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Asilo para las mujeres:

The Hesitation to Recognize Women as a Particular Social Group under U.S. Asylum
Legislation and Its Effects on the Central American Migrant Crisis of Women



Senior Project Submitted to
The Division of Social Studies
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by
Yamilet Cortes Gil

Annandale-on-Hudson, New York

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Abstract

Under U.S. Asylum Law a person can seek protection by proving that they have been subject to persecution on account of their : 1) political opinion 2) race 3) religion 4) nationality 5) membership in a particular social group (Nexus)¹. In addition to these five grounds of persecution a refugee may also apply for “withholding of removal under the Convention against Torture (CAT)”. The Board of Immigration Appeals (BIA), Federal Circuit Courts, and the Supreme Court continue to hesitate to establish “women” as a particular social group that faces persecution. This study posits the question: why are women not considered a particular social group under U.S. Asylum Law? In order to answer this question I define persecution, explain the qualifications for a particular social group (PSG), and then turn the focus to the main argument that exists against qualifying women as a social group. There will also be an analysis of whether the argument has any substantial foundation and evidence based reasoning. The current Central American migrant crisis of women is the first challenge of this magnitude to U.S. asylum law rethinking its stance on qualifying women as a particular social group. I will explore the multiple causes for this wave of female asylum seekers and how the exclusion of women as a social group continues to disenfranchise victims of sexual crime and persecution based on gender. The effort made by these female migrants to establish their persecution on account of being women, in a region fraught with the highest rates of femicide, is met with multiple obstacles. I contend that as well as the ‘floodgates’ argument that fuels the current interpretation of U.S. asylum law against these claims, there is also another layer of opposition that consists of the historical and persisting discrimination of migrants from the Latin American region. Addressing these forces and uncovering their illegitimacy is necessary because the U.S. legal recognition of women as a particular social group in asylum law has the power to influence international policy on female asylum claims across the world.

¹ Nexus must be established in order to win an asylum claim. Establishing Nexus means to prove that you suffered persecution “on account of” one of the five grounds. - Malett, Shoshanna. “Proving the ‘Nexus’ or Reason for an Asylum Claimant's Persecution.” *Www.nolo.com*, NOLO Legal Encyclopedia, 2018, www.nolo.com/legal-encyclopedia/proving-the-nexus-reason-asylum-claimants-persecution.html.

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Introduction

Through trial and toil, Latin American migrants progressively challenged the biased migrant narrative, motivated migrant workers' rights advocacy, and redefined visions of citizenry. An unexpected but fruitful consequence of the perseverance of Latino migrants manifests itself in the way in which these same migrant experiences extend past Latino issues to challenge the U.S.'s stance on the protection of women in asylum law.

I begin with the core question "Why are women not considered a particular social group under U.S. asylum law?" My analysis begins with the presentation of the main existing argument that supports the interpretation of the law as it currently stands. This is the fear of "opening of the floodgates" that has existed since the beginning of the formation of U.S. border patrol and immigration legislation. My intention is to first explain the logical misgivings of the floodgates argument in order to show how much of it is irrational and lacks evidential support.

I then present the case study of the Central American migrant crisis to explain the type of persecution these women face. Speaking about this migrant crisis, I want to make it very clear that I do not use the term "migrant crisis" lightly. From 2008 forward there has been a recorded fivefold increase in asylum seekers in the U.S. from El Salvador, Honduras, and Guatemala, as well as a thirteen-fold increase in the asylum requests from within Central America and Mexico.² This huge wave of migrants have been shown to be predominantly female and is the first historical challenge to qualifying gender as a particular social group in U.S. asylum law of this

² UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, A Study Conducted by the United Nations High Commissioner for Refugees, "International Protection of Refugees in US Law" (2015) "Since 2008, UNHCR has recorded a nearly fivefold increase in asylum-seekers arriving to the U.S. from the Northern Triangle region of El Salvador, Guatemala, and Honduras. Over the same period, we have seen a thirteen-fold increase in the number of requests for asylum from within Central America and Mexico, a staggering indicator of the surging violence shaking the region." Foreword, António Guterres. 2015

scale. For this wave of migrants to originate from the Latin American region is particularly trying because of the history U.S. immigration law has with Latin American migrants. A history of partisan U.S. immigration law regarding Latin Americans complicates an approach to the crisis.

Going further I unearth the historical exclusive practices U.S. immigration law enacted in order to keep Latin American migrants out. These female migrants already face the challenge of proving their need for protection because of their persecution on account of being women. I explain this history in order to reveal the added obstacle these women face because of their nations of origin and the U.S.'s history with migrants from these nations.

The changes these migrants enact on the U.S. interpretation of women under asylum law has the power to change international policy on the matter. Just as the Guatemalan case of the *Matter of Rodi Alvarado (R.A.)* became the landmark case that protects women escaping domestic violence, further cases could pioneer the effort to qualify women as a particular social group. This crisis provides an opportunity to reevaluate U.S. immigration policy and the influence such a reevaluation would carry could affect the protection of women under asylum law in international policy.

1

Why are women not considered a particular social group under U.S. Asylum Law?

A refugee and asylee is someone that has left their country due to a well-founded fear of persecution. In order to request asylum you must be in the country you are filing for protection in, whereas refugees requesting entry to the U.S. are subject to a different process and subject to the refugee quotas. Immigration quotas refer to the amount of visas that would be issued for each nation for legal entry into the U.S. There is no quota for how many asylum applications will be accepted in the U.S. The key difference between refugees and asylum seekers is that the asylum seeker is already in the country they are requesting asylum with. An asylum seeker must prove that they have a well-founded fear of persecution on account of their race, religion, nation of origin, political opinion, or membership in a particular social group (PSG). These are the five grounds of persecution agreed to in the Refugee Convention of 1951 that are still abided by today. To qualify for asylum for persecution on account of your membership in a particular social group you must establish the legitimacy of the group you claim membership of, and then prove the persecution you faced was because of that membership. There are three specific tests that determine whether something qualifies as a particular social group. These tests have been created through different asylum cases that have been tried in which the Board of Immigration Appeals may implement new tests to further define the particular social group ground of asylum. First the group must have an immutable characteristic, meaning something that exists in the group naturally that cannot be changed or should not be made to change. Second the group must have outer boundaries, meaning that one should be able to identify who is in and out of the

group. Third, the group should be socially recognizable, meaning that the people of the nation of origin should be able to recognize the group as socially distinct.

Being a woman is an immutable characteristic. By woman I refer to a biological female and cisgender women that identifies as a woman. I make this distinction specifically because transgender women would qualify as a particular social group because they are a part of the Lesbian Gay Bisexual Transgender Queer (LGBTQ) community. The LGBTQ community is generally recognized as a particular social group in U.S. asylum law. Transgender women find protection under U.S. asylum law by proving their persecution is on account of being transgender. Whereas when women pursue asylum for persecution on account of being women, they are met with claims that that is “too broad” to be a group.

A landmark case that took a step towards qualifying gender as a particular social group was the Matter of Acosta. The case itself consisted of a 36 year old Salvadoran male taxi driver that founded the taxi collective, COTAXI, and refused to participate in guerrilla-sponsored work stoppages. The respondent’s refusal and that of his members led to him receiving multiple death threats. The respondent argued that the persecution he feared was on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador. The immigration judge found that the characteristics established in his particular social group were not immutable because the respondent and other members of COTAXI could avoid the threats if they changed jobs or cooperated in the stoppages. Therefore the respondent was denied asylum and then appealed the decision which would then go in front of the Board of Immigration Appeals (BIA). The appeal would subsequently be denied but the matter of Acosta is a landmark case because the BIA elaborated on what qualifies as an immutable characteristic and this elaboration would go forward to be

used in future asylum claims as the *Acosta precedent*. The BIA noted that the other four grounds of persecution – race, religion, nationality, and political opinion – describe persecution directed at an immutable characteristic that is “either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it should not be required to be changed.”³

In this elaboration of what an immutable characteristic is qualified by, the BIA pronounced:

Persecution on account of membership in a particular social group encompasses persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. *The shared characteristic might be an innate one such as sex* [italicized for emphasis, not original quote], color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.⁴

Although this is a proper step in the direction of qualifying gender as enough to constitute a particular social group, future asylum claims will demonstrate how the *Acosta* immutable characteristic test is not upheld consistently and through the future asylum claims will come the further narrowing tests on PSG that I refer to as the “outer boundaries” and “social recognition” requirement. I will define these additional requirements of PSG as they arise in the analysis of the *Matter of Rodi Alvarado (R.A.)*.

Defining persecution becomes slightly harder as multiple organizations and bodies of law explain persecution differently. Different bodies of law also interact and affect each other in

³ *Matter of Acosta*, Int. Dec. 2986 (BIA 1985) at 30-31

⁴ *Ibid.*, at 31

varying degrees. The most influential policy that exists today is the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees, otherwise known as the Refugee Convention.

The Refugee Convention defines a refugee as 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 to, or owing to such fear, is unwilling to avail himself of the protection of that country.”⁵ If a person meets the criteria of “refugee”, both the Convention and the Protocol forbid the return of that person to their country of origin.

The United States became a party to the Protocol in 1968⁶ and adopted the main provisions of the article into domestic U.S. law in 1980⁷ but there are some key differences in the documents to point out. One of the most important differences between the documents is how the asylum applicant is required to demonstrate a “well-founded” fear of persecution. In a study conducted by the United Nations High Commissioner for Refugees (UNHCR) it is pointed out that the “well-founded” aspect of the refugee definition asks that the asylum applicant show “reasonable fear under the circumstances” but when the United States chose to adopt the UNHCR’s interpretation they defined a “well-founded fear” as a “reasonable possibility” and added “past persecution” to the refugee definition’s standard of proof.⁸ Amending “past

⁵ (1951 Convention art. 1A(2))

⁶ 1951 Convention; 1967 Protocol. Formally the United States ratified the Protocol, which incorporated the Convention except for certain temporal and geographic restrictions eliminated in the Protocol); UNHCR, States Party to the 1951 Refugee Convention relating to the Status of Refugees and the 1967 Protocol, April 2015

⁷ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

⁸ UNHCR, *Women on the Run*, 34.

persecution” to the refugee definition can create the presumption of a well-founded fear and if the past persecution was severe it can even result in a grant of refugee protection.

Defining Persecution

Demonstrating persecution entails showing serious harm (for instance, a serious human rights violation) *and* a State’s refusal or inability to offer effective protection.⁹ UNHCR recognizes that forms of harm that are gender specific, most prominently sexual violence, constitute such serious harm. Rape, for example, is a form of serious harm within the meaning of persecution, due not only to the physical harm, but also because of the severe and long-lasting psychological harm that it causes.¹⁰

The persecution itself does not immediately qualify under the refugee definition. The harder task is to prove that you were persecuted because of your membership in a particular social group, race, religion, nation of origin, or political opinion. Many asylum cases are denied because the clients do not successfully convince the immigration judge of the causal link between their well-founded fear of persecution and one or more of the convention grounds. This causal link is known as the nexus requirement.

