers from refugee advocacy and human rights organizations, academics, teachers, and students, among others, who make the trip because they are appalled by what is taking place. Together, this assemblage of individuals form a human rights community—composed of American citizens committed to the rights of non-citizens—united in "a belief that this place, or places like this, shouldn't exist … and that we must put an end to it," said the supervising attorney at our orientation.[208] Volunteering at a place like Dilley is not just about providing social and legal services to asylum seekers; it constitutes a larger movement against the detention of non-citizens and fortified borders—one that is based on raising awareness and visibility, protesting the horrendous conditions, developing political strategies, building solidarity across the citizen/non-citizen divide, and

[208] Supervising immigration attorney, interview by author, June 28, 2015.

expanding the breadth and scope of the human rights community's work. Working to free these detained women and children from behind the barbed wire is a step toward translating distant wrongs into domestic rights by first enabling their voices to be heard.

Driving along the seemingly endless dirt roads on Monday morning, we approached a row of white jeeps with CBP decals emblazoned on the doors and two large white road signs with bold fonts that read "South Texas Family Residential Center." The sign on the right indicated that the center was part of DHS' San Antonio Field Office and the one on the left had a Corrections Corporation of America (CAA) logo. CCA is a company that owns and manages private prisons and contracts with the U.S. government to oversee immigration detention centers. According to CCA promotional materials, the "center's mission is to provide an open, safe environment with residential housing as well as educational opportunities for women and children who are awaiting their due process before immigration courts."[209] Yet in contrast to the description of an open residential housing space, a 15-foot-tall barbed wire fence greets visitors. And just in case that was not "open" enough, inside the fence was another one encircling the entire 50-acre compound. The women and children may be referred to as "residents," but they are not allowed to leave the center until after their claims have been heard and determined.

Dilley is a "Kafkaesque" facility. While the rows of white and red trailers look to be mobile and temporary from the outside, on the inside they appear to be very much permanent. In earlier detention centers such as Artesia, the courtrooms were just another trailer with a folding table, some chairs, and a small television unit with a live feed from one of the 57 immigration courts around the country. In Dilley, however, the courtroom

[209] Text on file with author.

is meticulously replicated to produce an environment that looks and feels as though you are standing in any one of those courtrooms where the judge is present. Additionally, the trailers are grouped into residential neighborhoods that are organized by color/animal themes. There are five neighborhoods in total: red bird, blue butterfly, brown bear, yellow frog, and green turtle. The mothers wear color-coded shirts based on the neighborhood they reside in, with their children wearing the same color shirt. The detainees are housed in units that hold up to eight people in bunk beds, with mother and child huddled together in a single bed. Thus, while Dilley may mimic a "traditional" residential or suburban neighborhood and what "normal" social life is like for American citizens, it fundamentally exists to cut off communication and visibility. With minimal to no contact, state representations of the non-citizen can take shape.

What is disconcerting about Dilley is that it bears the marks of being both temporary and permanent. And while the government views it as an acceptable "residential space" for detainees during their removal proceedings, the women and children housed here very much think of it as a prison. As the supervising attorney told me at the very end of our first week together:

> There are two very different visions of what this place is: you have the government saying, 'look, there is a buffet in the cafeteria, a field where the kids can play, and a movie night' … then on the other hand, we have clients telling us these horrible stories of extortion, rape, murder taking place in their home countries, and how they think it is just so shocking that the U.S. thinks they are criminals and that they need to be locked up.[210]

Upon our Monday morning arrival, with the sun glaring in our faces on the 98°F day, we had to go through an extensive security check and answer a long list of questions: Why are you here? Who are you here with? Who authorized this visit? How long will you be

[210] Supervising immigration attorney, interview by author, July 5, 2015.

staying? Whether it was because of my status as a researcher, the only male volunteer, or the only volunteer whose skin tone was closer to the detainees', I was questioned noticeably longer than the immigrants' rights attorneys. I was asked about the purpose of my research project and where my research was going to appear. We were then told that we could not take our cell phones inside the facility. In fact, I was prevented from bringing in the tape recorder I had been using for months to transcribe interviews for this project, even though I had received permission to do so. This not only made translations difficult but forced me to rely upon hand-written notes for both the intake interviews and my research for this chapter. After receiving our IDs, I noticed that all the detainees had been given similar ID cards. Black-and-white photos of the women were posted in front of their doors. Even the toddlers had ID cards. Many of the young girls I met had decorated theirs with Disney stickers or flowers.

Eventually we were buzzed into the visitation trailer, which was composed of two larger trailers joined together to form an open space with a dozen or so tables for a maximum occupancy of 60 people. I spent most of my time at Dilley in the visitation trailer, conducting 10 to 15 intake interviews a day with the women and children and preparing them for their credible fear screenings with an asylum officer. By passing a credible fear screening, the asylum seeker is protected from deportation until their full asylum claim is heard by an immigration judge.

The Intake Interviews: Documenting Human Rights Violations

During intake interviews, the volunteers and I listened, documented, and discussed the details of the women's histories of persecution, domestic violence, sexual

assault, gang-based threats, and unspeakable violence. I conducted 40 open-ended and semi-structured interviews with the detained women (16 from El Salvador, 10 from Guatemala, 10 from Honduras, and four from Mexico), who all expressed a credible fear of persecution. 90 percent of the women had one or more children, and 10 percent traveled with partners or family members but were separated at the border. Nine had been detained for less than one moth, 13 for one to fourth months, and 18 were held there for more than four months. The two main factors for flight were gender-based violence and gang-based violence, often interrelated. Under the latter fell subcategories of threats to family members of the police, direct harm to family members including murder, recruitment of children, and extortion. Underlying both factors was the inability and/or unwillingness of the government and police to prevent such abuses from taking place; 27 of the women made police reports and 13 did not even bother given the circumstances.

My first interview was with Celina, a 28-year-old woman from El Salvador, who had been detained at Dilley for three weeks so far.[211] While she slowly told me her story, her 8-year-old son, Nicolas, sat quietly in the corner drawing on a piece of paper. Celina brought Nicolas with her because school had not been in session the past two days. A common occurrence in family detention centers is that the amenities the U.S. government publicizes are rarely functional. Previously, attorneys at Artesia and Karnes had observed that when women brought their children to the intake interviews they tended to speak in generalities about their claims, which in the long run could negatively impact their hearings. During asylum hearings, according to a former supervisory asylum officer in

[211] Asylum seeker, interview by author, June 29, 2015.

Houston, "The more horrific the specific details of the individual case are, the higher the chance that individual will be granted asylum."[212]

Celina first informed me that her husband, without the proper documentation or legal immigration status, came to the U.S. in 2013 to provide a better life for their family. Immediately after her husband left, however, is when the gang threats and extortion began. Mara Salvatrucha (MS-13), widely considered to be the most ruthless gang in the world, called her husband in New York and demanded that he send money to them. A missed payment would result in the kidnapping of their son. The gang repeatedly called Celina as well, demanding that she pay a fee for her "protection." Then, Celina paused for a few minutes. I glanced over at Nicolas, with his white t-shirt neatly tucked into his dark navy-blue shorts. He was carefully folding the piece of paper into an airplane.

Right before she gathered herself to speak, Celina took a deep breath, placed her hands over her face, and began to sob. She told me how one night after she received a phone call asking for money, six masked gang members came into her home and raped her while her two young sons were in the house (her 8-year-old son made the journey with her, but she had to leave her 3-year-old behind with family because he is severely disabled and unable to travel). After the incident, Celina went into hiding for some time, but the calls to her and her husband continued. She pleaded with the police in El Salvador for protection, but they said there was nothing they could do to ensure her safety. In her exact words, "There is no law. The gangs control everything … I had to run." So Celina packed up their things, firmly believing that death was inevitable if they had stayed, and trekked through El Salvador, Guatemala, and Mexico with hopes of reaching the U.S. and

[212] Supervisory asylum officer, interview by author, July 7, 2015.

reuniting with her husband in New York. She did not know much about the process of seeking asylum but had no idea that they would be detained indefinitely in Texas.

In family detention centers like Dilley and Karnes, stories such as Celina's are the norm, not the exception. The stories are so severe and so graphic that an immigrants' rights attorney from Boston who had volunteered at both Artesia and Dilley said:

> Part of being able to do this work is distancing yourself from it. When you are interviewing clients, you are hearing the most horrible aspects of human nature. You really have to separate your emotional and empathetic side because if you don't, you will burn out … and as attorneys, we have to hear the facts objectively, in a way that will help them present the strongest possible credible fear case so that they can get out of there immediately.[213]

The stories the women tell are of gender-based persecution. And rape. And murder. And extortion. Physical assault, endless abuse, and intimidation. Kidnapping, trafficking, and slavery. The particular countries, gangs, and perpetrators (state and non-state) of these atrocities may differ, but the themes of fear, violence, continual persecution, and a complete lack of protection and relief are universal. Virtually all the women interviewed spoke of several acts of trauma throughout their life. For the women (average age, 26) and children (average age, 6) held at family detention centers, these stories are life experiences that they carry with them as they cross the border in pursuit of freedom, equality, and above all, safety and dignity.

If part one of the intake interviews was about the abuse suffered in their countries of origin and throughout their journeys, part two focused on the shocking treatment at Border Patrol stations, which begins with being handcuffed and transported to a short-term holding cell. The cells are commonly referred to as *hieleras* (freezers or iceboxes)

[213] Immigrants' rights attorney, interview by author, July 4, 2015.

due to their extremely cold temperatures and cramped, overcrowded space. These facilities are only intended to hold immigrants for less than 12 hours—while they are being processed for release or long-term detention—but with the increased numbers of arrivals at the border, families are routinely held there for two to three days with an inadequate amount of food, water, and medical care. The maximum length of detention, according to the 2008 DHS Detention Standards Manual, is not to exceed 72 hours.[214] However, about half of the women I spoke with had been there for more than three days, including one Guatemalan family—a woman and her nine-month-old daughter—who were held for eight days.

Part three of the interviews covered their time at the family detention center and usually went something like:

> We've been here for three weeks.[215] Three months.[216] Six months.[217]
> The doctors won't see my daughter…. She was vomiting all night.[218]
> My son is losing weight.[219] My kids can't breathe in here.[220]
> The officers yell at us.[221] They ignore us.[222]
> What will happen to us?[223] When will they decide our case?[224]
> We came here for help, but we are in jail like criminals…. What for?[225]

Being detained in prison-like conditions affected the women just as much as the violence and persecution in their countries of origin. I was able to follow-up with Mara, a 20-year-old who fled Mexico after her father and brother were shot at by one the largest cartels, in

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[214] U.S. Immigration and Customs Enforcement, "2008 Operations Manual ICE Performance-Based National Detention Standards."
[215] Asylum seeker, interview by author, June 29, 2015.
[216] Asylum seeker, interview by author, June 29, 2015.
[217] Asylum seeker, interview by author, June 30, 2015.
[218] Asylum seeker, interview by author, July 2, 2015.
[219] Asylum seeker, interview by author, July 3, 2015.
[220] Asylum seeker, interview by author, July 2, 2015.
[221] Asylum seeker, interview by author, June 29, 2015.
[222] Asylum seeker, interview by author, June 30, 2015.
[223] Asylum seeker, interview by author, July 1, 2015.
[224] Asylum seeker, interview by author, July 1, 2015.
[225] Asylum seeker, interview by author, July 3, 2015.

2016 as she underwent her asylum hearing. She described her time in detention in the following words:

> Being detained was really bad. They tell you it's a home facility but it's a jail. They say you're only going to be there for 15 days and it's like a house. But first you are handcuffed on your wrists and transported. I was only there for just about 2 months, but most other girls were there for like three or four months. They wake you up at 5:30 in the morning to clean our rooms and eat breakfast…. For lunch, you'd get this greenish meat that was so nasty. The conditions were really bad. There was one time a snake got inside…. There are buttons to call someone to help, but no one came. They give you massive clothes that don't fit and they put chemicals in your hair because they assume you have lice. I almost fainted from how strong it was.[226]

Despite ICE creating formal family detention standards, the reality is that these standards are not codified, meaning they do not have the force of law and do not confer a cause of action in court.[227] Moreover, family detention facilities—like all ICE facilities—are subject to minimal independent oversight to ensure compliance with such standards.

The most common complaint I heard from the women at Dilley was about the lack of medical care. Elena, a 32-year-old from El Salvador, informed me that Sofia, her 5-year-old daughter, had a high fever for several days, reaching 102°F. She had to wait three days to see a nurse, who simply recommended that she give Sofia more cold water until the fever broke. The fever continued for several more days, until another doctor finally diagnosed her with severe tonsillitis and provided her with the appropriate medication. On average the women had to wait two to three days to see a medical professional—which was almost always a nurse and not a doctor—and when they did, the de facto response was, "drink more water." It is noteworthy that the volunteers were informed not to drink the same water due to potential contamination from fracking, yet

[226] Asylum seeker, interview by author, March 26, 2016.
[227] U.S. Immigration and Customs Enforcement, "Family Residential Standards."

this is the only water available to the women and children. It serves as a further reminder that detention centers reinforce the citizen/non-citizen divide by marking off which lives matter. Another story I heard was from María, a 30-year-old from Mexico, who told me that her 8-year-old son, Miguel, recently had surgery to correct his clubfoot. Upon arrival at Dilley, Miguel's orthopedic shoes were confiscated and now his feet were healing improperly and causing him a great deal of pain.

In addition to a lack of medical care, the confinement of women who have suffered serious human rights abuses in their countries of origin has a serious impact on their psychological wellbeing. Most notable is the case of Lilian, a 19-year-old mother from Honduras, who attempted suicide by cutting her wrist while she was detained at Karnes. In an interview after being sent back to Honduras, Lilian reported being "taken from her young son, stripped naked in front of screaming staffers, put into isolation, and then hidden at a hotel before a hasty deportation."[228] Her story is just one of many, as I often heard women during their intakes say, "I don't feel alive here."[229] In fact, a clinical psychologist who works exclusively with asylum seekers and refugees in the San Francisco Bay area said:

> Detention is equally, if not more, traumatizing than the initial experiences in their home countries. In most instances, we find that detention triggers the previous trauma and forces asylum seekers to relive their past … often immediately after it has happened. Conditions such as confined spaces, lack of light, complete lack of communication, and not being allowed to leave all contribute to re-traumatizing the women and children.[230]

Lack of communication and knowledge was another issue echoed by the detainees. Alma, a 21-year-old from Honduras, had no idea what country she was in after several days at

[228] Ordonez and Cuffe, "Teen Mom Who Attempted Suicide Speaks Out After Deportation."
[229] Asylum seeker, interview by author, July 1, 2015.
[230] Clinical psychologist, interview by author, April 24, 2015.

Dilley. Since much of the staff are of Mexican descent and speak Spanish, Alma thought she was still in Mexico, where she had previously been detained. She expressed great anxiety about where she was and how long she would be kept there. It is irrefutable, once listening to their harrowing stories, that indefinite detention takes a psychological toll on these women, often re-traumatizing them to the point of serious depression, which could result in an adverse credibility determination in immigration court, which will be discussed in Chapter 4.

And finally, even after enduring weeks of confinement and deprivation, part four of the intakes often revealed a sense of determination and hope. Meeting after meeting, the mothers were resolute, even if the stress of being detained was taking a toll on their children. On several occasions, I witnessed interactions similar to this one between Javiar, an energetic 6-year-old form Honduras, and Maribel, his 26-year-old mother:

> Javiar: Mommy, I hate it here. Can we leave now?
> Maribel: We will leave soon, my son.
> Javiar: But I don't want to be here anymore. I want to go home.
> Maribel: Soon. I'll get us out.[231]

Many of the children did not understand why there were being detained after being exposed to malnourishment, dehydration, and extreme exhaustion. Yet most of the women toward the end of their intake interviews spoke of a prospective future that already existed. That it was merely a matter of time. They spoke about a future in which they were free from the constant threat of violence and possibly reunited with friends and family. They had an unwavering belief in justice that overpowered the constant surveillance, restricted freedom and movement, denial of basic services, and continual suppression of their agency. They listened intently to the legal mechanisms we would

[231] Asylum seeker, interview by author, July 3, 2015.

review with them—how to present their testimony, what to include in their evidence packets to provide to judges, key deadlines to meet—and remained steadfastly confident that if they adhered to our guidance then they would be granted asylum.

Obstructing Justice: Erecting Barriers to Legal Representation

One of the defining aspects of family detention centers is their spatiality. Situated in remote and rural towns, these isolated geographies work to physically separate and contain those individuals to whom the law does not apply. The legal precariousness of these subjects is simultaneously linked to temporality, as detainees may be held for months upon years, not knowing when they will get out or if their claims will ever be heard by a judge. Without access to attorneys and resources that may help to strengthen their claims, detention centers work to mute asylum seekers' words and actions.

Although the families in Dilley and Karnes have been detained in an environment that closely resembles imprisonment, there is no requirement in U.S. immigration law to provide them with the same government-appointed counsel that is afforded to criminal defendants. This echoes Hannah Arendt's observation that criminals have more rights than non-citizens because they can still rely on their membership rights: "The best criterion by which to decide whether someone has been forced outside the pale of law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights."[232] This sentiment is echoed by Judith Butler who, in discussing the enemy combatants held at Guantánamo, states, "These prisoners … are not even called

[232] Arendt, *The Origins of Totalitarianism*, 286.

'prisoners' by the Department of Defense or by representatives of the current US administration. To call them by that name would suggest that internationally recognized rights pertaining to the treatment of prisoners of war come into play."[233] Thus, both those held at Guantánamo and Dilley are labeled as nothing more than "detainees"—"those who are held in waiting, those for whom waiting may well be without end."[234]

With no access to government-appointed counsel in civil contexts, the women and children are expected to defend themselves against powerful government attorneys in what amounts to a perversion of due process protections and judicial fairness that is inherent at all levels of the immigration system. After word spread about how Artesia became a de facto "deportation mill," there was tremendous groundswell in the human rights community who immediately sent pro bono legal representation and volunteers to assist these families. The fact that the women and children are expected to present their claims to an adjudicator without representation, unless they are lucky enough to be helped by an immigrants' rights or pro bono attorney from the CARA Project, has become even more alarming given the fact that the credible fear threshold was arbitrarily raised in response to the "surge" in credible fear applications from El Salvador, Guatemala, and Honduras. On February 28, 2014, the Chief of the Asylum Division, John Lafferty, issued a memo announcing the release of a new Lesson Plan on Credible Fear of Persecution and Torture Determinations.[235] Credible fear screenings are intended to have a low threshold standard that would allow those fearing persecution to present their claims to an immigration judge instead of facing expedited removal at the border. Up

[233] Butler, *Precarious Life*, 64.
[234] Ibid.
[235] U.S. Citizenship and Immigration Services, "Release of Updated Asylum Officer Training Course and Lesson Plan on Credible Fear of Persecution and Torture Determinations."

until the spring of 2014, the credible fear standard required the individual to establish only a significant possibility—which is defined as a one-in-ten chance—of facing persecution if returned to his/her country of origin.[236]

The 2014 Lesson Plan, however, declares that "significant possibility" does not include claims that have a "mere" 10 percent possibility and introduces a three-prong test: the claim must be "credible, persuasive, and specific."[237] With its references to case law, regulations, and even a legislative history of asylum, it cleverly reasserted sovereignty over the asylum process by increasing the value of "significant" and placing a heightened burden on the families, who must now practically prove the merits of a full asylum claim, rather than just establishing credible fear, and all from the confines of a detention center. Without an attorney assisting these families, it is difficult for the women to understand how their fears qualify them for protection in the U.S. By raising the bar at this initial stage, the government is attempting to screen out those asylum seekers who have *bona fide* (genuine) claims but lack the ability to articulate their claims.

When attorneys were denied access to family detention centers in 2014, the credible fear passage rate at Artesia was an abysmal 37.8 percent, compared to the nationwide average credible fear passage rate of 62.7 percent. However, after a huge effort on the part of the human rights community to organize and bring immigrants' rights and pro bono attorneys to family detention centers throughout 2015 and 2016, the credible fear passage rate for women and children soared to 88 percent, demonstrating that these families are known refugee populations. As Judge Robert Katzmann from the

[236] See Schrag, *A Well-Founded Fear*.
[237] U.S. Citizenship and Immigration Services, "Lesson Plan on Credible Fear of Persecution and Torture Determinations."

Court of Appeals for the Second Circuit said, in summing up the results of a two-year study on immigrant representation in New York, "The two most important variables affecting the ability to secure a successful outcome in a case are having representation and being free from detention."[238]

Out of the 20 family units I helped prepare for credible fear screenings with an asylum officer at Dilley, all 20 were found to have credible fear (passage rate of 100 percent). The team I volunteered with assisted a total of 115 family units in preparing for credible fear screenings and 106 were deemed to have credible fear (passage rate of 92.2 percent). These findings are consistent with recently released government data. In June 2015, one of the months fieldwork for this chapter was conducted, asylum officers found that 688 family units at Dilley had credible fear out of the 777 interviews decided (passage rate of 88.5 percent).[239]

Table 4: Credible Fear Screenings at Dilley (December 2014-September 2016)

Interviews Conducted	32,728
All Decisions	32,677
Fear Established	28,980
Fear Not Established	1,377
Closings	2,320
Fear Rate Found	88.7%

The extraordinary rates of violence in Central America and high credible fear passage rate at Dilley demonstrates the need for a humanitarian response to this latest refugee crisis, instead of continued efforts by the government to raise the legal standard and obstruct judicial fairness for the tens of thousands of women and children arriving at the southern border and requesting asylum. Yet during our time at Dilley, it was apparent the lengths DHS would go to prevent access to legal representation. The detention center

[238] New York Immigrant Representation Study Report, "Accessing Justice," 3.
[239] U.S. Citizenship and Immigration Services, "Asylum Division Quarterly Stakeholder Meeting."

staff purposefully kept the intake interviews short. Legal assistants and interpreters had to undergo lengthy background checks, which often delayed and shortened the time they had to meet with their clients. As previously mentioned, all electronic devices were seized. The supervising attorney informed me that two attorneys had been barred from returning to Dilley after speaking to the media about the conditions inside the center and criticizing the government's practices. And the week before we arrived, two female volunteers reported being denied entrance to the facility by a guard because their underwire bras were considered a "security risk."

Furthermore, as was the case in Artesia, Dilley holds a significant number of indigenous women, mainly from Guatemala, with varying levels of understanding of the Spanish language and virtually no grasp of English. While a small number of the ones I met spoke Spanish fluently, most fell within the range of having limited knowledge of Spanish to no understanding at all. In Guatemala, less than 30 percent of poor, rural indigenous girls are enrolled in secondary school. Several indigenous women I met held up index cards that read: "I speak K'iche," or "I speak Mam." With no cell phone access, the volunteers were unable to access translation applications or call interpreters. Our meetings with them would include a lot of miming, drawing, hand gestures, and body language to reach a minimal level of understanding of their claims. The obstacles these indigenous, non-Spanish speaking women face are tremendous. As an immigrants' rights attorney from Oakland who volunteered at Dilley said:

> In a way, immigration proceedings from within detention are truly a kangaroo court. There is no real due process, no real rules of evidence. We just do whatever we can. The way I felt in Artesia and currently feel in Dilley, we are just throwing ourselves in front of a moving bus. And it

> isn't pretty at all…. We are just reacting to the arbitrariness thrown at us to fairly represent these families in whatever way we can.[240]

Embodying spatial practices of confinement, discipline, and state power, Dilley appears to resemble Agamben's camp—simultaneously outside and inside the juridical order.

Disrupting Detention: The Universal Language of Protest

The closing of Artesia and the opening of Dilley in December 2014 occurred nearly simultaneously. Whereas Artesia was a temporary facility that was built as a quick response to the influx of families who arrived at the southern border in the spring of 2014, Dilley was built as a semi-permanent facility to "provide invaluable *surge* capacity should apprehension of adults with children once again *surge* this spring [emphasis mine]," according to ICE.[241] For the first six months it was open, it was business as usual at Dilley, as officials seamlessly followed the same processes that were in place in Artesia. In fact, dozens of detainees had been transferred from Artesia to Dilley, remaining in legal limbo as their cases dragged on. However, beginning in May 2015, the human rights community centered its advocacy and legal efforts on Dilley.

On May 2, 2015, 500 hundred people gathered outside Dilley and chanted "shut it down" as the guards watched them from the other side of the barbed wire fence. "We are here so that our voices are heard," said the director of a community-based program who works with immigrant families in the Rio Grande Valley.[242] For the human rights community, protesting is important on two levels: first, to send a message to public

[240] Immigrants' rights attorney, interview by author, July 2, 2015.
[241] U.S. Immigration and Customs Enforcement, "ICE's New Family Detention Center in Dilley, Texas to Open in December."
[242] Immigrants' rights activist, phone interview by author, May 9, 2015.

officials that their unjust practices must stop; and second, to express solidarity with the detained families, bridging the divide between citizen and non-citizen. Highly organized through the dissemination of promotional materials and use of social media with the rallying cry, #EndFamilyDetention, participants traveled to this far-flung part of Texas from states as far as California, New Jersey, and New York in what was one of the biggest protests of immigration detention in the U.S. in recent years. Since then, protests have spread to other detention centers throughout the country. Nearly two weeks after the protest outside Dilley, on May 15, 2015, the government's policy of family detention came under further scrutiny from the international community. As part of the Universal Periodic Review, which examines the human rights record of all UN member-states, the UN Human Rights Council issued a scathing report, highlighting the human rights violations of the families being detained in the U.S. The report adopted a recommendation by Sweden to "halt the detention of immigrant families and children, seek alternatives and end use of detention for reason of deterrence."[243]

While the policy of family detention has come under attack both from within the U.S. and the international community, protests have become increasingly regular inside family detention centers, such as the mid-April 2014 hunger strike at Karnes and the April 2015 workers strike inside Berks.[244] The hunger strike at Karnes had as many as 78 participants. Many of the women had passed credible fear screenings but were unable to pay the exorbitant bond amounts and were forced to remain in detention. The women collectively wrote a letter to denounce the conditions and request their immediate release

[243] United Nations Human Rights Council, "Draft Report of the Working Group on the Universal Periodic Review," 26.
[244] Planas, "Mothers Launch A Second Hunger Strike At Karnes Family Detention Center."

in order to go before an immigration judge and have their asylum claims heard: "We have come to this country, with our children, seeking *refugee status* and we are being treated like delinquents…. We deserve to be treated with some *dignity* and that our *rights*, to the immigration process, be respected [emphasis mine]."[245]

Similarly, in April 2015, 17 mothers detained at Berks sent a letter to ICE, citing their unfair treatment and demanding that the families be released:

> We deserve to be treated with *dignity* and to be respected with the *right* as people and to carry a free migrant process with our children, and we are not willing to continue here for more time in this confinement and we won't sign deportations, as mothers we want to be helped and not take any type of measures, we ask that as *humans* you touch your hearts for the children and that you will help us resolve this problem or give us a solution to be able to go *free* [emphasis mine].[246]

The letter never received a response form ICE, so the women went ahead and organized a strike to protest appalling work conditions—detained mothers are forced to clean the detention center for $1 a day or less. Months after the protest, Pennsylvania Department of Human Services Director Matthew Jones said that Berks was going to lose its license in 2016 due to the discrepancy between the approved and actual use of the center. The Berks directors currently have an appeal pending before the Pennsylvania Department of Social Services, which is allowing ICE to continue its operations at the facility. But the center has been the site of several protests and a request to increase its capacity from 96 to 192 beds was denied.

From June 22 to 23, 2015, seven Democrats from the U.S. House of Representatives toured the facilities in Dilley and Karnes to investigate the far-reaching humanitarian concerns over the detention of mothers and young children that were made

[245] Text on file with author.
[246] Text on file with author.

public by the human rights community. Upon their arrival at Dilley, they were greeted by hundreds of detained women and children chanting *"libertad"* (freedom) and *"dignidad"* (dignity) and holding makeshift signs made of pillowcases and bed sheets.[247] Some of the children had drawn sad faces on pillowcases and put them over their heads. Acts such as these illustrate how, despite every attempt by the government to dehumanize them, the women and children remain resolute and often employ rights-based speech—*liberty*, *dignity*, *freedom*, and *refugee status*—to assert their agency, and in the process, they expand our notions of human rights, citizenship, and belonging.

Alma, a 34-year-old from Honduras, was one of the more vocal detainees. I asked her about participating in the protest and she said, "Just because we are held here doesn't mean we don't exist."[248] After speaking with a few of the women who participated in the protest, it was clear that these demonstrations were not spontaneous acts of disobedience; they were organized *political* acts in which excluded subjects sought inclusion. And the fact that they framed their demands in the language of human rights should not be overlooked or diminished. While human rights law—at the domestic and international levels—may not provide these families with the most effective means to contest their exclusion from within in the camp, the power of the idea of human rights allows for distant wrongs (or human rights violations) to be voiced in a universal language that transcends borders. This articulation of rights need not be limited to addressing state actors; perhaps its strongest deployment is to appeal to Americans citizens to form a transnational solidarity under the banner of universal humanity.

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[247] For pictures and video footage of the protests, see: https://chu.house.gov/press-release/rep-chu-warns-lingering-damage-caused-family-detention.
[248] Asylum seeker, interview by author, June 30, 2015.

The work of Jacques Rancière provides us with a way to envisage political action from within the camp. In *Disagreement* (2004), he describes how normal politics is a process of negotiation between various stakeholders who argue over positions, resources, and entitlements without challenging the overall structure and organization of society.[249] In this mode of politics, which he refers to as "policing," rights play an integral role in adjudicating the claims of conflicting groups and maintaining the existing order, but social hierarchies remain intact and exclusions are routinely accepted. Policing is mainly concerned with matters of distribution and rational agreement in the Habermasian sense. In contrast, proper politics for Rancière is "the capacity for staging scenes of *dissensus*," or a disruption of the established social order, in which those who are excluded and deemed to lack speech make themselves heard as political animals.[250]

Politics in the context of the camp, then, involves the subjectivization of an agent who not only speaks, but makes a claim to participate in an order in which it has no part; politics exists because those who have no right to be counted as political beings set up a community of individuals who are experiencing a similar wrong and make a claim against their exclusion, and in doing so, they create a disruption that seeks to enact equality. According to Rancière:

> Political names are litigious names, whose extension and comprehension are uncertain, and which for that reason open up the space of a test or verification. Political subjects build such cases of verification. They put the power of political names—that is, their extension and comprehension—to the test. Not only do they bring the inscription of rights to bear against situations in which those rights are denied but they construct the world in which those rights are valid, together with the world in which they are not. They construct a relation of inclusion and a relation of exclusion.[251]

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[249] See Ranciere, *Disagreement*.
[250] Ranciere, "Who Is the Subject of the Rights of Man?," 304.
[251] Ibid.

In viewing the subject of rights as indeterminate, those without rights—including non-citizens who are forced to dwell in detention centers—can invoke them to contest their exclusion. The dissonance between the moral pronouncements of human rights as enunciated in the Rights of Man or UDHR and their denial in political and legal orders puts the ideals of human rights to test and demands their verification. It is this back-and-forth movement between the abstract inscription of rights and staging of a *dissensus* that produces the true meaning of human rights, as we witnessed in the previous chapter with respect to the Haitian Revolution as well as Olympe de Gouges and the other women who protested their exclusion after the French Revolution.

