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Why Are We Not Worth Saving? Latin American Immigrant Women's Experiences with Post-9/11 Crimmigration Policies and Asylum-Seeking in the United States

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Abstract
This thesis discusses Crimmigration—the convergence of criminal policies and immigration law—in a post-9/11 world as it relates to Latin American Immigrant women seeking asylum in the United States. Utilizing case law, legislation, and legal scholarship, I situate these policies in the broader context of immigration law both nationally and internationally, focusing on key post-9/11 legislation and policies such as Operation Streamline, Operation Liberty Shield, and Title 42, as well as key post-9/11 case law dealing with Latin American women seeking asylum in the United States. With these foundational understandings, I provide possible solutions that would lessen the harms presented to Latin American Immigrant women seeking asylum in the United States, including a better adherence to international law and a unified national judicial precedent.
Key Words:
Crimmigration, immigration, asylum, Latin American women, gender-based violence, GBV

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Introduction

This project explores the ways in which post-9/11 Crimmigration policies—policies which intertwine criminal law enforcement and immigration law enforcement[1]—have harmed Latin American Immigrant (LAI) women who are seeking refugee status and asylum in the United States. Following the 9/11 terror attacks, the United States launched the War on Terror[2]—preceded by the War on Crime[3] and the War on Drugs[4]—which has directly contributed not only to the growing number of Crimmigration policies, but also the growing number of people affected by Crimmigration policies.[5]

In this project, I investigate the patterns of legal treatment of LAI women based on these Crimmigration policies to better understand how these policies have harmed LAI women fleeing their home countries for any number of reasons.[6] To do this, I first investigate the history of Crimmigration and its origins, and how Crimmigration has changed since the 9/11 terror attacks. I then look at international refugee and asylum law, as well as United States refugee and asylum law, to better understand the general legal landscape not only of Crimmigration, but of

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[1] *See Chapter Two: Crimmigration: Definition and History*.
[2] *Global War on Terror*, GEORGE W. BUSH LIBRARY NATIONAL ARCHIVES, https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror.
[3] *See generally* Michael W. Flamm, *From Harlem to Ferguson: LBJ's War on Crime and America's Prison Crisis*, ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE, https://origins.osu.edu/article/harlem-ferguson-lbjs-war-crime-and-americas-prison-crisis?language_content_entity=en; Elizabeth Hinton, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).
[4] *See generally The 'War on Drugs' Has Failed, Commission Says*, THE LEADERSHIP CONFERENCE EDUCATION FUND (June 8, 2011), https://civilrights.org/edfund/resource/the-war-on-drugs-has-failed-commission-says/ ("Heavily investing in a criminalization approach can inadvertently lead to an arms race between law enforcement and violent trafficking organizations, make those markets more ruthless, and increase the homicide rates."); Graham Boyd, *The Drug War is the New Jim Crow* (2001), https://www.aclu.org/other/drug-war-new-jim-crow; History.com, *War on Drugs*, HISTORY.COM (December 17, 2019), https://www.history.com/topics/crime/the-war-on-drugs.
[5] *See generally* Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes*, PEW RSCH. CENTER (March 18, 2014), https://www.pewresearch.org/hispanic/2014/03/18/the-rise-of-federal-immigration-crimes/; Tanvi Misra, *The Rise of 'Crimmigration'*, BLOOMBERG CITYLAB (September 16, 2016), https://www.bloomberg.com/news/articles/2016-09-16/c-sar-garc-a-hern-ndez-on-the-rise-of-crimmigration; TRAC Immigration, *Growth in ICE Detention Fueled by Immigrants with no Criminal Conviction*, TRAC REPORTS, INC. (November 26, 2019), https://trac.syr.edu/immigration/reports/583/.
[6] *See Chapter Three: Women, Refugees, and Asylum Seeking in the United States*.

refugees and asylum seekers as well, and how these laws play into one another. Next, I apply this knowledge to the literature on Latin American women's experiences to analyze and understand the patterns of their treatment during migration into the United States. Penultimately, I research and read court cases relating to LAI women seeking refugee status or asylum in the United States to create an analysis of the language—the dicta[7]—of the Courts regarding LAI women seeking asylum or refugee status in the United States and how that dicta reflects sociocultural attitudes towards LAI women. All of this seeks to show the harm and marginalization that LAI women experience in their journeys of migration and immigration into the United States seeking refugee status and asylum. Finally, I draw conclusions from this knowledge to help create a better understanding of how we, as a country, can begin to reconstruct or completely recreate these policies and practices of Crimmigration to better aid those who are coming to the United States seeking help. This qualitative research project uses a discursive analysis of three key sources—legal scholarship, legislation, and case opinions[8]—to gain a complete and thorough understanding of the implications of Crimmigration law for LAI women, while simultaneously considering the reasons that these policies exist with such force and strength today.

I recognize that there are many LAI women in the United States,[9] but this project chooses to focus only on those LAI women who have attempted to immigrate, whether successfully or not, into the United States by claiming refugee status or seeking asylum. I focus

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[7] Dicta represents the rhetoric and language that a Court uses when discussing specific cases. This language is extra language that is not directly tied to the facts of the case, and is often indicative of the feelings, opinions, and biases that a Court holds. *Dicta*, The Free Dictionary, https://legal-dictionary.thefreedictionary.com/Dicta ("Opinions of a judge that do not embody the resolution or determination of the specific case before the court. Expressions in a court's opinion that go beyond the facts before the court and therefore are individual views of the author of the opinion and not binding in subsequent cases as legal precedent."). *See Chapter 3: Women, Refugees, and Asylum Seeking in the United States* for more information regarding dicta as it relates to LAI women's immigration cases.

[8] Court precedents and decisions are an ever-evolving, never-ending process, and this thesis in no way attempts to suggest otherwise. The Court cases utilized in this thesis only go as far as 2021. Though more recent case law could prove to be more helpful, I believed that it was important to give myself a reasonable timeframe within which to work.

[9] Pew Rsch. Ctr., *Migration and Gender*, PEW RSCH. CTR. (July 5, 2006), https://www.pewresearch.org/hispanic/2006/07/05/ii-migration-and-gender/.

on this group because it highlights a key intersectional identity that American politics fails—or blatantly refuses—to recognize, resulting in these already marginalized women being left behind by the immigration and refugee systems.

While the original research for this project was done in both Spanish and English, the sources utilized in the final creation of this thesis were in English, rather than in Spanish. The perspectives of this issue in Spanish focused on the issues primarily effecting the Mexican government, rather than the legal issues as they pertained to the United States. I do believe that it is important to focus on the issue from the side of the Mexican border as well, though the scope of this thesis did not allow for such an analysis. A stronger focus on the Spanish aspects of this work should be considered in the future, as the possibility of utilizing both English and Spanish would allow for the use of sources with limited English access. LAI women in particular with limited English fluency are generally those with lower incomes,[10] who are more likely to be the ones who do not see their petitions for asylum, refugee status, or withholding from removal granted, as they are often unable to afford a lawyer who can adequately advocate for them.[11] A better understanding of the perspectives of these women will be a critical intersection to explore in future scholarship, as it is essential to understanding the harm done towards some of the most marginalized communities affected by Crimmigration policies.

I come to this research with a multitude of theoretical lenses that are integral to my understanding of the issues at hand. I recognize that this issue is multifaceted and incredibly complex, so it is important that I use a variety of lenses to fully understand these questions and concerns. The most important lenses are those of intersectionality, Critical Race Theory (CRT), and Individual Rights Theory (IRT). These lenses create the theoretical underpinnings of my research and aim to center the lived, embodied experiences of immigrants, women, and people

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[10] Jessica Semega, Melissa Kollar, John Creamer & Abinash Mohanty, *Income and Poverty in the United States: 2018*, U.S. CENSUS (September 10, 2019), https://www.census.gov/library/publications/2019/demo/p60-266.html.
[11] Ilona Bray, *How Expensive is an Immigration Lawyer?*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/fiance-marriage-visa-book/chapter17-13.html.

of color. This is important because much of the work that has been done regarding immigration and refugee or asylum seeking has been done from a purely academic perspective, without considering the perspectives and experiences of those who have actually lived through these processes. I seek to include those perspectives in my research and in my findings to allow for a more comprehensive overview of the problems on both a procedural and personal level.

Chapter One: Foundational Theories, Literature Review, & Methodology

Foundational Theories

The lenses of the foundational theories that I view this project through are particularly important considering the history of the United States' immigration system, which has been fraught with racially charged and exclusionary policies. Utilizing these theoretical lenses, I am able to better shape an understanding of what is lacking in the immigration policies of the United States, as well as what could be added to these policies to make them more beneficial. While much of the legal scholarship that I make use of in my literature review references one or more of these theoretical lenses, these are by far not the normative lenses which are used when viewing these issues, which I believe suggests a larger gap in information and knowledge as it relates to the ways that immigration policy is discussed in a legal context.

Critical Race Theory (CRT)

CRT is an integral part of a more inclusive view of the legal system of the United States. The racialized experiences of all peoples in the United States require a significant amount of attention, as the United States functions as a politically charged, racially divided country. The rights of Black people and other People of Color ("POC") in the United States have historically been hard-won and met with a significant amount of backlash. The backlash against the rights of POC in the United States can be most clearly noted in the judicial precedent set forth by the Supreme Court in during and leading up to the Civil Rights Movement.

In 1903, the Supreme Court refused to aid Black people in Alabama gain access to the vote, despite the Thirteenth and Fourteenth Amendments guaranteeing their right to do so.[12] It was not until 1927 that the Court determined that it could, in fact, aid Black people in getting access to the vote.[13] In 1906, the Court determined that the Thirteenth Amendment did not

[12] *Giles v. Harris*, 189 U.S. 475 (1903).
[13] *Nixon v. Herndon*, 273 U.S. 536 (1927) (determining that Black people had a right to vote in the Texas democratic primary under the Fourteenth Amendment).

allow Congress to intervene in racially-discriminatory hiring practices[14]—a precedent that was not overturned until the Civil Rights Act of 1964.[15] The "separate but equal" doctrine which permitted segregation[16] was not overturned until 1954,[17] and integration was not enforced fully until over a decade later in 1969.[18]

It was not until the Civil Rights Act of 1964 prohibited the intentional discrimination against people on the basis of race, color, or national origin by any program or activity that received federal or financial assistance.[19] The Supreme Court determined in 1883 that Congress had no ability to safeguard Black people against the actions of private individuals under the Thirteenth and Fourteenth Amendments,[20] though in some part this ruling has been overturned by numerous Civil Rights Act cases regarding discrimination in interstate commerce.[21]

CRT focuses on the long, rich history of discrimination against POC in the United States in general. In an immigration context, CRT aims to focus on the disparate impacts of these discriminatory policies, practices, and histories, which scholar César Cuauhtémoc García Hernández argues are the very foundations of the Crimmigration policies that now exist in the United States. According to García Hernández, Crimmigration only exists because of the post-Civil Rights Era need for a "facially neutral"[22] way to deny immigrants of color access to entry

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[14] *Hodges v. United States*, 203 U.S. 1 (1906).
[15] 2 U.S.C. § 1311.
[16] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[17] *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954) (stating that public school segregation on the basis of race is unconstitutional); *Brown v. Board of Education of Topeka, Kansas II*, 349 U.S. 294 (1955) (stating that desegregation should be required of all public schools with "all deliberate speed").
[18] *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969) (holding that the precedent of desegregation of public schools with "all deliberate speed" was no longer constitutionally permissible, and that Mississippi schools must immediately desegregate).
[19] 42 U.S.C. §§ 2000d-2000d-7.
[20] *Civil Rights Cases*, 109 U.S. 3 (1883).
[21] *See generally Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress acted within its powers under the Commerce Clause when it forbade restaurants from engaging in racial discrimination because it was a burden on interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that Congress acted within its powers under the Commerce Clause by enacting Title II of the Civil Rights act, which prohibited racial discrimination in public accommodations); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that federal law bars all racial discrimination in the sale or rental of property, whether that property be public or private).
[22] César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2014).

into the United States, because it was no longer "acceptable to [deny people entry into the United States]… on the basis of the racialized markers used in the past."[23] Arguably, these racialized markers still exist in some way, as proposed refugee admissions numbers still separate asylum seekers by continent.[24]

The necessity for an analysis of immigration policies through the lens of CRT is, in a post-9/11 world, most clearly shown in the ways that post-9/11 immigration and security policies targeted any and all people who looked as though they could be Arab or from the SWANA[25] region.[26] The necessity of this analysis that focuses on LAI was most notable highlighted during the presidency of Trump,[27] whose enforcement of policies and rhetoric blatantly and directly targeted Latin American entrants into the United States–with a heavy focus on Mexican immigrants. These policies, though more strictly enforced under Trump, existed in the late 2010's during the presidency of Obama,[28] who most notably prosecuted 84,301 illegal entry and

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[23] *Id*. at 1511.
[24] U.S. Dep't of State, U.S. Dep't of Homeland Sec. & U.S. Dep't of Health and Hum. Servs., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2023, https://www.state.gov/wp-content/uploads/2022/09/FY-2023-USRAP-Report-to-Congress_FINAL_7-Sep-2022.pdf.
[25] SWANA stands for Southwest Asian/North African and is the term used to describe what was formerly called the Middle East, Near East, Arab world, or Islamic world. SWANA Alliance, *About*, SWANA ALLIANCE, https://swanaalliance.com/about.
[26] *See generally* Karen C. Tumlin, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CA L. REV., 1173 (2004); Nicole Davis, *The Slippery Slope of Racial Profiling*, COLORLINES (December 15, 2001), https://www.colorlines.com/articles/slippery-slope-racial-profiling; Stephen Lee, *Citizen Standing and Immigration Reform: Commentary and Criticisms*, 93 CAL. L. REV., 1479 (2005).
[27] *See generally* Kate Linthicum, *The Dark, Complex History of Trump's Model for his Mass Deportation Plan*, L.A. TIMES (November 13, 2015), https://www.latimes.com/nation/la-na-trump-deportation-20151113-story.html. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME MAGAZINE (August 31, 2016), https://time.com/4473972/donald-trump-mexico-meeting-insult/; Nick Gass, *Trump's Immigration Plan: Mass Deportation*, POLITICO (August 17, 2015), https://www.politico.com/story/2015/08/donald-trump-immigration-plan-121420; Stephanie L. Canizales & Jody Agius, *Latinos & Racism in the Trump Era*, 150 DAEDALUS, 150 (2021); Tal Kopan, *Trump Administration to Turn Away Far More Asylum Seekers at the Border Under New Guidance*, CNN POLITICS (July 12, 2018), https://edition.cnn.com/2018/07/11/politics/border-immigrants-asylum-restrictions/index.html; Tanvi Misra, *Revealed: US Citizen Newborns Sent to Mexico Under Trump-Era Border Ban*, THE GUARDIAN (February 5, 2021), https://www.theguardian.com/us-news/2021/feb/05/us-citizen-newborns-mexico-migrant-women-border-ban; Tina Vasquez, *I've Experienced a New Level of Racism Since Donald Trump Went After Latinos*, THE GUARDIAN (September 9, 2015), https://www.theguardian.com/commentisfree/2015/sep/09/donald-trump-racism-increase-latinos.
[28] *See generally* Julián Aguilar, *Illegal Re-entry Cases Surge Under Obama*, THE TEXAS TRIBUNE (June 15, 2011), https://www.texastribune.org/2011/06/15/illegal-reentry-cases-surge-under-obama/; Dara Lind, *The Government is Prosecuting the Immigrants Obama Promised to Help*, VOX (May 15, 2014), https://www.vox.com/2014/5/15/5714702/thousands-of-immigrants-the-obama-administration-wants-

illegal reentry federal court cases against immigrants in his first year of administration, the highest number of prosecutions of this crime to date at that time.[29] This policy and rhetoric continues to be echoed even now by the Biden administration, even if it is done more subtly.[30] The Biden administration continues to utilize both Operation Streamline and Operation Liberty Shield, as well as Title 42, to detain and prosecute immigrants along the United States' southern border, which will be further discussed in Chapter 2 and in Chapter 4.

Intersectionality

Intersectionality is often considered a cornerstone of CRT and of other critical legal theories. Professor Kimberlé Crenshaw coined the term intersectionality in 1989 to describe how multiple aspects of a person's identity–race, gender, religion, age, sexuality, disability, class, etc.–can intersect to make discrimination or power more potent.[31] Originally, it served as a critique of the legal system in the United States and its ability to consider the multifaceted identities of Black women when deciding discrimination cases. It has become a core legal and feminist theory lens that is used in a multitude of legal and feminist writings about various identities and issues today.

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to-protect-are; Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION INFO. SOURCE (January 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not; Sonia Nazario, *The Refugees at Our Door*, THE NY TIMES (October 10, 2015), https://www.nytimes.com/2015/10/11/opinion/sunday/the-refugees-at-our-door.html.

[29] *Supra* note 22 at 1473.

[30] *See generally* Aline Barros, *Ahead of US Midterms, How Has US Immigration Policy Changed?*, VOA (September 21, 2022), https://www.voanews.com/a/ahead-of-us-midterms-how-has-us-immigration-policy-changed/6757483.html; Myah Ward, *Immigrant Advocates Feel Abandoned as They Stare at Biden's First-Term Checklist*, POLITICO (October 20, 2022), https://www.politico.com/news/2022/10/20/immigrant-advocates-abandoned-biden-00062641; Mike Kuhlenbeck, *Biden's Immigration Policies Are Failing*, THE PROGRESSIVE MAGAZINE (August 10, 2022), https://progressive.org/magazine/biden-immigration-policies-fail-kuhlenbeck/.

[31] *See generally* Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019), https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. OF CHICAGO LEGAL FORUM 139.

