2020

Asylum as an Extension of the Biopolitical State: An Analysis of US Sexual Orientation-Based Asylum Cases

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A thesis presented by Abigail Ferland to the Gender, Sexuality, and Intersectionality Studies Department in partial fulfillment of the requirements for the degree of Bachelor of Arts

Connecticut College May 2020

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Abstract

Since 1990 when formal immigration exclusion based on sexual orientation ended in the United States, gay men have been seeking protection from persecution in the form of asylum. While it is a sign of progress that asylum protections have been broadened to include those facing persecution based on their sexual orientation, my research into gay men's asylum cases demonstrates that the asylum system persists in systematically discriminating against queer people by putting them in a double bind: if they are not considered to be "recognizably gay" by the courts, they are deemed not open to persecution and thus denied asylum; meanwhile if they are openly gay and participate in activities associated with the queer community, they are considered to blame for putting themselves at risk. Given the biopolitical goal of the state to mitigate threats to its population and maintain control over national boundaries, determining the authenticity and innocence of asylum seekers becomes a focus of asylum adjudication, especially for gay applicants. The courts have operationalized the notion of an “authentic gay victim” against which applicants are measured. However, this figure is an idealized and virtually unattainable goal, as it was built on misconceptions and stereotypes surrounding gender and sexual orientation and is accompanied by a resistance to viewing gay men as innocent victims. Homophobic bias and the devaluing of queer and/or criminalized lives continue to pervade asylum, resulting in a system that does not take seriously the experiences of gay men who have survived homophobic persecution. A major shift in how the state conceptualizes which lives are worthy of protection is necessary in order to ensure that the asylum works not as an exclusionary mechanism, but as a system that ensures everyone has the right to a future free from violence.

Abbreviations

AIDS: Acquired Immunodeficiency Syndrome
APA: American Psychological Association
BIA: Board of Immigration Appeals
CAT: Convention Against Torture
DHS: (United States) Department of Homeland Security
DSM: Diagnostic and Statistical Manual of Mental Disorders
HIV: Human Immunodeficiency Virus
ICE: Immigration and Customs Enforcement
ICR: Intergovernmental Committee on Refugees
ICRA: Immigration Reform and Control Act
IIRIRA: Illegal Immigration Reform and Immigrant Responsibly Act
IJ: Immigration Judge
INA: Immigration and Nationality Act
INS: Immigration and Naturalization Service
IRO: International Refugee Organization
LGBTQ: Lesbian, Gay, Bisexual, Transgender, and Queer
LPR: Lawful Permanent Residency (AKA green card)
MPSG: Membership in a Particular Social Group
NGO: Non-Governmental Organization
PSC: Particularly Serious Crime
RAIO: Refugee, Asylum, and International Operations Directorate
SOGI: Sexual Orientation and Gender Identity
UDHR: Universal Declaration of Human Rights
UN: United Nations
UNHCR: United Nations High Commission on Refugees
USC: United States Code
USCIS: United States Citizenship and Immigration Services
USRAP: United States Refugee Admission Program

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Introduction

In 2005, 15 years after sexual orientation was first accepted as a grounds for asylum in the landmark case *Matter of Toboso-Alfonso*, a United States immigration judge denied protection to Guyanese asylum seeker Peter Conrad Ali in part because of his opinion that "violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people" (Ali v Mukasey 2008, 14). The judge pervieved that Ali's two identities – the criminal and the homosexual - were incompatible. On the basis of this incompatibility, the judge believed that Ali was unlikely to be tortured if he was returned to Guyana as he would not be recognized as either a criminal deportee or a gay man. This case is a prime example of the ways in which the asylum system relies upon flat, stereotypical constructions of criminality and sexuality as mechanisms for determining who can be considered an authentic victim deserving of protection, and in the case of Ali, who can not. My study of gay men's asylum claims illuminates how courts' limited understandings of gender and sexuality inhibit the ability of gay men to successfuly navigate the asylum system and gain protection from homophobic violence.

The asylum system is a regulatory mechanism that serves to determine who can be incorporated into the nation on the basis that they are a true, innocent victim of persecution and thus are deserving of protection. In asylum claims based on sexual orientation, being perceived as an authentic victim is a near impossibility. Courts are plagued by stereotypes, contradicting expectations, and an unwillingness to see queer asylum seekers as truly innocent, a factor that is compounded when asylum seekers have criminal records due to criminal bars to asylum. The US asylum system is unwilling to recognize many queer people as victims in part because of the

association of queer folks with deviancy and criminality. These biases result in an asylum process that favors only those who conform most closely to the epitome of an ideal victim – a standard shaped by intersecting histories and understandings of migration and queerness in the United States. Those who the courts are unwilling to recognize as victims are constructed as threats, and subsequently face legal and discursive mechanisms designed to structurally exclude them from the nation. In this way, the asylum system functions as an extension of the state's bio- and necropolitical powers to determine who should be incorporated into the United States and whose lives are not worthy of protection.

Thesis Overview

The goal of this thesis is to understand how victimhood is constructed and understood in the context of gay men asylum seekers, and the implications of this construction for those who are not deemed to have been sufficiently victimized. I provide explanations as to why authenticity and lack of criminality have become central pillars of queer victimhood in the context of asylum. The unwillingness of the asylum court system to recognize gay asylum applicants as deserving of protection results in part from the intersection of discourse surrounding migration and constructions of queerness in the US.

Chapter one consists of an in-depth history of immigration read through an intersectional lens focusing on dynamics that are pervasive throughout the court cases at hand. It starts with an analysis of the early conceptions of asylum and refuge in the US as evidenced by archived presidential speeches in order to better understand how asylum and refuge moved from discourse to formal legal aspects of our immigration system. The main focus of this chapter is the evolution of the laws and policies surrounding immigration, which serves to provide a

foundational understanding of how our immigration system was built, how it has evolved, and what assumptions and expectations continue to be prevalent and are left unproblematized. This chapter emphasizes relevant moments and themes, including discussions of criminality, authenticity, victimhood, and sexual orientation-based exclusion. I utilize my theoretical framework of biopolitics, necropolitics, and homonationalism as a basis for unraveling and explaining the dynamics of immigration legislation and its impacts.

The second chapter focuses on the ways that courts challenge or call into question the authenticity of asylum seekers and seeks to understand why these dynamics are present. As the main function of the asylum system is to decide who has been correctly and sufficiently victimized in order to determine who is deserving of protection by the United States, the ability of applicants to conform to nearly impossible expectations of victimhood is a central aspect of a successful asylum claim. This chapter highlights how the courts treat effeminacy in gay men as nearly a necessary prerequisite for being deemed authentically and credibly gay. However, this chapter discovers that seemingly conforming to constructed ideals of queer victimhood does not ensure protection, as there is a systematic unwillingness of immigration judges to acknowledge queer victimization as a legitimate form of persecution worthy of protection.

The third chapter focuses on the intersection of criminality, victimhood, and asylum. This chapter utilizes the framework of the victim/criminal binary to explain why criminality is a major bar for asylum, with the goal of explaining why courts understand criminality as inherently incompatible with queer victimhoods. As a central aspect of biopolitics is the prevention of risk or threats to the population, being incorporated into the nation through asylum is conditional upon not being viewed as threatening. This chapter investigates what happens to those

individuals who have committed crimes deemed to be "particularly serious" and are thus excluded from the same level of protection and support available for asylum seekers without criminal histories. In some instances, criminality combined with other identities and statuses results in individuals being relegated to necropolitical "death worlds" manifested as indefinite detention. This chapter explains the processes behind why and how criminal status is both legally and discursively constructed as the antithesis to victimhood, and how this construction has shaped the adjudication of sexual orientation-based asylum claims.

The conclusion explores the broader implications of this research and looks towards a future where the expansion of biopolitical inclusion is possible. In this section I acknowledge the activism and work that has made possible the immense progress of sexual orientation-based asylum in the 30 years since sexual orientation was removed as a bar to immigration and was first considered a grounds for asylum. I also highlight what I see as the major systemic issues continuing to pervade sexual orientation-based asylum adjudication that will need to be addressed in the future. While it is a sign of progress that our immigration laws are no longer actively homophobic and that asylum has been expanded to include protection for those experiencing homophobic and transphobic persecution, my research evidences that the asylum process is far from truly accepting of queer folks. The asylum system continues to work as a mechanism of biopolitical control, creating an impossible standard where only those who are recognized as unquestionably innocent non-biopolitically threatening victims are seen as deserving of a future free from violence. Homophobic bias and the devaluing of queer lives continue to pervade asylum, resulting in a system that does not take survivors of violence seriously and continuously downplays or dismisses physical and sexual abuse. The goal of the

asylum system should not be to incorporate only those are deemed to be worthy of biopolitical inclusion in the nation. This system should rather work towards creating opportunities for a future free from violence for all, which will require a major shift in how the state conceptualizes which individuals are worthy of life.

Authenticity

In 1980, Congress signed into law the Refugee Act of 1980, codifying the 1951 Convention on the Status of Refugees' definition of a refugee into US law. According to this convention, a refugee is someone who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…. (UN General Assembly 1951).

Implementing this definition into US law presumably ended the practice of granting blanket refugee status to anyone that fell within a group of concern (Anker 1990, 79). Instead, refugee status designation was shifted towards evaluating each individual applicant's claim against the newly implemented refugee definition, meaning that every person applying for refuge or asylum must demonstrate to immigration officials that they have suffered persecution based on one of the protected grounds (Macekura 2011, 358). While there were still legal mechanisms like Extended Voluntary Departure (EVD) that allowed amnesty to be extended to entire groups of people, on the whole the 1980 act marked a shift in the US immigration system to evaluating claims on an individual basis (Macekura 2011, 358). The individual approach to asylum and refugee status determination creates a process where the credibility and authenticity of each

individual applicant is called into question, as the goal of the system is to determine who is a "real victim" deserving of protection.

Many scholars writing on refuge and asylum, particularly those concerned with Sexual Orientation and Gender Identity (SOGI) applicants, have themes surrounding authenticity woven through their works. It is clear that perceived authenticity plays a major role in either uplifting or discrediting certain categories of people. There is a certain skepticism surrounding asylum seekers in particular, leading many scholars to discuss the concept of a "bogus" asylum seeker, who is merely using the asylum system to gain access that they would otherwise be denied (Souter 2011; Sales 2002; Berry et al 2016; Lynn and Lea 2003; Zagor 2015). This idea of bogusness turns on the presumption that rather than being "genuine refugees," like those granted convention status, many asylum seekers are merely economic migrants and therefore undeserving of asylum (Souter 2011, 48). In contrast to a refugee, the asylum seeker has a more negative connotation and is surrounded by assumptions of neediness and the potential to be a burden (Bleiker et al 2013, 400). It is important to note that the media plays a role in spreading this discourse – particularly in the transnational right-wing press (Berry et al 2016, 15). Lynn and Lea have found that the idea of bogus or illegitimate asylum seekers is so widespread in the United Kingdom that it no longer needs to be substantiated or explained to be understood, it is seen as common knowledge (Lynn and Lea 2003, 433). This idea that many asylum seekers are illegitimate has been a major justification for restrictive immigration policies, including Trump's Migrant Protection Protocols, more commonly known as the "remain in Mexico" policy. The US Department of Homeland Security's webpage on the Migrant Protection Protocols references "fraudulent" asylum claims three times, claiming that "fraudulent asylum claims [are] making it

harder for the U.S. to devote appropriate resources to individuals who are legitimately fleeing persecution," further solidifying the distinction between "bogus" and "legitimate" asylum seekers (USDHS 2019).

The distinction between bogus and legitimate asylum seekers also draws on assumptions of criminality in the former group. Significantly, constructions of migrants are highly racialized, with white European refugees positioned as most deserving, while Mexican immigrants are foundationally criminalized and thus positioned as illegal and undeserving of entrance (Ngai 2004, 248). This preference reflects longstanding histories of colonization and conflict in the United States, but also reflects global attitudes towards migrants. Press coverage of refuge and asylum in several European countries ties the idea of an illegitimate, and therefore threatening, asylum seeker to current discourse surrounding border security (Berry et al 2015, 15). This construction of asylum seekers is used as justification for increasingly harsh policies. The assumption that at least some asylum seekers are not authentic throws suspicion onto asylum seekers as a category, placing them under particular scrutiny. This negative belief has implications for the extent of societal support for measures aimed at assisting asylum seekers and refugees, as well as impacting the processes of refugee status determination and asylum claim assessment themselves. In Britain in the late 90s and early 2000s, settlement of refugees was postponed on the basis that "genuine' refugees would be prepared to undergo a temporary period of hardship since the process would weed out 'bogus' claimants," (Sales 2002, 466). The sentiment here is reflected by the portrayal of Trump's Migrant Protection Protocols, where the Department of Homeland Security's webpage on the protocols argues that due to these policies "migrants with non-meritorious or even fraudulent claims will no longer have an incentive for

making the journey," (USDHS 2019). However, both the period of "hardship" or the risk of being returned to Mexico are much harder for those without personal wealth or connections, and thus could in fact weed out not "bogus" refugees, but those without access to resources, particularly single mothers with children. Excluding refugees based on ability to independently survive difficult situations ties into conceptions of refugees being seen as deserving/undeserving on the basis of their ability to contribute to the economy and be self-sufficient. Presuming the illegitimacy of asylum seekers and expecting that some asylum seekers are not genuine is intertwined with the concept of a "culture of disbelief" that many scholars argue surrounds refuge and asylum claims (Berry et al 2016; Souter 2011; Lewis 2013; Lewis 2014b; McPherson et al 2011; Heller 2009; Rollins 2009). This concept refers to the tendency of those involved in asylum and refuge decision making processes to refuse asylum on the basis of not believing the testimonies (Souter 2011, 48). This disbelief is upheld or justified by the concept of bogus asylum seekers (Souter 2011 , 48).