When looking at how detained asylum seekers have framed their demands in the language of human rights to a variety of actors—including government agencies, politicians, and citizens—it becomes apparent that they are contesting the exclusionary social, political, and legal order that denies them the same universal human rights from which Western countries of asylum derive their legitimacy. Through letters, speech acts, and protests, they are publicizing the fact that they do not enjoy the rights that are enshrined in the laws that the country has signed internationally and enacted domestically. In this case, the women and children at family detention centers are moving beyond bare life in specific moments by speaking in a language that is understood by parties on both sides of the citizen/non-citizen divide. The recognition of the part that was previously invisible presents the potential to disrupt the established order based on domination and replace it with one that is more equitable. As Rancière states, "These

rights are theirs when they can do something with them to construct a *dissensus* against the denial of rights they suffer. And there are always people among them who do it."[252]

A critique of this radical and extremely useful interpretation of the politics of human rights is that once a group of individuals has asserted their fundamental equality, they become subsumed under a new order that still recognizes the legal system, and therefore the state, as the legitimate gatekeeper. However, this overlooks the fact that in the case of asylum seekers, inclusion is likely the difference between life or death. Both the political struggle and legal quest to (re)define human rights are important on different yet complementary levels. Once on the inside, diverse alliances and dynamic solidarities can take shape to advocate for even greater inclusion. At the societal level, this is precisely what the Sanctuary Movement put into practice both as a political movement and legal strategy that extended protection to hundreds of thousands of individuals from Central America. Similar successes can be found in the mid-20th century when ethnic and human rights organizations mobilized to lobby various U.S. Presidents and Congress to admit tens of thousands of refugees at a time. And at the individual level, Mara, who we met above talking about her time in immigration detention, is a prime example of this continued engagement. Being fluent in English, she routinely shares her story publicly with refugee advocacy organizations, immigrants' rights attorneys, and researchers and helps fellow asylum seekers with translations. Mara's time in detention directly shaped her future goals; she went from "I felt like I was never going to get out of there" and "I thought I'd be stuck there for the rest of my life" to "right now I am working in a school

[252] Ibid., pg. 306.

with kids with special needs and I love it" and "I hope to go back to school and study something to make a difference one day."[253]

After visiting Dilley and Karnes and witnessing the moving protest, the members of Congress made a strong appeal to President Obama and their colleagues in Washington, D.C. to end the policy of family detention. "What I saw today did nothing but confirm my belief … that we should end the jailing of women and children," said Representative Zoe Lofgren (Democrat, California).[254] She added that this is not what *civilized* societies do. The power, influence, and reach of the organized criminal groups the women are fleeing are "worse than any dictator," said Representative Luis Gutiérrez (Democrat, Illinois). House Minority Whip Steny Hoyer (Democrat, Maryland) went on to add that, "The children at these centers have committed no crime. They've complied with U.S. law. They came and said we need refuge, we need safety."[255]

Less than a month after my visit to Dilley, a federal judge dealt a major blow to the government's policy of holding women and children in detention centers. On July 24, 2015, U.S. District Judge Dolly Gee for the Central District of California in *Flores v. Johnson* declared that the two family detention centers in Texas failed to meet minimum legal requirements of the 1997 *Flores* settlement. In her 25-page ruling, Judge Gee gave a scornful critique of the administration's positions, declaring them "unpersuasive" and "dubious," writing that officials ignored the "unambiguous" terms of the settlement.[256] Under the *Flores* settlement, as stated above, officials are required to try first to release a child to a parent, legal guardian, or close relative in the U.S. Judge Gee concluded that if

[253] Asylum seeker, interview by author, March 26, 2016.
[254] Marks, "After Tour, Rep. Castro and Other Dems Call to Close Family Detention Centers."
[255] Sakuma, "The Failed Experiment of Immigrant Family Detention."
[256] Preston, "Judge Orders Release of Immigrant Children Detained by U.S."

the mother is also detained, DHS should release her with the child, as long as the mother does not present a flight or security risk: "since releasing the parent along with the child in this case would, in most instances, obviate [DHS'] concern that releasing the child alone would endanger the child's safety, [DHS'] argument that this policy falls within the safety risk exception as a blanket matter is unavailing."[257]

Judge Gee also stated that "the testimony of one Border Patrol official regarding CBP's policies is insufficient to outweigh the evidence presented by Plaintiffs of the *widespread and deplorable conditions* in the holding cells [*hieleras*] of the Border Patrol stations."[258] She asserted that the authorities had "wholly failed" to provide the "safe and sanitary" conditions required for children. At Dilley and Karnes, the judge found that the centers were a "material breach" of provisions requiring that minors be placed in facilities that are not secured like prisons, effectively rejecting the partnership between ICE and privately-run companies. Sensing the mounting pressure from a variety of actors—including refugee advocacy and human rights organizations, governmental representatives in the U.S. and abroad, the legal community, and most importantly the women and children who shared their stories and protested the appalling conditions of their imprisonment—the government announced it would shorten the length of detention of the families to a few weeks depending on their individual circumstances.

From Dilley to "Home Detention": New Modes of Surveillance

On June 15, 2015, DHS Secretary Johnson stated that he wanted to see "substantial changes" at Karnes and Dilley and that "the detention of families will be

[257] *Flores v. Johnson*, 212 F. Supp. 3d 864, 875 (C.D. Cal. 2015).
[258] Ibid., 881.

short-term in most cases," which was a dramatic departure from the Obama administration's previous policy of denying release until families either passed credible fear screenings or were ordered deported. This announcement was followed by a new policy of releasing the women on bond. The intended purpose of immigration bonds is to help guarantee that the detained individual, once released, will show up for his/her hearing in immigration court and report to immigration officials when asked to do so. Generally, either an ICE officer or an immigration judge will set the bond amount, and that amount increases or decreases based on the following factors: a person's immigration status, criminal history, security threat, employment situation, and family and social ties in the U.S.—the higher the flight or security risk, the higher the bond amount.

In addition to preparing women for their credible fear screenings, immigrants' rights and pro bono attorneys spent much of their time at Dilley representing the families in bond hearings before ICE officers or immigration judges. "Basically, what we're doing right now is bonding people out as fast as possible—bond, bond, bond!" said the supervising attorney at Dilley.[259] As previously stated, the majority of families detained (88 percent) have been found to have a credible fear of persecution, meaning they should have the opportunity to present their asylum claims to an immigration judge outside of detention. If the families pass their credible fear screenings, then usually after two weeks they will have a bond hearing and can be released from detention to continue the application process from the home of a sponsor—usually a family member or friend who is a legal permanent U.S. resident or citizen—and hopefully with the help of an attorney.

[259] Supervising immigration attorney, interview by author, June 28, 2015.

Still, even getting a bond hearing is no guarantee that one will get out of detention right away. The initial bond amounts that ICE officials were setting for these families were extortionate sums that often kept them in detention indefinitely. A handful of women I interviewed had remained in detention for over a year because they could not gather enough money to pay the bond. Human Rights First visited Dilley in July 2015 shortly after DHS' pronouncement that it would be shortening stays and assisted 40 families who had already passed credible fear screenings. In all those cases, "ICE officers set initial bonds at $7,000 to $9,500."[260] For families that usually consist of a young mother in her 20s and two young children, bonds of $7,000 or greater are unduly high. Most of these women have already used the great majority of their savings to flee persecution in their countries of origin and embark upon the treacherous journey throughout Central America to seek asylum. One can liken the excessive bond amounts presented to the women as the last link in the gang–*coyotaje* (smuggler)–government extortion chain that these women go through to extricate themselves from violence. They clearly pose no security threat yet are faced with high bonds that keep them from accessing legal representation.

During my time at Dilley I observed 15 bond hearings, where the initial amount set by ICE officers was on average $8,000. However, with the help of immigrants' rights attorneys, the bonds were reduced to $2,000 by the immigration judge. What is troubling, though, is that I saw families with almost identical cases, and one was released on a bond of $1,500 and the other on a bond of $5,000. The decisions on bond amounts were completely dependent on who was presiding over the case that day. An immigrants'

[260] Human Rights First, "A One-Week Snapshot," 1.

rights attorney from Cleveland volunteering at Dilley said, "The setting of high bonds makes all the difference for these families because it is very difficult for them to come up with $5,000 plus … and what that means is that they have to fight their case from within custody and their access to counsel and the ability to develop their case is severely limited…. Usually this means that their case will not be successful."[261]

For the women and children in family detention centers, the fight for realizing their human rights continues. They may have won the battle by getting out on bond, but the war for their freedom and equality is far from over. Most have never been to the U.S. before, and when they are finally released from detention, the families are dropped off at the Greyhound bus station in San Antonio by ICE, usually around midnight. The station is a drab and chaotic space in a seedy part of downtown. The three times I visited the bus station families were dropped off at 11pm, 12am, and 12:30am. After weeks or months of detention, they board buses and travel for hours or days to locales as far as California, Florida, and New York. Some will reunite with family members and friends, while others will travel to cities where there is a strong immigrant network. Either way, once they get to their destination, the families will have to appear in immigration court and present their asylum claims, where the odds are stacked against them.

During the spring of 2015, I noticed a large, black electronic device on the ankle of several women entering the San Francisco immigration court. The women had a look of discomfort on their faces, as the clunky, two-pound device just below their rolled-up-jeans and above their sneakers weighed on them physically and emotionally. In response to the mounting pressure from the human rights community about the conditions at

[261] Immigrants' rights attorney, interview by author, July 1, 2015.

Artesia, Berks, Dilley, and Karnes, ICE began exploring alternatives to detention.[262] Thus far, GPS ankle monitors, which track the mothers' every move, read out instructions, and govern all aspects of their release, are the most popular alternative. DHS Secretary Johnson informed the House Judiciary Committee that ICE was "ramping up" its use of ankle monitors and intended to more than double the total number of women monitored, from 23,000 in 2015 to 53,000 in 2016.[263]

Up until the summer of 2015, most women remained in detention for an average of three to fourth months. However, DHS' current policy is to get everybody in and out of the detention center within three to four weeks due to Judge Gee's decision and the wave of protests that increased visibility surrounding the controversial issue. While the electronic devices do get the families out of Dilley faster, the women I met with provided a long list of reasons as to why they detested the ankle monitors, or *grilletes* (shackles) as they call them. In practice, ankle monitors are just another example of the extension of a criminal justice paradigm to U.S. asylum and immigration policy—a grotesque manifestation of disciplinary power infringing upon individual freedom.

Nearly a dozen women I met at Dilley informed me that immediately after they passed their credible fear screenings, ICE told them that if they wanted a bond it would take over two months (when in reality it takes about two weeks) and cost around $10,000 (when judges were reducing them to about $2,000). While no ICE official would respond to requests for information regarding this practice, it appears that the agency has adopted this coercive tactic—as a response to *Flores*-related litigation and pressure from the

[262] U.S. Department of Homeland Security, "U.S. Immigration and Customs Enforcement's Alternatives to Detention."
[263] Hennessy-Fiske, "Immigrants Object to Growing Use of Ankle Monitors After Detention."

human rights community—to get women to agree to wear an ankle monitor instead of waiting in detention for their bond hearings.

Ankle monitors govern all aspects of these asylum seekers' daily lives. The women cannot take off the devices—even when they shower—and they must charge them frequently. With short cords, they are left tethered to electrical outlets with restricted movement. When the battery on the device gets low, it emits a message in Spanish: "charge the unit." All the women fitted with the device stated how burdensome it was. Rosa, a 32-year-old woman from Honduras, said, "It is very uncomfortable. It has bruised my leg. When I charge it, it burns my leg."[264] Other women interviewed showed me blisters and adverse skin reactions to wearing the device. And while there is no available information on the health effects of these monitors, it is significant to note that ICE does remove them from pregnant women, calling into question the impact this may have on all women's health. I spoke with two women who only realized they were pregnant after being fitted for the devices, and it took ICE several weeks to remove them.

The women also raised concerns about the discrimination they faced while wearing the ankle monitor. The headline "ICE Ramps Up Use of Ankle Monitors: Is it the Solution or a New Stigma?" aptly captures their concerns.[265] Cristina, a 26-year-old from Guatemala, said, "It makes me feel like a criminal. We haven't done anything wrong … but they treat us like criminals."[266] Alicia, a 35-year-old from El Salvador, conveyed how the ankle monitor often elicits harassment when she walks down the street: "A few times, men will say some bad comments to me after seeing it. They say

[264] Asylum seeker, interview by author, April 27, 2015.
[265] Ontiveros, "ICE Ramps Up Use of Ankle Monitors."
[266] Asylum seeker, interview by author, April 30, 2015.

things like, 'You must have done something bad. Come here and show us.'"[267] Others said they were unable to find work because employers refuse to hire someone with such a visible device. The two most cited words from the women in response to the question "how does wearing an ankle monitor make you feel?" were "humiliated" and "ashamed."

One of the most troubling aspects of the ankle monitor scheme is that the same private, for-profit company that owns and operates the facilities where families are detained is tasked with monitoring them upon release. Currently, our immigration detention system detains thousands of families every year in prison-like facilities run by the government (ICE) in partnership with private corporations (such as GEO Group and CAA). CAA has been heavily profiting from the boom in immigration detention. In 2015, the first year that Dilley was operational, CAA—which has 74 other facilities throughout the country—made 14 percent of its revenue from just this one center when its profits had flat-lined the previous five years.[268] Detention not only exposes detainees to brutal and inhumane conditions of confinement, but it also comes at a tremendous cost to American citizens—ICE's annual budget for immigration detention is approximately $3.3 billion.[269] And with the introduction of ankle monitors, this cycle continues. Behavioral Interventions Incorporated (BI)—a company that manufactures, assembles, markets, and monitors electronic monitoring systems for use by corrections agencies—has been contracting with ICE to provide electronic monitoring and related supervisory services since an initial pilot program in 2004. The company was acquired by GEO Group in 2011, and in September 2014, it won a new contract with ICE from which it is "expected

[267] Asylum seeker, interview by author, April 30, 2015.
[268] Harlan, "Inside the Administration's $1 Billion Deal to Detain Central American Asylum Seekers."
[269] U.S. Department of Homeland Security, "Budget-In-Brief," 5.

to generate $47 million in annualized revenues."[270] Private companies are not only profiting from the detention of immigrant families but are also profiting from their release from detention and subsequent tracking and monitoring.

The stated purpose of ICE's "Intensive Supervision Appearance Program" (ISAP), of which the ankle monitors are an integral component, is to facilitate attendance at immigration hearings and compliance with final court orders. Under ISAP, private companies such as BI undertake case management and supervision. However, many of the women expressed great confusion over what they were supposed to do and who and where they were supposed to report to—the program guidelines are rarely conveyed to the women in a manner they understand.

I observed three specific instances that call into question the program's stated purpose of getting women to report to immigration court. Gabriela, a 25-year-old from Ecuador, had her initial hearing in immigration court on the same day she had a check-in appointment with ICE's supervisory program. She went to ICE's San Francisco office on Sansome Street first, which is just a few blocks away from the immigration court on Montgomery Street. At these appointments, ICE officers are supposed to go over the participant's reporting requirements, but in Gabriela's case, they simply signed her paper and sent her on her way. She informed me that each time she checked-in there was a different officer. On this day, the officer present did not tell Gabriela when her next check-in would be nor did he tell her when she was meant to appear in immigration court, which was scheduled for an hour after she left the office. It was only when she received a deportation letter in the mail a few weeks later that she realized she missed her hearing.

[270] "The GEO Group Awarded Contract By U.S. Immigration and Customs Enforcement for the Continued Provision of Services under Intensive Supervision and Appearance Program."

In 2015, President Obama and DHS forcefully ramped up "deportation raids."[271] After an immigration judge issues a deportation order, ICE can pick up the individual at home or work, and then three days later, ICE can deport the individual without another court hearing. Gabriela was one of the "lucky" ones, as she got in touch with refugee advocacy and human rights organizations that provided her with an attorney who filed a motion to reopen her hearing with the immigration judge immediately. Those without attorneys will most likely fail to articulate, in the appropriate legal jargon of immigration court, a reason for the recognition of their human rights and will be deported to face the horror and persecution they hoped to escape.

The second instance occurred during a master calendar hearing—preliminary court hearing—for families recently released from immigration detention. As I observed the case of a young Guatemalan woman and her daughter, there was a loud beeping noise that radiated throughout the courtroom. At first, the sound was hard to decipher, as the pro bono attorney was addressing the judge and the room was filled with the ordered chaos that ordinarily accompanies such perfunctory hearings: dozens of families packed into limited seating, searching for an immigrants' rights or pro bono attorney to help them fill out their forms and present their claims to the judge. As the sound continued, it became apparent that it was coming from the young mother currently in front of the judge. The judge, as did most people in the courtroom, thought the woman's cell phone was going off and immediately remarked in an angry tone how this was a sign of disrespect. It was only after the attorney realized it was the mother's ankle monitor directing her to report for a check-in with ICE that the confusion was cleared up. An

[271] Constable, "Deportation Raids to Continue Despite Outcry."

asylum seeker without representation present would likely not have been as lucky. During asylum hearings, where the credibility of an applicant is a primary determining factor, a misunderstanding such as this one could easily lead to a denial.

Not only did the women express how overwhelming the supervisory program was, but they also told me how it erodes their ability to do the important tasks they are meant to do, like work on their asylum claims by visiting an attorney, psychologist, or social worker. A clinical psychologist in Berkeley told me that one of her clients, a young woman from Mali, was suffering from severe post-traumatic stress disorder after having been tortured. The frequent check-ins, as part of the supervisory program, repeatedly triggered the trauma she experienced in Mali because the ICE office was in a government building that resembled the one she was tortured in. As such, the young woman was having a very difficult time developing her claim and had fallen into a deep depression.

These examples underscore an important debate that is lacking in the context of family detention and "home detention," as many activists refer to the ankle monitor scheme. Many human rights activists are reluctant to condemn the electronic monitoring program because they want to encourage ICE to release people from detention centers. But a 2012 report by the Immigrant Rights Clinic at Rutgers School of Law-Newark and American Friends Service Committee Immigrant Rights Program points out that while electronic monitoring is usually used as an alternative for people who would otherwise be in jail, with increasing frequency, such monitoring is now being imposed on people who would otherwise be released under much less restrictive conditions.[272] Incidents such as this illustrate one of the key points Foucault describes toward the end of *Discipline*

[272] Immigrant Rights Clinic at Rutgers School of Law-Newark and American Friends Service Committee, "Freed but not Free," 15.

Punish: "By operating at every level of the social body and by mingling ceaselessly the art of rectifying and the right to punish, the universality of the carceral lowers the level from which it becomes natural and acceptable to be punished."[273]

The title of the 2012 report, "Freed but not Free," accurately depicts the situation these immigrant families find themselves in. As Rosa, the woman in the first example, said, "Yes, this is better than being stuck inside the prison. Everyday my daughters asked me, 'Mom, when are we leaving this place?' Of course this is better. But as long as I wear this shackle, I feel like a criminal … like part of me is in that prison."[274] "The carceral network, in its compact or disseminated forms, with its systems of insertion, distribution, surveillance, observation, has been the greatest support, in modern society, of the normalizing power," writes Foucault.[275] Disciplinary power in the context of the "border wall–detention center–ankle monitor–immigration court" paradigm enforces conformity to a normalized model of subjectivity: the women and children will be prepared to be deported at any time, watched and monitored 24 hours a day, appear in court at the mercy of government prosecutors and immigration judges, conform to certain discursive representations of what it means to be a genuine refugee, and remain passive and quiet subjects during the lengthy and profitable process.

Conclusion

In immigration detention centers, the foundation of the human rights discourse—human rights law at the domestic and international levels—may seem ineffective and

[273] Foucault, *Discipline and Punish*, 303.
[274] Asylum seeker, interview by author, April 27, 2015.
[275] Foucault, *Discipline and Punish*, 304.

even non-existent. Confinement is employed as another measure to prevent people from reaching sovereign territories and claiming rights. Women and children appear to be languishing in camps, where legal representation is denied, freedom of movement is restricted, and due process is trampled upon. Unwelcome migrants and asylum seekers are simultaneously humanity excluded from territorialized political life, yet constitutive of the system of nation-states. After all, detention centers are an extension of national borders; they are border zones located in the interior, where detained non-citizens fall outside the protection of the nation-state while remaining fully in its grasp.

Yet, precisely because detention centers are border zones, places like Dilley are where notions of rights, citizenship, and belonging are constantly contested and negotiated. Despite their marginalization, the women and children continue to frame their struggles in the language of universal rights to build bridges and relationships between individuals and groups sharing perhaps little else in common, and in doing so, there have been some tangible results. If it were not for the continued protests, then Artesia with its substandard conditions and "deportation mill" mandate would not have been exposed and subsequently shut down. And while the closing of Artesia prompted the U.S. government to evolve and reassert its sovereignty by opening another detention center in Dilley that appears to be more palatable and "humane," there are still greater possibilities for disruption at this new center. The presence of immigrants' rights and pro bono attorneys, social workers, psychologists, researchers from refugee advocacy and human rights organizations, academics, teachers, and students who routinely travel to this remote location not only results in immediate humanitarian assistance, but also challenges the rest of the population's ambivalence over the immigrant families' rights by bridging the

citizen/non-citizen divide through a cosmopolitan solidarity. For the human rights community, then, the fundamental goal is to transform the politics of human rights because the nation-state will remain reluctant to relinquish any of its gatekeeping function that is essential to its sovereign power.

Through these solidarities as well as moments of disruption, we have seen dynamic internal strategies exert pressure on government officials with direct power over the conditions of detention that has resulted in better-quality schooling options for children, a soccer field for recreation, and more nutritious food introduced at Dilley. Yet, improving the conditions inside detention centers is certainly not the end goal for these women and the human rights community. Neither is settling for "home detention" by wearing ankle monitors. The women and children held in detention centers throughout the country are seeking asylum based on their lived experiences of persecution, and in turn, they are hoping to expand the meaning and scope of human rights by insisting that *freedom*, *liberty,* and *dignity* apply to them.

Thus, if we conceive of human rights as claims that challenge the established (discriminatory) order—such as the ones made by immigrant families in their letters, worker strikes, protests, and engagement with members of Congress and the public at large—then we have a different understanding of what human rights may offer to those who are excluded. As Upendra Baxi states in *The Future of Human Rights***,** "The historic mission of 'contemporary' human rights is to give voice to human suffering, to make it visible, and to ameliorate it…. Recovery of the sense and experience of human anguish provides the only hope that there is for the future of human rights."[276] The primary

[276] Baxi, *The Future of Human Rights*, 165-66.

function of immigration detention centers is to distance certain classes of migrants and asylum seekers from the citizenry; the less contact American citizens have with the women and children in places like Dilley, the less likely they are to understand the nature of their human rights violations, enabling the state to discursively represent the non-citizen as a threat to national security and national identity. By doing this, state power seeks to bury oppositional voices and alternate knowledge. Yet, such efforts can never be fully successful because power always produces its mirror image: *resistance*. The movement for human rights may not be linear, as evidenced by the ferocity of the government's responses to increased migration and its mistreatment of asylum seekers. But the true meaning of human rights comes from the human rights community. Asylum seekers and their allies show us in very specific moments through their movements, words, and actions that rights are fundamentally about redressing injustice. The next two chapters will look at how the human rights community works with asylum seekers who are released from immigration detention to frame their claims to adjudicators in a legal context. The *struggle for human rights* is ongoing.

CHAPTER 3: NAVIGATING THE ASYLUM SYSTEM

"Do you do press the facts into the box or stretch the box?"

Introduction

In San Francisco, California, adjacent to the Beaux-Arts-style City Hall, sits the Philip Burton Federal Building and U.S. Courthouse, a towering structure of concrete and glass, with 21 floors that occupies an entire city block. I enter the building, go through the security checkpoint, and take the elevator to the fourth floor. Doors open to a sterile room with rows of black chairs underneath bright, fluorescent lights reflecting off the barren, white walls. Here you will find people dressed in their most formal clothes patiently sitting, as they wait to have their photographs snapped and fingerprints taken. Some will be speaking with their attorneys or interpreters, reviewing last-minute preparations. Others will be pacing back and forth, as they ready themselves for the most important interview of their life. This is the waiting room of the San Francisco asylum office—one of the eight regional asylum offices throughout the country—where individuals and families from all corners of the world seek asylum in the U.S. due to rampant human rights violations in their countries of origin.

On this sunny Tuesday morning in June 2015, I accompany Carlos, a 15-year-old from Honduras, to the asylum office for his interview. To my left is a woman fleeing China because she opposes the government's one-child policy (forced sterilization). After a few minutes of deep yet anxious breathing, an asylum officer steps into the waiting room and calls out the last three digits of an "alien registration number" and Carlos

immediately springs up. Looking down at the ground, he follows his attorney and the asylum officer down a long hallway of offices. The office is sparsely decorated, with a few photographs as well as a large map of the world. After going over introductions and reviewing Carlos' biographical information listed on the application, the asylum officer asks, "Why did you come to the United States?" Carlos replies, "Because I opposed the gangs and they threatened to kill me." Over the next two hours the asylum officer asks a series of questions about the most traumatic experiences of Carlos' young life.

This is the first point of the asylum system, where applicants must stake a claim, declaring that they are human rights subjects and deserve to be recognized as such. To be granted asylum, the burden of proof rests with the applicant to present a persuasive case that s/he has a well-founded fear of persecution on account of one or more of the five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion). If, however, the asylum officer does not believe that the applicant has carried his/her burden in establishing the veracity of the human rights claim, or the asylum officer accepts the applicant's proffered facts as true but does not believe that those facts qualify as a matter of law, then the case is referred to immigration court. The implication of this is not to be understated, as an adverse ruling in immigration court overwhelmingly results in deportation, especially for those without access to counsel.

I first met Carlos two months earlier at his Oakland high school. Initially withdrawn and quiet, he quickly grew out of his shell on the soccer field. With his Adidas sneakers, skinny jeans, and hair buzzed on the sides to emulate his favorite athlete Cristiano Ronaldo, Carlos looks like your average high school freshmen. Except for the fact that this is Carlos' first few months in the country, not his first year in high school.

He is one of the 39,970 unaccompanied immigrant children that were apprehended at the southern border in 2015, fleeing a combination of gang violence, police brutality and/or indifference, pervasive poverty, and government corruption that disproportionally affect women, children, and indigenous populations.

Carlos' story contains many of these elements. As soon as he became a teenager, he was harassed by members of the 18th Street gang (Mara 18). They would block him from getting on his school bus and take his money all while pressuring him to join. When he was 14-years-old, Carlos witnessed one of his friends getting shot in the head for refusing to join the gang. Sadly, death is not the exception but the norm in his home city of San Pedro Sula, which holds the title of "the murder capital of the world." Then a few days later, Carlos came home from school to find his mother's shop vandalized with a note saying that her son was going to be next. Finding police efforts futile and unable to pay smuggling fees that can run as high as $10,000, Carlos left Honduras. His perilous journey included riding atop *La Bestia* (the beast), known as the "train of death," a network of freight trains that run the length of Mexico carrying resources to the U.S. After being apprehended by Border Patrol in Texas and spending three weeks in a shelter run by the Office of Refugee Resettlement, an office within the Department of Health and Human Services, he was sent to live with his uncle in Oakland while undergoing immigration proceedings. Just months removed from the trauma of witnessing his friend's murder, Carlos finds himself navigating the complicated immigration system.

In this chapter, we follow asylum seekers like Carlos and the women and children released from Dilley through a system marked by obscure rules, staff shortages due to a lack of resources, hearing backlogs, aggressive government prosecutors, and indifferent

as well as compassionate adjudicators (asylum officers and immigration judges). Through participant observation at asylum offices, immigration courts, and the offices of refugee advocacy and human rights organizations as well as interviews with asylum seekers, immigration attorneys, social workers, clinical psychologists, unaccompanied immigrant children specialists, educators, and adjudicators, I provide an in-depth look at the U.S.' asylum system. This complex system is overseen by two different government agencies, has a culture of adversarial legalism that produces outcomes that are unpredictable and inconsistent, and contains multiple entry and exit points which applicants must navigate to present their claims to be human rights subjects.[277]

The first part of this chapter examines the impact of the protracted process, which can be tedious, expensive, and even traumatic, on the lives of individuals fleeing persecution. With no government-appointed counsel, applicants struggle to find immigration attorneys at little to no cost; and when we take into account asylum seekers' unique situations—limited English proficiency, the effects of trauma, cultural differences, and limited financial resources—the importance of having an attorney to navigate the convoluted process and frame a claim that is understood by the adjudicator in legal terms and/or as an appeal to universal humanity is paramount. According to the Transactional Records Access Clearinghouse at Syracuse University, applicants without counsel have only a 10 percent chance of being granted asylum, while the success rate for those with representation is approximately 50 percent.[278] I argue that even though the American legal system is founded on the principle of "Equal Justice Under Law," as engraved on

[277] Hamlin, *Let Me Be a Refugee*, 66.
[278] Transactional Records Access Clearinghouse at Syracuse University, "Continued Rise in Asylum Denial Rates," Figure 2.

the U.S. Supreme Court building, obtaining asylum for those applying from certain countries (such as the Northern Triangle region of Central America) and under the protected ground of membership in a particular social group (such as gender-based and gang-based claims) is especially arduous because the international refugee framework as constituted in the mid-20th century did not conceive of women, children, and other groups as possessing political agency, and hence, worthy of refugee status.

The second part of this chapter shifts the focus from the experiences of asylum seekers to one of the central tensions within the contemporary human rights discourse: the expansive aspiration of human rights to extend protections to an increasing number of groups and the bureaucratic processes established by the nation-state through which claims are determined. The legalization of human rights presents both opportunities and challenges to the human rights community because the relationship between ethics and law is never entirely straightforward; it is highly contingent on the time, place, and actors involved. This chapter's battleground is the administrative and legal regimes' interpretation of the most ambiguous of the five protected grounds: "membership in a particular social group." I argue that despite the wide-spread notion that recognition of new human rights subjects comes from a top-down approach that sees international human rights law enacted into domestic law by policymakers, the human rights community played a major role in liberalizing international refugee law in the 1980s and 1990s; this was done from the ground-up, through relentless direct representation of asylum seekers that translated distant wrongs into domestic rights by altering the decision-making culture of certain asylum offices and immigration courts, while allowing seminal cases to work their way through the system that resulted in precedent-setting

decisions by the Board of Immigration Appeals (BIA) and federal courts that interpreted the social group category broadly.

However, over the past fifteen years, the BIA has retreated from its progressive stance and veered closer to the nation-state's gatekeeping function by creating additional social group criteria that makes the recognition of new human rights subjects exceedingly difficult. This is compounded by the fact that due to the stretched human and financial resources of refugee advocacy and human rights organizations, they often rely on strategies that inadvertently participate in the gatekeeping process by taking on cases that fit neatly in the BIA's narrowly construed refugee definition and leaving those with the most difficult cases without counsel. Thus, just like at Dilley, while human rights law at the domestic and international levels seems limited in the face of today's restrictive immigration policies, the human rights community has two interrelated and vital tasks that will determine the future of human rights: it must continue to litigate the parameters of the amorphous social group category to extend legal protections to those refugees in dire need, while fostering a cosmopolitan solidarity among American citizens, including humanitarian-minded adjudicators, members of the judiciary, and policymakers, that establishes the necessary social, legal, and political environment to enact equality.

An Overview of the Asylum Process

The government processes asylum applications in two ways: affirmatively through U.S. Citizenship and Immigration Services (USCIS), located in the Department of Homeland Security (DHS), and defensively through the Executive Office for Immigration Review (EOIR), located in the Department of Justice—both part of the

Executive Branch and under the leadership of the President. While subsequent sections pay attention to an applicant's nationality, access to counsel, and type of claim (protected ground), this section looks at how an asylum seeker enters the process and the way that impacts the processing of his/her case, both in terms of procedure and outcome. The stated objective of both the affirmative and defensive asylum process is to provide a fair hearing for any individual currently present in the U.S. or arriving at a port of entry (airport, land border, or sea), regardless of immigration status, who is fleeing persecution. To apply affirmatively, an individual must submit Form I-589 (Application for Asylum and for Withholding of Removal) to USCIS within a year of his/her last arrival in the country or establish that an exception applies based on changed or extraordinary circumstances. If, however, an asylum seeker is apprehended by one of the DHS agencies—Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE)—before applying, then s/he is moved into the defensive process overseen by the Department of Justice and faces deportation.

The affirmative process is meant to be a non-confrontational interview between the asylum officer and applicant. Interviews take place in one of eight regional asylum offices: Arlington, Virginia; Chicago, Illinois; Houston, Texas; Miami, Florida; Newark, New Jersey; New York, New York; Los Angeles, California; and San Francisco, California. Asylum officers receive extensive training, including a residential six-week course that addresses researching asylum and immigration law and human rights country conditions, interviewing techniques, and decision-making and writing. They also have additional weekly training sessions of up to four hours on the latest human rights issues and legal developments conducted by Quality Assurance and Training Officers. Although

they come from varied professional backgrounds, there has been a trend over the past decade toward hiring individuals with law degrees or those with some work experience in an immigration or humanitarian context.