Now although the UNHCR recognizes sexual violence as a significant human rights violation and would substantiate a client’s well-founded fear, it does not matter if a client can prove they were sexually violated and persecuted, they need to prove it was for the reasons covered in U.S. asylum law.

Even though sexual violence can be proven as gender-based violence, women need to narrow down their claim and form a more distinct social group in order to stand a chance in

⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, UN Doc. HCP/1P/4/Eng/Rev.2.1979, (edited 1992), 51 and 65

¹⁰ UNHCR, *Women on the Run*, “International Protection of Refugees in US Law”, 34.

immigration court and that can complicate their claim to a point where the particular social group is completely disproven. Allison Reimann speaks to this explicitly in her 2009 J.D. dissertation for the University of Pennsylvania Law Review publication. She states that because U.S. decision makers stand by the attitude that gender alone cannot constitute a particular social group¹¹ applicants have felt constrained to describe their claims in terms of extremely narrow subsets of women. Unfortunately in these cases gender alone is often the single factor linking the persecution to the protected ground. Reimann points out that this condition creates a paradox of applicants having to define their particular social group very narrowly only to render nearly impossible their ability to establish the required causal nexus between the persecution and their narrowly defined particular social group.¹²

For example a Guatemalan woman can claim to have been targeted, persecuted, and raped by a gang, because she was a woman but she would have to hope that the immigration judge would uphold the *Acosta* precedent. Most cases would end up creating a much narrower group in order to try to justify the tests that would come after *Acosta*. An example of a narrowed down group that would have to go beyond the immutable characteristic of sex would be “Guatemalan women between the ages of x and x who do not have a male figure in their lives.” Although the sexual violence against her could be understood to be because she is a woman the

¹¹ Reimann, Allison W. “Hope For The Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala.” *University of Pennsylvania Law Review*, *University of Pennsylvania Law School*, vol. 157, no. 4, Apr. 2009, pp. 1207–1229, scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1192&context=penn_law_review. Reimann notes that the pervasive attitudes among United States decision makers that gender alone cannot constitute a particular social group are largely out of fear that such an allowance would make half a country’s population eligible for asylum. This evokes the same attitudes governed by the “opening the floodgates” fear that I will discuss in the following sections.

¹² *Ibid.*, 1201

U.S. immigration courts recurrently make decisions that deem that immutable characteristic as not enough to constitute a particular social group (PSG).

Now although the UN Convention became the foundation for asylum and refugee law and many state parties signed on to the standards of the convention, the UNHCR's determinations are not determinative in U.S. immigration court. For example the UNHCR states:

UNHCR interprets particular social group in the context of gender as defined by gender alone or by gender in combination with other characteristics. Indeed, UNHCR's *Guidelines on Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (Gender Guidelines) state "[W]omen [are] a clear example of a social subset defined by innate and immutable characteristics...and who are frequently treated differently than men."¹³

So while the UNHCR acknowledges gender-based persecution, their determinations do not affect U.S. asylum law qualifying gender as a particular social group. Although U.S. jurisprudence made some advances within the *matter of Acosta* in 1985 and *matter of Kasinga* in 1996. The *matter of R.A.* in 1999 revealed the inner hesitations within judicial interpretations of PSG to accepting gender-based claims.

This back and forth of recognizing gender-based claims is possible because each immigration judge has their own interpretation of asylum law but they are supposed to work within the set precedents. When judges go against set precedents and succeed in overturning the precedents then the following cases that claim similar persecution do not have positive case law on their side.

¹³ UNHCR, *Women on the Run*, "International Protection of Refugees in US Law", 35.

Now how can it be that one judge's asylum grant is another judge's denial? There are multiple approaches taken when interpreting the qualifications for "membership in the particular social group." There are cases that have successfully widened the definition and others that have significantly installed barriers for any further progression of the definition. What fuels these varying approaches are multiple irrational fears that penetrated U.S. immigration law since its fabrication. I will be focusing specifically on the fear of "opening the flood gates".

"Opening the Floodgates"- Contradicting asylum decisions

The fear of opening the floodgates of migration to the U.S. is a fear that permeates the different arguments that enforce a narrow interpretation of membership in a particular social group. This fear is a significant obstacle for female asylum seekers claiming gender-based persecution. In varying degrees the U.S. courts have made steps towards qualifying gender as a PSG but they continue to take steps back in the face of newer cases. The fear of opening the floodgates can be found in the language used in the denials of asylum cases. As Jesse Imbriano points out in her Villanova University Charles Widger School of Law dissertation, "courts have claimed concern that the internationally narrow definition of a refugee will be lost if gender is recognized as a basis for a particular social group because everyone will qualify."¹⁴ Imbriano speaks specifically to the matter of *Sanchez-Trujillo v. I.N.S.* quoting the immigration judge's concern with recognizing too large of a group. She continues to point out that the implication

¹⁴ Jesse Imbriano, *Opening the Floodgates or Filing the Gap: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 Vill. L. Rev. 350-351 (2011). Available at: <http://digitalcommons.law.villanova.edu/vlr/vol56/iss2/4>

that a social group should be small is absolutely unfounded and PSG is intended to be as large of a group as its fellow pillars of race, religion, and nationality.¹⁵

Professor Karen Musalo of UC Hastings College of the Law in San Francisco was lead attorney in the matter of Kasinga and represented Rody Alvarado in the landmark case for women escaping domestic violence of the matter of R.A.¹⁶ Musalo has both recognized the existence of the fear of “opening the floodgates” and actively discredits the fear through her consistently produced law scholarship. Musalo recognizes three reasons for why women are not considered a PSG under U.S. asylum law. First there is the contention that the harms imposed on women do not meet the definition of “persecution” because they arise from cultural norms (e.g., female genital cutting, forced marriage, polygamy), or constitute religious requirements.¹⁷ Second it is assumed that persecution must be government-inflicted, and they reject the validity of women’s claims because the persecution is often at the hands of family members or members of the community.¹⁸ Third, and recognized by Musalo as the most important argument, is that it is argued that women’s claims fail to meet the nexus requirement, because women are often persecuted because of their gender, and gender is not one of the five Convention grounds.¹⁹

¹⁵ *Ibid.*, 350-351.

¹⁶ See <http://www.uchastings.edu/faculty/musalo/index> Professor Karen Musalo directs the Center for Gender & Refugee Studies and the Refugee and Human Rights Clinic. She is lead co-author of *Refugee Law and Policy: An International and Comparative Approach* (4th edition), and has contributed to the evolving jurisprudence of asylum law through her scholarship, as well as her litigation of landmark cases.

Professor Musalo was lead attorney in *Matter of Kasinga* (fear of female genital cutting as a basis of asylum), which continues to be cited as authority in gender asylum cases by tribunals from Canada to the United Kingdom to New Zealand. She was co-counsel in the Ninth Circuit en banc decision, *Abebe v. Gonzales*, and attorney of record in *Canas-Segovia v. INS* and *Ramirez-Rivas v. INS*. She represented Rody Alvarado, whose case was a landmark in the struggle for the right to asylum for women fleeing domestic violence. She also represented Ms. L-R-, the asylum seeker from Mexico whose high profile victory broke additional ground on the issue of gender asylum.

¹⁷ Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 *Va. J. Soc. Pol'y & L.* 119 (2007). Available at: http://repository.uchastings.edu/faculty_scholarship/561

¹⁸ *Ibid.*, 121

¹⁹ *Ibid.*, 121 see further cited : “ A related, but different, nexus obstacle arises when women are the victims of rape or other sexual assaults by their political opponents during war or civil unrest. Notwithstanding the political context, it is often argued that the assault was “personal” rather than political. See, e.g., *Campos-Guardado v.*

Musalo explains that these three reasons conflict with the UNHCR's interpretation of the Refugee Convention and its Protocol. As I stated above on page 9 the UNHCR's position on the matter of qualifying gender as a PSG is a positive position but their position is not legally binding to the U.S. application of the guidelines. In monitoring the signatory states application of the Refugee Convention and protocols the UNHCR called for states to provide guidance on gender asylum for their adjudicators to which the U.S. reacted positively by issuing its most favorable Gender Considerations.²⁰ Musalo points out, though, that in the same year the Gender Considerations were issued, a U.S. immigration judge, Donald Ferlise, denied asylum to Fauziya Kassindja. This asylum claim will go on to be called the matter of Kasinga from which a young woman from Togo had escaped to the U.S. and filed her claim for asylum to escape from the fate of being forced into a polygamous marriage against her will and subsequently be subjected to the condition of undergoing female genital cutting. This discrepancy between the UNHCR's standing on gender based asylum, U.S. issued Gender Considerations, and the actual decisions made by U.S. immigration judges reveals the underlying resistance to gender-based asylum claims that Musalo recognizes as the fear of opening the floodgates. Musalo also points out that although Judge Ferlise's decision in the matter of Kasinga was ultimately reversed by the Board of Immigration Appeals (BIA), the resistance Judge Ferlise demonstrated, regardless of U.S. issuance of the Gender Guidelines, was a resistance that would persist and would manifest itself clearly in the 1999 decision of the BIA in the case of Rodi Alvarado in the Matter of R.A.

I.N.S., 809 F. 2d 285,291 (5th Cir. 1987) (holding that there was no showing of political motive on the part of individuals who shouted political slogans during an incident in which they gang raped the female relatives of the leader of an agricultural cooperative, and killed the cooperative leader and his male relatives). *But see Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (overturning BIA's decision that gang rape by soldiers during civil war in Guatemala was a personal, criminal act rather than political persecution).

²⁰ Office of Int'l Affairs, U.S. Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*. (1995)

1999 Matter of R.A. Reversed Decision

The undisputed facts of Rodi Alvarado's claim are that her husband, who was previously a soldier in the Guatemalan military, subjected her to consistent and vicious physical abuse.²¹ Having suffered this abuse for years, Rodi Alvarado made the decision to leave her two small children behind in fear that if she remained, her husband would kill her. She was caught at the border and immediately put into deportation proceedings from which she passed her credible fear interview and applied for asylum. The granting of the Matter of Kasinga in 1996 established favorable precedent for gender based claims of asylum and because of this precedence Rodi Alvarado's first hearing with an immigration judge in San Francisco was met with a grant of asylum. The Immigration and Naturalization Service (INS) appealed that grant and in 1999 the BIA reversed the immigration judge's grant of asylum in the Matter of R.A. Ten years later the Matter of R.A. would finally be granted but not without an immense amount of law analysis that dissects the inner workings of how this matter was deflected and in proceedings for ten years after the first original grant by the immigration judge in San Francisco. These analyses are important to address as they expose the underlying fears of opening the floodgates. The main text I will introduce to expose these discrepancies in immigration judge interpretations is "Gender-Related Asylum Claims and the social group calculus: Recognizing women as a "Particular Social Group" *Per se*" conducted by The Committee on Immigration and Nationality Law of Association of the Bar of the City of New York. Now although this text was written in 2003 while the Matter of R.A. had still not been finalized it is important to use this text because it was

²¹ Her husband broke windows and mirrors with her head, whipped her with electrical cords, threw a machete at her, woke her up with a knife at her throat, subjected her to rape and sodomy, and brutally kicked her around the spine when she was pregnant with their child, in an attempt to cause a miscarriage. Karen Musalo, Matter of R-A-, *An Analysis of the Decision and Its Implications*, 75 INTERPRETER RELEASES 1177, 1179 (1999).

in this interim period that the most scholarship was created to analyze how exactly the BIA could contradict itself so clearly between asylum claims and set precedents. It is within this scholarship that the fear of the floodgates can be found in the language used by the BIA, Immigration judges, and other adjudicators.

