

**Turning Away Our Neighbors: Critiquing U.S. Policy Towards Latin American and
Caribbean LGBTQ+ Asylum Seekers**

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ABSTRACT

The United States hold significant responsibility for the growing number of LGBTQ+ individuals around the world fleeing sexual orientation and gender identity (SOGI)-motivated persecution, especially those from Latin America and the Caribbean (LAC). This thesis provides a critical analysis of the sources of and reasons for that responsibility as well as an examination of what the U.S. has done to uphold—and evade—its obligations in the past. I begin with a summary of relevant ethical arguments regarding the responsibility for refugees and asylum seekers, then move into a short history of U.S. policy towards displaced people. I prioritize historical events and government decisions relating to LAC and LGBTQ+ individuals. I then describe the current international asylum regime established by the United Nations and the domestic system for assessing claims from refugees and asylum seekers. Finally, I include an analysis of recent court cases from the Board of Immigration Appeals and the federal circuit courts relating to LGBTQ+ asylum seekers. This thesis provides a clear understanding of the United States' shortcomings in the area of SOGI asylum, and argues that it could better honor its obligations by accepting remedial responsibility for displacement in LAC and enforcing a uniform standard for entry in its immigration courts.

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Introduction

There are now more forcibly displaced people worldwide than at any other moment in history. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that around 68.5 million individuals—including forty million internally displaced people (IDP), 25.4 million refugees, and 3.1 million asylum seekers—are living away from their native or established homes due to armed conflict, famine, extreme poverty, and individual persecution.¹ Another ten million are considered stateless, having been denied a nationality the basic rights which accompany citizenship such as education, healthcare, employment, and freedom of movement. This thesis focuses on forced displacement in Latin America and the Caribbean.

One often overlooked catalyst of displacement is sexual orientation and gender identity (SOGI)-motivated persecution. Although the United States does not collect precise demographic information on the numbers, nationalities, or geographical distribution of LGBTQ+ refugees and asylees in the U.S., there is reason to believe that the number of SOGI-related asylum cases in the U.S. has increased and is likely to continue to grow in the future. First, LGBTQ+ civil and human rights are increasing in Latin America and the Caribbean, placing more grassroots LGBTQ+ activists at risk and encouraging more people to disclose their SOGI publicly, even in the face of a hostile society.² Second, since the mid-1990s SOGI has become an established basis for asylum in the U.S., and this precedent continues to grow with each successful asylum case. This may encourage persecuted LGBTQ+ Latin American and Caribbean to seek refuge in the neighboring U.S. instead of trying to survive at home.

¹ UNHCR, “Figures at a Glance,” *UNHCR USA*. URL: <https://www.unhcr.org/figures-at-a-glance.html>

² U.S. Department of Health and Human Services. *Rainbow Welcome Initiative: An assessment and recommendations report on LGBT refugee resettlement in the United States*. Washington, D.C: Heartland Alliance, 2017. URL: https://www.rainbowwelcome.org/uploads/pdfs/ORR%20Report%20MASTER%20COPY_01.2012.pdf

This thesis examines the United States' refugee and asylum policy over time, focusing especially on governmental practices and responses relating to LAC and SOGI. I not only provide a comprehensive summary of this, but also argue that the United States holds significant responsibility for LGBTQ+ asylum seekers in the LAC region and must change its current system of handling SOGI-based asylum cases in order to meet that duty. I begin with an overview of responsibility for the displaced, including ethical arguments concerning what factors generate responsibility on the part of states and other powerful actors. In order to compare these ethical arguments with the historical and current asylum and refugee-related practices of the United States, and in doing so make judgments about how the U.S. has underperformed and evaded its responsibilities, I then detail the history of U.S. policy regarding LAC refugees and asylum seekers and its often troubling LGBTQ+ foreign policy.

From there I move into an analysis of the current system for processing asylum claims in the U.S., comparing domestic policy to international refugee and asylum law as established by the United Nations and differentiating between affirmative and defensive SOGI asylum. In the next chapter I illustrate this system by examining precedential and revealing SOGI asylum cases from the immigration courts, Board of Immigration Appeals, and federal circuit courts. Each case provides insight into a certain subset of SOGI asylum, including the treatment of gender non-conforming behavior by immigration personnel and judges, the effort to verify one's LGBTQ+ identity or identities, and more.

Ultimately, I argue that the United States is failing its obligations to LGBTQ+ asylum seekers for several reasons. First and foremost, the U.S. has not yet accepted this responsibility and continues to evade its duties as it has done throughout its history. Additionally, the current asylum system is inadequate and incapable of fairly processing SOGI asylum claims due to the

disparity of standards that LGBTQ+ asylum seekers must meet across jurisdictions, and the overly strict interpretation of U.S. and international asylum law employed by asylum personnel and the immigration court system. Accepting responsibility for displaced LGBTQ+ individuals from the LAC region and crafting a fairer asylum system would move the U.S. closer to meeting its ethical responsibilities to the displaced.

Chapter 1 - Responsibility for the Displaced

Before assessing the history of U.S. policy toward refugees and asylum seekers, it is imperative to establish an ethical argument that assigns states responsibilities for the displaced. This allows for a comparison of what the U.S. has done regarding Central American and Caribbean refugees and asylum seekers with an analysis of what the U.S. *ought* to have done and continue to do in the future. David Miller, Joseph Carens, Chandran Kukathas, Serena Parekh, Iris Young, and Thomas Pogge provide us with the tools to posit and analyze ethical and normative arguments about admitting refugees and asylum seekers. Additionally, this section demonstrates that even the most restrictionist of immigration theorists who recognize a wide array of justifications for limiting the entry of foreigners recognize a duty toward forced migrants, namely refugees and asylum seekers. This responsibility is heightened when a nation has contributed to their displacement, whether over time or in acute and belligerent instances.

Refugee Ethics

Modern thought regarding the ethical treatment of foreigners and hospitality toward the displaced is grounded in the work of Immanuel Kant, who based his cosmopolitan philosophy on the belief that a peaceful “stranger” entering foreign territory must be treated without hostility.³ Although he does not use the terms “refugee” or “non-refoulement,” the first of which existed during Kant’s era but was not commonly used in philosophical analyses of individual rights, Kant makes clear that anyone outside of their country of origin with a credible fear of returning has a right to enter another state:

We are speaking here...not of philanthropy, but of right; and in this sphere hospitality signifies the claim of a stranger entering foreign territory to be treated by its owner

³ Kant, Immanuel, *Perpetual Peace: A Philosophical Essay*, trans. Mary Campbell Smith (London; New York: George Allen & Unwin; The Macmillan Company, 1917), 137-42 at p. 137.

without hostility. The latter may send him away again, if this can be done without causing death; but, so long as he conducts himself peaceably, he must not be treated as an enemy.⁴

The assertion that the rights of the displaced are not a matter of “philanthropy” demonstrates the prescience of Kant’s thinking. Modern nations too often treat the admission of refugees and asylum seekers as a charitable act that exceeds their obligation to the rest of the world; in fact, letting in “strangers” in peril is nothing more than the recognition of their intrinsic right to safety.

Contemporary philosophers have critiqued and expanded Kantian principles regarding the freedom of movement, adding specific ethical parameters to modern policy. David Miller and Joseph Carens approach this issue from two opposite corners: Miller seeks to identify the ethical and justifiable limitations that a state can place on immigration, while Carens seeks to push the limit and make a case for a system in which borders are almost entirely open. Although their work primarily concerns regular immigrants and does not focus on refugees and other displaced individuals, their treatment of the latter topic—though infrequent—provides a necessary theoretical base upon which the refugee ethics of the thinkers below are built.

Miller’s self-identified challenge is to argue that “every member of the political community, native or immigrant, must be treated as a full citizen, enjoying equal status and the equal respect of his or her fellow, *and*...that there are good grounds for setting upper bounds both to the rate and the overall numbers of immigrants who are admitted,” and to do so in a way that does not rely on xenophobia or racism.⁵ He distinguishes between “basic freedoms,” which people should enjoy as a matter of right, and “bare freedoms,” which do not warrant that level of protection.⁶ Basic freedoms must be so essential to human dignity that they generate obligations

⁴ Ibid., 137.

⁵ Miller, David, “Immigration: The Case for Limits” in *Contemporary Debates in Applied Ethics*, Ed. Andrew I. Cohen and Christopher Heath Wellman (Hoboken: Wiley-Blackwell, 2014), 363-90.

⁶ Ibid., 365.

on other individuals or states, and Miller does not believe that a right to movement across open borders meets this standard. He notes that although the freedom of *internal* movement is well established in liberal states, even that freedom is limited by traffic laws, private property and trespassing regulations, and so on. He concludes that the key factor when considering freedom of movement is sufficiency, not absolute freedom; in other words, the region in which a person finds themselves must be so harmful to their vital interests, be it medical care, employment, or other, that they must seek to move elsewhere. Even Miller, a demonstrated skeptic of free movement, recognizes that individuals forced to flee persecution and conflict hold a basic right to movement that regular immigrants do not.⁷

Although he grants refugees this right, he does not consider it an absolute one. He argues that states do have an obligation to admit refugees (including, notably, those deprived of adequate healthcare) but are not bound to host them permanently, and would be ethically justified in terminating their protected status once the threat in their home region has passed.⁸ Moreover, Miller argues that states who do not wish to host refugees should be permitted to pay their way out of any quota imposed on them by financially assisting states who do opt into a refugee-distribution system.⁹ Nonetheless, his willingness to grant forced migrants a right to seek refuge away from their homes provides evidence that even skeptics of immigration make exceptions for refugees.

For Joseph Carens, freedom of movement is an essential human right that virtually every sovereign state violates by maintaining militarized and largely impenetrable borders.¹⁰ He argues not only for easing restrictions and making global immigration a more accessible process for all

⁷ Ibid., 365.

⁸ Ibid., 372-3.

⁹ Ibid., 373.

¹⁰ Carens, Joseph, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013), Ch. 9-11.

human beings, but also for the right of individuals to move across borders without permission in pursuit of a higher standard of living.¹¹ Predictably, he advocates for a “flexible” interpretation of the 1951 Convention and its definition of a refugee, especially the particular social group (PSG) category of persecution.¹² Carens’ obligations of states follow those established by the 1951 Convention and the 1967 Protocol: first, states must adhere to a principle of non-refoulement, which dictates that a country cannot return a refugee to their region of origin or any state where their life or liberty may be threatened. Many states find ways to limit their obligation in this area by preventing asylum seekers from reaching their territory in the first place; specifically, by restricting visa access, forcing refugees to apply for protection in the first safe country they reach, and literally pushing them back to their origin at sea.¹³

The “right to membership” promised to refugees by the Convention—including the economic, social, culture, and political rights equal to those enjoyed by regular citizens—must be fully awarded by states. This includes not only the nominal granting of these rights, but also the removal of any barriers that may prevent refugees from enjoying them.¹⁴ Finally, Carens answers the question of how to allocate responsibilities for protecting refugees among states. He suggests that neighboring states have more responsibility for hosting refugees because “it is easier for refugees to return home if they have not gone too far away.”¹⁵ Although this principle, if enacted, would have the benefit of drawing several resource-rich and historically apathetic Gulf states into the refugee protection regime, it ultimately ignores the importance of social capital. For example, a refugee from South Sudan may have an easier time in Canada than in

¹¹ Ibid., 236-7, 234-5.

¹² Ibid., 199-200.

¹³ Ibid., 199.

¹⁴ Ibid., 202-4.

¹⁵ Ibid., 208.

neighboring Ethiopia, given her familial or linguistic ties to the former. Carens disapproves of the use of cultural criteria such as language, ethnicity, and religion when deciding whether to admit a refugee, but does not offer a solution to this troubling tendency among governments.

Ultimately, neither Miller nor Carens provide an adequate theoretical basis for protecting refugees and the displaced. Miller's defense of the right of states to terminate refugees' protected status based on developments in their country of origin ignores the individual nature of refugee and asylum cases. For example, Mexico has passed a slate of legislation concerning LGBTQ+ rights and protections in the past two decades, including anti-discrimination legislation in 2003 and 2010, the right to change one's legal gender without surgery in 2008, same-sex marriage in 2009, and a ban on conversion therapy in 2017.¹⁶ Additionally, in 2013 61% of Mexicans believed that society should accept homosexuality.¹⁷ Under Miller's system, the United States could plausibly interpret this as evidence that Mexico is now safe for LGBTQ+ people and begin deporting Mexican LGBTQ+ refugees and asylees in the U.S. back to their country of origin. This would endanger the lives of those LGBTQ+ individuals stripped of their protective status, many of whom fled from situations of harm that these laws will do little to nothing to remedy; for example, a gay asylee who fled violent abuse at the hands of his conservative family, or a trans refugee who suffered at the hands of the local police, will still be in grave danger despite the changes to Mexican law and favorable public opinion of homosexuality.

Additionally, Carens casts too narrow a net when criticizing the policies that states use to prevent asylum seekers from reaching their territory, a violation of the principle of non-refoulement. I would add more instances of illegal refoulement: third country refoulement, which

¹⁶ "LGBT Rights in Mexico." *Equaldex*. Accessed 12 March 2019. URL: <https://www.equaldex.com/region/mexico>

¹⁷ "The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries." *Pew Research Center Global Attitudes and Trends*, 4 June 2013. URL: <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>

occurs when a country deports an asylum seeker to a country that then deports them to an unsafe state or their state of origin (for example, from Greece to Turkey to Syria); agreements between host countries and border states to limit migration flows (e.g. the cooperation between Spanish and Moroccan authorities in Morocco); and incentivizing asylum seekers to abandon their asylum claims (for example Germany, which in the past has rewarded asylum seekers with cash or even a new apartment in their home country if they do so).

More recently, Chandran Kukathas writes that we live in a world in which “only a few borders come close to being absolutely shut, but none are fully open.”¹⁸ Nations must employ an ethical calculus when deciding whether to let in non-citizens, and might consider factors such as the protection of their citizens from crime or other harm, the health of their economy and its ability to withstand an influx of immigrants, the limited resources of the welfare state, the maintenance of a cultural majority, and many others.¹⁹ This decision is consequential not only for the nation, but also (and often even more so) for the foreigner; after all, one of the ultimate purposes of a border is to protect the rights of the citizens while limiting those of outsiders.

Continuing the tradition of Kant, Kukathas notes that the duty of hospitality toward outsiders is an ancient one; he cites the *Odyssey*, in which the Cyclopes, Lastrygonians, and Circe (all of whom do not honor this duty) “come to grief” while the Phaiakans (“model hosts”) live in a “civilized” and orderly society.²⁰ One moral of this tale is that “we owe a duty of hospitality to strangers, particularly when they come to us in distress: and we owe the *most* when they can offer us the *least*.”²¹ His question for his modern audience is whether this norm can

¹⁸ Kukathas, Chandran, “Are Refugees Special?” In *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 249-268, (Oxford: Oxford University Press, 2016).

¹⁹ *Ibid.*, 253.

²⁰ *Ibid.*, 250.

²¹ *Ibid.*, 250, emphasis added.

survive in our contemporary world of sovereign states and militarized borders. The answer as elaborated throughout his essay is that the ethics of Homer cannot be abandoned, but should be treated as a goal to aim for because our treatment of outsiders--especially those fleeing danger—has an important bearing upon the quality of our civilization.²² In other words, it is beneficial to live in an ethical society because such a society rewards behavior that minimizes harm between individuals. Whether a society can be considered ethical can in part be measured by its conduct towards desperate outsiders.

The current formula considered by states when making decisions regarding refugees involves balancing a vague notion of “state interests” with humanitarian concerns. Like Kukathas, I argue that this is an ethically indefensible position which rests upon a dichotomy that cannot be sustained; he adds that it also rests on “the establishment of institutions that cannot do what they proclaim,” such as the United Nations High Commissioner for Refugees (UNHCR).²³

Kukathas is generally skeptical of the current international refugee regime. He sees the category of “refugee” as an instrument created by states more for the purpose of evading our duties to the displaced than for fulfilling them. This view is informed by two arguments: first, that the definition that emerged in the post-WWII period was designed to make sure the displaced eventually returned to their regions of origin, and second, that the definition is far too limited since it leaves out “those who have fled but not crossed an international boundary; ...those whose flight from persecution has taken them across borders but who have been persecuted for reasons other than race, religion, nationality, or social or political membership,” and those fleeing war, famine, and environmental disaster.²⁴

²² Ibid., 251.

²³ Ibid., 251.

²⁴ Ibid., 255.

Although Kukathas is correct to note that the definition of “refugee” has historically been too stringent, it seems that his criticism targets the wrong definition. The definition elaborated in the 1951 Convention and the 1967 Protocol, which he refers to as the “post-WWII” definition, is far more inclusive than those created in the WWI and interwar period.²⁵ I argue that it is sufficiently inclusive, especially given the expansive “particular social group” category under which groups as diverse as LGBTQ+ individuals and victims of domestic abuse have been able to find refuge. Some states have even taken the expansion of the term “refugee” into their own hands, as Spain did when it added gender and sexual orientation as protected categories under its definition of “refugee” (the rest of which exactly copies the 1951 Convention).²⁶ The problem with this definition is not that its language is overly restrictive, but rather that states have misinterpreted its provisions—especially regarding PSG applicants—and applied overly strict standards, as the United States often does when processing LGBTQ+ refugees. In other words, the Spanish attitude is by no means the global norm; most countries try as much as possible to restrict the definition they willingly codified.

Kukathas argues in favor of the definition offered by Matthew Gibney, under which refugees are “those people who require a new state of residence, either temporarily or permanently, because if forced to return or stay at home they would, as a result of either the inadequacy or brutality of their state, be persecuted or seriously jeopardize their physical security or vital subsistence needs.”²⁷ He praises this definition for including refugees who flee in “anticipation of rightly foreseeable repression” and “persons who were not refugees when they

²⁵ For example, see footnote 5, above.

²⁶ Ley 12/2009 (263), de 30 de octubre, Reguladora del Derecho de Asilo y de la Protección Subsidiaria, Art. 3: “La condición de refugiado”. URL: <http://www.interior.gob.es/web/servicios-al-ciudadano/normativa/leyes-ordinarias/ley-12-2009-de-30-de-octubre>

²⁷ Matthew Gibney, “Liberal Democratic States and Responsibilities for Refugees,” *American Political Science Review* 93:1 (1999), 169–81 at pp. 170–1.

left their countries, but are unable to return home” due to changes in circumstances in their country that would subject them to harm if they did so.²⁸ He overlooks the fact that the purpose of asylum, a separate process from that of refugee protection, is to protect individuals in exactly the cases he cites in support of the Gibney definition.

Part of Kukathas’ criticism of existing definitions is rooted in the reliance on a clear-cut distinction between immigrants and refugees which rewards the latter with more rights and protections than the former. He cites Yael Tamir, who argues that “a clear distinction should be drawn between the rights of refugees and the rights of immigrants. Although certain restrictions on immigrants could be justified, they could never rescind the absolute obligation to grant refuge to individuals for as long as their lives are at risk.”²⁹ He argues that risk is never “absolute” and individuals are always at different levels of risk; therefore, there is no way of determining what level of risk might “trigger a right to be granted refuge” without excluding those fleeing war zones, famine, or even widespread genocidal violence.³⁰ For Kukathas, this proves that the current definition is too stringent. This is not accurate. The definition does not exclude those fleeing any of the conflicts he cites if they are personally facing harm; it *does* exclude those whose lives and rights are not threatened by conflict, even if they live in the conflict zone. Kukathas seems to think that any citizen of a country undergoing a civil war, for example, deserves refuge elsewhere, regardless of their wealth, power, role in the conflict, or other factor which insulates them from its devastation, which is largely felt by the unprotected masses.

Continuing, Kukathas argues that it is impossible to show that refugees and the displaced suffer in ways that “economic migrants” do not, and therefore deserve special protection:

²⁸ Kukathas, “Are Refugees Special?”, 256.

²⁹ Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), 159.

³⁰ Kukathas, “Are Refugees Special?”, 257-8.

The root of the problem is that the source of injustice, or of human suffering, is not always easy to locate. The aspiration to find the explanation that distinguishes the refugee from the human being who moves merely (merely!) to improve his lot is in many cases motivated by a noble concern to address the needs of those who are most vulnerable or suffer most. But, for better or for worse, suffering is dispersed too erratically for our political concepts to handle.”³¹

This strikes me as a rather hasty invitation to throw our hands in the air and do away with refugee protections altogether. The work of distinguishing refugees from economic migrants is undertaken by asylum officers, immigration judges, humanitarian organizations, and international bodies such as the UNHCR, and while it is not an exact science, it is continuously improved by the ever-expanding list of persecuted groups (including those with LGBTQ+ identities) and growing recognition of the importance of intersectionality.

However, Kukathas is right in claiming that the international refugee regime can “scarcely be said to have served the interests of refugees” adequately, since the proliferation of instruments for refugee protection has been matched by an increase in state tactics to evade responsibility. Agnès Hurwitz points to five kinds of policies states have employed to avoid aiding the displaced. First, there are measures to restrict access to the territory by, among others, requiring visas from nationals of refugee-producing countries, intercepting vessels at sea to prevent them from making landfall, and punishing companies that transport undocumented migrants. To this category I would add regulations requiring immigrants to prove that they plan on leaving the country, for example by showing that they have purchased a ticket for an outbound flight. Second, there are policies that limit access to asylum procedures by imposing time limits for the submission of an asylum claim (in the U.S., the limit is one year),³² creating international zones in airports that do not count as state territory (and therefore forbid a migrant

³¹ Ibid., 258.

³² 8 U.S. Code § 1158(2)(B)

from claiming asylum from an airport), and so on. Third, states have developed weaker categories of protection such as the United States' "temporary protection status" (TPS) category or other subsidiary protections which do not grant full refugee rights as established in the 1951 Convention. Fourth, states have tried to create "safe zones" in conflict-stricken countries to prevent nationals from those countries from journeying to the U.S. to seek asylum. Similarly, Kukathas notes that "refugee camps have become...one of the four solutions to the refugee problem" adopted by the UNHCR, in addition to repatriation, integration in the country of asylum, and resettlement in a third country.³³ This has resulted in mass encampment, which is unacceptable given the human rights violations endemic in refugee camps. Finally, states have placed asylum seekers in detention and withheld welfare benefits and work visas as deterrent measures.³⁴ There are currently over one thousand asylum seekers being held in indefinite detention in the United States, including families and unaccompanied minors.³⁵

These reactionary policies have created a contradiction: even as states maintain the centrality of the distinction between refugees and ordinary immigrants, they have also blurred this line "by treating asylum seekers as undocumented would-be immigrants unless they can show otherwise."³⁶ While some celebrate the codification of refugee and asylee rights in countries around the world, Kukathas points out that the creation of these categories is only one half of the victory for the displaced; the other is making sure that states do not make the barrier to entry for these categories unreasonably high. States, "while not merely reflections of the relations of power and the strength of particular interests in society, are nonetheless substantially

³³ Kukathas, "Are Refugees Special?", 261.

³⁴ Hurwitz, Agnès, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), 18-19.