One of the clearest cases of the need for intersectionality–often cited as one of three cases that sparked Crenshaw's theory[32]–was the case *DeGraffenreid v. General Motor Assembly Division, St. Louis*,[33] in which a District Court failed to recognize that the discrimination against and the marginalization of Black women in workplace environments was not *either* sexism *or* racism, but instead a combination of both. The District Court in this case stated that by focusing on the intersection between the identities of "Black" and "woman," it would inadvertently "create a new 'super remedy'[34]" for Black women pursuing workplace discrimination complaints, rather than recognizing that the intersectional identities of Black women place them at an inherent disadvantage specifically *because* of the combination of *both* sexism *and* racism. This combination of sexism and racism against Black women is known as misogynoir, which elaborates on the unique nuances of the intersection between Blackness and womanhood that Black women experience.[35]

The use of intersectional theory no longer applies only to discrimination cases. Because Black women are statistically more likely to be subjected to physical or domestic violence, higher rates of psychological or emotional abuse, higher rates of sexual abuse or assault, and higher rates of murder than other groups of women,[36] the idea of intersectionality has taken on a larger

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[32] *Id.*
[33] 558 F.2d 480 (1977).
[34] *Id.*
[35] *See generally* Moya Bailey, MISOGYNOIR TRANSFORMED: BLACK WOMEN'S DIGITAL RESISTANCE (2021); Kesiena Boom, *4 Tired Tropes That Perfectly Explain What Misogynoir Is—And How You Can Stop It*, EVERYDAY FEMINISM (August 3, 2015), https://everydayfeminism.com/2015/08/4-tired-tropes-misogynoir/; Eliza Anyangwe, *Misogynoir: Where Racism and Sexism Meet*, THE GUARDIAN (Oct 5, 2015), https://www.theguardian.com/lifeandstyle/2015/oct/05/what-is-misogynoir; *What is Misogynoir?*, BLACKBURN CENTER (Feb 12, 2020), https://www.blackburncenter.org/post/2020/02/12/what-is-misogynoir.
[36] *See generally* Susan Green, *Violence Against Black Women—Many Types, Far-Reaching Effects*, INST. FOR WOMEN'S POLICY RSCH. (July 13, 2017), https://iwpr.org/iwpr-issues/race-ethnicity-gender-and-economy/violence-against-black-women-many-types-far-reaching-effects/; Alicia Nichols and Christina Jones, *Black Women Deserve the Right to be Free from Violence*, BWJP (February 28, 2022), https://bwjp.org/black-women-deserve-the-right-to-be-free-from-violence/; Stephanie Hargrove, *Intimate Partner Violence in the Black Community*, THE NAT'L CTR. ON VIOLENCE AGAINST WOMEN IN THE BLACK CMTY., https://ujimacommunity.org/wp-content/uploads/2018/12/Intimate-Partner-Violence-IPV-v9.4.pdf; ACLU, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU.ORG, https://www.aclu.org/news/racial-justice/legal-system-has-failed-black-girls-women-and-non (last accessed Nov 13, 2022); Josey Allen, *The Epidemic of Violence Against Black*

scope than originally intended, and in large part focuses on the discrimination that Black women face in the legal system as a whole, not just in civil cases.

Intersectionality also no longer applies exclusively to the intersection between "Black" and "woman," and for the purposes of this particular project, focuses more on the intersections between "Latine,"[37] "woman," and "refugee" or "immigrant," because it is impossible to consider any one of these identities without considering the others in regard to this particular topic.

Individual Rights Theory (IRT)

IRT generally refers to the rights of citizens of the United States as protected under the Constitution and under the Bill of Rights.[38] However, according to scholar Kit Johnson, IRT can be applied to immigration law as well. As applied to immigration law, IRT focuses on the "rights of the prospective migrant and the migrant's right of entry into the United States."[39] This theory can be traced back to Aristotle's positing of a 'natural law,'[40] and the Declaration of Independence itself, which states that all men are "endowed by their Creator with certain inalienable Rights."

Scholar Philip Cole argues that one of these rights is the liberty of free movement, which should not be infringed upon by nations denying entry.[41] Another aspect of IRT in relation to immigration law is the belief that deportation is a massive miscarriage of justice, which is forcefully stated in Justice Brewer's dissent in the case of *Fong Yue Ting v. United States*.[42]

Women in the US, DAY ONE (Mar 11, 2020), https://www.dayoneny.org/blog/2020/3/11/the-epidemic-of-violence-against-black-women-in-the-us.

[37] While the terms "Latina," "Latino," or "Latinx/LatinX" are the terms that are most commonly used when describing people from Latin America, I personally prefer to use the term "Latine" because it is more gender-inclusive—which is the goal of "Latinx/LatinX"—but is also easily pronounced in the Spanish language. The pronunciation of "Latinx/LatinX" in Spanish is nearly impossible, meaning that the gender-neutral term is inherently inaccessible.

[38] *See generally* Dennis G. LaGory, *Federalism, Separation of Powers, and Individual Liberties*, 40 VANDERBILT L. REV., 1353 (1987); Jussi Varkemaa, CONRAD SUMMENHART'S THEORY OF INDIVIDUAL RIGHTS (2012). *See also District of Colombia v. Heller*, 554 U.S. 570 (2008).

[39] Kit Johnson, *Theories of Immigration Law*, 46 AZ STATE L. JOURNAL, 1211 (2015).

[40] *Id.* at 1219

[41] Phillip Cole, PHILOSOPHIES OF EXCLUSION: LIBERAL POLITICAL THEORY AND IMMIGRATION (2000).

[42] 149 U.S. 698 (1893).

Justice Brewer states that deportation is a "most severe and cruel" punishment that "forcibly [takes one] away from home and family and friends and business and property…."[43]

IRT, as a foundational theory, hinges on the belief that all people are guaranteed certain rights through their mere existence as a human being. While this is a belief that I, undoubtedly, hold, writer Hannah Arendt suggests that it is not always this simple. In her book *The Origins of Totalitarianism*,[44] Arendt states that these human rights are often not given to migrants, refugees, or asylum seekers, and that people must be more than just human beings to be granted rights–they must be "members of a political community,"[45] something that many migrants, refugees, and asylum seekers are not. I combine this understanding of "the right to have rights"[46] with my understanding of IRT–while people *should* be granted human rights and individual rights, they often are not. This is integral in my chapter on moving forward.[47]

Literature Review

There is a large body of legal literature available which discusses Crimmigration policies and their harm towards immigrant communities as a whole. This literature seeks to explain the interactions between the legal precedent set by the Courts and the legislative actions that have resulted in specific rights being removed from immigrants during the immigration process. The article *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*[48] examines the ways in which post-9/11 Crimmigration policies have slowly eroded the rights of both immigrants and citizens, discussing at length the shift from viewing people as innocent until proven guilty to guilty until proven innocent. Another article, *Developments in the Law: Immigrant Rights & Immigration Enforcement*,[49] discusses the ways in which immigration law

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[43] *Id.* at 740.
[44] Hannah Arendt, THE ORIGINS OF TOTALITARIANISM (1973).
[45] *Id.* at 138, 140, 186, and 293.
[46] *Id.* at 296.
[47] *See Chapter Four: Moving Forward.*
[48] Tumlin, *Supra* note 26.
[49] *Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARVARD L. REV., 1565 (2013).

continues to deny immigrants their rights when they enter the United States pursuant to post-9/11 legislation and court cases. Other articles which discuss immigration policies and their change over time in the post-9/11 world include *Citizens, Residents, and the Body Politic*;[50] *De Facto Immigration Courts*;[51] *Immigration Law's Arbitrariness Problem*;[52] and *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*.[53]

Other articles, such as *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*,[54] seek to express how some civil rights cases that have percolated up to the Supreme Court can begin to rectify the harm caused by Crimmigration policies on those who enter the United States seeking refugee status or seeking asylum. Specifically, this article explains how the current precedent set by the Courts could be read to require that asylum seekers be given appointed counsel if they cannot afford it, which could be a massive game-changer for the process of asylum seeking in the United States. As previously mentioned, poor LAI women are less likely to have their petitions for asylum or refugee status granted because they are unable to afford a lawyer who can advocate for them as effectively as possible. The precedent set forth in *Eldridge*,[55] if it was applied to asylum-seekers, would require that all refugees or asylum seekers in the United States be automatically granted appointed counsel, which would significantly improve their chances of their petitions for refugee status or for asylum being granted and accepted by an Immigration Court. Currently, in Immigration Court, an appointed counsel is not required, and one is entitled only to the counsel that they can afford.

There are numerous articles which discussed violence against women as it relates to immigration into the United States, and several articles which discussed domestic violence as a

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[50] Paul David Meyer, *Citizens, Residents, and the Body Politic*, 102 CA L. REV., 465 (2014).
[51] Stephen Lee, *De Facto Immigration Courts*, 101 CA L. REV., 553 (2013).
[52] Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUMBIA L. REV., 2049 (2021).
[53] Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. & SOC'Y REV., 241 (2015).
[54] Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CA L. REV., 169 (2007).
[55] *Matthews v. Eldridge*, 424 U.S. 319 (1976).

reason for granting asylum or refugee status in the United States.[56] However, none of these articles that I found discuss LAI women in particular, instead speaking to all women who have been victims of domestic violence. This helps to provide a framework under which we can adjust our Crimmigration laws to better serve LAI women who are seeking asylum or refugee status in the United States, but these articles do not necessarily address the complexities that LAI women in particular face.

I believe that there are two main reasons why there are so few articles discussing domestic violence as it relates to LAI women seeking asylum or refugee status in the United States. First, domestic violence is an area of law that has long been ignored both in domestic law and subsequently in foreign policy, as will be more thoroughly discussed in Chapters Three and Four. In particular, violence against women has been codified in the judicial precedent of the Supreme Court and in numerous other lower courts throughout the country, and it is only in the past fifty years that this precedent is beginning to be undone. Domestic violence against women, in particular, has been codified or accepted in judicial precedent since the early 1800s, carried over through English judicial precedent.[57] It was not until 1940 that a Court admitted that it had

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[56] See generally Michael Kagan, *Believable Victims: Asylum Credibility and the Struggle for Objectivity*, 16 GEORGETOWN JOURNAL OF INT'L AFFAIRS, 123 (2015); Elizabeth Hull, *At Long Last: Asylum Law is Beginning to Address Violence Against Women*, 18 In DEFENSE OF THE ALIEN 186 (2015); Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protections in the United States*, 67 LOYOLA L. REV. 121 (2021); Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 UNIV. OF MI JOURNAL OF L. REFORM 343 (2019); Christina Gerken, *Credibility, Trauma, and the Law: Domestic Violence-Based Asylum Claims in the United States*, 30 FEMINIST LEGAL STUDIES 255 (2022); Annie S. Lemoine, *Good Storytelling: A Trauma-Informed Approach to the Preparation of Domestic Violence-Related Asylum Claims*, 19 LOYOLA JOURNAL OF PUB. INT. L. 27 (2017); Stacy Burstin, *Images of Women in U.S. Immigration Policy—The Paradox of Domestic Violence*, 88 AMERICAN SOC'Y OF INT'L L. PROCEEDINGS OF THE ANNUAL MEETING 454 (1994); Elsa M. Bullard, *Note: Insufficient Government Protection: The Inescapable Element in Domestic Violence Cases*, 95 MINNESOTA L. REV 1867 (2011); Linda Kelly, *"On Account of" Private Violence: The Personal/Political Dichotomy of Asylum's Nexus*, 21 UCLA J. INT'L L. & FOR. AFF. 98 (2017); Lourdes Peroni, *The Protection of Women Asylum Seekers Under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm*, 18 HUMAN RIGHTS L. REV. 347 (2018); Hannah Cohen, *When Will Asylum Law Protect Women?: The Abusive Relationship Between Agency Decision Making and Asylum Claims Involving Domestic Violence*, 61 BOSTON COLLEGE L. REV. 1855 (2020).

[57] *See generally Harris v. Harris*, 191 Eng. Rep. 697 (1813) (holding that "[t]he cruelty which entitles the injured party to a divorce… consists in that sort of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe." What, exactly, "unsafe" or "endanger[ing] the life or health" of a person looks like has, historically, been up for debate).

a duty to grant relief in situations where violence "might be repeated" and where "violence has been inflicted and threats have been made" in a marital relationship,[58] and was not until 2014 that a Court determined that domestic abuse and domestic violence could take the shape of anything other than severe physical violence.[59] Second, the United States' long history of racial prejudice, specifically regarding Latin American and Hispanic individuals, is well documented and spans a time period nearly as long as the precedent of domestic violence.[60] With these two factors, it is not a difficult presumption that it would be difficult for legal scholarship and the law to begin to change to address violence against LAI women as a legitimate reason for them to petition for refugee status or asylum. For the United States to begin to delve into the genuine necessity of aiding LAI women facing violence in their home countries, who are fleeing persecution and seeking refugee status or asylum in the United States, the United States would have to admit numerous things. First, it would require an admission of guilt—that the United States' policies in Latin America are directly responsible for much of the violence that takes place there now.[61] Second, it would require a desire to help those that it views as outsiders or as

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[58] *Timanus v. Timanus*, 10 A.2d 322 (1940).
[59] *Cavanaugh v. Cavanaugh*, 92 A.3d 200 (2014).
[60] *See generally* Erin Blakemore, *The Long History of Anti-Latino Discrimination in America*, HISTORY.COM (August 29, 2018), https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america; William D. Carrigan & Clive Webb, *When Americans Lynched Mexicans*, NY TIMES (February 20, 2015), https://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html; Leslie Marcy, *The Eleven Hundred Exiled Copper Miners*, 18 INT'L SOCIALIST REV. 160 (1917) (discussing the Bisbee Deportation in 1917); Doug J. Swanson, CULT OF GLORY: THE BOLD AND BRUTAL HISTORY OF THE TEXAS RANGERS (2020) (discussing the history of racism rampant in the Texas Rangers organization, as well as detailing some of the horrific lynchings that the Rangers either ignored or actively took part in); Nicholas Villanueva, THE LYNCHING OF MEXICANS IN THE TEXAS BORDERLANDS (2017); Clive Webb & William D. Carrigan, FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICANS IN THE UNITED STATES, 1848-1928 (2013) (discussing, in part, the Porvenir Massacre of 1918, in which 15 unarmed Mexican American boys and men were slaughtered by the Texas Rangers, U.S. Cavalry, and local ranchers); Monica Muñoz Martinez, THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS (2018); Robert Keil, BOSQUE BONITO: VIOLENT TIMES ALONG THE BORDERLAND DURING THE MEXICAN REVOLUTION (2002).
[61] *See generally* ARGENTINA'S MILITARY COUP OF 1976: WHAT THE U.S. KNEW, (Carlos Osario, ed., 2021); Donna Katzin, *Alliance for Power: U.S. Aid to Bolivia Under Banzer*, NACLA (September 25, 2007), https://nacla.org/article/alliance-power-us-aid-bolivia-under-banzer; J. Patrice McSherry, *Tracking the Origins of a State Terror Network: Operation Condor*, 29 LAT. AM. PERSPECTIVES, 38 (2002); Larry Rohter, *Exposing the Legacy of Operation Condor*, THE NY TIMES (January 24, 2014), https://archive.nytimes.com/lens.blogs.nytimes.com/2014/01/24/exposing-the-legacy-of-operation-condor/; Stephen Dalton, *The Day That Lasted 21 Years (O Día Que Duró 21 Años): Rio Review*, THE HOLLYWOOD REPORTER (October 9, 2012), https://www.hollywoodreporter.com/news/general-news/day-

different—particularly Indigenous peoples, to whom the United States continues to deny aid, even within its own borders.[62]

Methodology

This project is a discursive analysis which attempts to create meaning based on the patterns and conclusions drawn from three key sources: legal articles and books, legislation, and case opinions. These sources serve to cover the majority of scholarly literature around the topic of immigration and how immigration appears on a policy level. At the beginning of this project, I intended to include a fourth source—interviews with LAI women and those who work in the refugee and asylum-seeking processes, so that I could get a better understanding of the lived experiences of those who have gone through these processes. However, due to a number of issues, I was unable to utilize interviews in my discursive analysis.[63] I do still think that it is critical that these interviews be conducted by anyone who wishes to work in this field, because I believe that it is crucial that we understand these lived experiences in order to humanize issues that we are largely looking at from a scholarly perspective. No work can be done, in my opinion, without a fundamental understanding of how exactly these policies are directly affecting people.

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lasted-21-years-0-377451/; STATE VIOLENCE AND GENOCIDE IN LATIN AMERICA, (Marcia Esparza, Henry R. Huttenbach & Daniel Feierstein, eds. 2010); Stansfield Smith, *21st Century U.S. Coups and Attempted Coups in Latin America*, DISSIDENT VOICE (January 6, 2022), https://dissidentvoice.org/2022/01/21st-century-us-coups-and-attempted-coups-in-latin-america/; Sakura Saunders, *CIA in South America*, GEOPOLITICAL MONITOR (October 24, 2007), https://www.geopoliticalmonitor.com/us-interventions-in-latin-american-021/.

[62] In 2020, Esther Lucero, the chief executive officer of the Seattle Indian Health board, requested medical supplies and PPE during the Covid-19 pandemic from the government. Instead of Covid-19 tests and PPE, the health center was instead sent a box of body bags. See: Erik Ortiz, *Native American Health Center Asked for COVID-19 Supplies. It Got Body Bags Instead.*, NBC NEWS (May 5, 2020), https://www.nbcnews.com/news/us-news/native-american-health-center-asked-covid-19-supplies-they-got-n1200246; Nicole Pasia, *When They Gave Her Body Bags Instead of PPE, She Used Them to Make a Healing Ribbon Dress*, THE SEATTLE TIMES (April 1, 2021), https://www.seattletimes.com/life/when-they-gave-her-body-bags-instead-of-ppe-she-used-them-to-make-a-healing-ribbon-dress/; German Lopez & Ashley Wu, *Covid's Toll on Native Americans*, THE NY TIMES (September 8, 2022), https://www.nytimes.com/2022/09/08/briefing/covid-death-toll-native-americans.html; Riis L. Williams, *Native American Deaths from COVID-19 Highest Among Racial Groups*, PRINCETON SCHOOL OF PUB & INT'L AFFAIRS (December 2, 2021), https://spia.princeton.edu/news/native-american-deaths-covid-19-highest-among-racial-groups#:~:text=Native%20Americans%20experience%20substantially%20greater,led%20by%20Princeton%20University%20researchers.

[63] *See Appendix A: HRRC Materials*.

I use these three sources to understand the following four key concepts and questions that require understanding if we are to begin rectifying the harms that our current Crimmigration policies cause to LAI women. 1) I explore the phenomenon of Crimmigration, where it comes from originally, and how it gained traction after the terrorist attacks on 9/11. 2) I explore federal legislation for immigration, refugee status, and asylum, as well as the ways in which federalism plays a role in the immigration processes. 3) I examine the reasons that LAI women give for immigrating into the United States seeking refugee status or asylum, and how those reasons may conflict with historically accepted reasons for seeking refugee status or asylum in the United States. And lastly, 4) I look at the reasons why Courts either do or do not accept LAI women's petitions for refugee status and asylum, and how the dicta of those reasons reflect public opinions regarding immigrants and refugees in the United States. I aim to synthesize these four concepts and questions to answer a critical question: how do we better aid LAI women seeking refugee status and asylum in an increasingly criminalized system of immigration?

In beginning this project, my first task was to gather literature on immigration, Crimmigration, and asylum seeking or refugee status seeking. I did this in two separate steps. The first step was to utilize Lexis Nexus and do keyword searches on immigration, Crimmigration, and asylum seeking or refugee status seeking. After I had found numerous cases about these topics, I sifted through them to find only those which were applicable to a post-9/11 world. From there, I Shepardized[64] the cases, to see where and how they had been cited after their decisions.

My next task was to research the relevant legislation cited in the cases and legal articles that I had found. I utilized federal and state government websites and articles to find this information.

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[64] To Shepardize a citation is to "ascertain the subsequent treatment of a legal decision, thus putting its precedential value in a complete context." Wex Definitions Team, *Shepardize*, CORNELL L. SCHOOL LEGAL INFO. INST. (July 2021), https://www.law.cornell.edu/wex/shepardize.