The first asylum grant decision to Rodi Alvarado (R.A.) was made by the Immigration Judge (IJ) Mimi Schooley Yam. The IJ found that R.A. had indeed suffered past persecution and established a well-founded fear of future persecution at the hands of her husband²² and proved that the government of Guatemala was unwilling to control him “because domestic abuse... is considered a family matter in which outside intervention is inappropriate.”²³ The particular social group that R.A. claimed was that of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” IJ Schooley Yam stood by the ruling that this group constituted a particular social group and cited the Matter of Acosta when observing that members of R.A.’s group shared gender and past associations, specifically “intimate involvement with a male companion who practices male domination through violence”, and qualified R.A. as having satisfied the immutable characteristic test as according to the *Acosta* precedent.

Specifically important to how this will tie into the Central American Migrant Crisis of women is how Judge Schooley Yam noted that Guatemalan society permits men to control their female intimate companions through violence without fear of legal or social reproach.²⁴

“Identifying Guatemala’s social climate and the government’s inaction as evidence of the

²² Matter of Alvarado, No. A73753922 (San Francisco) Sept. 20, 1996) at 8.

²³ COMMITTEE ON IMMIGRATION AND NATIONALITY LAW ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *Gender-Related Asylum Claims and the Social Group Calculus: Recognizing Women as a “Particular Social Group” Per Se. Section B. “The Immigration Judge’s Ruling and Reasoning”* 20-21

²⁴ *Ibid.*, 21

persecutor's motivations, and noting that "[the applicant], and others like her, are targeted for persecution specifically *because* they are women who have been involved intimately with their male companions, who believe in male domination,"²⁵ the IJ thus concluded that Ms. Alvarado was persecuted on account of her social group membership. The Immigration and Naturalization Service (INS) appealed IJ Schooley Yam's grant of asylum claiming that the respondent had "not demonstrated that she suffered harm or persecution, nor that she fears harm or persecution, based upon race, religion, nationality, political opinion or membership in a particular social group."²⁶ The Committee on Immigration and Nationality Law of Association of the Bar of the City of New York points out that at the time the INS appealed Judge Schooley Yam's asylum grant there had been several other highly publicized Immigration judge grants of asylum in domestic violence cases in which the INS had not pursued appeals. One of the cases that the INS did not appeal were the *Matter of A & Z* that granted asylum to a Jordanian woman who had been "physically and verbally abused throughout a 30-year marriage by her husband, who was a wealthy and successful businessperson; in which the IJ found the applicant to be a member of the social group of women who are "challenging the traditions of Jordanian society and government."²⁷ The other case that the INS did not appeal was the *Matter of M & K* which granted asylum on social group and political opinion grounds to a woman from Sierra Leone who was subjected to female genital mutilation (FGM) against her will, and verbally and physically abused by her husband; the IJ defined the social group as "women who have been punished with physical spouse abuse for attempting to assert their individual autonomy."²⁸ So then the question arises, why appeal the granting of the matter of R.A. if these previously granted

²⁵ *Matter of Alvarado*, No. A73753922 (IJ (San Francisco) Sept. 20, 1996) at 9-10

²⁶ *Matter of R-A-*, Notice of Appeal by INS, Sept. 18, 1996.

²⁷ *Matter of A & Z*, Nos. A72-190-893 & A72-793-219

²⁸ *Matter of M & K*, No. A72-374-558

cases also qualified IJ Schooley Yam's decision on domestic violence and the grounds of PSG? This question is one I will address explicitly in chapter three when analyzing how the fear of the floodgates works in conjunction with a specific fear of undesirable Latin American migrants.

Moving forward the matter of R.A. would change the interpretation of PSG for all future asylum claims because it is within this case that the INS instituted the following two requirements of qualifying a particular social group. The BIA stated:

The Acosta immutable characteristic test stated only a threshold requirement: "The starting point for "social group" analysis remains the existence of an immutable or fundamental individual characteristic in accordance with Matter of Acosta. We never declared, however, that the starting point for assessing social group claims articulated in Acosta was also the ending point." The majority then imposed, in addition to the Acosta test, two fundamentally new, additional requirements for demonstrating the existence of a cognizable social group: (i) that the members of the proposed group "understand their affiliation with the grouping, as do other persons in the particular society;" and (ii) that the harm suffered (i.e. the spousal abuse¹¹⁶) "is itself an important societal attribute, or in other words, that the characteristic of being abused is one that is important within Guatemalan society."²⁹

These two new requirements would come to be known as the "outer boundaries" and "external social recognition" tests in establishing PSG. These new requirements narrow the qualifications of PSG and help to impede the "opening of the floodgates". Although the matter of R.A. would be granted in 2009 after an arduous ten years, and the Matter of Kasinga was granted, the latter asylum claim was used by the BIA against R.A.'s asylum claim in a way that evokes the fears of the floodgates. This is a tactic that continues to be used and persists as different immigration judges refuse to abide by the *Acosta* immutable characteristic precedent

²⁹ Matter of R—A—, Int. Dec. 3403, at 10.

and then the *Kasinga* precedent. Karen Musalo who was the lead attorney for both cases points out that the floodgates were evoked around the *Kasinga* claim. Musalo explains that although some opponents do not admit to fear of floodgates as a reason to deny women's claims, others expressly state that this is the basis for their concern. By others she specifically points out how David Ray of the Federation for American Immigration Reform (FAIR) was quoted in an article as stating that asylum "was never meant to be divorce court To expect asylum law to address family issues is impractical and invites huge abuses of the system... You can't say 'I'm in a bad situation and therefore I'm a member of some new social group.['] If the categories grow so large as to include millions of people, asylum policy is going to crumble."³⁰

The dissents that arose around the *Kasinga* asylum grant claimed that millions of women a year are subject to female genital cutting (FGC) and predicted that the U.S. would be inundated with asylum seekers if it recognized fear of FGC as a basis of asylum. Musalo discredits this notion by explaining that Fauziya Kassindja was granted asylum and the prediction of a flood of women seeking asylum never materialized.³¹ As a matter of fact Musalo references an INS publication that explicitly states "although genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM" after the *Kasinga* decision. In the same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.

³⁰ Dan Stein, *Ashcroft Re-Considers Clinton-Era Asylum Rule*, THE STEIN REPORT, March 3, 2003

³¹ Musalo, *Protecting Victims*. 132

Concluding Thoughts on Fear of the Floodgates

Notwithstanding that the fear of the floodgates is unfounded, it is a fear that permeates the immigration rhetoric and has done so since the foundation of immigration policy in the 1920s. It is a fear that was born of the restrictionist policies that founded U.S. immigration legislation, e.g. the race quotas of the Johnson-Reed Immigration Act of 1924. Karen Musalo uses the evidence found in Canada's experience with becoming the first country in 1993 to issue Gender Guidelines that accept that women fleeing gender-related persecution qualified for refugee protection to prove that the fear of the floodgates is unrealistic. Through the statistics kept in Canadian immigration archives on gender asylum, it was reported that there was no explosion of claims; "to the contrary, gender claims consistently constituted only a minuscule fraction of Canada's total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines."³²

There are multiple reasons as to why the floodgates did not manifest themselves after the matter of R.A. and Kasinga. First, women who have legitimate claims for gender based claims for protection often times come from countries where they have little or no rights and this limits their ability to leave their countries for protection. Second, Musalo points out that these women are often times – if not always – the primary caretakers for their children and extended family which means that while making the journey to the asylum seeker has to leave behind family or expose them to the risks of traveling to the potential country for asylum. This is exactly what Rodi Alvarado and countless other Central American women had to decide when escaping their abuse. Third, female asylum seekers often come from countries where they have little or no

³² Ibid., 133

control over family resources which restricts them from being able to travel to a country where they may seek asylum.³³ These three factors are conditions that do not change easily and are a result of varying degrees of international approaches to the ending of violence against women. As long as the means of travel are so difficult to obtain for migrant women, the fear of the floodgates will remain unfounded but its effects on immigration judges and BIA decisions still persists.

Musalo explains that although this fear is unfounded it does provide incentive to discuss the alternative responses that can answer the fear of an inundation of asylum seekers. The first response that this chapter focused on was the response of denying protection to women seeking asylum for gender persecution as seen in the reluctance to grant the matter of Kasinga and R.A. The second response is the exact direction I have taken for this next chapter. A response that examines the conditions which cause women to flee. The lens here will shift to emphasize the importance of the matter of R.A. not only for cases of domestic violence, but for cases that legitimize the Central American migrant crisis of women. It is no mere coincidence that the matter of R.A. was that of a woman escaping from domestic violence in Guatemala. There are other factors at work here that will provide further challenges to qualifying women as a particular social group under U.S. asylum law. Specifically because the majority of the cases that will challenge the qualifications of PSG will be coming from Central American women.

³³ Ibid., 133

2

The Central American Migrant Crisis of Women

From a post-WWII perspective, when thinking of asylum you would think of someone seeking political asylum because their views threaten the current administration or regime. This chapter serves to explain how asylum status is not reserved for those that fit any preconceived notions and biases of who asylum status would protect. Asylum law is about protecting those who fear for their lives, and protecting those that can demonstrate that their state failed to protect them. In turn when thinking of a migrant crisis, first thoughts may be of crises originating from the Middle Eastern and North African regions. Preconceived notions of political asylees and the inundation of the U.S. media with migrant crises abroad shield the U.S. audience from thinking of Latin America as a region that could fall victim to terrorist-like oppression, subsequently enabling its' own migrant crisis. This chapter will exhibit how migrant crises do not only exist across oceans but more immediately across our own western borders and how this migrant crisis calls into question the standing interpretations of establishing PSG in U.S. asylum law.

The Central American migrant crisis is a product of multiple factors that have thrown the region into disarray. From the complete mishandling of U.S. imprisoned organized crime leaders and their deportation to a civil-war-torn El Salvador, to the deep *machismo* imbedded into the legal systems of Central America, the effects have ravaged the region with gang violence, police corruption, drug trafficking, and the highest rates of femicide of any countries in the world. The violence in Central America can be identified through the country conditions of El Salvador and Guatemala as the forms of violence experienced in these two countries reflects the same violence experienced throughout all of Central America.