After both parties enter the office and are seated, the asylum officer provides the applicant with a detailed introduction stating the purpose of the interview while transcribing notes from their conversation on a computer. The affirmative process is designed to be a conversation, so that the asylum officer can ascertain detailed responses to the probing questions s/he must ask about the applicant's fear of persecution. In fact, many asylum officers, such as this one in New York, decorate their offices to make the process more inviting: "The reason I have all these artifacts around my office is so that people [applicants] can look around and find something from their country and say, 'oh someone else from my country has been here before.' It eases them into the interview."[279] The handful of offices I had access to were ornately decorated with African masks, Asian tapestries, Persian rugs, antique maps, and postcards from the officers' travels.

Regardless of the aesthetic of asylum offices, the affirmative process is designed to be less adversarial than the defensive. According to a private practice immigration attorney in New York, "The intimate atmosphere of the asylum office interview is, while not particularly comfortable, definitely easier for my clients. Immigration court is a drawn out process that is more traumatic and upsetting."[280] A major reason for the affirmative process being easier for applicants is that "asylum officers tend to be highly educated and worldly; they are probably the most internationalist and humanitarian-minded staff in all of government," said a former supervisory asylum officer in

[279] Asylum officer, interview by author, July 27, 2015.
[280] Private practice immigration attorney, interview by author, July 28, 2015.

Houston.[281] With the rise in applications from unaccompanied immigrant children, some offices have hired staff with experience working with children and other marginalized populations, such as the asylum officer in San Francisco who presided over Carlos' case:

> Just developmentally, some of the things you have to be able to articulate to make an asylum claim are usually not that well developed in adolescents. A lot of making asylum claims is understanding the motivation of others. You know, why did the gang members want you to join. You'll get the answer, 'I don't know' a lot from kids. And why should they know. When you're being teased in junior high school, you don't really understand why others are bullying you. Our job is supposed to be non-confrontational. We are supposed to help them elicit the testimony they need to give. I think it just means you have to help them more. I think there is already this huge power dynamic when you are going to be deciding something important in another person's life. And then when you add … the power dynamics of gender, race, socio-economic class, citizenship status, and then age, I just think there are a lot of barriers for them to overcome.[282]

This asylum officer previously worked as an attorney at one of the country's leading LGBTQ immigrants' rights organizations, thus he approached the decision-making process from an empathetic human rights perspective. His approach was echoed by other officers in San Francisco, which explains why it has the highest grant rate at 76.7 percent. The culture of each asylum office, however, differs based on the supervisory asylum officer's outlook and the background and experience of the staff s/he hires, resulting in varying outcomes—New York and Houston have grant rates of 22.6 percent and 30.1 percent, respectively.

After an officer has conducted the interview, which usually lasts between two and three hours, s/he has either three main options: to grant asylum, refer the case to immigration court, or administratively close it. Each decision is reviewed within the

[281] Supervisory asylum officer, interview by author, July 7, 2015.
[282] Asylum officer, interview by author, April 16, 2015.

regional office by the supervisory officer. These individuals undergo continuous training as well, including a two-week session that updates them on the latest asylum-related case law in order to ensure consistency and effectiveness in evaluating asylum officers' interviews and outcomes. Therefore, the Asylum Division of USCIS, with its emphasis on training and oversight, is viewed by the human rights community as the most politically insulated stage of the process. Nevertheless, there are still some officers who do not approach their duty to develop the evidentiary record with the gravity and fastidiousness required. According to an immigrants' rights attorney in New York:

> It does happen that good cases, cases that should be granted based on the facts, are referred from the asylum office to immigration court. Especially when the asylum seeker does not have a lawyer. It's the asylum officer's job to develop the record. So when you see a template referral like 'the claim lacks sufficient detail,' it is the asylum officer's job to get that detail. When I see that, I know they're not doing their job fully. They're either not asking the right questions, or that they are focusing on things that aren't relevant to the claim.[283]

Referrals from the Asylum Division initiate the defensive process, which is triggered by a Notice to Appear (NTA) letter. The NTA is significant because it triggers a set of rights for the non-citizen. For example, an individual in immigration court has the right to both present and challenge evidence. Moreover, due to asylum seekers' difficulties in obtaining legal representation, an immigration judge is obligated to tell an individual facing removal of his/her eligibility for any other forms of relief.

Applicants may be placed into the defensive process in two ways. The first is the situation described above (referred from an asylum office) and such applicants are entitled to *de novo* hearings, meaning that the immigration judge—who only receives one week of classroom training in contrast to the extensive training of asylum officers—

[283] Immigrants' rights attorney, interview by author, July 23, 2015.

reviews all facts of the case from the beginning. The second is when an asylum seeker, without legal immigration status, is apprehend by one of the DHS agencies. Defensive applicants are mainly individuals who arrive at the border and request asylum. They are usually detained by DHS; some are released on bond after passing the initial credible fear screening, while others undergo the whole process while being detained, like at the former detention center in Artesia. Congress created the two-tiered system to differentiate between affirmative applicants, who were "seen as more legitimate, and therefore more deserving, of a thorough system of administrative justice," and defensive applicants, who lawmakers did not want to reward "for entering the country illegally by allowing them to access the Asylum Office, which has a reputation for generosity."[284]

The one exception in which someone apprehended by DHS can have an affirmative hearing is if s/he is an unaccompanied minor like Carlos from a country that does not share a land border with the U.S. On December 23, 2008, President Bush signed into law the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), named after the 19th century British abolitionist, which strengthened federal laws to combat human and sex trafficking. TVPRA distinguishes between legal procedures for unaccompanied children who are nationals of non-contiguous countries (including those from the Northern Triangle region of Central America) and contiguous countries (Mexico and Canada). The TVPRA provides USCIS with initial jurisdiction over all asylum applications filed by unaccompanied immigrant children from non-contiguous countries; such children cannot be deported immediately, and it is recommended they have access to counsel, resources permitting.

[284] Hamlin, *Let Me Be a Refugee*, 69.

The law also requires such minors to be referred to the Office of Refugee Resettlement within 72 hours for screening and placement in the least restrictive setting—one that is in the best interest of the child as laid out in the *Flores* settlement. This includes being placed in the custody of a family member, Office of Refugee Resettlement shelter, or foster care pending the outcome of the hearing. In contrast, minors from contiguous countries are screened within 48 hours to determine whether they have been trafficked or possess a credible fear, and if not, their removal is expedited. The Obama administration viewed the law with its protections for certain unaccompanied minors as partly responsible for tying its hands in dealing with the influx of children at the southern border in 2014,[285] which led immigration restrictionists in Congress like Representative Mike Rodgers (Republican, Michigan) to pose the following question to DHS Secretary Jeh Jonson during a hearing: "Why aren't we putting them on a bus like we normally do and sending them back down to Guatemala?"[286]

While applicants in the affirmative process have a chance to present their claims to asylum officers who have a reasonable understanding of the human rights situation in their countries of origin, defensive hearings are adversarial and contested. According to a private practice immigration attorney in Arlington:

> The asylum office is more administrative, I'd say. And lawyers don't get to do much talking, which surprised me. I went in there thinking it was going to be like court and I would make my argument, but I had to sit on the side and not say much. Immigration court, on the other hand, is way more formal. Everybody is seated, your client is basically your star witness, and you can bring expert witnesses as well. The government attorney can question everyone…. Of course, the judge is always running the show, so they can chime in whenever they want. Court is a lot more stressful because you never know what to expect.[287]

[285] Hulse, "Immigrant Surge Rooted in Law to Curb Child Trafficking."
[286] Resnick, "Why We Don't Immediately Send the Border Kids Back."
[287] Private practice immigration attorney, interview by author, September 2, 2015.

The level of confrontation during defensive hearings is highly dependent on the backgrounds, temperaments, and biases of the ICE trial attorney (government prosecutor) and judge. Without representation, though, the system is stacked against the applicant.

The defensive process is marked by structural power imbalances that favor the government and undermine fundamental legal principles such as fairness and due process. As Susan Terrio writes, "The current structure of the immigration court is in constant tension with the legal mandate to exercise independent judgment, a mandate premised on the separation of the judiciary from the legislative and executive branches of government. The immigration court is part of the executive branch of government."[288] All aspects of the defensive process are overseen by EOIR, an office of the Department of Justice under the purview of the Executive Branch. Within EOIR, the Office of the Chief Immigration Judge, which reports directly to the Deputy Attorney General, establishes operating policies and oversees policy implementation for all the immigration courts. The Attorney General, a political appointee of the President, is responsible for appointing trial attorneys, who are tasked with prosecuting cases against asylum seekers they think should be deported, as well as immigration judges, who determine the outcomes. Thus, the defensive process blurs the line between politics and law, as the Executive Branch is in charge of appointing gatekeepers to the system that embody its views on immigration.

To accentuate the asymmetrical power relations, defensive hearings take place in what appears to be a traditional legal setting: courtrooms outfitted with wooden pews for the audience, the applicant and ICE trial attorney seated at opposing tables ready to make their respective cases, and the immigration judge presiding over the hearing with gavel in

[288] Terrio, *Whose Child Am I?*, 163.

hand from a raised platform. Defensive hearings, however, are far from ordinary. "Federal rules of evidence don't apply, applicants don't have a right to counsel, and judges don't have contempt authority over attorneys," said a judge at the San Francisco immigration court.[289] Because immigration judges do not have contempt authority, prosecutors exhibit an unrivaled discretionary authority during hearings. In fact, I repeatedly observed ICE trial attorneys who showed up to hearings late, unprepared, and requested for continuances without regard to the applicants' circumstances.

"For asylum seekers, there is a terror of the institutional process. Of having to face individuals who are clearly in a more powerful position," said a clinical psychologist in San Francisco. "Most of them want to avoid situations where they may have to face past trauma. Asylum hearings trigger that."[290] Mara, who we first met in the previous chapter, confirmed this: "I'm really scared. My biggest fear is going to court. That I am going to accidently say something wrong and they are going to accuse me of lying and deport me right away."[291] The layout of the courtroom is designed to prevent interaction between the parties and reinforces the authority of the judge and trial attorney. The symbolism of the American flag and golden bald eagle behind the judge's desk, casting a shadow over the applicant's table, is not to be taken lightly, as this is where the asylum seeker's freedom will be determined.

The two distinct tracks of the asylum system have different trajectories in terms of their outcomes. In 2013, 25,151 individuals were granted asylum in the U.S. Approximately two-thirds of applicants who started the process affirmatively were

[289] Immigration judge, interview by author, May 27, 2015.
[290] Clinical psychologist, interview by author, April 24, 2015.
[291] Asylum seeker, interview by author, March 26, 2016.

granted refugee status (one-third of those were successful at the initial affirmative asylum office interview and over 50 percent were successful at the subsequent defensive immigration court hearing), while less than one-third of those who began the process defensively were ultimately recognized as human rights subjects. In 2015, the total number of individuals granted asylum increased slightly to 26,124.

Table 5: Individuals Granted Asylum Affirmatively by Nationality [Number] (2015)[292]

Country of Nationality	***Number Granted***
China	2,582
El Salvador	1,870
Guatemala	1,713
Egypt	1,517
Honduras	1,109
Syria	873
Iraq	711
Mexico	667
Iran	640
Ethiopia	624
All other countries	5,572
Total	17,878

Table 6: Individuals Granted Asylum Defensively by Nationality [Number] (2015)[293]

Country of Nationality	***Number Granted***
China	3,610
Guatemala	369
Honduras	307
El Salvador	303
India	303
Ethiopia	255
Nepal	253
Mexico	203
Russia	176
Somalia	166
All other countries	2,301
Total	8,246

[292] U.S. Department of Homeland Security, "Refugees and Asylees," 6.
[293] Ibid.

Figure 1: Steps in the Asylum Process

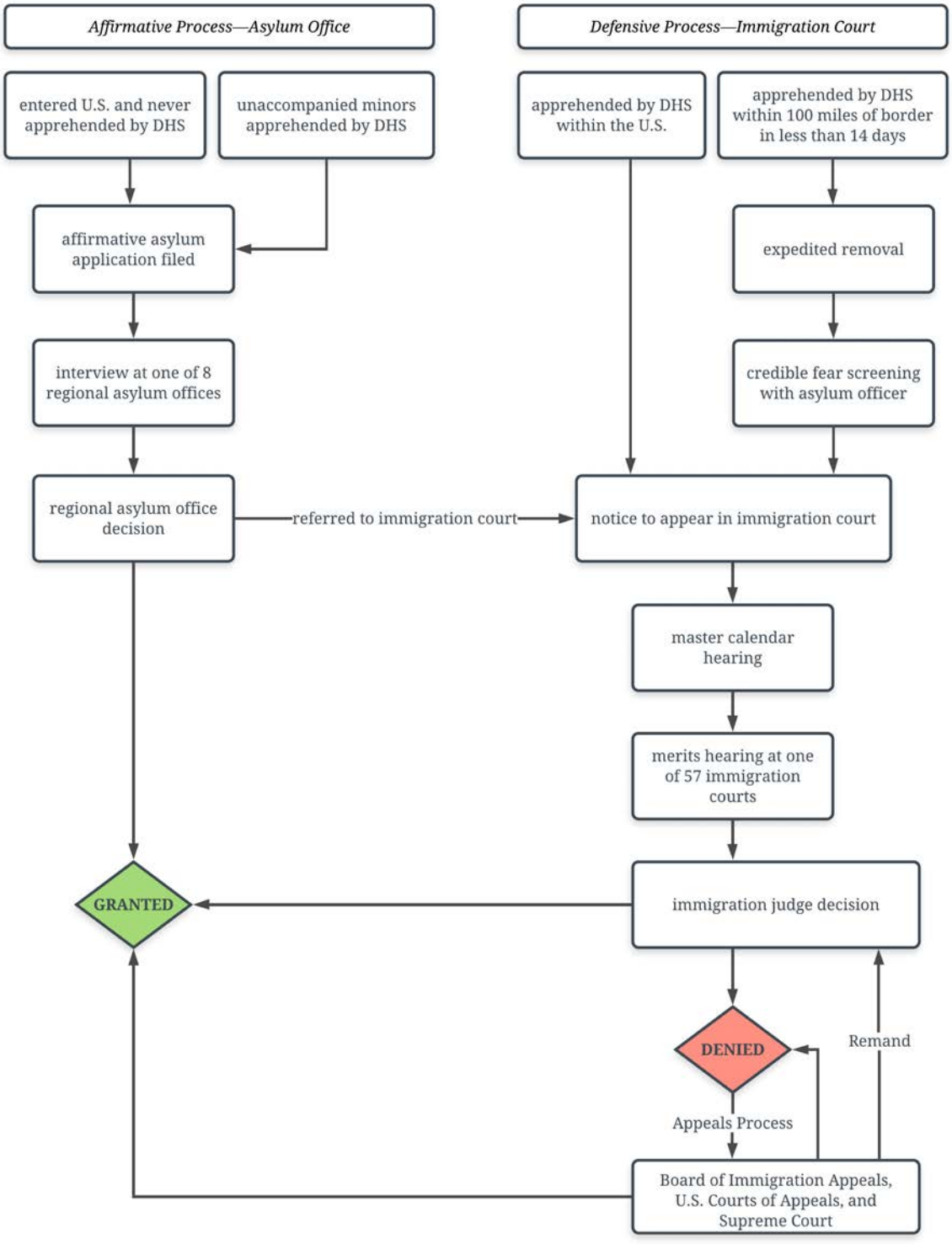
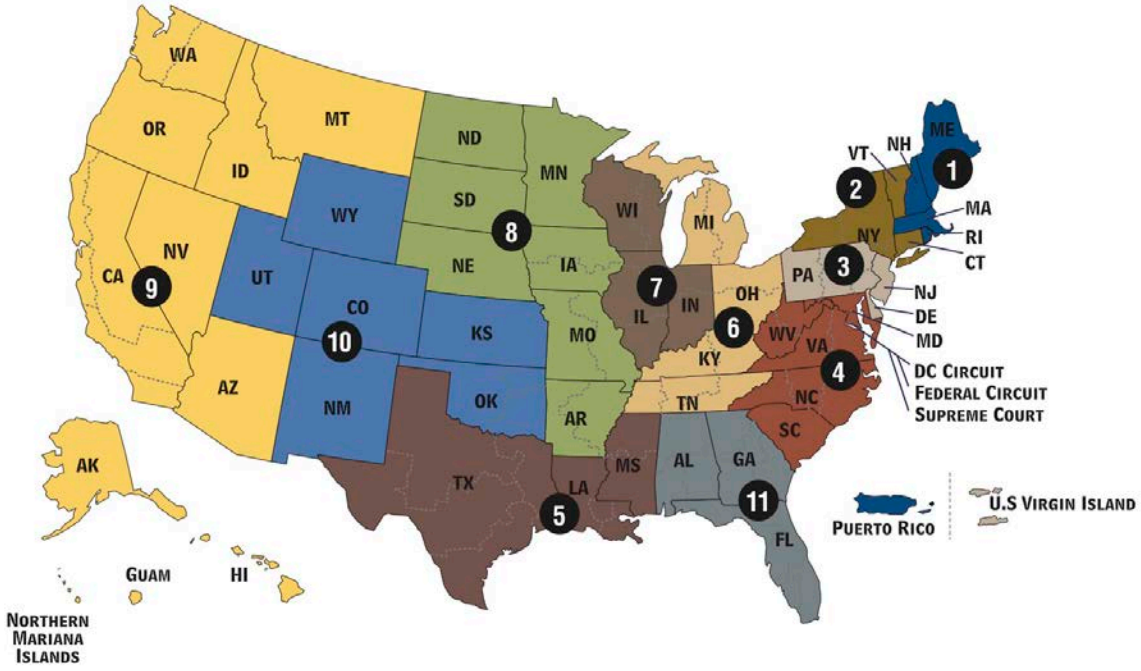


Figure 2: Geographical Boundaries of the U.S. Courts of Appeals[294]



For those applicants who are denied asylum by an immigration judge and have the assistance of an attorney, one uphill path remains. They may file an appeal within 30 days to the Board of Immigration Appeals (BIA), which is an administrative appellate body within EOIR. Under the purview of the Attorney General—who has the power to overrule its decisions, change its procedures, and appoint/remove members who disagree with his/her political ideology—the BIA is tasked with interpreting and applying immigration laws.[295] Located in Falls Church, Virginia, the full size of the body varies from time to time, but may have up to 17 board members under the current legislation. Due to its administrative nature, the BIA does not conduct courtroom proceedings, but rather decides appeals by conducting a paper review of cases. The BIA has two options:

[294] For more information on the role and structure of U.S. Courts, see: http://www.uscourts.gov/about-federal-courts/court-role-and-structure.
[295] Ramji-Nogales, Schoenholtz, and Schrag, *Refugee Roulette*, 61.

to dismiss the appeal (uphold the judge's deportation order) or sustain the applicant's case. In sustaining, the BIA will either cancel the deportation order or remand the case (send it back to the immigration court with instructions to reconsider the decision).

For those whose cases are dismissed by the BIA, the next, and for practical reasons the last, stage of appeal is a U.S. federal court of appeals (circuit court). Appeals at this level can only be put forth to the circuit in which the immigration judge decided the applicant's defensive hearing. Circuit courts do not undertake a full review of the case, but rather the applicant must specify the grounds for why s/he is appealing the BIA decision. They may either grant asylum or remand the case back to the immigration judge. Procedurally, a case can go all the way to the Supreme Court but given that the nation's highest court has only reviewed a handful of asylum-related cases since 1980, it is the BIA that has historically been the most important body in the immigration system. Its decisions are binding on all asylum officers and immigration judges nationwide unless modified or overruled by the Attorney General or a federal court of appeals.[296]

Despite being below the federal courts of appeals, the BIA only has to follow a court of appeals' interpretation within that particular circuit. However, over the past 15 years, the politically-motivated nature of the BIA and its close proximity to the Executive Branch has come under scrutiny from not just the human rights community, but federal judges who view the administrative body's guidance as flawed. This has greatly increased since 2002, when the Bush administration urged Attorney General John Ashcroft to initiate procedures to "streamline" adjudicatory procedures; these included "more frequent reliance on decisions by one board member instead of three-member

[296] Schoenholtz, "Refugee Protection in the United States Post-September 11," 352-53.

panels, a policy of 'deference' to the conclusions drawn by IJs [immigration judges], an end to independent BIA fact-finding, and the use 'Affirmances without Opinion,' which uphold the decision of the IJ with no elaboration of the legal issues involved."[297] The result of these changes has led to the weakening of the body, as federal courts of appeals with the largest amount of immigrations cases like the Second Circuit (which includes New York) and Ninth Circuit (which includes Arizona and California) increasingly overrule BIA decisions and view themselves as "error correctors."[298] Now over a quarter of the BIA's decisions are reviewed, placing the body under tighter judicial scrutiny.

Decisions issued by asylum officers and immigration judges only affect the individual applicants before them and are not officially distributed or published. According to an asylum officer in San Francisco, "You can be more creative in the asylum office because we don't need to reference case law. No one is going to appeal our decisions."[299] Decisions issued by the BIA and circuit courts, on the other hand, have the potential of impacting an entire group of asylum seekers, as described by a former supervisory asylum officer who is now a DHS official:

> The Asylum Division, much to the chagrin of officers, they can't make *official* law. It frustrated me a great deal too when I was there. If you truly care about an issue, you let it go through the court system. But if you think you can willy-nilly, cases-by-case, change the law down in a regional asylum office, it's not going to happen. You must have that one big case and get it in front of the BIA or the Ninth Circuit…. There were times as a supervisory officer that I'd see *compelling cases,* like some women's cases in the 1990s, and your gut instinct is to not kill them in their infancy. But it's a trade-off. The only way to do that is to withhold the benefit [grant of asylum] for an individual at this level. Because if you settle with just that person, then the issue may just go away. The asylum seeker's lawyer would have to convince them to take the risk of waiting out a

[297] Hamlin, *Let Me Be a Refugee*, 73-74.
[298] Law, *The Immigration Battle in American Courts*, 216.
[299] Asylum officer, interview by author, April 14, 2015.

> lengthy process for the benefit of many more people like them [emphasis mine].[300]

What this official is getting at is an internal tension within asylum advocacy, which falls between the domains of humanitarianism and human rights. Despite their shared genealogies that trace back to 18th century liberalism and fundamental connections to ideas about universal humanity, humanitarianism and human rights can mandate conflicting courses of action on how best to protect human life, with the former's emphasis on needs and moral impulses to alleviate suffering and the latter's focus on entitlements and legal reforms to enact equality.[301] Thus, for those immigrants' rights attorneys as well as asylum officers and immigration judges who are sympathetic to the situation of asylum seekers, the bifurcated adjudication system poses a tension between seeking/granting immediate humanitarian relief at the grassroots level of asylum offices and immigration courts throughout the country or fighting for larger recognition of human rights subjects at the administrative, circuit court, or federal government levels.

As will be explored throughout the rest of this chapter, given the government's attempts to restrict asylum seekers from accessing legal representation—epitomized by immigration detention centers—as well as the BIA's recent reluctance to recognize new human rights subjects, refugee advocacy and human rights organizations have developed dynamic models that center on providing direct representation to individual applicants with the hope of obtaining immediate humanitarian relief, while engaging in several human rights strategies. They engage in advocacy efforts that focus on rallying support for progressive legislation and highlighting injustice. One such example is traveling to

[300] DHS official, interview by author, June 19, 2015.
[301] Feldman and Ticktin, "Introduction: Government and Humanity," 3.

Dilley not just to represent the women and children at their hearings, but to publicize the conditions of family detention centers that are omitted from the public discourse and engage with politicians to end the unjust practice. They also undertake impact litigation by employing tools such as class action lawsuits, which seeks to effect change for thousands of asylum seekers at once, illuminated by the contemptuous critique of Artesia and Dilley by U.S. District Judge Dolly Gee of California. Although this dual approach is not without its criticisms, as will be discussed in the final section, it gets to the heart of the DHS official's comments by continually bringing forth "compelling" cases that center on an applicant's humanity with an aim of transforming the decision-making culture on specific issues at the grassroots level, while creating a nurturing environment for the establishment of legal protections at the administrative and federal levels.

"All I Could Do Was Wait": Backlogs and Legal Limbo

The jump in new affirmative asylum applications from 44,446 in 2013 to 83,254 in 2015—the highest level since 1996—has resulted in a substantial backlog of cases. While China remained the main country of origin for affirmative applications at 14,000, the increase primarily came from the Northern Triangle region. More individuals from El Salvador, Guatemala, and Honduras applied between 2013 and 2015 than the prior 15 years combined. Much of this can be attributed to the 26,000 children seeking asylum—the highest level on record—with Guatemala (4,325) and El Salvador (3,671) leading the way. Due to asylum officers' expanding caseloads, wait times are well over three years for the affirmative process. At the Los Angeles asylum office, applicants who had their interviews in January 2017 submitted applications in August 2011. I regularly

encountered individuals who had their interviews rescheduled, including an Iraqi man in California whose case got pushed back from 2015 until 2020 and had to search for new counsel because his attorney could not commit to stay on for another five years.

There is no doubt that waiting indefinitely impacts an asylum seeker's mental health. Applicants referred from the affirmative to defensive process can expect to wait an additional two to three years. In response to a question about the duration of the process, all the asylum seekers interviewed referenced words like "stuck," "waiting," "anxious," and "uncertain." These words allude to being trapped in legal limbo—a state of precariousness due to a lack of legal immigration status and uncertainty about the future. Not knowing whether they will be allowed to stay in the U.S. or returned to the countries they fled out of fear affects asylum seekers in numerous ways, including being unable to rebuild their lives, struggling to cope with trauma, and being separated from their families for several years.

Alex, a 32-year-old asylum seeker I met in New York in August 2015 shortly after his case was granted, fled Nigeria after years of being persecuted due to his sexual orientation. With regard to the process of applying for asylum, he recalled:

> I had to wait 18 months for my interview, and after about six months, it became too much stress. It affected me so much psychologically that my lawyer made me go see a therapist. I couldn't move forward. I couldn't open a bank account. I couldn't travel. I couldn't do anything. I just wanted to have my hearing so that I could move on. I had plans to go back to school and start a career in music management. But everything was on hold … and all I could do was wait.[302]

Other asylum seekers interviewed expressed frustration with how the process complicates the most basic aspects of life, such as obtaining work authorization and access to food,

[302] Asylum seeker, interview by author, August 7, 2015.

shelter, education, and health services. Asylum seekers are not eligible to work in the U.S. until at least 180 days have passed since the submission of their application, complicating their ability not just to procure legal assistance, but to access basic, daily necessities. Limited financial resources may also force asylum seekers into difficult housing situations. According to a social worker in New York, "Most people live in doubled-up situations. You might have a three-bedroom apartment with four families living there, and each family will have three of four members. Very rarely do you not have people in a doubled-up situation."[303] Alex emphasized the significant psychological toll that waiting for a hearing can have on an applicant. In addition to the trauma suffered on account of the persecution experienced in his/her country, the lengthy legal process may re-traumatize an applicant, as stated by a clinical psychologist in San Francisco who has served as an expert witness for numerous asylum hearings: "One of the issues we are dealing with is whether we should just update our initial evaluation closer to the hearing, or if we should do a brand-new report later because of the additional trauma added during the process. There is definitely a noticeable change in a person's psychological well-being when there is no security, no stability in their life."[304]

Being separated from one's family for a lengthy period of time is another demoralizing effect of the backlog. Article 14 of the UDHR asserts that everyone has the right to seek asylum. While international law acknowledges asylum as an individual human right in the abstract, asylum seekers and refugees should not be viewed as isolated actors detached from their families. In the face of grave violence and persecution, families adopt a range of strategies to survive that may result in temporary separation,

[303] Social worker, interview by author, October 28, 2015.
[304] Clinical psychologist, interview by author, April 24, 2015.

such as sending a parent into hiding from government forces or sending a child abroad to avoid recruitment/exploitation from militias and gangs. Kate Jastram and Kathleen Newland point out that "family members may be forced to take different routes out of the country or to leave at different times as resources or opportunities permit."[305]

Due to the limited legal means of entering countries of asylum due to the increasing criminalization and securitization of migration as well as the cost and danger associated with protracted journeys, it is common for one adult—usually the husband/father—to seek asylum with the aim of bringing his family over once legal status is obtained. This is what Omar, a 40-year-old Syrian doctor I met in New York in August 2015, hopes to do. With his wife and son in a refugee camp in Jordan, he escaped in 2013 after refusing to assist the government forces. The asylum officer who first interviewed him, however, referred Omar's case to immigration court and now he must wait until 2018. "When I hear every day on the phone that my son is scared and wants to come here now, it's devastating," he said. "I don't know what to do."[306] This was echoed by a private practice immigration attorney in New York: "Any kind of delay can be damaging to an applicant. People get sick and die, and if you can't be there and comfort them in their time of need, it can be heartbreaking. It's inhumane to separate families."[307]

Prolonged separation not only endangers the lives of those family members waiting in the applicant's country of origin, but it also places great stress on relationships. This is especially the case with children, according to a clinical psychologist in New York: "They often come when they are teenagers and reunite with parents who they've

[305] Jastram and Newland, "Family Unity and Refugee Protection," 562.
[306] Asylum seeker, interview by author, August 2, 2015.
[307] Private practice immigration attorney, interview by author, July 28, 2015.

been estranged from for many years, and after a brief honeymoon period … there is conflict and resentment on both sides. Parents will say things like, 'I've been paying for your schooling,' and kids will say, 'but you abandoned me.'"[308] In June 2015 at Oakland International High School, Jenny, a 17-year-old from Guatemala, told me how her aunt kept a list of everything she paid for, including the *coyotaje* for her journey, food, and clothes: "When I turn 18 in a few months, my aunt expects me to pay her back."[309] "On top of all the emotional and psychological problems … kids feel pressure to work when they see their families struggling…. And in some cases their families expect them to work," said the Principal at New York's Flushing International School.[310]

Schools throughout the country have become ground-zero for identifying the needs of children—many of whom do not speak English, have not attended much school in years, and are suffering from trauma—while they await their immigration hearings. The Unaccompanied Minor Specialist for the Oakland Unified School District—one of several positions created by the sanctuary city in 2014—stated that her job is to keep this vulnerable population from falling through the cracks and identified the effects of family separation as one of the biggest challenges:

> There are many kids who are meeting their fathers for the first time because they only lived with their mothers back home. So that's a complicated dynamic. And a lot of the parents who came here years before formed different families here, and there's the difficult issue of merging these families together. And then you also have the complex situation in some families where some siblings have legal status and others don't…. They are dealing with all of this while they are in school, learning the language, and waiting for their court dates.[311]

[308] Clinical psychologist, interview by author, July 27, 2015.
[309] Asylum seeker, interview by author, June 2, 2015.
[310] High school principal, interview by author, August 4, 2015.
[311] Unaccompanied minor specialist, interview by author, June 2, 2015.

Individuals working with unaccompanied children stressed that the challenge is not just figuring out how to help these kids succeed academically, but how best to manage the basic aspects of everyday life. The Specialist's main priority is to connect students with attorneys, and once that matter is out of the way, she focuses on their most pressing needs, such as access to food, housing, clothing, and psychological counseling. "These are the rights they need the most when they get here," she said. "They haven't had a chance to be regular kids yet."[312] It was through the Specialist that Carlos was introduced to an immigrants' rights attorney in Oakland, who shepherded him through the legal process.

With such distressing consequences arising from a protracted process, it begs the question: what has contributed to this massive backlog? The most obvious answer is the inadequate number of adjudicators. As of March 2016, USCIS employed 447 asylum officers to decide the 144,500 pending affirmative cases. The number is even more daunting for the defensive process: as of February 2016, 480,815 removal cases were pending in the country's 57 immigration courts, with only 254 judges. Human Rights First estimates that the Asylum Division of USCIS would have to hire an additional 300-400 asylum officers and EOIR would have to employ 300 more immigration judges to eliminate the backlog and adjudicate new cases within an average of one year.[313] Rather than substantially increasing the number of staff to adjudicate claims, the government for the past three decades has adopted an "enforcement first" strategy that prioritizes stringent border control: apprehension, detention, and deportation. Since the creation of DHS in 2003, the annual budget of CBP has more than doubled from $5.9 billion to

[312] Ibid.
[313] Human Rights First, "In the Balance," i-v.

$13.2 billion and ICE's annual budget has increased from $3.3 to $6.1 billion, with much of this money going towards immigration detention facilities and surveillance measures.