Asylum Barriers for Gay Men

In the context of sexual orientation based asylum claims, the culture of disbelief manifests in the courts challenging the authenticity of an applicant's identity. In order to be deemed credible, a requirement for gaining asylum, an applicant must prove their sexual orientation to the courts. In the UK, some gay men seeking asylum have gone as far as submitting pornographic visuals as evidence of their sexual orientation (Lewis 2014b, 959-960). This task of proving their identity and thus having their authenticity called into question can be difficult for asylum seekers, especially for those who do not conform to the judge's expectations of how someone holding their identity should look or act. Asylum officers and immigration

judges have an extreme amount of power in making asylum decisions, and their personal biases can taint the adjudication process. The process of adjudicating gay men's asylum cases is influenced by the judges and asylum officers stereotypical, US-centric, and white expectations of what it means to be part of the LGBTQ community (Heller 2009, 302; Rollins 2009, 520, Lewis 2013178-179). This results in a limited narrative being seen as more authentic, leaving those that do not conform to stereotypical expectations vulnerable to being deemed not credible. This dominant and assumed to be universal narrative is that of the white, western, effeminate, politically active gay man (Dawson and Gerber 2017, 305; 316; Llewellyn 2017, 684; Heller 2009, 302; Lewis 2013, 178). In an analysis of 191 published sexual orientation asylum claims, Cheryl Llewellyn discovers that those applicants who most closely resemble or appear to most closely resemble the stereotypical western gay man have greater asylum success rates than those with narratives that are not reflective of this stereotypical experience (Llewellyn 2017, 684). Further, gay asylum applicants of color have to contend with racialized and heterosexist sterotypes of men of their race or ethnicity that can conflict with dominant stereotypes of (white, effeminite) gay men, which becomes yet another barrier to being recognized as authentically gay (Morgan 2006, 149-150).

As a result of courts expecting conformity to a limited and US centric narrative, at some level individuals need to perform stereotypes to be taken seriously in an asylum case. While "covering," or downplaying aspects of identity and its expression, may be necessary to avoid persecution and discrimination, the asylum system's reliance on stereotypes to determine authenticity results in a pressure for asylum seekers to "reverse cover" or performatively highlight stereotypical expressions of identity (Heller 2009, 295; Berasi 2019). These competing

demands, covering to avoid persecution and reverse covering to be taken seriously and seen as authentic in asylum cases, create additional barriers for asylum seekers, particularly for those whose identities do not align with dominant and stereotypical expectations. The push for reverse covering has been found to have negative mental health consequences for the applicants (Berasi 2019). Additionally, the demand for reverse covering does not recognize that the need for covering might not end upon arrival to the US. While the narratives of rescue and protection by the 'progressive' US might lead to the conclusion that covering is no longer needed and the asylum seeker should feel free to perform their identity in a way that is authentic to themself, the reality is that covering or passing can be an essential survival mechanism in the United States. In 2018, there were 1,347 reported hate crimes against LGBTQ+ people, with the majority of incidents targeting gay men (Fitzsimons 2019). Further, this demand for reverse covering does not consider the wide range of identities, genders, and gender expressions, and does not take into consideration that the expectations of behavior and appearance are inherently based on gendered, raced, and classed stereotypes that do not reflect the reality of many asylum seekers.

Along with conforming to stereotypical expectations of identity, behavior, and appearance, a significant part of the asylum credibility assessment is having a coherent and legible life story that conforms to expectations and thus "confirms" the identity and authenticity of the applicant (Llewellyn 2017, 685). This expected life path is one that emphasizes the coming out narrative - realization of same-sex desire, exploration, acceptance, and most importantly coming and being 'out' to other people (Dawson and Gerber 2017, 309). The "coming out of the closet" narrative has been critiqued by scholars, as the binary of in/out of the closet that the narrative creates privileges being "out" as the necessary end goal without

acknowledging how the social position of an individual might make being "out" undesirable or unsafe (Klien et al 299-300). Further, the "coming out" narrative was built on and centers the experiences of white middle class gay men while ignoring the ways in which race and class influence experiences with and understandings of identity (Decena 2008, 339; Ross 2005, 175). In the case of Dominican immigrant men, the in/out binary does not recognize the potential to live a life without necessarily being verbally open about one's sexual orientation with family, but where there is some level of unspoken understanding (Decena 2008, 340). Privileging "outness" also does not recognize the challenges and discrimination that can come with being open about one's sexual orientation, including job and housing discrimination. For example, the US Fair Housing Act does not explicitly prohibit discrimination based on sexual orientaiton or gender identity (USHUD). Even within the US this "coming out of the closet" narrative does not adequately reflect the lives of many queer people. Utilizing this linear narrative as a marker of authenticity in asylum cases falsely assumes that the "closet" is a universal construction and ignores the ways in which understandings of sexuality and gender identity may differ cross-culturally.

Implicit in this expected life narrative is the assumption of active participation in and/or knowledge of LGBTQ community organizations and activism (Lewis 2013, 179; Dawson and Gerber 2017, 313). This expectation of political or community involvement is reminiscent of the original category of refuge – persecution based on political beliefs. It is notable that the expectations inherent to a political refuge claim are being mapped on to sexual orientation-based claims. This expectation indicates that, along with fitting the expected life narrative, conforming to the political model of refuge is an important factor in having a claim be taken seriously by the

courts. The continued influence of the political refugee model also explains why being out is such an emphasis of the expected narrative –being out is essentially a prerequisite for being openly political and targeted for one's politics or beliefs. However, those who are out and act as such by being involved in queer nightlife are in danger of being blamed for their own victimization.

Many queer migration scholars are critical of this expectation of a linear narrative of sexual and gender identity formation/development, as they challenge the idea that there is one linear path of sexual and gender identity development (Murray 2014, 455; Llewellyn 2017, 685; Dawson and Gerber 2017, 293; Lewis 2013, 178). Additionally, this linear life path does not account for complex realities and is particularly inaccurate at representing the experiences of lesbian and bisexual asylum seekers (Dawson and Gerber 2017, 309-310). Imbedded in this expectation of what an authentic queer life should look like the assumption that gay asylum applicants will not have participated in a typical heterosexual life, ie being married to someone of a different gender and/or having children with them, which is particularly damaging to lesbian and bisexual asylum applicants (Dawson and Gerber 2017, 313-314). It is notable that this expected life course, and the SOGI asylum process more broadly, does not recognize or make space for the potential of fluidity in sexual orientation and gender expression (Miller 2005, 138; Dawson and Gerber 2017, 311). This expectation of rigid identities stems in part from the immutability requirement, which can be fulfilled in two ways. The first is the innate characteristic category, which means that members of a 'particular social group' must share a characteristic or aspect of themselves that is inherent, cannot be changed – this is the category sexual orientation and gender identity are placed in. The second option for fulfilling the

immutability requirement is the characteristic fundamental to human dignity category – the members of a particular social group share a characteristic that is core to their human dignity and thus cannot be expected to be concealed. Categorizing SOGI claims under the fundamental to human dignity category would leave more room for fluidity in identities (Dawson and Gerber 2017, 311). However, as it currently stands the reliance on the innate characteristic aspect of immutability reinforces the linear life narrative and casts doubt on the authenticity of those who may have a more fluid gender identity or sexual orientation and those who may have engaged in relationships with someone of a different gender previously in their life.

Criminality

In order for the courts to determine that gay men asylum seekers are legitimate victims deserving of protection, there are underlying expectations that privilege a lack of criminal history. This expectation is a reflection of a larger societal phenomenon that prohibits criminalized people from being viewed as victims. The binary of criminality and victimization does not allow for a person to simultaneously be recognized as a victim and a criminal. This victim/criminal binary "was originally popularized, in part, to do the work of legitimizing increasingly putative criminal justice policies and to dramatize the desirability of expanding both the law enforcement and security industries" (Lewis 2014a, 43). This binary, as with most others, does not accurately reflect the complexity of reality. In fact, In the US, people with criminal histories are victimized at rates disproportionate to that of the general population (Berg et al 2013, 76). The implications of the binaristic distinction between victims and criminals is that for one to be a true victim one must never have committed a crime. This logic assumes that if you have committed a crime and are victimized it is your fault, and you do not deserve the same level

of protection from the state that 'true victims' do. This attitude is reflected in the fact that seven US states have policies barring those convicted of certain types of crimes from receiving money from victim's compensation funds if they themselves become victims (Santo 2018). The victim/criminal binary is pervasive both in the US and internationally, with both domestic and international immigration laws reflecting this binary's assumptions and negative consequences for people with both a criminal and victim past.

The victim/criminal binary has permeated through international refugee law, manifested in the "particularly serious crime" bars to asylum and related protections. One major aspect of refuge law is the principle of *non-refoulement*. This principle, as outlined in article 33 of the 1951 Convention Relating to the Status of Refugees, prohibits states from returning or deporting someone to a place where they would be persecuted based on one of the five protected grounds (race, religion, nationality, political opinion, or membership in a particular social group). However, a 1954 amendment introduced an exception to this rule – the principle of non-refoulement did not apply to those who had been convicted of a "particularly serious crime" and were considered a danger to the community (McGary 2010, 215-216). The 1980 amendment to the Immigration and Nationality Act adopted this international legal exception into US law, applying it to immigrants seeking withholding of removal from the country (McGary 2010, 217).

Forms of Protection
Sources: (Immigration Equality a; Immigration Equality B; Immigration Equality C; NOLO; USCIS 2018a)

	Asylum	Withholding of Removal under the Immigration and Nationality Act	Relief under the Convention Against Torture	
			Withholding of removal	Deferral of Removal

Filing Deadline	1 year after entering US	n/a	n/a	
Standard of Persecution	Well founded fear of persecution (>10% chance)	>50% chance of persecution	>50% chance of torture	
Government Involvement	Government instigated persecution or acquiesced	Government instigated persecution or acquiesced	Government instigated persecution or acquiesced	
Criminal Bars to Eligibility	Barred if committed particularly serious crime for asylum purposes	Barred if committed particularly serious crime for purposes of withholding under INA	Barred if committed particularly serious crime for purposes of withholding under CAT	No criminal bars to eligibility
Reason for Persecution	Must be because of one of the 5 protected grounds	Must be because of one of the 5 protected grounds	Not required to be because of a protected ground	
Benefits/ Rights	*Pathway for green card and citizenship *Automatically granted work authorization *Must receive prior permission to travel *May petition to bring family members	*No pathway for green card or citizenship *Work authorization granted with yearly fee *Cannot travel outside of US *Cannot petition to bring family members	*No pathway to green card or citizenship *Can apply for work authorization *Cannot petition to bring family members	
			*Protection can be terminated if found to no longer be at risk of torture	*Can be detained if considered a danger to the community *Protection can be terminated more easily than withholding protection under the CAT

The table above outlines the different forms of protection immigrants can apply for, the standards necessary to be eligible for each status, the benefits or rights granted (or not granted) with each form of protection, and the criminal bars to eligibility. It is notable that the only form of protection that has no bars based on criminal status is deferral of removal under the Convention Against Torture (Immigrration Equality a). Further, "particularly serious crime" is an ambiguous phrase not aligned with any existing categorization of crimes. While there has been attempts to resolve the ambiguity of particularly serious crime by specifying what types of crimes *must* be considered 'particularly serious' (aggravated felony resulting in a sentence of 5 years or more, among others), individual immigration judges still have some discretion in regards to what crimes they consider serious enough to result in the denial of asylum or withholding of removal (McGary 2010, 218-219). What constitutes a "particularly serious crime" differs between asylum, withholding under the INA, and withholding under the CAT, with the severity of the crimes considered "particularly serious" increasing for each subsequent form of protection. However, there is no clear set of rules outlining which types of cases must be considered "particularly serious" due to the prevalence of judges exercising discretion and the complexity of the details of each individual applicant's crime(s). Notably, the Trump administration has proposed a rule to expand the list of offenses that bar asylum to include misdemeanors such as possessing a fake ID or possessing more than 30g of marijuana that would not have met the 'particularly serious' requirement (Kanno-Youngs 2019). It is also important to note that the asylum system does not take into account the circumstances surrounding the crime or recognize the systems and structures that might have contributed to the criminalization of migrants.

Legal jargon aside, this 'particularly serious crime' bar to asylum and both forms of withholding of removal is evidence that true protection of refugees and asylees is conditional on their lack of criminal status. Essentially, if someone has committed a crime that the US immigration system deems to be "bad enough," they are rendered undeserving of protection, unable to be recognized as simultaneously a criminal and a true victim. It is notable that the only form of protection available to those who were convicted of particularly serious crimes is under the Convention Against Torture, and this protection comes with the possibility of indefinite detainment or revocation of status resulting in deportation. Serving the sentence they were given by our criminal legal system is not considered to be enough punishment for non-citizens convicted of particularly serious crime. By virtue of their lack of citizenship and conviction, they are rendered barred from protection against persecution with the best possible outcome being indefinite detention with the constant fear of deportation. As I discuss in detail later, this form of indefinite detention is akin to the necropolitical 'death worlds' as conceptualized by Achille Mbembe (Mbembe 2003, 40).

Given both the criminal bars to asylum and the fact that the role of the asylum system is to effectively determine who is a true victim and who is not, the victim/criminal binary is particularly harmful for asylees. In many cases their lives or freedom depends on the US agreeing that they are a believable victim, and subsequently will not be a threat to US society. In the case of gay men asylum seekers, being viewed as a victim can be complicated by the long history of criminalizing migrants, people of color, and queer folks, which will be discussed more in depth in later sections. For those applicants who have been convicted of crimes, it becomes much harder to be recognized as victims deserving of protection.

Foundational Theories: Biopolitics, Necropolitics, and Homonationalism

Biopolitics

In order to unpack and explain why these two factors – authenticity and criminality – are so central to asylum adjudication, and to better understand the implications of this system, I consider how and why the state manages life and death. Biopolitics names prime functions of modern sovereign states as population management and control, or the power to regulate life. A major aspect of this population management is the reduction of risk both to and within the population. These threats are theoretically mitigated by the disciplinary powers that work towards normalization or regularization of the population (Puar 2007, 115). The state has the power to determine who is included in the concept of nation, and who is inherently outside and thus a potential threat. State regulation of immigration is a prime example of the state exerting its biopolitical control, determining who is physically allowed to exist within the bounds of the nation. Each of the United States' exclusionary immigration acts is reflective of national anxieties regarding what populations were/are considered threatening to the nation. They serve as a record of the historical moments in which the admittance of certain populations was of particular concern to the state. The Page Act and the Chinese Exclusion Acts are prime examples of how anti-Chinese racism and fear of women's sexuality heightened by the Social Purity movement intersected and resulted in not only the exclusion from physically entering the US, but also the clear elimination of any possibility of incorporation into the nation or national identity. Biopolitics as a theory is central to my study because of its capacity to explain the logic or reasoning behind immigration regulation and exclusion and to help understand the connection

between the constructions of queer folks as devient and criminal (read: threatening) and the exclusion of queer immigrants.