The third task was to find and interview willing LAI women who have gone through the process of seeking refugee status or asylum in the United States, as well as find and interview those who work within the systems of refugee seeking and asylum seeking who were willing to discuss their experiences. Unfortunately, I was unable to find individuals who were willing to discuss their experiences with whom I could successfully coordinate interviews, which means that I was unable to complete this desired step in my research.

The last task was to synthesize meaning and understanding from the conglomeration of these resources that allow one to fully demonstrate the harm that is caused by Crimmigration policies to LAI women, explain why and where our systems are failing to protect LAI women or are actively harming LAI women, and to explain how our systems can be better at helping LAI women.

Chapter Two: Crimmigration: Definition and History

Prior to 9/11

As many scholars have noted, Crimmigration is not solely the criminalization of immigration or immigrants, it is much narrower and more complex than this. Crimmigration is defined broadly by numerous scholars in many different ways. It is defined as the "letter and practice of laws and policies at the intersection of criminal law and migration law,"[65] the intertwining of "crime control and migration control" to the point that they "have ceased to be distinct processes,"[66] and as the "convergence of immigration enforcement and criminal law enforcement."[67]

No matter the definition, scholars agree that Crimmigration is defined by numerous interrelated phenomena converging. Scholar Rachel Rosenbloom outlines these phenomena as 1) "the dramatic expansion of the immigration consequences of crimes," 2) "the increasing criminalization of immigration law violations," 3) "the growing use of immigration detention and other harsh enforcement techniques," and 4) "the growing involvement in state and local police in enforcing immigration laws."[68] García Hernández suggests that another one of the phenomena that plays a crucial role in Crimmigration policies is the need for "facially neutral rhetoric and laws" to target people of color following the Civil Rights Movement.[69] According to García Hernández, legislators and policymakers looked to "criminal law and procedure to do

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[65] Juliet P. Stumpf, *Social Control and Justice: Crimmigration in the Age of Fear*, *in* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 7 (Maria João Guia, Maartje van der Woude & Joanne van der Leun, eds., 2013).
[66] Joanne van der Leun & Maartje van der Woude, *A Reflection on Crimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing*, *in* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 41 (Maria João Guia, Maartje van der Woude & Joanne van der Leun, eds., 2013); *Supra* note 22.
[67] Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CA L. REV., 149 (2016).
[68] *Id.*
[69] *Supra* note 22.

what race had done in earlier generations: sort the desirable newcomers from the undesirable."[70]

While many scholars argue that the phenomenon of Crimmigration began in the 1980s and 1990s following the inceptions of the War on Crime[71] and the War on Drugs,[72] the involvement of state and local law enforcement in enforcing federal immigration policies has a history that, as Rosenbloom argues, goes back to the policing of queer[73] men in the 1950s and 1960s. The 1950s and 1960s saw the birth of a new idea in immigration enforcement that remains a core aspect of Crimmigration to this day: the use of police arrest records as a tool for screening noncitizens that could possibly be deported.[74] García Hernández notes in his article *Creating Crimmigration* that the criminalization of immigration and immigrants can be traced all the way back to 1929, when Congress passed the Act of March 4, 1929,[75] which created a penalty of up to a year of imprisonment and a fine of up to $1,000 for those who entered into the country illegally.[76] Prior to this, under the Chinese Exclusion Act of 1892,[77] Chinese immigrants who were found to be illegally present in the United States were subjected to a year of hard labor without judicial process.[78] In 1896, this provision of the Chinese Exclusion Act was found to be overstepping the bounds of Congress' ability to legislate in the case of *Wong Wing v. United States*,[79] insofar as this provision did not provide for "a judicial trial to establish the guilt of the

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[70] *Id.*
[71] *Supra* note 3.
[72] *Supra* note 4.
[73] While there are many people who may consider the word "queer" to be a slur, I have chosen to use this word here because I feel that it best encompasses the large community that falls under the umbrella of the acronym LGBTQIA+, despite potential past negative connotations. It is a reclaimed slur that I myself choose to utilize when self-identifying, and as such, I find it appropriate to use here.
[74] Eric A. Posner, *The Institutional Structure of Immigration Law* , 80 UNIV. CHICAGO L. REV. 289 (2013); *Supra* note 67 at 155.
[75] Ch. 690, S 2, 45 Stat. 1551
[76] Act of March 4, 1929; *Supra* note 22.
[77] Pub. L. 47-126. *See generally* Erika Lee, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943 (2003); John Robert Soennichsen, THE CHINESE EXCLUSION ACT OF 1882 (2011); Beth Lew-Williams, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018).
[78] *Supra* note 22 at 1464.
[79] 163 U.S. 228 (1896).

accused."[80] This case did, however, recognize the government's "power to impose criminal penalties [on immigration] so long as it abided by the constitutional limitations on its power to criminalize."[81] While there is a long history in the United States of criminalizing immigration and criminalizing immigrants, it is important to note that this criminalization is markedly different from the phenomenon of Crimmigration, as we see in the definitions of Crimmigration that scholars give. Crimmigration is a unique phenomenon that, like many scholars argue, is less than one hundred years old.

Despite this history of criminalizing immigration, immigration has historically remained a predominantly civil procedure.[82] Thus, the rights of defendants in criminal trials–which are laid out in the Constitution and quite substantive–are not conferred to the immigrants who are going to trial, even in a criminalized immigration system. Many, if not most, aspects of Crimmigration, in fact, remain largely controlled by civil legal processes, allowing for a laxer set of procedures in matters that are often considered life-or-death.[83] To quote Jennifer M. Chacón, "we are… witnessing the importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm."[84]

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[80] *Id*. at 237.
[81] *Supra* note 22 at 1464.
[82] *See e.g*., Peter L. Markowitz, *Deportation is Different*, 13 UNIV PENNSYLVANIA JOURNAL OF CONST. L., 1299 (2011) ("…[P]oor immigrants have no right to appointed counsel despite the notorious complexity of immigration law…"); *United States ex rel. Knauff v. Shanghnessy*, 388 U.S. 537 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIMINAL L. REV., 157 (2012) ("…as the boundary between criminal law and immigration continues to blur, it will be particularly important to find ways to bolster the accountability at the intersection of the systems."); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. 135, 137 (2009).
[83] *See generally* Jeremy Slack, DEPORTED TO DEATH: HOW DRUG VIOLENCE IS CHANGING MIGRATION ON THE US-MEXICO BORDER (2019); José Manuel Alburto, Hiram Beltrán-Sánchez, Victor Manuel García-Guerrero & Vladimir Cadunas-Romo, *Homicides in Mexico Reversed Life Expectancy Gains for Men and Slowed Them for Women, 2000-10*, 35 HEALTH AFFAIRS, 88 (2016); Heather Robin Agnew, *Reframing 'Femicide': Making Room for the Balloon Effect of Drug War Violence in Studying Female Homicides in Mexico and Central America*, 3 TERRITORY, POLITICS, GOVERNANCE, 428 (2015); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION AND DEV. REV., 661 (2001); Jason De Léon, THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL (2015).
[84] Chacón, *Supra* note 82 at 137.

One of the hallmarks of Crimmigration is "the dramatic expansion of the immigration consequences of crimes."[85] Nowhere can this be seen more clearly than in the passage of the Anti-Drug Abuse Act of 1986[86] and subsequent legislation. Prior to 1986, immigrants could be denied entry only on the basis of "crimes of moral turpitude."[87] While they can still be denied entry on the basis of these crimes, this definition is vague and difficult to prosecute in many cases.[88] Instead, in 1988, Congress passed the Anti-Drug Abuse Act, which added a provision that conviction of an "aggravated felony" was grounds for deportation.[89] At the time of this Act's passage, only three crimes were considered "aggravated felonies:" murder, drug trafficking, and trafficking firearms illegally.[90] In the three and a half decades since the passage of the Anti-Drug Abuse Act, Congress has added over 30 new crimes to this definition of "aggravated felonies" as a means of excluding "undesirable"[91] immigrants while still appearing to be "facially neutral"[92] in their exclusion of immigrants.

Aggravated felonies as defined under 8 U.S.C. § 1101(a)(43) now amount to the following list of crimes: alien smuggling, attempt to commit an aggravated felony, bribery of a witness if the term of imprisonment for the crime at trial is at least one year, burglary if the term of imprisonment is at least one year, child pornography, commercial bribery if the term of imprisonment is at least one year, crimes of violence as defined as 18 U.S.C. § 16 that result in a term of imprisonment of at least one year, trafficking destructive devices such as bombs or

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[85] *Supra* note 67 at 151 footnote 3.
[86] Pub. L. No. 99-570, 100 Stat. 3207 (1986); amended by the ANTI-DRUG ABUSE ACT OF 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).
[87] IMMIGRATION ACT OF MARCH 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084. 8 U.S.C. § 1229b(b)(1)(C) (2006). *See e.g.*, Emily Pope-Obeda, *'This is Deportation Business': 1920s and the Present*, 182 AGAINST THE CURRENT (2016).
[88] *See generally* Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NE L. REV., 647 (2012); Derrick Moore, *Crimes Involving Moral Turpitude: Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT'L L. JOURNAL, 813 (2008).
[89] ANTI-DRUG ABUSE ACT OF 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70; *Supra* note 22 at 1468.
[90] *Id.*
[91] *Supra* note 22. *See also* Lisa A. Flores, DEPORTABLE AND DISPOSABLE: PUBLIC RHETORIC AND THE MAKING OF THE "ILLEGAL" IMMIGRANT (2020).
[92] *Supra* note 22 at 1459 ("Derision of people of color, however, did not cease. Instead, it found a new outlet in facially neutral rhetoric and laws penalizing criminal activity.").

grenades, any drug offenses that are considered to be "drug trafficking" (and any federal drug offenses or analogous felony state offenses), failure to appear to serve a sentence if the underlying offense is punishable by a term of five years, failure to face charges if the underlying sentence is punishable by two years, using or creating false documents if the term of imprisonment is at least one year (except for the first offense, if it was committed for the purpose of aiding the person's spouse, child, or parent), trafficking in firearms (and various other federal and state crimes relating to firearms), forgery if the term of imprisonment is at least one year, fraud or deceit if the loss to the victim exceeds ten thousand dollars, illegal re-entry after deportation—or removal[93]—for conviction of an aggravated felony, money laundering if the amount of funds exceeds ten thousand dollars, fraud and tax evasion if the amount of funds exceeds ten thousand dollars, murder, gathering or transmitting national defense information or the disclosure of classified information, obstruction of justice if the term of imprisonment is at least one year, perjury or subornation of perjury[94] if the term of imprisonment is at least one year, prostitution or pimping, ransom demands, rape, receipt of stolen property if the term of imprisonment is at least one year, revealing the identity of an undercover agent, RICO[95] offenses if the offense is punishable by a term of imprisonment of one year, sabotage, sexual abuse of a minor, slavery, tax evasion of more than ten thousand dollars, theft if the term of imprisonment is at least one year, trafficking in vehicles with altered identification numbers if the term of imprisonment is at least one year, and treason.[96]

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[93] Deportation and removal are one and the same when discussing immigration law, though often the Courts will use the word "removal" rather than "deportation." *See* Wex Definitions Team, *Deportation*, CORNELL LAW SCHOOL LEGAL INFO. INST. (September 2022), https://www.law.cornell.edu/wex/deportation.

[94] "Subornation of perjury" refers to inducing someone else to lie under oath.

[95] The RICO Act, also known as The Racketeer Influenced and Corrupt Organizations Act of 1970 seeks to "strengthen the legal tools in evidence gathering by establishing new penal prohibitions and providing enhanced sanctions and new remedies for dealing with the unlawful activities of those engaged in organized crime." *See also* G.S. Roukis & B. H. Charnov, *RICO (Racketeer Influenced and Corrupt Organizations Act) Statute—Implications for Organized Labor*, 36 LAB. L. JOURNAL, 281 (1985); 18 U.S.C. 96.

[96] *See § N.6 Aggravated Felonies*, IMMIGRANT LEGAL RESOURCE CENTER (2013), https://www.ilrc.org/sites/default/files/resources/n.6-aggravated_felonies_0.pdf.

The use of "aggravated felonies" as an excuse to exclude undesirable immigrants is compounded significantly by another one of Crimmigration's key facets: the involvement of state and local police forces in enforcing immigration laws. The use of criminal records to exclude aliens and deport undesirable immigrants, as noted by Rosenbloom, has existed for half a century, stemming from the policing of queer men in the 1950s and 1960s. However, with the increased number of "aggravated felonies" that immigrants can be charged with and deported for, this bond between enforcement of law and enforcement of immigration law has strengthened significantly.

Even before the use of "aggravated felonies" to exclude undesirable immigrants, the rights of immigrants at trials were few and far between. In 1984, the Court held that the exclusionary rule proffered under the Fourth Amendment—which prohibits the use of illegally obtained evidence in criminal trials—does not apply to immigration proceedings.[97] Also in 1984, the Court held that aliens were not 'seized' for Fourth Amendment purposes when Immigration and Naturalization Service ("INS") agents filled their workplace and did not allow anyone to leave while they spoke with every individual in the factory.[98] While immigrants have been granted Fifth Amendment Due Process rights in deportation hearings since 1903,[99] what these rights actually look like has been ill-defined and the application of this right has not been well-enforced.

Crimmigration in a Post-9/11 World: Foundational Legal Cases and Legislation

A 1953 ruling states that the Due Process Clause does not "acknowledge[] any distinction between citizens and resident aliens."[100] The Bill of Rights does not delineate between citizens and non-citizens—using only the language of "persons," "people," or "the accused" when referring to the rights granted to us in the document, rather than the language of citizens with

[97] *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).
[98] *INS v. Delgado*, 466 U.S. 210 (1984).
[99] *Yamataya v. Fisher*, 189 U.S. 86 (1903).
[100] *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) at 344 footnote 5.

no exceptions,[101] something that the federal courts have noted time and time again.[102] Despite these rulings, the Supreme Court has, both prior to and following the 9/11 terror attacks, stated that "Congress regularly makes rules that would be unacceptable if applied to citizens."[103] A strictly textual reading of the Constitution would require that this latter precedent be overturned without hesitation.[104]

Immediately following the terror attacks on 9/11, the then Vice President of the United States, Dick Cheney, stated that "somebody who comes into the United States of America illegally…. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."[105] This idea that non-citizens who are in the country 'illegally' do not deserve any rights continues to play out in today's Crimmigration policies in the United States. It can be seen in the ways that the United States houses those attempting to cross the border,[106] the rhetoric used by politicians when discussing

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[101] *America's Founding Documents: The Bill of Rights: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript.
[102] *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Plyler v. Doe*, 457 U.S. 202 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wong Wing v. United States*; *Gutierrez v. Holder*, 662 F.3d 1083 (9th Cir. 2011); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. 2006); *Andia v. Ashcroft*, 359 F.3d 1181 (9th Cir. 2004); *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000); *Sanchez v. Sessions*, 870 F.3d 901 (9th Cir. 2017).
[103] *Matthews v. Diaz*, 426 U.S. 67 (1976); *Demore v. Kim*, 538 U.S. 510 (2003).
[104] *See Chapter Four: Moving Forward* for more analysis.
[105] Elisabeth Bumiller & Steven Lee Myers, *A Nation Challenged: The Presidential Order; Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, THE NY TIMES (November 15, 2001), https://www.nytimes.com/2001/11/15/us/nation-challenged-presidential-order-senior-administration-officials-defend.html.
[106] *See generally* Denise Lavoie, Martha Mendoza & Garance Burke, *Girl Recalls Poor Care in Texas Border Station*, ASSOCIATED PRESS (July 2, 2019), https://apnews.com/article/immigration-ap-top-news-border-patrols-politics-tx-state-wire-909c9dd0243244018ab8eab00e1d73b3; Bea Bischoff, *Immigrant Detention Conditions Were Atrocious Under Obama. Here's Why They're So Much Worse Under Trump*, SLATE (June 25, 2019), https://slate.com/news-and-politics/2019/06/trump-child-immigrant-detention-no-toothpaste-obama.html; Reuters Staff, *U.S. Centers Force Migrant Children to Take Drugs: Lawsuit*, REUTERS (June 20, 2018), https://www.reuters.com/article/us-usa-immigration-medication-idUSKBN1JH076; *Are US Child Migrant Detainees Entitled to Soap and Beds?*, BBC NEWS (June 20, 2019), https://www.bbc.com/news/world-us-canada-48710432; Tim Dickinson, *Trump Administration Argues Migrant Children Don't Need Soap*, ROLLING STONE (June 20, 2019), https://www.rollingstone.com/politics/politics-news/safe-sanitary-no-soap-beds-court-migrants-trump-850744/; *Results of Unannounced Inspections of Conditions for Unaccompanied Alien Children in CBP Custody* (September 28, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-87-Sep18.pdf; Sergio R. Bustos & Eliza Collins, *DHS Chief Heads to Southern Border Following Deaths of Migrant Kids in Federal Custody*, USA TODAY (December 28, 2018), https://www.usatoday.com/story/news/world/2018/12/28/kirstjen-nielsen-dhs-chief-travels-border-wake-migrant-kids-deaths/2426176002/; Brianna Rennix & Natahn Robinson, *Crammed into Cells and*

these immigrants,[107] and the way that the Court continues to write opinions in immigration cases.[108]

The dehumanization of immigrants in the post-9/11 world is seen as a necessity for safety. David Cole writes "[i]n short, in seeking the balance between liberty and security, we have adopted the easy choice of sacrificing the liberties of a vulnerable minority—foreign nationals…—for the purported security of the majority."[109] This idea that foreign nationals—particularly those who are in this country without the proper documentation—are a danger to the country serves as the foundation for post-9/11 Crimmigration policies. Who constitutes an 'illegal' alien has continued to expand in the post-9/11 world as well. As an article published in September of 2022 in the Los Angeles Times so eloquently states in its title, "Illegal Migrants Who Apply for Asylum Are Still Here Illegally."[110] While this author goes on to explain the complexities of immigration law and the issues regarding media coverage of immigration law and asylum-seeking, the title speaks for itself. It is a rising sentiment in the United States that asylum seekers are in the country illegally and should not be here.[111] Following the SCOTUS

Forced to Drink from the Toilet—This is How the US Treats Migrants, THE GUARDIAN (July 3, 2019), https://www.theguardian.com/commentisfree/2019/jul/03/migrant-dentention-centres-us-border-patrol; Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorneys: Texas Border Facility is Neglecting Migrant Kids*, ASSOCIATED PRESS (June 21, 2019), https://apnews.com/article/texas-immigration-us-news-ap-top-news-border-patrols-46da2dbe04f54adbb875cfbc06bbc615.