Another reason for the backlog is the increased use of expedited removal as a mechanism of expansive border control. Expedited removal is a rapid deportation process whereby a non-citizen is denied entry to the U.S. without seeing a judge. If, however, an individual arriving at the border expresses a fear of persecution, the DHS officer is supposed to refer that individual to the Asylum Division for a credible fear screening. As expedited removal is employed more and more, asylum officers are forced to divert their time away from conducting merits interviews to credible fear screenings. According to a supervisory asylum officer in Arlington:

> We have a high percentage of our resources going towards [credible fear] screenings for people who are detained. That means we are traveling to these remote areas for a week here and there…. Because it is meant to be an initial screening, the bar is low. It is basically: is there a significant possibility that they [asylum seekers] have a fear, which really means is there any possibility at all. Most of the families have a real fear…. 90 percent or so end up passing.[314]

The use of summary proceedings against known refugee populations diverts substantial staffing, resources, and time to screen individuals that will ultimately be entitled to apply for asylum and have a full hearing before a judge. But perhaps the biggest contributing factor to the recent backlog increases is the "fast tracking" of cases involving unaccompanied children and family units from Central America to the head of the queue.[315] Such a move is intended to speed up the deportation process, which, as will be conveyed in the next section, negatively impacts all asylum seekers.

[314] Supervisory asylum officer, interview by author, September 2, 2015.
[315] Preston, "U.S. Adjusts Court Flow to Meet Rise in Migrants."

Master Calendar Hearings and "Surge Dockets"

The overcrowding at master calendar hearings, with individuals arriving hours before their scheduled hearing in order to make it through security and get a spot in their assigned courtroom in time, as well as kids clutching stuffed animals and playing together in the hallway illustrates some of the many problems with the asylum system. Master calendar hearings are preliminary proceedings that last only a few minutes with limited interaction between the judge and applicant. They do not address any of the applicant's substantive claims, but they are significant in that they formally mark the start of the government's efforts to remove the asylum seeker from the U.S. At a master calendar hearing, the judge will set a date for the submission of written documents as well for the asylum hearing, which is when the legal grounds for refugee protection through the introduction of corroborating evidence and witness testimony will be evaluated. Most applicants do not have legal representation at this stage because they have recently arrived in the country, been held in an immigration detention facility, or just been released on bond from such a facility.

Without representation, though, basic biographical details such as applicant's address for correspondences and date of entry into the country can be miscommunicated and negatively impact his/her credibility during the asylum hearing. As such, nearly all master calendar hearings I observed involved a request for continuance of removal proceedings, giving the asylum seeker more time to find an attorney. This is compounded by the fact that many asylum seekers show up to their master calendar hearing alone, afraid to bring relatives or friends who may be without legal immigration status. At the San Francisco immigration court in April 2015, for example, Javier, a 19-year-old asylum

seeker from Mexico, told me: "My mom wanted to come, but I said no. She doesn't have papers. If something happens to her, then what would my family do?" Such fears are not unfounded, as I frequently saw ICE agents waiting outside of courthouses.

In July 2014, Chief Immigration Judge Brian O'Leary announced the Department of Justice's new docketing, or scheduling, procedures that prioritized "cases involving unaccompanied children, adults with children who are detained, and adults with children who are released as an alternative to detention."[316] The Asylum Division of USCIS followed suit with a revised scheduling bulletin in December 2014. This new policy affects all asylum seekers, as applicants who were already waiting two to three years will be forced to wait an additional one to two years. Moreover, by moving unaccompanied children and family units to the front of the line, the Obama administration sought not only to deter Central Americans from making the journey, but to "increase capacity for *enforcement* and *removal* proceedings, and *quickly return* unlawful migrants to their home countries [emphasis mine]."[317]

The fast tracking of such cases through so-called "surge dockets" or "rocket dockets" operates in a similar exceptional manner to detention centers by seeking to cut off legal representation—another tactic to reinforce state sovereignty over the asylum process. While it normally takes several months for asylum seekers to find an immigration attorney or refugee advocacy or human rights organization to assist with their cases, the new docketing procedures gives them a month at most. Expedited hearings may even result in an applicant not receiving his/her court hearing notice in

[316] U.S. Department of Justice, "Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities."
[317] Obama, "Letter from the President."

time, leading to a removal decision *in absentia* (while absent).[318] *In absentia* decisions vary widely depending on the immigration court. Families that failed to show up for their initial master calendar hearing at the Dallas and Memphis immigration courts were ordered deported 72 percent of the time without an asylum hearing, while in the San Francisco and New York courts this occurred only 10 and 11 percent, respectively.[319]

Between July 2014 and September 2016, a total of 38,601 "surge" cases involving adults with children—such as those detained at family detention centers—were decided in immigration court. Of the 38,601 cases, 27,015 (70 percent) did not have access to counsel, and only 3.8 percent of these cases were granted asylum or other forms of relief. Moreover, 43.4 percent of the 27,015 unrepresented families were ordered deported after their master calendar hearing—the median time from applying to closure was just 24 days.[320] Despite establishing a credible fear of persecution, these families are ordered deported without a full asylum hearing. In contrast, for the 11,586 families that did have representation, nearly 40 percent of them were granted protection.

The odds of obtaining relief without an attorney for unaccompanied children tells a similar story. As of November 2014, unaccompanied children had representation in just one-third of the 63,721 cases pending in immigration court.[321] In the three previous years, unaccompanied immigrant children without attorneys were granted relief in only 15 percent of cases, while those with legal representation were successful 75 percent of the time. This situation prompted a judge in San Francisco to state that cases involving

[318] Semple, "In Court, Immigrant Children Are Moved to Head of Line."
[319] Transactional Records Access Clearinghouse at Syracuse University, "With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported," Table 2.
[320] Ibid., Figure 1 and Table 1.
[321] Transactional Records Access Clearinghouse at Syracuse University, "Representation for Unaccompanied Children in Immigration Court," Figure 1.

unaccompanied children without attorneys are like "death penalty cases in immigration court."[322] In this round of "refugee roulette," Carlos luckily came out on top: he had the perfect combination of a compelling case, a skilled attorney and the help of an immigrants' rights organization, and a humanitarian-minded asylum officer in the jurisdiction with highest grant rate, resulting in a grant of asylum. The likelihood of all these factors aligning is rare, evidenced by the statistics above.

In an effort to counteract the rapid deportations of unaccompanied children, the ACLU and several refugee advocacy and human rights organizations filed a nation-wide class-action lawsuit—*J.E.F.M. v. Lynch*—on July 9, 2014 asserting that that the government was in violation of the Constitution's Fifth Amendment due process protections, which was extended to asylum seekers with the 1980 Refugee Act, and the Immigration and Nationality Act's provisions requiring a fair hearing before an immigration judge. The government's opposition to the lawsuit can be summarized by Judge Jack Weil, who during the deposition said, "I've taught immigration law literally to 3-year-olds and 4-year-olds. It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done."[323] As the Assistant Chief Immigration Judge in EOIR's Office of the Chief Immigration Judge—which sets and oversees policies for the all the nation's immigration courts—he is responsible for training immigration judges and influencing the culture of the courts.

While many adjudicators adopt the hardline stance laid out by Judge Weil, there are others who are sympathetic to the unique situation of children like the asylum officer who adjudicated Carlos' case. Similarly, according to an asylum officer in Los Angeles:

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[322] Immigration judge, interview by author, April 16, 2015.
[323] Markon, "Can A 3-Year-Old Represent Herself in Immigration Court?"

> With kids, I spend a lot of time at the beginning explaining what my role is and having them realize it is not my job to catch them and send them home. They have already met CBP officers, ICE agents, they've usually been to immigration court at least once and have met an ICE attorney and a judge…. The process is overwhelming for them, so I adopt a much more child-sensitive outlook.[324]

This "best interest of the child" approach was also echoed by a few immigration judges. One of the judges that presides over the "rocket docket" in San Francisco asked all mothers before her how they were adapting to life in the U.S. and whether their children were enrolled in school. She made small talk with the mothers to put them at ease. "With kids, we need more information. We need to know about their family, how much school they have had. What the gang situation is like in their town," she said. "We cannot expect kids to be disconnected from all these issues."[325] A retired immigration judge went a step further in stating that "all children under the age of 12 or so should not even have to appear in court."[326] Thus, despite a top-down governmental policy that stresses immigration enforcement and removal at the expense of human rights, adjudicators adopt individualized approaches based on their backgrounds and outlooks.

In response to the federal government's curbing of due process protections, several U.S. states and cities have stepped in to fill the legal and moral void just as they had done during the Sanctuary Movement of the 1980s. In June 2014, New York earmarked $4.9 million of the city's budget, making it the "first city in the U.S. to provide lawyers for low-income immigrants detained by federal authorities."[327] Similarly, in September 2014, California Governor Jerry Brown signed a measure into

[324] Asylum officer, interview by author, June 13, 2015.
[325] Immigration judge, interview by author, April 16, 2015.
[326] Retired immigration judge, phone interview by author, February 20, 2016.
[327] Bruinius, "New York to Provide Free Legal Aid, IDs to Undocumented Immigrants."

law that allocated $3 million to legal aid and nonprofit organizations to assist unaccompanied children in removal proceedings.[328] Sanctuary cities such as Oakland and San Francisco have redistributed resources as well as teamed up with philanthropic organizations to provide representation to as many children as possible. These resources created several positions, such as the Unaccompanied Minor Specialist at Oakland International High School who first connected Carlos with an immigrants' rights attorney. She also told him about the Soccer Without Borders program, which employs the world's most popular (and his favorite) sport as a vehicle to facilitate assimilation and educational achievement: 95 percent of the program's Oakland participants, who speak 33 languages and come from 32 different countries, graduated high school, which is 35 percent higher than the city average.[329] The program not only provides a universal language, but offers a welcoming, hospitable community in a national environment where their presence is highly politicized.

Due to the large immigrant populations in these cities as well as vibrant community of refugee advocacy and human rights organizations, energy for protecting the rights of asylum seekers is palpable. I attended dozens of workshops held by these organizations to recruit attorneys and volunteers and each one was packed from wall-to-wall with individuals expressing an interest to help in whatever capacity was needed. The groundswell of support and hospitality in these communities, like that of the volunteers who travelled to Dilley, has resulted in the continual presence of attorneys and volunteers at the "rocket dockets" in New York, San Francisco, and a few other cities. They bring coloring books and toys for the children to play with, conduct intake interviews, represent

[328] Chokshi, "California Will Give Undocumented Immigrant Children $3 Million in Free Legal Services."
[329] Killion, "Soccer Without Borders Aims for Global Change."

the families at their master calendar hearings, and distribute pamphlets with a directory of organizations providing social and legal services. Several individuals even expressed an interest in housing families that needed a place to stay.

In addition to sending volunteers to immigration court, the human rights community holds fairs and workshops in places ranging from churches and schools to shopping malls and amusement parks so that asylum seekers do not fear coming out of the shadows. The East Bay Sanctuary Covenant in Berkeley, California is one such organization that started to provide legal services in the form of counsel and advice, referral, and representation at little to no cost during the first Sanctuary Movement. According to one of their staff attorneys, "This year, we plan to file nearly 600 applications because of the unaccompanied children caseload. I think last year we did about 500."[330] Such organizations have instituted a drop-in system, keeping certain time slots available for applicants to visit their office, and since 2014, they have been unrelentingly busy. "Our clients are used to being ignored. They feel that if they call or write, then they may not get our attention. So they just show up thinking that if I am just there in person, they can't blow me off. I think that is why we get so many walk-ins here," said the Asylum Program Coordinator at the Lawyers' Committee for Civil Rights, one of the organizations that received $100,000 from the city of San Francisco to provide pro bono legal representation to unaccompanied children.[331]

In contrast to the overwhelming majority of women and children arriving at the border who rely on refugee advocacy and human rights organizations as well as law school clinics for low to no cost representation, asylum seekers with financial resources

[330] Immigrants' rights attorney, interview by author, May 22, 2015.
[331] Immigrants' rights attorney, interview by author, April 9, 2015.

may procure private practice immigration attorneys. With the quality, experience, and knowledge of such attorneys varying widely, their fees range anywhere from $1,000 to $10,000 per case. Asylum tends to comprise just a small portion of private practice attorneys' caseloads; most of their income derives from assisting clients with employment visas, naturalization/citizenship, and family immigration.

Furthermore, there has been a noticeable shift in the demographics of private practice immigration attorneys in recent years. "The economy was terrible when I got out of law school and I took the first job that was available. It just happened to be for an immigration firm," said a private practice attorney in Los Angeles. "I hoped to do criminal law, but the recession led me to this work. I had no knowledge of it. Even in law school I didn't take any classes on immigration law."[332] Several staff attorneys at refugee advocacy and human rights organizations expressed frustration with this trend, voiced here by one such attorney in Phoenix:

> Since the economy tanked in like 2008, lawyers let off at firms got into immigration law. Most don't have any human rights or international background whatsoever, but they set up shop here. This is when you started to see a lot of slick suits running around detention centers trying to get clients. So now we have more attorneys taking on cases, but they are not invested in the overall situation of immigrants and that muddies the waters for us.[333]

This tension between those attorneys providing direct representation for individual clients and immigrants' rights attorneys who see themselves as part of a larger human rights movement aimed at protecting all asylum seekers will be explored in the last section of this chapter.

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[332] Private practice immigration attorney, interview by author, June 13, 2015.
[333] Immigrants' rights attorney, interview by author, June 18, 2015.

The Floodgates Doctrine: Exclusion Based on Protected Ground and Nationality

As discussed in Chapter 1, contemporary international refugee law is rooted in the 1951 Refugee Convention, which has endured through the enactment of national laws (such as the 1980 Refugee Act), regional agreements, and international covenants and the work of international institutions (most notably UNHCR). A close reading of the *travaux préparatoires* of the Convention reveals that for much of the deliberations, the definition of who could classify as a refugee concerned only four categories: race, religion, nationality, and political opinion. This is because Western countries wanted to establish a system based on national interests and state sovereignty that prevented the great majority asylum seekers, particularly from the Third World, from accessing protection on their territory unless the persecution reached a level that resembled the situation of refugees created during the European conflicts of the first half of the 20th century.

The prototypical refugee during the drafting of the Convention was conceived of as a political dissenter—specifically a man fleeing a communist country or fascist rule because of his political opinions or religious beliefs. Late in the negotiations, however, the Swedish delegation proposed a fifth category—membership in a particular social group—in recognition of the potential shortcomings of the other four categories to take account of "all the reasons for persecution an imaginative despot could conjure up."[334] The proposal was adopted "'to stop a possible gap' in the coverage afforded by the other, more specific categories."[335] It is important to note, however, that no specific definition

[334] Goldberg, "Anyplace but Home," 590.
[335] Aleinikoff, "The Meaning of 'Persecution' in United States Asylum Law," 11.

of the social group category was provided, leaving nation-states with wide discretion over who could qualify under this open-ended category.

In 1951, not one of today's numerous international human rights treaty bodies, regional conventions, or charters existed. The only human rights instrument at the time was the UDHR (1948). Viewed by states as an aspirational document, it had yet to acquire binding, customary law status. It is no surprise, then, that the refugee framework established in the mid-20th century completely omits the role of gender in human rights violations as well as the special interests of children. International human rights treaties pertaining to women and children would not come into effect for another twenty years until 1979 and 1989, respectively.

The omission of the most marginalized groups from the refugee definition takes on a different scale and dimension in our contemporary world, where the majority of the approximately 65.3 million persons forcibly displaced in 2015 were women and children. According to the previously mentioned DHS official:

> I truly believe we need a sixth [protected] ground for women only. Because most women in the world are not considered to have political agency under the law … and most asylum cases are based on politics. It is hard for them to get asylum, unless they argue that 'I was harmed just like a man was harmed.' But women have different issues and the perpetrators are different. A man can just get up and leave the country, but a woman will wait for her children to grow up safely while being subjected to violence … and only then does she have a chance to leave.[336]

Because women and children were historically not considered to be human rights subjects, the chances of them being granted refugees status under an archaic framework and definition were obsolete. However, with the enactment of the 1980 Refugee Act, the human rights community began to engage with the burgeoning international human rights

[336] DHS official, interview by author, June 19, 2015.

framework to advocate for the protection of this population through the social group category. Thus, it is this protected ground of the five that has become a hotly contested legal, political, and social issue—one of the many battlegrounds between state sovereignty, asylum, and human rights.

In looking at the list of top ten countries of origin for successful defensive asylum claims (copied from Table 6), what jumps out is that the odds of being granted asylum if the applicant is from Mexico or one of the Northern Triangle countries is significantly less than if s/he is from China, Ethiopia, Russia, and a host of other countries.

Individuals Granted Asylum Defensively by Nationality [Number and Percent] (2015)

Country of Nationality	***Number Granted***	***% Granted***
Mexico	203	10.4%
El Salvador	303	17.1%
Honduras	307	19.7%
Guatemala	369	22.8%
Somalia	166	45.3%
India	303	54.5%
Nepal	253	72.7%
China	3,610	78.2%
Ethiopia	255	83.5%
Russia	176	90.0%
All other countries	2,301	
Total	8,246	

One explanation is that although the asylum rules issued by the Department of Justice in 1990 were supposed to remove U.S foreign policy objectives from refugee admissions, political considerations continue to play a role in asylum determinations, as will be conveyed in the next chapter. In an effort to highlight the human rights abuses in two of its chief adversaries, the U.S. has granted asylum at higher rates to individuals who are able to flee China and Russia. “With respect to China, there is this idea that everyone applying from there is a dissident fleeing an abusive totalitarian state,” said an immigrant’s rights attorney in Washington, D.C. “China now is kind of like what Cuba

used to be."[337] This can be traced back to the Tiananmen Square protest of 1989, when student-led demonstrations were forcibly repressed, resulting in hundreds of deaths and thousands of arrests. Due to the Chinese government's heavy-handed approach when it comes to the lives of its citizens and their civil liberties, individuals migrating to the U.S. have a high rate of success because their claims easily conform to the specific contours of the refugee definition: political opinion (such as opposition to the one-child policy) or religious belief (such as Falun Gong and Christian religions).

In contrast, claims put forth by Central American women and children blur the boundaries of the archaic refugee definition because they are escaping different, evolving forms of persecution rather than the strictly political, ethnic/racial, and religious ones envisioned during the mid-20th century. Many of the asylum seekers arriving at the southern border are fleeing gang violence and recruitment, gender-based violence, trafficking, and enlistment into the drug trade, among many other factors. Because these abuses are deemed to be "apolitical" and committed by non-state actors whose governments refuse to or cannot control, individuals from Central America are left with only one legal option: to take a chance and apply as members of a particular social group. This protected ground, however, is the most difficult to articulate in legal terms as well as prove with evidence because individual adjudicators interpret it differently and the BIA and federal courts are hesitant to recognize new subjects.

"Most of the time, fear of gang recruitment and extortion is not enough to get asylum," said an asylum officer in San Francisco. "I believe that they have more subjective fear than almost anyone, but under our current case law they just don't have a

[337] Immigrants' rights attorney, interview by author, September 4, 2015.

chance…. It is up to their lawyers to make a strong case."[338] These words illustrate why the local funds and services appropriated to Carlos' case made all the difference in the world. Similarly, an immigrants' rights attorney in Phoenix said:

> Everyone knows Honduras is the murder capital of the world, but just a drop in the bucket of people from there get asylum. The courts are reluctant because they think everyone will get up and flee. When things are really bad in a country, it puts a greater burden of proof on each individual claim. When you take an issue like gay rights or opposing a political party, because it is a smaller population and it is the majority of a country or society punishing those citizens … those applicants will have a lesser burden than a woman or kid coming out of the wide context of violence and trauma … escaping gangs, bullets, and drugs.[339]

The unwillingness of adjudicators and the BIA and federal courts to grant certain claims under the social group category constitutes the "floodgates" doctrine. Legally, it is an argument employed to restrict one party's right to make claims because of a concern that permitting such a claim might open the "floodgates," enabling every member of that group to be eligible. Politically, the government argues that granting asylum to individuals from Central America will result in a mass exodus, resulting in a national security threat, evidenced by the framing of this particular influx of women and children at the southern border in 2014 and 2015 as a "surge."

"I think society at large sees asylum as when people are in danger, of course we help them out and let them in because that's part of America's story. But once the rubber meets the road, and it's a bunch of Central American children arriving at the border, then it becomes an explosive political issue. It becomes, 'I don't want them here,'" said the Asylum Program Coordinator at the Lawyers' Committee for Civil Rights.[340]

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[338] Asylum officer, interview by author, April 21, 2015.
[339] Immigrants' rights attorney, interview by author, June 16, 2015.
[340] Immigrants' rights attorney, interview by author, April 9, 2015.

Underpinning the legal and political aspects of the floodgates argument is a cultural anxiety propagated by conservative groups, certain media outlets, and policymakers who argue that accepting new groups will alter the ethnic and racial make-up of the country, thus deteriorating social cohesion and posing an existential threat to national identity. The most well-known anti-immigration think tank, the Center for Immigration Studies, continuously puts out papers with arguments like "the battle over asylum seems to have less to do with giving shelter to persecuted individuals than with a larger quest to remake American legal norms, establish victim status for a number of officially recognized groups, and overhaul American society more generally."[341]

Expanding the Social Group Category: Recognizing New Human Rights Subjects

Leading international refugee law scholars have argued since the mid-20th century that the open-endedness of the social group category in the 1951 Refugee Convention enables it to be applicable to unanticipated circumstances[342] as well as allows states to accept new persecuted classes.[343] Since the 1980 Refugee Act adopted the 1967 Refugee Protocol's definition word-for-word, there is no statutory definition of membership in a particular social group in U.S. immigration law. To understand how the category has been interpreted by adjudicators, we must turn to BIA and federal court case law.

The question of what constitutes a social group was first addressed in *Matter of Acosta* (1985), in which the BIA declared that "we interpret the phrase … to mean

[341] Feere, "Open-Border Asylum Newfound Category of 'Spousal Abuse Asylum' Raises More Questions than It Answers," 1.
[342] See Grahl-Madsen, *The Status of Refugees in International Law*.
[343] See Goodwin-Gill and McAdam, *The Refugee in International Law*.

persecution that is directed toward an individual who is a member of a group of persons all of whom share a *common, immutable characteristic* [emphasis mine]."[344] The BIA employed the legal doctrine of *ejusdem generis* (of the same kind) to give meaning to the amorphous social group category alongside the more defined categories of race, religion, nationality, and political opinion. In doing so, it developed a two-pronged approach: membership in a particular social group refers to characteristics an individual cannot change (race and nationality) and characteristics an individual should not be required to change because it is fundamental to their identity or conscience (religion and political opinion). The BIA went on to state that the "common, immutable characteristic" shared by individuals in the group could be "an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."[345]

This conception of social group membership, with its emphasis on objectivity and non-discrimination, became known as the "protected characteristics" approach and was welcomed by the human rights community. It is important to note, however, that *Acosta* did grant autonomy to adjudicators in determining membership status by stating that "the particular kind of group characteristic that will qualify … remains to be determined on a case-by-case basis."[346] Nevertheless, *Acosta* opened the door for contestation, and shortly thereafter, immigrants' rights attorneys put forth a number of cases to test the category's boundaries, resulting in the recognition of new human rights subjects on account of their sexual orientation, gender, kinship ties, and several other groups.

[344] *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).
[345] Ibid.
[346] Ibid.

In Matter of Toboso-Alfonso (1990), the BIA heard the case of a 40-year-old man who had been paroled into the U.S. as part of the Mariel boatlift and feared being sent back to Cuba, where "homosexuals were imprisoned and sent to work camps."[347] While the immigration judge provided the applicant with protection against deportation, the Immigration and Naturalization Service appealed the decision. Appeals such as this—increasingly employed after *Acosta*—are an example of the floodgates doctrine in action, as the government feared sexual orientation claims would overwhelm the system. The BIA, however, departed from the government's deterrent stance; it stated that "the [Cuban] government's actions against him were not in response to specific conduct on his part (e.g. for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual." In other words, the persecution the applicant suffered was tied to his sexual identity, which the BIA found to be an immutable characteristic. The *Toboso-Alfonso* decision represents a drastic shift in U.S. policy; just 25 years earlier, Congress had passed an amendment to the Immigration and Nationality Act that considered "sexual deviation" as a medical ground for denying prospective immigrants entry into the U.S.[348]

After this seminal ruling, immigrants' rights attorneys feverishly litigated similar cases. By 1994, there were over 40 sexual orientation cases pending in the immigration court system. Moreover, gay and lesbian rights activists continued to pressure the human rights community to take up the issue, and in Feburary1994, Amnesty International became the first major human rights organization to publish a report, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation*, framing gay and lesbian

[347] *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 825 (BIA 1990).
[348] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 919 (1965).

rights as human rights.[349] In the subsequent years, human rights NGOs began to document LGBTQ human rights violations throughout the world, which provided applicants with documentary evidence to corroborate their claims. As the issue gained traction in media and political discourses and with sexual orientation claims making their way up the legal system, Attorney General Janet Reno personally intervened in June 1996 to declare the *Toboso-Alfonso* ruling as the law of the land.[350] Asylum and immigration law, thanks to the persistence of immigrants' rights attorneys and their efforts to localize cosmopolitan ideals, emerged as the one aspect of U.S. law to protect the rights of sexual minorities, while the courts and Congress dragged their feet in the ensuing 20 years to recognize the rights of sexual minorities in areas such as marriage and employment.

Historically, the violation of the rights of sexual minorities, women, and children were not seen as human rights issues. Such violations were often considered expressions of cultural norms or were justified on religious grounds. There also persisted a delineation between violations committed by nation-states against their citizens in the public sphere and violations committed by non-state actors against marginalized groups in the so-called "private sphere." According to Charlotte Bunch, a central figure in the women's and human rights movements:

> Because those Western-educated, propertied men who first advanced the cause of human rights most feared violation of their civil and political rights in the public sphere, this area of violation has been privileged in human rights work. They did not fear, however, violations in the private sphere of the home because they were the masters of that territory…. The assumption that states are not responsible for violations of women's rights in the private sphere or cultural sphere ignores the fact that such abuses are often condoned or even sanctioned by states even when the immediate perpetrator is a private citizen.[351]

[349] Mertus, "Applying the Gatekeeper Model of Human Rights Activism," 56.
[350] Johnston, "Ruling Backs Homosexuals On Asylum."
[351] Bunch, "Transforming Human Rights from a Feminist Perspective," 13-14.

In the years after *Toboso-Alfonso*, the BIA and federal courts began to recognize human rights violations committed by non-state actors precisely because previously excluded groups sought to transform the human rights discourse by demanding inclusion.

One of the first cases to test the boundaries of gender-based persecution was *Fatin v. INS* (1993), in which an Iranian woman sought asylum for refusing to wear a traditional Islamic veil and opposing the government. Even though Fatin's asylum claim was denied due to the specific facts of her case, the Court of Appeals for the Third Circuit asserted that gender could be the basis of a social group, citing *Acosta's* identification of "sex" as an innate characteristic; Judge Samuel Alito, who would go on to serve as an Associate Justice of the U.S. Supreme Court, stated in his decision that "feminism qualifies as a political opinion."[352] Immediately after the ruling, the human rights community, including Harvard Law School's Immigration and Refugee Clinic who filed an amicus brief in support of Fatin, underlined the language in the decision and employed it in future litigation. The recognition of gender-based claims would be further advanced with *Matter of Kasinga* (1996), a case that is now considered a monumental trailblazer.

In 1994, Fauziya Kassindja, a teenager from Togo, arrived in the U.S. and sought asylum to avoid undergoing female genital mutilation/cutting (FGM), which refers to "all procedures involving partial or total removal of the external female genitalia … for non-medical reasons."[353] Despite including letters from family members and the police in Togo as well as an expert witness affidavit from an anthropologist to corroborate her testimony, the judge denied the claim because he did not find her membership in a

[352] *Fatin v. INS*, 12 F.3d 1233, 1242 (3rd Cir. 1993).
[353] World Health Organization, "Eliminating Female Genital Mutilation," 1.

particular social group sufficient. With the help of attorney Karen Musalo—who later founded the Center for Gender and Refugee Studies—the decision was appealed to the BIA. Refuting the judge's findings, the BIA accepted the proffered social group and its adherence to *Acosta*: "The characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it."[354] Not only did the BIA formally grant asylum for the first time to a gender-based claim, but it also wiped away a major barrier to social group claims when it asserted that persecution does not just refer to state imposed violence, but also individuals a government is unwilling or unable to control.

The *Kasinga* victory was not simply a result of outstanding legal representation, but also a concerted effort by feminists and human rights activists to increase awareness around the case specifically and the issue generally. While prominent NGOs and even international organizations were reluctant to frame FGM as a human rights issue because of their internal politics and criticisms of human rights as a form cultural imperialism coming from countries in Africa and the Middle East, it was a grassroots-led transnational human rights community composed of subaltern human rights activists and medical practitioners as well as their Western feminist allies who persistently raised the issue first as a matter of public health and then as a matter of human rights. As Madeline Baer and Alison Brysk point out, throughout the 1970s and 1980s, several women in Africa and the Middle East began publicizing FGM both within their regions and internationally, including Egyptian scholar and medical doctor Nawal El Saadawi,

[354] *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996).

Sudan's first woman surgeon Dr. Nahid Toubia, and Efua Dorkeeno who founded an organization to end FGM in Ghana.[355] Their efforts struck a chord with one audience in particular—the women's rights movement in Western countries—who began to speak out on the issue and lobby international organizations to take up the cause. The call to end FGM gained serious traction by the early 1990s with the post-Cold War fortification of the human rights discourse, and in 1993, the UN Declaration on the Elimination of Violence Against Women asserted that violence against women encompasses female genital mutilation and traditional practices harmful to women. This language would be adopted by the UN World Conference on Human Rights in Vienna later that year, proclaiming the practice as a human rights violation.

With the issue garnering substantial attention at international forums, *Kasinga* introduced this distant human rights violation to most American citizens for the first time. In fact, details of the case appeared in the *New York Times* four times in a span of three weeks, signaling a "broader acknowledgment that many women are victimized by cultural practices that violate human rights" and that they may be eligible for asylum in the U.S.[356] As such, *Kasinga* came to symbolize a major triumph for the transnational women's rights movement and the role of the U.S. in protecting women's rights, coming just nine months after the Fourth World Conference on Women (1995) in Beijing, where First Lady Hillary Clinton gave a speech titled "Women's Rights Are Human Rights." Thus, we can view the human rights movement as an integral factor in transforming the social, cultural, and legal environment for marginalized populations both in the U.S. and internationally.

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[355] Baer and Brysk, "New Rights for Private Wrongs," 96-97.
[356] "The Asylum System Needs Work."

"Most of what we are doing during the course of a day is applying the story of an individual to our nation's human rights obligations and trying to prevent our clients from being sent back to where they would be in imminent danger," said an immigrants' rights attorney in Washington, D.C.[357] Armed with the individual stories of their clients and supported by diverse materials ranging from unpublished BIA and immigration judges' decisions to Asylum Division training materials to UNHCR guidelines and international human rights law, immigrants' rights attorneys' persistent activism illustrates how legal change can be initiated at the grassroots level. Through the direct representation of asylum seekers, they have not only laid the groundwork for larger scale change at the BIA and federal courts and government level, but continue to influence adjudicators and their supervisors, which has resulted in a culture change at some regional asylum offices and immigration courts. According to an asylum officer in San Francisco:

> We have to send all novel social groups we grant up to headquarters. I'm not sure if that is a recent thing, but our asylum office is one of the most pushy offices. We are constantly pushing headquarters to move on new social groups. I think headquarters wants to see everything that is coming from Central America…. But if we are identifying a social group of Kenyan women who have not yet undergone FGM, how is that different than women targeted in Central America? Our hands are a bit tied, but we are willing to stretch the boundaries here.[358]

Instead of waiting for change to be bestowed from the top-down, immigrants' rights attorneys and human rights activists continue to take the lead in exposing distant human rights violations to adjudicators and American citizens with the aim of enacting equality.

[357] Immigrants' rights attorney, interview by author, September 3, 2015.
[358] Asylum officer, interview by author, April 21, 2015.