³⁵ Gomez, Alan, "Asylum seekers sue Trump administration over prolonged detention," *USA Today*. 15 March 2018. URL: <https://www.usatoday.com/story/news/nation/2018/03/15/asylum-seekers-sue-trump-administration-over-prolonged-detention/425572002/>

³⁶ Kukathas, "Are Refugees Special?", 260.

precisely that,” and as a result the likelihood that an outsider seeking asylum will be met with hospitality instead of hostility is very low.³⁷ For Kukathas the ultimate solution to this unethical treatment of outsiders is “a serious diminution in the importance of the state, and of membership of states.” This would allow for a new regime in which the state “takes seriously” the interests of non-members, especially those most desperate.³⁸

Serena Parekh considers the lines that states draw between humanitarian benevolence and responsibility, finding that they often shirk their obligations to the displaced and offer only superficial remedies to refugee crises. This has led to mass encampment of refugees around the world, long-term statelessness, and “concomitant violations of human rights and dignity.”³⁹ She places the blame for this phenomenon on the difficulty of assigning responsibility for a crisis:

When a problem, however serious, is not caused by the actions of one particular state nor can be traced causally to any given entity, traditional accounts of responsibility cannot provide a sufficient ground for responsibility. How do we determine who is responsible for addressing the problem? An inability to answer this question in a way that is satisfying, morally as well as politically, is without a doubt one of the big stumbling blocks that prevent a more robust response to global displacement.⁴⁰

Parekh notes that even in instances where a country is directly causally responsible for displacement—for example, the United States’ invasions of Iraq and Afghanistan—responsibility is often denied by that country since mass displacement was not the intended outcome of their actions. Given this, grounding responsibility for refugees in a “causal connection” is unlikely to cause states to accept their obligations to the displaced.⁴¹

From here, Parekh considers the suggestions of Thomas Pogge, Iris Young, and David Miller on how to hold states responsible, and adds her own arguments specific to displacement.

³⁷ Ibid., 266.

³⁸ Ibid.

³⁹ Parekh, Serena, “Responsibility for the Forcibly Displaced” in *Refugees and the Ethics of Forced Displacement*, 104-35 (New York: Routledge, 2016).

⁴⁰ Ibid., 104.

⁴¹ Ibid., 106.

Their work contains three key points: first, that some of the injustices in the global refugee regime should be understood as forms of structural injustice, defined as moral wrongs that are not intentional, but rather the result of independent agents acting according to their own interests; second, that we ought to shift focus from outcome to remedial responsibility, focusing on who ought to remedy the harm rather than who caused it; and finally, we ought to expand the way we think about our connection to global displacement and the refugee regime in order to examine more deeply the ways in which we are connected to the causes and outcomes of displacement.⁴² With the latter point, Parekh refers to our “co-participation in a global system from which Western states derive significant benefits” and in which refugees suffer.⁴³

She begins with Pogge, who does not so much define global responsibility as argue for a negative duty to refrain from harming the global poor and dispossessed. His view is one of structural injustice, and he moves beyond notions of “bad luck” or a “birth lottery” to argue that Western states are responsible for not harming the global poor insofar as they contribute to and benefit from the existing global economic order.⁴⁴ The ground he provides by establishing this negative duty is instructive for creating a legitimate account of responsibility for global problems. In response to the objection that much of global poverty can be attributed to the corruption and mismanagement of resources by the governments of impoverished countries, Pogge points out that Western government—in the course of pursuing their own interests—treat these corrupt and even illegitimate governments as if they were entitled to represent their people and allocate their region’s natural resources. The business the West does with these governments

⁴² Ibid., 105.

⁴³ Ibid., 105.

⁴⁴ Pogge, Thomas, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd Ed., Ch. 4 & 8 (Cambridge: Polity Press, 2008).

grants them legitimacy, even as they actively harm their own people.⁴⁵ Furthermore, the World Trade organization allows “affluent countries to protect their markets against cheap imports...through tariffs, anti-dumping duties, quotas, export credits, and huge subsidies to domestic producers,” which allows the West to exploit impoverished countries’ desperation for capital. Such measures make it less profitable for developing countries to export their goods; according to Pogge’s estimate, these countries would realize a gain of \$100 billion dollars annually if these measures were not in place.⁴⁶ To summarize, the West actively maintains a system that oppresses the global poor for its own benefit.

Parekh extends Pogge’s arguments to cover the global displaced. She notes that global poverty shares several features in common with problems of refugees and global displacement. First, neither can be attributed “solely to discreet wrongs or omissions by specific agents but involve causal chains of numerous people around the globe.”⁴⁷ As such, the problem of displacement should be considered a type of structural injustice. Second, both result in grave moral harms and human rights violations. Finally, both could be solved with enough political will, but “both injustices are sustained because they support important economic and political interests.”⁴⁸ Parekh sees assigning states remedial responsibility instead of outcome responsibility as a way around this impasse.

Young agrees that global harms such as poverty ought to be viewed as structural injustices. She differentiates between two “irreducible” perspectives from which we can view injustice: interactional and institutional. The interactional point of view demands that we look at the ways in which an action contributed to an injustice; this could be lying, cheating, stealing, or

⁴⁵ Ibid., 202.

⁴⁶ Pogge, Thomas, *Politics as Usual: What Lies behind the Pro-Poor Rhetoric* (Cambridge: Polity Press, 2010), 20.

⁴⁷ Parekh, “Responsibility”, 120.

⁴⁸ Ibid.

anything else that “contributed to structural processes that produce vulnerabilities to deprivation and domination for some people who find themselves...with limited options compared to others.”⁴⁹ The institutional perspective looks at how we contribute to unjust institutions and structures that result in harm. This contribution leads to structural injustice, defined by Young as “when social processes put large groups of persons under systematic threat of domination or deprivation at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them.”⁵⁰ For example, homelessness is the result of a lack of affordable housing, a structural feature of a society not necessarily caused by bad luck or ill-intentioned landlords acting on their own.

As with Pogge, Parekh extends Young’s thinking into the realm of displacement. She notes that massive, semi-permanent refugee camps are the result of a system of sovereign states where people are forced to leave but have very limited rights of entry to other countries. This is not due to the malicious intentions of one individual, one organization such as the UNHCR, or even one state; rather, this can be seen as the consequence of many different states acting on their own “goals” regarding migration (especially the repulsion of migrants).⁵¹ The human rights granted by the Universal Declaration of Human Rights, the 1951 Convention, and the 1967 Protocol provide individuals with a set of tools to use against this unjust structure. For those who are personally unaffected by displacement, responsibility arises when actions taken in their name results in a “political responsibility” to try and redress the harm being done. Although the average American is not responsible for mass displacement or encampment, she does benefit from a government which is directly responsible for such harm; this relationship generates

⁴⁹ Young, Iris, *Responsibility for Justice* (Oxford; New York: Oxford University Press, 2011), 73.

⁵⁰ *Ibid.*, 52.

⁵¹ Parekh, “Responsibility”, 112.

duty.⁵² The more power or influence that an individual or body holds over a process that produces injustice and harm, the more responsibility ensues; this means that “unions, churches, students groups” and other organizations with the ability to coordinate action have a “particular kind and degree” of responsibility. UNHCR and other large refugee organizations are largely funded by Western states, and as such can feel pressure to adhere to their agendas.⁵³

David Miller argues that it is essential to distinguish between “outcome” and “remedial” responsibility. The former arises from the consequences of one’s actions, for example, the persecution of a people to the point of their forced displacement, while the latter is rooted in one’s ability to remedy a situation of injustice.⁵⁴ He details six ways in which we may assign remedial responsibility. First, an individual or body such as a state may bear remedial responsibility for an injustice if they are morally responsible for bringing it about. The actor must have displayed moral fault by acting recklessly or deliberately in a way that produced harm, or by not honoring a previous obligation.⁵⁵ Second, if the actor is not morally compromised, but nonetheless caused a harmful outcome with their actions, they may be held to remedial responsibility. Miller gives the example of a business that outperforms another in a fair competition and caused it to go bankrupt. Third, remedial responsibility applies even if the only link between the actor and the victim is one of “physical causation” completely devoid of intent.⁵⁶ Parekh gives the example of tripping and accidentally knocking someone off a ladder.⁵⁷

Additionally, Miller argues one who receives a benefit from injustice, even if not responsible for it in any of the three ways described above, holds remedial responsibility. If one

⁵² Ibid.

⁵³ Ibid., 125.

⁵⁴ Miller, David, *National Responsibility and Global Justice* (Oxford; New York: Oxford University Press, 2007), Ch. 4.

⁵⁵ Ibid., 100.

⁵⁶ Ibid., 101.

⁵⁷ Parekh, “Responsibility”, 117.

has been “unjustly enriched by the train of events” that led to the deprivation of another, she has a moral responsibility to remedy the injustice suffered by the other.⁵⁸ Fifth, he argues that “one rather obvious way of identifying an agent who can be held responsible for bringing relief...is to establish who is *capable* of supplying the remedy,” giving the example of a lone individual who sees a child fall into a river (and presumably has the ability to swim).⁵⁹ He dubs this subset of remedial responsibility “capacity” responsibility. Finally, there is “community” responsibility: if ties of “family, friendship, collegiality, religion, nationality...language or cultural background” and so on unite two entities, each is responsible for assisting the other in times of need.⁶⁰

These six criteria help us move past the distribution of outcome responsibility and toward action to remedy injustice. Perhaps the most useful of Miller’s categories is “capacity” responsibility. The United States is linked to global displacement both by the benefit principle and the capacity principle: as the richest nation in the history of the world, it inarguably benefits from the existing global order in which tens of millions are displaced, and has the capacity to remedy the harm caused by displacement. Moreover, the current regime benefits Western states by allowing them to treat aiding refugees as a benevolence, a non-obligatory charity to deploy at their discretion; specific benefits gained by this include not having to spend public funds accommodating refugees and appeasing anti-immigration politicians and voters.⁶¹

To reiterate, the failure of the global refugee regime to adequately address the needs of the displaced should be viewed as a form of structural injustice. It is difficult to place blame for the current system of mass encampment on any individual actor:

[Prolonged encampment] arises as a consequence of sovereign states acting according to their interests and encouraging international organizations...to do what seems best for the

⁵⁸ Miller, *National Responsibility*, 103.

⁵⁹ Ibid.

⁶⁰ Ibid., 104.

⁶¹ Parekh, “Responsibility”, 124.

displaced, namely keeping them in camps close to their countries of origin, for their own safety and for the sake of facilitating repatriation. No state is acting on an immoral principle, since they are acting to protect their citizens and the well-being of their states, and, in principle at least, acting in the interest of the displaced themselves.⁶²

Despite this, the actions of Western states still create human rights violations by barring access to safety, education, healthcare, and so on. One especially egregious human rights violation related to encampment occurs when camp residents cannot access the justice system of their host country due to geographic isolation, strict camp security which restricts their movement, and other hindrances.⁶³ Of course, not all injustice related to refugees is structural; the sources of displacement such as civil war, genocide, and political repression can often be understood as “straightforward” injustices with clear culprits who deserve individual punishment.⁶⁴ Clearly, the regime needs to change in a way that adequately compels Western states to remedy the injustice of displacement. Moving toward a system based on remedial responsibility would greatly improve the current situation.

⁶² Parekh, “Responsibility”, 121.

⁶³ This topic is addressed extensively by Kelsey Kofford in “An Examination of the Law, or Lack Thereof, in Refugee and Displacement Camps” in 35:1 *Hastings Int. and Comp. L. Rev.*, 173-216. Kofford demonstrates how language and cultural barriers, physical distances, restrictions on freedom of movement, lack of legal representation, meager financial resources, lack of transportation, and poor understanding of the domestic legal system can hinder a refugee from enjoying access to the judicial system of their host nation.

⁶⁴ *Ibid.*, 122.

Chapter 2 - U.S. Refugee History

The United States has been responding to the arrival of displaced individuals on its doorstep since the founding of the republic. The history of policy governing the admission of refugees and asylum seekers in the U.S. is inextricably linked with our history in general, and must be analyzed alongside changes in domestic society and culture, foreign affairs and conflicts, and political realignment. These factors and others—including the nation’s economic health, public opinion of immigrants, and the friction between ethnic and civic nationalism—add up to a “tricky and shifting calculus” that ultimately informs the government’s policy.⁶⁵ By juxtaposing the refugee ethics detailed above with the history of refugee admissions and other refugee-related policy in the United States, the gap between what the U.S. *ought* to have done in the past and what it *did* do becomes clear. The following section focuses on the latter topic, beginning from the mid-18th century and continuing to the present day. As with the rest of this thesis, the primary focus is on Latin America and the Caribbean, and LGBTQ+ individuals.

Bon Tempo’s broad distinction between “liberalizers” and “restrictionists”—generally, those individuals and organizations in favor of a steady flow of immigration and those opposed—is a useful narrative tool for analyzing policy debates over time.⁶⁶ One noteworthy theme throughout is the tendency of U.S. refugee and immigration policy to run parallel with the similar efforts of other countries and international organizations, never entirely intersecting. This individuality has historically meant that the stance of the U.S. towards refugees has been inconsistent, with several episodes in which the U.S. failed to respond to the needs of the displaced and other, more admirable instances in which it came close to respecting their rights.⁶⁷

⁶⁵ Bon Tempo, Carl J., *Americans at the Gate: The United States and Refugees during the Cold War* (Princeton: Princeton University Press, 2008), 1.

⁶⁶ *Ibid.*, 2.

⁶⁷ *Ibid.*, 3-4.

Two other themes regarding the history of U.S. refugee policy are worth mentioning at the start of this chapter. The first is the evolution of the role played by race in the admission of refugees and asylum seekers. Due to historical factors such as the end of World War II and the geopolitics of the Cold War, for decades most refugees admitted to the U.S. were from Central, Southern, and Eastern Europe. Racism and ethnonationalism caused the government to prioritize white refugees over refugees of color. For example, politicians during the Cold War welcomed so-called “victims of communism” from the Soviet Union but turned their backs on Afghani refugees displaced by the 1979 Soviet invasion of their country, also denying entry to victims of communist regimes in Mozambique and Angola.⁶⁸ The second and related theme is the domestic debate over the meaning of the term “refugee” and efforts to establish a comprehensive, stable definition. The term used to be defined by a specific conflict,⁶⁹ but because of the refugee-related international policy produced after World War II and the social movements of the 1960s the definition has become more static. However, although the definition has been codified in the U.S., the debate over who fits under its protection is still very much alive.⁷⁰

Pre-1900

During the decades before the American Revolution in colonial British North America, the Crown significantly eased immigration requirements to allow Germans, Swedes, Finns, and Dutch citizens to settle in North America and supply the colony with a robust work force.⁷¹

Many prominent members of the English, Scottish, and Irish majority opposed this influx of

⁶⁸ Ibid., 38, 183.

⁶⁹ Ibid., 15. Bon Tempo gives the example of the League of Nations, which in 1926 defined a refugee as “a person of Russian or Armenian origin who had lost the protection of the government” of his or her country and had yet to acquire “another nationality.” This definition is notable for setting specific ethnic parameters, a trend that would continue well into the Cold War era.

⁷⁰ 8 U.S. Code § 1101 (42)

⁷¹ Gerber, David A., *American Immigration: A Very Short Introduction* (Oxford: Oxford University Press, 2011), 18.

continental Europeans. Benjamin Franklin, reflecting on the fact that his home of Pennsylvania was one-third German, expressed his contempt for the group:

[The immigrants] ... are generally of the most ignorant stupid sort of their own nation.... Their own clergy have little influence over the people.... Not being used to liberty, they know not how to make a modest use of it.” He complained that they refused to learn English, and that the colonial legislature eventually must translate its proceedings so that the delegates could understand one another.⁷²

Franklin’s worry that those unaccustomed to the relative freedom enjoyed by American citizens were likely to abuse it resurged among early-20th century restrictionists.

The European agricultural crisis in the 1840s and resulting influx of displaced Germans and Irish led to the first major explosion of nativist politics in the United States.⁷³ The short-lived American Party tapped into nativist sentiment around the country, but ultimately failed to deliver the radical changes to immigration policy that its hardline supporters demanded.⁷⁴ The Civil War largely halted these nativist politics, in part because immigrants and native-born citizens fought together on both the Union and Confederate sides.⁷⁵ From 1885-1903, anti-immigration politicians were able to find limited successes: they banned illiterates, convicted criminals, and workers with foreign contracts.⁷⁶ Refugee politics in large part arose during the next century.

1900-WWII

Eleanor Roosevelt dubbed the first half of the 20th century the “age of the uprooted man,” due to the high level of displacement driven by armed conflict and the failure of major countries—especially the United States—to resettle refugees.⁷⁷ During this time period, the U.S.

⁷² Ibid.

⁷³ Ibid., 21-2.

⁷⁴ Ibid., 22.

⁷⁵ Ibid., 23.

⁷⁶ Ibid.

⁷⁷ Bon Tempo, Carl J., *Americans at the Gate: The United States and Refugees During the Cold War* (Princeton: Princeton University Press, 2008), 11. Roosevelt wrote in the foreword to Lyman C. White’s *300,000 New*

did not develop a comprehensive, long-term response to problems of displacement, often shunning temporary solutions as well. Even in the 1930s when the government created programs for Jews fleeing Nazi persecution, anti-Semitic members of the federal bureaucracy made efforts to slow refugee admissions.⁷⁸ Generally, the U.S. failed due to the indifference of policymakers to refugee crises and paranoia about political subversives entering as refugees. Of course, negative public opinion toward immigrants and refugees played a significant role in the government's inaction during this time period, although it is difficult to tell when it influenced government policy and when it followed lawmakers' leads.

From 1900 through World War I, the immigration and refugee debate was divided between the "liberalizers" and "restrictionists," to use Bon Tempo's terms. The former—led by organizations such as immigrant aid groups and ethnic identity groups—wished to maintain the "open door" that had let twenty-five million people in since 1880, while the latter—dominated by organized labor, Anglo ethnonationalists, and the Daughters of the American Revolution—sought to aggressively curtail legal immigration and refugee admissions.⁷⁹ Western politicians often played to anti-Asian prejudices to win votes, and Southern Democrats stoked racist xenophobia despite the fact that most immigrants settled in the industrial north. Immigration from Latin America was extremely rare if not nonexistent due to the racist restrictions in the law.

The rapid displacement of Europeans during World War I led to the first major refugee crisis of the century and invigorated debate in the United States. While the League of Nations (LON), which the Wilson administration helped start but the U.S. never formally joined, worked to respond to the crisis, the United States shirked responsibility. The LON employed a narrow

Americans (New York: Harper & Bros, 1957): "This is still the age of the uprooted man, the man who seeks to build a new life in a new land and who needs our help to do so."

⁷⁸ Ibid.

⁷⁹ Ibid., 12-13

definition of refugee, under which only a person of “Russian origin” or “Armenian origin” who had lost the “protection of his government and had yet to acquire another nationality” qualified.⁸⁰ The specific ethnic parameters of this definition would be emulated by U.S. definitions of “refugee” for decades to come, limiting the influx from Latin America and the Caribbean. Meanwhile, restrictionists in the U.S. won passage of the national origins quota immigration laws in the 1920s. These laws awarded visas to specific European countries only, with strong preference for Northern Europe and Great Britain. The success of restrictionism during the 1920s can be attributed in part to the Ku Klux Klan, which experienced a resurgence in the 1910s and by 1924 boasted a membership of almost six million.⁸¹ The KKK advocated for the ethnicity-based immigration laws that congressional restrictionists delivered in the 1920s. The quota system made no special accommodations for refugees, and continued unchanged until the 1960s.

Beyond the legal changes, the 1920s brought a rise in ethnonationalism which prevented Latin American and Caribbean immigrants from entering the country, along with Asians and Africans. Restrictionists argued (like Ben Franklin before them) that even Eastern and Southern Europeans, and even more so non-Europeans, lacked the ability to transcend their ethnic identities and embrace “American” democratic values. These critics employed the now-debunked methods of race science to argue that only Northern European and Anglo-Saxon individuals were genetically capable of living freely in a democratic society.⁸²

The 1930s saw a continuation of the trends of the prior decade. Even as Europe again began to swell with refugees due to Nazism, the U.S. did not contribute to the humanitarian response. Bills to create a refugee process outside of existing immigration quotas failed in 1938

⁸⁰ Ibid., 15.

⁸¹ Rothman, Joshua, “When Bigotry Paraded Through the Streets,” *The Atlantic*, 4 Dec. 2016. URL: <https://www.theatlantic.com/politics/archive/2016/12/second-klan/509468/>

⁸² Ibid., 14.

and '39, mostly as a result of the “America first” mentality caused by the Great Depression and the strong anti-Semitic persuasion of many elected officials.⁸³ Jewish organizations, labor unions like the Congress of Industrial Organizations (CIO), and New Deal politicians all supported assisting Jewish refugees and eventually persuaded President Franklin D. Roosevelt to host a refugee-themed conference at Evian in 1938. This caused the government to fill 85% of the German quota from 1938-40 (the quota system still being the only way for refugees to enter), but that plummeted to only 5% fulfillment in 1941 due to the war.⁸⁴

The United States violated its obligations during the 1930s and early 1940s. As the richest country in the world, it undoubtedly had the capacity to unilaterally and significantly respond to this crisis by resettling millions of persecuted individuals. As a geopolitical superpower, it had contributed immensely to the destruction of Europe during World War I and the long-term shackling of the German economy, two factors which led directly to the mass displacement and persecution of the 1930s and '40s. The United States held both moral responsibility and capacity responsibility for these European refugees.⁸⁵

Furthermore, several institutional changes enacted during the War would come to hinder U.S. refugee admissions in the future. First, the Immigration and Naturalization Service (INS) was moved by Congress (at Roosevelt's urging) from Labor to the Justice Department, signaling that immigration was an issue of law enforcement and national defense rather than economics. Similarly, the State Department ramped up its security clearance process due to paranoia that German subversives would enter the U.S. posing as peaceful immigrants. Congress changed the admissions procedures to allow consular officials to deny visa applications by labeling an

⁸³ Ibid., 16-18.

⁸⁴ Ibid., 17.

⁸⁵ Miller, *National Responsibility*, 100-04.

applicant as a “public safety concern,” a vague and often abused phrase.⁸⁶ In this environment, immigrants and refugees were met with instant suspicion and rejected for the slightest connection to ideologies or political groups deemed threatening.

On a positive note, the public conception of fascism and Nazism as “the enemy” served to “discredit the scientific racism that underlay much of restrictionist thinking,” leading to a diminution of ethnonationalism and race-based immigration arguments.⁸⁷ This change opened the door for immigration reform in the next two decades, which finally allowed regular immigration from Latin America and the Caribbean. Additionally, the United States embraced its post-War status as the world’s lone superpower and with it a more activist international policy. This global position meant that the task of resettling the millions displaced by war fell to the U.S. government, which served as *de facto* leader of the newly-created United Nations.

By the end of the war, eight million people from Germany, Italy, and Austria found themselves without permanent residences or the protection of citizenship. The United States and the U.N. Relief and Rehabilitation Agency (UNRRA) led repatriation efforts beginning in 1945, often moving groups back to their region of origin against their will.⁸⁸ In 1948, the U.S. finally created a refugee admissions process outside of immigrant quotas with the 1948 Displaced Persons Act (DPA), signed by Truman at the urging of prominent Jewish organizations such as the Hebrew Immigrant Aid Society (HIAS) and progressive politicians. The DPA led to the admission of 202,000, only 40,000 of which were Jewish; to persuade conservatives, liberalizers had to promise that most refugees would be Christian. This relatively minute refugee program

⁸⁶ Bon Tempo, *Americans at the Gate*, 20.

⁸⁷ *Ibid.*, 21.

⁸⁸ *Ibid.*, 22-3.

marked the most significant contribution of the United States to the post-War refugee crisis, illustrating the country's failure to uphold its responsibility to the displaced.