[107] *e.g.*, Dallas Card, Serina Chang, Chris Becker, Julia Mendelsohn, Rob Voigt, Leah Boustan, Ran Abramitzky & Dan Jurafsky, *Computational Analysis of 140 Years of US Political Speeches Reveals More Positive But Increasingly Polarized Framing of Immigration*, 119 PNAS (2022), https://www.pnas.org/doi/10.1073/pnas.2120510119. Most recently, a Florida prosecutor's office in Jefferson County has been at the center of attention for its racist policies regarding Hispanic-appearing persons who are pulled over for misdemeanors. The policy reads "IF EXTENSIVE CRIMINAL HISTORY and/or HISPANIC -> Adjudicated Guilty + Costs." See Max Herrle, *Florida Prosecutor's Racism Policy Leaked*, OUR TALLAHASSEE (April 17, 2023), https://ourtallahassee.com/florida-prosecutors-racism-policy-leaked/ (in an update to the article, state attorney Jack Campbell has clarified that the policy should have stated "undocumented immigrant" rather than "Hispanic," which raises significant concerns regarding racial tensions).

[108] Discussed in greater depth in *Chapter 3: Women, Refugees, and Asylum Seeking in the United States*.

[109] David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*,25 T. JEFFERSON L. REV. 367 (2003).

[110] Andrew R. Arthur, *Illegal Immigrants Who Apply for Asylum Are Still Here Illegally: Parsing the Nonsense on 'Biden's Border Fiasco'*, CTR. FOR IMMIGR. STUDIES (September 28, 2022), https://cis.org/Arthur/Illegal-Migrants-Who-Apply-Asylum-Are-Still-Here-Illegally.

[111] *e.g.*, Eileen Sullivan, *Biden Administration Has Admitted One Million Migrants to Await Hearings*, THE NY TIMES (September 6, 2022), https://www.nytimes.com/2022/09/06/us/politics/asylum-biden-administration.html.

keeping a Trump-era policy known as Title 42 in place—which denies asylum seekers entry into the United States on the grounds of preventing the spread of Covid-19[112]—Iowa Governor Kim Reynolds was quoted as saying "I'm grateful that Title 42 remains in place to help deter illegal entry at the US southern border."[113] While there are numerous factors that play into this sentiment, such as inflation and simultaneous worker shortages and job shortages, it would be remiss to ignore the fact that much of this fear and much of this hatred—at least in its newest iterations that believe the government should simply kick all of the asylum seekers out of the country—stems from the post-9/11 Crimmigration policies and fear tactics used by the government during the War on Terror.

One of the rights which has been the most damaged by post-9/11 Crimmigration policies is the Fourth Amendment right of probable cause, which essentially states that police cannot simply decide to search a person or a person's belongings because they feel like it—they have to be able to explain what reasons they have for doing so, and what laws they believe you are breaking. There are noted exceptions to this rule—such as when passengers are in a vehicle that has been pulled over,[114] or when police can clearly see something that is indicative of criminal activity[115]—but overall, this is considered one of the most important rights granted to us as a protection from government invasion into our private lives. This principle is also the principle under which police must obtain warrants for arrests or for searches—again, with noted exceptions. However, immigrants are largely not granted this right, as seen in the decisions of *Lopez-Mendoza* and *Delgado* in 1984. It is a commonly held belief among ICE agents and other law enforcement agents that these rights do not extend to immigrants, as can be evidenced by

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[112] *See* Nicole Ellis & Casey Kuhn, *What is Title 42 and What Does it Mean for Immigration at the Southern Border?*, PBS NEWS HOUR (January 13, 2023), https://www.pbs.org/newshour/nation/what-is-title-42-and-what-does-it-mean-for-immigration-at-the-southern-border.
[113] Rebecca Santana & Elliot Spagat, *US Supreme Court Keeps Asylum Limits in Place for Now*, ASSOCIATED PRESS (December 27, 2022), https://apnews.com/article/title-42-immigration-limits-supreme-court-updates-0494c30834fad66ce9c6057ea1605d89.
[114] *See Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).
[115] *See Terry v. Ohio*, 392 U.S. 1 (1968).

one ICE agent's quote to a New York Times reporter in 2007, where he states "We didn't have warrants…. We didn't need warrants to make arrests. These are illegal immigrants."[116] The Courts have upheld this belief to a large degree, both in their decisions in 1984, and in subsequent, post-9/11 decisions. In *Puc-Ruiz v. Holder*,[117] the Court upheld that the use of illegally obtained identification information could be used in court proceedings without violating an immigrant's rights. In *United States v. Guijon-Ortiz*,[118] the Court upheld that a West Virginia deputy did not violate the Fourth Amendment when he called ICE during a routine traffic stop for a speeding infraction. It was not until 2013, in the case *Aguilar v. ICE*,[119] that ICE explicitly agreed to instruct its agents about Fourth Amendment limitations on its activities, essentially admitting what many activists in the immigration world had already known: ICE regularly broke such Fourth Amendment limitations in their routine operations.

It is not just asylum seekers or 'illegal' immigrants who have begun to experience a curtailing of their Constitutional rights, though. Even United States citizens have experienced their rights being curtailed since the terrorist attacks on 9/11. Cases like *North Jersey Media Group, Inc. v. Ashcroft*,[120] which held that the closure of "special interest" deportation hearings was not a violation of the First Amendment right to a free press; *Omar v. Casterline*,[121] which held that the denial of religious practices in prison is not a violation of the First Amendment Right to freedom of religion; and *Padilla ex rel. Newman v. Bush*,[122] which held that the government can deny immigrants suspected of terrorist ties their right to counsel because it would "set back… the government's efforts to bring psychological pressure to bear… in an effort

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[116] Nina Bernstein, *Raids Were a Shambles, Nassau Complains to US*, THE NY TIMES (October 3, 2007), https://www.nytimes.com/2007/10/03/nyregion/03raid.html.
[117] 629 F.3d 771 (8th Cir. 2010).
[118] 660 F.3d 757 (4th Cir. 2011).
[119] No. 1:07-cv-08224-KBF (S.D.N.Y. April 4, 2013).
[120] 308 F.3d 198 (3rd Cir. 2002).
[121] 414 F. Supp. 2d 582 (2005).
[122] 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

to interrogate him [by months]"[123] have continued to erode the rights of all people in the United States—citizens or not.

Post 9/11 federal policies such as the PATRIOT Act,[124] which allowed warrants to be granted for multiple jurisdictions at once, have been upheld and reified by the precedent of the Courts. Another particularly harmful post-9/11 federal policy is known as Operation Liberty Shield,[125] a policy which allows for the detention of asylum seekers at the border. This federal policy, along with a policy known as Operation Streamline,[126] created one of the most detrimental environments for asylum seekers and refugee status seekers in the United States prior to Title 42.[127]

Operation Streamline was a joint initiative created in 2005 between the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") to fast-track immigration cases by allowing up to 80 unlawful entrants into the country to be tried together in a single hearing.[128] By allowing Operation Liberty Shield and Operation Streamline to function at the same time, the United States essentially allowed for asylum seekers to be swept under the rug and completely ignored, lumped in with the rest of the entrants into the United States who were considered illegal. If someone coming into the United States with the intention of seeking asylum or refugee status got lumped into the group of people who were undergoing proceedings under Operation Streamline, it is entirely plausible that their case would go unheard and improperly tried, as the processes of seeking asylum are difficult to navigate without a lawyer.

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[123] *Id.*
[124] UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).
[125] *Operation Liberty Shield*, GEORGE W. BUSH WHITE HOUSE (March 17, 2013), https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030317-9.html. *See also* Sharon A. Healey, *The Trend Toward the Criminalization and Detention of Asylum Seekers*, 12 HUM. RTS. BRIEF, 14 (2004).
[126] *See generally* Bill De La Rosa, *Managing Non-Citizens Through the Criminal Justice System: The Mass Persecution of Migrants Under Operation Streamline*, BORDER CRIMINOLOGIES (November 12, 2019), https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/11/managing-non.
[127] While Title 42 is hugely harmful to asylum seekers attempting to enter the United States, an in-depth analysis of this policy would warrant another thesis all together and will thus not be included in this work.
[128] Rommel H. Ojeda, *How Operation Streamline Changed Illegal Border Crossing*, DOCUMENTED NY (March 5, 2022), https://documentedny.com/2022/03/05/operation-streamline-meaning-border/.

Many persons involved in the Operation Streamline processes were granted lawyers, yes, but their meetings with lawyers sometimes lasted less than ten minutes, and if language barriers were present, there was no time to attempt to rectify those issues.[129]

These two pieces of legislation were most recently very heavily enforced under the Trump administration, which resulted in children being separated from their parents during border crossings and placed into large detention centers where conditions were inhumane at least.[130] Occasionally, this was known to result in children as young as three years old[131] being forced to 'represent' themselves in front of an immigration judge during the mass proceedings which are tolerated, if not required, under Operation Streamline.

In 2012, the Courts decided *Arizona v. United States*,[132] a case in which a controversial Arizona law was ultimately struck down—with important caveats. The law in question gave Arizona law enforcement officials and its judicial system the right to enforce federal immigration policies—effectively usurping federal preemption and executive deference in immigration proceedings. While this law was eventually overturned because of these reasons, the caveat to this was that Arizona law enforcement agents were now able to require that those with whom they interacted proffer proof of citizenship in any interactions with law enforcement—making any contact with law enforcement by undocumented immigrants even more potentially dangerous than it previously had been. Prior to and during this litigation, numerous other states enacted similar legislation,[133] something that was undoubtedly a

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[129] *See generally* Pooja R. Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 DENVER L. REV 707 (2020).
[130] *Supra* note 106.
[131] *See generally* Molly Hennessy-Fiske, *This Judge Says Toddlers Can Defend Themselves in Immigration Court*, LA TIMES (March 6, 2016), https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html; Christina Jewett, Shefali Luthra & Kaiser Health News, *Immigrant Toddlers Ordered to Appear in Court Alone*, THE TEXAS TRIBUNE (June 27, 2018), https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/; Beth Werlin & Kristin Macleod-Ball, *How Can A 3-Year-Old Represent Himself in Court?*, ACLU (October 22, 2014), https://www.aclu.org/news/civil-liberties/how-can-3-year-old-represent-himself-court.
[132] 567 U.S. 387 (2012).
[133] Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85 (2012).

devastating blow to immigrant rights in the United States. This court precedent immediately had drastic effects on asylum seeking and refugee status seeking for women who were already present in the United States, and undoubtedly made the country less safe, rather than safer, as it was intended to do.[134]

[134] *See generally* FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM, ACLU (2018), https://search.issuelab.org/resource/freezing-out-justice-how-immigration-arrests-at-courthouses-are-undermining-the-justice-system.html; *Stepped Up Illegal-Entry Prosecution Reduce Those for Other Crimes*, TRAC IMMIGRATION (August 6, 2018), https://trac.syr.edu/immigration/reports/524/; Jeff Daniels, *Immigrants are Afraid of President Trump's Crackdown, Making it Harder to Prosecute Crimes, ACLU Report Says*, CNBC NEWS (May 4, 2018), https://www.cnbc.com/2018/05/04/crimes-tougher-to-prosecute-due-to-immigrant-fears-says-aclu-report.html.

Chapter Three: Women, Refugees, and Asylum Seeking in the United States

Before one is able to fully understand the relationships between asylum seeking and gender, or the ways that court cases speak about LAI women seeking refugee status or asylum in the United States, it is important to have a general understanding of the basic legal framework of refugee status and asylum seeking, outside of a Crimmigration context. Refugee status and asylum seeking in the United States is governed by a complex set of domestic laws, court precedents, and international treaties to which the United States is beholden. The first, and most binding, of these is the Immigration and Nationality Act ("INA"), which has been described as "second only to the Internal Revenue Code in complexity."[135]

The INA, which is codified in Chapter 8 of the United States code, is filled with numerous loopholes and potential contradictions. While the United States is beholden to the 1951 Refugee Convention and 1967 Protocol (herein after referred to as the "Refugee Convention"), it is beholden to it largely because it is codified in scattered sections of the INA.[136] The Convention Against Torture ("CAT")—another provision that is often used in seeking asylum or refugee status in the United States—has also been codified in this same section.[137]

The Refugee Convention was not ratified by the United States until November of 1968, but nonetheless it has served as a cornerstone for our country's legal framework for refugees and asylum seekers since then—or at least, it is supposed to. As will be discussed in Chapter 4, this framework often perverts the intent of the Refugee Convention and instead adds additional caveats to ensure that the United States is not required to take in too many refugees or asylum seekers at once.

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[135] *Castro-Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988).
[136] *See* 8 U.S. Code § 1158 – ASYLUM.
[137] *See* 8 CFR § 208.18 – IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE.

Women and Seeking Asylum or Refugee Status

Refugee law and international human rights law have, historically, been focused almost exclusively on the harms suffered in the public sphere–typically the sphere dominated by and associated with men–rather than the harms experienced in the private sphere–typically the sphere reserved for women and women's work.[138] This has led to refugee status and asylum being granted primarily to men, with women's claims for asylum being viewed with far more scrutiny than a man's in the same position would be.[139] According to gender-based asylum advocate Karen Musalo, "[f]ew refugee issues have been as controversial as that of gender asylum,"[140] and much of this controversy stems primarily from this distinction between the public sphere and the private sphere. Events and persecution in the public sphere have long been considered acceptable reasons to claim asylum or refugee status,[141] but events and persecution in the private sphere are often not. The United States, for example, shared in 2012 a global strategy for preventing and eradicating gender-based violence,[142] but still does not recognize gender as an established identity category "for which one may experience persecution."[143] In order for a woman to claim the right to refugee status or the right to asylum, she must be able to show that her gender (or her sex–they are often considered one and the same in legal spaces) is an "innate characteristic that *could* link"[144] (emphasis added) her to

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[138] *See generally* Jürgen Habermas, Sarah Lennox & Frank Lennox, *The Public Sphere: An Encyclopedia Article*, 3 NEW GERMAN CRITIQUE, 49 (1974); Oxford Reference, *Public and Private Spheres*, OXFORD REFERENCE (n.d.), https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100353296.
[139] *Fatin v. INS*, 12 F.3d 1233 (1993); *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975).
[140] Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Toward Recognition of Women's Claims*, 29 REFUGEE SURVEY QUARTERLY, 46 (2010).
[141] *See* CONVENTION RELATING TO THE STATUS OF REFUGEES, 189 U.N.T.S. 150 *and* PROTOCOL RELATING TO THE STATUS OF REFUGEES, 19 U.S.T. 6223.
[142] Exec. Order No. 13623, 77 Fed. Reg. 49345 (August 12, 2012).
[143] Sara L. McKinnon, GENDERED ASYLUM: RACE AND VIOLENCE IN U.S. LAW AND POLITICS (2016).
[144] *Matter of Acosta*, 19 I. & N. Dec. 211 (1985).

members of a "particular social group,"[145] meaning that gendered violence is not an inherent reason to claim rights to refugee status or asylum.[146]

This focus on the harms which happen in the public sphere as the only valid reason for requesting refugee status or seeking asylum can be seen most clearly in the language actually used in these pieces of legislation. The CAT, for example, does not ever use the pronouns "she" or "her," instead only using "he" and "him" when referring to the persons for whom the protection is created.[147] In the 56 page document that the UN provides regarding the Refugee Convention, the pronoun "she" is used exactly one time, in the introductory note to the Convention and Protocol that was added in 2010; the pronoun "her" is used only once as well, in the introductory note as well. The Refugee Convention specifically notes that special attention should be given to the protection of "girls,"[148] and that the "women's work"[149] of refugee women should be treated the same as the women's work of non-refugee women in a state. This is the only mention of womanhood in the Refugee Convention. Every other pronoun regarding the persons for whom the protections were created is "he" or "him."[150] Once again, this suggests that there is a fundamental difference between how men and women are treated in the processes of seeking refugee status and/or asylum.

Women and girls are granted no agency when they are mentioned in the Refugee Convention, either. The mentions of womanhood and gendered differences are mentioned only in passing and are mentioned only in relationship to men and their experiences. They are relational only to the actors in the Refugee Convention, or as laborers who do what is necessary

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[145] What a "particular social group" entails has changed over the last several decades and is an ever-evolving definition. *See generally Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014); *Matter of A-B-*, 28 I. & N. Dec. 307 (BIA 2021) (superseding *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I. & N. Dec. 40 (BIA 2017); *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006); *Matter of Acosta*; *Matter of A-R-C-G-*.
[146] *Matter of Pierre*.
[147] 1465 U.N.T.S. 85.
[148] 189 U.N.T.S. 150, *Supra* note 141 at IV(B)(2)(stating that "The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.").
[149] *Id.* at Art.24(1)(a).
[150] *Id.*

for their male counterparts. This further speaks to the inevitable conclusion that women are not in need of things like refugee status or asylum on their own, as they are not the ones mentioned as needing it and are not the ones who are acting in any capacity in the Refugee Convention.

Using Andrew Shacknove's definition of a refugee as a person whose "basic needs are unprotected by their country of origin, [and] who [has] no remaining recourse other than to seek international restitution of their needs,"[151] the exclusion of gender-based claims for asylum or refugee status become increasingly more concerning. In a world where the harms that come to people—predominantly women—in the private sphere go unnoticed or uncared for by many governments, it stands to reason that there is a large population of women who would fall under Shacknove's definition of refugees as people whose basic needs are unprotected. However, women are often denied refugee status or asylum because their experiences are not given protection under the CAT,[152] the Refugee Convention,[153] or under the INA.[154] While there are some ways to get around this lack of protection for women already in the United States who have experienced this harm in the private sphere in the United States,[155] women coming into the

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[151] Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274 (1985).

[152] The CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT: 1753 was ratified in 1994 by the United States. *See* United Nations Human Rights Office of the High Commissioner, *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS (2014), https://indicators.ohchr.org/.

[153] THE 1951 REFUGEE CONVENTION AND 1967 PROTOCOL was ratified by the United States in 1968 and was incorporated into U.S. law in 1980 with the REFUGEE ACT OF 1980. *See* Mark Krikorian, *Time to Withdraw from the U.N. Refugee Treaty: The Cold War Anachronism is Today Being Used by the American Left to Pry Open Our Borders*, NAT'L. REV. (July 28, 2021), https://cis.org/Oped/Time-Withdraw-UN-Refugee-Treaty.

[154] Sections 207 and 208 of the INA lay out the regulations for who can apply for refugee or asylum status and what the protocols for doing so look like. *See* 8 U.S.C. § 1157 (Annual admission of refugees and admission of emergency situation refugees); § 1158 (Asylum); *and* § 1159 (Adjustment of status of refugees). *See also* American Immigration Council, *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (October 22, 2022), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy; *and* U.S. Department of State, *Refugee Admissions*, U.S. DEPARTMENT OF STATE, https://www.state.gov/refugee-admissions/.

[155] *See generally* American Immigration Council, *Fact Sheet: Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AMERICAN IMMIGRATION COUNCIL (November 23, 2019), https://www.americanimmigrationcouncil.org/research/violence-against-women-act-vawa-immigration; VAWnet, *Responding to the Needs of Immigrant Survivors of Domestic Violence: Legal Protections Available*, NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE (2021), https://vawnet.org/sc/legal-protections-available; *Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (January 11, 2011),

United States who have experienced this harm in the private sphere outside of the United States are often left with no protections or recourse if they are denied regular immigration status[156] in the United States.