Narrowing the Social Group Category: Closing the Door on Women and Children

Just as the *Acosta* standard was adopted by several countries of asylum, including Canada and the United Kingdom, and influenced UNHCR guidelines and guidance notes, U.S. immigration law at the turn of the 21st century abruptly retreated from its progressive advances, demonstrating the political nature of the U.S. administrative regime. Just three years after *Kasinga*, the BIA dealt a stinging blow to the human rights community trying to gain protection for women fleeing domestic violence. In *Matter of R-A-* (1999), the BIA reversed an immigration judge's grant of asylum for Rody Alvarado. Whereas the immigration judge found her social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" to be viable, the BIA added a new criterion: that the social group must be "recognized and understood to be a societal faction."[359] This arbitrary addition of what would become the forerunner to the BIA's "social visibility" approach forced Rody's case into legal limbo for a decade.

In July 2001, UNHCR convened a roundtable discussion in San Remo, Italy with a variety of actors—including international human rights and refugee law experts, NGO practitioners, and government representatives—to clarify the unsettled parameters of the social group category. In addition to the protected characteristics approach epitomized by *Acosta*, some countries and courts employed a "social visibility" or "social perception" approach that examines whether members of a group are cognizable or externally

[359] *Matter of R-A-*, 22 I&N Dec. 906, 918 (BIA 1999).

perceived as distinct by the society in question. The purpose of this meeting was to reconcile these two approaches and provide guidance to legal practitioners, adjudicators, governments, and judiciaries. The deliberations resulted in the May 2002 publication of UNHCR Guidelines on International Protection that put forth following definition:

> A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights [emphasis mine].[360]

By developing a two-step approach, UNHCR sought to close any gaps in protection when just one approach is employed. It also asserts that the size of the group should not be a relevant criterion, not all members of the group need be persecuted, and the group need not be cohesive.

The administrative and legal regimes in the U.S. continued to adhere to *Acosta* until 2008, when the BIA issued two precedential decisions—*Matter of S-E-G-* (2008) and *Matter of E-A-G-* (2008)—in cases pertaining to gang violence in Central America. Like most gang-based claims, *Matter of S-E-G-* (2008) involved two brothers who were targeted for recruitment by MS-13, and when they refused, the boys were beaten, threatened, and told that their older sister would be raped. The three siblings fled El Salvador and sought asylum on account of their membership in a particular social group defined as "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities, and their family members."

[360] United Nations High Commissioner for Refugees, "Guidelines on International Protection," 3.

In reviewing the proffered social group, the BIA departed from *Acosta* and placed two *additional* requirements on the category: "membership in a purported social group requires that the group have *particular* and well-defined boundaries, and that it possess a recognized level of *social visibility* [emphasis mine]." The first criteria of "particularity" refers to whether the group would be recognized "as a discrete class of persons."[361] The BIA stated that the siblings' proposed social group failed to meet this standard because it encompasses "a potentially large and diffuse segment of society." The second criteria of "social visibility" requires the shared characteristic of the group to "be recognizable by others in the community."[362] The BIA asserted that the siblings were not socially visible since "victims of gang violence come from all segments of society."[363]

In developing this new formulation, the decisions imprudently referenced the 2002 UNHCR Guidelines. Whereas the Guidelines suggested social visibility as a secondary step to prevent groups from being filtered out, the BIA proclaimed that particularity and social visibility must be met over and above the establishment of a protected characteristic. This blatant rejection of the disjunctive "or" in the Guidelines moves social visibility from just one factor in evaluating the validity of a social group to a requirement. This shift in approach departed from the spirit of the Guidelines and put U.S. asylum law in violation of international refugee law. The *S-E-G-* decision concluded by stating that the applicants did not establish a political opinion nor did MS-13 impute an anti-gang political opinion to them, meaning that the gang did not perceive the children as opposing them for political reasons, which points back to the DHS official's

[361] *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008).
[362] Ibid., 584.
[363] Ibid., 586.

statement above saying that refugee law as it was constituted during the mid-20th century did not truly consider women and children to possess any political agency.

The 2008 decisions generated more questions than answers, and shortly thereafter, the human rights community put forth a series of appeals. Most of the circuit courts, however, deferred to the BIA under the *Chevron* doctrine. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), the Supreme Court ruled that in instances where Congress does not express a clear intent in the statutory language of a law (in this case the 1980 Refugee Act's lack of a social group definition), the federal courts should defer to the administrative agency in charge. However, there is a degree of ambiguity and judicial discretion in the doctrine because courts are able to strike down agency interpretations that they deem to be unreasonable or erroneous. As such, three circuit courts (the Seventh, Third, and Ninth) rejected various aspects of the rulings.

In *Gatimi v. Holder* (2009), Judge Richard Posner of the Court of Appeals for the Seventh Circuit delivered a scathing critique of the BIA's doctrine of social visibility:

> Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'[364]

He rightfully points out the absurdity of making social visibility a requirement instead of a consideration. To meet this heightened standard, asylum seekers would have to put a sign on their back identifying themselves to their persecutors to establish protected status and somehow escape and make it to the U.S. to apply for asylum. Judge Posner went on

[364] *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

to add that he was disregarding *Chevron* deference because "when an administrative agency's decisions are inconsistent," citing the BIA's inexplicable departure from *Acosta*, "a court cannot pick one of the inconsistent lines and defer to that one."[365]

The BIA not only employed flawed analysis in *S-E-G-* but failed to establish a sound framework by neglecting to clarify whether social visibility requires literal/ocular visibility or societal perception of the group as well as whether particularity and social visibility are to be determined by the society in question, the persecutor, or the adjudicator. As a matter of policy, administrative agencies are tasked with creating a uniform standard for adjudicators to apply consistently.[366] With respect to the established social groups in *Toboso-Alfonso* and *Kasinga*, the Third Circuit in *Valdiviezo-Galdamez v. Attorney General* (2011) also disregarded *Chevron* deference: "If a member of any of these groups applied for asylum today, the BIA's 'social visibility' requirement would pose an unsurmountable obstacle to refugee status."[367]

In response to the BIA decisions, UNHCR issued a Guidance Note on Refugee Claims Relating to Victims of Organized Gangs in March 2010 that states:

> It is important to consider, especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and *de facto* exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities.[368]

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[365] Ibid., 616.
[366] Bresnahan, "The Board of Immigration Appeals's New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal Policy Implications," 670-71.
[367] *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582, 604 (3rd Cir. 2011).
[368] United Nations High Commissioner for Refugees, "Guidance Note on Refugee Claims Relating to Victims of Organized Gangs," 16.

This expert opinion, formulated explicitly to counsel adjudicators, runs counter to many of the BIA's arguments. For example, UNHCR asserts that not only could the gangs' recruitment of "young people who are poor, homeless and from marginalized segments of society or particular neighborhoods" serve as a basis for membership in a particular social group, but that such individuals' objections to "the activities of gangs or to the State's gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power."[369]

A close reading of the 2008 decisions convey the BIA's fixation with the size of a social group, which points back to the floodgates argument. However, nowhere in the 1951 Refugee Convention and its enactment into U.S. law does it state that standards can arbitrarily be raised and asylum capped once it reaches a certain number. This sentiment was echoed by the Seventh Circuit in *Cece v. Holder* (2012) when it said, "it would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims."[370] Not only is the floodgates argument legally flawed, but it makes little sense in practice. For example, since *Toboso-Alfonso* and *Kasinga,* not every individual persecuted on account of his/her sexual orientation or woman being subjected to FGM has fled to the U.S.

In addition to the BIA's attempt to narrow the social group category by arbitrarily employing vacuous criteria, there is clearly a political and discriminatory dynamic at play. There has never been a concern with the large number of Chinese applications, yet when it comes to Central American asylum seekers at the peak of a humanitarian crisis, the administrative and legal doors have been slammed shut. In *The Latino Threat* (2008),

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[369] Ibid.
[370] *Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2012).

Leo Chavez employs Foucauldian discourse analysis to show how immigration restrictionists, conservative politicians, and the mainstream news media have constructed an alarmist narrative that says:

> Latinos are not like previous immigrant groups, who ultimately became part of the nation. According to the assumptions and taken-for-granted 'truths' inherent in this narrative, Latinos are unwilling or incapable of integrating, of becoming part of the national community. Rather, they are part of an invading force from south of the border that is bent on reconquering land that was formerly theirs (the U.S. Southwest) and destroying the American way of life.[371]

Chavez conveys that despite such a narrative being far removed from the empirical evidence and current trends in Latino assimilation—including greater intergenerational educational attainment, English fluency, and home ownership—"the virtual lives of 'Mexicans,' 'Chicanos,' 'illegal aliens,' and 'immigrants' become abstractions and representations that stand in the place of real lives."[372] He goes on to illustrate that Latina sexuality, reproduction, and fertility have become subjects of the public discourse and scientific investigation in order "to produce fears about Latino population growth as a threat to the nation—that is, 'the American people,' as conceived in demographic and racial/ethnic terms," justifying further immigration and border control.[373]

Furthermore, perhaps the most unfounded aspect of the floodgates argument is that it overlooks a central feature of the migratory process that Alex, the previously mentioned asylum seeker from Nigeria, clearly articulated: "If it was safe for me, I'd love to go back home. I am Nigerian. I want to live among my people, enjoy my kind of food, enjoy the culture, music. I don't know if I am using the word correctly English-wise, but

[371] Chavez, *The Latino Threat*, 2.
[372] Ibid., 43.
[373] Ibid., 72.

I want to live *organically* again."[374] When it comes to seeking asylum, the likelihood of being persecuted is the ultimate push factor that propels an individual to uproot him/herself and face the uncertainty of the journey as well as the daunting prospects of adjusting to life in a foreign country, learning a new language, and being separated from friends and family. But it is not a decision that comes easy. "Most refugees [would] rather live in the country they came from. I've heard it in many testimonies over the years," said a former supervisory asylum officer in Houston. "Americans think that everyone wants to live here. Believe me, all things being equal, people [would] rather live in their home country, but there are things that prevent them from doing so."[375]

Nevertheless, preoccupation with border control prompted the BIA to issue two more precedential decisions—*Matter of M-E-V-G-* (2014) and *Matter of W-G-R-* (2014)—that addressed the circuit courts' criticisms yet doubled down on the flawed 2008 decisions. *M-E-V-G-* sought to clarify the additional social group requirements by asserting that social visibility does not mean literal/ocular visibility, but instead refers to whether the social group is "perceived … as a *sufficiently distinct* group [emphasis mine]" by both members of the group as well as the society in question.[376] In departing from the other protected grounds, *M-E-V-G-* explained that while the persecutor's motivations and perception of the group is relevant, it is society's perception of the group that determines the group's validity. While neither case clarified the particularity requirement, *W-G-R-* stated that "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" failed to meet the particularity test because

[374] Asylum seeker, interview by author, August 7, 2015.
[375] Supervisory asylum officer, interview by author, July 7, 2015.
[376] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238 (BIA 2014).

the proposed group was "too diffuse" and "could include persons of any age, sex, or background."[377] This language is far more restrictive than previous case law—notably the BIA's decision in *Matter of C-A-* (2006)—which rejected the need for cohesiveness and homogeneity among group members, and marks a departure from what is required of the other protected grounds, as political opinions and religious beliefs may be shared by a diverse group of individuals regardless of age, sex, and duration of membership.[378]

The BIA's reaffirmation of particularity and social visibility—now called social distinction—effectively prevents the recognition of any new social groups, unless the politicized BIA deems it worthy, by creating two standards that work in opposition to one another. If, for example, the social group proposed in *W-G-R-* of former gang members was defined with concrete age and duration delineations to meet the particularity requirement, then it is unlikely that such a narrowly defined and discrete group would be broadly perceived by the society in question as socially distinct. Without legal representation, the new requirements make it virtually impossible for an asylum seeker to successfully obtain refugee status. How can an applicant, especially a child, with limited education and English proficiency be expected to formulate a social group in terms that are simultaneously statistically precise and commonly recognized?

In addition to obfuscating an applicant's ability to frame an asylum claim, the 2014 decisions also raise his/her evidentiary burden by calling for "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies," as enumerated in *Matter of M-E-V-G-*, to show that the social group is

[377] *Matter of W-G-R-*, 26 I&N Dec. 208, 221 (BIA 2014).
[378] *Matter of C-A-*, 23 I&N Dec. 951, 957 (BIA 2006).

recognizable.[379] This calls upon judges to act as experts on cultural and social matters, despite the fact they are unlikely to possess the requisite knowledge. Judges often turn to familiar forms of corroborating evidence, such as Department of State country reports, to inform their decisions; however, as will be discussed in the next chapter, such reports are far from impartial and authoritative. One way for an asylum seeker to counteract this is by procuring an expert witness to provide anthropological or sociological information about the proffered social group. Financial limitations, though, make it difficult to obtain an attorney, let alone an expert witness; and even then, they may not be able to persuade the adjudicator. "It's hard to tell someone yes you qualify for asylum or no you don't because it's never really totally defined," said an immigrants' rights attorney in Phoenix. "It's somewhat of a gray area and sometimes judges might see an asylum claim, and sometimes they won't … and that goes for lawyers too. It matters who the lawyer is, what pair of glasses we put on, and how we see the claim."[380]

The narrowing of the social group category is exemplified by the fact that the BIA did not find any groups that met the specified criteria from 2006 until August 2014, when it finally accepted the proposed social group of "married women in Guatemala who are unable to leave their relationship" in *Matter of A-R-C-G-* (2014).[381] *A-R-C-G-* can be viewed as a huge victory for the human rights community—here in the form of the Center for Gender and Refugee Studies, American Immigration Lawyers Association, National Immigrant Justice Center, and UNHCR who served as *amici curaiae* (friends of the court) for the respondent—in that the BIA finally recognized domestic violence as a

[379] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 244 (BIA 2014).
[380] Immigrants' rights attorney, interview by author, June 16, 2015.
[381] *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

human rights abuse, providing relief not just for Ms. C-G- but also Rory Alvarado, whose case had been pending for 15 years, and all the women fleeing similar circumstances. However, the BIA's decision was carefully crafted to comport with its 2008 and 2014 flawed decisions, finding that a social group defined by gender, nationality, and marital status meets the immutability, particularity, and social distinction criteria. The continued reliance on this stringent formulation poses a challenge to immigrants' rights attorneys as they try to balance obtaining protection for individual clients on one hand and advocating for the rights of all asylum seekers on the other. This tension was highlighted by an immigrants' rights attorney in New York:

> The [social group] definitions are constantly shifting. There is an underlying sense on the part of any good lawyer that they should have not shifted and that you should fight by trying to get things back to the *Acosta* definition. There is a kind of resentment that goes into the definition of those classes…. But that may not always be in the best interest of the client. Because it is easier for the client to just be themselves and hopefully that is enough to persuade the judge to interpret the category in a way that is more liberal and based on the applicant's circumstances. On the one hand, you want your client to fit the existing law, so you have to make a judgment: do you do that by trying to press the facts into the box that seems to be the one the BIA has prepared for you, or do you want to try to stretch the box to represent the facts your client is presenting?[382]

Outsourced Gatekeeping: The Immigrants' Rights Attorney's Dilemma

With the government's tactics to prevent access to representation as well as the BIA's shrinking of the legal categories, the human rights community has had to scramble to assist as many asylum seekers as possible. For those able to procure legal representation, the process of making a claim is a constant back-and-forth between

[382] Immigrants' rights attorney, interview by author, July 28, 2015.

attorney and asylum seeker, whom together, attempt to translate a distant wrong into a domestic right. This is done by taking the applicant's particular lived experience of persecution and transforming it into a universally recognized human rights abuse that is understood by the adjudicator in legal terms and/or as an appeal to humanity. On the face of it, those representing asylum seekers appear to be a distinct class of human rights activists. They engage with an archaic refugee framework, while employing the most up-to-date human rights instruments, documentation, and strategies to ensure that refugee status is granted to marginalized groups. They operate both across borders by engaging with ideas of universal humanity and at border zones (of hostility) by transforming bare life into citizenship.

Yet, despite securing protection for thousands of individuals fleeing persecution each year, immigrants' rights attorneys occupy an ambivalent position within the international human rights movement compared to other activists. This might sound like a strange thing to say. But if we look at the work of women's rights activists and researchers, for example, we see individuals who document abuses in far-flung corners of the world with an overarching aim of *dismantling* patriarchal systems of exploitation, oppression, and exclusion. Immigrants' rights attorneys, on the other hand, operate *within* the state's gatekeeping system. They are one actor out of several—from CBP and ICE officers and agents to detention center staff to adjudicators and policymakers—who partake in the management of international migration. Although they are working at border zones to fight restrictive immigration policies, immigrants' rights attorneys are still part of the process that sorts out thousands of refugees from the tens or hundreds of thousands of migrants and asylum seekers who cross the border but are deemed to be

undesirable and labeled economic migrants, illegal immigrants, criminal aliens, and bogus asylum seekers—categorizations that justify their removal.[383] Benevolent intentions aside, there are both organizational (scarcity of resources) and substantive (lack of expertise) reasons that contribute to their ambiguous relationship with the human rights movement and locate them between humanitarianism and human rights.

Due to the limited human and financial resources of refugee advocacy and human rights organizations that usually operate on a nonprofit or low bono model, they have had to employ a variety of methods to meet the urgent needs of asylum seekers. The most common strategy is to leverage the resources of the private bar, as outlined by the National Immigrant Justice Center:

> Asylum cases require *80-160 hours* of work. Due to the significant resources required for an asylum case, National Immigrant Justice Center is generally only able to place asylum cases with attorneys at mid-large firms that have resources to support asylum representation. You and/or your firm must have the necessary resources to gather and compile exhibits, conduct legal research, communicate with potential witnesses who are abroad, etc. Asylum filings are usually 200+ pages long and require significant material resources to prepare and file. In many cases, asylum cases will require an expert witness, which must be identified and paid for by the representing attorney or firm/corporation. Asylum cases could last three to five years, and sometimes longer. *No previous experience required*.[384]

After conducting intake interviews and screening potential clients, these organizations will contact law firms that are signed up to their networks to see whether any of their staff are willing to volunteer their time and serve as pro bono attorneys.

In response to a question about how they decide which asylum cases to accept, a staff attorney at Human Rights First said:

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[383] Bhabha, "Internationalist Gatekeepers?," 160-62.
[384] National Immigrant Justice Center, "Be A Pro Bono Attorney."

> We have over a 90 percent success rate in our cases, but if you start taking on a lot of weaker cases … what does that do to your success rate? And if your success rate goes down, how does that impact your ability to get funding and your ability to work with pro bono attorneys? Most pro bono attorneys want to walk away from their first experience winning and feeling good about themselves. Of course we have the expertise to take on hard cases, but we have other challenges to keep in mind as well.[385]

The staff attorney gets at two key interrelated points that were echoed by several organizations. In vying for external funding and taking into consideration the interests of pro bono attorneys, these organizations take on cases that are most likely to be successful. This often precludes many of the social group cases, especially gang-based claims, due to their degree of difficulty, especially for inexperienced attorneys. In fact, one pro bono attorney in San Francisco who had just completed her third case said, "I usually take on cases from Middle Eastern countries because the arguments are more straightforward and fit neatly into boxes."[386] Despite such organizations' missions to afford legal assistance to the greatest number of asylum seekers, they are inadvertently endorsing the state's gatekeeping function by screening out the types of cases where representation is most needed to address the BIA's burdensome formulation. In turn, their position in the human rights movement is ambiguous because they are participating in a process that filters out the "undeserving" cases that may never be heard by adjudicators, thus affording the nation-state's exclusionary immigration policies some degree of legitimacy.

Another consequence of the pro bono model is that by reaching out to staff at law firms, refugee advocacy and human rights organizations are working with individuals who have limited knowledge in the necessary fields. "Most of the pro bono attorneys are corporate attorneys who have zero asylum experience and don't know anything about

[385] Immigrants' rights attorney, interview by author, July 23, 2015.
[386] Pro bono immigration attorney, interview by author, May 21, 2015.

immigration law, so we provide them with training, mentoring … and we teach them how to litigate a case," said the staff attorney at Human Rights First.[387] The Asylum Coordinator at the Lawyers' Committee for Civil Rights echoed this by stating that "most of the pro bono volunteers work in corporate law at the city's major firms, which have all the resources in the world, but they don't necessarily know how to do an asylum case … so we mentor them."[388] While the mentorship provides them with some basic knowledge and confidence on how to build a case, pro bono attorneys are unlikely to have the time it takes to become familiar with the human rights conditions in their clients' countries of origin, and hence, they hire expert witnesses to fill in this gap.

Despite their benevolent intentions, pro bono attorneys are generally detached from the activities of the larger human rights movement, and as such, there are instances where they come into conflict with the work of immigrants' rights attorneys and refugee advocacy organizations. According to an immigrants' rights attorney in Phoenix:

> One of the things these [pro bono and private practice] attorneys bring to asylum law is the over-use of experts. It wasn't always necessary to have experts, but now the pool of practicing attorneys has changed and they tend to come from this firm background where you over-lawyer … and that raises the standard for everyone. So now I feel like if I don't have an expert, I am not doing my job. But that's the thing: before you didn't need an expert. It was just credible testimony and documents. To expect an asylum seeker to walk in with experts is just wrong.[389]

By helping their individual client obtain relief by employing expert witnesses, pro bono attorneys are raising the standard for all other asylum seekers, including those navigating the process alone or represented by immigrants' rights attorney with limited resources.

[387] Immigrants' rights attorney, interview by author, July 23, 2015.
[388] Immigrants' rights attorney, interview by author, April 9, 2015.
[389] Immigrants' rights attorney, interview by author, June 18, 2015.

Pro bono attorneys are also unlikely to have prior experience working with asylum seekers, which presents a variety of challenges for both parties, including overcoming linguistic barriers, the effects of trauma, and cultural differences. These differences may result in a hierarchical and detached relationship between attorney and client, which is antithetical to the solidarity-building aspect of the human rights movement. This is most salient when it comes to drafting the declaration, which is commonly referred to as the asylum seeker's narrative and serves as the foundation of his/her oral testimony. For the most part, immigrants' rights attorneys focus on listening, developing rapport, and giving clients ownership over their stories, while pro bono attorneys are more likely to take the lead in drafting their clients' declarations.

The former approach presupposes an assertive political agency, seeing asylum seekers *as rights-holders* and members of the same human and political community.[390] The latter approach, on the other hand, views asylum seekers as passive *beneficiaries of humanitarian aid/assistance*; such a categorization on the part of pro bono attorneys may lead to one-dimensional paternalistic descriptions of their clients' countries or origin as barbaric, uncivilized, and in need of "saving." Miriam Ticktin reaches a similar conclusion in her rich and thought-provoking ethnographic study *Casualties of Care* (2011), which examines humanitarian responses in the wider context of anti-immigration policies in France. She argues that the humanitarian exceptions instituted for undocumented migrants on account of life-threatening illnesses and gender-based violence have actually contributed to an "antipolitics of care" by reproducing new forms of subjectivity, inequality, and racialized ways of viewing and managing the "victim."[391]

[390] Wilson and Brown, "Introduction," 8.
[391] See Ticktin, *Casualties of Care*.

Knowledge and experience affect all aspects of the attorney-client relationship. In the previous chapter we met Celina, a 28-year-old woman who fled El Salvador with her son after being raped by members of MS-13 and then was detained at Dilley. While conducting research in New York a few months after my visit to Dilley, I learned that a prominent human rights organization in the city agreed to assist her at no cost. The organization's social worker, who worked closely with Celina, updated me on her case:

> After meeting with her attorney for nearly two months, she hadn't informed anyone that she was pregnant as a result of being raped. When she would go to meet her attorney, it was her in a board room with 5 young [pro bono] attorneys on their computers typing down exactly what she said. She was on one side of the table and they were on the other. That was so out of the ordinary, so overwhelming for her that she completely shut down. She later told me her situation and I had to relay that to her attorney. I had to help her with basic life stuff before we could think about working on her legal case. That is why I was hired. To give information on interviewing techniques. Common sense things like don't meet in a board room with several other people. Be predictable. Give the client ownership and follow their pace. Taking proper breaks based on client's needs and mood…. I [also] provide the attorneys with information on traumatic reactions, the difference between an acute traumatic reaction, which most human beings will have when they experience trauma versus when it develops into full-blown post-traumatic stress disorder and affects general functioning.[392]

This particular human rights organization created the social worker's position in 2015 to help with the increased number of claims from women and children. Her words indicate the importance of cultivating an empathetic and authentically non-hierarchical relationship to avoid having the asylum seeker feel disempowered. Immigrants' rights attorneys are better equipped to accomplish this with their knowledge of the asylum seeker's language and country of origin, and most importantly, with their ability to communicate across differences and borders.

[392] Social worker, interview by author, September 27, 2015.

Although the U.S. has constructed an elaborate asylum system that takes into account an applicant's written declaration, the human rights situation in his/her country of origin, and corroborating evidence if the adjudicator deems it necessary, courtroom proceedings are often the most determinative aspect of a claim. Asylum hearings are a performance, where the various actors in the courtroom play out the applicant's credibility and his/her "deservingness" to be recognized as a refugee. According to a private practice immigration attorney in New York:

> I always tell my clients it's show-time … that it's a play. And every person in that courtroom has their part. The judge has a certain role, the government prosecutor has a certain role. It's my job to help the client tell a story and it's the government's job to test them to see if they're telling the truth. The judges have their own personalities and their own ways of making decisions, so it pays off if you can figure out how that particular judge makes decisions and it influences how I prepare that case to be presented.[393]

This situation is heightened by the recent BIA case law that forces applicants to prove the "visibility" of their social group. For example, sexual minorities are often left having to convey their "gayness," even though many go to great lengths to hide their identities out of fear, just as Judge Posner of the Seventh Circuit wrote in *Gatimi v. Holder*.

The wide discretion afforded to immigration judges is something that all attorneys must contend with, regardless of their knowledge, experience, or commitment to the human rights movement. At the Phoenix immigration court in July 2015, I observed the hearing of Juan, a young gay man from El Salvador who broke down into tears while being questioned. After the hearing, I asked his attorney about the case and she said:

> I just basically asked him a simple question: does your mother know about your sexual orientation, and if not, how would she feel? I knew that he is very close to his mother and hadn't told her any of this. I knew asking it would bring up the issue of his mother being a devout Catholic who is

[393] Private practice immigration attorney, interview by author, July 27, 2015.

> against homosexuality, but also did everything she could to raise him and love him. You just want to ask questions like that lightly, to show there is genuine emotion there. Get him to cry a little bit and then move on. That's better than all the evidence out there because you can't really fake emotion like that…. I think he probably conformed to the judge's notions of what it is to be gay in Central America and that helped.[394]

Such cases pose moral predicaments for those attorneys working on asylum cases. Employing sexist, gendered, or even racist stereotypes may gain their individual client protection, but it negatively impacts the rights of all asylum seekers who deserve to be recognized based on their inherent dignity rather than what adjudicators think about their identities. The performance aspect of asylum hearings can render the voice of asylum seekers inaudible. This poses an impossible dilemma to immigrant's rights attorneys: should they put their clients "into the box" that the BIA created and adjudicators expect, or should they provide a holistic account of their clients' lives and shape adjudicators' judgments for future determinations? The former, while appealing with its straightforward strategy and immediate results, is ultimately self-defeating.

Juan's attorney expressed unease with the situation and stated that she only used such a tactic because of the judge's reputation for being tough on sexual orientation claims. She reconciled this by highlighting the totality of her work within the larger human rights movement, having just volunteered at a family detention center and taking on cases that are often disregarded by pro bono and private practice immigration attorneys. The work of immigrants' rights attorneys is onerous yet uniquely important. They are tasked with employing international human rights and refugee law in the face of restrictive immigration policies. In undertaking this endeavor, however, they must resist falling into or exacerbating the exclusionary tendencies outlined above.

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[394] Immigrants' rights attorney, interview by author, July 13, 2015.

Conclusion

Celina's case rapidly made its way through the "surge docket," moving from detention at Dilley in July 2015 to a full asylum hearing at the New York immigration court in October 2015. Despite the difficulty of winning social group cases, her attorney felt confident. Not only did they have witness affidavits, but the organization was able to procure an expert witness. There was not one dry eye in the courtroom as she recalled the details of the atrocities she faced back in El Salvador. Celina's attorney offered two legal theories: the first was her membership in a particular social group comprised of Salvadoran female heads of household without male protection; and the second was an imputed political opinion on account of her expressing opposition to the gang. The judge rejected both legal theories with no explanation. At the end of the hearing, though, the judge stated that, given the horrific details of the case, "I cannot *not* grant this case. Consider it a gift." Celina broke into tears and hugged her attorney. Her family gathered around her and began celebrating the fact that she would be able to stay in the U.S.

This case, while resulting in a grant of asylum, illuminates the tension between the human rights community's insistence that asylum seekers deserve to be recognized as human rights subjects and the bureaucratic processes that claims get filtered through. Despite laying out a legal theory that resembled recent case law in *A-R-C-G-* as well as providing evidence of the rampant human rights abuses in El Salvador, the judge did not find any legal basis for recognizing Celina's claim to be a human rights subject. Rather, asylum was granted as a humanitarian act, or "gift," based on an appeal to humanity. Decisions based on judges' backgrounds, temperaments, and biases are common in asylum hearings, which is the focus of the next chapter. In fact, the Center for Gender

and Refugee Studies analyzed 67 decisions in the year since *A-R-C-G-* and found continued arbitrary and inconsistent outcomes.[395]

Yet, this chapter has also conveyed an expansion of the social group category in the 1980s and early 1990s that came not from legislation enacted by the government, but through the direct representation of individual asylum applicants, advocacy activities in coordination with international NGOs and grassroots human rights activists throughout the world, and impact litigation. During that period, the BIA and federal courts were often far ahead of the government in pushing the boundaries of inclusion, and when that happened, legal decisions offered concrete entitlements beyond abstract moral pronouncements. Even though the last decade has seen the BIA close the asylum door on women and children fleeing evolving forms of violence in Central America, past experiences tell us that legal change from the grassroots level is still possible. The recent decision in *A-R-C-G-* may be limited in scope, but it is still a formal victory after a decade of stagnation in the never-ending fight for human rights. Most of the Central American "surge" cases are just now working their way through the system, so we will only know in a few years what impact the human rights community has had on this particular aspect of asylum.

On September 20, 2016, the Court of Appeals for the Ninth Circuit in *J.E.F.M. v. Lynch* begrudgingly dismissed the human rights community's ambitious lawsuit that sought court-appointed counsel for all unaccompanied children in removal proceedings. The ruling was not on the merits of the minors' claims that were still proceeding forward through the system, but rather a matter of jurisdiction. The Court asserted that claims

[395] See Bookey, "Gender-Based Asylum Post-Matter of A-R-C-G-."

must first be addressed to an immigration judge and the BIA, which as we have seen has dealt with this population harshly, and only then can they reach the respective circuit court for appeals. However, Judge Margaret McKeown wrote an unusual concurring opinion that highlights the gravity of the situation:

> Congress and the Executive should not simply wait for a judicial determination before taking up the 'policy reasons and … *moral obligation'* to respond to the dilemma of the thousands of children left to serve as their own advocates in the immigration courts in the meantime. *The stakes are too high*. To give meaning to 'Equal Justice Under Law,' the tag line engraved on the U.S. Supreme Court building, to ensure the fair and effective administration of our immigration system, and to protect the *interests of children* who must struggle through that system, *the problem demands action now* [emphasis mine].[396]

Her words convey the many contradictions within the legalization of human rights. While in this instance the courts could not provide relief to the immigrant children, she acknowledges that the "problem demands action now" and calls on the government to create a humane solution. In the meantime, the human rights community may be well served to resurrect some of the lessons of the Sanctuary Movement. As we saw in the previous chapters, while legal protection is a matter of life and death for individual asylum seekers, ethical encounters in the form of hospitality that evolve into large-scale social struggles have the potential to initiate change for a whole category of people.

[396] *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1041 (9th Cir. 2016).

CHAPTER 4: ASYLUM ADJUDICATION

"What if they don't believe me?"

Introduction

When I arrive to pick up Fernando at seven o'clock in the morning, he is already waiting outside of his apartment building in the Fruitvale neighborhood of Oakland, California. His slight, five-foot-four-inch frame is pacing back and forth on the sidewalk, and he is drenched with anxiety. After getting into my car and exchanging pleasantries, Fernando discloses that he is terrified. He keeps playing out the events that are about to take place and he has not been able to sleep for days. "What if they don't believe me? I can't go back there," he says. After two and a half years of waiting in legal limbo, Fernando, who left El Salvador in 2013 because of persecution based on his sexual orientation, is about to appear before an immigration judge in San Francisco to present his asylum claim.