Restrictionism & the Cold War

The Cold War brought a resurgence of restrictionist politics and significant challenges for immigrants and asylum seekers from Latin America and the Caribbean. In 1952 Congress passed the Immigration and Nationality Act (INA), also known as the McCarran-Walter Act, which retained the national origins quota system and affirmed the United States' strong opposition to communism. The 1952 INA eliminated the ban on Asian immigration but allocated very few visas for that region, while continuing to heavily favor Northern Europe and the United Kingdom. Truman vetoed the legislation but was overridden; his outrage over the bill stemmed from its failure to do away with the quota system:

National origins thinking, Truman asserted, was “utterly unworthy of our traditions and our ideals,” like the “the great political doctrine of the Declaration of Independence that ‘all men are created equal’ . . . the humanitarian creed inscribed beneath the Statue of Liberty. . . our basic religious concepts, our belief in the brotherhood of man.” By the 1950s, this rhetoric was boilerplate, even if honestly and energetically professed; similar sentiments had failed liberalizers repeatedly over the preceding three decades.⁸⁹

Also outraged were the liberal Democrats, Republicans, ethnic organizations, Catholics, and Jews who had lobbied intensely for the end of the quota system.

Concern over communism largely informed the 1952 INA. Senator McCarran (D- NV, 1933-54), one of the principle authors of the law, had previously written the 1950 Internal Security Act which explicitly linked immigrants with communism and warned of communist subversion via the legal immigration system.⁹⁰ As the eight-year chairman of the Committee on

⁸⁹ Ibid., 30.

⁹⁰ Internal Security Act of 1950 (McCarran Act). URL: <https://loveman.sdsu.edu/docs/1950InternalSecurityAct.pdf>

the Judiciary, McCarran used his congressional bully pulpit to wield the national origins system as a weapon against communism. The 1952 INA enacted strict security provisions designed to thwart the entrance of subversives, including fascists, anarchists, and, most importantly, communists or “supporters of the world communist movement.”⁹¹ It included no refugee admissions system, even as the refugee crisis in Europe continued to worsen into the mid-1950s.

Bucking his party’s restrictionists, President Eisenhower supported the creation of the Refugee Relief Program in 1953. This program was motivated by concerns that the “refugee overpopulation” of Europe could destabilize the region and lead it to establish relations with the USSR, continuing the trend of infusing refugee policy with anticommunist politics.

Unfortunately, the anticommunist crusade hindered the administration of the program, which was overly securitized. Edward Corsi, a New York Republican and immigration expert hired by the State Department to make the program more efficient, complained that the RRP was “in the hands of the security people” and that “in their desire to keep security risks out, they have kept almost everybody out.”⁹² Corsi was eventually accused of being a communist and fired.

The RRP retained the racism of previous programs. Liberalizers secured only a token quota for Asia—many of whom were victims of communist regimes, demonstrating the hypocrisy of anticommunist restrictionists who supported accepting refugees of the USSR—and the Middle East, but none for Latin America or the Caribbean. The program also included a new definition of refugee to reflect its anticommunist lean:

“Refugee” developed into a catch-all term that applied to any person living in a noncommunist country who could not return home—and could not be resettled—because of “persecution, fear of persecution, natural calamity, or military operations.” ... A refugee had only to be living in a non- communist country and to be in danger of persecution; the definition lacked a geographical component that stood in for ideology.

⁹¹ Bon Tempo, *Americans at the Gate*, 30-1.

⁹² *Ibid.*, 49.

But since most of the refugees admitted under the bill were escapees and expellees, the definition of “refugee” took on distinctly politicized, and anticommunist, overtones.⁹³

As Bon Tempo notes, the lack of a geographical specifier (or ethnic one for that matter) did not result in an influx of refugees from around the world. Victims of communism in Africa and Latin America were not perceived as such by the restrictionists in government.

Notably, the RRP issued rejections based on the “moral security” of an applicant, a phrase that included sexual orientation. Rejections of this kind constituted eighteen percent of total RRP rejections, adding up to almost six thousand individuals; it is unknown how many were specifically kept out for their sexual orientation or gender identity. However, it is certain that under the RRP both were valid justifications for rejecting a refugee application.⁹⁴

The 1960s brought significant change to immigration and refugee policy which eventually culminated in the disposal of the national origins quota system. Representative Francis Walter (D- PA) of the McCarran-Walter Act died in 1963 and was replaced as head of the House Immigration Subcommittee by Michael Feighan (D- OH). Feighan represented a heavily Eastern European district, and was less wedded to national origins and ethnocentric immigration policy than Walter.⁹⁵ Additionally, moderate Republicans such as Eisenhower and Senator Jacob Javits (R- NY) joined progressives such as Senator Ted Kennedy (D- MA) and Senator Hubert Humphrey (D- MN) in supporting liberalizing immigration and refugee policy. They were buoyed by support from labor unions and the American Civil Liberties Union.

However, Southern Democrats still dominated positions of power over immigration in the Senate, and continued to openly doubt the ability of nonwhite individuals to assimilate in the United States. Members of the New Right, including Vice Presidential Candidate William Miller

⁹³ Ibid.

⁹⁴ Ibid., 58.

⁹⁵ Ibid., 87.

(R- NY), blasted the drive to overturn the national origins quota on the campaign trail in 1963.⁹⁶

The Southern Democratic-New Right coalition made clear in the early '60s that they did not welcome immigrants and refugees of color in the United States, including Latin Americans.

The reform that eventually passed as the 1965 INA did away with the national origins quota over three years, allocating 170,000 annual visas for outside the Western hemisphere and 120,000 for inside the West (the latter included Latin America and the Caribbean). The cap on Western hemisphere immigration infuriated the United States' South and Central American allies, but restrictionists insisted on the measure. President Lyndon Johnson supported the reform effort for political reasons, realizing that "ethnic whites" made up a key part of the Democratic voting base, and his landslide victory over Goldwater provided the mandate to finally reform the system. The new system created a seven-tiered preference system which prioritized those with family connections to the U.S. and those with needed skills. Senator Ted Kennedy celebrated the reform and placed it within the context of the broader Civil Rights Movement:

We are past that period in the history of the United States when we judge a person by his last name or his place of birth or where his grandfather or grandmother came from. . . . I hope we shall start anew to judge people on what their merit is, on what they can contribute to the country. . . . That is the whole philosophy of the immigration bill, and that was the whole philosophy of the civil rights bills of 1963 and 1964 and the voting rights bill of 1965.⁹⁷

Nonetheless, the new system maintained many significant restrictions. The new refugee process was overly strict, and allocated only *six percent* of the Eastern Hemisphere visas for refugees.

The new definition also maintained the focus on communism, defining a refugee as a person

"who . . . because of persecution on account of race, religion, or political opinion [has] fled . . .

from any *Communist or Communist-dominated* country or area, or . . . from any country within

⁹⁶ Ibid., 89.

⁹⁷ Ibid., 95.

the general area of the Middle East . . . and [is] unable or unwilling to return to such country.”⁹⁸ Liberalizers had pushed for the new system to include southern Africans and Cubans, who were being displaced at alarming rates, but these proposals were killed by restrictionists.⁹⁹

Restrictionists, joyful over the prioritization of those immigrants with family ties, saw this system as a *de facto* replacement of the national origins quota. Instead, the family ties priority resulted in an influx of non-European immigrants. Fewer Europeans chose to join their relatives in the U.S., given the new economic prosperity in Europe. As a result, almost a million Latin Americans came to the U.S. from 1975-9 while less than half a million came from Europe, and by 1976 over fifty percent of legal immigration to the U.S. came from Mexico, the Philippines, Korea, Cuba, Taiwan, India, and the Dominican Republic. For the first time, a large and diverse community of Latin American and Caribbean immigrants was established in the United States, providing the pro-immigration movement with another powerful organizing base.

The Case of Cuba (1959-66)

Communist Cuba posed the closest threat to the United States during the Cold War, a fact which greatly influenced immigration and refugee policy toward the island. In 1959, the first year of the Castro regime, the U.S. started allowing Cubans fleeing their home to enter the States via a relatively lax admission process overseen by the INS. The INS still ran a security check on each individual and demanded that they formally denounce communism, but did not prohibit entry to former communists, a policy that had been standard for decades.¹⁰⁰ A Cuban refugee during this time was not assessed to determine the likelihood that she would become a “public

⁹⁸ Immigration and Nationality Act 1965. URL: <https://www.govinfo.gov/content/pkg/STATUTE-79/pdf/STATUTE-79-Pg911.pdf>, emphasis added.

⁹⁹ Bon Tempo, *Americans at the Gate*, 100-04.

¹⁰⁰ *Ibid.*, 106-7.

charge,” dependent on welfare and other government support; instead, in 1963 the U.S. government launched a program—the Cuban Refugee Program (CRP) administered by the Department of Health, Education, and Welfare—to supply the Cuban refugees with housing, healthcare, job training, and welfare.



Figure 1. Two Cuban refugees landing in Florida. Their boat is anchored in the background.

Of course, the government still sought to keep out criminals and “persons...with a criminal potential.”¹⁰¹ This extended beyond possible crimes such as espionage or political subversion. Until 1962, sodomy—including sex between two same-sex individuals as well as

¹⁰¹ Ibid., 117.

oral and anal sex between different-sex individuals—was a criminal offense in all fifty states, enforced almost exclusively against LGBTQ+ people. In 1986, the Supreme Court of the United States (SCOTUS) upheld the constitutionality of sodomy laws in the case *Bowers v. Hardwick*.¹⁰² That decision stood until the SCOTUS reversed in *Lawrence v. Texas* (2003), which invalidated sodomy laws in the fourteen remaining states, including Florida.¹⁰³ This means that a history of non-heterosexual sexual behavior, a criminal offense at the time, would have been disqualifying for a Cuban refugee fleeing to the United States. Moreover, in the 1950s and early 1960s it was illegal in almost every state to dress in a manner not customarily associated with one's assigned sex. Therefore, any individual deemed male by the government would be charged as a criminal if found wearing women's clothing, and the same was true for cross-dressing women. A Cuban refugee found to have a history of crossdressing or other gender non-conforming behavior would likely have been rejected by the United States.

All told, around 300,000 Cuban refugees were settled in the U.S. from 1959-66, mostly in Florida. The government drummed up public support for the Cuban refugees by arguing that they were victims of communism, although this was not entirely truthful; some of the refugees had been persecuted by Castro, but the majority were middle-class Cubans who freely chose to leave because they thought that their financial prospects would be better in the market economy of the United States.¹⁰⁴ Additionally, the CRP engaged in a public relations campaign to cast Cuban refugees as hardworking and innovative people. The magazine *Newsweek*, at the urging of the CRP, published a profile of Vincent Rangel, a lawyer imprisoned by Castro who fled and found work as a high school Spanish teacher in Iowa. Entitled "Iowa, Sí!", the article fed the 'model

¹⁰² *Bowers v. Hardwick*, 478 U.S. 186 (1986). URL: <https://www.oyez.org/cases/1985/85-140>

¹⁰³ *Lawrence v. Texas*, 539 U.S. 558 (2003). URL: <https://www.oyez.org/cases/2002/02-102>

¹⁰⁴ Bon Tempo, *Americans at the Gate*, 124-5.

refugee' archetype that the CRP hoped to sell to the American public using Rangel's story.¹⁰⁵

Moreover, the article offered a clear and reassuring message: Cuban lawyers, doctors, and businessmen were willing to work in less glamorous and well-paying jobs than their years of training and experience had prepared them for—jobs that Americans generally did not want.¹⁰⁶

Although the standards for admitting Cuban refugees were lower than refugees from other countries, the U.S. can hardly be said to have shown generosity in this case. A more accurate assessment is that it minimally filled its obligations as a safe, wealthy, and neighboring country, while still managing to reject many deserving individuals over bogus concerns about public morality. Many of the LGBTQ+ individuals who were forced to remain in Cuba suffered at the hands of the Castro regime because of their sexual orientations and gender identities. Some would come to the U.S. as refugees decades later.

The 1970s

By the end of the 1960s the flow of refugees from Cuba had slowed to a trickle, but three new crises arose during the subsequent decade: a wave of mostly Jewish individuals fleeing the Soviet Union sought entry to the United States, the escalation of the conflict in Southeast Asia generated millions of refugees fleeing Vietnam, Laos, and Cambodia, and thousands of Chileans fled their country after Augusto Pinochet seized power in 1973.¹⁰⁷ I focus on the latter case.

The Pinochet regime created a system of detention, mass incarceration, torture, and extrajudicial killing shortly after taking power. In response to the tide of refugees leaving Argentina, Latin American and European nations worked with the Office of the United Nations

¹⁰⁵ "Iowa, Sí! Training Programs for Spanish Teachers," *Newsweek*, August 1963, 75.

¹⁰⁶ Bon Tempo, *Americans at the Gate*, 125.

¹⁰⁷ *Ibid.*, 133, 141.

High Commissioner for Refugees (UNHCR) to secure safe passage and eventual resettlement for them; the Nixon administration did not participate in this process, instead choosing to “stabilize the Pinochet government and normalize U.S.-Chilean relations”¹⁰⁸ In 1975, President Gerald Ford set a goal to admit only four hundred Chilean refugees.

The government’s failure to respond to this crisis can be attributed to two factors: first, the refugees were not victims of a communist enemy, but rather of a right-wing, free market-oriented dictator who had seized power from the leftist Allende administration in collaboration with the United States government. Outside of the White House, the Neoconservatives who vigorously advocated for the admission of Soviet Jews fleeing the USSR largely ignored the case of the displaced Chileans, perhaps to avoid displeasing the Nixon administration.¹⁰⁹ Second, the government was better able to shirk responsibility for this crisis than for other major refugee-generating events in the 1970s, most notably the war in Southeast Asia. From 1975 to the early 1980s, the U.S. accepted almost half a million refugees from Vietnam, Cambodia, and Laos. The causal connection between the actions of the U.S. and their displacement was much more obvious than in Chile, where the involvement of the U.S. in the *coup d’état* that ousted Allende would not become public until years after the fact. Additionally, Chile is not considered a neighbor of the United States to the extent that Cuba is; the U.S. government felt no pressure to resettle refugees in the States when Latin American countries closer to Chile could offer safety.

The standards followed by the U.S. when accepting refugees from Southeast Asia and other parts of the world reveal a continuation of the sexual orientation and gender identity-based discrimination of prior years. Three broad categories of offenses could disqualify a refugee from admission: violations of social norms, a criminal record, or offenses that were political in nature

¹⁰⁸ Ibid., 142.

¹⁰⁹ Ibid., 143.

(almost exclusively applied to communists) or endangered American national security.¹¹⁰ The “social norms” offense included polygamy and polyamory as well as non-heterosexual sexual orientations and gender non-conforming behavior such as crossdressing. As a result, LGBTQ+ refugees displaced by violence and war in Chile, Southeast Asia, and elsewhere were largely left behind by the United States in the 1970s and 1980s.

The 1970s and the Beginning of the War on Drugs in Latin America and the Caribbean

As Juan Gabriel Tokatlian notes, the “war on drugs” declared by President Nixon in 1971 was never a metaphor, but rather a transnational military effort from the beginning.¹¹¹ The goal of the war was to stop the rapidly-growing production, transmission, and consumption of drugs in Latin America and the United States. Although the production of drugs, especially cannabis and cocaine, in Colombia was nothing new, the industry had recently expanded to Mexico, causing the United States to take newfound interest in dismantling the narco-trafficking network. Much of the work in the war on drugs has been undertaken by officers of United States Southern Command, also known as “USSOUTHCOM” or simply “SOUTHCOM,” one of ten Unified Combatant Commands (CCMDs) of the Department of Defense.

A primary tool of SOUTHCOM and of the war on drugs in Latin America generally has been crop eradication, a practice that involves clearing forest areas, aerial and manual spraying of large swaths of agricultural land with chemicals, and large-scale burning. Crop eradication has destroyed enormous areas of land in Mexico, Colombia, Bolivia, and elsewhere, dismantling the large “subsistence peasant economy” in rural areas and displacing rural and indigenous groups in

¹¹⁰ Ibid., 158.

¹¹¹ Tokatlian, Juan Gabriel, “The War on Drugs and the Role of SOUTHCOM” in *Drug Trafficking, Organized Crime, and Violence in the Americas Today*, Ed. Bruce M. Bagley and Jonathan D. Rosen (Gainesville: University Press of Florida, 2015), 67.

the process.¹¹² Additionally, crop eradication has served, in some cases, to greater strengthen violent groups. In Bolivia, the *cocalero* (“coca grower”) movement organized into an armed group in the 1980s based on its rejection of the forced eradication of illicit crops.¹¹³ In Colombia, the United States’ crop eradication campaign has directly strengthened the hold that the Revolutionary Armed Forces of Colombia (FARC) has over rural areas in that country. This in turn has served to reinforce the incentives to continue the illicit cultivation of drugs, namely poverty, desperation, and fear of violence from both the government and armed militia groups.¹¹⁴ In short, crop eradication is ineffective, if not completely paradoxical, and has led to the displacement of tens of thousands of Latin Americans. The United States has not created any sort of program or fast track for victims of its aggressive drug war in Latin America or the Caribbean, a clear evasion of its responsibility for the situation.

The 1980s: Carter, Reagan, and New Crises

During the late 1970s and early 1980s the country experienced a sharp rise in anti-immigrant politics led by the New Right coalition. This movement was largely based in the West and Southwest, mostly due to the influx of Southeast Asian refugees in that region and increasing undocumented immigration along the Mexican border, the latter of which accounted for over 250,000 entries annually by 1980.¹¹⁵ This trend embraced a style of ethnonationalism reminiscent of the 1920s for its blatant white supremacy, but partially new in its focus on Latin America. Politicians and prominent anti-immigration activists played into the deep paranoia with which white Americans—especially in the South and Southwest—viewed Hispanic immigrants.

¹¹² Ibid., 68-9.

¹¹³ Ibid., 69.

¹¹⁴ Ibid.

¹¹⁵ Bon Tempo, *Americans at the Gate*, 168-9.

In their “nightmare vision,” the “Hispanicization” of the United States was more likely than the “Americanization” or integration of Mexican immigrants; therefore, Mexicans in the U.S. represented a “subversive wedge for a Mexican irredentism focused on retaking the territory conquered by Americans in the mid-nineteenth century.”¹¹⁶ In short, this new vision feared the replacement of the white majority by a violent foreign force; it is no coincidence that President Donald Trump often describes Latin American immigration to the U.S. as an “invasion”.¹¹⁷

Although this ethnonationalist tide influenced immigration politics, it had apparently little effect on refugee admissions. Even Senator Jesse Helms (R- NC), who openly doubted the ability of refugees to integrate into American life and fretted over the white majority, admitted that the U.S. had a responsibility towards refugees from the war in Southeast Asia.¹¹⁸ More significantly, the 1980 Refugee Act (RA) began to gain traction in Congress. Based on a policy foundation built by Senator Ted Kennedy in the 1970s, the RA used the definition of “refugee” found in the 1967 United Nations treaty entitled “Protocol Relating to the Status of Refugees” (“the Protocol”):

The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of *race, religion, nationality, membership in a particular social group, or political opinion*.¹¹⁹

The U.S. had signed the Protocol, but this was nothing more than an “empty diplomatic and public relations gambit aimed at demonstrating interest in the UN’s International Year for

¹¹⁶ Gerber, *American Immigration*, 130.

¹¹⁷ See Choi, Matthew, “Trump: Military will defend border from caravan ‘invasion.’” *Politico*. 29 Oct. 2018; Morin, Rebecca, “Trump warns of invasion as he tries to pitch crisis on the border.” *Politico*. 11 Jan. 2019; Baker, Peter, “Trump Declares a National Emergency and Provokes a Constitutional Clash.” *The New York Times*. 15 Feb. 2019.

¹¹⁸ Gerber, *American Immigration*, 169.

¹¹⁹ Refugee Act of 1980, Public Law 96-212 (1980).

Human Rights.”¹²⁰ Adopting a formal definition free of ethnic or geographical parameters into U.S. law via the RA was much more significant.

The final law signed by President Jimmy Carter in March of 1980 made very few concessions to refugee restrictionists, mostly due to the significant mobilization of old groups such as HIAS and the International Rescue Committee (IRC) in support of the bill, in addition to the resurgence in the popularity of human rights in the United States.¹²¹ This resurgence was evidenced by the growing political clout of Amnesty International, which lobbied in favor of the RA, throughout the 1970s. The RA created a new two-tiered system for refugee admissions. The first tier allowed for up to 50,000 “normal flow” refugees annually and the second tier permitted unlimited admissions in the event of an unforeseen crisis; refugees admitted in the first tier generally applied from a third country or a refugee camp and traveled to the U.S. upon acceptance, while the second tier was for more urgent cases. At the urging of conservatives, the law includes a qualifier that the second tier must only be activated when “justified by grave humanitarian concerns or...the national interest;” however, under the law an administration does not need *approval* of Congress to declare these conditions.

The law nearly tripled the country’s annual refugee admissions, and, by allowing the executive to take in more refugees without consulting Congress, greatly expanded the number of potential admissions. It also divorced refugee affairs from immigration policy by ending the “seventh-preference” system created by the 1965 INA, recognizing that a refugee does not leave their country voluntarily while a regular immigrant does. Finally, the RA clarified the asylum system by which foreigners already in the U.S. could apply for protection; before the RA this process was handled by the Justice Department and the INS via “murky administrative

¹²⁰ Bon Tempo, *Americans at the Gate*, 173.

¹²¹ *Ibid.*, 176-7.

procedures” and rarely resulted in a successful petition.¹²² The RA resulted in a large increase in asylum applications as individuals were now able to travel to the U.S. and *then* claim asylum instead of waiting from a third country; just as importantly, undocumented individuals caught in the U.S. and placed in removal proceedings were now able to claim defensive asylum.

Maribel and Haitian Refugee Crises

The first major test of the RA came only one month after it was signed into law, when 130,000 Cubans arrived in Florida over six months beginning in April of 1980. At the same time, 12,000 Haitians displaced by the cruel repression of political opposition by President Jean-Claude “Baby Doc” Duvalier arrived in Florida. Most Haitians had chosen to come because of the change to U.S. asylum law; less than one hundred of the 55,000+ asylum claims from Haiti had been accepted pre-1980.

The Cuban flow resulted from a decision by Castro to allow all Cubans who wished to leave the island to do so at the port of Mariel. He also invited Cubans in the U.S. to sail to Mariel and pick up their relatives in Cuba; this quickly created a chaotic and dangerous boat crisis on the water between the U.S. and Cuba. Not every Cuban left willingly; the Castro regime forced “social deviants” to join the emigrants, including 24,000 prisoners, 600 patients in mental health facilities, and 1,500 “homosexuals,” among unknown numbers of other groups deemed undesirable by the Cuban authorities.¹²³ It is safe to assume that not only gay men, but all LGBTQ+ Cubans were vulnerable to this mass expulsion.

Since the refugee infrastructure laid out in the RA had yet to be fully established, President Carter chose to parole all the Cuban arrivals into the U.S. instead of having them go

¹²² *Ibid.*, 179.