One of the most frequent reasons that women—particularly LAI women—request refugee status, asylum, or relief from removal,[157] is the threat of domestic violence.[158] While the United Nations has acknowledged that domestic violence[159] is a significant concern, this acknowledgement is not codified in law or in international treaty, and it is undoubtedly not considered a legitimate reason to seek asylum in the United States. The definition of domestic violence, according to the Department of Justice, is "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[160] This definition is often curtailed by judicial application in immigration contexts to be focused solely on those relationships in which both people are cohabitating.[161] The Istanbul Convention, also known as the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence, defines domestic violence more broadly than the Department of Justice, defining it as "acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former and current

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https://www.uscis.gov/archive/information-on-the-legal-rights-available-to-immigrant-victims-of-domestic-violence-in-the-united.

[156] Here, I am using "regular immigration status" to discuss immigration status which is documented and thus considered "legal."

[157] Often, when immigrant women have been in the United States without documentation or "illegally," and they get caught by ICE for being here without documentation or "illegally," they are sent for deportation proceedings. During these proceedings, they are allowed to request relief from removal, which is essentially a plea to the government to allow them to stay in the United States.

[158] *See* the following section "Court Cases and Dicta in the United States" for more information.

[159] According to author Michael P. Johnson, a sociologist who studies domestic violence, domestic violence is far broader than it is often considered. For the purposes of discussing domestic violence as it relates to asylum seeking and refugee status seeking, it can be assumed that the definition of domestic violence utilized here is what he deems "intimate terrorism," which he defines as "violence enacted in the service of taking general control over one's partner." *See* Michael P. Johnson, *Domestic Violence: It's Not About Gender: Or Is It?*, 67 JOURNAL OF MARRIAGE AND FAMILY 1126 (2005).

[160] Office on Violence Against Women, *Domestic Violence*, https://www.justice.gov/ovw/domestic-violence.

[161] *See generally Cardona v. Sessions*, 848 F.3d 519 (2017); *Vega-Ayala v. Lynch*, 833 F.3d 34 (2016); *De Pena-Paniagua v. Barr*, 927 F.3d 88 (2020); *Lopez v. Holder*, 740 F.3d 207 (2014).

spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."[162] While the Istanbul Convention is not a legally binding treaty in the United States,[163] I believe that the definition of domestic violence proposed by the Istanbul Convention is the most appropriate definition to use in general, but particularly in an immigration context.[164] It is worth noting that, even though the Convention is not recognized as international law by the United States, the United States was invited to sign it despite not being a member of the Council of Europe. Thirty-seven member states of the Council of Europe ratified this document, including Albania, Andorra, Austria, Germany, Georgia, Greece, Ireland, and the United Kingdom. Only one member state—Türkiye—has renounced its ratification of the treaty and no longer considers it binding law.[165]

Almost surprisingly, Public Law 106-113,[166] which was created in 1999, created a gender-related persecution task force that was intended to "determin[e] eligibility guidelines for women seeking refugee status overseas due to gender-related persecution."[167] However, it does not seem like this task force made any real headway or progress in advancing this agenda, as there were no guidelines produced in closely subsequent years that I was able to find.

Court Cases and Dicta in the United States

The ways in which courts discuss legal issues, and the people affected by those legal issues, often reflect the ways in which the general public views said issues and people. Court dicta—the non-legally binding language written into case opinions—therefore can be used to paint a somewhat accurate picture of the general sociocultural attitudes and sentiments towards certain groups and causes. This is true even in immigration law. In the context of women

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[162] COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE art. 3(b), May 11, 2011, CETS 210.
[163] Treaty Office, *Chart of Signatures and Ratifications of Treaty 210*, COUNCIL OF EUROPE (November 2022), https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210.
[164] For further information and explanation, *see Chapter 4: Moving Forward*.
[165] *Supra* note 163.
[166] GENDER-RELATED PERSECUTION TASK FORCE, Pub. L. 106-113, div. B, § 1000(a)(7).
[167] *Id.*

seeking asylum and refugee status, the ways that the Court speaks about these issues are often indicative of larger, more systemic issues regarding the attitudes that exist towards these women. Often, the dicta in these cases is rife with casual misogyny, a disregard for women's safety, and a refusal to acknowledge the legitimate physical harms of said misogyny and disregard.

Following the implementation of Operation Streamline,[168] it is difficult to say how many women come into the United States seeking refugee status or asylum, as many of these cases are heard in hearings where ten or more immigrants are applying for immigration status in the United States all at once. Because of this, these cases often do not get the detailed case opinions necessary to allow us to fully dissect them, if they get any case opinion at all. Unless a case goes to a secondary court, it is unlikely that there will be any mention of asylum seeking or desire for refugee status. As discussed in the introduction, this process can be an incredibly expensive one, and many women seeking refugee status or asylum do not have the funds, or the knowledge, to be able to properly pursue this avenue.

When cases make it to a secondary court, they are often heard only in the narrowest of circumstances, and their cases are not always looked at in totality. In fact, it is common Court practice to *not* look at an asylum case in totality. The Court states in numerous cases that "if an alien's asylum application is fatally flawed in one respect… [then] an immigration judge or the Board need not examine the remaining elements of the asylum claim."[169] In the event that an asylum application is not fatally flawed, then Court precedent argues that the Court should look for the weakest argument and utilize only this as a basis for its decision, "[f]or simplicity's sake."[170]

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[168] The initial immigration court cases are often upwards of 10 defendants/petitioners in the room with a singular judge, which means that they likely do not all receive detailed court opinions that are submitted to Lexis Nexis, allowing them to be searched and found by keywords. *Supra* note 126.
[169] *Matter of A-B-*, 27 I. & N. 316 (BIA 2018), quoting *Guzman-Alvarez v. Sessions*, 701 F. App'x 54 (2nd Cir. 2017).
[170] *Aguilar-De Guillen v. Sessions*, 902 F.3d 28 (1st Cir. 2018).

In order to best illustrate the harmful dicta utilized in court cases regarding asylum proceedings of LAI women, I focus here on one of the most damaging cases regarding LAI women seeking asylum and refugee status here in the United States, which was decided in 2018. The case, *Matter of A---B---*, [171] overturned what was one of the most helpful decisions made in the recent history of asylum law as it relates to gendered asylum claims—*Matter of A---R---C---G---*.[172] In *A---R---C---G---*, the Court decided that abuse suffered by a wife at the hands of her husband constituted "persecution… on account of a particular social group comprised of married women in Guatemala who are unable to leave their relationship" (internal quotations omitted).[173] This decision was largely taken to mean that the "definition of a particular social group [extended] to encompass most Central American domestic violence victims" (internal quotations omitted).[174] This case gave not only women in Central America the ability to seek asylum on the grounds of being a victim of domestic violence, but also nearly all women this ability, as the legal arguments made by *A---R---C---G---* could be easily altered to discuss other countries with similar legal concerns. This precedent held for only four years before a decision made by the Attorney General stated that it was "wrongly decided and should not have been issued as a precedential decision."[175] While the Attorney General conceded that it was "undisputed that the respondent… suffered repugnant abuse by her husband,"[176] that the woman "sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a marital relationship,"[177] and that "the [particular social group] in this case is defined with particularity,"[178] he stated that the asylum statute could not function as a "general hardship statute"[179] and thus denied the respondent's petition for asylum in the United

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[171] *Supra* note 169.
[172] 26 I. & N. Dec. 388 (BIA 2014).
[173] *Id*. at 390.
[174] *Supra* note 169 at 332.
[175] *Id*. at 316.
[176] *Id*. at 337.
[177] *Supra* note 172 at 389.
[178] *Id*. at 393.
[179] *Supra* note 169 at 346, quoting *Velazquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017).

States. Framing "repugnant abuse" as a "general hardship" shows a distinct lack of compassion and, frankly, the legal system's refusal to aid victims of domestic violence.

As of 2020, the decision in *A---B---* has been overturned by *Grace v. Barr*,[180] and has been rescinded as a precedential decision. Nonetheless, its dicta is still impactful and important, and plays a significant role in illuminating the ways in which the United States views asylum seekers and domestic violence victims both in the country and outside of it.

Nearly every case that I read regarding LAI women's entrance into the United States seeking asylum from domestic violence or other gendered violence in their home countries made note of the fact that the women had come into the country in some illegal manner.[181] While, at face value, this may not seem like a harmful thing to note and point out, it does serve to further criminalize women seeking asylum or refugee status in the United States by making it clear that they have already broken the law, even if their breaking of the law was unknowing or in an attempt to save themselves from harm. Usually, this breaking of the law amounts to perjury, which is one of the felonies for which immigrants can be deported in the United States.[182]

Even in the case *A---R---C---G---*, the dicta utilized by the Court is incredibly problematic and harmful. Yes, she was eventually granted asylum—however, the Court still referred to her abuse as mere "criminal acts," rather than persecution, further stating that the abuse she suffered was perpetrated "without reason,"[183] blatantly ignoring the large body of literature which suggests that domestic violence is perpetrated by and because of misogyny and

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[180] 965 F.3d 883 (2020).
[181] *See e.g.*, *Sosa-Perez v. Sessions*, 884 F.3d 74 (2018) ("…while entering the United States without inspection…."); *De-León v. Barr*, 984 F.3d 11 (2020) ("…entered the United States without inspection."); *De Abarca v. Holder*, 757 F.3d 334 (2014) ("…she entered the United States without inspection…."); *Vega-Ayala v. Lynch* ("…she entered the United States… without admission or inspection…."); *Matter of A---B---* ("The respondent… entered the United States illegally…."); *Matter of A---R---C---G--- et al.* ("The respondents… entered the United States without inspection…."); *Costa v. Holder*, 733 F.3d 13 (2013) ("…she successfully entered the United States without inspection…."); *De Pena-Paniagua v. Barr* ("[She] entered the United States without inspection…."); *Supra* note 170 ("She traveled to the United States through the U.S./Mexico border without inspection.").
[182] *Supra* note 96.
[183] *Supra* note 172 at 390.

misogynistic ideals,[184] particularly in Latin American countries where machismo culture may be exceptionally prevalent.[185] In ignoring this, and in characterizing domestic violence as "arbitrary," the Court suggests that there is no reason why men turn to abusing their wives or intimate partners, and that abused women cannot constitute a particular social group for the purposes of asylum seeking or refugee status.

While this line of reasoning diverges from solely focusing on dicta rather than Court precedent, I think it is an important consideration to make in terms of the general sociocultural feelings towards LAI women and towards victims of domestic violence. According to the precedent set forth in the case *In re A---M---E--- & J---G---U---*,[186] a particular social group "cannot be defined exclusively by the fact that its members have been subjected to harm."[187] This precedent was upheld by the decision of *Matter of R-A-*,[188] but was overturned by the then-Attorney General Janet Reno, who then proposed a new rule for asylum and withholding definitions in an attempt to undo the damage caused by this case.[189] However, the rule was never fully implemented, and further still required that decisions be made on a subjective, case-by-

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[184] *See generally* Jacalyn A. Claes & David M. Rosenthal, *Men Who Batter Women: A Study in Power*, 5 JOURNAL OF FAMILY VIOLENCE 215 (1990); Jeremy Posadas, *Teaching the Cause of Rape Culture: Toxic Masculinity*, 33 JOURNAL OF FEMINIST STUDIES IN RELIGION 177 (2017); Jess Hill, *Patriarchy and Power: How Socialisation Underpins Abusive Behavior*, THE GUARDIAN (March 7, 2020), https://www.theguardian.com/society/2020/mar/08/patriarchy-and-power-how-gender-inequality-underpins-abusive-behaviour; Ella Kuskoff & Cameron Parsell, *Preventing Domestic Violence by Changing Australian Gender Relations: Issues and Considerations*, 73 AUSTRALIAN SOC. WORK 227 (2020); Karen Vincent & Joan Eveline, *The Invisibility of Gendered Power Relations in Domestic Violence Policy*, *in* MAINSTREAMING POLITICS: GENDERING PRACTICE AND FEMINIST THEORY 215-236 (Carol Bacchi & Joan Eveline eds., 2010); Chris B. Geyerman, *The NFL's "Violence Against Women Problem": Media Framing and The Perpetuation of Domestic Abuse*, 38 STUDIES IN POPULAR CULTURE 99 (2016); Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOLOGICAL BULLETIN 476 (1994); Lundy Bancroft, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2002); Susan Forward & Joan Torres, MEN WHO HATE WOMEN & THE WOMEN WHO LOVE THEM (1986).

[185] *See generally* Matthew C. Gutmann, THE MEANINGS OF MACHO: BEING A MAN IN MEXICO CITY (2007). Tamar Diana Wilson, *Introduction: Violence Against Women in Latin America*, 41 LATIN AM. PERSPECTIVES 3 (2014).

[186] 24 I. & N. 69 (BIA 2007).

[187] *Id*. at 74.

[188] 22 I. & N. Dec. 906 (BIA 1999).

[189] *Asylum and Withholding Definitions*, 65 FED. REG. 76,588 (Dec. 7, 2000).

case basis.[190] As I will discuss in Chapter 4, the subjective, case-by-case basis nature of many asylum cases is part of the reason why these cases are so difficult to adjudicate, why there is so much uncertainty around them, and why the system is inherently failing asylum seekers and refugee status seekers. In part, this failure is due to the lack of judicial oversight of immigration judges, who are "uniquely advantaged to determine… [an] applicant's credibility"[191] and whose determinations of credibility cannot be overturned by the Board of Immigration Appeals ("BIA") unless there is a showing that the immigration judge was "not capable of judging… fairly on the basis of [the case's] own circumstances."[192]

[190] *See Chapter 4: Moving Forward* for discussion on why this subjective, case-by-case basis is not always ideal.
[191] *Matter of A-B-*; *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2nd Cir. 2006); *Djadjou v. Holder*, 662 F.3d 265 (4th Cir. 2011).
[192] *Supra* note 169.

Chapter Four: Moving Forward

Any form of movement forward from these harmful policies and beliefs will happen in a distinctly two-pronged approach, though it is entirely possible that these two prongs could occur simultaneously, and often do.[193]

The first prong is the legal prong, in which the United States will be forced to rewrite its laws and policies on immigration, refugees, and asylum seeking in order to make them more inclusive and helpful to those in need. The policies that need to change will also need to encompass those which relate to gendered violence and women's rights, as well. While there has undoubtedly been a more conservative shift in the government in the last decade—as evidenced by Donald Trump's rise to the presidency and the increasingly restrictive laws regarding personal freedoms being presented and passed on both the state and federal level[194]—I believe that this prong will be the easier of the two to achieve, if only because it will require a smaller group of people change their opinions and beliefs.

While the legislative branch technically has exclusive control over immigration law, the implementation of these laws falls—as it does with all things—squarely on the shoulders of the executive branch. In the case of immigration, however, the executive branch has more flexibility in enforcement than it does in many other regards, because of its ties to foreign relations—which are the sole prerogative of the executive branch.[195] In this regard, a much smaller number of people need to change their beliefs and attitudes towards immigration, asylum-seeking,

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[193] *See generally* Sally F. Goldfarb, *A Clash of Cultures: Women, Domestic Violence, and Law in the United States*, *in* GENDER AND CULTURE AT THE LIMIT OF RIGHTS (Dorothy L. Hodgson ed., 2011).
[194] *See generally* Shawn Hubler & Jill Cowan, *Flurry of New Laws Move Blue and Red States Further Apart*, THE NY TIMES (April 3, 2022), https://www.nytimes.com/2022/04/03/us/state-laws-republican-democrat-division.html; Ronald Brownstein, *Red States Are Remaking the Civil Liberties Landscape*, CNN POLITICS: FAULT LINES (February 22, 2022), https://www.cnn.com/2022/02/22/politics/republicans-civil-liberties-abortion-voting-race/index.html; Stephen Groves, *House Republicans Pass 'Parents' Rights' Bill in Fight Over Schools*, PBS NEWS HOUR (March 24, 2023), https://www.pbs.org/newshour/education/house-republicans-pass-parents-rights-bill-in-fight-over-schools.
[195] *United States v. Curtiss-Right Export Corp.*, 299 U.S. 304 (1936) at 299 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

gendered violence, and women's rights to create substantive change in the enforcement of legislation. The judicial branch, which is responsible for the decisions that impact how the policies of the executive branch are fulfilled in this aspect, is also a substantially smaller group of people than the legislative branch is—and undoubtedly than the entire country is—and could also play a significant role in providing aid to changing these policies, as will be explored later in this chapter.

The second prong, and arguably the harder of the two, will be the United States reshaping how it responds not only to immigrants, but also to women in need of aid and protection, as well as the misogyny and racism that are pervasive in our culture. This sort of cultural shift will undoubtedly make changing legislation far easier, but—despite how slowly the law may move—it is a process that will presumably take far longer than shifts in policy and law, if only because of the sheer number of people that would need to reframe their way of thinking and their beliefs.

While I recognize the importance of a cultural shift, I focus here on the legal changes that I believe will be most beneficial in these issues.