Necropolitics

Derived from Foucault's notion of biopolitics is the theory of necropolitics, a concept created by Achille Mbembe that centers the management of death by the state as opposed to the management of populations and their lives. Mbembe is critical of the inability of biopolitics "to account for contemporary forms of subjugation of life to the power of death," which is central to necropolitics (Mbembe 2003 39-40). This sentiment is also held by Judith Butler, who is critical of biopolitics' lack of attention to the ways in which the state marks queer folks for death, particularly those living with HIV (Butler 1993, 83). Ultimately, under necropolitical theory, the state decides who is worthy of life and who is marked for death, creating *death worlds* : "new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*" (Mbembe 2003, 40). Mbembe cites slavery and colonization as examples of necropolitics (Mbembe 2003, 21-24). Biopolitics and necropolitics are concurrent: "while biopolitical powers work to manage, order, and foster life for citizens worthy of protection, such powers work in tandem with necropolitical powers that produce death for those destined to abandonment, violence and neglect" (Lamble 2014, 161). A more contemporary example of the workings of bio- and necropolitics is the US Mexico border, where criminalization of border crossing puts unauthorized migrants in a precarious position where their existence is rendered illegal, they are produced as exploitable and disposable, they are rhetorically constructed as a threat to national security, and they are legally deportable (Castro 2015, 244). Asylum seekers are put in a sort of limbo state between incorporation and

deportation, making asylum courts a stage where asylum seekers lives, histories, credibility, and authenticity are called into question in order for the courts to determine whether the individual deserves to be incorporated into the biopolitical workings of the state. Asylum is a site where it is determined whether one is worthy of protection and biopolitical incorporation based on their conformity to correct constructions of victimhood, and conversely where those deemed to be unworthy of protection are at risk of being kept in or sent to necropolitical death worlds such as detention centers and prisons.

Homonationalism

Jasbir Puar connects biopolitics and necropolitics to her concept of homonationalism, arguing that homonationalism can serve as an explanatory framework to answer the biopolitical question "which queers are folded into life?" (Puar 2007, 36). In *Terrorist Assemblages: Homonationalism in Queer Times*, Puar critiques US sexual exceptionalism, which is "a narrative claiming the successful management of life in regard to a *people*" rendering the US as a space of progressive queer inclusion (Puar 2007, 2). However, according to Puar, it is white masculine gay men, who conform to homonormative ideals of racial and gender conformity who have been normalized and incorporated into the nation. Mark Bingham, the white gay businessman who prevented 9/11 hijackers from crashing into the White House, was constructed as a quintessential ideal gay citizen (Puar 2007, 46; Shakhsari 2014, 96). His white hypermasculinity and patriotism were constructed through the media as an ideal to aspire to, particularly for gay American citizens wanting to be incorporated into the nation (Shakhsari 2014, 96). Puar terms this concept of the embrace of patriotic, conformist queer people as homonationalism.

Puar argues that homonationalism is made possible by the sexual othering of those who do not conform to white western homonormativity, depicting the 'Muslim other' as simultaneously perversely sexual and homophobic (Puar 2007, 4) Subsequently, while Mark Bingham's death was being mourned, he was being cast as a hero, and the acceptable homonationalist citizen was being constructed and incorporated into the national imaginary, the Muslim world was painted as archaic, backwards, and homophobic, further justifying the war on terror (Shakhsari 2014, 97).

Cheryl Llewellyn applies the concept of homonationalism to gay men's asylum, arguing that homonationalism is one mechanism that makes the adjudication of asylum claims based on sexual orientation possible (Llewellyn 2017, 682). She argues that "homonationalism operates by 'Westernizing' homosexual identity, racializing the anti-homosexual and elevating powerful nations over weaker ones," (Llewellyn 2017, 683). As the homonationalist citizen is constructed as inherently Western and built in contrast to this homophobic and sexually devient Muslim 'other,' homonationalism serves to support the notion that Western states are progressive and superior in their capacity to assimilate this acceptable homonational gay citizen into the dominant national culture. In her analysis of asylum court cases based on sexual orientation, Llewellyn discovers that cases were more likely to be successful when they adopted the narrative of 'the homosexual' in a way that aligns "with with white, Western gay homonormativity" – their ability to do so renders them 'worthy of protection' by the state (Llewellyn 2017, 695). To the extent that it helps to 'confirm' the authenticity of the applicant's identity and life narrative, effeminacy is privileged in asylum adjudication (Llewellyn 2017, 691). This aligns with my research of asylum cases involving gay men. The emphasis on effeminacy as a prerequisite for

being conceived by the courts as authentically gay suggests that there is more than one archetype of the gay man that is accepted or understood by the state. The cases I have analyzed show how the properly effeminate, and thus victimized, immigrant is imagined by judges as the proper subject for incorporation into the nation through asylum. Other gay asylum applicants who fail to meet this standard are thus rendered as insufficiently qualified for incorporation, either as frauds or criminals, who carry more risk than value for the United States.

Granting asylum to those queer folks who sufficiently conform to expectations of victimhood serves to benefit the nation in that it allows the US to portray itself as a progressive nation. Referencing necropolitical theory, Puar argues that "[q]eer bodies may be disallowed, yet there is room for the absorption and management of homosexuality – temporally, historically, and spatially specific – when advantageous for the nation," (Puar 2007, 50). By granting asylum to those facing persecution based on sexual orientation, the US elevates itself as a progressive and accepting nation, painting itself as morally superior to the states the applicants migrated from. In order for their persecution to be viewed as legitimate, asylum seekers must portray their nation and its culture as inherently unaccepting of or discriminatory towards the queer community while simultaneously upholding the country of asylum as progressive and accepting, a safe haven (Llewellyn 2017, 686). This concept is one that David Murray calls the 'migration to liberation nation' narrative (Murray 2014, 453). He argues that this narrative "reproduces simplistic imperialist tropes of civilized west/uncivilized rest," while ignoring the discrimination and persecution that occurs in the receiving country on the basis of race, class, gender, ethnicity, nationality, religion, gender identity and sexual orientation (Murray 2014, 453-454). This narrative does not consider the challenges that gay asylees could face due to their race, religion,

and immigrant status in addition to their sexual orientation that would make gaining asylum not an escape from discrimination but would instead result in their discrimination in the United States.

Further, painting homophobia, transphobia, and subsequent violence as a cultural issue in gay asylum narratives serves to mask the role that colonialism, imperialism, and neocolonialism have played in creating the conditions that allowed for the persecution to take place (Cantú 2005, 65). It is well-documented that colonization is responsible for the creation and implementation of sodomy laws across the globe (Kizito 2017, 568; Charania 2017, 47). These colonial legacies and the current neoliberal context continue to influence and perpetuate homophobia, as evidenced by American pastor Scott Lively, an evangelical preacher who spent a significant amount of time in the 2000s and 2010s spreading bigotry and homophobia in Uganda (Kizito 2017, 569). These homophobic attitudes, cultivated by evangelical missionaries, culminated in the proposal of a bill that would criminalize homosexuality with a punishment of life in prison or the death sentence for cases of 'aggravated homosexuality' (Kizito 2017, 568). While this bill did not pass, it exemplifies how colonial legacy and current neo-colonialism combine to promote homophobia, a factor that is not considered in the larger asylum discourse. Emphasizing the 'backwards' culture of the country of origin while ignoring these histories and current realities allows US culture to be heralded as progressive and enlightened, furthering the narrative of US exceptionalism and US superiority. In his discussion of Mexican SOGI asylum seekers, Lionel Cantú Jr. points to the role that centering culture in asylum discourse plays in reifying national difference and creating a distinctive 'other' (Cantú 2005, 67). With this emphasis on regressive and inherently homophobic cultures comes the potential for assumptions about where

homophobic violence occurs and where it 'cannot' occur to influence asylum adjudication. These assumptions result in a potential undermining of credibility of an asylum seeker or discounting of their experiences of persecution based on assumptions that homophobic violence is not a problem in their country.

Background Information

Overview of the Current Immigration System

The current United States immigration system is complex, resulting from a very long history of laws and policies, both national and international. For the purposes of this study, policies surrounding refuge and asylum are the focus. I will go more in depth into the creation of this system in Chapter 1. However, a brief and basic overview of the current system is critical for understanding the context of asylum and refuge-seeking. The Immigration and Nationality Act of 1952, which has been amended since and is now Title 8 of the US Code, is the source of much of today's immigration law and policy (USCIS 2019b). This act defines an immigrant as any person who is not a US citizen or national, and who does not have a non-immigrant status (8 U.S.C. § 1101 2019). As of October 2019, the limit on permanent immigrants was set at 675,000 (American Immigration Council 2019b, 1). Having Lawful Permanent Residency (LPR) status is commonly known as having a green card (American Immigration Council 2019b, 7). Typically, after five years as an LPR an immigrant can apply for US citizenship (American Immigration Council 2019b, 8). The immigration limit of 675,000 includes 140,000 reserved for permanent employment-based immigrants and their families, with a preference for highly skilled workers holding advanced degrees or who otherwise have outstanding abilities (American Immigration Council 2019b, 4). Up to 480,000 spots are allocated for family-sponsored immigrants, and the

remaining 55,000 are for diversity immigrants, or immigrants from countries that have low rates of immigration to the US (8 U.S.C. § 1101 (2019)). The final categories of potentially permanent immigration are those who have been granted asylum and those who have been determined to be refugees by the United Nations High Commission on Refugees (UNHCR) and have subsequently been relocated to the United States. Refugees and asylees are eligible to apply for their LPR one year after they entered the country or were granted asylum respectively (American Immigration Council 2019b, 5-6). A refugee, as defined in the United Nations' 1951 Convention relating to the Status of Refugees, is someone who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country….(UN General Assembly 1951).

As previously stated, this definition of refugee was put into US law with the Refugee Act of 1980 (American Immigration Council 2018, 1). The two methods of gaining refugee status in the United states are resettlement and asylum (American Immigration Council 2018, 1). In order to be considered for resettlement to the United States, individuals must be referred by the United Nations High Commission on Refugees (UNHCR), a US Embassy, or certain Non-Governmental Organizations (NGOs); be a member of a group of special humanitarian concern as decided by the United States Refugee Admission Program (USRAP); or be a family member of a refugee who is currently living in the US (USCIS 2018b). Those who fall under one of the above categories can then apply for resettlement to the US, where they go through rigorous screening processes before their request for resettlement is eventually approved or denied (USCIS 2018b). The maximum number of refugees that can be approved for resettlement each year is decided by the current president, with input from Congress (American Immigration Council 2019b, 6). The

refugee admittance ceiling was set at 30,000 for 2019, the lowest it has ever been in the history of US refugee policy (American Immigration Council 2019a, 2).

One main difference between refugees and asylum seekers in the US is their location during applying for admittance: refugees apply from outside of the US, while asylum seekers enter the United States and then request protection. To be eligible for asylum the individual must apply within one year of entering the United States (American Immigration Council 2018, 2). There are two asylum processes – affirmative asylum and defensive asylum. In both processes, affirmative and defensive, it is the responsibility of the asylum applicant to prove that they meet the refugee definition through their testimony and any additional evidence they may provide, along with information gathered in country of origin reports (American Immigration Council 2018, 2). Based on the testimony provided, the judge determines whether the applicant's testimony is credible and sufficient to prove the applicant falls under the definition of a refugee (8 USC § 1158(b)(1)(B)(ii)). If the judge determines additional evidence is necessary to corroborate the applicant's testimony, the asylum seeker is required to provide evidence unless it is impossible for the applicant to obtain further evidence ((8 USC § 1158(b)(1)(B)(ii)). To be eligible to apply for affirmative asylum an individual must be present in the United States and not currently undergoing removal proceedings (USCIS 2019a). After the individual completes the initial application they are fingerprinted and eventually scheduled for an interview, where the asylum officer determines whether the individual meets the definition of a refugee set out in the 1951 Refugee Convention and later adopted into US law (USCIS 2019a).

If an individual's affirmative asylum request is denied or if an individual is already undergoing removal proceedings, they may apply through the defensive asylum process

(American Immigration Council 2018, 2). Each of the cases I discuss in later chapters were a result of the defensive asylum process. During the defensive asylum process an immigration judge hears arguments from the asylum seeker and from an Immigration and Customs Enforcement (ICE) attorney and then makes a decision as to whether the individual is eligible for asylum (USCIS 2015). This decision can be appealed by the asylum seeker if they are not found eligible, or by the US if they are granted asylum (USCIS 2015). Typically, applications for asylum are accompanied by applications for withholding of removal and relief under the Convention Against Torture (CAT) (Immigration Equality c). Withholding of removal may be granted if the judge determines that their risk of being persecuted in their country of origin is higher than 50%, and it prevents the government from deporting the individual but does not allow them to apply for their green card or citizenship (Immigration Equality c). Withholding of removal functions as a safety net for those who did not apply for asylum within the one year period or those who have committed a crime that renders them ineligible for asylum, as withholding of removal does not have the same eligibility restrictions that asylum has (Immigration Equality c). Relief under the CAT is subject to even fewer restrictions and is the only pathway to prevent deportation if the individual has committed crimes that render them ineligible for both asylum and withholding of removal (Immigration Equality c). As a party to CAT, the US is committed to the international legal principle of *non-refoulement*, which, as discussed in the section on criminality above, does not extend to those convicted of "particularly serious crimes" (International Migration Law Unit 2014). While the current US asylum and refuge system is a result of the combination of domestic laws and international obligations, the expansion of the particularly serious crime bar beyond its international legal intent evidences the

ways in which national attempts to exercise biopolitical power compete with international legal obligations.

Unpacking the Refugee Definition

The refugee definition outlined in the 1951 Convention Relating to the Status of Refugees remains the basis for determining all refuge and asylum claims within the US. While sexual orientation and gender identity were not considered in the original definition, it has since been interpreted by the courts to include SOGI applicants. Knowledge of this definition and each of its elements is crucial for understanding the arguments and decisions that underlie the sexula orientation-based asylum court cases that form the basis of this thesis. As such, this section will highlight each element of the definition, detailing exactly what they mean, how they have been interpreted, and their particular relevance to sexual orientation based asylum.