¹²³ *Ibid.*, 182.

through the new asylum procedure. At his request, the INS created a new category, “Entrant (Status Pending),” which was also extended to the 30,000 Haitians who arrived by the end of 1980. Both groups were eventually “normalized” by Congress in 1984 and set on a path to citizenship or permanent residence.¹²⁴

President Ronald Reagan took office in January of 1981 and displayed an overall ambivalence on immigration issues. He supported a free flow of newcomers to supply U.S. businesses with cheap labor and saw a crackdown on undocumented immigrants as an unnecessary economic regulation; on the other hand, he opposed granting undocumented immigrants social and political rights.¹²⁵ The beginning of his administration coincided with an explosion of the global refugee population: from 1975 to 1985, the number of global refugees jumped from three to twelve million, driven by upheaval in Afghanistan (the Soviet occupation displaced millions to Iran and Pakistan), Central and Eastern Africa, Mexico, Nicaragua, El Salvador, and Honduras.

In response, the global refugee regime moved towards mass encampment instead of resettlement. In 1983 Charles Sternberg of the IRC stated that “in more and more countries, the readiness to assist and receive refugees is diminishing. It is not just in the United States; it is a universal phenomenon.”¹²⁶ The Reagan administration shirked leadership on the issue and created a global vacuum of inaction. In the early 1980s, industrialized nations such as Canada, West Germany, Great Britain, and Switzerland all toughened the criteria by which they granted asylum; instead of increasing their admissions quotas, they funded refugee camps in the Global

¹²⁴ Ibid., 183.

¹²⁵ Ibid., 184.

¹²⁶ Teltsch, Kathleen, “Committee Celebrates 50 Years of Aiding Refugees.” *The New York Times*. 16 Nov. 1983. URL: <https://www.nytimes.com/1983/11/16/nyregion/committee-celebrates-50-years-of-aiding-refugees.html>

South, which quickly ballooned to the size of small cities.¹²⁷ Reagan contributed to this trend, setting refugee quotas at record lows and heavily favoring white refugees. Eastern European and Soviet refugees received 31,000 spots in 1982 while refugees from Latin America, the Middle East, and Africa received only a few thousand. Reagan demonstrated not only a return to the anti-communist thinking of the early Cold War, but also the significant racism of that mindset; his administration did not care to resettle the Afghani victims of communism displaced by the Soviets, or the victims of armed conflict involving communism in Angola or Mozambique.¹²⁸

In Latin America, armed conflict produced two million refugees by the end of the 1980s. Most of these came from countries allied with the United States, including El Salvador and Honduras, and as such received very few refugee slots. For example, by 1982 there were 8,900 pending refugee claims from El Salvador, and only seven had been accepted. Worse, Reagan continuously stoked fear of Central American refugees streaming into the U.S. to persuade the American people to support his administration's military and economic aid to El Salvador and the Contras.¹²⁹ The role of the United States in this refugee crisis should not be understated. During the early 1980s, the war on drugs led by SOUTHCOM was moving from a periodic police action to a permanent military operation—an all-out militarized war aimed at crop eradication, the arrest of killing of drug traffickers, and the breakup of organized crime.¹³⁰ In 1986, Reagan issued Presidential National Security Decision Directive (NSDD) 221 which further expanded the role of the military in fighting drugs in Central America, especially in El Salvador, Guatemala, and Honduras (the “Northern Triangle”).¹³¹

¹²⁷ Bon Tempo, *Americans at the Gate*, 186.

¹²⁸ *Ibid.*, 188.

¹²⁹ *Ibid.*, 189.

¹³⁰ Tokatlian, “The War on Drugs”, 70.

¹³¹ National Security Decision Directive No. 221, 8 Apr. 1986. URL: <https://fas.org/irp/offdocs/nsdd/nsdd-221.pdf>

However, even though the Reagan administration displayed great reluctance to follow the provisions of the 1980 RA, the 1980s saw the establishment of refugee admissions as a routine part of U.S. policy. The machinery of refugee admissions created in 1980 proved able to withstand a hostile administration. Soon, the first major asylum case regarding SOGI-motivated persecution would be favorably decided, setting a precedent that would open the door for LGBTQ+ refugees and asylum seekers. That topic is handled in detail in Chapter 4 of this thesis.

The 1990s

At the start of the next decade twelve million refugees remained without permanent protection around the world, but the growth of that number slowed dramatically due to the end of the Cold War and the dissolution of the USSR, and with it the Soviet-funded conflicts in Africa and Central America. The United States continued to focus on funding refugee camps instead of resettling refugees, which reinforced the permanence of some of the world's largest camps and often produced paradoxical results. In one memorable instance, the Clinton administration caused significant damage to a refugee camp in Rwanda by dropping "giant pallets of supplies" from C-130 planes over the camp without warning.¹³² As of October 2018, the U.S. had taken in less than 1,500 Rwandan refugees out of over three million displaced by the genocide.¹³³

Additionally, the Clinton administration continued to heavily favor white refugees from Eastern Europe and the former Soviet Union. The U.S. admitted over a million refugees from 1990 to 2000, but refugees from Africa, the Middle East, and Latin America made up only a few thousand admissions per year. The decision to implement a "wet foot, dry foot" policy for Cuban

¹³² Bon Tempo, *Americans at the Gate*, 198.

¹³³ Gordon, Claire, "Coming to America: the 5 biggest refugee groups of the last 20 years." *Aljazeera America*. 14 Oct. 2018. URL: <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/13/the-5-biggest-refugeegroupsofthelast20years.html>

asylum seekers was particularly reprehensible. Under this policy, a Cuban apprehended at sea—even if she had made it to U.S. waters—could be returned to Cuba or a third country, and only those who made it to U.S. land could seek asylum or permanent residence. This is a clear violation of the international principle of non-refoulement, which prohibits the deportation of any individual to a country where their life may be in danger, and of the individual human right to seek asylum in a safe country. Bon Tempo is correct in his assessment of U.S. refugee policy in the 1990s, writing that it was “rarely laudable, usually minimally, and sometimes morally repugnant.”¹³⁴

Post-9/11 Developments

In early September 2001, the Bush administration was preparing to announce the refugee quota for 2002. After the events on September 11th, the administration halted all refugee admissions immediately and closed refugee processing centers around the world, even blocking around 20,000 refugees who had already been accepted and given permission to travel to the U.S. from doing so.¹³⁵ The institutional changes made in the aftermath of 9/11 moved refugee admissions back into the national security realm, where it had lived until the passage of the 1980 RA. The State Department and the Department of Justice formed a joint task force to study and secure the refugee admissions process, setting tougher screening standards for security threats. The task force deliberately excluded officials from the departments who ran the refugee program and did not consult NGOs which specialized in refugee resettlement, including the IRC.¹³⁶

¹³⁴ *Ibid.*, 198.

¹³⁵ *Ibid.*, 203.

¹³⁶ *Ibid.*

The results of the task force were striking. The State Department's Bureau of Population, Refugees, and Migration (BPRM) tightened its security checks for refugees from a list of certain countries, requiring the FBI to conduct an investigation called a Security Advisory Opinion on every individual applicant. Every refugee entering the U.S. had to be fingerprinted, and their family ties (used to award refugee protection to a refugee's immediate family) were more vigorously tested.¹³⁷ Just as during the Cold War, the government scrutinized the political beliefs and activities of all applicants, searching for any disqualifying connection to extremism. These changes drove down the number of refugees accepted: the quota for 2002 was 70,000 (the lowest since the mid-1980s), but only 27,000 of those spots were filled due to the backlog created by the new security measures. Only 28,400 spots were filled in 2003, and the percentage of the quota filled finally went up to 75% in 2004 and 2005. Whether the new measures had an impact on LGBTQ+ refugees and asylees is unclear; however, like all refugees, they were harmed by the backlog created by the overly comprehensive security checks.

Although the primary focus of the government was in the Middle East and Central Asia following 9/11, SOUTHCOM increased its influence after the attacks by arguing that "narcoterrorists" were spreading throughout LAC.¹³⁸ The post-9/11 government was receptive to this argument, and the funding of the war on drugs reflects that: from 2000 to 2011, the U.S. funneled almost twelve billion dollars to SOUTHCOM and other law enforcement groups fighting narcotrafficking in Latin America and the Caribbean. These funds were divided between the armed operations Plan Colombia, the Andean Initiative (Bolivia, Peru, Ecuador, Venezuela, Panama, and Brazil), Plan Mérida (Mexico), the Caribbean Basin Security Initiative (Jamaica, Dominican Republic, The Bahamas, and many Caribbean islands), and the Central American

¹³⁷ *Ibid.*, 204.

¹³⁸ Tokatlian, "The War on Drugs", 79.

Regional Security Initiative (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama). In one decade, the U.S. funded violent and destructive campaigns against drugs and criminal organizations in virtually every country in Latin America and the Caribbean.¹³⁹

As described above, the war on drugs has displaced many thousands if not millions of rural and indigenous people, strengthened the grip of organized crime on rural and urban areas, and proven ineffective at stemming the production or consumption of drugs in the Western hemisphere. As Chapter 4 demonstrates, many LGBTQ+ individuals who seek refuge in the U.S. fled their countries due to sexual orientation and gender identity-motivated persecution at the hands of criminal organizations and gangs, creating a direct link between their suffering and the recent actions of the U.S. government. The United States therefore holds not only capacity responsibility, but also moral responsibility for Latin American refugees, including the many LGBTQ+ individuals seeking safety.¹⁴⁰

¹³⁹ *Ibid.*, 75.

¹⁴⁰ Miller, *National Responsibility*, 100-104.

Chapter 3: The U.S. and LGBTQ+ Human Rights Abroad

In this chapter I examine LGBTQ+ -related foreign policy decisions and actions undertaken by the United States abroad, with special attention given to Latin America and the Caribbean. When assessing the growing problem of LGBTQ+ refugees and asylum seekers, many of whom were displaced from societies plagued by anti-LGBTQ+ hatred, it is important to know how the U.S. has attempted to influence other parts of the world on this issue. This chapter takes a critical view of the policies of the Clinton, Bush, Obama, and Trump administrations and argues that the U.S. has not adequately supported LGBTQ+ rights abroad or worked to foster acceptance of diverse sexual orientations and gender identities on the world stage. Beyond the government, I also include an analysis of U.S. missionaries and anti-LGBTQ+ activists working abroad who have damaged the quality of life for foreign LGBTQ+ individuals. I lean heavily on the work of Cynthia Burack, specifically her history of sexual orientation and gender identity (SOGI) human rights. Ultimately, the actions of the U.S. government and private citizens abroad generate significant responsibility for LGBTQ+ refugees and asylum seekers.

International statements and global leadership

The United States has historically been hesitant to join the rest of the developed world in recognizing LGBTQ+ human rights. One example is the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles or YP), a statement produced by diverse and prominent figures in human rights and government in 2006.¹⁴¹ According to the YP website, the Principles serve as

¹⁴¹ International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, URL: <https://yogyakartaprinciples.org/>

a “universal guide to human rights which affirm binding international legal standards with which all states must comply.” The twenty-nine principles can be divided into eight broad categories: rights to universal enjoyment of human rights and recognition before the law; rights to personal security; economic, social, and cultural rights; freedom of movement and asylum; rights of participation in cultural and family life; rights of human rights defenders, and rights of redress and accountability for harm committed.¹⁴² Anticipating an objection to Western cultural imperialism based on our understanding of sexual orientation and gender identity (SOGI), Burack notes that the drafting committee was not only dominated by non-Western members, but also made a conscious effort to draft principles that could be applied universally without hindrance by cultural differences.¹⁴³

The Yogyakarta conference was attended by a “who’s who” of international human rights figures, including former President of Ireland and head of the UN Office of the High Commissioner for Human Rights (OHCHR) Mary Robinson.¹⁴⁴ Other notable government figures were Edwin Cameron, Justice of the Constitutional Court of South Africa, and Nepalese politician Sunil Babu Pant, the first openly gay legislator in Asia. Only one signatory of the document was from the United States, and was not a government figure.

In December 2008, when Argentina introduced a statement supporting LGBTQ+ human rights in the United Nations General Assembly, the U.S. was not among the sixty-six signatories.¹⁴⁵ This was the largest group of countries to openly call for ending SOGI-motivated discrimination and persecution, included six African nations. The U.S. would eventually sign on

¹⁴² Burack, Cynthia, *Because We are Human: Contesting US Support for Gender and Sexuality Human Rights Abroad* (Albany: State University of New York Press, 2018), 20.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Human Rights Watch, “UN: General Assembly Statement Affirms Rights for All: 66 States Condemn Violations Based on Sexual Orientation and Gender Identity.” *Human Rights Watch*. 18 Dec. 2008. URL: <https://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>

to the document in March 2009 after the Obama administration had taken power from President Bush.¹⁴⁶ Under Obama, the U.S. began enthusiastically supporting these kinds of international declarations. In March 2011, the UN Human Rights Council produced a statement condemning violence and other human rights violations motivated by SOGI; this time, the U.S. joined the eighty-five other signatories.¹⁴⁷

The U.S. was slow to support LGBTQ+ rights on the global stage, but the Obama administration made significant strides beyond joining UN declarations. In 2012, Secretary of State Hillary Clinton gave a speech in Geneva in which she defended the human rights of LGBTQ+ individuals as laid out by the 2006 YP.¹⁴⁸ By the end of the administration, the U.S. had gone from recusing itself from the global LGBTQ+ debate to being one of its loudest voices for good. Of course, there is a breach between the rhetoric of the administration and its treatment of LGBTQ+ individuals abroad and at home, a topic which is explored in the sections below.

The Trump administration has shown a partial commitment to continuing the leadership of the U.S. in this arena. In February of 2019, the administration launched a global campaign to end the criminalization of homosexuality, working with the UN, the European Union (EU), and the Organization for Security and Cooperation in Europe (OSCE). The effort is led by U.S. Ambassador to Germany Richard Grenell, the highest-profile openly gay person in the Trump administration. Some have argued that the effort is meant to isolate and criticize Iran on the world stage; Grenell himself has been an outspoken critic of Iran and had pressed the EU to re-

¹⁴⁶ Fleming, Sue, "In turnaround, U.S. signs U.N. gay rights document." *Reuters*. 18 Mar. 2009. URL: <https://www.reuters.com/article/us-rights-gay-usa/in-turnaround-u-s-signs-u-n-gay-rights-document-idUSTRE52H5CK20090318>

¹⁴⁷ United Nations Human Rights Council, "Joint statement: Ending acts of violence and related human rights violations based on sexual orientation and gender identity." *ARC International*. 22 Mar. 2011. URL: <https://arc-international.net/global-advocacy/human-rights-council/hrc16/joint-statement/>

¹⁴⁸ Barack, *Because We are Human*, 26.

impose sanctions on the country.¹⁴⁹ Trump’s record is inconsistent, however; in October 2018, just four months before launching this effort, his administration began denying visas to same-sex partners of foreign diplomats and UN officials if they were not married, even though many come from countries where same-sex marriage is illegal.¹⁵⁰ Additionally, in 2017 Trump banned trans individuals from serving in the U.S. military, expelling thousands of capable people from their careers at home and overseas.¹⁵¹ These choices demonstrate an abdication of the U.S.’s position among global LGBTQ+ rights defenders.

Unilateral action

According to Burack, the history of U.S. government assistance programs for the global LGBTQ+ community began with the founding of two organizations by and for LGBTQ+ federal employees in 1992: the Gay Lesbian, Bisexual, and Transgender Employees of the Federal Government (Federal GLOBE) and Gays and Lesbians in Foreign Affairs Agencies (GLIFAA).¹⁵² The groups concentrated the influence of LGBTQ+ individuals over the government’s foreign policy initiatives.¹⁵³ Two years later, Attorney General Janet Reno would issue order 1895-94 designating the INS case *Matter of Toboso-Alfonso* as precedent and affirming the right to seek asylum in the U.S. from SOGI-motivated persecution. That designation is covered in more detail in Chapter 4.

¹⁴⁹ Lederman, Josh, “Trump administration launches global effort to end criminalization of homosexuality.” *NBC News*, 19 Feb. 2019. URL: <https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>

¹⁵⁰ Lynch, Colum, “Trump Administration to Deny Visas to Same-Sex Partners of Diplomats, U.N. Officials.” *Foreign Policy*, 1 Oct. 2018. URL: <https://foreignpolicy.com/2018/10/01/trump-administration-to-deny-visas-to-same-sex-partners-of-diplomats-un-officials-gay-lgbt/>

¹⁵¹ Cooper, Helene and Julie Hirschfeld Davis, “Trump Says Transgender People Will Not Be Allowed in the Military.” *The New York Times*, 26 Jul. 2017. URL: <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?module=inline>

¹⁵² Burack, *Because We are Human*, 35.

¹⁵³ *Ibid.*

Beginning in the late 1990s, the government began sending openly gay ambassadors to represent the United States abroad. President Clinton nominated James Hormel as Ambassador to Luxembourg in 1997, but his appointment stalled in the Senate due to outrage from organizations on the Christian right.¹⁵⁴ He was eventually confirmed via recess appointment in 1999. In 2001, Michael Guest became the first confirmed openly gay U.S. Ambassador after being nominated by President Bush for the position in Romania. President Obama expanded the ranks of gay ambassadors by nominating David Huebner (New Zealand), Daniel Baer (Organization for Security and Co-operation in Europe), James Costos (Spain and Andorra), Rufus Gifford (Denmark), Wally Brewster (Dominican Republic), John Berry (Australia), and Ted Osius (Vietnam). Trump has nominated one LGBTQ+ Ambassador: Grenell, now leading the drive to decriminalize homosexuality described above. These nominations were much less controversial than those in the late 1990s; when Baer was nominated in 2013, the State Department even created a video in which Baer described his post and introduced his husband.¹⁵⁵

Nominating LGBTQ+ ambassadors to represent the U.S. abroad, especially in countries that lack protections for LGBTQ+ individuals such as Vietnam and the Dominican Republic, is an important part of our diplomatic mission. However, we should not overlook the fact that all appointees have been white, cisgender, gay men, an unfortunate pattern which undermines the goal of advancing the status of *all* LGBTQ+ people, not just the most privileged group.

Perhaps more important than the appointment of LGBTQ+ ambassadors is the programming required of all embassies. Beginning in 2012, every foreign embassy is required to incorporate LGBTQ+ outreach and engagement into their diplomatic activities; this means

¹⁵⁴ Ibid., 36.

¹⁵⁵ Ibid., 37.

working with local activist and support organizations and planning events for LGBTQ+ Pride.¹⁵⁶ This ambitious rule is not always followed; for example, while the U.S. Embassy in Mexico City routinely participates in Pride events and holds events with LGBTQ+ organizations periodically, the embassy in El Salvador resisted joining Pride celebrations despite pressure to do so from prominent Salvadoran activists and groups.¹⁵⁷ Some embassies risk causing uproar in their host countries, as the U.S. embassy in Islamabad did when it hosted a Pride event and placed newspaper ads supporting LGBTQ+ rights. Prominent Iranian politicians and religious leaders denounced this “cultural imperialism” and organized protests outside the event.¹⁵⁸ In response to this controversy and to keep embassies from expressing support for LGBTQ+ human rights, in March 2019 House Republicans led by Representative Jeff Duncan (R- SC) introduced a bill to prevent embassies from flying any other flag than that of the U.S.¹⁵⁹ Although the bill would ban all other flags, it is generally seen as a response to controversies in Iran, Jamaica, and Israel over the flying of the rainbow flag.

In 2015, Secretary of State John Kerry announced the creation of the position of Special Envoy for Human Rights of LGBTI People, appointing Randy Berry as the first officeholder.¹⁶⁰ Prominent LGBTQ+ organizations in the U.S. had been pushing for the creation of this position as a demonstration of the U.S. commitment to spreading LGBTQ+ acceptance globally. After his confirmation, Berry embarked on a fifteen-country tour to introduce himself to foreign LGBTQ+

¹⁵⁶ *Ibid.*, 100.

¹⁵⁷ See U.S. Embassy & Consulates in Mexico, “LGBTI Pride Month.” *US Embassy.gov*, 1 Jun. 2018. URL: <https://mx.usembassy.gov/lgbti-pride-month/>; Human Rights First, “Ahead of San Salvador Pride, United States Urged to Support El Salvador’s LGBT Community.” *Human Rights First*, 24 Jun. 2016. URL: <https://www.humanrightsfirst.org/press-release/ahead-san-salvador-pride-united-states-urged-support-el-salvadors-lgbt-community>

¹⁵⁸ Burack, *Because We are Human*, 103.

¹⁵⁹ Kasperowicz, Pete, “GOP bill bans US embassies from raising gay pride flags, other emblems.” *The Washington Examiner*, 20 Jul. 2018. URL: <https://www.washingtonexaminer.com/news/gop-bill-bans-us-embassies-from-raising-gay-pride-flags-other-emblems>

¹⁶⁰ Burack, *Because We are Human*, 122.

activists and assist in the investigations of SOGI-motivated human rights violations.¹⁶¹ This included Jamaica, where he faced opposition from local government officials.

Although the response from major LGBTQ+ organizations such as the Human Rights Campaign was largely positive, some criticized Kerry's decision. At the time of the creation of the office, Nigerian LGBTQ+ activist Adebisi Alimi questioned whether the appointment of the envoy would function as a symbolic substitute for robust and well-resourced political commitment to LGBTQ+ human rights.¹⁶² This strategy could be seen as a form of "pinkwashing," in which the state makes superficial commitments to LGBTQ+ rights to steer attention away from human rights violations suffered by LGBTQ+ U.S. citizens or from the failure of the U.S. to accept an adequate number of LGBTQ+ refugees and asylum seekers.¹⁶³ Alimi also criticized the choice of a white person for the post, arguing that it reinforces the perception of LGBTQ+ rights as a Western import.¹⁶⁴ The impact of the position is difficult to determine, especially since embassies are already required to coordinate with local LGBTQ+ organizations. The office has been vacant under Trump, though not formally eliminated.¹⁶⁵

PEPFAR

In 2003 the Bush administration launched the President's Emergency Plan for AIDS Relief (PEPFAR), which is often credited today as the largest international health initiative for a specific disease in history.¹⁶⁶ A full analysis of the accomplishments and criticism of PEPFAR is

¹⁶¹ Ibid., 124.

¹⁶² Alimi, Adebisi, "Why I Oppose the United States' Special Envoy for LGBT Human Rights," *Daily Beast*, 10 Mar. 2015. URL: <https://www.thedailybeast.com/why-i-oppose-the-united-states-special-envoy-for-lgbt-human-rights>

¹⁶³ Burack, *Because We are Human*, 124.

¹⁶⁴ Alimi, "Why I Oppose".

¹⁶⁵ Burack, *Because We are Human*, 125.

¹⁶⁶ Ibid., 44.

far outside the scope of this thesis; I focus here on the debate over PEPFAR's function as a missionary organization and the changes made to the program by the Obama administration.

From its creation, PEPFAR funded sexual and HIV/AIDS education programs which emphasized abstinence and stigmatized sex workers (whom were often conflated with sex slaves and human traffickers), while marginalizing condom use and other methods of safe sex and HIV prevention.¹⁶⁷ It reportedly forced organizations to sign an "antiprostitution pledge" before receiving any PEPFAR funding, a practice which was struck down by a federal court in 2015 as a violation of the First Amendment right to freedom of speech.¹⁶⁸ Its strategies around the world minimized the voices of LGBTQ+ individuals and sex workers, two key groups in the worldwide fight against HIV/AIDS. At times, it seemed to function more as a missionary force which prioritized the teachings of the U.S. conservative right and clergy. This led to significant discrimination against HIV/AIDS-positive LGBTQ+ individuals in PEPFAR countries, who were often last to receive treatment, if they received it at all.¹⁶⁹

The Obama administration issued two broad new policies in 2011 and 2013 which asserted PEPFAR's focus on supporting the human rights of men who have sex with men (MSM) while treating HIV and recognized the importance of gender. Regarding the latter, Burack writes:

The Updated Gender Strategy [2013] was designed to help programs recognize the critical role gender norms and inequality play in the HIV epidemic, ensure equity in access to HIV programs and services, and take concrete steps to respond to the unique needs of populations whose sex (women and girls), gender identity (transgender persons), sexual orientation (lesbian, gay, and bisexual populations—LGBT), and/or sexual behavior (men who have sex with men, sex workers) make them vulnerable to HIV.¹⁷⁰

¹⁶⁷ Ibid., 45-6.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid., 50.