More than 3,000 women were murdered in Guatemala between 2001 and 2007.³⁴ What raises alarm about the violence in Central America against women is that the murder rate of women has increased much faster than that of men; between 2002 and 2004, murders of men increased thirty-six percent, while murders of women increased fifty-six percent.³⁵ There also appears a correlation between the victims' gender and the level of brutality of the murders. Specifically the finding that a significant number of murdered women are subjected to sexual violence or sexual mutilation.³⁶ Reimann points out that some victims have been found with "hands tied together with barbed wire, fingernails torn off, decapitation . . . and messages tattooed or written on their bodies, like 'vengeance,' 'one less bitch,' or 'you have paid, bitch.'"³⁷

In a 2005 Amnesty International report on Guatemala the Guatemalan Human Rights Ombudsman's Office had observed that "[i]n the case of women, the brutality used in cases of mutilation is definitely unique by comparison to male victims."³⁸ They noted that even the victims that were not subjected to sexual violence before their murder had suffered mutilation in ways that "demonstrate a particular type of cruelty" that is unique to women, such as disfiguring beauty and severing organs.³⁹ These gendered differences of brutality have bred the understanding of these murders as femicides.

³⁴ Musalo, *Protecting Victims*. 137, see also: U.S. DEP'T OF STATE, GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007 § 5 (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm>. (reporting 603 killings in 2006 and 559 killings in 2007). However, factors including relatives' fears of reporting murders and low confidence in the Guatemalan justice system suggest that these numbers may all be conservative.

³⁵ Reimann, *Hope for the Future?* 1208.

³⁶ See Amnesty Int'l, Guatemala: No Protection, No Justice: Killings of Women 10 n.23 (June 2005) (citing the 2004 Department of State Report on Human Rights Practices)

³⁷ Adrian Reyes, Guatemala: Killings of Women Recall Brutal Civil War Tactics, INTER PRESS SERV., June 23, 2005, <http://www.ipsnews.org/news.asp?idnews=29187>. While not all of these violations on their own would indicate gender animus (for example, a man's fingernails may be torn off as much as a woman's), they take special significance in the context of Guatemala's larger pattern of brutal violence against women.

³⁸ Amnesty Int'l, Guatemala: No Protection. at 10 (quoting the Human Rights Ombudsman's Office, Oct. 2004)

³⁹ *Ibid.*, 10-11

The Amnesty International report connects these forms of brutal murder tactics against women to the same tactics used during Guatemala's thirty-six-year civil war. During the civil war, approximately 50,000 women "disappeared" or were executed, and sexual violence was purposefully used as a weapon of war. Amnesty International sees that the current day brutality of the killing of women and signs of sexual violence on their mutilated bodies bear many of the hallmarks of the terrible atrocities committed during the civil war. For example Reimann points out that "women were raped before being mutilated and killed and the wombs of pregnant women were cut open and fetuses strung from trees." These tactics were used to strike fear in the communities and the vast majority of these acts are attributed to Guatemalan intelligence officials that have not been brought to justice and many of whom are now even serving in law enforcement or private security forces.⁴⁰ The Salvadoran civil war had similar effects and the sexual subjugation and murder of women is an over-arching plague in Central America. The Salvadoran civil war made way for new parasites to take root and spread within the region. These are the transnational gangs that virtually control territory, extort citizens, and persecute women.

The gang violence and persecution that many of these migrant women are escaping today actually originated in 1980 in the U.S. in Los Angeles, California. The initial members of the Los Angeles gangs were refugees escaping the civil wars ravaging El Salvador, Guatemala, and Nicaragua. The two largest gangs were and are the Mara Salvatrucha (M.S.13) and its rival, the 18th street gang, which spread internationally after Bill Clinton's "get-tough" immigration push

⁴⁰ Katharine Ruhl, *Guatemala's Femicides and the Ongoing Struggle for Women's Human Rights: Update to CGRS's 2005 Report Getting Away with Murder*, 18 HASTINGS WOMEN'S L.J. 199 (2007) (detailing the increasing severity of the epidemic in Guatemala and the continued failure of the international community to address it) One report indicated that government forces committed nearly ninety-four percent of human rights abuses and other violent acts during the civil war.

to deport foreign-born residents convicted of wide ranging crimes sent as many as 20,000 criminals to El Salvador, Honduras, Guatemala, and elsewhere from 2000-2004. With the Salvadoran civil war having just ended in 1992, the already weak political and government institutions could not handle the influx of criminals. If gang members were imprisoned they would use the prison as a base of operations for further recruitment.⁴¹ I explain the gangs in such detail because the gang's presence and power in the region could be argued to be a larger force in the region than the actual governing bodies. The gangs control territory, engage in street wars, extort citizens, abduct women, extort public transportation, make deals with the police institutions, and murder anyone that interferes or refuses to cooperate. The gangs are run in cells, oftentimes referred to as cliques, and there is no specific leader known to the gang. Although it is organized as a hierarchy, the cliques operate loosely and some cliques control smaller cliques within specific regions.⁴² This diffuse cell structure makes the gang especially resistant to government crack downs because if the first in command is caught, the second quickly takes his position.

The Constitutional Chamber of the Supreme Court of El Salvador has named the criminal gangs terrorist groups. To name a group a terrorist organization is to grant the police force and military special privileges deemed necessary to pursue the threat. The U.S. recognizes these gangs as transnational criminal organizations. The disparity between each country's recognition of the gangs is an indicator of the risk each country recognizes the gangs to pose. Only recently has the media in the U.S. began speaking about the M.S.13 because of Trump's misguided statements on the gang presence in the U.S. The current president's immigration policies and

⁴¹ "MS13." InSight Crime, 19 Feb. 2018, www.insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile/.

⁴² Ibid see *Leadership section*

push to crack down on immigration echo the same counterproductive measures taken under the Clinton administration that handed the M.S.13 more power and territory. By focusing on mass deportations of criminals back to Central America the U.S. is adding members to the gangs on the ground in Central America that will now have knowledge and experience in the U.S. that serves useful for reentry.

“In the Northern Triangle of Central America (NTCA) countries, the presence of criminal armed groups is pervasive and difficult for the government to control. Recent estimates suggest that there are 20,000 gang members in El Salvador, 12,000 in Honduras, and 22,000 in Guatemala.”⁴³ Central American “mano dura” (“iron fist”) policies involved large-scale government efforts to crack down on gang violence, but recent data shows their effectiveness has been limited.⁴⁴ El Salvador, in particular, is facing the highest rates of murder since the end of the civil war in 1992.⁴⁵

The president’s framing of the gang members as “animals” changes the media perception from whom many of these gang members actually are, children.⁴⁶ As the first members of the M.S.13 were young displaced children scared of the pre-existing crime and poverty they faced,

⁴³ UN Office on Drugs and Crime (UNODC), *Transnational Organized Crime in Central America and the Caribbean: a Threat Assessment*, Sept 2012, p.29)

⁴⁴ Clare R. Seelke, *Gangs in Central America*, Congressional Research Service, Publication No. RL34112, 7-5700 (20 February 2014) p.6)

⁴⁵ The Guardian, “El Salvador Gang Violence Pushes Murder Rate to Postwar Record,” 2 September 2015

⁴⁶ Martínez, Óscar. “Trump Is Making MS-13 Stronger.” *The New York Times*, The New York Times, 17 Feb. 2018, www.nytimes.com/2018/02/17/opinion/sunday/trump-ms-13-gang.html. “Deporting gang members, however, seems to have actually helped stimulate MS-13’s growth in the United States. There are now around 10,000 members in 40 states. Gang members who are deported to El Salvador simply regroup in the heart of the criminal organization and then many head back to the United States, where they operate in “*clicas*,” or subgroups, like the Sailors Locos Salvatrucha and Teclas Locos Salvatrucha in Maryland. All Washington is doing is handing MS-13 recruits who know how to navigate the United States...Long Island, where prosecutors say two girls were beaten to death by MS-13 members in 2016, is one of the many places where the gang has expanded. The police have been fighting the gang there since 2007, but MS-13 continues to murder and grow more powerful because the authorities have failed to attack the organization at its roots. The people accused of killing those girls were not hardened murderers with tattoos, members of a “cartel,” as Mr. Trump described the gang in 2017. They were teenagers. They were also part of the gang’s hard-core American ground forces: young immigrants, either with or without papers, lost and lonely in a new and violent world, where they have responded to the first institution that has lent them a hand — MS-13, not the United States government.”

so are the migrant children today that join the gangs out of feeling they had no other choice and out of search for protection. The existence of the gang is treated by the U.S. as an issue that can be dealt with as an immigration issue, whereas the actual tactics, organization, and power of the gang could constitute it as El Salvador recognizes it, a terrorist group.

The authority these gangs hold cannot be overstressed and the lack of media coverage for their terrorist-like oppression should not indicate that their victims are any less refugees than the mainstream depiction of refugees. Although WWII refugees and post-9/11 terrorist studies fuel the U.S. perception of refugees and terrorists there is indeed a migrant crisis in the western hemisphere from the Central American region. El Salvador's recognition of these gangs as terrorist organizations speaks to the chaos occurring on the ground that has forced citizens to flee in search of the protection their state cannot grant them.

As long as the U.S. continues with the same immigration practices and law enforcement techniques that continue to strengthen the M.S.13 and 18th street gang, it can be expected that the gang's almost 40 year presence in the United States and Central America will not be meeting an end anytime soon. During this time one of the most vulnerable communities suffering at the hands of these gangs are Central American women.

A common theme among women interviewed was that, due to their gender, they were both targets of violence and unable to find adequate protection.⁴⁷...All three NTCA countries have made some effort to put in place laws to protect women from Sexual and Gender Based Violence.⁴⁸ But these laws have not been effectively implemented and offer only limited protection to women. Under-reporting of

⁴⁷ UNHCR, *Women on the Run*, "Violence and Insecurity Due to Criminal Armed Groups" 17

⁴⁸ Decree No. 97-96, 24 October 1996, Law to Prevent, Punish, and Eradicate Intrafamily Violence (Guatemala); Decree No. 132-97, 29 September 1997, the Law on Domestic Violence (Honduras); Decree No. 902, 5 December 1996, the Law on Intrafamily Violence (El Salvador).

instances of severe harm, as well as the widespread impunity for acts of violence, are pervasive examples of the lack of trust in government institutions and point to the basic structural challenges to rule of law, citizen security, and justice.⁴⁹

Both the state machismo-influenced laws and impunity-ridden police force create a particularly dangerous environment for Central American women. The purpose of this chapter is to illustrate the type of living conditions that women in this region are subject to and the multiple forces that prevent women from achieving safety in these states. It is important to look at these conditions because these are the forces that these women claiming asylum need to demonstrate to the immigration judge in order to achieve lawful status and protection in the U.S. It is the combination of these different forces that make it impossible for women to seek protection and has channeled this north-bound migrant crisis of women.

Furthermore it is this combination of factors that has created an influx of asylum applications from women suffering persecution on account of being women. These asylum cases caused by the conditions of their countries, are now engaging U.S. asylum jurisprudence and fueling the movements to qualify gender as a particular social group.