When we first met in March 2015 to draft his declaration, Fernando was an extremely shy, soft-spoken, and guarded 22-year-old. By our third meeting, however, he slowly began to disclose years of emotional and physical abuse. Fernando's earliest childhood memories are marked by family members and classmates mocking him for looking effeminate as well as MS-13 gang members targeting him for recruitment. "If you refuse to join the gang, they make you pay," he said. "You never feel safe." Then one afternoon shortly after his 16th birthday, Fernando was attacked and beaten by several gang members on his way home from school, one called him a *maricón* (fagot) and

threatened to sexually assault him. Several more incidents of gang harassment as well as police inaction let Fernando know at an early age that because of his sexual orientation, his country would not protect his rights. The severity of his situation reached a boiling point when two years later, after leaving a nightclub with some friends, he was stopped on a dark road by two police officers who, while hurling gay slurs and profanities, gruesomely beat him, leaving him with a broken nose and serious injuries.

Left with no recourse, Fernando packed a few possessions, crossed over the farmlands and hills of El Salvador and Guatemala, traveled atop *La Bestia* for a portion of his trip through Mexico, and then hiked until he crossed the southern border, only to be held for several months at an immigration detention facility in California. After finally being released on bond due to the assistance of a pro bono attorney, he then travelled to reunite with a friend who had successfully sought asylum in San Francisco. I met Fernando at an immigrants' rights organization in San Francisco that aids Central Americans. As we began to draft his declaration, Fernando expressed great worry over not having any evidence or documents to support his claim. I assured him that most asylum seekers find themselves in a similar situation; the 1979 UNHCR Handbook and Guidelines states that "in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents."[397] My words did not calm him, as Fernando still expressed great anxiety about the process: Who would be his judge? What if he did not fully understand what the judge was asking? What if the judge thought he was lying? What types of documents did he need to present? How

[397] United Nations High Commissioner for Refugees, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees," 38.

could he corroborate his sexual identity when he had spent his whole life concealing it out of fear?

As discussed throughout this project, to be recognized as a refugee, an asylum seeker must prove to an adjudicator that s/he has a well-founded fear of persecution on account of one or more of the five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion). In assessing such claims, adjudicators look at two elements: first, the subjective aspect of whether the applicant fears being returned to his/her country of origin based on past/lived experiences; and second, the objective aspect of whether the applicant provides reasonable grounds that corroborate his/her subjective fear and make it well-founded.[398] In this chapter, I explore the conditions under which asylum seekers—especially those applying under the protected ground of membership in a particular social group (such as women, children, and sexual minorities)—present their claims at one of the eight regional asylum offices or 57 immigration courts throughout the country, while focusing on the perspectives of immigration attorneys and adjudicators (asylum officers and immigration judges). Through participant observation as well as interviews with asylum seekers, immigration attorneys, expert witnesses, and adjudicators, I provide an in-depth examination of key concepts and issues in the refugee status determination process (or asylum adjudication)—namely burden of proof, standard of proof, evidentiary standards, credibility determinations, and corroboration standards.

The first part of this chapter outlines the difficult legal framework through which applicants and adjudicators must navigate. One of the most foreboding hurdles for

[398] Thomas, "Assessing the Credibility of Asylum Claims," 79.

applicants is the fact that due to the precarious circumstances that lead most asylum seekers to flee their countries of origin, they arrive with little to no corroboration. Taking into account this reality, BIA and federal court case law developed relaxed evidentiary standards throughout the 1980s and 1990s that brought U.S. immigration law in line with international human rights and refugee law. I argue, however, that because asylum seekers are able to introduce wide-ranging evidence from diverse sources to meet the lower standard of proof, a culture of mistrust has developed among adjudicators, who skeptically view an applicant's credibility and corroborating evidence. Even with a well-structured legal framework to guide individual assessments, factors outside the legal realm—an adjudicator's background, outlook, and bias—heavily influence asylum determinations and produce outcomes that are unpredictable and inconsistent.

The second part of the chapter examines how, in an era marked by the increasing criminalization and securitization of migration that privileges border control at the expense of human rights, adjudicators tend to demand excessive corroborating evidence to measure the reasonableness of an applicant's claim. This shift is most notably represented with the enactment of the REAL ID Act of 2005. I argue that these heightened corroboration standards have given rise to a false dichotomy between the subjective and objective aspects of an asylum claim: while the applicant's testimony is relegated to the "subjective" sphere to be scrutinized by ICE trial attorneys (government prosecutors) and immigration judges, some forms of corroborating evidence are afforded greater weight due to their "objectivity." This false dichotomy, however, obscures the fact that some forms of "objective" documentation can be highly politicized (in the case of Department of State country reports) and overly formalistic and superficial (in the case

of changed country conditions, which point to legislative reforms in the country of origin such as the ratification of international human rights treaties which often are not enforced). Despite these factors, such evidence is still employed by the U.S. government to question an applicant's motivations and deny valid asylum claims.

This chapter offers both a critique and engagement with the human rights discourse, simultaneously suppressive and subversive, just as capable of functioning as an instrument of domination as it is acquiescent to operating as an agent of resistance. On one hand, there is the state-centric version in which the government employs Department of State country reports and changed country conditions to promote better relations with allied countries, while denying valid asylum claims in order to assert sovereignty over the asylum process. On the other hand, a constellation of individuals committed to the rights of all migrants—here in the form of immigrants' rights attorneys, social workers, researchers at refugee advocacy and human rights organizations, academics with international expertise, grassroots activists, and asylum seekers themselves—form a human rights community that seeks to translate distant wrongs into domestic rights. By highlighting the lived experiences of asylum seekers and refugees, this community pushes adjudicators to look past the state-centric version of human rights as well their personal biases and recognize the complex interaction of law with politics, culture, and society that forces individuals to flee persecution and seek asylum in the U.S.

Legal Framework: From "Benefit of the Doubt" to Heightened Standards

According to the 1998 UNHCR Note on Burden and Standard of Proof in Refugee Claims, when conducting refugee status determinations, the exceptional

situation of asylum seekers should be kept in mind.[399] *Black's Law Dictionary* (2009) defines burden of proof as "the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause." In the asylum context, the "issue" is whether one party (the asylum seeker) should be recognized by the other party (the U.S. government) as a refugee, or human rights subject, and afforded the requisite protection. The "facts in dispute" are whether the applicant has a well-founded fear of persecution on account of one or more of the five protected grounds based on his/her subjective experiences as well as the objective human rights situation in the country of origin. And since the asylum seeker is the person raising the issue, s/he bears the burden of proof.[400] The standard of proof is a certain threshold an asylum seeker must meet to persuade the adjudicator that his/her assertions are factual.

The contemporary standard of proof arises from *INS v. Cardoza-Fonseca* (1987), in which the Supreme Court decided that the "clear probability" (higher than 50 percent) standard for withholding of removal set in *INS v. Stevic* (1984) was too high for asylum applicants to satisfy and thus put forth a relaxed standard of "reasonable possibility."[401] To the applause of the human rights community, the Supreme Court calibrated the standard of proof to the exceptional circumstances faced by asylum seekers by emphasizing that the "reference to 'fear' [in the 1980 Refugee Act] makes the asylum eligibility determination turn to some extent on the alien's *subjective* mental state [emphasis mine]."[402] The Court held that an applicant can meet the standard even if s/he

[399] United Nations High Commissioner for Refugees, "Note on Burden and Standard of Proof in Refugee Claims," 1.
[400] Ibid.
[401] See Anker and Blum, "New Trends in Asylum Jurisprudence."
[402] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (SC 1987).

does not show that persecution is more likely than not. The majority opinion of the Court stated that "there is simply no room in the United Nations' definition for concluding that, because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no 'well-founded fear' of the event's happening."[403]

While the burden of proof rests with the applicant to tell his/her story truthfully, it is often overlooked that adjudicators bear a burden as well—to "produce" (or gather) evidence and evaluate it. The USCIS Asylum Officer Basic Training Course mandates that asylum officers develop the facts of the case through eliciting testimony and researching country conditions. This task is especially important because asylum officers are not only first in line to evaluate claims, but they have more time than immigration judges to review each one as well as greater expertise on specific human rights issues and country conditions, as discussed in the previous chapter. When an asylum officer fails to properly develop the evidentiary record, an applicant's case gets referred to immigration court, where s/he is just one step away from a deportation order if the claim is denied.

As Fernando's case above illustrates, asylum seekers are commonly forced to flee their countries or origin under dangerous and uncertain circumstances. The passage of time, distance, the effects of trauma, lapses in memory, cultural and linguistic differences, limited financial resources, and a lack of legal representation, among other factors, have an impact on the amount and quality of evidence an asylum seeker can gather. The Court of Appeals for the Ninth Circuit in *Bolanos-Hernandez v. INS* (1984) highlighted these distressing conditions when it said, "The imposition of such a [corroboration] requirement would result in the deportation of many people whose lives

[403] Ibid.

genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats."[404] Requiring corroborating evidence imposes a great burden on the asylum seeker when delaying one's journey to gather evidence could be the difference between life and death. Similarly, in *Senathirajah v. INS* (1998), the Court of Appeals for the Third Circuit stated that "common sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution."[405] For most vulnerable and marginalized asylum seekers, it is only their own words—in the form of their written declarations and subsequent oral testimonies—that serve as their claims *and* corroborating evidence.

As such, in the absence of specific legislation governing corroborating evidence after the passage of the 1980 Refugee Act, a common law standard developed throughout the 1980s and 1990s that an applicant's testimony, under certain circumstances, should be enough to satisfy the burden of proof if it is deemed to be credible. Credibility and corroboration standards were first articulated several months after the *Cardoza-Fonseca* decision in *Matter of Mogharrabi* (1987), in which the BIA asserted that an applicant's testimony "may be sufficient, without corroborative evidence, to prove a well-founded fear of persecution where that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."[406] This relaxed corroboration requirement linked U.S. law with international human rights and refugee standards, as according to the 1979 UNHCR Handbook and Guidelines, "it is

[404] *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).
[405] *Senathirajah v. INS*, 157 F.3d 210, 216 (3rd Cir. 1998).
[406] *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

hardly possible for a refugee to prove every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the *benefit of the doubt* [emphasis mine]."[407]

However, the BIA, not wanting to let the "floodgates" open too wide for individuals who may take advantage of the asylum program and present fraudulent claims, issued three key decisions that clarified credibility and corroboration standards. In *Matter of Dass* (1989), the BIA stated that while it adhered to the *Mogharrabi* ruling that a lack of corroborating evidence would not necessarily be detrimental to an application, this does not mean that "the introduction of supporting evidence is purely an option."[408] Here the BIA clarified the *Mogharrabi* standard by asserting that "such evidence should be presented where available."[409] *Dass* also linked an applicant's credibility to corroborating evidence by underlining that "without background information against which to judge the alien's testimony, it may well be difficult to evaluate the credibility of the testimony," especially when claims move away from applicant-specific events to broader allegations about the general human rights situation like rampant gang-based violence, embedded gender-based violence, or a lack of recognition of LGBTQ rights.[410]

The BIA further specified corroboration requirements several years later in *Matter of S-M-J-* (1997). While the Court did not overturn the *Mogharrabi* standard, it built on *Dass* by affirming that evidence is expected for "material facts which are central to [the asylum] claim and easily subject to verification," such as one's birth place, accounts of

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[407] United Nations High Commissioner for Refugees, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees," 39.
[408] *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).
[409] Ibid.
[410] Ibid.

large protests, or documentation of medical treatment.[411] However, in staying true to the benefit of the doubt principle, the BIA placed two limits on this heightened corroboration requirement. First, when an adjudicator requires the applicant to provide additional documentation, s/he must give the applicant a chance to explain the omission of such evidence. Second, the BIA asserted that "unreasonable demands should not be placed on the applicant."[412] For applicants locked up in an immigration detention center, for example, it would be overly burdensome to expect them to contact friends or family back in their countries of origin to provide corroborating evidence.

S-M-J- also clarified the credibility standard by saying that "adverse credibility determinations are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony."[413] In recognizing that an applicant's testimony is not insulated from a larger context, the BIA emphasized that because country conditions are helpful in assessing an applicant's credibility, immigration judges bear a burden "to introduce into evidence current country reports, advisory opinions, or other information readily available," thus bringing defensive asylum hearing standards in line with the standards for affirmative hearings, especially to assist those asylum seekers without representation who may be unable to provide their own country conditions.[414] This call for a cooperative approach between the applicant and adjudicator acknowledged the shared responsibility of immigration judges to elicit information from the applicant

[411] *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997).
[412] Ibid.
[413] Ibid., 729.
[414] Ibid., 727.

and help create "a record that affords an adequate basis of review for the BIA and federal courts of appeals."[415]

While *Dass* and *S-M-J-* addressed credibility in relation to corroboration, the BIA in *Matter of A-S-* (1998) exclusively focused on an asylum seeker's credibility, which would serve as a precursor to our contemporary, more stringent standard. The Board declared that where there are "inconsistencies and omissions regarding the dates and key events forming the heart of the respondent's persecution claim," an immigration judge can reach an adverse credibility determination.[416] This requirement is not a departure from *Dass* and *S-M-J-*, as all three cases focus on the significant aspects of an applicant's claim such as dates or key events. But the Board went a step further in *A-S-* by bringing a more subjective element, the asylum seeker's demeanor, into play. In the original case, the immigration judge found the applicant's testimony to be delivered in a "very halting" and "hesitant" manner. "Because an appellate body may not as easily review a demeanor finding from a paper record," the BIA said, "a credibility finding which is supported by an adverse inference drawn from an alien's demeanor generally should be accorded a high degree of deference."[417] The BIA went on to say, however, that the applicant's demeanor is just one component of many for an immigration judge to consider.

The standard developed by the administrative and legal regimes throughout the 1980s and 1990s established a pragmatic, albeit demanding, framework in the absence of specific legislation through which applicants and adjudicators could navigate the difficult

[415] Kerns, "Country Conditions Documentation in U.S. Asylum Cases," 203.
[416] *Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998).
[417] Ibid.

situation that they found themselves in during an asylum hearing. Board member Lory Rosenberg illuminated the tension in her concurring opinion in *S-M-J-:*

> With the advantage of computer technology, television news, and film … we can easily envision the situation of one forced to flee her country. We can see the poverty, the political repression, the exploitation, the corruption, the religious intolerance, or the ethnic divisions which gave rise to the conflict that escalated to the point where the applicant or a family member was persecuted or is likely to be persecuted…. It is also possible to have a different vision: to see this same person as an opportunist, who would perpetrate a fraud. In that case we see a person who, through technology and other sources, has heard about asylum in the United States and who is using our laws simply to gain access to a life in our country, at our expense…. Given the potential for deceit, and our legitimate desire to protect the integrity of the process, how do we determine whether this person really warrants our protection?[418]

The judicious framework outlined above served as a reasonable balance between giving applicants a fair hearing and preserving the integrity of the system by not allowing fraudulent claims to go unchecked. "Remember in asylum law, you have two customers: you have the applicant who walks in, and you have the American people on the other side. You have a humanitarian duty, but you also have a duty to the American people to not let in bad guys," said a DHS official.[419]

The benefit of the doubt rule and its humanitarian justifications, however, would partially give way to an increased burden of proof when President George W. Bush signed into law the REAL ID Act on May 11, 2005. While the Act is mainly known for establishing new federal standards for identification cards with biometrics, it was the first piece of antiterrorism legislation in the post-9/11 era to target asylum seekers and usher in changes that provide adjudicators with wide-ranging discretion to deny asylum claims. REAL ID, similarly to the Immigration Reform and Immigrant Responsibility Act signed

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[418] *Matter of S-M-J-*, 21 I&N Dec. 722, 733-34 (BIA 1997).
[419] DHS official, interview by author, June 19, 2015.

into law a decade prior by President Bill Clinton, prioritizes U.S. border security and immigration enforcement over a serious commitment to human rights. In fact, many of the asylum provisions are located in the section titled "Preventing Terrorists from Obtaining Relief from Removal," signaling a steady evolution of the criminalization and securitization of migration.[420]

On the surface, REAL ID does not appear to be a drastic departure from the case law outlined above, as throughout the deliberations over the Act, Congress extensively cited *S-M-J-* as providing a sound framework. However, as will be conveyed throughout the rest of this chapter with ethnographic examples, REAL ID appears to eliminate much of the benefit of doubt afforded to applicants in the above-mentioned common law standards in two key ways. First, by providing adjudicators with greater discretion over credibility determinations, more time is spent on inherently subjective criteria at the expense of an exhaustive review of the applicant's claim. Second, by heightening the burden of proof with respect to corroborating evidence, adjudicators often demand documentation even when the applicant provides credible testimony. Taken together, the law makes the process of applying for asylum much more onerous.

Credibility Determinations: Between Law and Subjectivity

As stated above, asylum seekers often flee their countries of origin without any supporting documentation, and therefore, all they have is their testimony to present to an adjudicator. Depending on which country the asylum seeker is fleeing, even providing verifiable material facts, as outlined in *S-M-J-*, can prove to be impossible. In countries

[420] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005).

like Somalia that have no effective government due to decades of civil strife and war, basic documents like birth certificates are nonexistent.[421] And even if an applicant gathers some form of corroborating evidence, it is unlikely that those documents will show how the individual was specifically singled out for persecution. The Court of Appeals for the Seventh Circuit in *Mitondo v. Mukasey* (2008) addressed this tension when it said, "Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that an incident occurred, there may be doubt about whether a given alien was among the victims."[422] In the absence of such evidence, adjudicators are left with only the details of an applicant's testimony to make an evaluation of its truth. Through a series of probing questions, adjudicators are trying to illicit a response to their central question: is the applicant telling the truth? In determining whether an applicant is lying, the Court went on to state that "the major clue, apart from factual gaffes and inconsistencies that amount to confessions, is the amount of detail," with liars generally providing less details and fewer references to their own feelings (fear of persecution).[423]

It is widely considered that credibility determinations are the most important aspect of a hearing: if the applicant cannot persuade the adjudicator that s/he is credible, then how will they be recognized as a human rights subject? The magnitude of this is not taken lightly, as an immigrants' rights attorney who works with unaccompanied immigrant children in Phoenix said, "We tell our clients that credibility is the main issue. I, in fact, tell all my clients that we are going in there and these adjudicators are already thinking that people like you are here just to work the system and get papers. I tell them

[421] See Immigration and Refugee Board of Canada, "Somalia."
[422] *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008).
[423] Ibid.

that so they have the mentality of appearing *extra* credible."[424] But what exactly is credibility? How is an individual deemed to be credible? *Black's Law Dictionary* (2009) defines credibility as: "worthiness of belief." At the core of this definition is an acknowledgment of uncertainty; the claim does not necessarily need to be 100 percent true, but at the very least it must persuade the adjudicator. The inherent ambiguity in the concept makes credibility determinations complex and subjective, as two adjudicators questioning the same applicant may come to different conclusions based on a variety of factors, including the background and perspective of the adjudicator, where the applicant is from and the type of persecution s/he was subjected to, differences in language and culture between the adjudicator and applicant, and the effects of trauma on the applicant.

Prior to the enactment of REAL ID, BIA and federal court case law developed criteria for assessing credibility by examining the testimony's specificity, internal consistency, plausibility, consistency with general country conditions, as well as the applicant's demeanor (but only when viewed in relation to the other factors laid out in *A-S-*). However, with no uniform standard throughout the country, determinations varied from circuit to circuit, court to court, and adjudicator to adjudicator. REAL ID, for the first time, codified credibility standards by laying out the following provisions to guide adjudicators in their assessments:

> *Considering the totality of the circumstances* … a trier of fact [adjudicator] may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (*whenever made and whether or not under oath*, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country

[424] Immigrants' rights attorney, interview by author, June 16, 2015.

> conditions), and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor* [emphasis mine].[425]

While REAL ID incorporates much of the pre-existing case law criteria, several of its amendments all but diminish the benefit of the doubt principle; in fact, the last line of the Act emphatically states "there is no presumption of credibility."[426] The ethnographic examples that follow seek to illustrate how an applicant's credibility—and hence the validity of his/her human rights claim—can be called into question, especially with regard to subjective criteria such as demeanor and responsiveness, and to a lesser extent, minor inconsistences.

Many asylum seekers suffer significant psychological distress from exposure to traumatic events in their countries or origin—including torture, imprisonment, and sexual violence—as well as the hardships experienced during their journeys to the U.S. and subsequent detention.[427] The six mental health professionals (4 social workers and 2 clinical psychologists) I interviewed stated that a least three-fourths of the individuals they have examined suffer from symptoms of post-traumatic stress disorder (PTSD), which is a mental health condition triggered by a terrifying event—either experiencing or witnessing it. According to the Mayo Clinic, some of the common symptoms in asylum seekers include uncontrollable thoughts about the event, flashbacks, nightmares, severe anxiety, nervousness, memory lapses, and avoidance. Celina, who we met in the previous two chapters, suffered from all these symptoms. She required the assistance of a social worker and clinical psychologist before her team of attorneys could even think about

[425] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 304 (2005).
[426] Ibid.
[427] U.S. Department of Veteran Affairs, "PTSD in Refugees."

going to immigration court. REAL ID's revised credibility standard creates an additional obstacle that asylum seekers must overcome, as chronic health conditions produce symptoms that can cause an adjudicator to question the truthfulness and sincerity of the applicant.[428] In response to a question about the impact of the legal process on an asylum seeker's mental state, a clinical psychologist in New York said:

> It feels unethical in some respects. Especially when you have someone who is severely traumatized, may have even thought about suicide, and then they have to go in front of a bunch of strangers and tell them the most intimate, humiliating things. And to appear credible, they have to testify. They have to say these things in court. For some people they can do it, and maybe it's empowering for them. But it's not that way for everybody. As a therapist, it feels uncomfortable making someone talk about something they may not be ready to talk about. And that goes for the whole process. Unfortunately, this is the system we are stuck with.[429]

For applicants—who are forced to recount the details of their traumatic experiences first to Border Patrol agents, then to asylum officers, and finally to government prosecutors and immigration judges—the process of seeking asylum itself can induce PTSD symptoms. Moreover, delays in processing applications, family separation, obstacles to employment, racial discrimination, and loneliness all contribute to high levels of stress and psychiatric symptoms in those who have been previously traumatized.[430]

The U.S. government's delay in processing applications, which has resulted in a massive backlog of cases waiting to be heard, also engenders a great deal of stress for adjudicators. Asylum officers operate on a fixed schedule: from Monday through Thursday, they conduct two interviews per day with Friday set aside to write up the eight decisions. "You are supposed to complete all your cases—that is research, interview, and

[428] Cummins, "Post-Traumatic Stress Disorder and Asylum," 289-92.
[429] Clinical psychologist, interview by author, July 27, 2015.
[430] See Silove, et al., "Anxiety, Depression and PTSD in Asylum-Seekers."

adjudicate—within 4 hours," said a supervisory asylum officer in Arlington. "I've been doing this for a while now, so I get through them pretty quickly. But it's difficult when you first start because you don't know the country conditions that well yet."[431] According to an asylum officer in San Francisco, "For most lawyers at firms, what is taxing about the job is the long hours. In this job, you are not allowed to work overtime, so you can't do as much research and preparation as you'd like. It's very much that you can't be both perfect and keep up with your work. It's stressful, just in a different way."[432] All the asylum officers interviewed mentioned the stress of the job, underlining the burnout caused by having to make a decision with such grave consequences in a limited amount of time, which results in a high turnover rate among staff. Several officers explicitly said that they cannot imagine themselves doing the job for more than two years.

The backlog is even more severe in the court system, where a former Second Circuit Chief Judge commented that each judge has over "1,400 cases a year—or about 80 a week—a virtually impossible task."[433] Similar to asylum officers, a 2008 study that employed traditional psychological testing instruments to measure stress levels found that "immigration judges, whose enormous caseloads consist of one horrific story of human suffering after another, face significant risks of stress and burnout—conditions that make adjudicating cases more challenging."[434] In fact, the study stated that "judges reported more burnout than any other group of professionals to whom the Copenhagen Burnout Inventory had been administered," including prison wardens and hospital physicians, due

[431] Supervisory asylum officer, interview by author, September 2, 2015.
[432] Asylum officer, interview by author, April 16, 2015.
[433] Human Rights First, "Reducing the Immigration Court Backlog and Delays," 5.
[434] Lustig, et al., "Inside the Judges' Chambers," 57.

to the pressure, volume, and complexity of their work.[435] Through a quantitative data analysis of the 96 immigration judges—roughly 45 percent of the 212 judges nationwide at the time—who responded to the survey, the researchers found that the judges suffer from "compassion fatigue" and "secondary traumatic stress." These symptoms may shape their decision-making process; the study found that while some judges may become more lenient after hearing one harrowing case after another, many become desensitized and deny valid asylum claims.

The impact of trauma on an asylum seeker's hearing is most visible in credibility determinations based on "demeanor, candor, or responsiveness." Whereas *S-M-J-* made no reference to an applicant's demeanor and *A-S-* mentioned it only in conjunction with other factors, REAL ID allows adjudicators to base credibility determinations *solely* on criteria such as an applicant's physical appearance, body language, avoidance of eye contact, etc. The difficulty with assessing an applicant's credibility based on these criteria is that they are highly dependent on the cultural backgrounds, temperaments, and personal experiences of the adjudicator and applicant. The 2013 USCIS Asylum Officer Basic Training Course on Cross-Cultural Communication and Other Factors that May Impede Communication at an Interview recognizes this fact by stating, "It is impossible to train asylum officers to understand the cultural norms of all the applicants whom asylum officers encounter. Anthropologists and others spend many years immersed in other cultures and still are not able to learn all the nuances of the culture."[436] The course goes on to provide adjudicators with advice on how to minimize the "negative effects" of communication through a second language, cultural factors, stress, and "personal

[435] Ibid., 60.
[436] Text on file with author.

agendas," but an underlying theme is the recognition of the inherent subjectivity of credibility determinations. Basically, adjudicators are told to just try their best.

Determinations based on demeanor prioritize a judge's expectation of how an asylum seeker is supposed to look, act, and communicate after experiencing persecution and while publicly testifying about the details of that persecution. At the New York immigration court, for example, I observed the hearing of a Haitian man in his early 30s, who provided testimony that he was severely beaten, shot, and had valuable possessions stolen because he was a member of an opposing political party. During the hearing, the ICE trial attorney remarked several times how the applicant was speaking with a "straight face" and questioned the authenticity of his testimony because of a perceived "lack of emotion." Just two weeks prior to the hearing, the previously quoted clinical psychologist told me that it was rare for Haitian men to express emotion in public, especially ones that have experienced trauma. Without an attorney to push back against these judgments or an expert witness to testify on his behalf, the applicant's demeanor resulted in an adverse credibility determination and his asylum claim was denied.

In speaking with immigration attorneys and adjudicators, there is no consensus when it comes to demeanor assessments: while one judge may find an applicant's lack of emotion to be detached and disingenuous, another judge may find too much emotion to be inauthentic and fabricated. The same can be said about an applicant's level of education, exemplified by the following responses from parties in the same jurisdiction—the San Francisco asylum office:

> Immigrants' Rights Attorney: Working with [Central American] clients who have little to no education is difficult. Those clients don't always know how to answer direct questions. They tend to need to memorize things in a certain order which makes them difficult witnesses. And most

> of our clients are really traumatized and that causes all sorts of memory issues. While this office is better than most, I think there is a correlation between less education and higher denials.[437]
>
> Asylum Officer: People who get into the U.S from overseas from countries like China and Ethiopia often have the financial resources to pay for a plane ticket, obtain a visa, etc. They tend to be better educated and better prepared for this process. So, you sometimes wonder … if they were the ones in power instead of the ones being persecuted? But with Central American cases, these aren't high-powered people. They are not the ones that have come to the U.S. with a prepared claim. Oftentimes, they are very unprepared. They don't even know about asylum. To me, there is no question they fled something bad. Why else would you be walking across the desert and confronting danger head on?[438]

Questions about the relationship between an applicant's education and the outcome of his/her case yielded the most diverse and contradictory responses, conveying the subjectivity at play.

During asylum hearings, applicants come face-to-face with adjudicators' stereotypes concerning their race, ethnicity, gender, and sexual orientation. Perhaps no group is more affected by the amplified demeanor provision in REAL ID than asylum seekers persecuted because of their sexual orientation. In *Todorovic v. Attorney General* (2010), the Court of Appeals for the Eleventh Circuit reversed a decision in which an immigration judge in Miami denied asylum because, after studying Todorovic's demeanor, he asserted that the applicant's claims of persecution were "highly suspect." The judge's rationale was that because the applicant did not "appear to be overtly gay," then he could avoid persecution back home by concealing his sexual orientation. The Court rejected the judge's decision in a scathing critique:

> Because of the 'immense *discretion'* conferred on those … who find facts on the basis of oral testimony and demeanor, we require that credibility determinations made by an immigration judge rest on substantial evidence,

[437] Immigrants' rights attorney, interview by author, May 22, 2015.
[438] Asylum officer, interview by author, April 21, 2015.

> rather than on *conjecture or speculation*. One clearly impermissible form of conjecture and speculation, sometimes disguised as a 'demeanor' determination, is the *use of stereotypes as a substitute for evidence* [emphasis mine].[439]

The Court went on to reject credibility determinations that "rest on stereotypes about how persons belonging to a particular group would act, sound, or appear."[440] Nevertheless, stereotypes about an applicant's sexual orientation, heavily influenced by the adjudicator's outlook and bias, still play a major role in credibility determinations. On two separate occasions, I heard immigration judges reference sexual minority applicants' "manly" and "macho" appearances to question the validity of their claims. And during the hearing of a gay Honduran man, an immigration judge in San Francisco—with a grant rate of 2.3 percent—denied asylum because "since there are gay nightclubs in Honduras," he said, "individuals like you should be safe there." Situations such as these are precisely why immigrants' rights attorneys find themselves in a legal and moral dilemma: do they encourage their clients to conform to adjudicators' stereotypes or do they try to transform the decision-making culture into one that is in line with the goals of the human rights community to help future applicants?

In addition to demeanor, REAL ID provides adjudicators with greater discretion to deny a claim based on the applicant's responsiveness to questions posed during the hearing, even though every asylum seeker will have an individualized response to the trauma s/he experienced based on their age, gender, culture, and other psychosocial factors. For example, women and sexual minorities who suffer gender-based persecution

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[439] *Todorovic v. Attorney General*, 621 F.3d 1318, 1325 (11th Cir. 2010).
[440] Ibid.

are often afflicted with an enveloping shame that is exacerbated by the asylum process. According to a social worker in New York:

> I think the experience is different if it's some sort of government entity that tortures or abuses you versus if you were abused by a husband or family member. A lot of the women I work with fleeing domestic violence have less strong relationships … their social network is not as developed. There is this sense of betrayal that gets internalized … and a sense of shame that overcomes them.[441]

At the Los Angeles immigration court, I observed the hearing of Marisol, an unaccompanied minor from Guatemala, who had fled an abusive father and was later trafficked into prostitution in Mexico. A common question immigration judges ask at the beginning of a hearing is: did anyone help you prepare your application? Upon hearing this question, through the court-provided interpreter, she immediately froze. A panicked looked flashed over Marisol's face as she stood utterly still with fright. The male judge asked again in slightly different wording and began to grow impatient with her unresponsiveness. A moment of misunderstanding such as this, which is common in asylum hearings, would be enough to derail a case under REAL ID's revised credibility provisions. This example is reminiscent of the case where a woman's ankle monitor loudly went off in immigration court (Chapter 2). Luckily, Marisol had the help of an immigrants' rights attorney, who explained what the judge was asking, and she responded accordingly. After extensive cross-examination, the judge finally granted her asylum. I then asked her attorney about what had just transpired, and she explained:

> A lot of women fleeing from violence in Central America—especially the indigenous women with limited education … we're talking less than a second or third grade education—interpret this question as meaning did somebody back home, or a *coyotaje*, provide you with a template story to repeat in court. They assume this because that is what they are accused of doing by Border Patrol agents, who are very skeptical of their claims and

[441] Social worker, interview by author, July 27, 2015.