Since 1893, it has been noted that deportation is undoubtedly a punishment, and one that "[e]veryone knows… [is] most severe and cruel,"[196] which "visits great hardship on the individual"[197] and that can result in the loss of "both property and life; or of all that makes life worth living."[198] This belief continues to be echoed in immigration advocacy even today.[199] It is even more notably cruel in the case of anyone seeking asylum or refugee status, and arguably even more so in the case of women seeking asylum or refugee status, as this punishment could

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[196] *Supra* note 42 at 149 (Brewer, J., dissenting).
[197] *Bridges v. Wixson*, 623 U.S. 135 (1945) at 325.
[198] *Ng Fung Ho v. White*, 259 U.S. 276 (1922) at 258.
[199] Elliot Spagat, *Sessions: Zero-Tolerance Policy May Split Families at Border*, ASSOCIATED PRESS (May 7, 2018) (quoting Representative Bennie Thompson of Mississippi stating that "Criminalizing parents seeking protection for themselves and their children is inhumane, excessively punitive, and can deliberately interfere with their ability to seek asylum."). *See also INS v. Cardoza-Fonesca*, 480 U.S. 421 (1986) ("Deportation is always a harsh measure…").

result in loss of life, not just liberty.[200] The question, then, is how do we go about preventing this punishment? How do we go about fixing these broken systems so that this punishment is not a reality—or even just a fear[201]—for thousands upon thousands of people each year?[202]

Both sides of the political aisle in the United States have ideas, though they are vastly different. Republicans largely believe that the border should be completely closed to prevent deportations from being necessary,[203] and Democrats generally believe that opening up better

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[200] *Supra* note 54.
[201] *See* Abby Budiman, *Key Findings about U.S. Immigrants*, PEW RSCH. CENTER (August 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ (noting that there are roughly 10.5 million unauthorized immigrants in the United States as of 2017, but only 337,000 deportations per year as of 2018).
[202] *Id.*
[203] *See generally Immigration & Border Security*, THOM TILLIS: U.S. SENATOR FOR NORTH CAROLINA, https://www.tillis.senate.gov/immigration ("…including introducing legislation that secures our borders…"); *Immigration, Border Security, and Law Enforcement*, JOHN THUNE: U.S. SENATOR FOR SOUTH DAKOTA, https://www.thune.senate.gov/public/index.cfm/immigration ("A porous border leaves us susceptible to illegal entry by gang members, human traffickers, drug dealers, and weapons traffickers."); *Barrasso: Biden Already the Most Open Borders President in U.S. History*, JOHN BARRASSO: UNITED STATES SENATOR – WYOMING (March 10, 2021), https://www.barrasso.senate.gov/public/index.cfm/2021/3/barrasso-biden-already-the-most-open-borders-president-in-u-s-history ("If you talk to law enforcement all across the country, they will tell you that many of the problems that they face every day are problems related to our open Southern Border…. We want a secure border."); *The Clear Charge of the Federal Government in the Constitution is the Protection of the American People*, JONI ERNST: U.S. SENATOR – IOWA, https://www.ernst.senate.gov/priorities/homeland-security ("More must be done to fully secure our borders…"); *Ernst: An Open Border Is A Drug Lord's Dream*, JONI ERNST: U.S. SENATOR – IOWA, https://www.ernst.senate.gov/news/press-releases/ernst-an-open-border-is-a-drug-lords-dream ("An open border is an invitation for mischief…. I anticipate a common theme in all of our conversations: the need to physically secure our border…."); *Immigration*, Marsha Blackburn: U.S. Senator for Tennessee, https://www.blackburn.senate.gov/immigration ("Secure countries have secure border."); *Immigration Reform & Border Security*, JOHN BOOZMAN: UNITED STATES SENATOR FOR ARKANSAS, https://www.boozman.senate.gov/public/index.cfm/immigration-reform-border-security ("The fact that our border can be penetrated so easily leaves us vulnerable to national security threats…. IT is in our national interest to secure the border."); *Securing the Border*, TED BUDD: U.S. SENATE, https://tedbudd.com/issues/border-security/ ("…the devastating effects of the Biden administration's open borders policies."); *Immigration & Border Security*, JOHN CORNYN: UNITED STATES SENATOR FOR TEXAS, https://www.cornyn.senate.gov/key-issues/immigration-border-security/ ("We must take immediate action to secure our borders…"); *Immigration & Homeland Security*, MIKE CRAPO: U.S. SENATOR FOR IDAHO, https://www.crapo.senate.gov/issues/immigration-and-homeland-security ("…the United States must commit resources necessary to have the strongest border enforcement realistically possible."); *Immigration*, TED CRUZ: U.S. SENATOR FOR TEXAS, https://www.cruz.senate.gov/about/issues/immigration ("Sen. Cruz… has long called to secure the Texas-Mexico border. He has introduced legislation to build the wall on the southern border, support CBP and ICE agents working to protect Texas' communities…."); *Immigration*, CHUCK GRASSLEY, https://www.grassley.senate.gov/about/results/immigration ("Critical to these efforts is securing the U.S. southern border…."); *Stopping Illegal Immigration*, HAGERTY: U.S. SENATE, https://teamhagerty.com/issues/stopping-illegal-immigration/ (Putting an end to illegal immigration begins with securing our southern border. Bill is working with his Republican colleagues in the Senate to

channels in immigration systems will be more effective in preventing this punishment[204]—though this is arguable to some in light of the number of deported immigrants during the Obama administration.[205] There are also those who believe that abolishing borders all together, and essentially opening them entirely, will be the most effective way to resolve these issues;[206] certainly, not needing to immigrate would undo *all* of our immigration problems. Unfortunately,

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continue building the wall and ensure that existing immigration laws are fully enforced. He opposes amnesty and DACA… and will work to stop sanctuary cities in Tennessee and across the country."); *Hoeven: Biden Administration's Immigration Policies Making Southern Border Crisis Worse*, UNITED STATES SENATOR FOR NORTH DAKOTA JOHN HOEVEN (June 9, 2022), https://www.hoeven.senate.gov/news/news-releases/hoeven-biden-administrations-immigration-policies-making-southern-border-crisis-worse ("Border security is vital to national security and we need to secure our border.").

[204] *See generally Immigration*, MARIA CANTWELL: UNITED STATES SENATOR FOR WASHINGTON, https://www.cantwell.senate.gov/issues/immigration ("Maria supports comprehensive immigration reform to fix our broken immigration system…. She has opposed harmful attempts to limit the ability of asylum-seekers to seek refuge in the United States…."); *Immigration*, BEN CARDIN: U.S. SENATOR FOR MARYLAND, https://www.cardin.senate.gov/issues/immigration/ ("Congress should provide… individuals with a pathway to citizenship…."); *Immigration*, BOB CASEY: U.S. SENATOR FOR PENNSYLVANIA, https://www.casey.senate.gov/issues/immigration ("This means enacting policies that bring undocumented immigrants out of the shadows and into our communities and economy…. Fundamentally, Senator Casey believes that the United States… must foster a system that treats all individuals with compassion and dignity…."); *Immigration*, CHRIS COONS: U.S. SENATOR FOR DELAWARE, https://www.chriscoons.com/issue/immigration/ ("Chris is a leading voice for comprehensive immigration reform…."); *Immigration*, TAMMY DUCKWORTH: U.S. SENATOR FOR ILLINOIS, https://www.duckworth.senate.gov/about-tammy/issues/immigration ("…Senator Duckworth is an advocate for comprehensive, fair, humane and just immigration reform…."); *Immigration*, UNITED STATES SENATOR FOR CALIFORNIA DIANNE FEINSTEIN, https://www.feinstein.senate.gov/public/index.cfm/immigration ("She has been a staunch advocate for the creation of a farmworker protection program, protections for unaccompanied immigrant children and a pathway to citizenship for young immigrants who came to this country through no choice of their own and know no other home."); *Immigration*, RICHARD BLUMENTHAL, https://www.blumenthal.senate.gov/about/issues/immigration ("He has fought to bring comprehensive reform to our immigration laws, including an expanded and reformed visa and green card system… and an earned path to citizenship."); *Building a Humane, Safe, and Secure Immigration System*, JOHN FETTERMAN, https://johnfetterman.com/issue/building-a-humane-safe-and-secure-immigration-system/ ("I will also fight for a pathway to citizenship for frontline workers, small business owners, and young people who have only known this country as their home."); *Gillibrand: Time for Pathway to Citizenship for Essential Workers, Dreamers, TPS Recipients*, KIRSTEN GILLIBRAND: U.S. SENATOR FOR NEW YORK (June 7, 2021), https://www.gillibrand.senate.gov/news/press/release/gillibrand-time-for-pathway-to-citizenship-for-essential-workers-dreamers-tps-recipients/ ("I am committed to creating a fairer, more transparent and just immigration system that recognizes the dignity and promise of those who come here seeking a better life, and that will make our communities stronger.").

[205] *Supra* note 28.

[206] This belief predominantly stems from Indigenous efforts to decolonize the United States, Mexico, and Canada. *See generally* Chandra Talpade Mohanty, FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY, (2003). Beth Daley, *Explainer: What is Decolonisation?*, THE CONVERSATION (June 22, 2020), https://theconversation.com/explainer-what-is-decolonisation-131455; Eve Tuck & K. Wayne Yang, *Decolonization is Not A Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUCATION & SOCIETY, 1 (2012).

abolishing borders entirely is not feasible. Nor, however, is completely closing the border, as we have seen most clearly with the advent of Title 42 in a post-Covid-19 world. Instead, we must look at how we can better work within the current frameworks that the law provides for us. There is no guaranteed way to begin any such process, as it is all ultimately deeply intertwined. Nonetheless, there are some steps that can be taken to begin to rectify the harms caused.

There are two main issues with how refugee and asylum law are handled in the United States that need to be addressed in order to begin to fix the problems in these areas of law: a stricter adherence to international law and the spirit of the law, and a unified Court precedent discussing how refugee status and asylum-seeking cases should proceed. The latter will undoubtedly influence the former to some degree, as the former will undoubtedly influence the latter as well.

Adherence to international law and the spirit of international law also looks like adherence to the domestic laws which have been codified in the Immigration and Nationality Act ("INA") as well. The Refugee Convention, as discussed in the previous chapter, was codified into this act, and is therefore considered binding domestic law as much as it is international law. However, I choose to look at it as an international law rather than as a domestic law, because the domestic legislation surrounding it arguably denies the spirit of the international law after which it is patterned. The Refugee Convention specifically states that a refugee is someone who is "unable or *unwilling* to return to [their] country of origin" (emphasis added)[207] because of a fear of persecution on account of their race, religion, nationality, membership to a particular social group, or political opinion. However, as *Matter of A-B-*[208] points out, an immigration judge is statutorily required to "deny the asylum application" of an asylum seeker if it can be found that the "applicant could avoid persecution by relocating to another part of the… country"

[207] 189 U.N.T.S. 150, *Supra* note 141 at *Introductory Note by the Office of the United Nations High Commissioner for Refugees*.
[208] *Supra* note 169.

(internal quotations omitted).[209] This requirement, as promulgated by 8 C.F.R. § 1208.13(b)(3)(i)[210] is a direct contradiction to the Refugee Convention's principle of non-refoulment—that is, the principle of not forcing a refugee or asylee to return to their home country if their life or liberty is in danger on account of one of the five aforementioned categories in their home country.[211] This statute is located squarely within the part of the law which codifies the Refugee Convention in the United States domestic law. Not only is there legislation which directly contradicts the concept of non-refoulment—a central part of the international reaction to and treatment of refugees—the domestic legislation is conspicuously missing any mentions of refoulment in 8 C.F.R., with a search of the document revealing no matches even for simply "refoul".[212] It is exemplary of a number of other contradictions that are found within refugee and asylum law, and judicial precedent, which must be addressed before we can begin to truly aid those in need. Further, it violates the spirit of the Refugee Convention undoubtedly, as the Refugee Convention itself makes no mention of this and is directly opposed to this idea of refoulment, even if the persecution is happening only in one area of the country. It violates the spirit of the law, undoubtedly, in an effort to try to stymie the number of refugees that could come into the United States and potentially 'damage' the country in any number of

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[209] *Supra* note 169 at 344. *See also* 8 C.F.R. § 1208.13(b)(3)(i).
[210] 8 C.F.R. § 1208.13(b)(3)(i) reads, in full, "Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence: (A) There has been a fundamental change in the circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or (B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so."
[211] 189 U.N.T.S. 150, *Supra* note 141 at Article 33 ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").
[212] Concerns regarding the adherence to international law are noted in *Dir. Order No. 11-2021*, though these concerns apply specifically to the utilization of the Covid-19 pandemic to exclude refugees and asylum seekers from the country. *See* Dir. Order No. 11-2021, 85 Fed. Reg. 84160 (December 23, 2020) (delayed by *Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 86 Fed. Reg. 15072 (March 22, 2021)).

ways. Regardless of intent, a return to the spirit of the Refugee Convention and a refusal to enforce that portion of the domestic law could present, undoubtedly, significant aid to potential refugees and asylum seekers in the United States.

Another piece of international law that could be more appropriately followed by the United States to provide more aid to those seeking asylum or refugee status is the Convention Against Torture ("CAT"). In particular, the United States' definition of torture should be reconsidered to be more beneficial in the context of asylum and refugee law. Torture, for the purposes of the CAT, is defined as "any act by which severe pain or suffering… is intentionally inflicted on a person for such purposes as… punishing him… or intimidating or coercing him… or for any reason based on discrimination of any kind, when such pain or suffering is inflicted *by or at the instigation of or with the consent… of a public official…*" (emphasis added).[213] There is a caveat built into this article, however, which is that the pain and suffering must also arise "from, [or be] inherent in or incidental to lawful sanctions."[214] This lawful sanction requirement could—and arguably, should—be sufficiently defined by governmental acquiescence and the non-enforcement of laws in a country, as noted in *Matter of A-B-*, *Barajas-Romero v. Lynch*,[215] and *Myrie v. Attorney General, U.S.*.[216] Many circuit courts, however, continue to routinely deny this definition of lawful sanctions, as can be most clearly seen in the overturning of *Matter of A---R---C---G---*,[217] *In re A---M---E--- & J---G---U---*,[218] *Aguilar-De Guillen v. Sessions*,[219] and *Fuentes-Erazo v. Sessions*.[220] The concerns regarding circuit court distinctions between case decisions will be discussed shortly.

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[213] *Supra* note 147 at Part I Article 1.
[214] *Id.*
[215] 846 F.3d 351 (9th Cir. 2017).
[216] 855 F.3d 509 (3rd Cir. 2017).
[217] *Supra* note 172.
[218] *Supra* note 186.
[219] *Supra* note 170.
[220] No. 15-3149, 2017 WL 629283 (8th Cir. Feb. 16, 2017)

In the case of *Aguilar-De Guillen*, the crimes that the petitioner had suffered, for which she was requesting asylum in the United States, "appear[ed] to be widespread according to country conditions,"[221] and yet the Court argued that there was no government involvement in acquiescing to the harm even though a country report highlighted violence in her home country and specifically noted the police inability to manage said violence.[222] This was upheld in the decision of *Fuentes-Erazo*, in which a country's lack of enforcement of laws protecting domestic violence victims was not considered an inability or refusal by the government to protect victims.[223] Some courts—and in particular the Third Circuit court—have noted that even probable government conduct could equate to acquiescence, if there is reason to believe that the government would almost certainly react in a specific manner, as noted in *Myrie*.[224]

The decision in *Myrie* brings us to our second aspect of necessary legal change: a unified judicial precedent. As of now, much of the judicial precedent that is utilized by the courts in determining immigration cases is created at the level of Circuit Courts. While Circuit Courts are the second-highest level of federal court, they are still geographically dependent. This means that how an asylum seeker is treated, and what rights they have during their case, are dependent entirely on their geographical location during the case, rather than on any unified judicial precedent. While some executive oversight undoubtedly exists during these proceedings—as has been previously noted and will be discussed further later in this chapter—these processes largely are determined only by circuit court precedents. This has been noted even by the circuit courts themselves, as seen in *Garcia v. Sessions*.[225] The decisions made in circuit courts can have influence over the decisions made in other circuit courts, this precedent is not binding, but is

[221] *Supra* note 216 at 4.
[222] *Id.*
[223] *Supra* note 220.
[224] *Supra* note 216 at 11 (quoting that "…the question of whether likely government conduct equates to acquiescence is a mixed question of law and fact…").
[225] 856 F.3d 27 (1st Cir. 2017) ("…a contrary holding is not necessarily inconsistent with other circuits that have held in favor of the reinstatement statute in similar cases….").

instead persuasive, meaning that it does not necessarily have to hold any weight in the determinations of another circuit court.

The Supreme Court is not technically required to wait for a case to be appealed up to it before it decides to take the case or issue a decision on a case, as noted by scholar Steve Vladeck.[226] The Supreme Court, if it so chose, could decide a case before the Court of Appeals even had an opportunity to do so. In doing so, it could set and create a unified judicial precedent for Circuit Courts and Appeals Courts to follow, thereby eliminating the questions surrounding what rights immigrants or asylum seekers are truly granted during judicial hearings. While it is unlikely that any one case would be able to cover all of the issues that plague judicial hearings regarding immigration, the Supreme Court could use the case as an opportunity to expand upon what rights are granted in judicial hearings regarding immigration, as well as what rights are not granted.

In an ideal Supreme Court decision regarding immigrant and asylum-seeker rights, the Court would make determinations on the following things: 1) what due process rights look like for asylum seekers and refugees, 2) what, generally, constitutes persecution insofar as it relates to 'private' crimes, and 3) what can disqualify a judge from hearing asylum cases. This final one is particularly important within the context of the cultural changes that are necessary as well, because remarks made against asylum seekers, refugees, immigrants, or women are generally not considered reasons to recuse a judge from a case, which could be directly impacted by these biases. Here, I outline what I believe these answers should look like in an ideal world, as well as what precedents would allow for such decisions to be made.

First, the Supreme Court needs to determine what due process rights immigrants and asylum seekers actually have in court cases. As noted in Chapter 2, immigrants in deportation

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[226] Steve Vladeck, *Power Versus Discretion: Extraordinary Relief and the Supreme Court*, SCOTUSBLOG (December 20, 2018), https://www.scotusblog.com/2018/12/power-versus-discretion-extraordinary-relief-and-the-supreme-court/.

proceedings have been granted Fifth Amendment Due Process rights since 1903,[227] though what that has looked like has been questionable at best. In *Morrissey v. Brewer*,[228] the Court acknowledges that the determination of due process rights being required does not necessarily mean that what due process or how much due process is required will be evident. Even a strictly textual reading of the Constitution—which requires that immigrants and asylum seekers be given *all* Constitutional protections that are laid out in the Bill of Rights and in judicial precedent—would not be completely sufficient under the precedent of *Morrissey*. It would also not be sufficient because of immigration's status as a civil proceeding, rather than a criminal proceeding. Even though the Court itself has noted since 1975 that civil deportation proceedings and criminal trials often look more alike than different,[229] immigration proceedings are still held squarely under the rights granted in civil proceedings, rather than criminal ones. This parallel between criminal and civil proceedings is particularly concerning when considering the loss of liberty that is at stake during deportation or removal hearings. Deportation is, without question, a loss of liberty—something echoed by the Individual Rights Theory of immigration discussed by scholar Kit Johnson[230]—and it is one that is at least five years long.[231]

Considering the Supreme Court decisions in *Baldwin v. New York*[232] and *Lewis v. United States*,[233] the Sixth Amendment rights to fair trials should undoubtedly be applied to immigration and asylum-seeking cases as well, at least in some capacities. It is not feasible, of course, for a jury to be present for every single immigration and asylum-seeking case, as suggested by both *Baldwin* and *Lewis*, but other Sixth Amendment rights, such as the right to

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[227] *Supra* note 99.
[228] 408 U.S. 471 (1972).
[229] *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975) at 569 footnote 3.
[230] *Supra* note 39.
[231] *How Long After Deportation Must I Wait Before Returning to the U.S.?*, NOLO, https://www.nolo.com/legal-encyclopedia/how-long-after-deportation-must-i-wait-before-returning-the-us.html.
[232] 399 U.S. 66 (1970) (stating that a jury trial is required in cases where a guilty verdict would result in a loss of liberty for six months or more).
[233] 518 U.S. 322 (1996) (stating that *Baldwin* applies only if a single charge carries a potential loss of liberty of six months or more, rather than if the aggregate charges could).

representation, the right to a speedy and public trial, and a right to understand and know the nature of the charges against one, should undoubtedly be granted. In a post-9/11 world, public trials are not always required for immigration cases pursuant to the ruling of the Supreme Court in *North Jersey Media Group, Inc. v. Ashcroft*,[234] which effectively can deprive immigrants of this crucial Sixth Amendment right. Though this revocation of this right is relegated to specific 'special interest' cases only, what those special cases look like is ill-defined at best and could easily be utilized to say that any and all cases regarding asylum-seekers are 'special interest' cases, thereby closing off this critical right to a fair trial. The Supreme Court overturning this particular case would be a significant win in ensuring that public trials are granted to all immigrants, even those in 'special interest' cases. However, this could also pose considerable problems, considering that many asylum seekers in the United States are running from domestic violence perpetrators, who are often known to follow and harass their victims.[235] A potential solution for this can already be found, partially, in the way that immigration courts handle most cases regarding immigration and asylum, by utilizing the initials of the person rather than the full name of the person. However, this could still pose problems because initials are usually relatively easily recognized, and the circumstances of a case could easily be used to figure out if the person in the case is someone that is being looked for. This could be avoided in some ways by utilizing pseudonyms for the petitioner and others involved in the case, though even this could cause problems if the fact patterns of the case are significantly unique. Nonetheless, I believe that it is important that the trials of immigrants and asylum seekers be public in order to ensure that there is nothing suspicious going on behind the closed doors of a courtroom and that all other rights are being granted to the petitioner.