As indicated in the definition, a refugee must be **outside their country of origin** and be unable or unwilling to avail themself of the protection of that country. Notably, this clause excludes internally displaced persons from qualifying as refugees under the convention definition (Hathaway and Foster 2014, 17). It is important to note that refugees do not have to have left their country of origin because of the persecution they faced – a refugee could have left for any number of reasons, but if the circumstances in their country change and they now have a well-founded fear of persecution, they presently can be considered a refugee (Hathaway and Foster 2014, 76).

Refuge applicants must have a **well-founded fear** of persecution.. The concept of "well-founded fear" is analyzed in law through two approaches – the objective approach and the combined objective-subjective approach, which hinge on the distinction between the objective

and the subjective aspects of well-founded fear. The first approach focuses on an anticipatory definition of fear rather than an emotional one, meaning that the individual could realistically expect to be persecuted upon return to their country of origin (Hathaway and Foster 2014, 108). This fear must be reasonable and consistent with country of origin information (UNHCR 2011, 12). The applicant only has to reasonably anticipate that they will be persecuted; their demeanor or emotional response is not a relevant factor in this approach. The second commonly used approach is the combined or bipartite approach, which necessitates not only a reasonable anticipation of persecution but also includes the subjective element (Hathaway and Foster 2014, 92) The subjective element uses the emotional definition of fear and is based on an assessment of the state of mind of the applicant during the asylum interview. The subjective element is critiqued by scholars, as evaluating an individual's fear of persecution based on their emotional response is particularly difficult because not everyone reacts to trauma or displays emotion in similar or outwardly recognizable ways (Zimmerman 2011, 339). In my case studies, well-founded fear becomes a site where an applicant's "outness" is evaluated as a criteria for determining future risk, often regardless of past experiences of persecution.

Proving that the violence or abuse SOGI applicants have faced legally rises to the level of persecution is yet another aspect of the asylum determination process. In the context of international refugee law, Hathaway and Foster define **persecution** as "the sustained or systemic denial of basic human rights demonstrative of a failure of state protection," and argue that persecution can be interpreted through a bipartite approach in which "persecution = serious harm + failure of state protection," (Hathaway and Foster 2014, 85). The first component of *serious harm* is a severe denial of the human rights of the individual in question, often in the form of a

threat to life or freedom (UNHCR 2011, 13). This denial of rights must be either sustained or systemic, meaning that either the risk of harm is continuous or that the risk is inherent in the social or institutional structures of the country of origin (Hathaway and Foster 2014, 195). In discussing human rights violations, it is important to identify the "agent of persecution," or the person(s) that caused the violation by either acting or failing to act (Goodwin-Gill and McAdam 2007, 98). The persecutor may be the state itself and/or state actors such as the police or military, but it does not have to be so long as there is a clear failure of state protection from threats such as gangs, neighbors, abusers, or family members. In order for serious harm to amount to persecution, the state needs to either be *unwilling* or *unable* to protect the individual in question, amounting to *failure of state protection* (Hathaway and Foster 2014, 318). The former could be an instance where the state either ignores the persecution or is the agent of persecution itself. The latter applies under circumstances where there is state breakdown and state institutions are no longer functional, resulting in an inability to protect individuals from persecution. It is important to note that this aspect of the definition relies on how effective the state is at protecting individuals in reality rather than looking at formal legal protections (Hathaway and Foster 2014, 318). In the context of SOGI asylum, failure of state protection does not require state breakdown but rather can result from direct hostility towards queer people and/or a systemic unwillingness to protect them from harm or adequately respond to incidents of violence. Finally, in order for the state to truly be seen as unable or unwilling to protect, there must be no internal protection alternative, meaning there is nowhere else in the state that the applicant could reasonably flee to or be returned to without being put in an unsafe or unreasonably harsh situation (Colloquium on Challenges in International Refugee Law 1999, 137-138).

A refugee must face persecution because of one or more convention reasons, or **grounds of persecution**. The phrase "for reasons of" in the definition necessitates a connection between the persecution and a convention ground. It is important to note that the convention ground can be linked to either serious harm or failure of state protection, i.e. their connection to one of the grounds is the reason they were persecuted, or they can be persecuted for another reason but the state refuses to protect them based on one of the convention grounds (UNHCR 2011, 84). These grounds include race, religion, nationality, political opinion, and membership of a particular social group. While the first four grounds are relatively straightforward, membership of a particular social group (MPSG) is a widely contested and continuously evolving category. MPSG is crucial to this project as is the category under which most SOGI applicants fall – for example, gay men from Nigeria or transgender women from El Salvador could be considered particular social groups based on their sexual identity in the first example and their gender identity in the second. Sexual orientation was first considered a basis for a social group by US courts in 1990, while the first US case that regarded gender identity as a basis for a social group occurred in 2000 (Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990); (Hernandez-Montiel v INS 2000, 719). There are two approaches to MPSG – immutable characteristics and social perception. In practice, there are two different approaches to MPSG - the alternative and cumulative approaches (Hathaway and Foster 2014, 432). The former requires that a group either must share an immutable characteristic OR be perceived as a social group to be considered a social group for the purposes of MPSG (Hathaway and Foster 2014, 432). The latter requires that both the immutable characteristics and social perception tests be met (Hathaway and Foster 2014, 432). To meet the immutable characteristics test, the applicant must fit into a social group

because of an innate characteristic, a characteristic that is fundamental to their human dignity, and/or have a former status that puts them at risk (Zimmerman 2011, 392). The social perception test is less straightforward. The applicant must be a member of a group that is visible or distinct in society and the group must have particularity, i.e., not be so large that it cannot be distinct. Notably, this is the only ground that could be interpreted to include persecution specifically based on gender, gender identity, and sexual orientation. SOGI individuals have been recognized under both tests in many jurisdictions, including in the US (Hathaway and Foster 2014, 430). However, the social perception test has left room for courts to challenge the inclusion of SOGI applicants under MPSG, as it requires that the group must have "a distinct identity within the society of the country of origin," meaning the group must be recognized as such by society (Hathaway and Foster 2014, 430). Given that sexual orientation and gender identity are not necessarily visibly recognizable characteristics and there are very real dangers in being openly out, it is understandable that social groups based on sexual orientation and gender identity might not publicly express their shared identities in a way that would make them recognizable as a group by society, but that does not mean the persecution they face is any less real. This complex category is one example of how mapping legal definitions onto groups they were not intended to include can result in the denial of protection to those that deserve it. Not having persecution based on sexual orientation and gender identity more explicitly stated as grounds for asylum creates a situation where protection is conditional on prior legal precedent, which is vulnerable to being overturned.

Methods and Source Materials

The main focus of this thesis is an analysis of sexual orientation based asylum court cases in the US. I have looked at 36 different asylum court cases related to sexual orientation, gender identity, and/or HIV status. All of the cases I studied were listed at the bottom of an asylum officer training document from 2012 created by the United States Citizenship and Immigration Services (USCIS). Each of these cases were found in the section "LGBTI-Related Case Law." The vast majority of the cases involved gay men. A few cases involved transgender women, and one applicant was a cisgender lesbian. There were no cases of transgender men, bisexual individuals, or gender-nonbinary individuals. My research centers several of the cases involving gay men. All of these cases were from the courts of appeals, as cases at the level of the Immigration Judges and the Board of Immigration Appeals are not available publicly and thus the information I have is limited. The document I have access to is at least the third and highest level of proceedings – the first is with the Immigration Judge, the second is an appeal by either party to the Board of Immigration Appeals, and the third level is the appeal of the BIA's decision to one of the US Circuit Courts of Appeal. These cases all occurred between 1990 and 2011, with the majority concentrated in the late 2000s. However, due to the fact that they are all appeals cases, many of the proceedings started several years prior to the final decision I have access to. The appeals courts give a varying amount of information about the prior proceedings, which means the amount that I know about each person and their case is not consistent across the cases. For cases that center criminality, oftentimes the only information contained in the court documents is the offense they were formally convicted of, with little to no information about the circumstances or even what the specific act they committed was. Further, I do not know what

happened to each individual after the appeals courts' decisions were made. I could hypothesize what is likely to have happened based on the court's decision either to remand the case back to the BIA to reconsider or their denial of the appeal. However, for the purpose of this study the way that the courts, at all levels, discuss the cases and give reasoning for either denying or granting asylum provides useful information about the dynamics of sexual orientation-based asylum regardless of whether the outcome is clear or not.

In order to better understand the historical context of refuge and asylum in the US, I conducted a search of an archive of presidential speeches for keywords relating to refuge and asylum. I focused on the early usage of the terms as a way to understand how refuge and asylum were conceptualized before they were formal legal categories. Through these speeches I was able to gain an understanding of how these concepts were framed and understood in the early years of the United States. It is important to note that with asylum, I excluded results that used the word asylum in contexts outside of immigration, for example references to the creation of institutional asylums. Along with my analysis of presidential speeches, I have compiled a history of immigration utilizing a variety of primary and secondary sources relating to the US immigration system. I have supplemented this history with literature on the ways in which the immigration system influences/is influenced by national systems of racism, classism, sexism, homophobia, transphobia, nationalism, and xenophobia. Both the speeches and the history serve as ways to unpack and understand the context and the systems through which the contemporary concept of asylum has evolved.

In order to better understand current asylum dynamics, I have looked into scholarship focusing on the dynamics of migration, and sexual orientation-based asylum in particular, in the

contemporary context. From these sources I have uncovered important themes and tropes related to sexual orientation-based asylum that help to contextualize the court cases I have analyzed. Many of these sources are focused on the United States, but I have also included studies from other states in order to better understand global trends. I have supplemented the literature when necessary with sources related to criminality, queer theory, and queer history in order to better understand the dynamics present in the court cases. Utilizing these contemporary sources in combination with more historical immigration literature provides a framework for understanding the dynamics underlying the courts' lingering resistance to accepting that gay asylum seekers can be authentic victims of persecution who deserve protection and are worthy of biopolitical incorporation.

Chapter 1: Immigration History

Early Conceptions of Refuge and Asylum

The first use of the term asylum in a presidential speech was by President Taylor in 1849, where he discussed his intervention in the removal of a "foreigner who claimed [U.S.] protection," with the intent to "vindicate the honor of the country and the right of every person seeking asylum on our soil to the protection of our laws" (Taylor 1849). The use of the rhetoric of rights in this context is striking given that there was no national legal right to seek asylum during this time period as immigration law. Even more interesting is looking at this speech in concert with the second use of the term asylum, which is used in an 1851 speech by President Fillmore in reference to a thwarted attempt of some in the United States to go to Cuba and start or assist in a rebellion against Spanish colonial rule (The Cuba Invasion 1851; Cuba – the Expected Invasion 1851; Cuba – Rumors of an Outbreak 185; Chaffin 1995, 81). Fillmore blames this thwarted invasion on "foreigners" in the United States who "[sought] by falsehood and misrepresentation to seduce our own citizens, especially the young and inconsiderate, into their wicked schemes," (Flilmore 1851a). He characterizes these actions as "an ungrateful return for the benefits conferred upon them by this people in permitting them to make our country an asylum from oppression and in flagrant abuse of the hospitality thus extended to them" (Fillmore 1851a). The language used to describe those involved in the incident is significant to my project because it highlights the foundational assumptions upon which modern conceptualizations of asylum seekers were built. Firstly, the use of the word foreigners to describe those who have ostensibly immigrated to the US to gain protection is indicative of the attempt to maintain the

divide between those that are considered American and those who are positioned as not belonging. This othering is further established by Fillmore's use of the phrase "seduce our own citizens," which places these "foreigners" firmly outside the bound of citizenship and belonging. The blame for this attempted "invasion" is directed at those that Filmore positions as foreign outsiders, while US citizens that were involved are portrayed as nearly innocent, helpless and unable to resist the influence of the foreigners and the pressure to join their "wicked schemes." Additionally, his use of the language "ungrateful return for the benefits conferred upon them ..." ties into long-held narratives of undeserving, ungrateful, and therefore inauthentic asylum seekers. Looking at both of these speeches – given just two years apart – it is clear that fears that the asylum system would be taken advantage of or corrupted have been present even before asylum was a formal legal category. These fears have resulted in a deeply embedded suspicion of asylum seekers and an unwillingness to fully incorporate them into the biopolitical state.

The third mention of asylum is particularly revealing of how it was conceptualized at this time. Also in 1851, in his Second Annual Address President Filmore stated that, "[t]his country has been justly regarded as a safe asylum for those whom political events have exiled from their own homes in Europe…" (Fillmore 1851b). This statement clearly highlights the quintessential asylum seeker in this period – European and needing asylum for political reasons. US asylum was based on and built from this one particular idea of who is deserving of protection, and for what reasons. President Lincoln's 1864 Fourth Annual Message contains the statement, "For myself, I have no doubt of the power and duty of the Executive, under the law of nations, to exclude enemies of the human race from an asylum in the United States," (Lincoln 1864). This statement leaves the category of those who could be rightfully excluded very open ended and

places the responsibility of determining who is excludable under the power of the executive branch. This concept of the executive having the power to designate exclusions is still extremely relevant in our current context, as evidenced by President Trump's attempted immigration ban on Muslims. Additionally, the use of the phrase "enemies of the human race" is notable in that the language used is not enemies of the American people or nation, but enemies of the *human race*. This rhetorical decision places those that Lincoln is referring to as necessarily outside of and against what he considers the human, which subsequently positions them as subhuman. This dehumanization of potential asylum seekers as justification for exclusion, particularly those who differ ideologically from dominant US narratives and culture, is a recurring theme in US asylum history. These early conceptions and conditions of asylum are telling about the basic assumptions that underlie the entire institution of asylum and the long history of many tropes and themes throughout asylum discourse – the asylum seeker as a burden, the inauthentic asylum seeker taking advantage of the system, the quintessential asylum seeker as the European political refugee, and the asylum seeker as a perpetual outsider.