> may lead them into false admissions. And when they report claims to the police back home, they are often the ones accused. So this question triggers all of that blame, all of the doubt they have been subjected to over the course of a lifetime.[442]

Even though Marisol's declaration clearly stated the reasons she was applying for asylum and the name of the refugee advocacy organization that assisted her with the application, the immigration judge's growing impatience with her lack of responsiveness could have defeated her claim before the merits were discussed in detail.

Another impediment to an applicant's claim to be a human rights subject is REAL ID's provision that *any* inconsistency can result in an adverse credibility determination. This is major departure from prior case law—notably the Ninth Circuit's decision in *Mendoza Manimbao v. Ashcroft* (2003)—which stated that "minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution … are insufficient to support an adverse credibility finding."[443] Minor inconsistencies are commonplace during asylum hearings, as applicant's who have experienced trauma often suppress memories or have a difficult time recalling every single detail. "Most of my domestic violence clients have suffered abuse at the hands of their partner for at least a decade, and generally there was abuse from another family member beforehand, so we're talking over 20-30 years of trauma," said an immigrants' rights attorney in San Francisco. "Most people don't remember specific dates or have a chronological timeframe of the events. They just don't think about theirs lives in that [legalistic] way."[444]

Inconsistencies may also arise from misunderstandings, exemplified by this exchange between an applicant from Ethiopia and immigration judge in Atlanta:

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[442] Immigrants' rights attorney, interview by author, June 13, 2015.
[443] *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003).
[444] Immigrants' rights attorney, interview by author, March 11, 2015.

> Immigration Judge: Did anything else happen to you?
> Asylum Seeker: No.
> Immigration Judge: Are you sure nothing else happened to you?
> Asylum Seeker: Yes. Nothing else happened.
> Immigration Judge: But you wrote in your application that you were arrested three times. Why are you omitting that now?

In this exchange, the asylum seeker thought the judge was asking him about the first time he was arrested and detained by government forces for his political opposition, whereas the judge had already moved on to a different part of the applicant's declaration and assumed he was lying. I observed this type of incident numerous times, in which the government prosecutor or immigration judge would ask a question and then immediately move on to another aspect of the claim, leaving the applicant confused. At the Atlanta immigration court, quick denials based on minor inconsistencies are common, as asylum claims are granted only two percent of the time.

This example, which resulted in a denial, illustrates how REAL ID provides adjudicators with greater discretion when it comes to credibility assessments based on subjective factors such as the applicant's "demeanor, candor, or responsiveness" as well as minor inconsistencies between the declaration and testimony. Although it can be determinative of the outcome, credibility is not a legal element of asylum protection. Herein lays the paradox of the legalization of human rights: while asylum claims are based on international human rights and refugee protection standards and their enactment into U.S. immigration law, the adjudication of such claims moves outside of the legal realm as adjudicators are given the power to make subjective determinations which are unavoidably influenced by the individual adjudicator's background, outlook, and bias.

In addition to the subjective aspects described above, REAL ID also emphasizes that decisions depend heavily on the plausibility of an applicant's testimony in relation to

general background information available on the human rights situation in his/her country of origin, referred to as "objective evidence." The text of the law explicitly singles out State Department country reports as a benchmark to judge the applicant's testimony. While such reports appear to be more objective than the criteria described above, the next section will show that there is no mechanism to substantiate the accuracy and fairness of the information included in the country conditions, as well as how that information is utilized by adjudicators to reach a decision.

Corroboration Standards: A Culture of Mistrust

One of main issues confronting asylum seekers and their representatives is that adjudicators increasingly look at corroborating evidence as easily obtainable. Every immigration attorney I spoke with said that because REAL ID provided adjudicators with greater discretion over credibility determinations, they were basically given free rein to demand corroborating evidence. REAL ID codified corroboration standards by laying out the following provisions:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant *satisfies* the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, *the trier of fact may weigh the credible testimony along with other evidence of record*. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence [emphasis mine].[445]

[445] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 303 (2005).

While the first line appears to uphold the benefit of the doubt principle, the last line noticeably heightens corroboration standards. Whereas *Dass* and *S-M-J-* used permissive language that "evidence *should* be provided," REAL ID moved the corroboration requirements beyond what the courts had described by asserting that "such evidence *must* be provided."[446] Now claims supported only by credible, persuasive, and specific testimony may no longer succeed if the applicant fails to produce corroborating evidence deemed reasonably available by the immigration judge randomly assigned to his/her case.

In response to a question about the importance of corroborating evidence to the outcome of a case, an immigrants' rights attorney in San Francisco said, "Nearly all of my clients are super concerned about not having proof. It's one of the first things they say when we meet to discuss the asylum process: 'I'm afraid, but I have no proof.' I tell them not to worry about that just yet, that's like step three or four."[447] This echoes the concerns of Fernando who we met at the beginning of this chapter. While obtaining corroborating evidence is an obstacle for all asylum seekers, sexual minorities are disproportionately disadvantaged. When an asylum seeker flees for political reasons, s/he may be able to locate local news of political activities in their country of origin and political parties often have their own documents or websites. But how are sexual minorities supposed to corroborate their sexuality? It is not as if one can show up to immigration court with a certificate stating s/he is gay. Moreover, many sexual minorities, like Fernando, have spent their entire lives concealing this fact. Either they avoid relationships altogether or their partners are reluctant to come forward out of fear of being outed. In Fernando's case, we were unable to locate anyone back in El Salvador

[446] Conroy, "Real Bias," 25.
[447] Immigrants' rights attorney, interview by author, May 26, 2015.

to corroborate his testimony because no one in his family knew and his friends were afraid. This burden can be too high for individuals from certain countries like "Saudi Arabia or Iran where homosexuality is punishable by death and it can be dangerous to be openly gay or report an anti-gay hate crime."[448]

For asylum seekers who are able to obtain representation, it becomes the central task of their attorney—after conducting the intake interview and assisting with the written declaration—to gather corroborating evidence. Broadly speaking, corroborating evidence can be broken down into two categories, namely applicant-specific and country conditions. Applicant-specific evidence is comprised of documents that verify an asylum seeker's identity and corroborate specific details about his/her fear as expressed in the declaration. Examples include identification cards, birth certificates, passports, letters from family members and friends, reports by medical or mental health professionals, photographs, police records, death certificates, local newspaper articles (translated to English with a certificate of translation), and letters from organizations or groups in which the applicant claims membership (i.e. political party, religious group).

Due to time constraints and heavy caseloads, adjudicators tend to consult a familiar handful of materials to further their understanding on the applicant's country or origin, as explained by an asylum officer in the San Francisco:

> If the applicant has a good lawyer, usually we're going to get a pile of documents about the human rights situation of that country and we don't have time to read it all. We're mostly looking up two or three websites that are relevant to the case, and we're *always citing the U.S. State Department country reports*. I also cite reports put out by organizations like Amnesty International and Human Rights Watch. And if it's a religious based claim, we're required to cite the U.S. Commission on International Religious Freedom Report [emphasis mine].[449]

[448] Bilefsky, "Gays Seeking Asylum in U.S. Encounter a New Hurdle."
[449] Asylum officer, interview by author, April 16, 2015.

Collectively referred to as country conditions, immigration attorneys provide these documents to corroborate the fear expressed in their client's declaration. Country conditions depict the general human rights situation in the asylum seeker's country of origin, paying specific attention to how the applicant's group (political, religious, or social) is treated. Some examples of country conditions are: State Department country reports; reports by UN bodies (UNHCR, Human Rights Council, Special Rapporteurs); reports by international NGOs (Human Rights Watch, Amnesty International); local, and international news articles; and reports by grassroots NGOs in the country of origin.

Additionally, immigration attorneys may solicit testimony from an expert witness—an individual who is qualified by knowledge, education, skill, experience, and training—to fill in any gaps in the proffered applicant-specific and country conditions evidence. For an expert witness, the process of assisting an asylum seeker usually begins with a phone call or email from an immigration attorney or refugee advocacy and human rights organization. However, without their assistance, it is exceedingly difficult for asylum seekers to seek out the appropriate expert.

Experts can be medical or psychological professionals who undertake an exhaustive clinical examination of the applicant's physical and mental trauma. Experts can also be researchers—usually anthropologists, sociologists, or area studies scholars—who have spent years conducting field research and have an intimate knowledge of what is happening on the ground. While general country conditions reports provide the necessary background to contextualize the individual claim, employing an expert helps highlight unique, specific, and recent issues. Experts can go beyond reports by speaking about an applicant's ethnic, linguistic, or tribal identity as well as verifying the existence

of a particular social group, which is central to the claims of women, children, and sexual minorities. The BIA highlighted its view of expert testimony in *Matter of Marcel-Neto* (2010) when it stated that "immigration judges … are often required to determine factual disputes regarding matters on which they possess *little or no knowledge or substantive expertise*, and, in making such determinations, they typically rely on evidence, including expert testimony, presented by the parties [emphasis mine]."[450]

Due to the administrative nature of asylum hearings—immigration court proceedings are conducted by the Executive Office for Immigration Review, an administrative agency of the Department of Justice—the general rule with respect to evidence is admissibility. Not strictly bound by Federal Rules of Evidence, immigration judges are free to consider wide-ranging evidence from diverse sources, as long as "the evidence is probative and its admission is fundamentally fair," as emphasized by the Ninth Circuit in *Espinoza v. INS* (1995).[451] As an immigrants' rights attorney in Phoenix said, "Look, you almost never have a news article or video corroborating your client's story. So you get creative…. I remember once calling Mexico to get a SIM card to hook up to a phone there so that I could get access to the text messages on [the client's] phone that had explicit threats. We downloaded, transcribed, and translated them and used that as evidence."[452] Another immigrants' rights attorney in San Francisco added, "If we don't have enough time to get a proper medical evaluation, I'll have clients bring in their medication and we'll put the bottles up on this table and take photos of them with their names on it. Something is better than nothing."[453] I observed documentation put forth in

[450] *Matter of Marcel-Neto*, 25 I&N Dec. 169, 176 (BIA 2010).
[451] *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995).
[452] Immigrants' rights attorney, interview by author, June 16, 2015.
[453] Immigrants' rights attorney, interview by author, May 26, 2015.

immigration court ranging from photographs of injuries and scars on mobile phones to a blanket used during a female genital mutilation ceremony to shirts with political slogans worn during rallies where the applicants were beaten and detained.

On the surface, these relaxed evidentiary standards appear to favor asylum seekers and their representatives, as they can introduce evidence that would normally be precluded from normal legal proceedings to meet the calibrated standard of proof. Upon closer examination, however, it becomes apparent that the lower standard can be a double-edged sword and work against asylum seekers in two significant ways.

First, due to the abstract and fragmented nature of the evidence presented in asylum hearings, immigration attorneys and ICE trial attorneys are constantly navigating through incomplete information; as such, a culture of mistrust has developed among adjudicators, who skeptically view the evidence before them. According to an asylum officer in San Francisco who estimated that her grant rate was 50 to 60 percent, "I feel like I am a lie detector at times and I didn't get into this job wanting to do that."[454] The officer, who has a background working with refugee communities, added that certain countries of origin like China and India with well-established immigrant networks in the U.S. have come under scrutiny lately because some private practice immigration attorneys have been caught producing fraudulent documents. She lamented how isolated instances of fraud negatively affect the most vulnerable applicants: "It's frustrating to me when someone wastes my time with a bogus claim because it takes an interview slot from someone who really needs it."[455] Second, the lower standard of proof that benefits the applicant is equally, if not more, advantageous to the government, which has far greater

[454] Asylum officer, interview by author, April 21, 2015.
[455] Ibid.

resources.[456] Thus, in cases where the applicant has only his/her testimony as corroboration, there is no limit to the amount of evidence the government can introduce to refute the asylum claim. This includes a common tool used by ICE trial attorneys to undermine the credibility of asylum seekers and draw out any inconsistencies in their testimonies or previous statements: extensive cross-examination.[457] I observed adversarial cross-examinations, including that of children which lasted more than two hours, in which the applicants barely spoke English and were unaware of what the ICE attorney was asking.

With no benchmark to evaluate the wide-ranging evidence from diverse sources, we get decisions from immigration judges that appear to be unfair and erratic. In making a judgment, uncertainty over the facts of the case must be translated into an outcome: grant or denial. Moreover, with the relaxed evidentiary standards, it is important to not just look at what evidence is included or excluded from the record, but also how much weight an adjudicator affixes to each piece presented. It is precisely because immigration judges do not have strict control over admissibility that some forms of evidence are privileged over others. For example, when it comes to expert witnesses, Anthony Good explains that adjudicators may accuse some, such as doctors, of "being hoodwinked" by asylum seekers, whereas "country experts usually do not meet [the applicant] so their evidence appears less dependent on what they have been told."[458] Despite the expertise of individuals who offer to testify on behalf on the asylum seeker, adjudicators have the discretion to call any expert's qualifications and objectivity into question.

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[456] Artola, "In Search of Uniformity," 865.
[457] Kidane, "Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings," 136.
[458] Good, "Undoubtedly An Expert?," 120.

The next two sections will convey how two specific forms of corroborating evidence—State Department country reports and changed country conditions—are afforded special weight, as they are viewed as "objective" facts cast against the asylum seeker's "subjective" experience. I contend that this false dichotomy between subjective and objective elements in an asylum claim conceals the fact that some forms of corroborating evidence are employed by the government to enforce immigration and border control and legitimize gatekeeping.

"All the Lies": State Department Country Reports

Although country conditions may come from a wide range of sources, adjudicators tend to afford U.S. government-produced reports a greater weight over the others. In response, immigration attorneys always include such documentation as part of their clients' applications. "We always use the State Department report. There are things we as attorneys do just as matter of fact," said an immigrants' rights attorney in Phoenix. "If you don't have it, adjudicators will be like, 'Oh how come you didn't include the State Department report?' and grow suspicious."[459] In fact, the Department of Justice's country conditions page for El Salvador, for example, lists State Department reports from 1996-2016 as the primary reference tool for adjudicators to consult.

Published annually since 1977, U.S. State Department Country Reports on Human Rights Practices outline the human rights conditions in countries and regions outside the U.S. in upholding their international commitments to civil and political as well as individual rights. Reports are submitted on all UN member-states, particularly

[459] Immigrants' rights attorney, interview by author, June 16, 2015.

countries receiving U.S. assistance, to Congress in accordance with the Foreign Assistance Act of 1961 and the Trade Act of 1974. The significance of 1977 as the year the U.S. government started publishing reports on human rights globally is not coincidental. Stephen Hopgood argues that human rights became our dominant moral language in the 1970s because of the consolidation of American power in the international system; he states that "from the 1970s onward, a new kind of advocacy emerged that sought to pressure the American state into using its vast resources to coerce, cajole, and induce human rights abroad."[460] Similarly, Samuel Moyn roots the history of our contemporary human rights framework in the year 1977: "[President] Carter's January 20 inauguration … put 'human rights' in front of the viewing public for the first time in American history. This year of breakthrough would culminate in Amnesty International's receipt of the Nobel Peace Prize on December 10."[461] Human rights found an ally in U.S. foreign policy during this period, which hastened its explosion on the international scene during the second half of the 20th century.

Following Hopgood's lead, it is important to note that State Department country reports, while seemingly an example of human rights triumphalism, also represent a highly-politicized version of human rights that serve U.S. strategic interests both at home and abroad. As discussed in Chapter 1, human rights were employed during the Cold War to undermine Soviet influence throughout the world. However, just as human rights came to be co-opted by the U.S. government, several NGOs that would rise to prominence were established in the 1970s to provide an alternative perspective. One of the most well-known international NGOs that conducts research and advocacy campaigns on human

[460] Hopgood, *The Endtimes of Human Rights*, xi.
[461] Moyn, *The Last Utopia*, 155.

rights issues—Human Rights Watch—was founded in 1978. And while Human Rights Watch initially monitored the former Soviet Union's compliance with the Helsinki Accords, Robert Bernstein, the founder of the organization, said that the Americas Watch branch was founded in 1981 to correct "all the lies" of the early State Department country reports.[462] Throughout the 1970s and 1980s, many of the nascent human rights NGOs accused the State Department of focusing exclusively on violations in the Soviet sphere, while completely ignoring violations by anti-communist allies in Central America.

This is most evident in the treatment of Central American asylum seekers during the 1980s. As conveyed in Chapter 1, despite the passage of the 1980 Refugee Act, asylum determinations and refugee admissions under the Reagan administration continued to be guided by foreign policy and political considerations. In response to the mass exodus of hundreds of thousands of Salvadorans, Guatemalans, and Nicaraguans escaping civil war, repression, and economic devastation that was exacerbated by President Reagan's heavy-handed foreign policy in the region, individual adjudicators were told to consult with the State Department, which then offered advisory opinions recommending asylum denials that were routinely adopted by the adjudicators without question. In fact, the interim regulations of the 1980s required adjudicators "to adjourn proceedings and request an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs before reaching a determination regarding an applicant's eligibility for asylum."[463]

It was not until a decade after the passage of the Refugee Act, when the Cold War ended, that regulations were put in place to free asylum decision-making from State

[462] Cmiel, "The Emergence of Human Rights Politics in the United States," 1236.
[463] Ardalan, "Country Condition Evidence, Human Rights Experts, and Asylum-Seekers," 6.

Department (hence foreign policy) tutelage. Going forward, consulting the Department would be optional instead of mandatory. The 1990 regulations reduced the role of the State Department and set forth set a non-hierarchical list of potential sources of information that ranged from government documents to reports from intergovernmental organizations and private voluntary agencies to news organizations and academics. The 1991 settlement in *American Baptist Churches v. Thornburgh* that resulted from the activism of the Sanctuary Movement of the 1980s highlighted these regulatory changes and, in signing the agreement, the Department of Justice agreed that "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution."[464]

While the regulations appeared to usher in a new era of asylum adjudication based on the facts of the individual case and their relation to international human rights standards, some bodies continue to place "special weight" on State Department country reports. In 2010, the BIA in *Matter of H-L-H- & Z-Y-Z-* asserted "State Department reports on country conditions … are highly probative evidence and are usually the best source of information on conditions in foreign nations."[465] By placing State Department country conditions above other forms of evidence, the BIA decision failed to recognize the highly-politicized environments they both serve and operate in. As an asylum officer in the San Francisco office told me:

> The thing about the State Department report is … you wonder what political stuff goes into that. The people who are contributing to the reports are State Department officials in the embassy of that country. They are trying to maintain good diplomatic relations, so things get watered down. My understanding is that the embassy officials give drafts to State

[464] *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).
[465] *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010).

> Department staff in [Washington] D.C. and then it goes through a million different edits before it is published.[466]

This asylum officer is not alone in her concern about the objectivity of State Department country reports. In contrast to the BIA's decision in *H-L-H-,* several federal courts have condemned adjudicators for their excessive dependence on such documentation.

In *Gramatikov v. INS* (1997)*,* the Court of Appeals for the Seventh Circuit stated that "the advice of the State Department is not binding, either on the service or on the courts; there is perennial concern that the Department soft-pedals human rights violations by countries that the United States wants to have good relations with."[467] And seven years later in *Chen v. INS* (2004), the Second Circuit observed that "the immigration court cannot assume that a report produced by the State Department—an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid braiding relations with other countries, especially other major world powers—presents the most accurate picture of human rights in the country at issue."[468] These decisions illustrate that government-produced reports on human rights which have served as a benchmark to evaluate other forms of corroborating evidence are no more objective than the applicant's testimony, as they both represent the respective parties' points of view. The reports are helpful in developing the evidentiary record but should not be afforded any more weight than the applicant's testimony and supporting materials.

For asylum seekers and their representatives, one major problem with State Department reports is that they primarily cover individual civil and political rights—a specific vision of human rights that is far more limited in scope than contemporary

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[466] Asylum officer, interview by author, April 21, 2015.
[467] *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997).
[468] *Chen v. INS*, 359 F.3d 121, 130 (2nd Cir. 2004).

international human rights standards, as it jettisons economic, social, and cultural rights as well as group rights. In fact, the U.S. has not ratified any international human rights treaties since December 2012, even though several new ones have been adopted and other long-standing treaties have gained new members. Moreover, the U.S. has failed to ratify several key treaties: it is the only country other than Somalia that has not ratified the Convention on the Rights of the Child (1989), the most widely and rapidly ratified human rights treaty in history, and it is one of only seven countries—together with Iran, Nauru, Palau, Somalia, Sudan, and Tonga—that has failed to ratify the Convention on the Elimination of All Forms of Discrimination against Women (1979).

Fundamentally, State Department reports are informed by U.S. notions of human rights and its assumptions of other cultures, and therefore, the most vulnerable asylum seekers—those applying as members of a particular social group, such as women, children, and sexual minorities—are often absent from their pages. For example, human rights violations targeting sexual minorities were not included in State Department reports until 1993, and that shift came primarily from the activism of the human rights community and the relentless direct representation and litigation by immigrants' rights attorneys. Furthermore, with REAL ID diminishing an adjudicator's burden to produce evidence and develop the evidentiary record, omissions such as these speak louder than words.[469] These omissions do not just serve as justifications to deny asylum claims, but they also convey that certain groups are not considered "human" enough by the U.S. government to warrant a mere discussion of the human rights violations they suffer.

[469] Conroy, "Real Bias," 32.

Regarding the politicization of human rights, the State Department's 2015 Trafficking in Persons report, which is an annual publication that ranks countries based on their efforts to combat human trafficking, is a prime example.[470] A *Reuters* examination, based on interviews with more than a dozen sources in Washington, D.C. and foreign capitals, revealed that the international human rights experts tasked with evaluating global efforts to fight human trafficking were repeatedly overruled by senior political staff at the State Department and pressured into inflating the assessments of 14 strategically important countries—including China, India, Malaysia, and Mexico.[471] Malaysia, for example, was initially ranked by human rights experts in the lowest tier due to its rampant trafficking, the discovery of suspected mass migrant graves, and continued forced labor.[472] Yet, due to the country's strategic importance for the Obama administration's proposed Trans-Pacific Partnership trade pact, senior political staff at the State Department upgraded Malaysia to Tier 2 status to prevent any potential barriers to the agreement. This blatant disregard of human rights not only destroys the objectivity of such a report at the expense of political posturing but could also be used in immigration court to defeat valid asylum claims.

Another example of the state co-opting human rights to justify immigration enforcement is the 2007 Issue Paper on Youth Gang Organizations in El Salvador produced by the State Department's Bureau of Democracy, Human Rights, and Labor. The introduction explicitly states that the paper was drafted for "use by the Executive Office of Immigration Review and the Department of Homeland Security in assessing

[470] See U.S. Department of State, "Trafficking in Persons Report 2015."
[471] Szep and Spetalnick, "State Department Watered Down Human Trafficking Report."
[472] Ibid.

asylum claims," with the intended purpose of providing grounds for adjudicators to deny asylum claims from individuals fleeing gang violence.[473] At the Phoenix immigration court in July 2015, I observed the asylum hearing of Diego, a 14-year-old unaccompanied minor who fled El Salvador after his father was shot and his life threatened after refusing to join a gang. The ICE trial attorney countered the boy's testimony with the State Department issue paper, which asserts that while "the gang phenomenon presents a major challenge … [El Salvador] does not have a policy or practice of refusing assistance to persons who receive threats or are otherwise victims of gang violence."[474] The purpose of such a document is to serve as a justification for the government's floodgates argument. Politically, by providing documentation to counter claims of children fleeing gang violence in El Salvador, the U.S. government has one Executive Branch department (State) assisting two others (Homeland Security and Justice) in shutting the door on asylum seekers and ensuring that the "floodgates" do not open. The issue paper is just one instance of how ICE trial attorneys, immigration judges, and the BIA selectively use some country conditions information that strengthen their case and omit information that reflects a more robust picture.[475]

From 2011-2016, asylum seekers from El Salvador had their claims granted at the second lowest rate (17.1 percent).[476] Fortunately for Diego, while he was in the custody of the Office of Refugee Resettlement, a social worker put him in touch with an attorney at an immigrants' rights organization. In response to the government prosecutor's stance,

[473] U.S. Department of State, "Issue Paper," 1.
[474] Ibid., 3.
[475] Kerns, "Country Conditions Documentation in U.S. Asylum Cases," 215.
[476] Transactional Records Access Clearinghouse at Syracuse University, "Continued Rise in Asylum Denial Rates," Table 4.

the boy's attorney cited a landmark BIA decision, *Matter of Acosta* (1985), which stated that one aspect of persecution is "harm or suffering inflicted either by the government of a country or an organization that the government was unable or unwilling to control,"[477] the 2010 UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, and backed this assertion with research from a forthcoming Human Rights Watch report.[478] Moreover, Diego's attorney solicited an anthropology professor to serve as an expert witness, who testified that although the government of El Salvador does not have a policy of refusing assistance to victims, the reality is that police are often incapable of providing adequate protection, especially to individuals from lower socioeconomic areas, citing both his research and other academic texts.

The country expert went on to undermine the issue paper by discussing some of the reasons that lead to police inaction, including resource scarcity, indifference, ineptitude, officers' fear of gangs, and corruption—issues that only an expert would be able provide. Due to the aggressive demeanor of the ICE trial attorney, the immigration judge's hands-off approach, and the extremely low success rate of asylum seekers from El Salvador, there is no doubt that without the assistance of the social worker and attorney as well as an expert providing testimony on his behalf, Diego's valid asylum claim would likely have been denied.

This example highlights one significant way in which the human rights community—here an assemblage of immigrants' rights attorneys, researchers at refugee advocacy and human rights organizations, social workers, and academics—can provide a rich, more nuanced understanding of the situation in the asylum seeker's country of

[477] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).
[478] See Human Rights Watch, "Closed Doors."

origin. More importantly, such transnational collaborative efforts—where universal principles are grounded in a serious engagement with the particular—directly contradict the government's highly-politicized and self-serving version of human rights. Ultimately, the judge found the diverse range of corroborating evidence put forth on Diego's behalf to be more objective and holistic than the State Department issue paper, as the boy was granted asylum and allowed to remain in the U.S. Walking out of the courtroom, the boy's smile was wide enough to reach Los Angeles, which is where he was heading to reunite with a family member and enroll in school.

"Like Frosting, With No Cake": Changed Country Conditions

In addition to the politicization of human rights by various government agencies, the issue of changed country conditions is another obstacle asylum seekers and their advocates must overcome. Changed country conditions refer to formal legislative reforms in the applicant's country of origin, such as the ratification of international human rights treaties, recent election results, new domestic laws, new commissions, and statistics on the numbers and types of abuses.[479] Similarly to State Department reports, adjudicators view reports and documents detailing the current legislative environment in the applicant's country of origin as objective evidence; it is up to the applicant and his/her attorney to provide corroborating evidence—in the form of specialized country reports and expert testimony—that can convey the gap between a country's official policies and laws and the human rights situation on the ground. The issue of changed country conditions illustrates a significant paradox when it comes to the relationship between the

[479] Kerns, "Country Conditions Documentation in U.S. Asylum Cases," 209.

human rights discourse and asylum: on one hand, the human rights movement has led to sweeping changes in the laws of many countries that profess to protect the rights of all its citizens; but on the other hand, discrimination deeply embedded in societal structures toward the most vulnerable and marginalized groups endures long after the enactment of such laws. Thus, changed country conditions increase an asylum seeker's burden of proof, as the applicant must demonstrate beyond just the words in his/her testimony that the legislative reforms enacted do not reflect the social reality.

The gap between national legal reforms and the human rights situation on the ground is perhaps most visible when looking at the subordination of individuals applying under the social group category who are not only affected by state-sponsored violence, but face even greater violence in the private sphere.[480] As discussed in the previous chapter, *Matter of Kasinga* (1996) was the pioneering case in the recognition of gender-based claims. Nearly a decade after the decision, however, women fleeing countries where FGM continues to be practiced struggle to convince judges that it is still prevalent in certain regions. In *Uanreroro v. Gonzalez* (2006), for example, the Court of Appeals for the Tenth Circuit found that an immigration judge incorrectly depended on the State Department's report on Nigeria which suggested that FGM had been banned in the applicant's region of the country:

> The IJ [immigration judge] also looked to the Department of State's report on Nigeria generally (country report). The IJ noted that, according to the county report, Edo State had banned the practice of FGM…. However, a closer reading of the report indicates that, although Edo State had banned FGM, the law may not be enforced: In Edo State, the punishment [for FGM] is a $10 fine and 6 months imprisonment. Once a state legislature criminalizes FGM, NGOs have found that they must convince the LGA [local government area] that state laws are applicable in their districts.[481]

[480] See Charlesworth, "What are Women's International Human Rights?"
[481] *Uanreroro v. Gonzales*, 443 F.3d 1197, 1209 (10th Cir. 2006).

Here we see the applicant having to overcome not just the State Department's incomplete documentation, but also the judge's flawed reference to changed country conditions. Without the relentless work of grassroots NGOs, human rights activists, and experts documenting localized human rights situations, social group claims will continue to be denied because their harms are under/un-reported by states.

Revisiting Fernando's situation from the beginning of the chapter, one of the most challenging aspects of his case was proving that persecution against sexual minorities is still widespread in El Salvador, despite the fact that formal legislative reforms appear to have improved country conditions. On May 4, 2010, El Salvador's President, Mauricio Funes, issued Decree 56, which prohibits discrimination based on sexual orientation and gender identity in the public sphere and created a Directorate for Sexual Diversity within the Secretariat for Social Inclusion. This decree brought the nation's laws in line with the international anti-discrimination treaties it had already ratified. However, an immigrants' rights attorney in Phoenix who successfully won asylum for a gay Salvadoran man with a claim similar to Fernando's offered this alternative description:

> There have been these presidential decrees and so forth about not discriminating against people based on certain human rights norms, with regard to gender, sexual preference, etc. So you get a lot of press about that. But when you look at it, it's just decree. It's an articulation. It's an aspiration. But it doesn't really change things. You can see it as pressure from the international human rights community or other nations. But you know, there is zero buy in from most of the population in El Salvador. Outside pressure has prompted the government to issue these decrees that are just *like frosting, with no cake*, you know, without any real indigenous support … and it complicates cases for us because now you supposedly have a country that 'respects' human rights when they don't.[482]

[482] Immigrants' rights attorney, interview by author, June 18, 2015.

As this attorney poignantly alluded to, changed country conditions can serve the interests of nation-states in three ways: one, it functions as a veneer for El Salvador's abysmal human rights situation, historically a close ally of the U.S. and recipient of significant aid; two, it brings El Salvador in line with international norms, and hence, facilitates cooperation with other nation-states; and three, it enables the U.S. to employ changed country conditions to enforce it gatekeeping function by defeating valid asylum claims, especially those of applicants without representation who may struggle to meet this increased burden of proof.

In this context, the immigrants' rights attorney provided a roadmap for Fernando's case that was successful for her client. To counter the changed country conditions, she included a 2010 Shadow Report—prepared by several human rights groups and submitted to the UN—that detailed the latest on-the-ground research and data to convey the continued threats against LGBTQ activists and attacks on LGBTQ individuals.[483] In fact, four years after the issuance of Decree 56, numerous acts of violence were documented in 2014-2015 that led the country's legislative assembly to pass a law establishing increased penalties for hates crimes. Moreover, a 2014 Amnesty International report found that despite legislation prohibiting violence against women, "discrimination in the criminal justice system, including negative gender stereotypes and the religious beliefs of some judges, prevents women from accessing justice, compounding the abuse they have already suffered."[484] Grassroots human rights activists used the logic in the Amnesty International report to support their argument that the same

[483] See Asociacion Salvadorena de Derechos Humanos, et al., "The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador."
[484] Amnesty International, "On the Brink of Death," 16.

structural discrimination affects LGBTQ rights. In this case, we can see the human rights discourse as both suppressive and subversive: while the nation-state employs formal legislative reforms to exert its control, the human rights community—here in the form of immigrants' rights attorneys and volunteers utilizing research from human rights NGOs—provides a more accurate depiction of situations facing sexual minorities. In fact, the five groups that produced the Shadow Report are the epitome of a transnational collaborative effort, as they represent every level of the human rights movement: local (Asociación Salvadoreña de Derechos Humanos), regional (Red Latinoamericana y del Caribe de Personas Trans), and international (OutRight Action International, Global Rights), with the assistance of an academic institution (Harvard Law School's International Human Rights Clinic). The result: Fernando's asylum claim was granted.