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[234] *Supra* note 120.
[235] *See generally* TK Logan, *Research on Partner Stalking: Putting the Pieces Together*, NATIONAL INSTITUTE OF JUSTICE (October 2010), https://www.ojp.gov/pdffiles1/nij/245387.pdf (noting that 50-62% of stalking victims are stalked by partners or ex partners, that 81% of women stalked by a partner or ex-partner were also physically assaulted by said partner, and that partner stalking is common during periods of separation).

Another Sixth Amendment right that should undoubtedly be given to asylum seekers is the right to council. This right to council is not specific to criminal cases, as pointed out in *Lassiter v. Department of Social Services of Durham County, North Carolina*,[236] which stated that a person has a right to appointed council in situations where "the litigant may lose his physical liberty if he loses the litigation," because it is not "special Sixth and Fourteenth Amendment[] right[s] to council… which trigger[] the right to appointed counsel."[237] As noted previously, immigration or asylum seeking proceedings ending poorly for individuals can result in a loss of liberty to enter the United States that is at least ten years long, and could potentially result in the suffering and death of a person who is seeking asylum. In a case five years before, *Eldridge*,[238] the Court created a new set of criteria to decide if a person is required to at least be offered representation even in civil cases, which overruled the "harmless error" rule that had existed previously.[239] *Eldridge* sets out a three-part test to determine who in civil cases is afforded guaranteed council, which weighs the following three things: 1) "the private interest that will be affected by the official action," 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value… of additional or substitute procedural safeguards," and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[240] Using the standards set forth in both *Lassiter* and in *Eldridge*, it becomes clear that a blanket requirement for asylum seekers to have appointed counsel if they cannot afford to hire their own would not be an egregious violation of judicial precedent—in fact, it is arguably an egregious violation of judicial precedent to not require appointed counsel for asylum seekers.

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[236] 452 U.S. 18 (1981).
[237] *Id.* at 25.
[238] *Supra* note 55.
[239] For more on the "harmless error" rule, *see generally Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Michelson v. INS*, 897 F.2d 465 (10th Cir. 1990); *United States v. Campos-Ascencio*, 822 F.2d 506 (5th Cir. 1987); *Supra* note 229.
[240] *Supra* note 55 at 321.

Fourth Amendment protections against search and seizure, and against arbitrary detainment and arrest, are also sorely lacking in the context of immigration and asylum seeking. As mentioned in Chapter 2, a 1953 ruling by the Supreme Court also argues that the Due Process Clause—which is often used to enforce the Fourth Amendment and Sixth Amendment[241]—does not "acknowledge[] any distinction between citizens and resident aliens."[242] However, in practice and in precedent, it is clear that this is not truly the case.[243] Immigrants are not given the same protections against illegal evidence being utilized in court proceedings against them[244] and are not protected against arbitrary detention, either.[245] Asylum seekers are particularly vulnerable following the implementation of Operation Liberty Shield and Title 42, leaving them stranded at the border in abysmal conditions.[246] Though there is no official judicial precedent on a nationwide level which would suggest that indefinite detention of aliens is impermissible, the Sixth Amendment right to a speedy trial is a right that has a long and extensive court history, and is inherently against indefinite detention, particularly without the opportunity for bail or a set date for a hearing.[247] In fact, the Speedy Trial Act of 1974 holds that an indictment must be filed within thirty days from the date of arrest.[248] However, some asylum seekers have been in detention centers for over six months without any set court date.[249] The Court would need to

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[241] *See generally United States v. MacDonald*, 456 U.S. 1 (1982).
[242] *Supra* note 100.
[243] *Supra* note 103.
[244] *Supra* notes 97 & 117.
[245] *Supra* note 98.
[246] *Supra* note 106.
[247] *See Barker v. Wingo*, 407 U.S. 514 (1972) (holding that determinations of whether the Sixth Amendment right to a speedy trial has been violated must be done on a case-by-case basis and setting out four criteria for whether the delay between the initiation of proceedings and the beginning of a trail violates a defendant's rights to a speedy trial: the length, the cause, the defendant's assertion of their right to a speedy trial, and the presence/absence of prejudice which results from the delay); *Doggett v. United States*, 505 U.S. 647 (1992) (holding that an eight-and-a-half-year delay constituted an egregious violation of Sixth Amendment rights); *United States v. Lovasco*, 431 U.S. 783 (1977) (holding that if the government engaged in intentional delay of trial to gain a tactical advantage, a defendant can obtain a dismissal of the charges against them).
[248] 18 U.S.C. § 3161.
[249] Mica Rosenberg & Kristina Cooke, *Amid Pandemic, Sharply Increased U.S. Detention Times Put Migrants at Risk*, REUTERS (October 9, 2020), https://www.reuters.com/article/us-usa-immigration-detention-insight-idUSKBN26U15Y.

determine how this judicial precedent applies to asylum seekers, and ideally limit the amount of time that asylum seekers could spend in detention centers without being offered bail or being released on remand.

Second, the Supreme Court needs to determine what constitutes 'persecution' for the purposes of the INA insofar as it relates to 'private' crimes or gendered violence. Historically, the United States has deferred to traditional English lawmaking policies regarding gendered violence—in particular, regarding domestic violence—and has routinely decided against women's rights to be free of violence. This can be evidenced federally by the refusal to maintain the entirety of the Violence Against Women Act ("VAWA"), as decided in *United States v. Morrison*,[250] and on a local level by a long history of not providing relief in the form of divorce to women who were suffering domestic violence.[251] Despite a continuous effort to "prevent and respond to gender-based violence globally"[252] since August of 2012,[253] little effort has been made by the federal government to incorporate gender-based violence such as domestic violence into its list of legitimate reasons to seek asylum in the United States. The 2016 update of the United States Strategy to Prevent and Respond to Gender-based Violence Globally ("Strategy") even acknowledges that "dating violence[,] domestic violence… [and] intimate partner violence" constitute gender-based violence.[254] Further, it notes that "migrants, refugees, [and] the

[250] 529 U.S. 598 (2000) (holding that interpersonal violence is not related to commerce and therefore cannot be legislated on by Congress under the Commerce Clause, as well as holding that aspects of the Violence Against Women Act directly violated the Equal Protection Clause).
[251] *See generally McKane v. McKane*, 137 A. 288 (1927) (holding that a husband's "spells" caused by drinking, during which he called his wife vile names, cursed her, and implied unchastity on her part, did not constitute cruelty); *Bonwit v. Bonwit*, 181 A. 237 (1935) (holding that a husband's "violent outbursts of temper" which resulted in him hitting his wife did not constitute cruelty); *Hilbert v. Hilbert*, 177 A. 914 (1935) (cruelty was proved sufficiently only in instances where it appears that one party had been put in life-threatening danger); and most recently, *United States v. Rahimi*, No. 21-11001 (2023) (holding that people who are under protective orders for domestic violence are still Constitutionally allowed to carry firearms, despite numerous studies showing that a domestic violence victim's chances of being killed by their partner are five times higher when their abuser has access to a firearm).
[252] *United States Strategy to Prevent and Respond to Gender-Based Violence Globally: 2016 Update*, USAID, https://www.state.gov/wp-content/uploads/2019/03/258703.pdf.
[253] Exec. Order No. 13623, 77 FR 49345 (2012).
[254] *Supra* note 252 at 6. It is worth noting that the Strategy also notes that marital rape is considered a form of gender-based violence which is of particular interest to the United States to stop, even though there is no federal legislation which prevents marital rape from occurring and over nineteen jurisdictions

internally displaced" are more likely to be subjected to gender-based violence than other populations.[255] Even with this Strategy, the United States has not looked to implement private, gendered violence into its list of legitimate reasons to seek asylum in the United States, and the Courts have largely upheld the distinction between public violence and private violence, noting that the latter is not a valid reason for asylum seeking in the United States.[256]

An ideal Supreme Court precedent would undo these previous precedents and set out clear, defined ways that private violence can be considered a reason to seek asylum, as well as what government acquiescence truly looks like. Preferably, a unified Supreme Court decision regarding private violence as a reason to seek asylum would undoubtedly include domestic violence, as well as stalking—which is often used as a part of domestic violence once the victim attempts to leave their abusive partner.[257] Considering the Executive branch's interest in eliminating gender-based violence across the globe, it would not be a difficult stretch for the Supreme Court to determine that gender-based violence was a viable reason to seek asylum in the United States.

Third, the Supreme Court should determine what can disqualify a judge from hearing a case regarding asylum, or even immigration. As 28 U.S.C. § 144 states, a party may file an affidavit requesting the recusal of a judge "before whom [a] matter is pending" if that judge "has a personal bias or prejudice either against him or in favor of any adverse party" and that "no such judge shall proceed further therein, but another judge shall be assigned to hear such proceeding." However, it also states that a party may only "file… one such affidavit in any case,"

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in the United States have marital rape loopholes in their legislation which allow perpetrators to get away with sexually assaulting their spouse with very minimal criminal penalties. *See generally* Carter Sherman, *Men Who Rape Their Wives Can Still Get Away With It in Many States*, VICENEWS (May 5, 2021), https://www.vice.com/en/article/bvzzv8/men-who-rape-their-wives-can-still-get-away-with-it-in-many-states.

[255] *Id.*

[256] *See generally Sanchez v. U.S. Attorney General*, 392 F.3d 434 (11th Cir. 2004); *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005); *Matter of S-E-G-*, 24 I.&N. Dec. 579 (BIA 2008); *Supra* note 179.

[257] *Supra* note 232.

meaning that any further discrimination could not be remedied.[258] Nonetheless, utilizing this legislation, along with the precedent set forth in *Berger v. United States*,[259] *United States v. Grinnell Corp.*,[260] and *Hodgson v. Liquor Salesmen's Union, etc.*,[261] the Supreme Court could easily determine that certain derogatory comments made regarding refugees and asylum seekers should recuse a judge from such cases. Currently, derogatory comments towards immigrants, asylum seekers, and even women do not recuse immigration judges—or any judges—from hearing cases that discuss these matters, as can be seen most prominently in the decision to place Jeff Sessions as the Attorney General—the person in charge of prosecuting immigration cases in the United States, to whom the Board of Immigration Appeals ("BIA") and immigration judges are beholden—during Donald Trump's presidency. Sessions has an extended history of racism, misogyny, and anti-immigrant sentiments, as can be most obviously noted in his comments in May of 2018, where he told prosecutors that "[w]e need to take away children" from immigrant families being detained at and around the border[262] and his comments in a 2006 speech on the floor of the Senate, in which he stated that "[f]undamentally, almost no one coming from the Dominican Republic… is coming here because they have a provable skill that will benefit us."[263] Several lower immigration judges have faced similar criticisms of racism and xenophobia, and yet remain on the bench and able to judge cases, including one judge who

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[258] 28 U.S.C. § 144.
[259] 255 U.S. 22 (1921) (stating that the "twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.").
[260] 384 U.S. 463 (1966) (requiring a personal bias or prejudice that is not of a judicial character to recuse a judge from a case).
[261] 444 F.2d 1344 (2nd Cir. 1971) ("Only…personal bias or prejudice of a nonjudicial character will suffice.").
[262] Michael D. Shear, Katie Benner & Michael S. Schmidt, *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said*, THE NY TIMES (October 6, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html.
[263] Jorge Cancino, *Why Immigrants Fear Attorney General Sessions*, UNIVISION NEWS (November 20, 2016), https://www.univision.com/univision-news/immigration/why-immigrants-fear-attorney-general-sessions; 152 Cong. Rec. S4,877 (daily ed. May 22, 2006) (statement of Sen. Jeff Sessions).

referred to Hispanic immigrants using a racial slur in court.[264] Considering the Supreme Court precedent set forth in *Berger* and in *Grinnell Corp.*, the Court would be well within its rights to ensure that personal biases are properly utilized to recuse a judge from a case. In view of the long judicial precedent of the Court creating its own litmus tests for legislative actions and its own decisions,[265] there is no considerable reason why it could not do so for these circumstances as well. The Court would be well within its limits of power to adopt here a Seventh Circuit decision that stated public acts of defamation inspired by racial prejudice are reasons to disbar a judge, which could easily be expanded to include generally racially prejudiced remarks as well.[266]

Overall, any decision made by the Supreme Court would be helpful in regulating immigration cases in a judicial setting, even if it were not ideal or particularly lenient towards asylum seekers or refugee status seekers.

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[264] Jolie McCullough, *Judge in Texas Border Crackdown Accused of Using Racist Slur Against Migrants*, THE TEXAS TRIBUNE (August 22, 2022), https://www.texastribune.org/2022/08/22/texas-migrant-judge-racist-slur/.

[265] *See generally Abbott Labs v. Gardner*, 387 U.S. 136 (1967) (creating a two-part test for determining FDA authority to make regulations); *Spinelli v. United States*, 393 U.S. 410 (1969) (creating a two-part test for demonstration of probable cause); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (creating a three-part test for determination of standing to sue); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing a three-part test for determining violations of the First Amendment's establishment clause); *Schenck v. United States*, 249 U.S. 47 (1919) (developing the 'clear and present danger' test that limits free speech in specific instances); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (stating that the Court can create a litmus-paper test if necessary, but choosing not to in this instance); *Rakas v. Illinois*, 439 U.S. 128 (1978) (acknowledging a litmus-paper test for Fourth Amendment rights); *Davis v. Bandemer*, 478 U.S. 109 (1986) (arguing that *Baker v. Carr*, 369 U.S. 186 (1962) created an "ad hoc litmus test").

[266] *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979).

Conclusion

Originally, this project intended to show concretely how post-9/11 Crimmigration policies were at fault for many of the harms that LAI women face when seeking asylum or refugee status in the United States. However, as my research and writing progressed, it quickly became clear that this really was not the case at all. Certainly, post-9/11 policies that allow for the detention and exclusion of asylum-seekers—such as Operation Liberty Shield and Title 42—and post-9/11 policies which make any contact with law enforcement incredibly dangerous for undocumented immigrants—such as the policies greenlit by the decision in *Arizona v. United States*—have caused irreparable harm to countless women. Nonetheless, these policies are not the cause of the harm, nor do they necessarily make up the majority of the policies that harm LAI women seeking asylum and refugee status in the United States. The harms that LAI women face during these processes come not from mere decades of policy and precedent, but of centuries of it. Some of these policies come from traditions which are older than the United States itself, such as the case with governmental refusal to aid women in domestic violence situations. An understanding of this long-standing tradition must also be coupled with an understanding of the long-standing xenophobia that plagues the United States and is built into our foundational legal systems. 9/11 undoubtedly worsened this xenophobia and hatred, but it was never the cause of it. An intersectional approach to these issues demands that both factors—misogyny and xenophobia—be taken into consideration if the fundamental issues are ever to be fully addressed.

The problems I outline in Chapter 2 are a brief overview of some the issues that all immigrants and asylum-seekers face in a post 9/11 world but are in no way indicative of all of the issues that are faced by these people, nor are they fully comprehensive of the issues caused solely by post-9/11 policies. Those problems outlined in Chapter 3 follow the same pattern, offering a general outline and overview of the issues of gender and asylum seeking and refugee

status, but they are by no means inclusive. The dicta discussed is undoubtedly not exhaustive, and I do not believe that any project could ever truly be an exhaustive analysis of this language and its implications, if only because of the sheer number of cases that one would have to sift through. The solutions I suggest in Chapter 4 are not an end all, be all solution, but merely a Band-Aid while we shift the foundations of our legislation and our culture to better align with the purported ideals of our nation and will undoubtedly not cover every possible outcome or problem.

Appendix A: HRRC Materials

Table of Contents

HUMAN RESEARCH REVIEW COMMITTEE (HRRC)

APPLICATION FOR THE REVIEW OF HUMAN RESEARCH

Directions: Please complete Sections I - IV. If you have any questions, contact the HRRC Chair. Return **one electronic copy for review** of the completed application and attachments to the HRRC Chair **at least 14 working days** before the next meeting date. If any question below is irrelevant to the research proposal, note this by entering "Not Applicable." This application and its attachments (Protocol) will be returned without review if this form is not **COMPLETE AND TYPED.**

SECTION I: TYPE OF REVIEW—PLEASE CHECK ONE (Refer to Attached Appendix I for definitions of these categories)

X **Expedited Review** (Common examples include: research that involves some deception or experimental manipulation; research that includes collecting voice, video, digital, or image recordings; survey or other research that seeks personally sensitive information; non-invasive clinical, medical, or sports-training research. In all cases, Expedited Review is possible only when there is **no more than minimal risk** to the participants.)

☐ **Full Board Review** (Common examples include: experimental manipulation that involves more than minimal risk to participants; research involving assessment of sensitive aspects of participants' behavior, which may include sexual behavior, drug use or illegal conduct. In all cases, Full Board Review is required when **there is more than minimal risk** to participants.)

SECTION II:

	Name	**Phone Extension**	**E-mail Address**
Principal Investigator	Ashleigh Breske	540 362 6584	BreskeAM@hollins.edu
Investigator #2	Manuel Portillo	540 362 6280	PortilloJM@hollins.edu
Investigator #3	Kaley "Kaye" Wood	N/A	Woodka1@hollins.edu

Investigator #4 _____ _____
_____

Principal Investigator's *Division*: II

Principal Investigator's *Department*: Political Science, International Studies, Religious Studies, Environmental Studies/Environmental Science, First-Year Seminars

Sponsor (if funded)
_____

Site of Work: Roanoke, VA, Winston-Salem, NC, and El Paso, TX.

Title of Project: Why Are We Not Worthy of Saving? Latin American Immigrant Women's Experiences with Post 9/11 Crimmigration Policies in the US. / ¿Por qué no somos dignos de salvar? Las experiencias de las mujeres latinoamericanas con las policías de "Crimmigration" después de 9/11 en los Estados Unidos

6. Proposed dates for data collection. Begin date: 10/01/2022 End date: 04/01/2023.
7. Principal Investigator is: X Faculty ☐ Staff

Investigator #2 is: X Faculty ☐ Staff ☐ Graduate Student ☐ Undergraduate Student

Investigator #3 is: ☐ Faculty ☐ Staff ☐ Graduate Student X Undergraduate Student

Investigator #4 is: ☐ Faculty ☐ Staff ☐ Graduate Student ☐ Undergraduate Student

8. This application is for a(n): X New Project ☐ Extension of previously approved project
☐ Amendment to previously approved project

If this application is for an *extension of a previously approved project* or an *amendment to a previously*
approved project please indicate the <u>research</u> <u>number</u> assigned to that project on the line provided.