These directives changed the nature of PEPFAR, especially by emphasizing the equity of access to its services. In December of 2018, President Trump extended PEPFAR to 2023.¹⁷¹

Country Reports

The State Department has issued annual Country Reports on Human Rights Practices since the early 1970s. Until 2010, harm against LGBTQ+ people (when it was recorded at all) was listed under the miscellaneous “Other Societal Abuses and Discrimination” category of the reports. Beginning in 2010, the Obama administration required the State Department to include a new category: “Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity.” This change was an initiative of Secretary Clinton and Baer (the future Ambassador to the Organization for Security and Co-operation in Europe).¹⁷² This was the first time that SOGI-related persecution was required of all country reports.

This has continued under President Trump. For example, the section in the 2018 report on Mexico (now renamed “Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity”) notes that fifty-six trans individuals were killed in November 2017 in that country, and that an eighteen-year-old gay man was beaten to death by ten taxi drivers in San Luis Potosi.¹⁷³ The 2018 report on Jamaica characterizes it as a “very homophobic” country with “a culture of outward hostility toward LGBTI individuals.”¹⁷⁴ Having this information in the State Department’s country reports is an essential part of the U.S.’s

¹⁷¹ Matthews, Dylan, “Trump signed a good law this week. Yes, really.” *Vox*, 12 Dec. 2018. URL: <https://www.vox.com/future-perfect/2018/12/12/18136716/pepfar-hiv-aids-trump-congress>

¹⁷² Burack, *Because We are Human*, 50.

¹⁷³ U.S. Department of State, Bureau of Democracy, Human Rights and Labor, “Country Reports on Human Rights Practices for 2018: Mexico.” URL: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2018&dliid=289310>

¹⁷⁴ U.S. Department of State, Bureau of Democracy, Human Rights and Labor, “Country Reports on Human Rights Practices for 2018: Jamaica.” URL: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2018&dliid=289308>

obligation to LGBTQ+ refugees and asylum seekers; asylum officers, immigration judges, and other asylum and refugee personnel consult these reports when assessing individual cases and judging the safety of an LGBTQ+ individual's country of origin. The evidence this category provides could be the determining factor between a rejection and an admission.

Global Equality Fund

During her 2012 speech in Geneva, Secretary Clinton announced the creation of the Global Equality Fund (GEF), an umbrella fund that supports three kinds of programs aimed at advancing the human rights of LGBTQ+ persons around the world: those emergency support services, long term technical assistance and organizational capacity building programs, and a small grants program.¹⁷⁵ The first category includes the Dignity for All “rapid response” team, which provides security training, medical and legal assistance, prison visits, and temporary relocation for LGBTQ+ individuals in danger due to their SOGI. The second includes long-term partnerships with in-country LGBTQ+ organizations, who receive direct funding from the U.S. government via the GEF. The small grants component awards up to \$25,000 to local organizations working in the LGBTQ+ rights arena. The latter awards are distributed by U.S. embassies, which is both a recognition of their local expertise and part of the strategy of each embassy to build LGBTQ+ networks abroad.

The impact of the GEF is difficult to measure due the fact that the State Department does not publish any kind of report on its activities abroad. Similarly, whether its total funding has changed from the Obama to Trump administrations is unknown. The most recent statement by the State Department concerning the GEF was in May 2018, announcing that Canada had joined

¹⁷⁵ Burack, *Because We are Human*, 97.

the Fund as a donor fund.¹⁷⁶ The GEF's is noble; this should not, however, be seen as a substitute for accepting LGBTQ+ refugees and asylum seekers.

The Conservative and Christian Right

Burack addresses a prominent argument among anti-LGBTQ+ Christians and conservatives in the United States: that people have a right to their traditional beliefs, and U.S. attempts to spread LGBTQ+ acceptance and human rights violate this right.¹⁷⁷ Following this argument, anti-LGBTQ+ individuals in other countries are victims of cultural imperialism. This position is rather ironic, given that Christian missionaries have spent centuries attempting to replace indigenous religious beliefs with Christianity.¹⁷⁸ It seems that those who make this argument do not mind “cultural imperialism” when the beliefs being spread are their own.

One prominent anti-LGBTQ+ organization is the World Congress of Families (WCF), which is based in the U.S. but performs most of its work abroad. The goal of the WCF is to serve as a base for global activists of the Christian right, especially those working in the realm of sexual orientation and gender identity.¹⁷⁹ It organizes congresses around the world, including one in Mexico City in 2003 and in Warsaw in 2007. Notably, and disturbingly, the latter congress was addressed by Ellen Sauerbrey, then-head of the U.S. State Department's Bureau of Population, Refugees, and Migration (BPRM). It is outrageous that the government official charged with leading an office that processes refugee applications from a diverse array of persecuted people, including LGBTQ+ individuals, would endorse this anti-LGBTQ+ event.

¹⁷⁶ U.S. Department of State, Office of the Spokesperson. “Canada Joins the Global Equality Fund.” 17 May 2018. URL: <https://www.state.gov/r/pa/prs/ps/2018/05/282190.htm>

¹⁷⁷ Burack, *Because We are Human*, 129.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, 129-130.

Anti-LGBTQ+ organizations often send emissaries around the world to lobby and advise foreign governments on their homophobic and transphobic agendas. One of the more notable individuals is Scott Lively, an anti-LGBTQ+ pastor and attorney who has worked in Russia and Uganda to lobby governments an advance anti-LGBTQ+ policy.¹⁸⁰ Lively is currently being sued by Sexual Minorities Uganda (SMUG), a Ugandan LGBTQ+ group, for “inciting the persecution of gay men and lesbians” via his lobbying efforts on behalf of the 2009 Uganda Anti-Homosexual Bill.¹⁸¹ Today, Uganda is widely considered one of the most dangerous countries for LGBTQ+ individuals, thanks in part to the effort of U.S. actors such as Lively.

Conclusion

Since the 1990s, the U.S. has repeatedly demonstrated a halting commitment to global LGBTQ+ rights. Its commendable programs such as the GEF and the LGBTQ+ networks built by foreign embassies are disproportionate when considering the magnitude of the struggle that LGBTQ+ people face all over the world, and the wealth and power to make change that the U.S. possesses. Additionally, groups of private citizens such as the WCF actively harm LGBTQ+ people in developing countries by lobbying their own governments against them and peddling their hateful ideology abroad. Thus, to use Miller’s terminology, the U.S. not only holds capacity responsibility for LGBTQ+ asylum seekers and refugees abroad—given its immense wealth and geopolitical power—but also moral responsibility, since its citizens contribute to the harm suffered by LGBTQ+ individuals around the world.¹⁸²

¹⁸⁰ *Ibid.*, 128.

¹⁸¹ *Ibid.*, 139.

¹⁸² Miller, *National Responsibility*, 100, 104.

Chapter 4: The Asylum Regime: Foundational International Law and U.S. Policy

First, I briefly introduce the current international asylum regime as established by the 1951 Refugee Convention and its 1967 Protocol, with a special focus on the PSG category of persecution. The interpretation of the PSG has changed over time, a process aided by several published attempts at clarifying the boundaries of the category by the UNHCR. I will conclude this section with an analysis of such guiding documents as they relate to SOGI asylum claims and an attempt to define the UN's original and current intended interpretation and extent of the PSG category regarding these claims. Then, I give an overview of the current US asylum law, with a focus on the USCIS asylum process and the court system. As the UNHCR prefers the acronym "LGBTI" (Lesbian, Gay, Bisexual, Trans, and Intersex), I use it throughout this chapter.

International regime

The 1951 Convention Relating to the Status of Refugees ("1951 Convention" or "Convention") and the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol" or "Protocol") remain the foundation of the global asylum regime today.¹⁸³ The Convention, passed in the aftermath of the Second World War, originally applied only to persons fleeing events within Europe that occurred before January 1st, 1951; the Protocol removed these limitations and extended the rights granted in the Convention universally. The Protocol remains the only amendment to the Convention, although the latter has been greatly supplemented by guiding documents which assist in interpretation, as well as the body of international refugee law which

¹⁸³ Office of the United Nations High Commissioner for Refugees (UNHCR), "Convention and Protocol Relating to the Status of Refugees." URL: <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

has been developed since its passing. The original document was drafted by a Conference of Plenipotentiaries in Geneva in July 1951. The drafting conference included representatives of twenty-six states across five continents, with the noteworthy exception of any East Asian state.

The Convention employs a single definition of “refugee:” someone who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” The document also provides for the rights of stateless people, stating that a person qualifies for refugee status if she is outside of her “former habitual residence” (as opposed to “country of nationality”) and unable or unwilling to return for the same reasons described above.

Of these five categories, the relatively vague “membership of a particular social group” (PSG) provides the most room for interpretation. In assessing this category, it is essential to answer fundamental questions about what constitutes a PSG, what is required to demonstrate “membership” in a certain PSG, and how an individual’s identity can be proven in the legal and often confrontational setting of asylum proceedings. In the seven decades since the passing of the Convention, numerous groups have received protection under the PSG category, including victims of domestic violence, gang members, and individuals with diverse sexual orientations and gender identities (SOGI). This chapter focuses on the latter, including an analysis of PSG- and SOGI-related guiding documents produced by the UN since the 1951 Convention.

Interpreting PSG

When attempting to discern the intentions of the shapers of a foundational document such as the 1951 Convention, it is common for analysts to rely on the *travaux préparatoires*

(“working papers”) produced during the original drafting process. These papers include notes from each representative, discarded drafts of the final document, transcripts of debates among the writers, and more. Given the lack of elaboration about the meaning and requirements of the PSG category in the 1951 Convention and the 1967 Protocol, the *travaux preparatoires* of both documents have been analyzed extensively for further insight into the drafting committee’s reasoning behind the creation of such a category; unfortunately, the working papers that touch on PSG “shed little light on the meaning of ‘social group.’”¹⁸⁴ In the words of Janna Weßels, they are “particularly unhelpful.”¹⁸⁵ I argue that the lack of specificity in the original document, the failure to clarify the meaning of PSG sixteen years later in the 1967 Protocol, and the lack of detail in the *travaux preparatoires* of either document are evidence that the UNHCR did not intend for PSG to be applied in a “restrictive manner.”¹⁸⁶ McCuiston includes within her phrase “restrictive manner” the interpretations of PSG by some U.S. immigration and circuit courts, a topic addressed in the next chapter. If the drafters of these documents had intended that the PSG category be interpreted narrowly rather than expansively, they would have articulated necessarily specific language.

Nonetheless, the UNHCR has issued three resources to aid the application of the PSG statute. The first two, the 1979 “Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees” (“the Handbook”)¹⁸⁷ and the 2002 “Guidelines on International Protection: ‘Membership of a

¹⁸⁴ McCuiston, Hannah, “Membership in a Particular Social Group: Why United States Courts Should Adopt the Disjunctive Approach of the United Nations High Commissioner for Refugees,” *St. John's Law Review* vol. 88 (2015): 531–560; 536.

¹⁸⁵ Weßels, Janna, *Sexual Orientation in Refugee Status Determination* (Oxford: Oxford University Press, 2011), 9.

¹⁸⁶ McCuiston, “Membership”, 539.

¹⁸⁷ Office of the United Nations High Commissioner for Refugees (UNHCR), “Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.” Geneva, 1979. URL: <https://www.unhcr.org/4d93528a9.pdf>

particular social group’ within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (“the Guidelines”),¹⁸⁸ address the issue generally. The third, the 2016 “UNHCR’s Views on Asylum Claims based on Sexual Orientation and/or Gender Identity: Using international law to support claims from LGBTI individuals seeking protection in the U.S.” (“the Views”), applies specifically to issues of SOGI.¹⁸⁹

The Handbook, most recently updated in 1992, offers the first definition of “particular social group” from the UN: “a particular social group normally comprises persons of similar background, habits or social status.”¹⁹⁰ The text further specifies that members of a PSG may suffer persecution because their existence “is held to be an obstacle to the government’s policies,” but that “mere membership” of a social group does not independently substantiate an asylum claim.¹⁹¹ For example, a non-Christian individual living in a state where the government engages in persecution of non-Christian citizens for religious reasons does not automatically qualify for persecution; other factors must also be considered. This definition retains much of the vagueness of the original document, further proving that the UNHCR is reluctant to restrict PSG interpretation. The Handbook has been referenced by the Supreme Court, notably guiding the justices’ interpretation of “well-founded fear of persecution” in *INS v. Cardoza-Fonseca* in 1987.¹⁹² This hints at the significant weight the U.S. government—at least the court system—places on UNHCR guiding documents.

¹⁸⁸ Office of the United Nations High Commissioner for Refugees (UNHCR), “Guidelines on International Protection: ‘Membership of a particular social group’ within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.” Geneva, 2002. URL: <https://www.unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>

¹⁸⁹ Office of the United Nations High Commissioner for Refugees (UNHCR), “UNHCR’s Views on Asylum Claims based on Sexual Orientation and/or Gender Identity: Using international law to support claims from LGBTI individuals seeking protection in the U.S.” Geneva, 2016. URL: <https://www.unhcr.org/5829e36f4.pdf>

¹⁹⁰ UNHCR, “Handbook,” ¶ 77.

¹⁹¹ *Ibid.*, ¶ 78-9.

¹⁹² McCuiston, “Membership,” 539.

The second tool intended to assist asylum decision-makers is the Guidelines. This document is most notable for detailing two distinct paths to refugee status under the PSG category that have been followed by courts and administrative bodies around the world, namely the “protected characteristics approach” (also referred to as the “immutability approach”) and the “social perception approach.”¹⁹³ The former examines whether a group is united by an immutable characteristic that is “so fundamental to human dignity that a person should not be compelled to forsake it.”¹⁹⁴ This characteristic may be innate, such as sex or ethnicity, or “unalterable for other reasons” such as the fact of past association (e.g. gang membership), occupation, or status. The Guidelines urge decision-makers to consider whether a group is united by an innate characteristic, a status that is unchangeable because of historical fact, or an association so fundamental that group members should not be compelled to forsake it; the specific guidance ends there. Finally, the Guidelines specifically and approvingly note that this “immutability approach” has led courts to conclude that “homosexuals” constitute a PSG.¹⁹⁵

The “social perceptions approach” used by courts and administrative bodies examines whether a group shares a “common characteristic which makes them a cognizable group or sets them apart from society at large.”¹⁹⁶ This approach is noteworthy because it does not consider whether the trait that makes a group cognizable is immutable; it could be an occupation.¹⁹⁷

After reviewing these two paths that have developed internationally, the UNHCR goes on to give its own view of the PSG category. The definition of a PSG given in the Guidelines attempts to unify the two distinct approaches:

¹⁹³ UNHCR, “Guidelines,” ¶ 6-7.

¹⁹⁴ *Ibid.*, ¶ 6.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, ¶ 7.

¹⁹⁷ McCuiston, “Membership,” 540.

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of one's human rights.¹⁹⁸

This definition allows for characteristics which are historical fact and cannot be changed, for example, as described above. Furthermore, as signified by the definition's use of the nonexclusive word "often," even asylum claims that are not based in immutable, fundamental, or unchangeable fact are to be assessed to determine whether the individual is part of a cognizable societal group. The Guidelines give the example of a shopkeeper—an occupation which is neither immutable nor fundamental to one's identity—who may nonetheless have a valid claim to asylum if shopkeepers are recognized as a social group separate from the rest of society.¹⁹⁹

Finally, the Guidelines provide regulations for assessing PSG claims. First, regarding the role of persecution in an asylum claim, the Guidelines clarify that although "a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted...persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society."²⁰⁰ This is because the actions of the persecutors often identify a PSG in society. For example, redheads are not currently considered a PSG; however, if in a certain region they began to be persecuted for their hair color, they would certainly become cognizable as a PSG in their society.

Second, the Guidelines make clear that membership in a PSG does not require that an individual display "cohesiveness" with the group; in other words, one need not associate with other members of their PSG to be considered a member themselves.²⁰¹ Only the shared

¹⁹⁸ UNHCR, "Guidelines," ¶ 11.

¹⁹⁹ *Ibid.*, ¶ 13.

²⁰⁰ *Ibid.*, ¶ 14.

²⁰¹ *Ibid.*, ¶ 15.

characteristic is of importance to asylum decision-makers. This is especially relevant for LGBTI asylum seekers, who are sometimes assessed by asylum decision-makers regarding their knowledge of LGBTI bars, clubs, and hangouts, their prior relationships with same-sex individuals, and their familiarity with prominent LGBTI people in their society. According to UNHCR guidance, none of these questions are relevant. On the other hand, mere membership of a PSG is not normally sufficient to substantiate an asylum claim.²⁰² Similarly, an applicant need not demonstrate that all members of the PSG are at risk of persecution in order to establish the existence of a PSG or substantiate their own asylum claim.²⁰³ This standard recognizes the importance of intersectionality in asylum cases; for example, a wealthy and well-connected LGBTI citizen of Country A may not be at risk, whereas a poor LGBTI citizen would be.

Lastly, the Guidelines consider non-state actors and describe what constitutes state involvement in persecution. This question is particularly relevant in U.S. cases concerning the Convention Against Torture. According to UNHCR, persecution under the PSG category is equally valid when committed by a non-state actor; it specifically cites the persecution of homosexuals in demonstrating that private actors can persecute other individuals to such a level that their asylum claims are valid.²⁰⁴ Furthermore, acts by private actors are considered persecution if the state authorities refuse, or prove unable, to offer effective protection.²⁰⁵ This inability or unwillingness to protect on the part of the state creates the “causal link” which substantiates the victim’s claim of persecution. Since the publishing of the Guidelines in 2002, most asylum claims relating to persecution motivated by SOGI have been presented and

²⁰² Ibid., ¶ 16.

²⁰³ Ibid., ¶ 17.

²⁰⁴ Ibid., ¶ 20.

²⁰⁵ Ibid., ¶ 20-1.

analyzed under the PSG category; before 2002, this type of persecution was often treated as a result of political opinion or religious inclination.²⁰⁶

The third tool for considering PSG asylum is the 2016 UNHCR's Views. This document is an example of how LGBTI rights have "evolved within general human rights frameworks despite not being specified within founding [UN] documents."²⁰⁷ LGBTI asylum claims have been processed in courts and administrative bodies under the PSG category for decades, yet this document was published just over two years ago, providing evidence to Millbank's claim that "the potentiality of sexual orientation claims was latent within the 1951 Refugee Convention, until 'discovered' quite recently."²⁰⁸ It explains the UNHCR's views regarding LGBTI asylum claims and provides guidance on how to use such views in assisting asylum seekers specifically in the United States. Beginning with a defense of the relevance of international refugee law in the U.S., the document points out not only that the U.S. has incorporated such law into domestic policy by ratifying the 1967 Protocol and passing the 1980 Refugee Act, but also discusses various court cases in which U.S. courts have cited UN law in asylum decisions. These include *Barrios-Aguilar v. Holder* (Ninth Cir. 2010); *Karouni v. Gonzales* (Ninth Cir. 2005) (holding that "all alien homosexuals" constitute a particular social group); and others.

An asylum seeker must show that her fear of persecution is well-founded to be granted asylum; for LGBTI claimants, this means demonstrating that the harm or fear they have experienced constitutes persecution.²⁰⁹ According to the 1992 Handbook, a threat to life or liberty or other serious human rights violation for one of the five protected reasons established in

²⁰⁶ Weßels, *Sexual Orientation*, 8.

²⁰⁷ Millbank, Jenni, "Sexual orientation and refugee status determination over the past 20 years: Unsteady progress through standard sequences?" in *Refugees and Rights*, Ed. Mary Crock (New York: Routledge, 2016), 32.

²⁰⁸ *Ibid.*

²⁰⁹ UNHCR, "Views," ¶ 2a.

the 1951 Convention “always amounts to persecution.”²¹⁰ Therefore, LGBTI individuals who can prove that they have suffered—or are at risk of suffering—such serious violations are considered persecuted and eligible for asylum. This does not mean, however, that only those who have suffered clear-cut instances persecution are eligible:

An applicant for asylum may have been subjected to various measures not in themselves amounting to persecution, but “if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on `cumulative grounds.’”²¹¹

For LGBTI individuals, this ‘cumulative’ persecution may include systemic or government-sanctioned discrimination (especially when it prevents an individual from earning a livelihood, access education, or receive medical care), serious microaggressions, petty crime or violent crime motivated by the individual’s SOGI, domestic abuse, and more.

The UNHCR also provides guidance on assessing country conditions, an essential part of the asylum decision-making process. According to the Views, the relevant question “is not whether some progress is being made or whether some protections exist...the question is whether the state is either unable or unwilling in law and in practice to provide effective protection against persecution and serious harm to LGBTI individuals.”²¹² It further reminds decision-makers that although laws such as those decriminalizing same-sex conduct or banning discrimination against LGBTI people may have been passed in a certain country, this does not mean that the *society* in question has become any more tolerant of people with diverse SOGI. For example, although Mexico has passed some LGBTI-friendly legislation in the past decade, the country still generates many LGBTI asylum seekers who have suffered domestic abuse, persecution by non-state actors (sometimes with the complicity of state authorities), and other

²¹⁰ UNHCR, “Handbook,” ¶ 51.

²¹¹ UNHCR, “Views,” ¶ 2a.

²¹² *Ibid.*

forms of private persecution. Given this directive, it is up to asylum decision-makers to take a “comprehensive view of multiple independent and reliable sources to understand the situation” in the claimant’s country of origin.²¹³ The country reports created by the State Department provide essential insight on the violence and discrimination faced by LGBTI individuals abroad.

Finally, an LGBTI individual must demonstrate that their fear of persecution is based on one of the five grounds; today, this type of application is almost exclusively analyzed under the PSG category. As stated before, the Handbook notes that a PSG is often held to be an obstacle to the government’s policies.²¹⁴ The Views expand on this: “...in some countries, an individual may be persecuted by classmates, family, police, or other state agents because he or she is perceived as a homosexual and that identity is considered an affront to the religious and moral sensibility of the country.”²¹⁵ As long as the individual claiming asylum shares a “common identity” with other individuals based on SOGI, and insofar as that identity is the reason for the persecution, she is a member of a PSG; this does not conflict with U.S. law, including the Real ID Act of 2005 which states that one of the five grounds for asylum must be the individual’s “central reason” for being targeted.²¹⁶ The Real ID Act is discussed further in chapter 4.

In summary, the UNHCR has historically resisted specifying PSG to avoid over-restricting its interpretation in asylum claims; this hesitance is evidence that it is meant to be the most adaptive and open category available to asylum seekers.²¹⁷ It has, however, provided two major guiding documents for asylum decision-makers to consider when analyzing PSG asylum claims—the 1979/1992 Handbook and the 2002 Guidelines—and one which applies specifically

²¹³ Ibid.