Machismo and Marianismo

Machismo is a hyper-masculine idealization of male domination over women. Machismo consists of believing that women are property and a male's aggression and dominance determines the strength of their masculinity. These ideals lead to men believing that once a woman is his (whether physically intimate, in marriage, or even just in a relationship), they have

⁴⁹ UNHCR, *Women on the Run*, "Violence and Insecurity Due to Criminal Armed Groups" 17

all authority to discipline them however they see fit. Machismo is a hyper-aggressive form of sexism that originated and persists in Latin American countries, Spain, and Portugal, and it drives the rising femicide and domestic violence rates that are already exorbitantly high in the region.

In 2011 twenty five countries in the world measured with “high and very high” femicide rates and almost half of those countries were Latin American.⁵⁰ Domestic violence was also similarly measured in 2012 and was found to exist in alarming rates throughout Latin America. A 2017 dissertation by Meredith Kimelblatt of the George Washington University Law School titled “Reducing Harmful Effects of Machismo culture on Latin American Domestic Violence Laws: Amending the Convention of Belem Do Para to resemble the Istanbul Convention” provides explicit evidence that demonstrates the intense effects of machismo on Latin American legislation. Kimelblatt points out that a majority of women that suffered physical violence within 2012 also reported emotional abuse that ranged from 61.1% in Colombia to 92.6% in El Salvador.⁵¹

While machismo is enforced in the region through the positive messages of how to have personal pride, familial dedication, and chivalrous behavior. Those positive messages are lost in

⁵⁰ Meredith Kimelblatt, *Reducing Harmful Effects of Machismo Culture on Latin American Domestic Violence Laws: Amending the Convention of Belém Do Pará to Resemble the Istanbul Convention*, (George Washington International review, Vol.49 2018) “The inadequacy of legislative domestic violence regulation and corresponding enforcement mechanisms...is rather a dangerous theme across Latin America. The effects of these inadequacies are clear: a 2011 study found that Latin American countries accounted for almost half of the twenty-five countries associated with “high and very high” femicide rates.

⁵¹ *Ibid.*, 406 “A Pan-American study similarly found steep rates of intimate partner violence against women throughout Latin American and Caribbean countries, from seventeen percent in the Dominican Republic to fifty-three percent in Bolivia.11 According to the study, “a majority of women who experienced physical violence in the past [twelve] months also reported emotional abuse, ranging from 61.1% in Colombia . . . to 92.6% in El Salvador.” Perhaps most disheartening is evidence that in certain countries, violence against women continues to increase in the face of justice systems that are perceived as unresponsive.” Cited: Sara Miller Llana & Sibylla Brodzinsky, *Violence Against Women in Latin America: Is it Getting Worse?*, MINNPOST (Nov. 20, 2012)

execution when combined with the other messages of machismo that assert male sexual and gender dominance over women.⁵² Machismo does not work alone. The female counterpart to machismo is *marianismo* which is a hyper-feminine idealization of what the Latin American woman should be. Marianismo enforces female submission as sexual objects to the men. Just as machismo tries to disguise itself with positive notions of chivalrous behavior, marianismo also disguises itself under the guise of emphasizing strong spousal and familial commitments.⁵³

Kimelblatt points out that in a study conducted by the National Academy Press it was determined that motives of power and anger (which are commonly associated with machismo behavior, are particularly prominent in male rationalization of sexual aggression. Marianismo protects machismo in the sense that it instills in women from a young age that they must be subservient in order to maintain a family and relationship.⁵⁴ This enables domestic violence to become almost culturally acceptable and there is emphasis placed on maintaining the privacy of the family unit that make conversations of domestic abuse cultural taboo. These constructions of machismo and marianismo have deep roots in the region and you can scratch the surface of their effects when noticing that statistically Latinas have a higher risk of domestic abuse yet are less likely to report domestic violence when compared to Caucasian women.⁵⁵

⁵² Ibid., 412

⁵³ Ibid., 412 ; further cited: What Is Marianismo?, PSYCHOL. DICTIONARY, <http://psychologydictionary.org/marianismo/> [<https://perma.cc/MFX6-7X73>]

⁵⁴ Ibid., 414 ; “While machismo ideals may encourage men to “be aggressive and channel their expressions of violence toward women,” marianismo’s suggested response to this behavior as a non-issue perfectly “position[s] women for [the] receipt of violence and [effectively] operate[s] to silence them afterwards.”- Nat’l Research Council, *Understanding Violence Against Women*. 59 (Nancy A. Crowell & Ann W. Burgess eds., 1996).

⁵⁵ Ibid., 415; further cited: See Ecuador Leads the Battle Against Domestic Violence in Latin America, Council on Hemispheric Affairs (Aug. 1, 2011), <http://www.coha.org/ecuador-leads-the-battleagainst-domestic-violence-in-latin-america/> [<https://perma.cc/ME56-3RT3>]; see also Immigration and Refugee Board of Canada, Responses to Information Requests (RIRs), No. ECU103278.FE, Nov. 12, 2009, <http://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/ECU103278.FE.pdf> [<https://perma.cc/EN33-JADC>] (noting that “domestic violence is [frequently] perceived as a private matter”).

Internal relocation can also be more damaging for victims of domestic abuse and sexual violence. It is more likely that a woman escaping domestic violence will be followed by her persecutor wherever she relocates within the nation. The situation is worse for women who are escaping sexual violence from gang members that they are not in relationships with because she may lack the prior support system she had in her hometown and would be susceptible to the street gangs in the new community.⁵⁶ Those new street gangs may also assume that she has previous ties to gangs in her prior community and would target her as a form of attack to the rival gang.

The Central American migrant crisis that is majorly a crisis of female migration is a crisis that was bound to develop because of the combination of factors covered here. The purpose of this chapter is to paint the scene of the conditions in Central America that made such a specific migrant crisis of women happen. The factors that drive this dangerous environment for women are social, political, and historical. At the social level the social constructions of machismo and marianismo foster a dangerous environment for women that is to be kept private and underreported. At the historical level the Salvadoran civil war and the U.S.'s deportation policies in reaction to the civil war, delivered to the region the seedlings of what would become the severe gang presence that now controls the region today. The weak institutions in place breed the exorbitantly high impunity rates that prevent the proper prosecution of the women's abusers. These are the domestic factors that endanger women.

⁵⁶ Reimann, *Hope for the Future?* 1228-1229.

The Shortcomings of the Convention of Belem do Para in Latin America

As for international factors the situation is not that there are no laws in place for the protection of women in El Salvador, Honduras, and Guatemala, but rather that the political institutions meant to persecute offenders and uphold those laws does not operate successfully. Many Latin American countries have ratified the conventions like the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) but more than fifty of the countries that ratified CEDAW do so in a way that objects to key provisions that the countries feel interferes with their cultural or religious values.⁵⁷ Similar to how the U.S. adopted the Refugee convention but made its' own determinations on what constitutes a PSG and subsequently narrowing the qualifications, countries like El Salvador, Colombia, and Chile can avoid the specific demands made in CEDAW that would actually implement the convention in the way it was intended. There also exists an inter-continental organization comprised of thirty-five North and South American countries named the Organization of American States (OAS) that adopted legislation intended to deter domestic violence. The OAS on June 9th 1994 adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as the Convention of Belem do 'Para (CBP) in Brazil. The adoption of the CBP was not unanimous or without reservation. El

⁵⁷Kimelblatt, *Reducing Harmful*. 407 "effective implementation of international human rights conventions requires that individual countries themselves commit to adequate compliance. As such, enforcement is problematic despite many Latin American countries having ratified conventions like the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Furthermore, more than fifty of the countries that ratified CEDAW, including Chile, Colombia, and El Salvador, did so subject to reservations or objections to key provisions, often based on cultural or religious values." Further cited: U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; G.A. Res. 48/104, Declaration on the Elimination of Violence against Women (Dec. 20, 1993) [hereinafter G.A. Res. 48/104]. For a list of U.N. member states, see Member States of the United Nations, UNITED NATIONS, <http://www.un.org/en/members> [<https://perma.cc/W34B-AS4A>] (last visited Oct. 20, 2016).

Salvador, as well as many other member states, took reservation to Article 29, paragraph 1 which states:

“that any dispute between two or more Parties concerning the interpretation or application of the Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration or to the International Court of Justice.”⁵⁸

To take reservation with this section of the Convention is to demand immunity to any disputing opinions regarding the interpretation or application of the Convention. The choice to not abide by Article 29 paragraph 1, takes the power away from the International Court of Justice of holding member states accountable if there is failure to properly implement the Convention. It is this tactic of being a member party to a Convention on paper, but refusing to adhere to the protocols that would ensure the proper implementations and repercussions for lack thereof that hurts a Salvadoran woman’s asylum case in the U.S. courts. Trial attorneys see that El Salvador is a party to this convention and assume that the protocols are upheld and that the asylum seeker should be able to seek protection from her state. Then the immigration lawyer or client needs to prove that although El Salvador is a member on paper, they are not bound to the International Court of Justice should there be any failures in interpretation and implementation. Kimelblatt explains that the CBP seemed equipped to combat domestic violence as it recognized violence against women as a human rights violation, required states to provide mandatory education on women’s rights, demanded that states fight gender subordination, and pass protective legislation. However Kimelblatt points out than in practice the CBP’s definitions, legislative guidelines,

⁵⁸ See *Declarations, Reservations and Objections to CEDAW*, Algeria (defines the contents of Article 29 paragraph 1, El Salvador “Upon ratification of the Convention, the Government of El Salvador will make the reservation provided for in article 29...Reservation: With reservation as to the application of the provision of article 29, paragraph 1.” <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [<https://perma.cc/TL3P-L3RG>] (providing member States’ declarations, reservations, and objections to CEDAW including Chile and El Salvador)

monitoring mechanism, and reservation requirements cause it to be unsuccessful at shaping Latin American laws.⁵⁹

The Success of the Istanbul Convention for the Council of Europe

An alternate Convention that may serve as a proper example for addressing the failures of the Convention of Belem do Para is the Istanbul Convention. Created by an organization similar to the Organization of American States, the Istanbul Convention was formulated by the Council of Europe. The Istanbul convention is known for extending protections to migrant women and recognizes gender-based violence as being relevant to refugee status.

Kimelblatt proposes that the Organization of American States amend the Convention of Belem do Para to include the successful protective provisions from the Istanbul convention, specifically “(1) expanded definitions of violence to account more effectively for potentially harmful machismo influences, (2) provisions to incentivize domestic violence reporting, (3) heightened monitoring of state implementation at national levels, and (4) reduced state opportunities to circumvent implementation through reservations.” Amendments such as these would prevent impunity among aggressors that would traditionally be protected under machismo-influenced laws.