In contrast to a discussion of asylum in relationship to the Caribbean and Europe, the early uses of the word refugee in presidential speeches are all closely tied to formerly enslaved people in the Antebellum and post-Antebellum periods. The first mention of refugees was in reference to escaped formerly enslaved people in an 1863 speech by President Lincoln – "Suppose refugees from the South, and peace men from the North…." (Lincoln 1863). While the term refugee in this time was not a legal category, in terms of impact of the speech, using the word refugee to describe escaped enslaved people seeking refuge in the North positions the

South as refugee producing. The use of the term refugee combined with the phrase "peace men from the North," further positions the South as the aggressor and inhumane region.

The second use of the term refugee in a presidential speech was in 1865 by President Johnson in reference to the War Department's Bureau of Refugees, Freedman, and Abandoned Lands, which "is committed to the supervision and management of all abandoned lands and the control of all subjects relating to refugees and freedmen from rebel States…" (Johnson 1865). The following year, President Johnson vetoed a bill attempting to sustain the existence of the Bureau of Refugees after the end of the Civil War, and to extend its involvement and duties (Johnson 1866). Part of this legislation would have granted funds to provide land and homes for formerly enslaved people and to build schools, which Johnson opposed on the basis that Congress has never "founded schools for any class of our own people," (Johnson 1866). The use of the term "our own people" positions formerly enslaved people as outsiders, distinctly not a part of the nation he is addressing as President. This framing is a precursor of the question long asked in refuge and asylum discourses: why should we give aid or support to refugees when our own people are suffering? This question's logic relies on the continued conceptualization of refugees as distinct from and not a part of the nation or community in which they have sought refuge and thus rationalizes the denial of support to them. Johnson's argument is particularly troubling, as the reason that the Bureau of Refugees sought to support people is because they or their recent ancestors were forcibly removed from their homes, brought to the US, and enslaved. The country and its wealth were literally built off of the exploitation of these individuals, but they were still considered outsiders not deserving of any support that white Americans purportedly did not also get. While formerly enslaved people were released from the

necropolitical 'death world' of slavery, Johnson's speech exemplifies how the conceptualization of Black people as outsiders continued and was used as justification for denying them the support necessary to become fully biopolitically incorporated citizens.

Johnson goes on to say, "the idea on which the slaves were assisted to freedom was that on becoming free they would be a self-sustaining population," (Johnson 1886). This statement is an early example of the expectation that those seeking refuge will be self-sufficient and economically valuable – those who cannot make an economic contribution to society are positioned as less deserving (Sales 2002, 450). This expectation, and the consequences of failing, are further exemplified by Johnson's statement: "[a] system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another," (Johnson 1866). The use of the word "indigent" is telling, as it directly portrays formerly enslaved people as needy, burdensome – a construction and depiction of refugees that continues to be prominent in refugee discourse (Sales 2002, 457).

The themes and rhetoric present in these early discussions of refuge and asylum are reflected by immigration legislation and discourse throughout history and continue to be relevant in the current moment. Having an understanding both of where these themes, stereotypes, and expectations come from and of just how long they have been entrenched in the immigration system and discourse is essential for understanding the formation of immigration and asylum law and policy, and the evolution of this system into the structures we have today. These themes and tropes, particularly the asylum seeker as a foreign threat and the refugee as a needy burden, were and continue to be utilized to determine whether someone is worthy of biopolitical incorporation.

History of Immigration

Recognizing the history, both of policy and of ideology, that has built and continues to shape the asylum system is essential for understanding the dynamics that play out in the asylum proceedings of gay men. The immigration system is a prime example of biopolitical regulation – the state is literally deciding who should be included in the nation and who is a threat to be excluded at all costs. The structures and ideologies of racism, sexism, classism, ableism, homophobia, and transphobia form the foundations of immigration policy through much of history and continue to be pervasive. Constructions of the desirable and productive citizen have been shaped by these structures. Immigration regulation has made abundantly clear the types of identities and social locations that are not considered desirable in a migrant through explicit exclusions based on race, class, sexual orientation, gender identity, and ability. These exclusions revolve around several connected themes. First, regulating who is allowed to enter the nation on the basis of race, fueled by racism, accompanied by xenophobic fears that foreigners are threatening to national security. Second, regulating migration on the basis of morality, with fears that those deemed 'sexually deviant,' namely prostitutes and queer people, would threaten the moral character of the nation. Exclusion of queer people has been interwoven with the third theme, justifying exclusion based on public health or medical concerns, as queerness was pathologized. Fourth, regulating immigration based on economic concerns, allowing entrance to those who are viewed as beneficial to the economy, and excluding those who are assumed to be an economic burden. Construction as a drain on the economy is fueled by classism, racism, and ableism, and has become a central argument against accepting refugees and asylees. Fifth and finally, exclusion of those deemed threatening to the security of the population based on criminal

status, or associations with criminality as in the case of queer people. Each of these themes will be made clear throughout the following historical account.

Though the immigration system has changed over the years to less explicitly discriminate against migrants, the structures of oppression upon which the system was built continue to pervade both formal policy and the judgements of those in power. In order to highlight how the current immigration system was constructed, I will begin by outlining major immigration structures, or lack thereof, starting in the colonial era and ending in the present. Throughout this history I place a particular emphasis on policies related to refuge/asylum and exclusion with the goal of uncovering the foundations upon which the current refugee regime was built in order to better contextualize current discourse and practice surrounding refuge and asylum. I also pay particular attention to which people are constructed as threatening and criminal, with a focus on how queer folks have been pathologized, criminalized, and excluded. I aim to explore and uncover the underlying purpose of immigration regulation – to exert biopolitical control over the population by defining who is considered "worthy" of inclusion and excluding those that are deemed to be a threat to the nation and its population - and the ongoing troubling use of identity to determine such belonging or exclusion.

Colonial Era Immigration

The colonial era was characterized by largely unrestricted migration for some, namely white Europeans, and forced migration for racialized 'others' as an influx of colonists pushed Native Americans out of their lands and the North Atlantic slave trade began. Even before consistent immigration laws were put in place, colonial laws and policies set up a racialized dichotomy of who was considered worthy of inclusion and rights in the colonies. The United

States was a settler colony, meaning that the intention of the colonizers was to find a permanent place of settlement in order to build new communities (Kashyap 2019, 549). This process of colonization "rested upon the accomplishment of various goals: clearing indigenous groups; settling lands; instituting systems of forced labor, and regulating nascent communities" (Parker 2015, 22). The success of settler colonialism is dependent on "indigenous elimination, the subordination of people of color, and the creation and enforcement of laws designed to maintain the processes of elimination and subordination" (Kashyap 2019, 554). The colonies in the Americas were constructed as a place of refuge for those facing religious and economic discrimination in Europe. However, this refuge for Europeans came at the expense of the indigenous communities who faced extreme persecution as European colonists continued to expand control and exploit indigenous land and people.

Even before consistent immigration laws were put in place, colonial laws and policies set up a racialized dichotomy of who was considered worthy of inclusion and rights in the colonies. The forced migration of Africans and their subsequent enslavement and exploitation sharply contrasts with the nearly unrestricted migration of Europeans looking to gain political, religious, and economic freedom. In order to populate the colonies and maintain its hold on the land, the British government encouraged migration of not only its own subjects, but also of other European nationals (Totten 2008, 40-41; Proper 1900, 8). Historians have attributed this period of unrestricted and encouraged migration in part to the fact that "British and colonial leaders viewed population as a source of strength for the state" (Totten 2008, 39). A 1740 British act, attempting to attract immigration to the colonies, allowed the naturalization of non-British colonists so long as they resided in the colonies for seven consecutive years (Carpenter 1904,

293). In this context, naturalization came with more freedom of movement and the right to own property, though this right was severely limited for many women, especially married women (Proper 1900, 14; Parker 2015, 23; Rosen 2003, 369-370). Eligibility for naturalization was restricted to those holding Christian beliefs, though some exceptions were made for Quakers and Jewish people (Parker 2015, 35). Notably and perhaps obviously, British subjecthood and the subsequent rights that came with it did not extend to Native Americans or Black people, regardless of whether they were enslaved or free (Parker 2015, 24). Forced migration, exploitation, and exclusion from naturalization and subsequent rights are just a few of the mechanisms used to position people of color as outside the bounds of the nation and to perpetuate the goals of settler colonialism.

In the colonial period, control of migration was heavily raced and classed. While there was no comprehensive national immigration policy, there were many borders and boundaries controlled at various levels, from individual town policy to British laws (Parker 2015, 22). Movement through the many borders was restricted, both formally and informally, based on the identity and subsequent legal status of the individual attempting to cross (Parker 2015, 23). The hierarchy of statuses placed Native Americans and Black people, both free and enslaved, near the bottom and therefore both their rights and movements were heavily restricted. These race-based restrictions as to who is included as a full rights-bearing subject is an early reflection of the state exerting biopolitical control to position even those who are physically inside the bounds of the nation as outsiders.

Early United States Immigration: Independence to 1924

The racial exclusion, subordination, and forced migration continued after the colonial period and were solidified into the structures of national immigration policy, along with restrictions placed on other minoritized groups. Similar to beliefs during the colonial period, in the period following independence immigration was looked at as not just beneficial but essential, resulting in the inclusion of "clauses in the Constitution that granted easy terms of naturalization to foreigners, protected the slave trade, and allowed foreigners to run for most political offices, thus laying the foundation for mass migration," (Totten 2008, 49). It is important to note that the inclusion of Black people in these early immigration related laws was contingent on their subordination, and subsequently they were not included in the rights extended to voluntary migrants. Exclusionary limits on naturalization were adopted by the newly found US government, as codified by the 1790 "Act to establish an uniform Rule of Naturalization," which required that one must be "a free white person" in order to be eligible (Act to Establish An Uniform Rule of Naturalization 1790). These blatant racial bars to citizenship are yet another mechanism that served to exclude people of color from the biopolitical nation.

This early period of US history also came with discussions of asylum. George Washington, in a letter to Thomas Jefferson, stated

> I conceive under an energetic general Government [the government proposed under the Constitution] such regulations might be made, and such measures taken, as would render this Country the asylum of... industrious characters from all parts of Europe—would encourage the cultivation of the Earth by the high price which its products would command—and would draw the wealth, and wealthy men of other Nations, into our own bosom, by giving security . . . to its holders (Totten 2008, 50).

Though asylum in this context is not referring to the legal concept and there was no formal asylum process, this quote indicates that coming to the United States for asylum was encouraged, especially for "industrious characters" and "wealthy men". It is important to note that this support for asylum appears to be conditional on European nationality. This support for asylum was motivated both by the prospect of increasing the wealth of the United States and by the belief that increasing population would strengthen national security (Totten 2008, 50-51). In particular, increased immigration to the West was encouraged as a means to maintain dominance and control over the Native American population (Totten 2008, 51-52). It is interesting to see how early conceptions of asylum are either reflected or juxtaposed to current discourse. Washington's quote above exemplifies that the foundational expectations of asylum seekers is that they will be economically beneficial to the United States, both in their existing wealth and because of their "industrious characters." The hierarchical valuing of immigrants based on their economic contribution is an antecedent to contemporary notions that accepting asylum seekers is an unwanted economic burden on the State, and therefore threatening to the biopolitical nation. The expectation that an influx of European immigrants would strengthen national security directly contrasts with current discourse of racialized immigrants as a threat to national security. However, the belief that immigration would strengthen national security was not universal in the early US, with "many congressmen warning that granting rapid citizenship to immigrants could jeopardize national security," in reference to the Naturalization Act of 1790 (Totten 2008, 57). A major fear revolved around the belief that immigrants would remain loyal to their countries of origin and that unrestricted immigration and naturalization would thus allow foreign influence to take hold in the newly formed US (Totten 2008, 56-57). The implications of this concern with

security are exemplified by Robbie Totten's argument: "[t]hat security factored more prominently into early U.S. immigration policy than scholars recognize warrants against the popular myth that the founders opened the nation's borders for ideological and moral reasons," (Totten 2008, 61). This early emphasis on national security is evidence that biopolitics has been an underlying concern throughout the creation and evolution of the US immigration system. Both sides of the argument – immigration would strengthen national security versus immigration could jeopardize national security – are concerned with the biopolitical goal of mitigating threats to the colonial national population.

The 1798 Alien and Sedition Acts mark the first congressional authorization of deporting immigrants. An Act Concerning Aliens gave the President the power to expel from the country any migrant who he deemed to be a threat or suspected was working against the government (An act concerning aliens 1798). This act is an instance where the state's biopolitical power was reasserted and codified into law, in this case with the goal of giving the President the authority to physically remove those constructed as threats from the nation. Notably, this act also allowed for the indefinite detention of immigrants who returned after having been deported under this act (An act concerning aliens 1798). These Acts exemplify the interconnected nature of bio- and necropolitics – not only are those seen as threats subject to removal, if they attempt to subvert the state's power and return after being deported the state will exert its necropolitical control in the form of indefinite detention. This sends a clear message – the United States as a sovereign nation has the supreme authority to decide who belongs in the nation, and any resistance to this power will result in the social and legal death of those deemed to be a threat. Similarly, An Act Respecting Alien Enemies stated that "all natives, citizens, denizens, or subjects of the hostile

nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies," (An act respecting alien enemies 1798). It is notable that this act restricts its scope to only include men – this indicates that at this time, the figure of the threat to national security was constructed as distinctly masculine.

One of the earliest national regulations dealing directly with regulating the influx of immigrants was the Passenger Act of 1819, also known as the Steerage Act. Contained within this act was the requirement that upon arrival the ships must turn in "a list or manifest of all the passengers taken on board…" which included documentation of "the age, sex, and occupation, of the said passengers, respectively, the country to which they severally belong, and that of which it is their intention to become inhabitants" (An act regulating passenger ships and vessels March 2, 1819). This act was the first national attempt to document demographics of those immigrating to the US. The next immigration related act was the Immigration Act of 1864, also known as An Act to Encourage Immigration. This act created the position of Commissioner of Immigration under the State Department, who in part was responsible for creating a yearly report on immigration to send to Congress (An act to encourage immigration 1864). Another major aspect of this act was the legalization of contract labor where prior to immigration, individuals "could make contracts pledging their wages for a term not exceeding twelve months to repay the expense of their transportation" (Abbot 1924, 133). The purpose of this act was to encourage migration to make up for the labor shortage caused by the civil war (Abbot 1924, 133). This is the beginning of the need for laborers becoming a central focus of immigration policy. As a response to the emancipation of formerly enslaved Black people, the Naturalization Act of 1870

expanded eligibility for naturalization to "aliens of African nativity and persons of African descent" among other provisions (An Act to amend the Naturalization Laws 1870). It is notable that this expansion of naturalization eligibility was limited to those of African descent, leaving many still ineligible for citizenship based on race. These early acts are examples of the state tightening its biopolitical regulation of immigration - documenting who enters the nation, opening up immigration for those who can fulfil an economic need of the state, and maintaining strict control over citizenship even while expanding eligibility.