²¹⁴ UNHCR, “Handbook,” ¶ 78.

²¹⁵ UNHCR, “Views,” ¶ 2b.

²¹⁶ Ibid.

²¹⁷ McCuiston, “Membership,” 539.

to LGBTI individuals, the 2016 UNHCR Views. The Handbook states that “a particular social group normally comprises persons of similar background, habits or social status,” thereby providing the first UNHCR definition of the phrase.²¹⁸ The text further specifies that members of a PSG may suffer persecution because their existence “is held to be an obstacle to the government’s policies,” but that “mere membership” of a social group does guarantee asylum.²¹⁹ The Guidelines detail two distinct paths to refugee status under the PSG category that have been followed by courts and administrative bodies around the world, namely the “protected characteristics approach” (also referred to as the “immutability approach”) and the “social perception approach.”²²⁰ They also argue that an individual need not display “cohesiveness” to be considered a member of a PSG. Finally, the Views explain the burden of proof on LGBTI individuals and provide guidance on assessing country conditions comprehensively.

The domestic regime: an overview of how asylum works in the US

The Fourteenth Amendment to the United States Constitution established that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” T. Alexander Aleinikoff suggests that the use of “person” rather than “citizen” is “most dramatic” in the Fourteenth as anywhere else in the document, since the Amendment begins with a definition of citizenship, then frames the right to equal protection in terms of personhood rather than citizenship status.²²¹ Indeed, the first clause of the first section of the Amendment constitutionalized the principle of birthright citizenship, thereby overturning the Supreme

²¹⁸ UNHCR, “Handbook,” ¶ 77.

²¹⁹ *Ibid.*, ¶ 78-9.

²²⁰ UNHCR, “Guidelines,” ¶ 6-7.

²²¹ Aleinikoff, T. Alexander, “Citizens, Aliens, Membership and the Constitution” in *Constitutional Commentary* (University of Minnesota Law School, 1990), 21.

Court's determination in *Dred Scott v. Sandford* (1857). Considering this, the Fourteenth amendment grants significant rights to non-citizens. In the Supreme Court case *Yick Wo v. Hopkins*, the Justices recognized that this reference to "any person" includes "foreign aliens."

Furthermore, one of the purposes of the Equal Protection Clause is to protect vulnerable minorities from powerful majorities, including vulnerable citizens. According to Christopher Leslie, the Supreme Court will only recognize a group as politically powerless (and therefore vulnerable) if the group can hit an "undefined sweet spot" with the perfect combination of the presence and absence of political power.²²² In other words, heightened scrutiny will only apply if a group has shown some political power, albeit not enough to sweep away all of the discrimination against its members. Leslie points out that, as the judicial treatment of gay people shows, that sweet spot may not exist:

For decades, gays were legally labeled as psychopaths and criminals, labels that were both a cause and a consequence of gay people being politically powerless. Courts sometimes used the lack of legislative protection for gay people as the reason to deny heightened scrutiny and, thus, reduce any judicial protection for gay people targeted by discriminatory laws. But any movement towards equality was used against gay people seeking heightened scrutiny of remaining anti-gay laws. In short, the necessary sweet spot of "political powerlessness" is either ephemeral or fictional.²²³

As LGBTI individuals and noncitizens, aliens who seek asylum from persecution motivated by their sexual orientation or gender identity should benefit from the rights granted to noncitizens in the Fourteenth Amendment. They should be viewed within the context of its vulnerable-group principle, and therefore should receive equal treatment before the law. Like Ritu Ghai, I argue that the current disparity between the standards applied by the Board of Immigration Appeals

²²² Leslie, Christopher R., "The Geography of Equal Protection," 101 Minn. L. Rev. 1579, 1609-10.

²²³ Ibid.

and by the individual federal circuit courts when granting or denying asylum to LGBTI asylum seekers is a violation of the Fourteenth Amendment.²²⁴

U.S. refugee law

The 1952 Immigration and Nationality Act (INA) and the 1980 Refugee Act—which amended the former to incorporate international refugee law established by the United Nations in the ‘67 Protocol—are the bedrock of refugee and asylum law in the United States. Under the INA, a refugee is “a person who is outside his or her country and who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”²²⁵ This definition conforms with the 1951 Convention and ‘67 Protocol. Separate provision is made in the INA for the granting of asylum on a case-by-case basis to aliens who are already physically present in the U.S. or at a land border or port of entry and who meet the definition of a refugee, as opposed to the standard process of resettling refugees in the U.S. after a successful application from abroad.²²⁶ In the latter, standard process, an individual or family applies for refugee status from their country of origin or from a third country, for example from a refugee camp in a neighboring country, and is resettled when accepted. Those who gain entry under the standard process are generally referred to as refugees, while those who launch an application while already present in the U.S. are referred to as asylum seekers, or asylees if accepted.

²²⁴ Ghai, Ritu, “Deciphering Motive: Establishing Sexual Orientation as the “One Central Reason” for Persecution in Asylum Claims,” 43:2 Colum. Hum. Rts. L. Rev. 521.

²²⁵ Immigration and Nationality Act, U.S. Code §1101(a)(42)(A). URL:

<http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim>

²²⁶ *Ibid.*, §208 (1).

The annual number of refugee admissions and the allocation of these numbers by region of the world are set by the President of the United States after consultation with Congress, as mandated by the INA.²²⁷ Each year, the President submits a report to the House of Representatives and the Senate known as the “consultation document.” This document contains the administration’s proposed worldwide refugee ceiling and regional allocations for the upcoming fiscal year. Following congressional input, the President issues a “Presidential Determination” setting the refugee numbers for that year. It is important to note that asylees are not included in the ceiling as there is no limit to the number of asylum seekers accepted annually.

U.S. refugee law was significantly changed following the passing of the 2005 Real ID Act. In directing the analysis of refugee and asylum applications, the INA now states: “to establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.”²²⁸ Prior to this, the BIA had been following a standard that the persecution must be motivated “at least in part” by one of the protected categories. The key difference between the two standards is in the applicant’s ability to establish a causal nexus between their protected identity and the persecution they experienced. Therefore, the language of the Real ID Act directs asylum decision-makers to apply a more stringent standard when analyzing applications. In the House Conference Report on the Real ID Act, with which the Senate unanimously agreed in passing the Act, Congress explicitly rejected the Ninth Circuit applying the “at least in part” standard.²²⁹ However, in the same Report, Congress endorsed cases decided before the enactment of the “once central reason”

²²⁷ Ibid., §207(a).

²²⁸ Ibid., 8 U.S.C § 1158(b)(1)(B); emphasis added

²²⁹ Ghai, “Deciphering Motive,” 539.

standard in which decision-makers applied thresholds such as “in meaningful part” and “primarily” in reference to the persecutor’s motivation.²³⁰ This ambiguity undermines the language of the Real ID Act.

In adopting the “one central reason” standard, Congress sought to adopt a uniform standard for addressing mixed-motive situations. This was in response to national security concerns of terrorists abusing the asylum system to gain entry to the United States—concerns which Ritu Ghai places in the context of the post-9/11 tightening of immigration laws.²³¹ I agree with Ghai in arguing that since the new standard was meant to prevent those who threaten national security from being accepted as refugees, if it is in practice causing the rejection of non-threatening individuals who would have been accepted under old standards, then it is being interpreted incorrectly by courts and decision-makers.²³² In other words, Congress did not intend to make the process more difficult for non-dangerous asylum seekers; it only sought to make it impossible for those who wish to do harm to this country. Unfortunately, the BIA and several circuit courts have misunderstood this new standard and as a result are denying asylum to deserving applicants. This topic is covered in depth in chapter four.

Affirmative vs. defensive asylum

An asylum application is launched either affirmatively or defensively. Affirmative asylum describes a situation in which an asylum seeker arrives in U.S. territory—for example, by overstaying their visa or crossing the border without documentation or permission—and presents themselves to authorities. Importantly, U.S. law states clearly that whether the claimant enters at

²³⁰ Ibid.

²³¹ Ibid., 539-40.

²³² Ibid., 564.

an official port of entry or not, they have the right to seek asylum regardless.²³³ However, the current USCIS website reads: “To apply for asylum in the U.S., you must be physically present in the U.S. or seeking entry into the U.S. at a port of entry.”²³⁴ This is at best misleading and at worst a falsehood deliberately spread by the Trump administration to deter asylum seekers from entering the country. The two possibilities described on the website are valid, but incomplete. Seeking to enter the country at a non-port of entry—for example, at any point along the Mexican border—is an acceptable way of seeking asylum according to U.S. law.

To formally apply for asylum an individual must submit USCIS Form I-589 within one year of entering the country. Form I-589 includes extensive questions regarding past harm and credible fear designed to screen applicants and establish their eligibility for asylum. Following this, the asylum seeker will be scheduled for a Biometric Services Appointment during which they will be finger-printed and subjected to an initial background check. Depending on where the claimant lives, USCIS will then schedule an interview with an asylum officer either at one of the eight asylum offices, the two asylum sub-offices, or at a USCIS field office. The asylum seeker may bring an attorney or other accredited representative to the interview, and must bring their spouse and any children seeking derivative asylum benefits. Additionally, if needed, the individual must bring their own interpreter to the interview. Lastly, the asylum office permits witnesses to testify on behalf of the asylum seeker during the interview process.

Following this, the asylum officer determines the individual’s eligibility for asylum by deciding whether they meet the definition of a refugee established by the 1980 Refugee Act, and ensuring that they are not barred from being granted asylum under section 208(b)(2) of the INA.

²³³ 8 U.C. Code § 1158 (a)(1)

²³⁴ U.S. Citizenship and Immigration Services. “The Affirmative Asylum Process”. USCIS.Gov. URL: <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>

The officer makes a decision, subject to review by a supervising asylum officer. There are five possible decisions, the simplest of which is the granting of asylum. Once granted asylum, the claimant is eligible to apply for an EAD (work permit), Social Security card, and a Green Card.

The officer may instead choose to refer the case to an Immigration Court. The Executive Office of Immigration Review includes the Office of the Chief Immigration Judge (OCIJ), which operates a system of approximately 250 judges who hear cases in approximately sixty courts across the nation. A referral is an admission by the USCIS officer that a more extensive review of the case is needed. In this case, the asylum seeker will receive a Notice to Appear indicating a date and time to appear in court. The IJ will make their own decision based on the application and interview, and is not bound to follow the USCIS officer's analysis or reasoning.

Third, the USCIS officer can issue a "recommended approval," which means that the claimant's eligibility has been established but their background check is still pending. This decision generally means that once the security check clears, asylum will be granted in full. The asylum seeker can apply for an EAD in this case, but must wait for full asylum to receive an SS card or Green Card. Fourth, the officer may issue a Notice of Intent to Deny (NOID). The NOID is reserved for applicants who have valid legal status in the United States—generally, a short-term visa—but are found ineligible for asylum. The NOID will explain why the application has been rejected, and the applicant has sixteen days to explain in writing why the claim should be granted, or submit new evidence in support of the application, or both. The officer will consider this new material and make a final decision to grant or deny asylum.

Finally, if the applicant does not respond to the NOID or the new material does not convince the USCIS officer, they will receive a final denial. The claimant cannot appeal the asylum officer's decision, which also applies to any dependents such as a spouse or children. It is

possible to re-apply for asylum; however, to do so a claimant must demonstrate that their circumstances have changed significantly and in a manner that makes them eligible for asylum.

Defensive asylum refers to an asylum application launched by an individual as a defense against removal proceedings. People are generally placed into defensive asylum processing in one of two ways: first, they are referred to an Immigration Judge by a USCIS officer after they have been determined to be ineligible for asylum at the end of an unsuccessful affirmative asylum process; or, they are placed in removal proceedings because they were apprehended in the U.S. or a port of entry without proper legal documents in violation of their immigration status, or were caught by U.S. Customs and Border Protection trying to enter the U.S. without proper documentation and were placed in the removal process, and were determined during the process to have a credible fear of persecution or torture if returned home.

Immigration Judges hear defensive asylum cases in “adversarial” setting with trial-like cross-examination.²³⁵ If the individual is not able or does not wish to hire a lawyer, they will represent themselves before the judge, even if they are children. An attorney with the Immigrations and Customs Enforcement (ICE) agency will represent the government. The lack of representation afforded asylum seekers, in addition to the intimidating, confrontational cross-examination they are subjected to, can impede asylum seekers from adequately representing themselves and cause them to make mistakes in their testimony which may be used as evidence against them.²³⁶ For example, an individual who mistakenly omits or misstates a detail regarding their background or story may be accused of fabricating their story in order to abuse the asylum system. The IJ may order that the government grant asylum, or, if she finds the applicant

²³⁵ Paskey, Stephen, “Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum,” 56:3 Santa Clara L. Rev. 457 (2016), 511.

²³⁶ Ibid.

ineligible, will consider other forms of relief from removal.²³⁷ If found ineligible for other forms of relief, the Immigration Judge will order the individual to be deported from the US. The IJ's decision may be appealed by either the claimant or the government.

The appeals process

In addition to the Immigration Courts, the Executive Office of Immigration Review (EOIR) also includes the Board of Immigration Appeals (BIA), the appellate component of the federal immigration judiciary system. As it is still part of the executive branch, not the judiciary, it is the highest executive tribunal for interpreting and applying U.S. immigration law. The BIA hears appeals from asylum seekers or the government regarding asylum decisions, most of which are orders of removal or applications for protection from removal (removal defense).

Certain decisions by the BIA are designated as precedent by the EOIR, and the standards applied in them become universal across all BIA courts. When a federal circuit court decides an immigration case, the standards applied in that case apply only to BIA courts located within that federal circuit court's jurisdiction. The BIA judges are forced to respect the circuit court precedential standards when analyzing cases in that circuit court's geographical region. Because the federal circuit courts do not apply the same asylum standards uniformly across the nation, the BIA's application of these standards varies widely. Consequentially, an asylum application that may be accepted by a BIA judge in one state would be denied by a BIA judge in another. The jurisdiction in which an applicant's case is heard is determined by where they filed their Form I-589. This system issues arbitrary decisions and violates the equal protection clause described

²³⁷ For a full list of subsidiary protection and forms of relief from removal, see U.S. Department of Justice, Executive Office for Immigration Review, "Fact Sheet." Dec. 2017. URL: https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download

above, as it applies different treatment to individuals in similar situations based solely on geography. Any decision made by a BIA judge is plausibly a life-or-death determination; more uniform standards are necessary to reflect the seriousness of this fact, as I argue in chapter four.

To start the appeals process, an asylum seeker applies for review by the BIA. If they disagree with the BIA's final decision, they may file a petition for review with the appropriate Federal Circuit Court of Appeals for their region. The government may not appeal to the federal circuit courts, and is therefore bound to respect the BIA decision. Therefore, at the circuit level, all cases are defensive in the sense that the claimant is still seeking asylum; there are no federal cases where the government is challenging the granting of asylum to an applicant. This is a reasonable restriction on the government—after all, the EOIR (which houses the BIA) is part of the executive branch. By petitioning at the circuit level the administration would be arguing against its own immigration judges, whom the President is free to appoint and fire as she pleases.

Conclusion

The international refugee regime established by the 1951 Convention and the 1967 Protocol allows for a wide variety of individuals to qualify for protection, mostly thanks to the inclusion of the particular social group category of persecution. The United States has adopted the definition of the 1951 Convention and as such recognizes the PSG category, yet U.S. asylum officers and immigration courts often apply a stricter standard than was intended at the time of the creation of the category. The UN intended for the PSG category to be interpreted liberally, as shown by its hesitance to elaborate the category and the limited guidance it has provided member nations. In order to adhere to the intention of the definition, the U.S. must ease its PSG standards and make them uniform across the country.

Chapter 5: LGBTQ+ Asylum in the Courts: Precedential Cases and Differences across Jurisdictions

Over the past twenty years, there has been a substantial increase in the number of cases concerning asylum from prosecution for reasons of sexual orientation and gender identity (SOGI) processed by the immigration judges (IJs) and Board of Immigration Appeals (BIA) of the Executive Office for Immigration Review (EOIR), the U.S. federal circuit courts, and the U.S. Supreme Court. This section provides an overview of the most consequential and revealing cases that have passed through these systems, whether precedent-designated by the Department of Justice or not. As Kimberly Topel points out, whereas Supreme Court decisions control all the circuits, the BIA, and the immigration courts, circuit court decisions only control the IJs within its jurisdiction and the BIA when it is deciding cases within the locality of that particular case.²³⁸ An IJ need only heed a BIA decision when it is not in conflict with the existing, controlling circuit court precedent. Thus, the precedential decisions with the clearest consequences are usually from the individual circuit courts.²³⁹ Given this, and the fact that many BIA decisions are unpublished, almost all the cases analyzed in this section are from the circuit courts. These cases provide insight into the history of the interpretation of SOGI asylum cases and illuminate the disparity in interpretation of essential standards across jurisdictions. These standards include understandings of what constitutes an immutable identity, whether persecution of LGBTI individuals can be characterized as “widespread” in a particular country, the extent to which the government should be expected to protect persecuted citizens, whether inaccuracies and even lies

²³⁸ Topel, Kimberly D. ““So, What Should I Ask Him to Prove That He’s Gay?”: How Sincerity, and Not Stereotype, Should Dictate the Outcome of an LGB Asylum Claim in the United States,” 102 Iowa L. Rev. (2017), pp. 2357–2384; 2361.

²³⁹ Ibid.

in applications are disqualifying for an asylum case, and how Congress intended the courts to apply the “one central reason” standard established by the Real ID Act of 2005.

I argue that these differences in interpretation of certain asylum-related standards and statutes create a fundamentally unfair playing field for asylum seekers to navigate. Under the current system, the success of an applicant’s petition may be determined simply by where in the country their case is processed and by which court. Following the work of Ritu Ghai, I argue that this reality is at odds with the Equal Protection Clause of the Fourteenth Amendment, and that adopting uniform standards for asylum proceedings under which people in similar situations receive consistent treatment is essential for crafting a fair system.²⁴⁰

Matter of Toboso-Alfonso

The *Matter of Toboso-Alfonso*, a case settled by the BIA in 1990, is a useful point of departure before entering into a comparison of cases across circuits.²⁴¹ *Toboso-Alfonso* is considered a cornerstone of contemporary SOGI asylum law, most notable for establishing that sexual orientation is an immutable identity, and therefore that gay men could constitute a particular social group. The applicant in the case was a forty-year-old native and citizen of Cuba who arrived in the U.S. in 1980 as part of the Mariel boat lift, a mass emigration of Cubans to Florida from May to October of that year. In 1985 his parole²⁴² was revoked, and he applied for asylum and withholding of deportation to Cuba. The immigration judge ultimately concluded

²⁴⁰ Ghai, Ritu, “Deciphering Motive: Establishing Sexual Orientation as the “One Central Reason” for Persecution in Asylum Claims,” 43:2 Colum. Hum. Rts. L. Rev. 524, 566, 563.

²⁴¹ *Matter of Toboso-Alfonso*, Board of Immigration Appeals Interim Decision #3222 (March 12, 1990), URL: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3222.pdf>

²⁴² In the published decision of the BIA, the judges summarize Toboso-Alfonso’s experience in the U.S. as such: “The applicant is a 40-year-old native and citizen of Cuba who was paroled into the United States in June of 1980, as part of the Mariel boat lift. In 1985 his parole was terminated. He was placed in exclusion proceedings and appeared before an immigration judge in Houston, Texas” (820). Further down on the same page they reveal that his parole was a consequence of a conviction for cocaine possession.

that the applicant qualified for asylum and withholding of deportation as a member of a particular social group--homosexual men--that fears persecution by the Cuban Government. The INS appealed to the BIA, which dismissed the appeal and allowed Toboso-Alfonso to remain.

Toboso-Alfonso presented substantial evidence of persecution. He testified to the existence of a municipal office within the Cuban government which registers and maintains files on all homosexuals. He stated that his file was opened in 1967, and every two or three months for thirteen years he received a notice to appear for a hearing.²⁴³ Each hearing consisted of a physical examination followed by questions concerning the applicant's sex life and sexual partners. While he indicated the "examination" was "primarily a health examination," he stated that on many occasions he would be detained in the police station for 3 or 4 days without being charged, and for no apparent reason.²⁴⁴ He testified that it was a criminal offense in Cuba simply to be a homosexual; in other words, the government's actions against him were not in response to specific conduct on his part, but rather to his sexual identity.²⁴⁵

He further testified that on one occasion when he had missed work, he was sent to a forced labor camp for sixty days as punishment because he was a homosexual (i.e., had he not been a homosexual he would not have been so harshly punished). Additionally, in one incident several coworkers got on top of a table and screamed that all homosexuals should go to the United States. He testified that on that same day there was a sheet of paper tacked to the door of

²⁴³ It is worth noting that from November 1965 to July 1968 the Cuban government operated a network of *Unidades Militares de Ayuda a la Producción* or UMAPs (Military Units to Aid Production). These were agricultural forced labor camps created as an alternative for certain populations deemed unfit for military service, including LGBTI individuals. Approximately 8-9% of the 35,000 imprisoned in these camps were gay men. For more information see Guerra, Lillian, "Gender policing, homosexuality and the new patriarchy of the Cuban Revolution, 1965-70", *Social History*, 35: 3 (2010), 268-89.

²⁴⁴ Matter of Toboso-Alfonso, 821.

²⁴⁵ Homosexuality in Cuba was not decriminalized until 1979, only one year before Toboso-Alfonso arrived in the U.S. Cuban law still outlaws "publicly manifested" homosexuality and "persistently bothering others with homosexual amorous advances." See U.S. Citizenship and Immigration Services, "Resource Information Center: Cuba". USCIS.Gov. URL: <https://www.uscis.gov/tools/asylum-resources/resource-information-center-89>

his home which stated that he should report to "the public order." The applicant presented himself at the police station where he was informed by the chief of police that he could spend 4 years in the penitentiary for being a homosexual, or leave Cuba for the United States. He was given a week to decide and decided to leave rather than be jailed. The applicant further testified that the day he left his town, the neighbors threw eggs and tomatoes at him. The situation was such that the authorities were forced to reschedule his departure time from the afternoon to two o'clock in the morning, when he could leave without attracting too much attention. Given the details above, Toboso-Alfonso clearly qualified for asylum.

In so deciding this case, the immigration judge and the BIA provided the first official linkage of homosexuality to the particular social group category (PSG) of asylum in the US. The BIA relied in part on the "immutability" standard established in the *Matter of Acosta* (1985), which holds that a particular social group must consist of a group of people who share a common, immutable identity that the members cannot or should not be required to change.²⁴⁶ In *Acosta*, the BIA decided that a group of taxi drivers whose business had been targeted by anti-government armed rebels did not meet the definition of a particular social group, given that occupation is not an immutable characteristic. This reasoning has reverberated within the U.S. immigration court system; every circuit court, except for the 3rd and 7th, which have departed from the BIA-established standard in favor of their own interpretations of immutability, continues to apply the *Acosta* standard of immutability in cases of particular social group (PSG) persecution. According to the BIA, all gay individuals, including Toboso-Alfonso, clearly satisfy the *Acosta* standard. This is not to say that gayness is sufficient for asylum; rather, it allows

²⁴⁶ *Matter of Acosta*, Board of Immigration Appeals Interim Decision #2986 (March 1, 1985). URL: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf>

SOGI asylum cases to be processed under the particular social group category. In 1994 Attorney General Janet Reno designated *Toboso-Alfonso* as precedent for all immigration courts.²⁴⁷

Immutable identity and gender non-conforming behavior

Although questions of immutability are essential in every SOGI asylum claim, it is useful to begin with a particularly illuminating case. In *Hernandez-Montiel v. INS*, one of the first significant cases to reach the federal circuit court level after the designation of *Toboso-Alfonso* in 1994, the Ninth Circuit overturned the ruling of an immigration judge and of the BIA, both of whom rejected the appeal.²⁴⁸ Unlike the previous two courts, the federal court found that Hernandez-Montiel, a native Mexican citizen, qualified for protection because “gay men with female sexual identities” constitute a persecuted particular social group in Mexico. By “female sexual identity”, the court used a now-obsolete term to describe the claimant’s history of dressing in traditionally feminine clothing and exhibiting feminine behavior and mannerisms. A more accurate phrase is gender non-conforming behavior. To the court, Hernandez-Montiel’s identity was immutable and essential to their identity, thereby satisfying the *Acosta* standard.