“In El Salvador, between 2.7 percent and five percent of all cases filed with the Office of the Prosecutor General of the Republic involving violence against women were prosecuted and resulted in jail sentences for perpetrators. The University of California Hastings College of the Law’s Center for Gender and

⁵⁹ Kimmelblatt, *Reducing Harmful*, 408-409

Refugee Studies similarly reports a less than three percent resolution rate for the more than six hundred femicide cases reported in El Salvador in 2011.”⁶⁰

That is, amendments such as these would prevent impunity among aggressors if the law enforcement and political institutions in place were strong enough to implement and enforce these amendments. Yet that is the underlying difficulty in this situation. The difficulty of there being a total disconnection from the written law and the implementation of it on the ground. This disconnect is visible through the non-state actors of the gangs running amuck and undermining law enforcement and government authority, as well as engaging in illicit deals and corrupt arms trading

Concluding thoughts

The combination of these factors; gang presence, weak political institutions, weak law enforcement, corruption, impunity, machismo & marianismo, highest rates of femicide; create a particularly dangerous environment for Central American women to try to forge a life. I was exposed to this migrant crisis through my work with Central American Legal Assistance (CALA) in Brooklyn, NY. CALA is a non-profit immigration firm that provides low-no cost legal representation to Central American migrants requesting asylum. Throughout my time in CALA I was the official interpreter for multiple individual asylum hearings, psychological evaluations, and witnessed seven different final asylum hearings in the NY immigration court. While many male Central American migrants escape from gang persecution, gang-forced recruitment, or police persecution, the majority of female migrants escape for persecution on

⁶⁰ Central America: Femicide and Gender-Based Violence, CTR. GENDER & REFUGEE STUD., <http://cgrrs.uchastings.edu/our-work/central-america-femicides-and-gender-based-violence> [https://perma.cc/8XET-P25Z]

account of being women because of the factors detailed in this chapter. In order to combine the factors to demonstrate how they work with each other to make the toils of a Central American asylum seeker particularly strenuous I will provide a scenario that pulls from the asylum cases that I interpreted for, without compromising any specific information of any individual case.

First the Central American woman is raised under a machismo & marianismo influenced social structure that makes her subservient to men. The woman must grow up within a community where the police are not trusted due to their corrupt alliances with the M.S.13 or 18th street gang and if any gang members were to take an interest in her the high impunity rates would mean there would be no means for her to obtain protection. Her mother or father may drive a bus and suffer gang extortion. If the extortion becomes too much to bear and the family starts to deny the payments the gang would proceed to send death threats for any males in the family, and death and rape threats for the women. Let us say the woman in this scenario is the daughter. If one of the gang members take an interest in her the situation may proceed where they would move in together, she may have his child, and domestic violence may ensue. The domestic violence could reach a point that would prompt her to make the journey northward for protection. If the gang takes a more vicious route they may assault the woman as a group and proceed to rape her. If she is allowed to live past that experience she may then decide to make the journey northward for another country that could possibly grant her protection from her abusers. Once the woman, possibly with child, decides to escape she is faced with the possibility of being assaulted by one of the *coyotes*⁶¹⁶². If she makes it to the U.S. border there are two

⁶¹ A person who smuggles Latin Americans across the US border, typically for a high fee.

⁶² Goldberg, Eleanor. "80% Of Central American Women, Girls Are Raped Crossing Into The U.S." *The Huffington Post*, TheHuffingtonPost.com, 7 Dec. 2017, www.huffingtonpost.com/2014/09/12/central-america-migrants-rape_n_5806972.html. "According to a stunning Fusion investigation, 80 percent of women and girls crossing into the U.S. by way of Mexico are raped during their journey. That's up from a previous estimate of 60 percent, according to an Amnesty International report...Through May, the number of unaccompanied girls younger than 18

things that could happen. She could get caught at the border and immediately be put into deportation proceedings, in which case she would express her fear to return to her country in the credible-fear interview. If she passes her credible-fear interview she would continue in the U.S. trying to apply for asylum (assuming that she was not detained at the border and was instead released to a family member in the U.S.). When it would come time for her first asylum hearing with the judge, the trial attorney that represents Homeland Security would bring out all the information they could gather to discredit her asylum claim. One of the arguments would be that the international conventions in place demonstrate that the state is able to protect her, to which her immigration attorney (if she obtained representation) would provide country conditions to prove that those laws are not properly enforced. The immigration lawyer would argue that she is escaping persecution because of her membership in the particular social group of “Guatemalan women who are imputed to be in a domestic relationship that they cannot escape” (if it was the first scenario in which she lived with the gang member that domestically abused her). If it was the second scenario in which the gang abused her but she did not have a relationship with a gang member it would be harder to formulate a particular social group that has positive case law backing it. When the abuse or threat of abuse is sexual one central reason for the persecution is gender. The appropriate question in testing that PSG is “would she be threatened with rape if she was a man?” and if the answer is no, then her gender is one central reason for her persecution. If it was the first scenario there is positive case law for women escaping Central America because

caught at the US-Mexico border increased by 77 percent. But while many of these girls are fleeing their homes because of fears of being sexually assaulted, according to the UNHCR, they are still meeting that same fate on their journey to freedom.

of domestic violence and therefore, hopefully, the immigration judge would grant asylum if enough evidence is gathered on the past abuses suffered.

For the second scenario where a woman is escaping not for persecution from a partner but was attacked or threatened with rape, because gender has not been qualified as a particular social group, the immigration attorney would have to find a way to argue for her protection because of gender-based violence even though U.S. immigration law has not qualified gender as a PSG. One route would be to argue the woman's feminism is a political opinion that disagrees with the gang member's stance that she is their property. Her refusal and escape could be framed as a political decision and because of how it defies the machismo system of Central America, this argument may hold in court. The issue here is that the woman was threatened or assaulted with rape because she was a woman. The only two groups that gang members generally threaten are women and gay men. The threat or sexual assault of the gay man is in order to "punish them for acting like a woman" and often gang members will say things along the lines of "*te vamos a enseñar como ser una mujer*", which translates to "we are going to show you how to be a woman". So whereas a gay man raped or threatened with rape by the gang can find asylum in U.S. based on persecution for being a gay man, a woman cannot find protection for the same persecution on account of being a woman. Although the *matter of R.A.* broke barriers for women escaping domestic violence, the women escaping sexual violence still struggle to obtain asylum as they are stripped from the ability to establish their causal link of persecution which is their gender itself.

3

The Underlying Persistent Discrimination of Migrants from Latin America

While the fear of the floodgates is a fear that can be applied to virtually any broad human rights violations that occur en masse, there is another historically rooted underlying fear that Central American women need to face through their asylum claims. It is a fear of migrants from specific nations i.e. a historical discrimination of migrants due to their nation of origin. The situation is that although the current U.S. refugee and asylum law is a reflection of the U.N. Refugee Convention, U.S. immigration law is restrictionist from its conception and the restrictionist legacy is one that continues to affect the discourse around immigration policy and the decisions made at the administrative level. As stated in the first chapter, during the 10 year legal battle of the Matter of R.A., it was never explicit why the INS chose to appeal the Matter of R.A. when it had not appealed the granting of asylum to the other domestic violence case of a woman from Jordan and a woman from Sierra Leone. I suspect that the appeal was filed for the Matter of R.A. because the implications of granting asylum to a domestic violence case from a nation of the Western Hemisphere, specifically Latin America, were too large for the INS to quickly accept. Owing to the fact that asylum seekers must be present in the country they would apply for asylum from, the INS accepting a Jordanian domestic violence case would not “open the floodgates” as the trip to the United States is much less feasible from migrants from the Eastern hemisphere. The fear of the floodgates is more easily uncovered when U.S. immigration law is in dialogue with migrants on their doorstep and this is a historically rooted reality. There has been a discrimination of migrants from the Western Hemisphere for multiple factors that I will address and this discrimination needs to be acknowledged when speaking about these

asylum claims that are making advancements towards qualifying women as a PSG because these Central American women must face the barriers of claiming asylum as women and then additionally confront the discrimination inherited in U.S. immigration policy of Latin American migrants.

U.S. legal and political historian Mae M. Ngai provides an extensive analysis of the foundations of U.S. immigration law in her award winning book *Impossible Subjects: Illegal Aliens and the making of Modern America* which will be used to thoroughly unpack the overarching themes of American restrictionist immigration. This is specifically important for identifying who is being restricted and how these trends persist today.

Historical Fabrication of the “Illegal Alien” as Latin American, predominantly Mexican

Ngai documents the historical roots of the “illegal alien” in U.S. immigration policy and social understanding beginning with the Johnson-Reed Immigration Act of 1924. This is not the first moment groups of peoples were deemed undesirable migrants⁶³ but it was the first written restriction law to be passed in the U.S. These numerical limits on immigration bred a global, racial, and national hierarchy that would prioritize the rights of certain immigrants over others and would define what the desirable American population would reflect.

There were multiple tactics that fabricated the image of who a desirable migrant was. Specifically there was a differentiation between migrants that would be perceived as able to assimilate and those that would remain ‘foreign’ in the eyes of American society in the 1920’s. The first tactic being that of the national origins quota system that distinguished Europeans based

⁶³ Ngai, Mae M. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton University Press, 2014. 3 “The exclusion of Chinese, other Asians, and various classes of undesirable aliens (paupers, criminals, anarchists, and the like) in the late nineteenth and early twentieth centuries signaled the beginnings of a legal edifice of restriction. “

on their nationalities but also deemed all Europeans to be part of a white race. The quotas were assigned based on desirability and although there were some nationalities, such as the non-Anglo-Saxon Italians and Irish, that were given a lower quota, the over-arching white umbrella qualified these European nations as belonging to a white race. The white race was given priority over non-white migrants which enforced the formation of the Euro-American identity.⁶⁴

To be clear, the quotas represent the amount of visas that will be granted to the citizens of each nation, meaning that the quota is the only number of legal migration permitted for the entry of new migrants to the country.

The Johnson-Reed act did not assign numerical quotas to the Western Hemisphere but the visa requirements and border-control policies affected Mexicans so severely that it made them the single largest group of illegal aliens by the end of the decade.⁶⁵ This meant that there was no limit to how many legal visas were issued but the visa requirements made it very difficult for Latin Americans to obtain legal entry to the U.S. At the federal level, in the immigration rhetoric at the time, ‘Mexicans’ were so synonymous with illegal immigrants that Mexican was created as a separate racial category in the census. This in turn was treated as the “Mexican race problem” that led to the application of Jim Crow segregation laws to Mexicans in the Southwest.⁶⁶

The way in which we could see how Mexicans and Latin American migrants were discriminated against is through the disparate effects deportation policy had on them versus

⁶⁴ Ibid., 7-8

⁶⁵ Ibid., 7-8

⁶⁶ Ibid., 7-8

European and Canadian migrants. Seeing this disparity requires both a political lens and a social one.