Introduction of Formal Exclusions

Starting in 1875, there were a series of acts that created the first immigration restrictions and exclusions. These acts provided frameworks for questioning whether immigrants were authentic and deserving of entrance to the US, stemming from national anxieties surrounding race, morality, and class and the preservation of US national identity. These are the first concrete instances of the US exerting its biopower to regulate which kinds of people are allowed entrance to the nation. These exclusionary acts reflect many of the themes highlighted in the introduction to this section. It is notable that these exclusions are all based on factors that were considered threatening to the "purity" (namely racial and moral) of the US population in some way, or threatening to the economic success of individuals and the nation. The Page Law of 1875 outlawed the immigration of "persons undergoing a sentence for conviction in their own country of felonious crimes… and women 'imported for the purposes of prostitution,'" (An Act Supplementary to the Acts in Relation to Immigration 1875). Notably, this law focuses on whether "the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary" (An Act Supplementary to the Acts in Relation to Immigration

1875). The first exclusions were tied to presumed criminality and racialized expectations of Asian women's involvement in prostitution, both of which were constructed as biopolitical threats to the people and morality of the US nation. In her book *Entry Denied: Controlling Sexuality at the Border*, Eithne Luibhéid discusses this act in depth, arguing that "[t]he fact that the Page Law targeted Asian women, even when women of other nationalities were significantly involved in prostitution work too, highlights how the sexual monitoring of immigrants intersects with other systems of social hierarchy," in this case race and also expectations of class as wealthy men's wives were allowed entry (Luibhéid 2002, 31). Here, the law relied on associations of Asian women with prostitutes, resulting in the first of many race-based exclusions.

Early exclusions of criminals and prostitutes tied together immigration and morality. The exclusions continued with the 1882 Act to Execute Certain Treaty Stipulations Relating to the Chinese, more commonly known as the Chinese Exclusion Act. Aptly named, this act suspended the migration of Chinese laborers for ten years and allowed for the deportation of "any Chinese person found unlawfully within the United States," (An Act to Execute Certain Treaty Stipulations Relating to Chinese 1882). Additionally, this act prevented both state and federal courts from granting any Chinese people citizenship (An Act to Execute Certain Treaty Stipulations Relating to Chinese of 1882). These two laws were passed during a time of high anti-Chinese sentiment and discrimination, and were accompanied by Western local laws discriminating against Chinese prostitutes stemming in part from the fear that Chinese immigration threatened the white family, as anti-Asian scapegoating claimed that "Chinese men undercut white men's ability to earn, while Chinese women caused disease and immorality

among white men" (Lubhiéid 2002, 34-35). The 1882 act was later revised in the Immigration Act of 1891, which added to the list of excludable people

> "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not bender contract long to one of the foregoing excluded classes" (An Act in Amendment to the Various Acts Relative to Immigration 1891).

All of these groups of people, through these acts, were positioned as undesirable and threatening to the biopolitical population. The majority of these exclusions fall under one or more of three categories, – those who are deemed unable to financially support themselves, those who are viewed as criminal, and those who are viewed as immoral. Many of these categories of exclusion, and the assumptions about value that underlie them, continue to be pervasive throughout immigration regulation and discourse.

These exclusionary acts also contained language and clauses that would later be used to prevent the immigration of queer folks. The phrase in the 1891 act "crime or misdemeanor involving moral turpitude" remains a part of immigration and asylum law. The term "moral turpitude" is not explicitly defined, leaving it up to judges and immigration officers to decide whether a crime falls under that category (Minter 1993, 785). However, this term later became almost synonymous with same gender sexual conduct and was used as justification for excluding or deporting lesbian, gay, and bisexual people (Minter 1993, 787-789). In 1903, the "Act to regulate the immigration of aliens to the United States" added "constitutional psychopathic inferior" to the list of medical exclusions, a medical term that included those with "abnormal

sexual instincts" (Luibhéid 2002, 15). This early iteration of the pathologization of sexual difference was used as an excuse to exclude queer folks (Luibhéid 2002, 15). These two exclusionary clauses formed the foundations of LGBTQ exclusion through both the criminalization and the medicalization of queerness and evidence how the exclusion of queer people has been justified through the larger themes of criminality and pathology as a threat to the biopolitical population.

The 1903 act also added anarchists or "persons who believe in or advocate the overthrow by force of violence of the Government of the United States or of all government or all forms of law…" to the list of excludable people (An Act To Regulate the Immigration of Aliens into the United States 1903). This is notable because it was the first time that political opinion was considered a ground for exclusion, and because it was a clear attempt to exclude those who would be likely to openly speak out against the government and therefore were seen as a threat to the existing system of power. This exclusionary act serves as an attempt to ensure the continuation of the state's biopower. A final exclusionary act in 1917 added a literacy requirement as a condition for admittance, intended to limit immigration from southern and eastern Europe (Ngai 2004, 19). The literacy requirement is tied both to the themes of racial/ethnic regulation and exclusion based on fears of migrants becoming an economic burden. These foundational exclusions built into the early legislation highlight the root intention of the immigration system: to exert biopolitical control over what type of person is considered worthy of entrance, and what type of person is rendered undesirable and therefore excludable.

A major site where these exclusions were enforced were immigration stations, most notably New York's Ellis Island and San Francisco's Angel Island. Ellis Island was the first and

perhaps most well-known immigration station, opening in 1882 and processing upwards of 22 million people (Dolmage 2011, 24). These stations served as the gate to the country, and the inspectors were the gatekeepers. Ellis Island inspections served to ensure that no one who fell under any category of exclusion was allowed to enter the country. The main reasoning for deportation between 1892 and 1910 was cited as "likely to become a public charge" (Bayor 2014, 40). The public charge concept was gendered, with assumptions that single women, particularly those who were pregnant or had children, would be unable to provide for themselves and therefore were excluded on public charge grounds (Moloney 2012, 79-82). Further, this clause provided an avenue for exclusion based on ability, as a 1907 law allowed physicians to evaluate whether an immigrant's perceived mental or physical disabilities could cause them to become a public charge (Yew 1980, 500). The percentages of those deported compared to the percentages allowed through were not high, with only about 2% of arrivals returned to their countries during the year with the highest deportation rate but are evidence of the impacts of the exclusion laws of the late 19th Century. The use of the public charge clause to justify exclusion during this time reflects how concerns about economic prosperity influence immigration regulation.

The laws regarding Chinese exclusion were a major catalyst for the creation of the Angel Island immigration station. After the 1882 act, informal detention centers were created to deal with the logistics of detaining and inspecting Chinese immigrants, with awful conditions and overcrowding (Lee & Yung 2010, 10). By 1904, congress delegated funds for the creation of a more formal center on Angel Island, the location being chosen in part to segregate Chinese immigrants from their families to prevent interview coaching and to ensure no one was able to

escape detention (Lee & Yung 2010, 11-12). In contrast to Ellis Island, this station was designed specifically with the goal of enforcing racial exclusion (Lee & Yung 2010, 16). Ellis and Angel Islands were just two of many immigration stations around the nation that were designed as mechanisms of exerting bio- and necropolitical control through processing immigrants and enforcing the many exclusionary clauses detailed in the immigration acts in the last quarter of the 19th century.

National Quota System 1924 – 1965

The exclusion acts of the latter 19th century were precursors to a much larger system of restriction and regulation. The early 20th century came with a rise in nativism and massive efforts to "Americanize" recently arrived immigrants, as there was a rising fear among political leaders that the increasing number of southern and eastern European and Asian immigrants would be unable to assimilate into the nation (Fleegler 2013, 17-18). The expectation was that immigrants would abandon their own national traditions and ties in order to conform to a western European centric conception of American identity and culture, in part as a result of the belief that eastern and southern European migrants contributed to a both cultural and economic weakening of the nation (Fleegler 2013, 18-21). The emerging prominence of scientific racism and nativism played a significant role in rhetoric advocating for restrictive immigration laws (Fleegler 2013, 21). By the 1920s, there was a growing national and congressional support for placing restrictions on immigration. One major concern was the impact immigration was having on the economy. These economic concerns contributed to rising support for restrictions, as labor advocates feared that immigration resulted in a surplus of laborers, which undermined wages of American workers (Fleegler 2013, 22). This fear was heightened as the demand for increasing

amounts of manufacturing workers slowed and improved technology became increasingly central to economic growth (Ngai 2004, 19). Nationalist sentiments increased as a result of World War I, contributing to a distrust of immigrants who were presumed to still have loyalty to their nations of origin and subsequently posed a threat to the US nation (Ngai 2004, 19). The war also contributed to the solidification of national borders and the nation-state, as emergency wartime measures including passport checks laid the foundation for a larger system of migratory controls (Ngai 2004, 19). It is important to note that this restrictionist sentiment was not universal, even among those in power. In a 1915 speech President Wilson vetoed restrictive immigration legislation, arguing that this bill was contrary to the history and values of the United States as it would "all but close entirely the gates of asylum" (Wilson 1915). Despite his veto, Wilson was ultimately unable to prevent the implementation of restrictive immigration laws. Fueled by a rise in nationalism and nativism in the post-war period, Congress overrode Wilson's second veto in 1917 (Ngai 2004, 19).

After the end of World War I, fears of an influx of European immigrants displaced by the wars were the tipping point that prompted Congress to pass an emergency restriction on immigration which set a numerical limit on immigration and created a quota based on national origin, which was later made permanent with the Immigration Act of 1924 (Ngai 2004, 20; Rausau 2015). It is important to note that the US Congress decided to end the relatively open era of immigration in the wake of the war that left Europe devastated and many people in need of refuge. The quota system created a hierarchy around Western hemisphere nationalities and contributed to the creation of a category of whiteness based on a common European descent which divided the world's population into white and not white and rendered those in the latter

category as inherently different and thus incompatible with demands for white American cultural homogeneity (Ngai 2004, 25-26) Notably, this act did not attempt to place restrictions on immigration from countries in the Western Hemisphere, due in part to the need for agricultural labor and foreign policy interests (Fleegler 2013, 26-27).

This quota system remained largely in place until the Immigration Act of 1965, though the 40s and 50s brought a loosening of racial restrictions on immigration. 1943, marked an end to the exclusion of Chinese nationals from immigration, added a quota for Chinese immigrants to the existing system, and removed the bar preventing Chinese people from being eligible for naturalization (Act to repeal the Chinese Exclusion Acts, to establish quotas, and for other purposes 1943). The elimination of racial exclusions continued with Immigration and Nationality Act of 1952, which maintained the quota system but removed direct racial exclusion and racial requirements for naturalization (Ngai 2004, 197). This alteration opened up immigration possibilities for previously excluded groups, but did not change the fact that the nature of the quota system itself perpetuated racial exclusion by basing quotas on current populations of each nationality resulting in a system that heavily favored immigrants from northern European nations and allowed for very small quotas for those coming from outside of Europe.

While racial exclusions were being lifted, the foundations for queer exclusion based on pathologization were being laid. The 1952 Immigration and Nationality Act included a clause that classified individuals who were insane or "afflicted with psychopathic personality… or a mental defect," as ineligible to enter the US or apply for visas (An Act to Revise the Laws 1952, 182). In the same year, the American Psychological Association's *Diagnostic and Statistical Manual: Mental Disorders* classified sexual deviation as a mental disorder and explicitly

included homosexuality and transvestism in that definition (American Psychiatric Association 1952, 38-39). This legislation effectively excluded queer individuals from legally immigrating to the US or applying for asylum.

The Rise of the International Refuge Regime: The 1951 Convention and 1967 Protocol

On an international level, World War II was the catalyst for the creation of the foundational document of the international refugee regime, the 1951 Convention Relating to the Status of Refugees. This convention was created to address the large number of people that were displaced across Europe as a result of the war. The 1951 Convention was not the first international agreement created to address the needs of displaced or stateless people, but it is the convention that set up the framework for the current international discourse and policies surrounding refugees. Prior to this convention, a refugee was defined as someone "who does not enjoy the protection of the state to which he previously belonged and who has not acquired or does not possess another nationality," and was often applied on a group basis (Hathaway 1984, 357). This early emphasis on stateless groups shifted to a more individualistic approach in the 1940s, started by the Intergovernmental Committee on Refugees (ICR). In contrast to the more broad refugee definition that included anyone who did not have the protection of their state and was therefore without nationality, the Intergovernmental Committee on Refugees only considered those who were forced to "emigrate on account of their political opinions, religious beliefs and racial origin," (Hathaway 1984, 371). This definition was expanded upon by the International Refugee Organization who included in the category of refugee those with "valid objections" to returning to their country of origin, including those who could prove they had a

valid fear of persecution based on race, religion, nationality, or political opinion, or who expressed "valid political objections to returning" (Hathaway 1984, 375; 378).

The definition of a refugee laid out in the 1951 Convention relating to the Status of Refugees (hereafter referred to as the 1951 Convention) reflects the IRO's understanding of refuge. The 1951 Convention defines a refugee as someone who

> [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (UN General Assembly 1951).

Notably, this convention temporally and geographically limits those who are considered refugees. The individual must have a well-founded fear of persecution due to events that happened before the convention was put in place, and the state signatories were allowed to decide if they were going to recognize as refugees those displaced by events "occurring in Europe" or events "occurring in Europe and elsewhere," (UN General Assembly 1951). These limitations resulted in the convention having a narrow and Eurocentric scope, which gets at the purpose and intentions of the convention. While this convention was heavily influenced by the increasing prominence of human rights in international discourse and was created just three years after the Universal Declaration of Human Rights (UDHR), this convention was not designed to be an all-encompassing humanitarian measure. It was created for a very specific purpose – to address the refugee crisis in Europe created by the world wars and to maintain stability in Europe.