Hernandez-Montiel began exhibiting said behavior at twelve years old, and as a result was ostracized by his friends and family, even receiving death threats from parents of classmates who worried about his “turning their children gay.”²⁴⁹ At fourteen they were picked up on the street and driven to a remote location by a police officer who threatened them with imprisonment and forced them to perform oral sex; two weeks later, they and a friend were again forced into a police car and taken to an uninhabited area, where Hernandez-Montiel was raped and threatened

²⁴⁷ Attorney General Order No. 1895-94 (June 19, 1994).

²⁴⁸ *Hernandez-Montiel v. INS*, 225 F.3d 1088 (Ninth Cir., 2000). URL: <https://www.immigrationequality.org/wp-content/uploads/2013/09/hernandez-montiel.pdf>

²⁴⁹ *Ibid.*, ¶ 10469.

at gunpoint. Their web of abusers extended beyond law enforcement officers. A few months after being raped, Hernandez-Montiel was assaulted on the street with a knife by a group of young men who mocked their sexual identity and behavior, and spent a week recovering in a hospital. After a failed attempt to enter the US, they were deported back to Mexico, where their family enrolled them in a conversion therapy program which forced them to change their appearance and stop taking female hormones.²⁵⁰ The claimant reentered the U.S. and sought asylum in 1995.

The IJ of the original case defined Hernandez-Montiel's identity as "homosexual males who wish to dress as a woman", and argued that outward appearance—the source of their persecution, according to the judge—was not immutable, as evidenced by the fact that the claimant "sometimes dresses like a typical man". The BIA declined the appeal for the same reason, writing that their identity, "homosexual males who dress as females", was not immutable and therefore not grounds for asylum. The Ninth Circuit instead chose the phrase "female sexual *identity*", recognizing that appearance and behavior are manifestations of immutable identity and self-understanding.²⁵¹ According to the opinion:

This case is about sexual identity, not fashion. Geovanni is not simply a transvestite "who dresses in clothing of the opposite sex for psychological reasons." American Heritage Dictionary 1289 (2d Coll. Ed.) (1985). Rather, Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women.²⁵²

They referenced the immutability standard of *Acosta* in reversing the lower courts' decisions.²⁵³

Going further, the court referenced psychological journals and groups such as the Gay Rights

²⁵⁰ Ibid., ¶ 10470.

²⁵¹ Ibid., ¶ 10475, emphasis added.

²⁵² Ibid., ¶ 10485.

²⁵³ Ibid., ¶ 10476-7.

Coalition of Georgetown University Law Center to reinforce their understanding of sexual orientation as immutable, and of conversion therapy as cruel and ineffective²⁵⁴.

Finally, the court referred explicitly to *Toboso-Alfonso* as precedent in assigning a gay man PSG status, before proving that the group can reasonably expect persecution in Mexico (instead of Cuba, where *Toboso-Alfonso* was from). Regarding the social visibility of the claimant, the judges agreed with the IJ and BIA that Hernandez-Montiel was targeted because of their outward appearance; however, as stated before, the crucial distinction made by the federal court is in its affirmation that their appearance was a symptom of an immutable identity, not a costume to be taken on and off.

Application of the Convention Against Torture (CAT) in SOGI asylum cases: differing standards of government involvement

Over the past decade, the Eighth and Ninth circuits have had chances to apply the Convention Against Torture (CAT) in SOGI asylum cases. The CAT is an international human rights treaty under review by the UN which was adopted in December 1984. The US signed the treaty in April 1988 and adopted its standards into the Immigration and Nationality Act (8 C.F.R. § 208.16). It ratified the document on October 21, 1994, with the reservation that it was not self-executing and needed enabling legislation to take effect in the United States. In the following four cases—*Reyes-Reyes v. Ashcroft*, *Ornelas-Chavez v. Gonzalez*, *Bringas-Rodriguez v. Sessions*, and *Lopez-Amador v. Holder*—the two circuits display a consequential difference in their interpretation of the requirements for granting CAT protection. Generally, the Ninth Circuit

²⁵⁴ The American Psychological Association has condemned as unethical the attempted "conversion" of gays and lesbians. See *id.* Further, the American Psychiatric Association and the American Psychological Association have removed "homosexuality" from their lists of mental disorders. See *Boy Scouts of America v. Dale*, 530 US 640 (2000) (Stevens, J. dissenting). URL: <https://www.oyez.org/cases/1999/99-699>

recognizes that a government’s inability or unwillingness to protect persecuted citizens constitutes complicity in torture; the Eight Circuit, on the other hand, demands that CAT protection be given only when state actors directly participated in the persecution.²⁵⁵

In the case of *Reyes-Reyes v. Ashcroft*, four years after *Hernandez-Montiel*, the Ninth Circuit reaffirmed its view of gender non-conforming behavior as a symptom of an immutable characteristic—sexual orientation and gender identity—and therefore an essential part of one’s identity that one cannot or should not alter, as well as provided the first insight into the court’s interpretation of CAT requirements.²⁵⁶ Luis Reyes-Reyes (also known by the first names Josephine, Linda, and Cukita) was a claimant in their²⁵⁷ early 40s who arrived undocumented in the US at the age of 17 after fleeing El Salvador, their native country. When faced with deportation in 2002, Reyes appeared before an IJ and applied for withholding of removal, asylum, and protection under the Convention Against Torture (CAT). The IJ dismissed their asylum claim as untimely filed and in an oral decision declined to grant CAT relief, ruling that Reyes had failed to demonstrate that “anyone in the government or acting on behalf of the government tortured him,” therefore not satisfying CAT requirements. Reyes obtained pro bono representation and appealed to the BIA, which affirmed the IJ’s decision.

In their review of the case, the BIA agreed with the prior rulings against Reyes’ asylum claim, because the one-year time limit had expired twenty-four years before Reyes’ asylum

²⁵⁵ According to U.S. law, “torture” means an act committed by a person *acting under the color of law* specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control (CITE: 18 US 2340, emphasis added). And act committed “under the color of law” refers to an act done under the appearance of legal authorization, which does not require that the individual doing the act is a state actor.

²⁵⁶ *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir., 2004). URL: <https://www.immigrationequality.org/wp-content/uploads/2011/05/Reyes-Reyes.pdf>

²⁵⁷ I use “they/them/their” as gender-neutral singular pronouns to refer to Luis Reyes-Reyes, also known as Josephine, Linda, and Cukita, because of the claimant’s use of both traditionally female and male first names.

application. However, the court decided that the lower courts had improperly interpreted the CAT by requiring that the claimant demonstrate torture by government actors. Instead, the Ninth Circuit decided that if a government does not sufficiently respond to the abuse inflicted by non-state actors and protect the victim, this too rises to the level of government complicity in torture and the victim qualifies for CAT relief. In this case, Reyes was kidnapped as an early teenager by a group of men who took them to a remote location in the mountains, where they raped and beat them repeatedly. Reyes never reported the incident for fear of retribution by their attackers or quick dismissal by the authorities. Judge Bybee argued in a separate concurrence that the question of whether any public official knew of the crime and refused to act had not been sufficiently answered, and wrote that he would “grant the petition [for CAT relief] and remand for the purpose of addressing this question.”²⁵⁸ This case also provides another example of gender non-conforming behavior being accepted as evidence of membership of a particular social group by the Ninth Circuit.

The Ninth Circuit’s interpretation of CAT was consequential. In the case *Ornelas-Chavez v. Gonzales*, a different panel of judges of the same circuit found that the decision by the IJ and BIA to deny CAT relief on the grounds that the claimant had not been tortured by state actors was too stringent an interpretation of the law.²⁵⁹ The court decided that Ornelas-Chavez had established that the state was unwilling to protect him, if not complicit in his abuse in Mexico:

At his father’s bidding, his hometown police jailed him and threatened to do so again if he continued dating men. His supervisors at the Uruapan state prison refused to keep coworkers from harassing him for being homosexual. Even in Guadalajara, where Ornelas-Chavez for a short time performed in transvestite shows, he had “to go out in the street without any makeup . . . so [he was] not attack[ed] by the police.” ER at 78. Indeed, when asked directly why he did not report his alleged persecution to the police, Ornelas-

²⁵⁸ *Ibid.*, 13557.

²⁵⁹ *Ornelas-Chavez v. Gonzalez*, 458 F.3d 1052. United States Court of Appeals for the Ninth Circuit (21 Aug. 2006) URL: https://www.immigrationequality.org/wp-content/uploads/2011/05/Ornelas_Chavez.pdf

Chavez answered, “Because the same police mistreated you and harrasse[d] you. Even two of my friends were assassinated.”²⁶⁰

Given these details, it is apparent that the IJ and BIA either failed to properly gather all the facts necessary for assessing a CAT relief claim, or, as the judges decided, improperly applied the law using overly strict standards. The court admitted that it had “doubts” as to whether Ornelas-Chavez deserved CAT protection, but nonetheless argued that the IJ had failed to process the Cat claim (9977). One reason for this is her refusal to characterize the prison supervisor who jailed the claimant for his sexuality as a public official. Since her analysis was “fatally flawed,” they had to reverse and remand to the BIA (9977).

The Ninth Circuit has shown consistency in their treatment of state complicity in persecution and torture. In the 2017 decision of *Bringas-Rodriguez v. Sessions*, the court affirmed that an asylum seeker is not required to report abuse to the police if doing so would be futile.²⁶¹ In *Bringas-Rodriguez*, the claimant reported instances of gay friends being abused by the police and even laughed at by officers when attempting to report abuse in Mexico. In that case, the court recognized that the Mexican government’s unwillingness to protect gay citizens from harm constituted complicity persecution and instructed the BIA to reconsider.

The Eight Circuit offers a different interpretation of CAT requirements, as shown by its ruling in the 2011 case *Lopez-Amador v. Holder*.²⁶² This case concerns a lesbian woman from Venezuela who petitioned for review of a BIA decision affirming an IJ’s denial of her applications for asylum, withholding of removal, and deferral of removal under the CAT. She cited examples of harassment in her application, including a verbal altercation with a

²⁶⁰ Ibid., 9971.

²⁶¹ *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051. United States Court of Appeals for the Ninth Circuit (8 Mar. 2017), URL: <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/08/13-72682.pdf>

²⁶² *Lopez-Amador v. Holder*, 649 F.3d 880. United States Court of Appeals for the Eight Circuit (15 Aug. 2011), URL: <https://www.gpo.gov/fdsys/pkg/USCOURTS-ca8-10-03491/pdf/USCOURTS-ca8-10-03491-0.pdf>

homophobic police officer in a park while walking with her girlfriend. This, plus evidence of the general violence against trans individuals in Venezuela, did not convince for the court:

Ms. Lopez's central claim is now that treatment of homosexuals in Venezuela has worsened. Although her central evidence of this change is the 2009 Human Rights Report stating that thirteen transgender individuals were killed in Venezuela, Ms. Lopez does not claim to be a transgender individual. The BIA was left with a general report of alleged violence based on sexual orientation. While troubling, this information does not demonstrate that Ms. Lopez will be singled out and persecuted.²⁶³

The abuse that Lopez had suffered did not rise to the level of persecution in the eyes of the judges, and the general vulnerability of individuals with diverse sexual orientations in Venezuela was not accepted as grounds for asylum.

In their summary dismissal of her application for CAT relief the court notes that “in both her 2003 and 2007 applications, Ms. Lopez checked the “No” box when asked if she was afraid of being subjected to torture in Venezuela,” and argues that “Ms. Lopez failed to show she was specifically targeted or physically harmed by the government.”²⁶⁴ By requiring proof that the state or state actors tortured or would torture Lopez, the court displayed a far more stringent interpretation of the requirements of CAT relief than that established by the Ninth Circuit in *Reyes-Reyes*, *Ornelas-Chavez*, or *Bringas-Rodriguez*. Lopez should have instead been charged with proving that the Venezuelan government could be expected to insufficiently respond to harassment against her, and in doing so fail to protect her, an expectation supported by her experience with the homophobic police officer noted in her application. This case signifies another split between the Eighth and Ninth Circuits when handling SOGI-related asylum cases, the other being the ‘*Ndom* standard’ detailed in the following section.

²⁶³ *Ibid.*, 10.

²⁶⁴ *Ibid.*, 2, 4.

The role of identity in situations of widespread persecution

The Eighth and Ninth Circuits differ on fundamental questions regarding what constitutes widespread persecution (as opposed to random incidents of violence) and proof that persecution is motivated by a certain identity. Assessing the conditions of an applicant's country of origin, specifically as it relates to their protected identity or particular social group, is an essential step in deciding asylum cases. Asylum officials and judges rely on the applicant's testimony and country reports provided by groups such as the U.S. State Department or the United Nations, among other sources of credible and current information. Their interpretation of the data they receive is less objective than the facts themselves, as demonstrated by the disparate treatment received by the asylum seekers in *Bromfield v. Mukasey* and *Ixtilco-Morales v. Keisler*.

The Ninth Circuit in the *Bromfield* opinion strongly criticized the original IJ's interpretation of a country report on the status of gay individuals in Jamaica, the petitioner's home country. In ruling against Bromfield, the IJ argued that there was no generalized persecution against gay men in Jamaica, calling the incidents cited in the report "random acts of violence" of which Bromfield was never personally a victim. The report, the 2005 U.S. State Department Country Report for Jamaica, describes a situation in which "violence against homosexuals is widespread, and is perpetrated by both private individuals and public officials such as police officers and prison personnel." The report also noted that Jamaican law criminalizes homosexual conduct, making it punishable by up to ten-years imprisonment.²⁶⁵ In their criticism, the court cited a standard present in a prior case, *Ndom v. Ashcroft* (384 F.3d 743, 752, 9th Cir. 2004): if the perpetrator is motivated by his victim's protected status— including sexual orientation—he is engaging in persecution, not random violence. Given this standard, "it

²⁶⁵ *Bromfield v. Mukasey*, 543 F.3d 1071. United States Court of Appeals for the Ninth Circuit (15 Sep. 2008), 12849. URL: <https://www.immigrationequality.org/wp-content/uploads/2011/05/Bromfield.pdf>

is clear that the IJ erred when he ignored the perpetrators' motive in attacking homosexuals. The Country Report does not describe random violence. Rather, it makes clear that homosexuals are the victims of targeted violence on account of their sexual orientation."²⁶⁶

The application of this standard, which I will refer to as the *Ndom* standard, is an essential outcome of this case. In allowing the judges to recognize that there is a pattern of widespread persecution in Jamaica, and that "random" acts of violence united by a homophobic commonality are not truly random, the *Ndom* standard removes the burden of proving individual victimization from a claimant's shoulders. In other words, contrary to what the judges in *Lopez-Amador v. Holder* found, an individual need not demonstrate that they have been personally targeted as a result of their SOGI if they can show that individuals with that same identity are regularly targeted in their society. It is aided by a standard established in the landmark case *Karouni v. Gonzalez* that laws against homosexuality create a situation of generalized persecution, as cited in the present opinion: "evidence that homosexual acts were criminalized and actively punished in the proposed country of removal compelled the conclusion that petitioner had a well-founded fear of future persecution."²⁶⁷ Again, establishing a well-founded fear need not entail personal victimhood. In the case of Bromfield, both standards apply, and the judges correctly remanded the asylum decision to the BIA with instructions according to the standards above. This case strengthens the foundation for future decisions regarding a pattern of widespread persecution as opposed to random acts of violence against LGBTQ+ claimants.

In *Ixtilco-Morales*, the difference of interpretation between the circuit courts is on full display. Aureo Ixtilco-Morales was born in Axochiapan, Mexico, in 1976, and realized he was

²⁶⁶ *Ibid.*, 12854.

²⁶⁷ *Ibid.*, 12855. For *Karouni*: *Karouni v. Gonzalez*, 399 F.3d 1163. United States Court of Appeals for the Ninth Circuit (7 Mar. 2005). URL: <http://cdn.ca9.uscourts.gov/datastore/opinions/2005/03/07/0272651.pdf>

gay at nine years old. He also began displaying gender non-conforming behavior such as wearing his sister's clothing around the house. This, in addition to his identity, caused him to be beaten by his father, mother, and siblings, sometimes to the point where he feared for his life. At ten, he was thrown out of the house and began working in the produce market in Axochiapan for a woman who allowed Morales to live with her. At eleven years old, Morales left to work in Mexico City, and twice attempted unsuccessfully to return home. He attempted suicide when he was twelve years old.

In 1994, when Morales was seventeen years old, he illegally entered the United States and settled in Minnesota, where he eventually began living openly as a gay man. When faced with removal in 2003, he applied for asylum, withholding of removal, and CAT relief. His application claimed that he feared persecution in Mexico based on his sexual orientation and HIV+ status. His case was rejected by an IJ on the grounds that “the past abuse Morales suffered at the hands of his family did not amount to persecution because it was not inflicted by the government or by actors the government was unable or unwilling to control (Morales never reported the abuse to the authorities).²⁶⁸ This finding ultimately undermined his establishment of a well-founded fear of persecution. The BIA disagreed and decided that Morales' young age, and the well-documented problem of abuse of gender non-conforming children in Mexico, excused the fact that he never reported the abuse. However, the BIA also decided that his reaching the age of majority before applying for asylum was a significant change in circumstances as he could no longer fear being a victim of child abuse.

In their summary opinion, the Eight Circuit largely deferred to the decision of the BIA, writing that they would not overturn unless “the evidence was so compelling that no reasonable

²⁶⁸ *Ixtilco-Morales v. Keisler*, 507 F.3d 651. United States Court of Appeals for the Eighth Circuit (2 Nov. 2007). URL: <https://ecf.ca8.uscourts.gov/opndir/07/11/064123P.pdf>

fact-finder could fail to find the requisite fear of persecution.”²⁶⁹ The court considered the argument that the claimant’s change in age did not constitute a fundamental change in circumstances, because the phrase refers to a change in the circumstances of one’s home region that would make it safer for them. In disagreeing, the court noted that there is no indication that Congress intended for changes in personal circumstances to not count as fundamental changes under the law. Ultimately, the court agreed with the BIA Morales could no longer claim credible fear of his family members, whom had been his primary source of credible fear and persecution.

Morales argued that his HIV-positive status made him vulnerable to persecution in Mexico, because abuse of HIV+ people does occur regularly in Mexico, but the court concluded that these were isolated incidents and did not add up to widespread or regular persecution. The court applied a stringent interpretation of widespread persecution in this opinion, arguing that even criminalization of homosexuality and open government disapproval do not constitute persecution, disagreeing with the *Karouni* decision.

Given the details of this case and the standards cited by the court, this would likely have been decided differently if presented in the Ninth Circuit. As in *Bromfield*, the Ninth Circuit treats identity-motivated violence as persecution, even if the attacks have the appearance of random incidents at first. Morales was not targeted for anything other than his sexuality as a child; in other words, his abuse resulted from his identity as a gay individual, not his age. As an adult he would suffer due to his HIV+ status, another immutable characteristic which makes him especially vulnerable to abuse in Mexico. In sum, the Eighth Circuit does not abide by the ‘*Ndom* standard’, which is of paramount importance in this case and others concerning identity-motivated persecution. It is worth noting that of the eleven active judges of the Eight Circuit, ten

²⁶⁹ *Ibid.*, 4.

were appointed by Republican presidents, a higher ratio of appointment by party than any other federal appeals court. As a result, the court has a significant conservative tilt.

Inaccurate, misleading, or simply untrue: dishonesty as an asylum disqualifier

There is a divide over whether including inaccurate details or even blatant falsehoods in an asylum application should disqualify an asylum seeker from receiving protection, a debate which also considers whether to grant a claimant opportunities to correct their account. The cases detailed in this section provide insight into the current treatment of application errors and falsehoods by the federal circuit courts.

Martinez v. Holder was the first significant case regarding LGBTI asylum handled by the Obama Justice Department under Attorney General Eric Holder.²⁷⁰ The case concerns Saul Martinez, a Guatemalan citizen, who in his original hearing before an IJ sought asylum from persecution for his political opinion. He claimed that as one of the leaders of a political student group at the University of San Carlos, he had received threats from government actors, including once being chased by a car and shot at by what he believed were state agents trying to intimidate him. In the course of the trial, his story unraveled, and he ultimately admitted to fabricating it in order to apply for asylum. Before the same IJ, Martinez then switched his story and claimed that he had been persecuted as a gay man in Guatemala.

In the decision denying Martinez's petition for withholding of removal, the Ninth Circuit cited claimant's lack of credibility. The opinion states that Martinez had no reason to lie; according to testimony from the asylum officer cited in the opinion:

I personally explain the procedure trying to make him feel as comfortable as possible...After explaining the procedure we go ahead and verify the biographical

²⁷⁰ *Martinez v. Holder*, 557 F.3d 1059. United States Court of Appeals for the Ninth Circuit. 3 Mar. 2009. URL: <https://caselaw.findlaw.com/us-9th-circuit/1226981.html>

data...and ask for any other evidence that he may be willing to provide at that time. *We assure that the interview is very confidential, that nothing will get back to Guatemala. That's part of the procedure and basically trying to reassure the applicant we're there to help them if we can...* usually I start by asking him...to tell me the most severe incidents that he experienced in Guatemala that compelled him to come to the United States. I make it clear that there are five grounds so there is not just, not just one ground that there — I also let them know that there is membership in a social group...Not necessarily in a political group. I do make it clear that there are five grounds. And we, we get into eliciting information, ascertaining that information for credibility, that's the majority of the interview. We stress credibility very highly.²⁷¹

Judge Pregerson, dissenting, points out that the assurance of an asylum officer is not necessarily sufficient; in other words, it does not automatically ensure that an applicant is comfortable telling the truth about his sexuality. As Pregerson notes, at the time of Martinez's original claim in 1992, the INS had not recognized that sexual orientation was a valid basis for asylum (and would not do so until *Karouni* in 2005, thirteen years later). He adds: "Indeed, before the Immigration Act of 1990, homosexuality was a ground on which to *exclude* any immigrant who wished to enter this country. It is easy to understand how Martinez might have felt compelled to tailor his story to avoid being returned to Guatemala, where he suffered persecution on account of his sexual orientation."²⁷² Given the circumstances, Pregerson concluded that if Martinez had been entirely truthful and sought asylum on the basis of his sexuality, he would have been deported. It is easy to see why Martinez may have lacked confidence in a SOGI-based asylum claim when dealing with an agency that had not yet recognized such persecution. .