Through the Written Political Lens

The very first piece of immigration law, the 1790 Naturalization Act, provided that “free white persons” who have resided in the U.S. for at least two years may be granted citizenship and their children younger than 21 as well. This meant that the base legal population of the U.S. was comprised of free white persons and so immigration that would add to this population came from the white nationalities that would migrate to the U.S. through Ellis Island and other seaports. These white migrants were arriving in huge waves before the 1920s and distracted Immigration service from the land borders. The immigration inspectors turned a blind eye to the Mexicans that would arrive to the southwestern states during the 1900s and 1910s because they would work in railroad construction, mining, and agriculture. The Mexican land migrants were not perceived as a wave of migration that would affect the population of the U.S. but instead as something that was “regulated by labor market demands in the border states.”⁶⁷ The Immigration Act of 1917 would then be passed and require a literacy test which was one of the first barriers for entry, however the Labor Department exempted Mexicans from the entry requirements during WWI and so from 1917 – 1918 there were very little records of illegal migration. Once WWI ended Mexicans entering the U.S. had to apply for admission at lawfully designated ports of entry from 1919 onward. This would not be the last moment that immigration services would ignore Mexican migration in order to profit off of their labor.⁶⁸

⁶⁷ Ibid., 64

⁶⁸ Migration Policy Institute, *Major U.S. Immigration Laws 1790- Present*. 2013 -The 1942 Bracero Agreement allowed Mexican migrants to enter the U.S. to serve as temporary agricultural workers and Congress extended the agreement in 1949 and 1951 until the end of the program in 1964.

Moving on from 1919, while Mexicans dealt with the entry requirements, European migrants utilized Canada's lack of an immigration quota for entry to the U.S. to their advantage by residing in Canada for 5 years before entering the U.S. Ngai points out that "the proportion of lawful admissions from Canada of persons not born in Canada increased from 20 percent in 1925 to over 50 percent in the early 1930s."⁶⁹ Once the European immigrants became citizens they would legally bring over non-quota immigrant relatives. By 1927 over 60% of non-quota immigrants admitted to the U.S. were from Italy, followed by Poland, Czechoslovakia, and Greece.⁷⁰ Meaning that by the early 1930s the population of the U.S. would grow from white Anglo-Saxon citizens to make way for assimilating more white Europeans although they faced levels of discrimination as the "lesser European states".

Proceeding to the Great Depression from 1929 to 1939, on a local and state level the Immigration and Naturalization Services (INS) focused on targeting the movements of Mexicans and Mexican Americans in order to deport them. One failed attempt was the INS investigation of public outcry against alleged illegal Mexican workers at the Isabella Sugar Company in Michigan in 1935 which only proved that none were in the country illegally and 60% of the workers were born in Texas.⁷¹ The INS did not work alone as they had already had the help of the Mexican government from 1920-1923 through a program that repatriated around 100,000 Mexicans. The local authorities throughout the South and Midwest, led by the Los Angeles county relief agencies, would repeat this repatriation in the early 1930s, repatriating over 400,000 Mexicans. This repatriation is often referred to as an ethnic cleansing in which 500,000

⁶⁹ Ngai, *Impossible*. 66-67

⁷⁰ *Ibid.*, 67

⁷¹ *Ibid.*, 72

to 2,000,000 Mexicans were mass deported.⁷² Ngai uncovers that 60 percent of these repatriated migrants were children or American citizens by native birth and that the “vast majority” spoke English and many had been in the U.S. for at least ten years. There was no repatriation effort for European migrants.

At the same time that these repatriation efforts for Mexicans were occurring Congress had just passed the 1929 Registry Act which legalized the status of “honest law-abiding alien[s] who may be in the country under some merely technical irregularity.” Migrants would be allowed to register as permanent residents for a fee if they could prove that they were of good moral character and resided in the country since 1921 without interruption. This Act may as well have explicitly stated that it favored European and Canadian immigrants because although many Mexicans qualified for an adjustment of status, between 1930 and 1940, 80% of the immigrants that adjusted their status under the Registry Act were European or Canadian. Very few Mexicans knew about the Registry Act and fewer could afford the fee.⁷³ This moment in U.S. immigration history has such deep ramifications for future generations of Latin American migrants. The evident prioritizing of European and Canadian migrants over the nation directly connected to the U.S. by land, from which thousands of labor workers were exploited without a promise of status, changed the way in which Latin American migrants would be perceived for generations to come. Constructing the Mexican as the illegal alien was a calculated effort that dehumanized an entire group of migrants so much so that a full period of 7 years of ethnic cleansing took place that ripped the legal status away from 500,000 to 2 million Mexican migrants and this construction

⁷² Rosales, F. Arturo (2007-01-01). "Repatriation of Mexicans from the US". In Soto, Lourdes Diaz. *The Praeger Handbook of Latino Education in the U.S.* Greenwood Publishing Group. pp. 400–403. ; Johnson, Kevin (Fall 2005). "The Forgotten Repatriation of Persons of Mexican Ancestry and Lessons for the War on Terror". **26** (1). Davis, California: Pace Law Review.

⁷³ Ngai, *Impossible*, 82.

endures today and has been revitalized through the current administration. Now while the Obama administration did deport more than 5 million undocumented immigrants after his 8 years in office, Trump attempts to ban “undesirable groups” that echo the same racial quotas of the 1920s that created the racial hierarchies of white desirable migrants and other undesirable migrants. He also has mixed attempts to end the Deferred Action for Childhood Arrivals (DACA) program which withheld deportations for undocumented minors brought to the U.S. by their parents. While under Obama there was a clear emphasis to deport criminals and migrants that recently crossed unlawfully with no strong ties to the U.S., the Trump administration has doubled arrests of non-criminal immigrants. The deportation statistics for this administration will not be ready for years to come as every arrested migrant has to filter through the Immigration system that is severely backlogged with more than 500,000 cases pending.⁷⁴

Now even when newer immigration legislation would be passed, if it benefited Mexican migration Congress would see to it that it be immediately altered. This is evident in the Supreme Court ruling in 1950 of *Wong Yang Sung v. McGrath* that stated that “deportation proceedings were of a judicial character requiring a fair hearing and ordered the INS to adhere to the terms of the Administrative Procedures Act (APA)”.⁷⁵ The most crucial aspect of this ruling was how it demanded that the prosecutor cannot also be the hearing officer (judge). The INS witnessed a drop in the number of deportations from 16,903 in 1949 to 3,319 because of the *Sung* decision. In turn Congress nullified *Sung* and restored the INS’s ability to conduct their own deportations exempt from the APA.⁷⁶

⁷⁴ Law, Anna O. “This Is How Trump’s Deportations Differ from Obama’s.” *The Washington Post*, WP Company, 3 May 2017, www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?noredirect=on&utm_term=.5290322fe860.

⁷⁵ Ngai, *Impossible*, 87

⁷⁶ *Ibid.*, 88

Going even further, once the racial quotas were abolished in the Immigration Act of 1965 there came an even worse decision for Mexican and Latin American migrants as a whole. This was the decision to create a quota for the Western Hemisphere. Now to be clear, there were no quota restrictions on the amount of legal visas that could be issued to Latin American migrants. The entry requirements such as the literacy tests were what made the process of obtaining visas a difficult one. Even so through the repatriation it is seen how even Mexican Americans and children, regardless of U.S. citizenship, were still ethnically cleansed out of the U.S. To establish a new numerical limit of 120,000 on annual immigration from the Western Hemisphere caused a 40% reduction from the legal immigration quota that existed for the Western Hemisphere before 1965.⁷⁷ Then would come the 1976 amendments that would end the possibility of undocumented Mexican immigrants legalizing their status because they had children born in the U.S. Of the 120,000 allowed to enter the U.S., only 20,000 slots were allocated to Mexico. This took a fatal toll on the amount of migrants that would now be deemed illegal. Right before the Immigration Act of 1965 in the early 1960s, annual legal migration (before this quota) consisted of around 200,000 *braceros* (see footnote 56) alone and 35,000 regular admissions for permanent residency. This 20,000 migrants per country quota led to the deportation of 781,000 Mexicans, a targeted effort, considering that the total number of deportations for migrants from all other countries combined remained below 100,000 a year.⁷⁸

⁷⁷ Ibid., 260-263

⁷⁸ Ibid., 261

Through the social lens

Through a sociological lens Ngai repeatedly acknowledges that the disparity of treatment between Mexican migrants, and Europeans and Canadians was possible because the latter were disassociated from the category of ‘illegal alien’.⁷⁹ This enabled the European migrant’s easier racial assimilation as white American citizens while Mexicans were consistently pigeonholed as ‘illegal aliens’ and used as a highly exploited reserve labor force.

The individual efforts of certain officials expose the discrimination of Mexicans and migrants from countries with contiguous borders to the U.S. In the late 1930s and early 1940s while the Johnson-Reed racial quotas were still in place, there existed the option to undergo a pre-examination and suspension of deportation if you were a migrant with a legally resident alien relative, had long-term residence in the U.S., or an “exceptionally meritorious” case. Many Mexican migrants would have qualified for such a program except that the program would become exclusive to European migrants. One individual, INS El Paso district director Grover Wilmoth tried to utilize the pre-examination procedure for Mexican hardship cases but his efforts were blocked by William Blocker, the American consul in Juárez, who claimed that “those applying for visas at Juárez were of the laboring class, they should unquestionably be denied visas”.⁸⁰ The consul used his power to deliberately slow the work of processing visas for Mexican pre-examination cases. Only a handful a month were processed and Wilmoth’s efforts were crushed. Then in 1945 the INS changed the pre-examination requirements to migrants “other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States.”⁸¹

⁷⁹ Ibid., 58-59

⁸⁰ Ibid., 86-89

⁸¹ Ibid., 86-89

The discrimination against Mexican and Caribbean migrants was evident in this restriction because pre-examination involved permission for temporary entry into Canada to acquire the U.S. visa and this would be irrelevant to Canadians. Ngai uncovers that putting Canada in the same restriction was a tactic to disguise the restriction as non-racial by qualifying it as all the countries that border the U.S. Yet this restriction went on to have the most severe effects on Mexican and Latino migrants as the policy became an official and routine procedure that adjusted around 200,000 European illegal migrants.⁸²

Even the socially motivated movements that advocated for immigration reform were fueled by the INS's treatment of European and Canadian immigrants, not Mexicans.⁸³ Ngai explains that it was not for a lack of Mexicans in the U.S. voicing their concerns⁸⁴ but instead that media attention and public outcry focused on white European migrants that would recount the horrible vetting procedures endured coming through Ellis Island. Even John F. Kennedy's *A Nation of Immigrants*, a book on American immigration published in 1958 only dedicated two paragraphs to Asian and Latino immigration to the United States.⁸⁵

⁸² Ibid., 88

⁸³ Ibid., 76 "During the early 1930s several legal studies called for administrative law reform in deportation. These included *Deportation of Aliens from the U.S. to Europe*, by Jane Perry Clark, a Barnard political scientist, published in 1931; a report on deportation by the National Commission on Law Observance and Enforcement (Wickersham Commission), issued in 1931; and *Administrative Control of Aliens: A Study in Administrative Law and Procedures*, by William Van Vleck, dean of George Washington University Law School, published in 1932 for the Commonwealth Fund. Although the latter two concerned general policy and did not limit their studies to deportations of any particular ethno-racial group, all three were generally motivated by the Immigration Service's treatment of European and Canadian immigrants."

⁸⁴ Ibid., 82 "for example, the Los Angeles Spanish-language newspaper *La Opinión* criticized the deportation of Mexicans who had ten years of residence in the US, businesses, and families. But Mexicans remained marginalized from the mainstream of immigration discourse."