In addition to defining and limiting the term "refugee", the convention was a return to a state-centric model of addressing refugee concerns, with individual states prompted to share the responsibility of refugee protection and relocation (Goodwin-Gill & McAdam 2007, 92). Another main tenet of the 1951 Convention is the principle of *non-refoulement*, discussed in the introduction. The 1951 Convention was later amended by the 1967 Protocol Relating to the Status of Refugees, which removed the January 1951 time restriction and expanded the refugee definition to include persons of any nationality and geographical location, not just those in Europe (UN General Assembly 1967). Currently this convention has been ratified by 145 states, with the US being a notable exception (UNHCR 2015). However, being a signatory of the 1967 Protocol, the US is legally responsible to adhere to articles 2 to 34 of the 1951 Convention (UN General Assembly 1967).

A final international convention that is central to asylum is the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, 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 or acquiescence of a public official or other person acting in an official capacity (UN General Assembly 1984).

This convention prohibits states from returning anyone to a country where there is a possibility they would be tortured (UN General Assembly 1984). This clause formed the foundation for withholding of removal and relief under the CAT, which, as discussed previously, are forms of protection available for those who fear torture upon deportation.

The Beginnings of United States Refugee Policy

The United States' refugee and asylum related policy developed alongside international policy, though it is notable that the US showed resistance to simply adopting international guidelines and foregrounded the maintenance of biopolitical control in its policies. In the aftermath of the second World War, the US passed what is commonly known as the Displaced Persons Act of 1948. This act set the number of displaced people to be accepted by the US at 202,000 for the first two years following the act, on the condition that those accepted count towards the established quota either for the current year or future years (An Act to Authorize for a Limited Period of Time 1948). The continued reliance on the quota system to determine admittance directly contradicts the stated purpose of the act, as those most in need of refuge were of nationalities that were given comparatively low quotas. In its definition of "displaced person", this act utilized the refugee definition outlined by the International Refugee Organization (IRO) (An Act to Authorize for a Limited Period of Time 1948). However, the act further delineated a category of "eligible displaced person," restricting admittance on the requirement that one would be "suitably employed without displacing some other person from employment" and whose family would "not become public charges" (An Act to Authorize for a Limited Period of Time 1948). This restriction reflects the nativist attitudes prevalent in that historical moment and highlights the importance placed on self-sufficiency and that underlies so much of US immigration law and policy. Biopolitical concerns were at the forefront of refugee policy – protection was conditional on the refugee proving they would not be a burden on the state and would be a benefit to the national economy.

The Refugee Relief Act of 1953 was much less restrictive than the preceding act and utilized a much broader definition of refugee:

> any person in a country or area which is neither communist nor communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need to assistance for the essentials of life or for transportation (An Act for the Relief of Certain Refugees 1953).

This act allowed for the admittance of 209,000 special non-quota immigrants (Loescher and Scanlan 1986, 45). Its passage was motivated in part by foreign policy concerns regarding European stability (Bockley 1995, 265-266). Opponents of this act successfully utilized the act's security requirements to limit the number of refugees accepted by requiring verifiable evidence of each individuals' activities two years prior to entrance, resulting in the denial of many individuals fleeing persecution (Loescher and Scanlan 1986, 45). This rigorous screening process is an early example of the US immigration process weaponizing refugee and asylee's lack of documentary evidence against them for the purpose of unjust exclusion. This requirement of proof mirrors current asylum cases where the asylee is required to put forth evidence of their persecution, and in the case of gay men asylum seekers, evidence of their sexual orientation.. These screening mechanisms served as a way for the US to maintain biopolitical control over its population by exerting strict requirements of proof to ensure that only those the US deemed acceptable and non-threatening would be granted protection and removed from a potentially necropolitical existence, laying the groundwork for the construction of the ideal authentic victim.

The Cold War, Foreign Policy, and Refuge

The Cold War and the ideological fight against communism played a crucial role in shaping US refuge policies in the latter half of the 20th century (Macekura 2011, 357-358;

Bockley 1995, 266). The impact of the competing ideologies on immigration regulation is evidenced both by policies favoring refugees from communist dominated regions and by the discourse surrounding refuge during this time. An early example of such policy came as a consequence of the Soviet invasion of Hungary in 1956 and subsequent Hungarian liberation movement, which resulted in President Eisenhower utilizing a legal loophole known as the parole authority to allow the admittance of 38,000 Hungarian refugees (Bockley 1995, 268). The unprecedented generosity was reflective of the Eisenhower administration's belief that supporting the anti-communist liberation movement would challenge Soviet power (Bockley 1995, 266). These two cases are examples of how policies relating to refuge were deployed as an extension of US foreign policy rather than with humanitarian intentions.

The early Cold War era fears of communist infiltration is closely connected to the rise of government-led homophobia that resulted in the removal of those suspected of being queer from governmental positions (Johnson 2013, 55-56). This movement is known as the Lavender Scare, and was spurred in 1950 by Senator Joseph McCarthy's fear that communists and communist sympathizers were infiltrating the government (Johnson 2013, 56). There was a presumption that Communists were "twisted mentally or physically in some way," which aligned with constructions of queer people as pathalogical and resulted in the fear that LGBTQ people were more inclined towards Communist tendencies (Johnson 2013, 56). The Lavender Scare solidified the queer criminal archetype of the "queer security threat" by positioning LGBTQ people as both politically and sexually subversive (Mogul et al 2011 38-39). It is notable that this rise in homophobia coincided with the American Psychiatric Association's classification of sexual deviation as a mental disorder and the exclusion of those "afflicted with psychopathic

personality… or a mental defect," from immigration, both of which occurred in 1952 (American Psychiatric Association 1952, 38-39; An Act to Revise the Laws 1952, 182). This tightening of immigration controls to more easily exclude queer people during the height of the Lavender Scare evidences the pervasiveness of homophobia and pathologization of queer people.

The Immigration Act of 1965

The Immigration Act of 1965, also known as the Hart-Celler Act, marked the end of the national quota system and the end of formal racial exclusion. Instead, quotas were set by hemisphere, and a preference system was laid out that placed family ties at the center of immigration policy and that privileged those with high education and skills necessary for filling occupational gaps (Loescher and Scanlan 1986, 73). The preference system contained within this act sparked a "brain drain" from Asian countries to the US (West 2010, 15). The way that this act solidified the hierarchization of a person's value to the US based on their potential economic contribution worked to further devalue asylum seekers and refugees already constructed as an economic burden. This act also marked the formal beginnings of an ideological based understanding of refuge stemming from the Cold War and the fight against communism – a percentage of visas were reserved for those who have faced persecution based on race, religion, or political opinion, and are fleeing "from any Communist or Communist-dominated country or area," (Loescher and Scanlan 1986, 73). This language simultaneously restricted who was considered a refugee based on the ideology of their country of origin and served to position communist countries as refugee producing. This act is just one aspect of US policy and discourse that centered foreign policy concerns in discussions of immigration.

1980s and 1990s

As discussed briefly in the introduction, the Refugee Act of 1980 was intended to shift US policy from being based on ideological and foreign policy concerns to centering humanitarian concerns in order to comply with international norms and treaties (Anker 1990, 79). This act established a refugee quota set by the President each year (Loescher and Scanlan 1986, 215). The definition of refugee was reconceptualized and moved from the ideological definition enacted in the Immigration Act of 1965 to the definition utilized in the 1951 Convention and the 1967 Protocol (Anker 1990, 79). Therefore, asylum eligibility would subsequently be judged on an individual basis, assessing whether the individual met each aspect of the definition. The effectiveness of this policy in actually shifting refugee and asylee admissions to an individual humanitarian basis has been questioned by many scholars (Loescher and Scanlan 1986, 215; Anker 1990, 80; Nackerud et al 1999, 4; Macekura 2011). That immigration regulation was still influenced by foreign policy concerns is evidenced by the differential treatment of Cuban refugees and Salvadoran refugees in the 1980s, the former of which were granted nearly unrestricted migration on a group basis until nearly 15 years after the passage of this 1980 Act, while the latter were portrayed by the Regan administration as economic migrants and thus not deserving of refuge or asylum (Nackerud et al 1999, 4; Macekura 2011 358). Along with changing the definition of refugee and purportedly moving towards individual refugee determination, the concept of withholding of removal was formalized in order to reflect the international obligation of *non-refoulement* (Anker 1990, 80). The incorporation of withholding of removal under the INA is an extremely important aspect of the 1980 Act in terms of extending protection, as those who are barred from asylum for reasons of

not filing within the deadline or having committed certain crimes have an avenue for admittance. While the shift towards evaluating each individual case on its own merits and incorporating withholding of removal were meant to align US policy more closely with international humanitarian objectives, the state maintained or even strengthened its biopolitical control over which individuals were granted protection.

In 1980 the INS created a new policy with regard to lesbian and gay immigrants. LGBTQ exclusion was originally based in the pathologization of queer identities, justified in part by the American Psychological Association's inclusion of homosexuality and transvestism in its *Diagnostic and Statistical Manual* (DSM). However, in 1973 the APA removed homosexuality from the DSM (Drescher 2015). Despite being directed in 1979 by the Surgeon General to stop excluding lesbians and gay men on a medical basis, the Immigration and Naturalization Service (INS) continued to exclude lesbian and gay immigrants who either admitted their sexual identity or who were identified as queer by a third party (Luibhéid 2002, 23). This policy change did not fundamentally alter the system of exclusion, but merely shifted the determination process from the Public Health Service to the INS itself (Luibhéid 2002, 98). While homosexuality was no longer considered by the APA to be a pathology, exclusion of those who admitted their sexual orientation was still justified on the basis of "psychopathic personality," which was found by the courts to be a legal term rather than a medical term in this particular context and therefore admission of sexual orientation was sufficient evidence to exclude even without a medical diagnosis (Minter 1993, 779-780). The persistance of the INS in continuing to exclude LGB migrants even after homosexuality was medically depathologized reveals that the desire to

exclude queer migrants extends well beyond fears of psychological pathology. Medicalization was a tool utilized to exclude those positioned as undesirable and biopolitically threatening.

The other major immigration policy put into place in the 1980s was the Immigration Reform and Control Act (IRCA) of 1986. This act contained a provision that made it illegal for employers to knowingly employ an undocumented individual, except for temporary or seasonal positions that needed to be filled (Nichols 1987, 503-504). The exception for temporary positions that need to be filled is notable, as it is yet another example of how many migrants are only viewed as worthy or valuable when their labor is needed - they may be temporarily biopolitically incorporated only while it serves the US economy. This act also created a temporary amnesty policy, allowing undocumented migrants who arrived before 1982 to apply for legal status (Nichols 1987, 504). The employer sanctions were intended to curb future irregular immigration, while the amnesty policy was put in place to address the large number of undocumented immigrants already in the US at that time as it was viewed as an easier and more cost effective solution than mass deportation (Golumbic 1990, 166). This amnesty policy was also intended to give a path to legal status for those who had proven themselves valuable to the country, both economically and socially (Golumic 1990, 166). This is a clear example of the State taking steps to incorporate a population it now recognized as worthy of being a part of the biopolitical population. However, not everyone was deemed equally valuable and worthy. This amnesty policy was complicated by the AIDS epidemic and the addition of HIV to the list of medical exclusions from immigration (Nichols 1987, 522). 1987 guidelines mandated that everyone applying for permanent residence and refuge first be given HIV antibody testing, a policy that extended to those applying for legal status through the IRCA that meant anyone living with HIV

would be excluded (Goulmic 1990, 174-175). The policies surrounding HIV exclusion are yet another way that the state exerted biopolitical control over immigration and positioned those living with HIV as inherently threatening.

The Immigration Act of 1990 removed sexual deviation from being a basis of exclusion (Luibhéid 2002, 99) The end of excluding LGB people from immigration paved the way for a similar opening up in the realm of asylum. In 1990, in the Matter of Toboso-Alfonso, the Board of Immigration Appeals denied the Immigration and Naturalization Service's appeal of an immigration judge's decision to grant Toboso-Alfonso withholding of deportation on the basis that he would be persecuted on account of his sexual orientation, which the IJ found to fall under the particular social group ground of protection (Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990)). The decision that gay people could constitute a particular social group for the purposes of asylum opened the door for sexual orientation-based asylum claims. In 2000, the 9th Circuit Court of Appeals remanded the case of Hernandez Montiel back to the BIA with instructions to grant Hernandez Montiel asylum on the basis of persecution based on membership in the particular social group "gay men with female sexual identities in Mexico," which formed the basis for future asylum claims based on gender identity (Hernandez-Montiel v INS 2000, 719). However, while the 1990 Act ended the formal legal basis of queer exclusion and these two court cases laid the groundwork for SOGI asylum claims, they did not mark an end to LGBTQ discrimination in the immigration system. Two persistent mechanism of exclusion were the "good moral character" requirement of citizenship, and the continuing use of "crime of moral turpitude" as justification for exclusion or deportation, both of which impacted queer people who were found guilty of breaking sodomy and/or public morality statues (Minter 1993,

772). The continuing discrimination extends into the realm of asylum adjudication, which is the central premise of this thesis and will be expanded upon in detail in the following chapters.