Furthermore, any possible harassment experienced by Martinez on the part of translators or other asylum personnel, or other asylum seekers and detained migrants whom he may have encountered while his case progressed, could have encouraged him to lie about his true motivation for fleeing Guatemala. The asylum officer interviewed testified that the process is

²⁷¹ Ibid., 2450-1.

²⁷² Ibid., 2455.

“very confidential, that nothing will get back to Guatemala”, but this is not convincing to a man who has been harassed by state actors for his sexuality, especially if potentially dealing with Guatemalan regional experts and translators.

In addition to demonstrating the consequences that a judge’s misunderstanding of LGBTQ+ identities can have on an asylum case, the case of *Fuller v. Lynch* provides another example of inconsistencies in the asylum application being used to doubt the claimant’s credibility.²⁷³ Ray Fuller, a Jamaican native and citizen, arrived in the United States in 1999 with a fiancé visa sponsored by Carol Wood, a U.S. citizen. Fuller received conditional permanent resident status, but missed a required interview with USCIS, and in 2004 his status was terminated. The couple divorced the year after. As the Seventh Circuit notes, Fuller had pleaded guilty to attempted criminal sexual assault in 2004 and was sentenced to 30 months’ probation. He violated the conditions of his probation and was re-sentenced to four years’ imprisonment. Upon Fuller’s release in 2014, the Department of Homeland Security detained him and charged him as removable on three grounds: for being convicted of an aggravated felony, defined as an attempt to commit a crime of violence; for being convicted of a crime involving moral turpitude; and for losing his conditional permanent resident status.²⁷⁴ The IJ sustained each ground of removability. Fuller then applied for asylum and withholding of removal as a bisexual man.

Fuller testified that he began experimenting sexually with both men and women in his teenage years. He had two children with a woman in Jamaica, one in 1986 and another in 1987. During his college years, he was physically attacked and even stoned by other students due to his open bisexuality. Later, he was stabbed by a group of men who taunted him for being gay and in

²⁷³ *Fuller v. Lynch*, No. 15-3487. United States Court of Appeals for the Seventh Circuit. 17 Aug. 2016. URL: <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl%3FSubmit%3DDisplay%26Path%3DY2016/D08-17/C:15-3487:J:Posner:dis:T:fnOp:N:1812720:S:0>

²⁷⁴ *Ibid.*, 2.

a different incident was robbed at gunpoint by a man who called him a “batty man,” a Jamaican slur for gay men. In the most violent incident, Fuller was shot in the back and buttock at a gay-friendly party by anti-gay armed assailants; as a result of the shooting, his family “disowned” him and banned him from the house. Shortly after, he met Wood and moved to the United States.

The IJ displayed a disturbing misunderstanding of bisexuality. She expressed doubts about the veracity of Fuller’s identity on the grounds that he had children with two women, was married to a woman, and was convicted of sexual assault of a woman. In doubting his claimed bisexual identity based on these facts, the IJ treated Fuller as a gay man; after all, none of the behavior she cited is uncharacteristic of a bisexual man. The IJ also highlighted she took to be damning inconsistencies in Fuller’s testimony regarding important dates and individuals in his life. In its opinion, the court did reprimand the IJ for her misunderstanding of bisexuality, yet ultimately sided with the IJ and BIA in denying Fuller’s petition; they found the inconsistencies in his testimony to be disqualifying, especially concerning the date of the shooting.

In an impassioned dissent, Judge Posner argued that the inconsistencies are irrelevant to Fuller’s identity and that persecution upon return to Jamaica was highly likely in his case. Posner writes that his bisexuality takes precedence over all other details and chastises the IJ and his fellow judges for placing undue importance on “trivial” errors. For example:

The immigration judge’s opinion is oblivious to [the situation of anti-LGBTI violence and discrimination in Jamaica]. Instead she fastened on what are unquestionable, but trivial and indeed irrelevant, mistakes or falsehoods in Fuller’s testimony, for example that he “confused his sisters’ names, mixed up a sister with his mother, and gave different figures for the number of sisters that he had.” What this has to do with his sexual proclivities eludes me. The fact that an applicant for asylum makes mistakes or even lies is material to his asylum claim only if the mistakes or lies are germane—which the mistakes (or lies) about his sisters and mothers were not.²⁷⁵

²⁷⁵ Ibid., 13.

Posner points out that Fuller provided seven letters from his children and friends affirming his bisexuality, which the IJ disregarded due to what she took to be a suspicious commonality in the formatting of the letters. Posner asks: “And how exactly does one prove that he is bisexual? Persuade all one’s male sex partners to testify, to write letters, etc.? No, because most Jamaican homosexuals are not going to go public with their homosexuality given the vicious Jamaican discrimination against LGBT persons, which is undeniable, as I’ll show.”²⁷⁶ And he does, sourcing reports as to the potential violence faced by bisexuals in Jamaica.

In 2017, the Seventh Circuit again heard the case in *Fuller v. Sessions* (2018) in order to review new evidence presented by the petitioner.²⁷⁷ Specifically, the court considered three letters from friends of Fuller who knew him in Jamaica and each testified that his account of the shooting at Ocho Rios was accurate, with one recalling that a cousin of Fuller’s had been sent to the party specifically to kill Fuller.²⁷⁸ The BIA which heard the original appeal in 2017 was “unimpressed” and refused to reopen the case, prompting Fuller’s appeal to the Seventh Circuit.²⁷⁹ The Seventh Circuit asked Attorney General Sessions to provide a formal response to the case, which he did, arguing that “the new evidence does not change the IJ’s findings that his assertion that he is bisexual was not credible.”²⁸⁰

The Seventh Circuit questioned whether the BIA had sufficiently considered the effect of the legal proceedings on Fuller’s public image, writing:

Whatever the old evidence showed when this case first arose, it is clear on the record before this court that Fuller now identifies himself as bisexual. Given the instantaneous availability of documents on the Internet, there is no doubt that the facts revealed in these documents will become known, and Fuller’s life may well be in danger.²⁸¹

²⁷⁶ *Ibid.*, 12.

²⁷⁷ *Fuller v. Sessions*, No. 17-3176. United States Court of Appeals for the Seventh Circuit (8 Jan 2018). URL: <https://law.justia.com/cases/federal/appellate-courts/ca7/17-3176/17-3176-2018-01-08.html>

²⁷⁸ *Ibid.*, 3.

²⁷⁹ *Ibid.*, 5.

²⁸⁰ *Ibid.*, 4.

²⁸¹ *Ibid.*, 6.

Given these circumstances, the court urged the Attorney General not to deport Fuller before his legal proceedings conclude, and that the government consider the exposure that his legal proceedings have subjected him to in Jamaica. Although they denied his petition for removal, they granted Fuller's motion to proceed *in forma pauperis*. This case is notable not only for its lengthy consideration of inaccuracies in a SOGI asylum application, but also for the input of the Attorney General, the first time during the Trump administration that the government provided formal input on an asylum case concerning an LGBTQ+ individual.

One year after the Seventh Circuit's rejection of Fuller's first appeal to the federal court, the same court again ruled against an LGBTQ+ asylum seeker for inconsistent testimony. In *Barragan-Ojeda v. Sessions* the court sided with the IJ and BIA in denying asylum to Juan Carlos Barragan-Ojeda, a Mexican man who first requested protection from government-connected gangs after being apprehended at the US border in July 2013.²⁸² When asked by the IJ if there were any other reasons for his being afraid of returning to Mexico, Barragan-Ojeda testified that he had experienced harassment for being effeminate and was perceived as gay by his community but denied that he was actually gay when asked by the judge.

On appeal before the BIA, Barragan-Ojeda supplied additional statements claiming that he was raped at gunpoint by two men while in Mexico and that he was in fact gay, but had not disclosed his sexual orientation at the first hearing because he was not ready to admit it publicly given his youth and insecurity, his upbringing and the rejection of homosexuality in Mexican culture, his shame as a rape victim, his lack of counsel, and the presence of members of his family in the courtroom. He had requested a closed hearing, in which no family members would

²⁸² *Barragan-Ojeda v. Sessions*, 853 F.3d 374. United States Court of Appeals for the Seventh Circuit. 5 Apr. 2017. URL: <https://www.leagle.com/decision/infco20170405124>

be allowed to attend, at the outset of the case, but his request was denied by the IJ for unknown reasons. The BIA treated the appeal as a new application, given the introduction of significant evidence as to the claimant's sexual orientation. However, the Board found that it could not remand the case to the IJ given the fact that Barragan-Ojeda did not satisfy the standard found at 8 C.F.R. § 1003.2(c)(1): "A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."

In response to the argument that the claimant's due process rights were denied by the IJ who rejected his request for a closed hearing, the Seventh Circuit found that there was no reason to doubt the IJ's decision in the case. Regarding the standard cited by the BIA, the court agreed and similarly refused to remand the case. In doing so, the court did not sufficiently recognize the impact of the presence of the claimant's family on his testimony. Having family present, whether during the USCIS interview or before a judge, can alter their testimony and end up unfairly undermining their application. It is reasonable to expect an eighteen-year-old to be hesitant or even unwilling to proclaim his sexual orientation in front of his family members, especially in a courtroom setting, and *especially* when he has suffered from sexual assault in the past. Given these circumstances, Barragan-Ojeda's case does satisfy the standard cited by the BIA and the Seventh Circuit in their rejection of his application.

An asylum decision-maker should not assume that an applicant who has suffered trauma will tell their story consistently, even regarding critical details, and especially not when subjected to the adversarial cross-examination that often takes place during asylum proceedings.²⁸³ As Carens argues, asylum seekers often carry with them an intense fear of political authorities

²⁸³ Paskey, Stephen. "Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum." 56 Santa Clara L. Rev., (2016).

stemming from their experience in their country of origin, and as such may feel compelled to say what they perceive the authorities want to hear in lieu of the truth.²⁸⁴ This fear is to be expected in many cases involving a history of persecution at the hands of government officials. As Posner argues, these errors should only be considered disqualifying if they are relevant to the case, i.e. if they concern the protected identity under persecution and are not simply tangential. Considering all the above, lying at the outset of an asylum application is not necessarily grounds for rejection, and asylum seekers who do fabricate their story should be given chances to correct the account.

The Real ID Act of 2005 and the “one central reason” standard

In 2005 Congress enacted the Real ID Act, a sweeping law that modified U.S. policy pertaining to national security, identification, and immigration. This included a change to the burden of proof placed on an asylum seeker:

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least *one central reason* for persecuting the applicant.²⁸⁵

Since the passing of this law, the BIA and all the circuit courts have had chances to define their varying interpretations of this “one central reason” standard. As Ghai summarizes, there are three schools of interpretation: (1) the BIA interpretation, which states that the reason “cannot be incidental, tangential, superficial, or subordinate to another reason for harm”; (2) the Ninth Circuit’s interpretation, that *but for* the protected ground, the persecutor would not have harmed the applicant; and (3) the Third Circuit’s interpretation, under which the reason “cannot be

²⁸⁴ Carens, Joseph H., *The Ethics of Immigration* (Oxford: Oxford University Press, 2015), 211.

²⁸⁵ 8 U.S. Code § 1158(b)(1)(B)(i), emphasis added.

incidental, tangential, or superficial to another reason for harm."²⁸⁶ The First, Second, Fourth, Fifth, and Tenth Circuits have plainly adopted the BIA's interpretation of "one central reason", while the Sixth, Seventh, Eighth, and Eleventh Circuits have used the "one central reason" standard from the Real ID Act but have not adopted the BIA's interpretation.²⁸⁷

Like Ghai, I argue that the Third Circuit interpretation is the most loyal to congressional intent without applying overly stringent standards and should be extended nationally.²⁸⁸ At the time Ghai's piece in 2012, the Third Circuit had not applied their interpretation of this standard to a SOGI asylum case; however, in 2015, they ruled in *Gonzalez-Posadas v. AG of the United States of America*, applying the standard to this kind of case for the first time.²⁸⁹ Although the court denied the petition, I find the application of this standard loyal to the wording of the law.

Antonio Gonzalez-Posadas, a native and citizen of Honduras, entered the United States in 2012 and was immediately apprehended by agents of the United States Department of Homeland Security. He was deported from the United States on October 26, 2012. In February 2013, he again entered the United States, and, a week later, was again apprehended by DHS, which issued a "Notice of Intent/Decision to Reinstate Prior Order." That Notice referred to Gonzalez-Posadas's earlier order of removal and marked the first step toward deportation. In response, Gonzalez-Posadas expressed a fear of returning to Honduras and was interviewed by the US Citizenship and Immigration Service (USCIS). Gonzalez reported in his interview that he fled Honduras for two reasons: first, to avoid recruitment by the Mara Salvatrucha (MS-13) gang, who had been harassing and intimidating him for years; second, to seek refuge from abuse at the

²⁸⁶ Ghai, "Deciphering", 524.

²⁸⁷ Ibid., 542.

²⁸⁸ Ibid., 545.

²⁸⁹ *Gonzalez-Posadas v. AG of the United States of America*, 781 F.3d 677. United States Court of Appeals for the Third Circuit (26 Mar. 2015) URL: <http://www2.ca3.uscourts.gov/opinarch/141732p.pdf>

hands of his family for being gay. In the interview, the claimant asserted that he is not gay, but rather perceived to be gay by his community; later, in front of the IJ, he described himself as gay.

Gonzalez-Posadas told the USCIS interviewer that one of his cousins was tied up and raped by his father for being gay. He also said he was twice raped as a teenager by his cousin Felipe but never told anyone about the rapes because Felipe threatened to hurt his mother if he reported them. The second time, Felipe beat him with a pistol and threatened to kill him if he sought the help of his family or the police. Eventually, three years later, Gonzalez-Posadas reported the incident to the police; unfortunately, the published opinion of the Third Circuit does not include details as to the outcome of that report, if there were any. In addition to the abuse he suffered in the home, the claimant was relentlessly pursued by MS-13 gang members:

Gonzalez-Posadas also testified that the Maras mistreated him by using homophobic slurs, and they threatened to kill him if he did not pay them. He said that gang members would tell him that he had to perform oral sex on them, though he never did...Some time after his mother died, eight armed Maras showed up at his house, beat him, and demanded that he join their gang. When he refused to join, they told him that he had to pay them 1,500 Lempira [about \$60 USD] on the fifth of each month or else they would kill him. He attempted to escape the gang by moving to a different part of Honduras, but the gang found him after two weeks and threatened to kill him if he did not submit to the extortion. He testified that he went to the police in November 2012 to report the Maras but was told that he did not have enough proof to initiate an arrest against any members of the gang.²⁹⁰

Gonzalez-Posadas testified that in this interaction with the police, he had no reason to believe that they disregarded his report because of his sexual orientation.

In its decision, the court relied on the “one central reason” test as established by the Real ID Act of 2005, a law that many immigrant rights organizations felt created overly stringent evidentiary standards. According to the opinion:

Prior to passage of the REAL ID Act in 2005, there was no statutory standard for judging whether an alien should be granted asylum when he was persecuted on account of both protected and unprotected grounds. As a result, the Board and the courts formulated

²⁹⁰ Ibid., 7.

various “mixed motive” persecution tests, with this Court providing that an applicant needed only to show that his persecution was caused “at least in part” by membership in a protected group. The REAL ID Act supplanted that standard, requiring instead that an asylum applicant establish that membership in a particular social group “was or will be at least one central reason for persecuting the applicant.”²⁹¹

The IJ and BIA found, and Gonzalez-Posadas agreed, that “young Guatemalan men who have resisted gang recruitment” do not constitute a cognizable particular social group.²⁹² Although gay males certainly do, the judges found that the claimant’s sexual orientation was not a “central reason” for his persecution by the MS-13 gang; rather, the group was motivated by his money, as shown by their attempts at extortion. Additionally, it was decided that the rapes Gonzalez-Posadas experienced in his teenage years did not constitute persecution, especially when paired with the claimant’s testimony that he did not fear the Guatemalan government or law enforcement, nor did he seek their protection at the time.

The case was noted at the time by the Third Circuit Immigration Blog, which published an article declaring that the court had adopted the “one central reason” standard for withholding of removal.²⁹³ If Gonzalez’s case had been heard by the BIA, it is unlikely that the outcome would have been different, given the claimant’s failure to show that the abuse was motivated by a protected reason (in this case, sexual orientation). However, Gonzalez-Posadas may have received the decision he sought in the Ninth Circuit. Under that court’s interpretation of the Real ID Act, the claimant would have had to prove that the harm would not have occurred *but for* his sexuality, which he could plausibly do by arguing that his sexual orientation—apart from causing the horrific violence he experienced at home—made him an easier target in the eyes of the MS-

²⁹¹ Ibid., 15.

²⁹² Ibid, 13.

²⁹³ 3rd Cir. Immigration Blog, “Gonzalez-Posadas (Precedential): Third Circuit Adopts ‘One Central Reason’ Standard for Withholding of Removal.” 26 Mar. 2015. URL: www.3rdcirimmigrationblog.blogspot.com/2015/04/gonzalez-posadas-v-attorney-general-us.html

13 gang members who terrorized him. The difference between the standards of the BIA, the Ninth Circuit, and the Seventh Circuit is apparent, and it is easy to see how the same case could result in disparate outcomes based on where in the country it is heard.

Conclusion: Disparity and Injustice in U.S. Immigration Courts

The variety in interpretation of asylum statutes across the BIA and the courts of the Federal Circuit is on display in several areas. For example, the Ninth Circuit understands gender non-conforming behavior as a symptom or manifestation of sexual orientation or gender identity, and therefore part of an individual's immutable identity, as shown in their decision in *Hernandez-Montiel*. In contrast, the Eight Circuit found in *Kimumwe-Gonzalez* that the claimant had been persecuted for having sex with men, which is a gender non-conforming *behavior* and therefore a choice, and not for his gay identity. Therefore, he was not eligible for asylum as a victim of persecution of a protected class; the post-*Hernandez* Ninth Circuit surely would have found this reasoning objectionable and likely would have ruled in Kimumwe's favor.

Another example can be found in the variety of CAT interpretations across the immigration court system. In *Reyes-Reyes*, *Ornelas-Chaves*, and *Bringas-Rodriguez v. Sessions*, the Ninth Circuit has held that government inaction can rise to the level of complicity in torture, and as such a victim of torture need not be tortured by a government actor to qualify for CAT relief. In *Ixtilco-Morales v. Keisler*, the Eighth Circuit employed a much stricter understanding of CAT requirements, agreeing with the BIA's dismissal of a CAT application on the grounds that the persecution in that case was committed by a non-state actor.

Finally, the differing interpretations across courts of the "one central reason" policy of the Real ID Act of 2005 create an unfair asylum system. There are at least three distinct schools

of interpretation when it comes to the “once central reason” standard, one of which is overly stringent and another that does not closely adhere to congressional intent.²⁹⁴ The BIA interpretation requires that the central reason not be subordinate to any other, overstepping congressional intent and placing an undue evidentiary burden on the applicant.²⁹⁵ The law states that the protected identity be “at least one central reason” for the persecution, not that it be the primary reason. The interpretation of the Ninth Circuit is far less stringent, requiring only that the persecution would not have occurred *but for* the protected ground. This interpretation does not clearly stem from the language enacted by Congress, although it rightly does away with the “cannot be subordinate” BIA standard. The Third Circuit simply adopted the BIA interpretation without the “cannot be subordinate” clause, most recently demonstrated in *Gonzalez-Posadas v. AG of the United States*. The latter interpretation is most consistent with congressional intent.²⁹⁶ It should be extended to all courts charged with deciding cases of asylum.

The present disparity in treatment that LGBTI asylum seekers receive across the country is “contrary to the concept of equal protection, a fundamental value of the American legal system.”²⁹⁷ Leaving potentially life-saving or life-endangering decisions to the chance of where an applicant filed Form I-589, the USCIS asylum application, “will ultimately disserve the just ends that the immigration system seeks to uphold.”²⁹⁸ All individuals in similar situations should receive consistent treatment; closing the gaps between the disparate interpretations of the vital standards described in this chapter would constitute significant progress toward that goal.

²⁹⁴ Ghai, “Deciphering,” 542.

²⁹⁵ *Ibid.*, 541, 545, 563. The BIA interpretation exceeds congressional intent by requiring that the once central reason not be subordinate to any other; the law states that the protected category must be “a central reason,” not the primary one.

²⁹⁶ *Ibid.*, 562.

²⁹⁷ *Ibid.*, 566.

²⁹⁸ *Ibid.*

Conclusion

This thesis has pursued two broad arguments: first, that the U.S. holds significant responsibility for displaced LGBTQ+ individuals from the LAC region, and second, that it is currently failing to provide them safe haven. As the wealthiest nation in the world, it not only has the capacity to respond to mass displacement, but also benefits from the existing order in which millions of LAC individuals are displaced, thousands of them for reasons of SOGI. The U.S. is part of a global refugee regime that has failed to meet the needs of displaced people, as each individual power pursues its own interests without significant regard for human rights or remedial responsibility. The U.S. should no longer treat aiding asylum seekers and refugees as a benevolence to deploy at its discretion, but rather as a serious moral commitment.

The U.S. has done significant harm against both LAC citizens and the LGBTQ+ via its discriminatory immigration and asylum policies over time. This includes the racism which tainted the longstanding definition of refugees as “victims of communism” and led the U.S. to exclude such “victims” from Afghanistan, Southern Africa, and Latin America, as well as the ban on LGBTQ+ foreigners which existed well into the 20th century. Similarly, the U.S. has not done enough to defend the rights of LGBTQ+ individuals worldwide, and private citizens working through religious organizations continue to threaten the quality of life for LGBTQ+ people by spreading hatred abroad. Additionally, U.S. militarism and intervention in LAC—most notably the ongoing War on Drugs—has contributed greatly to displacement in that region by destroying the rural economy and placing communities under the control of organized crime. These factors, among the many more detailed in the chapters above, demonstrate the extent to which the U.S. has caused displacement in LAC, failed to defend the human rights of LGBTQ+ individuals worldwide, and evaded its obligations to those harmed.

This evasion of responsibility includes failing to a significant number of refugees, making asylum difficult to claim by criminalizing undocumented entry and spreading misleading information about asylum policies, and treating admitted LGBTQ+ asylum seekers unfairly. U.S. asylum officers and immigration courts often apply a stricter standard than was intended at the time of the creation of the particular social group (PSG) category. The UN intended for the PSG category to be interpreted liberally, as shown by its hesitance to elaborate the category and the limited guidance it has provided member nations. Additionally, the “once central reason” standard created by Congress with the 2005 Real ID Act has been misinterpreted by all federal circuit courts except the Third, and the disparity between court systems violates the right of every asylum seeker to equal protection under the law. In order to adhere to the intention of the UN and of the Congress, the U.S. must ease its PSG standards and make the interpretation of “one central reason” uniform across the country. Finally, the U.S. must train and educate its asylum officers and other asylum personnel on LGBTQ+ identities and discrimination in order to ensure that interviews and immigration hearings are fair and do not re-traumatize the applicant.

The U.S. has made significant progress in respecting the equal rights of its LGBTQ+ citizens in recent years, yet the same cannot be said for LGBTQ+ asylum seekers from the LAC region looking to their Northern neighbor for protection from persecution. The number of individuals fleeing their home because of their sexual orientation and gender identity is likely to continue increasing, especially as violence continues to destabilize countries such as El Salvador, Honduras, and Venezuela, and as LGBTQ+ discrimination and hatred continues to run rampant in places such as Jamaica and Guyana. The U.S. must decide whether it will continue to offer only superficial relief for the queer and forcibly displaced, or if it will change course, accept responsibility, and craft a more just system.

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