Just like the situation of sexual minorities, at the San Antonio immigration court in June 2015, I observed the asylum hearing of Maria, a 28-year-old woman who fled Guatemala after suffering years of brutal abuse at the hands of her domestic partner. Although she reported the repeated beatings and threats to police, they simply dismissed her by saying that domestic matters are not of serious concern. One afternoon when her partner was at work, Maria packed up her belongings and went to stay with her sister in another town. However, he immediately tracked her down, entered her sister's house with a pistol, and threatened to kill her if she did not return with him immediately. Fearing that the next incident would result in death, Maria fled Guatemala to reunite with family members in Texas who had left Guatemala during the great unrest of the 1980s. After arriving at the border and requesting asylum, she was held in an immigration detention

center for four weeks until she was released to her family in San Antonio, which is where her asylum hearing would take place.

Unable to afford an attorney, Maria told me before the hearing that she remembered bits of information from the "Know Your Rights Presentations" given by visiting pro bono attorneys at the detention center and was praying for a friendly judge. From 2011-2016, asylum seekers from Guatemala had their claims granted at the fourth lowest rate (22.8 percent), and those without an attorney at an even lower rate.[485] Communicating in Spanish through the court-provided interpreter, she informed the judge that she was seeking asylum on account of her membership in a particular social group—persecution based on gender—and laid out the details of years of domestic abuse. In addition to her testimony, Maria provided the judge with corroborating evidence in the form of letters from her doctor and sister and some photographs of her injuries. The ICE trial attorney countered her testimony with documentation of several laws that Guatemala recently adopted to directly address gender-based violence, including domestic violence, violence against women and femicide, and sexual violence and trafficking.[486]

Additionally, the trial attorney pointed out that in 2008, Guatemala established the Procurador de los Derechos Humanos (Human Rights Ombudsman), a government agency tasked with enforcing citizens' cooperation with human rights laws. It was the U.S. government's stance that Guatemala was taking serious steps to combat gender-based violence. Without representation, Maria visibly had difficulty following the ICE

[485] Transactional Records Access Clearinghouse at Syracuse University, "Continued Rise in Asylum Denial Rates," Table 4.
[486] The report presented by the trial attorney included the following legislation: 1996 Ley para prevenir, sancionar y erradicar la violencia intrafamiliar (Law on the Prevention, Punishment and Eradication of Domestic Violence); 2008 Ley contra el Femicidio y otras Formas de Violencia Contra la Mujer (Law against Femicide and Other Forms of Violence Against Women); and 2009 Ley contra la violencia sexual, explotación y trata de personas (Law against Sexual Violence, Exploitation and Trafficking in Persons).

trial attorney's legalistic arguments as well as the judge's questions. To draw out inconsistencies in her testimony, on three separate occasions the judge asked, "Well, why didn't you leave earlier?" Maria told him the first time that she was helping to support her mother but grew confused and timid by the judge's repetitive questioning.

According to a 2012 report by the Small Arms Survey—a center at the Graduate Institute of Development Studies in Geneva, Switzerland—gender-based violence is at epidemic levels in Guatemala. The country ranks third in the killings of women worldwide, behind only El Salvador and Jamaica, and murders are not properly investigated and rarely result in convictions.[487] In the long term, it is hoped that the legislative reforms will lead to an improvement of the human rights situation on the ground for all citizens, but the weakness of the justice system, absence of free institutions, and most importantly, a lack of social change at the community and local levels all contribute to a system where women routinely suffer human rights abuses. The prevailing culture of *machismo*, which can be characterized as a strong sense of masculine pride, underpins patriarchal power though an institutionalized acceptance of brutality against women that leads to high rates of violence. Human rights organizations and academics argue that the power difference in the relationship between men and women not only creates the social norm of *machismo* which condones violence, but it also places blame on the victim.[488] This highlights the fundamental tension that changed country conditions pose to those fleeing gender-based violence, as legislative reforms have done little to alter the discrimination deeply ingrained in societal structures.

[487] See Small Arms Survey, "Guatemala at the Crossroads."
[488] Guinan, "Nearly 20 Years After Peace Pact, Guatemala's Women Relive Violence."

That is why it is imperative to conceive of the relationship between asylum and human rights as not just a matter of formal law, but a complex interaction of law with politics, culture, and society. By incorporating a more dynamic perspective, we can see how a country's human rights situation is fluid: governmental change can be either regressive or progressive and the social acceptance of human rights ideas may take years or decades to filter down to the community level.[489] This is precisely why expert witnesses tend to be anthropologists, social scientists, and area studies scholars who can provide adjudicators in the U.S. with a more detailed and nuanced understanding of the applicant's culture. "Asylum cases are one of those things where different disciplines come together. The lawyers lead it, but then you have anthropologists, sociologists, psychologists, religious leaders, sometimes there is even a political angle to it," described an immigrants' rights attorney in Phoenix. "You got all these things coming together. It's like a bridal veil—everyone is holding a little bit of it up while the wind is blowing at our backs."[490] In Fernando's case, we were able to procure an expert witness who had conducted years of field research in El Salvador; he testified that Salvadoran society, despite the country's anti-discrimination legislation, considers gay men to be "undesirable" and that LGBTQ individuals pose a threat to the strict gender binaries that are at the core of *machismo* culture.

The discipline of anthropology, Mark Goodale argues, has a lot to contribute to the human rights discourse because it is a kind of dialectical social theory that puts the universal in dialogue with the particular, which over time, has the potential to contribute

[489] Margulies, "Democratic Transitions and the Future of Asylum Law," 47.
[490] Immigrants' rights attorney, interview by author, June 16, 2015.

to the protection and empowerment of human dignity.[491] Similarly, Sally Engle Merry in her seminal work *Human Rights and Gender Violence* (2006) provides an ethnographic analysis of the globalization of human rights approaches to combat violence against women. In observing human rights work both at the international level with UN diplomatic negotiations and at the local level with the workings of grassroots feminist organizations in several counties, she states, "In order for human rights ideas to be effective … they need to be translated into local terms and situated within local contexts of power and meaning. They need, in other words, to be remade in the vernacular."[492] In the asylum context, the intermediaries between the international human rights legal framework and local contexts are immigrants' rights attorneys, human rights lawyers and researchers, international bureaucrats and aid workers, and grassroots human rights activists—individuals who are able to freely move between the global/local linguistically and culturally. It is these individuals who "translate global ideas into local situations and retranslate local ideas into global frameworks" that form the backbone of the human rights community.[493] This is precisely why some of the world's largest NGOs are undergoing a restructuring process to shift their operations away from Europe and North America and "closer to the ground," according to Salil Shetty, the Chief Executive of Amnesty International.[494]

Returning to Maria's hearing, as the immigration judge reviewed the facts of the case, he said that while her testimony was credible, she was unable to corroborate many of her claims. He questioned the objectivity and veracity of the letters written by her

[491] See Goodale, *Surrendering to Utopia*.
[492] Merry, *Human Rights and Gender Violence*, 1.
[493] Ibid., 134.
[494] Moorhead and Clarke, "Big NGOs Prepare to Move South, But Will It Make a Difference?"

doctor and sister back in Guatemala because they were dated after her arrival in the U.S. This illustrates one of the central difficulties faced by asylum seekers: despite offering some form of corroborating evidence, the relaxed evidentiary standards in immigration proceedings may result in an adjudicator expressing doubt and mistrust about the applicant's intent. In this case, the judge stated that the letters must have been composed with the applicant's specific asylum claim in mind. Another judge could reasonably look at the same evidence and find them not just sufficient, but more than what was needed given that her testimony was deemed to be credible.

Additionally, the judge found that Maria did not adequately show that the government of Guatemala had failed to protect her and that her proffered social group based on gender was not the reason she suffered abuse; rather, the judge said that "her husband acted arbitrarily … and that abuse in domestic relationships is a feature of all societies." This statement completely overlooks the recent BIA decision in *Matter of A-R-C-G-* (2014), which recognizes that victims of domestic violence can establish asylum eligibility as members of a particular social group. Ultimately, the judge denied her claim because he found the abuse not to be tantamount to persecution. With limited resources, Maria's chances of appealing the decision are slim to none. She can either return to her country of origin and face the prospects of persecution or remain in the U.S. without legal status, live in the shadows, and hope to evade immigration enforcement.

What is important to highlight in the judge's decision is that he used language that conveys an outright hostility to domestic violence as a human rights issue. The judge's sexist comments about domestic violence being "a feature of all societies" says more about his outlook than it does about the asylum claim. For women's rights to be included

in the discourse of human rights—and this applies for all social group claims—they must not just be enacted legally, but they must be acknowledged politically and culturally accepted at all levels of society. As Catherine MacKinnon explains, "Becoming human … requires prohibiting or otherwise delegitimating all acts by which human beings as such are violated, guaranteeing people what they need for a fully human existence, and then officially upholding those standards and delivering on those entitlements."[495]

Adjudicator Bias: Backgrounds and Outlooks

Maria's case illustrates that in addition to overcoming the heightened credibility and corroboration standards, as set out in REAL ID, asylum seekers must also contend with adjudicators' personal biases. It would be naïve to think that adjudicators do not have already formed opinions on the highly-politicized issues they preside over; as such, there are instances when immigration judges depart from their role as neutral arbitrators. In *Lopez-Umanzor v. Gonzalez* (2005), the Court of Appeals for the Ninth Circuit found that a judge had been unfair when he refused to hear testimony from the applicant's domestic violence experts. According to the Court, "the judge's assessment of the Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture; and his refusal to allow the Petitioner to challenge those views by presenting expert testimony violate the Petitioner's right to due process."[496] To address such biases that result in discrepancies in asylum adjudication, the Department of Justice launched a training session in the summer of 2016 "to recognize and address implicit bias," which incorporates "the latest social science research and best practices in law enforcement" to

[495] MacKinnon, *Are Women Human?*, 2.
[496] *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005).

arrive at better decisions—acknowledging that asylum decisions move beyond the legal realm when adjudicators base their determinations on subjective criteria.[497]

Even if Maria had the assistance of a competent immigration attorney and resources to obtain an expert witness, the outcome of her case may have been decided from the very moment she received her Notice to Appear in court. From 2011-2016, the judge assigned to her case had one of the lowest grant rates in the country at 3.6 percent; only 14 out of 253 judges granted asylum less often. What is remarkable is that had Maria been assigned to the judge in the adjacent courtroom, the outcome of her case may have been different. That judge had a grant rate of 76.1 percent, well above the national average. Every immigration attorney I interviewed emphatically stated that the most frustrating aspect of the process is the variation in outcomes from judge to judge. When it comes to asylum cases, there is no such thing as a guarantee.

The 65-year-old judge assigned to Maria's case had been working for the government in an immigration enforcement role since 1975. Prior to becoming a judge in 1982, he worked as a trial attorney and general attorney for the former Immigration and Naturalization Service, prosecuting immigrants in removal proceedings. Whereas immigration attorneys represent their own clients in court, DHS trial attorneys represent the government, which dictates policy from the top-down and severely limits the exercise of professional judgment and discretion.[498] After all, the DHS' mission statement reads: "secure and manage our borders, enforce and administer our immigration laws, and

[497] U.S. Department of Justice, "Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel."
[498] Zimmer, *Approaching the Bench from Inside the Immigration Court*, 35.

prevent terrorism and enhance security."[499] Nowhere in that mandate are the words "humanitarian" or "human rights"; they do not appear to be part of the culture.

"The two core aspects of the [asylum] program are humanitarian and national security," said an asylum officer in San Francisco. "Most of the asylum officers in this office are sympathetic to immigrants. We are the most progressive office in the country. But it feels like those [DHS trial attorneys] in immigration court are in it for the enforcement and security aspect."[500] Not only does this comment point out the differences between affirmative and defensive hearings, but it also conveys that many trial attorneys who go on to become immigration judges have been greatly influenced by DHS' culture of enforcement that prioritizes border control over the rights of the applicant. In speaking about the differences between affirmative and defensive asylum hearings, an asylum officer in New York told me, "Judges have vast differentials in granting rates. It's like night and day. Honestly, to me it's borderline illegal. Judges don't have to write their own decisions, but we have to show our supervisors. So, if we want to deny someone asylum, we really have to lay out our reasons, but judges don't. Most don't formally write down their decisions. They have too much discretion."[501]

In contrast to the judge who presided over Maria's case, the 55-year-old judge in the adjacent courtroom had a reputation for being an open-minded and fair adjudicator. Prior to becoming a judge in 1994, she worked as a staff attorney for a legal aid organization that represents immigrants in removal proceedings and then served as the executive director of a non-profit organization that assists Central American refugees.

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[499] U.S. Department of Homeland Security, "DHS, Our Mission."
[500] Asylum officer, interview by author, April 21, 2015.
[501] Asylum officer, interview by author, July 27, 2015.

The difference between the two judges' experiences could not be starker. Discrepancies in adjudication even between immigration judges in the same jurisdiction is a major cause of anxiety for immigration attorneys and their clients. As an immigrants' rights attorney told me, "Judges mean everything for the outcome of the case. The San Francisco immigration court is one of the best, but we're getting five new judges here. And we're terrified because we hear that they are all men and that four of them were [government] prosecutors. We're all really nervous."[502]

Despite being appointed by the Attorney General, who is a political appointee of the President, the work of an immigration judge is meant to be impartial and nonpolitical. However, according to an analysis by the *Washington Post*, the Bush administration from 2004 to 2007 repeatedly prioritized partisanship over judicial expertise.[503] At least one-third of the immigration judges appointed during this period had ties to the administration or Republican Party, and over half lacked any experience in immigration law. Moreover, those judges with experience in immigration law were trial attorneys or held other positions in immigration enforcement. This was preceded by President Bush's Attorney General, John Ashcroft, undertaking what critics called a "purge" of BIA members he deemed to be "pro-immigrant," as discussed in the previous chapter.[504] This overt politicization of appointments, coupled with the dismissal of judges and Board members sympathetic to the plight of migrants and asylum seekers, was a reversal of the Clinton administration's outlook, which sought to strike a balance between individuals with prior government experience and those who held positions at non-profit, legal aid, or refugee

[502] Immigrants' rights attorney, interview by author, March 11, 2015.
[503] Goldstein and Eggen, "Immigration Judges Often Picked Based on GOP Ties."
[504] Alonso-Zaldivar and Peterson, "5 on Immigration Board Asked to Leave; Critics Call It a 'Purge.'"

advocacy organizations that represented immigrants. The Obama administration diversified the ethnic and gender makeup of the courts, which was predominantly white and male, but still erred on the side of appointing those with government experience.

As laid out in the Introduction (Table 2), in 2015, grant rates in the country's 57 immigration courts ranged from two to 84 percent. Of the courts that heard at least 100 cases and were not adjacent to detention centers, four had grant rates under 10 percent and four over 70 percent:

Individuals Granted Asylum Defensively by Immigration Court [Number and Percent] (2015)

Immigration Court	***Number Granted***	***Number Denied***	***% Granted***
Atlanta, GA	5	239	2%
Las Vegas, NV	3	102	3%
Dallas, TX	24	255	9%
Houston, TX	32	309	9%
San Francisco, CA	596	206	74%
Boston, MA	173	59	75%
Honolulu, HI	162	37	81%
New York, NY	4,423	847	84%

Looking at the three immigration courts with the lowest grant rates—Atlanta, Las Vegas, and Dallas—what distinguishes these courts from ones with higher grant rates is that they do not have a single female judge sitting on the bench. In contrast, the four immigration courts with the highest grant rates—New York City, Honolulu, Boston, and San Francisco—had more female than male judges. Out of the 26 judges in New York, for example, 15 were women. The U.S. Government Accountability Office analyzed the outcomes of asylum applications completed by the Executive Office of Immigration Review between 1995 and 2014 and found that "female judges granted asylum for defensive applications at a rate 1.4 times higher than male judges."[505] From my observations at various immigration courts—including Atlanta, Houston, San Francisco,

[505] U.S. Government Accountability Office, "Asylum," 33.

Boston, and New York, among others—generally speaking, female judges were not just more likely to grant cases under the social group category, which include claims made by women, children, and sexual minorities, but they were also more adept in communicating with the applicant and exhibiting patience to elicit the details of the case to develop a full evidentiary record. In discussing the impact of the judge's gender on the outcome of a case, a former immigration judge in San Antonio, who immigrated to the U.S. from Mexico when she was a child, said, "I sympathize with people's hardships and use the law to benefit those who are deserving. Women, I have found, are better at sympathizing with asylum seekers."[506]

Another reason for wide variations in the outcomes of asylum cases is the prior work experience of the immigration judge. The nine male judges in Atlanta, Las Vegas, and Dallas all had previous experience working in government, either as trial attorneys, judges, or in other immigration enforcement positions. Immigration courts with higher grant rates, however, employed judges with varied backgrounds. In New York, Honolulu, Boston, and San Francisco, roughly an equal number of judges came from one of the three following groups: individuals who held government positions in immigration enforcement; individuals who represented immigrants at non-profit, legal aid, or refugee advocacy organizations; and individuals who worked in private practice or academia. The one outlier in the chart above is Houston, where three out of the six judges were women and still only granted nine percent of cases. However, after taking into account that a large portion of the cases at the Houston court are women and children fleeing gang violence in Central America and recently released from immigration detention—coupled

[506] Retired immigration judge, phone interview by author, February 20, 2016.

with the fact that the Fifth Circuit is known as one of the most conservative appeals courts in the country—what stands out is that all the judges previously worked for the government in an immigration enforcement capacity. And judges with this background tend to be clustered in politically conservative states in the South and Southwest.

In speaking about adjudicators with previous government experience, the former supervisory asylum officer in Houston mentioned above said, "They are all going to give you the same answer, and they are all going to give you the same solutions. They tend to think between the same limited boxes, and I can probably tell you how they are going to rule on any given case. What we need is more experiential diversity."[507] His call was for adjudicators to represent all forms of diversity—ethnic, gender, professional, etc. In the context of hiring asylum officers, which is a task delegated to the supervisors in one of the eight regional offices, he emphasized looking for the candidates with different qualifications than the usual attorney or government staffer like social scientists, historians, or individuals who have worked abroad with international NGOs or aid organizations. Likewise, asylum officers also choose their location based on their personalities: "I knew this office [San Francisco] had the highest grant rate, so I only applied to work here," said an asylum officer with prior experience representing children and sexual minorities in immigration court. "I didn't really want to go someplace where I would constantly be butting heads with a supervisor who didn't see the world the way I did."[508] Thus, each of the eight offices develops a distinct culture based on the supervisor's outlook.

[507] Supervisory asylum officer, interview by author, July 7, 2015.
[508] Asylum officer, interview by author, April 16, 2015.

Variations are much more pronounced in immigration court for all the reasons mentioned throughout this dissertation, such as the hiring/firing of immigration judges based on partisanship, the politicization of the BIA and consequential incongruent case law in various circuits, the gender of the immigration judge, the experience and outlook s/he brings to the bench, and the location of the court and types of claims presented there. Thus, we get a set of jurisdictions where some adjudicators "would not give asylum to Jesus himself," according to a private practice immigration attorney in New York, and others who are willing to push the boundaries of asylum categories, while most fall somewhere in the middle.[509]

Conclusion

Asylum adjudication has increasingly come under scrutiny for producing inconsistent decisions. Phrases such as "asylum lottery" have been employed to convey the vast statistical discrepancies in outcomes between immigration courts and even judges in the same jurisdiction or courthouse.[510] The authors of *Refugee Roulette*, all legal scholars, conclude their study with a series of recommendations to reduce disparities in adjudication, such as: depoliticizing the immigration courts and BIA; creating a more professional culture in the reconstituted court; adopting more rigorous hiring standards for immigration judges; providing more staff and equipment for immigration judges; providing better and more frequent training for immigration judges; requiring immigration judges to issue written decisions after merits hearings; and

[509] Private practice immigration attorney, interview by author, July 27, 2015.
[510] Prasad, "The Asylum Lottery."

providing appointed counsel for unrepresented indigent asylum applicants.[511] There is a belief that these institutional changes will lead to decisions that are more transparent and fair. From a strictly pragmatic standpoint, I would go even further and implore the U.S. government to allow all asylum seekers to begin the process affirmatively and scrap the immigration court system and BIA altogether for an independent and impartial review board composed of international human rights and refugee experts appointed by a neutral authority like UNHCR.

Nevertheless, this chapter has attempted to provide a more nuanced analysis of the legalization of human rights. Because the bureaucratic processes that asylum claims get filtered through are ultimately a form of migration management based on the assessments of individual adjudicators, there will always be asylum seekers with valid claims that get *refouled*, hence undermining the legitimacy and effectiveness of the asylum system and the larger human rights framework. Yet, if we abandon these processes altogether, then we will likely be left with asylum decisions that are wholly political. Given the structural challenges to the protection of irregular migrants' rights—namely the deeply embedded character of the nation-state, the "schizophrenic" nature of liberal democracy, and the co-optation of human rights by the state—there may be moments when asylum is offered to refugees in dire need; however, given our current political climate, it is far more likely that such a move would signal the end of asylum as we know it. Thus, the legalization of human rights does serve an important function in maintaining a certain minimum standard, and perhaps more importantly, continuity in the recognition of the rights of asylum seekers. It posits, at least in theory, the moral

[511] Ramji-Nogales, Schoenholtz, and Schrag, *Refugee Roulette*, 94-116.

absoluteness of the principle of *nonrefoulement*—one that is grounded in a universal notion of humanity. By identifying the shortcomings of the asylum process, only then can we begin to formulate transformative social and political movements and effective legal strategies that challenge the state's unchecked gatekeeping function and extend human rights protections to those that are excluded from protection.

In his analysis of the historical link between human rights and social movements, Neil Stammers states, "Once institutionalized—human rights come to stand in a much more ambiguous relation to power. While they can still be used to challenge power, their origins and meanings as 'struggle concepts' can get lost or be switched in ways that result in human rights becoming a tool of power, not a challenge to it."[512] The U.S. government's politicization of human rights—conveyed in this chapter through State Department country reports and changed country conditions—is one such attempt to bolster sovereignty over asylum decisions. This makes the work of the human rights community that much more important. In the context of burden of proof (credibility and corroboration standards), this community seeks to subvert hegemonic state power in three ways. At the grassroots level, subaltern human rights activists conduct on the ground research and document human rights violations that tend to go under/un-reported. At the international level, NGOs based in the West provide resources to build the capacity of grassroots organizations, conduct research in conjunction with local activists, and engage in advocacy campaigns to raise awareness of these human rights violations.

And collectively, the human rights community operates both within and beyond the confines of the nation-state by taking abstract moral principles and localizing them

[512] Stammers, *Human Rights and Social Movements*, 3.

into concrete rights. "If human rights ideas are to have an impact," writes Sally Engle Merry, "they need to become part of the consciousness of ordinary people around the world."[513] In speaking about how the international human rights movement has transformed the asylum process in the U.S., a private practice immigration attorney in New York who has been representing asylum seekers since the 1980s said, "Thirty years ago, you would be lucky to find one [corroborating] document. Maybe a Human Rights Watch report, that's about it, and you hoped it had some relevance to the country you were working on. That's all there was. But now, you have countless human rights organizations all over the world documenting all sorts of issues."[514] In the face of draconian immigration and border control measures, it is the human rights community—the originating source of such rights—that bears the burden of building greater empathy for displaced and uprooted migrants, asylum seekers, and refugees.

[513] Merry, *Human Rights and Gender Violence*, 3.
[514] Private practice immigration attorney, interview by author, July 28, 2015.

CONCLUSION

On a blistering hot July afternoon in 2015, I sat down with Pastor Alison Harrington of Southside Presbyterian Church in Tucson, Arizona to discuss the prevailing immigration debates in the country. Just as it had done over three decades ago when it ignited the Sanctuary Movement in the early 1980s, Southside Presbyterian opened its doors in 2014 to two undocumented immigrants from Central America—first Daniel Neyoy Ruiz in May and then Rosa Robles Loreto in August—both of whom had received final deportation orders and were left with no other recourse. By October 2014, six individuals at various churches in Arizona, Colorado, Illinois, and Oregon had sought sanctuary to publicly protest their unjust removal from a country where they worked, paid taxes, and raised families (many with children who are American citizens).[515]

Pastor Harrington explained to me that the act of welcoming individuals without legal immigration status into the church as a form of protection and shelter is a tactic of last resort—that is, to prevent imminent deportation at all costs. But the overall strategy of those on the front line of the contemporary sanctuary movement, she said, can be broken down into three interrelated phases:

> There is the hospitality part of it … which is the short-term phase. Hospitality involves all of the logistics that go into having someone live here at the church full-time. So that's providing accompaniment 24 hours a day, making sure the family has enough to eat, there is some financial assistance we provide, there are vigils, and of course integrating her [Rosa] into the life of the church and caring for her family. The hospitality aspect is keeping her safe inside these church doors, while we pursue legal remedies. The medium-term phase is to work with lawyers and get her deportation order closed…. That also involves a whole advocacy strategy like the [handing out of 10,000] lawn signs campaign, doing media work and telling her story, and having her tell her story as well. The long-term

[515] Lo, "Inside the New Sanctuary Movement That's Protecting Immigrants from ICE."

> [phase] is to build a grassroots movement to end all deportations. With that we are working with other churches and communities that have declared sanctuary or have an interest in doing so.[516]

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The numerous testimonials documented throughout this dissertation portray the difficulty that irregular migrants like Rosa and Daniel face in having their fundamental human rights respected, as they are routinely subjected to detention, discrimination, deportation, and even death while trying to cross borders. Yet, while despair about the inhumane and degrading treatment of our fellow human beings and frustration with the shortcomings of human rights law at the domestic and international levels have been depicted in the preceding four chapters, the relentless activism of groups like Southside Presbyterian somewhat surmounts these feelings of hopelessness. The courage espoused by the constellation of individuals and groups that make up the human rights community has inspired dynamic social and political movements and concrete legal strategies to challenge sovereign power and illegal/immoral state policy, recalibrating society's moral compass and pointing us in a direction toward recognizing the dignity of asylum seekers.

Chapter 1 depicted how the Sanctuary Movement of the 1980s led to a string of major legal victories, ultimately securing temporary protected status and new asylum hearings for hundreds of thousands of Central Americans and provoking the formation of new asylum rules in the 1990s that brought the U.S. adjudication system in line with international human rights and refugee standards. Chapter 2 illustrated the potential for migrants and asylum seekers to build alliances with American citizens and engage in political acts that contest the exclusionary order from within immigration detention.

[516] Religious leader, interview by author, July 11, 2015.

Chapter 3 showed that expanding the refugee definition to recognize new human rights subjects is a definite possibility and is accomplished though the tireless direct representation of asylum seekers by immigrants' rights attorneys. And Chapter 4 conveyed how the human rights community produces documentation that challenges state-centric (and at times biased) depictions of human rights conditions in foreign countries in addition to providing social and legal services that help asylum seekers navigate the lengthy and onerous process.

Nevertheless, despite the laborious efforts of the human rights community to protect the inherent dignity of those who are displaced and uprooted, state sovereignty has adapted and evolved to exert control over the asylum process. Draconian immigration and border control tactics like requiring visas and documentation, imposing carrier sanctions, intercepting boats at sea, hiring CBP and ICE agents, expediting removals at the border, building walls, and constructing immigration detention centers have come to be accepted as normal state practice to reinforce territorial sovereignty as the basis for political organization. Furthermore, within national borders there exists a myriad of ways in which sovereign power disperses (often under the radar) throughout government agencies, bureaucratic processes, and adjudicatory state subjectivities to fortify the citizen/non-citizen divide. Some examples proffered in this dissertation include: erecting barriers to legal representation (even for unaccompanied children), developing ankle monitors that track immigrants' movements, fast-tracking cases to expedite deportations, politicizing the hiring of immigration judges and administrative bodies like the BIA, shrinking the protected ground of membership in a particular social group, increasing applicants' burden of proof, producing impartial reports, and providing adjudicators with

greater discretion to grant or deny claims without full consideration of the facts.

Thus, while the continual expansion of the international human rights regime plays an important role in advancing certain minimum standards of treatment toward marginalized and vulnerable populations through legislation and enforcement, normalized states of exception (such as immigration detention), arbitrary adjudication, and selective implementation leave asylum seekers caught between two outcomes: homelessness and sanctuary. To mitigate the gap between the theory and practice of human rights—or the discrepancy between the professed universality of human rights and the lived experiences of asylum seekers in our bordered world—we must, at the individual and community levels, supplement the legalization of human rights with recourse to the ethical principle of hospitality, that is, the notion of welcoming the "other" into one's home as a guest. It is this liminal zone between conditional welcoming and unconditional belonging where our notions of rights and citizenship can take on greater meaning, and hence, allow us to envision new ways of togetherness. At the very least, it creates the possibility for continued dialogue between the citizen and non-citizen, allowing them to engage with one other through public reason and deliberation.

This dissertation has chronicled the persistent appeal of universalist ideas rooted in an expansive notion of human dignity that has taken us from the Revolutionary Haitian Constitution (1805) to the Sanctuary Movement (1980s) to the work of immigrants' rights and human rights activists (today)—historical specificities at the margins that confront hegemonic power. "It is in the discontinuities of history that people whose culture has been strained to the breaking point give expression to a humanity that goes beyond cultural limits. And it is in our empathic identification with this raw, free, and

vulnerable state, that we have a chance of understanding what they say," writes Susan Buck-Morss. "Common humanity exists in spite of culture and its differences. A person's nonidentity with the collective allows for subterranean solidarities that have a chance of appealing to universal, moral sentiment, the source today of enthusiasm and hope."[517]

And so we circle back to hope. Since Pastor Harrington once again declared Southside Presbyterian a public sanctuary for those fleeing persecution she has been inundated with requests for information from media outlets, churches, universities, and human rights groups throughout the country interested in providing sanctuary to unaccompanied immigrant children and family units.

Some 870 miles northwest of Tucson, a similar response to the government's policy of fast-tracking cases to expedite the removal of this marginalized and vulnerable population was enunciated, as several of the original sanctuary groups and congregations in the San Francisco Bay Area renewed their participation in providing sanctuary, referring to themselves as the "New Sanctuary Movement." In October 2014, St. John's Presbyterian Church in Berkeley, California adopted a sanctuary declaration titled "An Interfaith Covenant with Children on the Border," which read:

> As people of faith, we reaffirm our love and commitment to welcome the stranger, the refugee, the dispossessed in our midst…. Today, we renew our covenant of *Sanctuary* to *protect, defend, and advocate* for the children and their families who are fleeing for their lives to our nation. As individual congregations we join together with other congregations to bear witness and stand in solidarity with today's refugees. We pledge the following: one, we will stand in solidarity with an immigrant child and/or family and seek to help in any way we can; two, we will pray for and extend the healing grace and love of God for the trauma that led them here, and seek to help them avoid further trauma; three, we may help with food, shelter, clothing, or employment opportunities; four, we seek to help and accompany them through the immigration and asylum legal process … five, if need be, we will offer sanctuary in our worshipping centers

[517] Buck-Morss, *Hegel, Haiti, and Universal History*, 133.

> from deportation; and six; we will join with refugees to advocate for policy changes and immigration reforms that support protection of human life and family unity, and that address the root causes of violence and the exodus from Central America.[518]

All four religious leaders interviewed for this project said that there are many more challenges facing sanctuary activists today than there were in the 1980s. The two most cited obstacles were getting American citizens to understand the evolving and complex nature of persecution in Central America (transnational gangs, extortion, corruption, and gender-based violence as opposed to political violence at the hands of U.S.-funded death squads and propped up right-wing dictatorships) and the U.S. government's willingness to prosecute individuals and groups assisting undocumented immigrants.

"We designed it [the Covenant] to be a public statement, to be a political call to action, so that other people would get involved and be moved to put pressure on the government for immigration reform and asylum reform," said Pastor Max Lynn of St. John's Presbyterian. "With these individual cases, we are redefining asylum beyond just political violence."[519] In the face of inhumane measures exacted on migrants, asylum seekers, and refugees, creating a hospitable community and offering sanctuary—both as an act of solidarity and to advocate for policy changes—is a step in the *right* direction toward reimagining human rights and citizenship. A step toward recognizing "the inherent dignity and … equal and inalienable rights of all members of the human family."[520]

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[518] Text on file with author.
[519] Religious leader, interview by author, May 29, 2015.
[520] United Nations General Assembly, "Universal Declaration of Human Rights," Preamble.

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