⁸⁵ Ibid., 246

Immigration Acts Currently In Place

Moving on from the Immigration Act of 1965 and its sweeping policies of “quota equality” that would place a quota on Latin America never before implemented, there would come the *Immigration and Nationality Act Amendments of 1976* that would adopt the 1965 system of immigration “preference categories” for immigrants from Western Hemisphere countries.⁸⁶ This is a clear recycling of the same discriminatory hierarchy of desirability practices first established in the Johnson-Reed Act. Around the same time the UN Convention on the status of Refugees will have passed in 1951 with the United States becoming a party to the 1967 Protocol in 1968⁸⁷ and would adopt the main provisions of the article into domestic U.S. law in *the Refugee Act of 1980*.⁸⁸ Followed by the *Immigration Reform and Control Act* passed in 1986 which doubled border patrol staff and sanctioned employers that would knowingly hire undocumented immigrants. Finally we arrive at the *Immigration Act of 1990* which remains as the framework for today’s legal immigration system. This act did not do much for the per-country immigration quota, raising it only from 20,000 to 26,000. It would issue 140,000 employment-based (EB) immigrant visas that would be divided into numerical allocations of desirability based on skill. The last notable acts to come after the Immigration Act of 1990 are the *Homeland Security Act of 2002* and the *Secure Fence Act of 2006*. The Homeland Security Act created the Department of Homeland Security (DHS) that adopted all of the functions of the US Immigration and Naturalization Service (INS) and created three new agencies: U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and US

⁸⁶ Migration Policy Institute, *Major U.S. Immigration Laws 1790- Present*. 2013

⁸⁷ 1951 Convention; 1967 Protocol. Formally the United States ratified the Protocol, which incorporated the Convention except for certain temporal and geographic restrictions eliminated in the Protocol); UNHCR, States Party to the 1951 Refugee Convention relating to the Status of Refugees and the 1967 Protocol, April 2015

⁸⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

Citizenship and Immigration Services (USCIS). The names can be changed a thousand times but the restrictionist influences from the conception of U.S. immigration law persists nonetheless. This is explicit in the Secure Fence Act enacted by Congress that mandates the construction of 700 miles of double-reinforced fence along the Mexican border.

American Baptist Churches v. Thornburgh (ABC) Settlement Agreement & TPS

At the time of the Salvadoran civil war 99.9% of U.S. asylum claims from El Salvador were denied because Congress at the time under the George H.W. Bush administration did not recognize the conflict as a civil war due to their support of the oppressive regime. In 1985, a group of religious organizations and refugee advocacy organizations filed a class action lawsuit in federal court against the Immigration and Naturalization Service (INS) (now USCIS), the Executive Office for Immigration Review (EOIR) and the United States Department of State (DOS). The lawsuit is known as American Baptist Churches (ABC) v. Thornburgh in which a federal judge certified a class of Guatemalan and Salvadoran nationals as plaintiffs in the lawsuit. The allegations claimed that the INS (now USCIS, EOIR and DOS) engaged in discriminatory treatment of asylum claims made by Guatemalans and Salvadorans. The class action lawsuit was settled by granting any ABC class member that filed for asylum within specific dates a new asylum interview and adjudication under the asylum regulations published in July of 1990. This was a huge win for Central American migrants that were subject to the discriminatory practices of INS. At the same time, however, the Immigration Act of 1990 would include the creation of Temporary Protected Status (TPS).⁸⁹ TPS seemed to be positively

⁸⁹ Along with TPS there was passed the Nicaraguan Adjustment and Central American Relief Act (NACARA) which applied to ABC class members that applied for asylum on or before January 3rd 1995, A Salvadoran who first entered the United States on or before September 19, 1990; registered for ABC benefits on or before October 31, 1991 (either directly or by applying for Temporary Protected Status (TPS)); applied for asylum on or before February 16, 1996; and was not apprehended at time of entry after December 19, 1990. A Guatemalan or

founded on granting temporary protection to noncitizens present in the U.S. who temporarily cannot return to their countries because of armed conflict or environmental disaster.⁹⁰ Yet, in practice it evokes the same sentiments of preventing “undesirable migrants”, who should otherwise qualify for protection as refugees or asylees, from obtaining a clear path towards citizenship in the U.S. El Salvador became the first country whose nationals could seek TPS as a result of the civil war and TPS was extended for El Salvador after the 2001 earthquakes. TPS was created as a temporary measure and was a status that needed to be renewed every 18 months for a fee. The current Trump administration has ended TPS and now 200,000 Salvadorans that have lived in the country since at least 2001 have until September 9th 2019 to leave the U.S. or find a way to obtain a green card.⁹¹ After this date they will be immediately put in deportation proceedings and subject to arrests.

What this means for Central American Women

This survey of U.S. immigration law is not for the purpose of disproving that the “opening the floodgates” argument is the main fear that prevents the acceptance of women as a protected ground under U.S. asylum law. This survey is for the purpose of revealing that when the “opening the floodgates” phrase was coined, it was unfinished, as the full fear should read as

Salvadoran who filed an application for asylum on or before April 1, 1990 and has not received a final decision on your asylum application. An individual who entered the United States on or before December 31, 1990; applied for asylum on or before December 31, 1991; and at the time of filing the application was from one of the former Soviet bloc countries (Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Lithuania, Estonia, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, Yugoslavia, or any state of the former Yugoslavia). I did not dedicate specific time to this relief because it only applied to the migrants of those specific dates and does not affect the current Central American migrant crisis.

⁹⁰ Chishti, Muzaffar and Stephen Yale-Loehr. 2016. *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*. Washington, DC: Migration Policy Institute

⁹¹ Miroff, Nick, and David Nakamura. “200,000 Salvadorans May Be Forced to Leave the U.S. as Trump Ends Immigration Protection.” *The Washington Post*, WP Company, 8 Jan. 2018, www.washingtonpost.com/world/national-security/trump-administration-to-end-provisional-residency-for-200000-salvadorans/2018/01/08/badfde90-f481-11e7-beb6-c8d48830c54d_story.html?utm_term=.aba2f13eb2b2.

“opening the floodgates of undesirable migrants.” The floodgates fear is not complete without the underlying fear of the undesirable migrants that lay beyond those gates. ‘Undesirable migrants’ should be acknowledged within the discourse of disproving the floodgates fear because opening the floodgates is not only a fear that “too many would qualify” but specifically of ‘*who*’ would qualify. “Undesirable migrants” carries all the weight of the Johnson-Reed Act, the braceros program, and the creation of Mexicans as ‘illegal aliens’. For the region geographically closest to the U.S. this historical discrimination (and at one point ethnic cleansing) of Mexicans established a social prejudice that extended against migrants of Latin America as a whole. As Mae Ngai stated “Race is always historically specific”. At this moment in U.S. history the term illegal alien has been revived under the current administration and the anti-Mexican, anti-migrant, and anti-Latino sentiments are elevated as a significant amount of the population supports the idea of building a wall along the Mexican border and hate crimes have jumped since the 2016 election. After eight years under the first black president of the United States these sentiments were a shock for many democrats and liberals in the U.S., yet this rhetoric is not historically out of the ordinary in the slightest. There is an intentional history behind the constructions of “illegal aliens” and “undesirable migrants” and the current administration candidly reflects these historical roots. The history is not out of date, discontinued, or innocent. The constructions of desirability that stimulate the production of each immigration act persist today. Therefore the women escaping the violence in Central America have to contend with the sexism pervasive in the “fear of the floodgates” because they are women escaping gender-based violence and then beyond that they must contend with the historically rooted discrimination against them because of their nations of origin. Carrying the burden of being from nations that have historically been deemed as only exporting “undesirable migrants” provides a grim forecast

for the efforts of these women to make the U.S. rethink its stance on qualifying gender as a protected ground of persecution.

CONCLUSION

To answer why it is that women are not recognized as a particular social group (PSG) in U.S. asylum law there needed to be a clear understanding of the reasons immigration judges provide to justify their denials of gender-based asylum claims from women. Analyzing the language in those reasons revealed that the main recurring argument for these denials is the fear of “opening the floodgates.” Looking into the case law that exists currently, which established the precedents that bind the Board of Immigration Appeals, Circuit Courts, and immigration judges to a consistent interpretation of the law, revealed the disparities that existed within the application of the *Acosta* precedent. The *matter of R.A.* and the ten year legal battle that resulted from the Immigration and Naturalization Services (INS) choosing to appeal the original asylum grant revealed that the fear of opening the floodgates was still going strong regardless of the *Acosta* precedent.

The INS’s appeal of the *matter of R.A.* also gave rise to the question of ‘why appeal the *matter of R.A.* when you had not appealed the previously granted asylum claim of the *matter of A & Z* from a Jordanian woman also escaping domestic violence?’ This discrepancy led to questioning the reason why the fear of the floodgates applied to a Guatemalan woman’s domestic violence case and not a Jordanian woman’s.

To answer all these questions there needed to be an extensive retracing of U.S. immigration laws to search for the reasons the fear of the floodgates came to be and if there was historical evidence of the discrimination of migrants from specific nations or regions. This retracing in chapter three revealed just that. The foundations of U.S. immigration laws were based on restriction, deportation, and the establishment of racial quotas on a scale of desirability.

The term “undesirable migrants” would then be made synonymous with Mexicans and Latin Americans. Mexican migrants would be exploited for labor and deported through multiple policies and programs that targeted their removal and simultaneously aimed at the integration of European and Canadian migrants. Even the social movements that demanded immigration reform completely ignored the plights of Latin American migrants and their sweeping “equal quota for all nations” resolution in 1965 extremely crippled Mexican and Latin American migrant opportunities for legal admission into the U.S.

This discrimination of migrants based on their nation of origin provides the rest of the fear of opening the floodgates that explains why it is these Central American cases of women escaping persecution have not been able to succeed in pushing the Board of Immigration Appeals to recognize women as a particular social group. It is not just a fear of opening the floodgates but specifically a fear of opening the floodgates to undesirable migrants of nations that have historically been deemed unworthy for admission into the United States. By further defining the fear of the floodgates it is revealed that because Central American female cases are the largest wave of cases that intend to establish women as a particular social group that the U.S. has ever had to encounter, it is going to be even harder for gender to be qualified as a PSG because these women’s cases have to face the inherited biases that discriminate against asylum claims from their nations of origin.

If new social movements for immigration reform integrated the Latin American narratives that have been systematically erased from the history of U.S. immigration reform the discrimination of these cases could be targeted. Just as the religious organizations and refugee advocacy organizations filed a class action lawsuit in federal court against the Immigration and Naturalization Service (INS) that resulted in the ABC settlement that righted the injustices of

purposefully denying 99.9% of cases from El Salvador during their civil war, so can new social movements address the discrimination of these Central American female cases in order to succeed in definitively qualifying women as a particular social group. A success such as this one would be ground breaking for women of all nations that have suffered violence for being women as a definitive change in U.S. asylum law would affect international policy on the matter and allied nations would follow suit in taking that climactic step for the real protection of women.

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