_____

9. Age Range of Participants: 18+

10. Type of Participant: ☐ Hollins University Student X Adult non-student ☐ Minor
☐ Other (describe)_____

11. Participants: ☐ Volunteer X Other (describe): Volunteers who are immigrants into the US. As such, they could potentially have limited civil freedoms. However, this may not be the case, depending on how far along in the immigration process they are.

☐ Individuals with special needs (e.g., mentally disabled, individuals with limited civil freedom)

12. Estimated total # of participants: 5-10
Estimated # of Treatment participants (If Applicable):_____
Estimated # of control participants (If Applicable):_____

13. What is the expected duration of research participation for the participants? (e.g., if participation lasts only 30
minutes, please write '30 minutes' below)

The interviews will range anywhere from 15 minutes to over an hour, depending on how long the person is willing to talk and explain their circumstances.

SECTION III: Directions: Please check the appropriate response for questions 14-17 and, in a ***total of no more than four pages,*** please answer the questions 18-23. Please be brief and concise in your responses to each of these questions. Failure to respond to any questions will cause significant delays in the processing of this application.

☐ **Yes** X **No** **14**. Will participants receive payment or extra credit point compensation for
participation? If yes, detail amount, form, and conditions of award.

☐ **Yes** X **No** **15**. Was this proposed project initiated by a researcher at another institution? If yes, indicate
cooperating institution and attach copy of approval letter from that institution. (e.g.
Copy of institution's HRRC approval, copy of approval letter from school board, etc.)

☐ **Yes** X **No** **16**. Does this project involve investigator(s) at another institution? If yes, identify investigator(s) and
institution and attach copy of agreement to cooperate.

☐ **Yes** X **No** **17**. Will the participants be deceived, misled, or have information about the project
withheld? If so, identify the information involved, justify the deception, and describe
the debriefing plan if there is one.

18. Describe the objectives and significance of the proposed research.

The goal of the research is to show how Latin American Immigrant women are harmed alarmingly often by the United States' immigration policies following the terror attacks on 9/11. I want to interview Latin American Immigrant women who have gone through the refugee process or the asylum-seeking process, and/or Latin American Immigrant women who are attempting to go through the refugee process or the asylum-seeking process.

19. Describe methods for selecting participants and assuring that their participation is voluntary. Indicate whether participants will be selected for participation on the basis of specific characteristics (e.g., sex, age, ethnic origin, religion, social and economic characteristics, or disabilities) and provide a rationale and justification for the selection process. Attach a copy of the consent form that will be used. If no consent form will be used, explain the procedures used to ensure that participation is voluntary. (See example Consent Form attached)

Participants will be chosen through a variety of factors. They will be chosen by gender, age, ethnic background, and social status and/or legal status. I will choose only people who identify as women who are above the age of 18 and who are considered immigrants into the United States from Latin American countries who are seeking refugee status or asylum in the United States. The justification for these selections is that my project focuses only on Latin American Immigrant women seeking refugee status or asylum in the United States.
To ensure that participants are participating voluntarily, I will ask them if they are interested in being interviewed and explain to them that the interview process is voluntary, and that they do not have to answer all questions if they do not wish to. I will have copies of the consent forms in both Spanish and in English.

20. Describe the details of the participation procedures that relate to the participant. Attach copies of all questionnaires or test instruments (include as Appendices to this application package).

I will ask participants a series of questions relating to their experiences as immigrants seeking asylum or refugee status in the United States. Questions will include where they are from, when they began the process, and how the process is going at this point.

21. Describe the methods that will be used to ensure the confidentiality of all participants' identities and the stored data. Confidentiality of data is required.
All information will be kept either physically locked or in password-protected folders on the researcher's computer(s) only. Audio recorded interviews will be transcribed and then the audio recordings themselves will be deleted to ensure that no voice recognition is possible. Any personal identifying information will be removed from the transcripts of the interviews to ensure that no information that is traceable is published.

22. Describe the risks to the participants and precautions that will be taken to minimize those risks. Risk goes beyond physical risk and includes risks to the participant's dignity and self-

respect, as well as psychological, emotional, employment, legal, and/or behavioral risk. (Note: There is always minimal risk(s) associated with a project.) Include as an appendix to this application Human Participant Protection Education for Research Teams Training Module Completion Certificates for all investigators involved in the proposed project. (This training module can be found at http://cme.cancer.gov/clinicaltrials/learning/humanparticipant-protections.asp)

The potential risks associated with this project are incredibly minimal. The primary risk is law enforcement potentially having access to this information if there was to be a specific subpoena for this information. At such a time, however, there would likely only be evidence of the signed consent forms as well as transcribed audio recordings which would remove any personal identifying information. No questions regarding legality are asked in these interviews for the specific purposes of ensuring that even if there was a subpoena, there is no way that the participant would be potentially held liable for any admissions of criminal activity. The secondary risk is the potential mental anguish that could occur when discussing events that have taken place in the past for them, particularly those events which led to them immigrating into the US and seeking refugee status or asylum. As such, it will be made abundantly clear to participants that their answers to questions, how much they answer, or even if they choose to answer a specific question, is all up to them. There is no requirement that once they agree to be interviewed, they have to answer every question.

23. Describe the benefits of the project to science and/or society. Also describe benefits to the participant if any exist. The HRRC must have sufficient information to make a determination that the benefits outweigh the risks of the project.

Unfortunately, there will not be any benefits to the participant, unless they view sharing their story as a benefit. This project will benefit society by demonstrating just how harmful the US immigration policies are towards Latin American Immigrant women and intends to shine a light on where these processes are failing or need to be redone.

Consent Form

1) Title of Research Study: Why Are We Not Worthy of Saving? Latin American Immigrant Women's Experiences with Post 9/11 Crimmigration Policies in the US. / ¿Por qué no somos dignos de salvar? Las experiencias de las mujeres latinoamericanas con las policías de "Crimmigration" después de 9/11 en los Estados Unidos

2) Investigator(s): Dr. A. Breske, Dr. M. Portillo, Kaye Wood.

3) Purpose: The purpose of this research study is to show how Latin American Immigrant women are harmed alarmingly often by the United States' immigration policies following the terror attacks on 9/11. I will interview Latin American Immigrant women who have gone through the refugee/asylum seeking process, and/or Latin American Immigrant women who are attempting to go through these processes.

4) Procedures: To participate in the current study, you must:

1. Be 18 years of age or older.
2. Identify as, or be classified by your government as, a woman.
3. Be from a Latin American Country (i.e. from one of the following: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, French Guiana, Paraguay, Peru, Suriname, Uruguay, Venezuela, Cuba, the Dominican Republic, or Haiti.)
4. Have gone through, or are currently going through, the process of immigration into the United States either as an asylum-seeker or as a seeker of refugee status. Temporary Protected Status (TPS) does not qualify.

If you choose to participate in this study, the interview will be conducted under a pseudonym, so no information that is traceable to you will be given to anyone. These interviews will be audio recorded, but no one except the researcher will have access to these audio recordings. These recordings will be transcribed, and any identifying information will be removed before they are used in any capacity for the project. These interviews consist of 15 questions and may take anywhere from 15 minutes to over an hour, depending on how much information you share and if you choose to answer all of the questions. *.Answering questions is voluntary, and if you do not wish to answer a question you do not have to. There will be no punishment or repercussion for refusing to answer a question or for deciding to stop the interview at any point.* **None of this information will be shared with law enforcement without a subpoena which requires it.**

5) Risks: The risks associated with this project are minimal. No personal identifying information will be available to anyone on record. The only personal identifying information that will be given is through the signing of this form. Any information given will not be shared with law enforcement, ICE, or any other immigration services unless required by a specific subpoena. Once the interviews have been transcribed, the audio recordings will be deleted so that not even your voice remains on file for any potential identification purposes. The researcher recognizes that this is a sensitive subject, and the legal system and immigration enforcement are stacked against

immigrants, which is why the researcher will go through great lengths to ensure that no personal identifying information is kept. The information shared is potentially triggering and may cause mental anguish. Should you need assistance in dealing with this mental anguish or trauma, you can text "HOLA" to 741741 for assistance in Spanish, or "HOME" to 741741 for assistance in English.

6) Benefits: There will likely be no concrete benefits to the participants in this research study, other than the chance to share their story. However, it will help to show the necessity of substantive legal change in the immigration, refugee seeking, and asylum-seeking processes in the United States.

7) Data Collection & Storage: All information provided will be kept confidential. Interviews will be recorded on an audio recording device that is kept in a locked box at all times that it is not being used. Only the researcher will have access to the code to open this box. All participants will provide pseudonyms for interviews and no personal identifying information will be kept on record with the exception of the consent form. Results of interviews will not be released or reported in any way that might allow for the identification of individual participants. All information will be kept confidential, unless otherwise required by law (i.e.: a specific subpoena).

8) Contact Information: For related problems or questions regarding your rights as a participant, the Chair of the Human Research Review Committee at Hollins University, Caroline Mann, can be contacted at (540) 362-6238. For other questions about the study, you should call the principal investigator, Ashleigh ML Breske at (540) 818-6134, or the researcher, Kaye Wood at (336) 521-3987.

9) Consent Statement: I have read or had read to me the preceding information describing this study. All my questions have been answered to my satisfaction. I am 18 years of age or older and freely consent to participate. I understand that I am free to withdraw from the study at any time. I have received a copy of this consent form.

Participant Name: _____

Signature of Participant:_____
Date: _____

Signature of Investigator: _____
Date: _____

Appendix A-1: Interview Questions in English

English Questions for those actively in the process of immigration

1. Is it okay if I audio record this interview, knowing that this audio recording will not be seen by anyone other than myself?
2. Where are you originally from?
3. When did you begin the process of attempting to immigrate into the United States?
4. Why have you come to the United States?
5. Are you immigrating into the United States seeking refugee status or seeking asylum?
6. How long have you been in the process of immigrating, seeking refugee status, or seeking asylum?
7. Has anyone explained to you the processes of seeking refugee status or seeking asylum in the United States?
    a. If they are working with a refugee organization: Before [organization name] began helping you, had anyone explained to you the processes of seeking refugee status or seeking asylum in the United States?
8. Have you attempted to come into the United States before?
    a. If yes: Have you been deported before?
        i. If yes: On what grounds were you deported?
9. Have you considered other avenues to enter the United States, such as regular immigration?
10. How have you been treated in your immigration process so far?
11. Did you/do you have access to affordable legal counsel?
12. If they are involved in a refugee program: Do you know of others who have attempted to immigrate into the United States seeking refugee status or seeking asylum that did not have the help of [organization]? Do you know if or how their processes were any different?
13. Do you have a plan for what you will do if you do receive asylum or refugee status?
14. What are you afraid of happening to you if you do not receive asylum or refugee status?
15. Are you hopeful about your immigration process?

English Questions for those who have been granted asylum or refugee status

1. Is it okay if I audio record this interview, knowing that this audio recording will not be seen by anyone other than myself?
2. Where are you originally from?
3. When did you immigrate into the United States?
4. Why did you come to the United States?
5. Did you immigrate into the United States seeking refugee status or seeking asylum?
6. How long did your process of seeking refugee status or seeking asylum take?
7. Did anyone explain to you the processes of seeking asylum or seeking refugee status before you began those processes?
8. Did you work with any refugee organizations?
9. Did you ever consider other avenues to enter into the United States, such as regular immigration?
10. How were you treated during your immigration process?
11. Did you attempt more than once to enter the United States?
    a. If yes: were you deported at any time?
        i. If yes: on what grounds were you deported?

12. Did you have access to affordable legal counsel?
13. If they were involved in a refugee program: Did or do you know of others who attempted to immigrate into the United States seeking refugee status or seeking asylum that did not have the help of any organization? Do you know if or how their processes were any different from your own?
14. Did you have a plan for what would happen if you received asylum or refugee status? How has that plan changed since you've been granted asylum or refugee status?
15. What were your fears about what would happen if you didn't receive asylum or refugee status?
16. What would you change about your immigration process if you could change anything about it?

English Questions for those who work with refugees and asylum seekers

1. Is it okay if I audio record this interview, knowing that this audio recording will not be seen by anyone other than myself?
2. How long have you been working with refugees or asylum seekers?
    a. If they have been working with refugees and asylum seekers since before 9/11: what has changed about the processes of refugees and asylum seeking in your experiences since the terror attacks on 9/11?
3. What is the most common reason that Latin American women seek asylum or refugee status, from what you have seen and experienced in your work?
4. What do you think is the hardest part of the immigration process for women who are asylum seekers or refugees?
5. How long does it usually take someone to get asylum or refugee status, in your experiences?
6. What's the longest you've seen an asylum case or refugee status case go on, that you can remember?
7. What fears do you see most often in Latin American women who are seeking asylum or refugee status in the United States? What scares them about going back to their home countries the most?
8. How hard is it to explain the laws and processes surrounding immigration, asylum seeking, and refugee status to people who are coming to your organization for help?
9. What do you think refugees and asylum seekers need most?
10. If you could change anything about the immigration, refugee, and asylum-seeking system in the United States, what would it be? Why?

Appendix A-2: Interview questions in Spanish

Spanish Questions for those actively in the process of immigration

1. ¿Está bien si grabo en audio esta entrevista, sabiendo que esta grabación de audio nunca será vista por nadie más que yo?
2. ¿De dónde es originalmente?
3. ¿Cuándo comenzó el proceso de intentar inmigrar a los Estados Unidos?
4. ¿Por qué viniste a los Estados Unidos?
5. ¿Está inmigrando a los Estados Unidos en busca de estatus de refugiado o en busca de asilo?
6. ¿Cuánto tiempo ha estado involucrado en el proceso de inmigración, búsqueda del estatus de refugiado o solicitud de asilo?
7. ¿Alguien le ha explicado los procesos de búsqueda del estatus de refugiado o de asilo en los Estados Unidos?
    a. Si están trabajando con una organización de refugiados: Antes de que (nombre de la organización) comenzara a ayudarle, ¿alguien le había explicado los procesos para solicitar estatus de refugiado o solicitar asilo en los Estados Unidos?
8. ¿Ha intentado venir a los Estados Unidos antes?
    a. En caso afirmativo: ¿ha sido deportado antes?
        i. En caso afirmativo: ¿Por qué motivos fue deportado antes?
9. ¿Ha considerado otras vías para ingresar a los Estados Unidos, como la inmigración regular? ¿Por qué?
10. ¿Cómo ha sido tratado en su proceso de inmigración hasta ahora?
11. ¿Tenía/tiene acceso a un aseso jurídico asequible?
12. Si están involucrados con un programa de refugiados: ¿Conoce a otros que han intentado inmigrar a los Estados Unidos buscando el estatus de refugiado o buscando asilo que no tuvieron la ayuda de (la organización)? ¿Sabe si sus procesos fueron diferentes?
13. ¿Tiene un plan para lo que sucede si recibe asilo o estatus de refugiado?
14. ¿Qué cree que se sucederá si no recibes asilo o estatus de refugiado?
15. ¿Tiene esperanzas sobre su proceso de inmigración?

Spanish Questions for those who have been granted asylum or refugee status

1. ¿Está bien si grabo en audio esta entrevista, sabiendo que esta grabación de audio no será vista por nadie más que yo?
2. ¿De dónde es originalmente?
3. ¿Por qué viniste a los Estados Unidos?
4. ¿Inmigró a los Estados Unidos buscando estatus de refugiado o buscando asilo?
5. ¿Cuánto tiempo tomó su proceso de búsqueda de estatus de refugiado o solicitud de asilo?
6. ¿Alguien le explicó los procesos de solicitud de asilo o de búsqueda de la condición de refugiado antes de comenzar esos procesos?
7. ¿Trabajó con alguna organización de refugiados?
8. ¿Alguna vez ha considerado otras vías para entrar a los Estados Unidos, como la inmigración regular? ¿Por qué?
9. ¿Cómo le trataron durante su proceso de inmigración?
10. ¿Intentaste entrar más de una vez en los Estados Unidos?
    a. En caso afirmativo: ¿Fue deportado en algún momento?
        i. En caso afirmativo: ¿Por qué motivo fue deportado?
11. ¿Tuvo acceso a asesoría legal asequible?
12. Si estaban involucrados en un programa de refugiados: ¿Sabía usted, o sabe usted, de otros que intentaron inmigrarse en los Estados Unidos buscando la condición de

refugiado o buscando asilo que no tenían la ayuda de una organización? ¿Sabe si sus procesos eran diferentes de los suyos?
13. ¿Tenía usted un plan para lo que sucedería si recibiera asilo o la condición de refugiado? ¿Cómo ha cambiado ese plan desde que se le ha concedido la condición de refugiado o asilo?
14. ¿Cuáles eran sus temores sobre lo que sucedería si no recibiera asilo o la condición de refugiado?
15. ¿Qué cambiaría sobre su proceso de inmigración, si pudiera cambiar algo al respecto?

Spanish Questions for those who work with refugees and asylum seekers

1. ¿Está bien si grabo en audio esta entrevista, sabiendo que esta grabación de audio no será vista por nadie más que yo?
2. ¿Cuánto tiempo ha estado trabajando con refugiados y solicitantes de asilo?
    a. Si ha estado trabajando con refugiados y solicitantes de asilo desde antes del 9/11: ¿qué ha cambiado sobre los procesos de refugiados y asilo en sus experiencias desde los ataques terroristas del 9/11?
3. ¿Cuál es la razón más común por la que las mujeres latinoamericanas buscan la condición de refugiado o asilo, basándose en lo que usted ha visto y experimentado en su trabajo?
4. ¿Cuál cree que es la parte más difícil del proceso de inmigración para las mujeres que buscan asilo o refugiados?
5. ¿Cuánto tiempo toma generalmente alguien conseguir asilo o la condición de refugiado, en sus experiencias?
6. ¿Cuál es el más largo que usted ha visto un caso del asilo o de la condición de refugiado que va encendido, que usted puede recordar?
7. ¿Qué temores ve con más frecuencia en mujeres latinoamericanas que tienen asilo o condición de refugiado en los Estados Unidos? ¿Qué es lo que más les asustan a la hora de volver a sus países de origen?
8. ¿Cuán difícil es explicar las leyes y los procesos de inmigración, solicitud de asilo y estatus de refugiado a las personas que vienen a su organización en busca de ayuda?
9. ¿Qué cree que más necesitan los refugiados y los solicitantes de asilo?
10. Si pudiera cambiar algo sobre el sistema de inmigración, refugiados, y la solicitud de asilo en los Estados Unidos, ¿qué sería? ¿Por qué?