In addition to ending formal queer exclusion, the Immigration Act of 1990 made other alterations to the immigration system. The structure that this act laid out is still central to how our current immigration system functions. The act established an overall quota for immigration, setting it at 675,000 for the years after 1995, and altered the preference categories (Leidin and Neal 1990, 328). This quota was a significant increase from the admissions under the previous system. Through this act, immigration visas are divided into three categories: family based, employment based, and diversity, with the vast majority of visas available in the family-based category (Leiden and Neal 1990, 328). This act also established temporary protected status (TPS), which allows the Attorney General to grant protection to certain nationalities whose countries are facing civil wars, conflict, natural disasters, or other conditions that make it unsafe to return (Leiden and Neal 1990, 334). Temporary protected status prevents protected individuals from being deported and grants them work authorization (Leiden and Neal 1990, 334). Prompted in part by the war on drugs, this act also expanded the list of drug related crimes that would render someone deportable (Macías-Rojas 2018, 6). This expansion is particularly notable in the context of this thesis, as in this period drug trafficking became the only non-violent crime considered to be an aggravated felony, and thus "particularly serious." Therefore, this period tightened regulations on who could be granted asylum or withholding of removal, and the inclusion of drug related crimes paved the way for other non-violent crimes to be considered "particularly serious" (Holper 2017, 1110)

In 1996, during Bill Clinton's presidency, the Illegal Immigration Reform and Immigrant Responsibly Act (IIRIRA) was passed. This act, as indicated by its title, focused mainly on preventing and addressing irregular immigration. At the time it was passed, this act "include[d] some of the toughest measures ever taken against illegal immigration," (Fragomen et al 1997, 438). This act, passed when the war on crime was a major political focus, played a major role in solidifying the association unauthorized migrations and criminality, positioning irregular migrants as always already criminal (Macías-Rojas 2018, 2). The IIRIRA included provisions that strengthened border control at the US Mexico border, requiring an increase in border patrol agents and the establishment of a fourteen mile long fence (Fragomen et al 1997, 438). In terms of legal migration, the act strengthened sanctions for those who overstayed their visas, required vaccinations for visa applications, and created penalties for those who knowingly file or assist in the filing of a false immigration document (Fragomen et al 1997, 439-440). Additionally, the IIRIRA contained provisions to require family-sponsored immigration cases to prove that the family member would not become a public charge (Fragomen et al 1997, 441-442). This act represents a tightening of biopolitical control over immigration in the realm of criminality.

The IIRIRA has significant ramifications for asylum seekers. The act barred any migrant who knowingly made a "frivolous application for asylum" from receiving any immigration benefit in the future (Fragomen et al 1997, 442). This provision further emphasized the requirement of authenticity, and heightened consequences for those deemed inauthentic. New bars to asylum were also implemented, adding the provision that those who could be returned to a "safe third country" would not be eligible for asylum in the US (Fragomen et al 1997, 442). Additionally, this act was responsible for the implementation of the one-year filing deadline for

asylum, rendering any asylum application received more than one year from the applicants last entry to the US automatically denied, unless the courts determine that there were "extraordinary circumstances" that justified the late application (Acer & Bryne 2017, 358). The IIRIRA was also responsible for the creation of expedited removal, which allowed immigration enforcement officers to order the removal of a migrant, a major shift from the previous system that gave only immigration judges the authority to order someone removed (Acer & Bryne 2017, 360). As a result of the increased criminalization of immigrants and asylum seekers, this act mandated that certain categories of immigrants would be detained, including asylum seekers subject to expedited removal procedures (Acer & Bryne 2017, 364). One major consequence of detaining asylum seekers is that it makes it much more difficult for them to obtain legal counsel, reducing their chances of gaining asylum (Acer & Bryne 2017, 364). The provisions in the IIRIRA have significantly undermined asylum protections and have resulted in the deportation of many individuals who should have had the opportunity to have their asylum cases legitimately considered (Acer & Bryne 2017, 361).

The criminalization of immigrants was also a central aspect of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), though this act is not specifically an immigration act. The AEDPA "authorized detention, wiretapping, secret evidence in removal proceedings, and provisions that limit relief from deportation and judicial review in expedited deportation and asylum cases for immigrants designated as 'terrorists' or 'criminal aliens' (Macías-Rojas 2018, 11). This act expanded crimes that rendered immigrants deportable (Macías-Rojas 2018, 11). Additionally, the AEDPA added a provision that required any undocumented immigrant who was found in the US to be processed as a new arrival, preventing them from qualifying for

deportation relief previously available for some immigrants who had strong ties to the US (Macías-Rojas 2018, 11). While the decade of the 1990s came with the end to formal exclusion based on sexual orientation and marked the opening up of asylum to include those fleeing persecution on that basis, it was also an era of intense strengthening of biopolitical control over immigration through increasing criminalization of migration.

The 2000s

Immigration policy and sentiment was heavily influenced by the September 11, 2001 attacks and the subsequent "war on terror." The criminalization of immigrants that was seen in the prior decade continued. Due to the end of the Cold War and the beginning of the war on terror, there was a shift from conceptualizing the main national security threat as communists and communism to focusing on terrorists and terrorism as the main threat in immigration discourse and policy. Through his rhetoric, President George W. Bush contributed to the solidification of the dichotomy American/Un-American, and the subsequent exclusion of those who were anti-war, immigrants, many LGBTQ Americans, and LGBTQ immigrants from the metaphorical nation (Bloodsworth-Lugo & Lugo-Lugo 2010, 19-20). This categorization of the queer community as un-American was made possible in part by Bush's rhetorical positioning of same-sex marriage as a threat to the American way of life (Bloodsworth-Lugo & Lugo-Lugo 2010, 7, 19-20). In a speech calling for a constitutional amendment to "protect marriage in America," Bush rhetorically produces same-gender marriage as a national threat by arguing that rulings by local courts to allow same-gender marriage "are presuming to change the most fundamental institution of civilization" in ways that could have "serious consequences throughout the country," (Bush 2004). By constructing both terrorism and same-gender marriage

as national threats, Bush was able to portray those who were critical of his war and those who were supportive of gay marriage as un-patriotic and un-American, solidifying metaphorical national boundaries (Bloodsworth-Lugo & Lugo-Lugo 2010, 7, 19-20).

While Bush's leadership tightened who was included in the biopolitical nation, not all gay men were excluded. According to Jasbir Puar, the formation of homonationalism during the Bush presidency created a distinction between those who are acceptably gay and those who are not, with the former being "folded into life," or incorporated into the biopolitical nation and the latter defined as un-American, threatening (Puar 2007, 36). Acceptance was reserved for those white gay men who successfully exhibited patriotic homonormativity. This idea was embodied in Mark Bingham, the white gay businessman who helped to prevent 9/11 hijackers from crashing into the White House (Puar 2007, 46; Shakhsari 2014, 96). Bingham was hailed as a heroic gay role model, and his white hypermasculinity and patriotism were constructed as an ideal to aspire to, particularly for gay American citizens wanting to be incorporated into a national imaginary that privileged manliness and patrotism (Shakhsari 2014, 96). This era was a prime example of how "there is room for the absorption and management of homosexuality – temporally, historically, and spatially specific – when advantageous for the nation," (Puar 2007, 50). Incorporating some LGBTQ folks into the national imaginary allowed the US to portray itself as morally superior and progressive, a notion that was furthered by the depiction of the Muslim world as simultaneously homophobic and perversely sexual (Puar 2007, 4). Thus, protecting gay men against the homophobia of the 'enemy' became yet another way to justify and gain support for the war (Shakhsari 2014, 96). In this way, homonationalism created an acceptable white

American queer subject deserving of biopolitical incorporation while maintaining the exclusion of those queer folks and immigrants still deemed to be a threat to the nation.

In terms of formal policy post-9/11, one major piece of legislation was the REAL ID Act of 2005. This act amended the Immigration and Nationality Act (INA) in several ways, with the stated goal of preventing terrorism (Rempell 2008, 186). First, this act codified extensive criteria to be considered during the credibility assessment aspect of an asylum case, indicating that any and all factors can be used to determine the credibility of an asylum applicant "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim" (Rempell 2008, 194). Prior to the act, factors relevant to the credibility determination were based on case law and precedent (Rempell 2008, 194). Similarly, prior to the REAL ID Act, the standards determining when an Immigration Judge could require corroborative evidence in asylum claims were created by case law and were not formally codified (Reed 2017, 559). The REAL ID Act formalized and expanded the corroboration requirement, which now allows Immigration Judges to require evidence to corroborate a credible testimony, provided that this evidence could be "reasonably obtain[ed]" (Reed 2017, 560). The requirement is especially worriesome for gay asylum applicants given the already existing skepticism surrounding the authenticity of gay asylum applicants' identities, as this requirement allows courts to request evidence of someone's sexual orientation beyond their own testimony. For those who have not been open about their sexual orientation prior to applying for asylum, not having access to evidence to support their claim could pose a significant barrier to gaining asylum and being recognized as authentic.

The Rise of Executive Orders as Immigration Reform

In the latter half of the 2000s, Congress attempted and failed to pass immigration reform. In 2007, the Comprehensive Immigration Reform Act, President Bush's major immigration reform legislation, was defeated in the Senate (Smith 2007). The failure to pass immigration law through Congress extended into Barack Obama's presidency. In Obama's first term, attempts to pass a comprehensive immigration reform bill failed to pass in both the House and the Senate (Skrenty and López 2013, 62). In the absence of congressional agreement on immigration policy, President Obama turned to executive action as a way to address immigration. Some of his major executive orders relating to immigration include the creation of two programs, Deferred Action for Childhood Arrivals (DACA), and Deferred Action for Parents of Americans and Legal Residents (DAPA). DACA is a program aimed at providing legal residence for undocumented immigrants who arrived in the US as children and who had graduated high school (Skrenty and López 2013, 75). DACA came two years after the DREAM Act, which would have created a similar program, failed to pass in Congress (Skrenty and López 2013, 73). Deferred Action for Parents of Americans and Legal Residents (DAPA) created a program that would provide relief from deportation to some parents of children who were US citizens or legal permanent residents (Wadhia 2016, 138). The groups that his executive actions benefited were very limited, favoring those undocumented individuals who had been in the US for a significant amount of time, while "sanction[ing] the increasingly harsh treatment of more recent entrants" (Zug 2015, 954). It is important to note that deportations under Obama increased significantly, particularly deportations of those deemed to be criminals (Skrenty and López 2013, 70). While DACA was an avenue for some LGBTQ immigrants to gain legal status and legalization of gay

marriage in 2014 opened the door for many queer migrants to sponsor spouses, the Obama administration's policies posed challenges for many LGBTQ immigrants. Abuse of LGBTQ immigrants, particularly transgender women, in immigration detention became a major source of contention when activist Jenicet Gutierrez demanded the relase of LGBTQ immigrants and an end to deportations during an LGBTQ event at the White House (Stack 2015). Obama was widely criticized for his use of executive orders, with opponents arguing that he had overstepped his authority (Volpp 2016, 386). The impacts of using executive orders in place of actual legislation are complicated. Executive action is much faster and does not have the potential to get stuck in Congress like formal legislation does. While potentially useful in addressing immediate issues, using executive action in place of formal legislation means that the programs and policies can easily be reversed, as seen with Obama era orders during the Trump administration.

The trend of utilizing executive orders to manage immigration continued under Trump's presidency. In late January 2017, less than a month into his presidency, Trump signed three executive orders relating to immigration. One of these orders was entitled *Protecting the Nation from Foreign Terrorist Entry into the United States*, also known as the Muslim Ban or Travel Ban, which prevented anyone from entering the US from 7 predominantly Muslim countries for 90 days and stopped refugee admittance for 120 days (Barrow 2018). This order was challenged in the courts and was subsequently revised. Another January 2017 executive order was called *Border Security and Immigration Enforcement Improvements,* which allowed for the creation of a physical border barrier and increased the number of Border Patrol agents (Fullerton 2017, 328). Finally, the order *Enhancing Public Safety in the Interior of the United States* threatened to revoke federal funding from those cities that failed to comply with federal laws regarding

undocumented individuals (Fullerton 2017, 328). These are the first of many executive orders relating to immigration that Trump has signed during his presidency.

One major policy of the Trump administration is known as the "Zero Tolerance" Immigration and Enforcement Policy, which pushed for the criminal prosecution and subsequent incarceration of all adults, including asylum seekers, who crossed the border outside of a designated port of entry (Congressional Research Service 2019). This increased criminalization is reflective of and perpetuates the Trump Administration's attempt to portray immigrants as criminals and to discredit legitimate asylum claims. This policy resulted in the separation of upwards of 3,000 children from their parents due to the detention of parents in facilities children are not allowed in (Congressional Research Service 2019). Due to the backlash against this policy, Trump signed the executive order *Affording Congress an Opportunity To Address Family Separation*, which affirmed that the administration would continue to criminally prosecute those who crossed the border without proper documentation until congress directs them otherwise (Executive Order 13841 2018).

In addition to executive orders, The Trump administration has undermined asylum through the court system. In particular, there have been attempts to limit individuals included in the Membership of a Particular Social Group (MPSG) ground for asylum. The first challenge came in 2018, when former Attorney General Jeff Sessions overturned the court decision that had granted a Salvadoran woman, Ms. A.B., asylum on the basis that the domestic violence she experienced constituted persecution and that she was a member of a particular social group (Center for Gender and Refugee Studies 2018). This decision overturned the then precedential decision *Matter of A-R-C-G* that stated that domestic violence survivors could qualify for asylum

as they were considered members of a particular social group, which undermines and potentially poses a challenge for future domestic violence survivors applying for asylum on the basis of their membership in a particular social group. Similarly, in the *Matter of L-E-A,* Attorney General Barr referred the Board of Immigration Appeals' case to himself and overturned the decision on the basis that in this case a family did not qualify as a particular social group, which challenges decades of case law and precedent that established that family membership could qualify someone for asylum under MPSG (Dias 2019). These are just two examples of how case law can easily be challenged, and protections can be unilaterally rolled back when they are not established in formal legislation. As asylum applicants persecuted because of their sexual orientation or gender identity also generally fall under the category 'membership in a particular social group,' this trend of restricting and challenging the groups that qualify for asylum based on MPSG has the potential to impact those in the LGBTQ community in the future.

Conclusion

The history of immigration in the US is a history of nativism, exclusion, and control in order to maintain homogenous and exclusionary conceptions of national identity and protect the nation from biopolitical threats. Those who did not conform to dominant US expectations of identity and behavior were rendered undesirable and subsequently excluded. While there has been a significant amount of progress in the realm if immigration, particularly LGBTQ immigration, and while current immigration legislation no longer explicitly excludes based on identity, there are still remnants of the hierarchical and exclusionary structure that this system was built on in current immigration policy and discourse. Many of the themes outlined in the introduction are still evident in current regulations. The value of an immigrant is still deeply tied

to their ability to contribute to the economy. Associations of immigrants with criminality have been persistent throughout history and in the contemporary moment, and deportations and denial of asylum for those with minor criminal records persist. Medical exclusions from immigration remain in place. While exclusion based on sexual orientation is no longer formalized, misconceptions surrounding gender and sexual orientation continue to influence asylum claims. The US immigration system has been and is centered around controlling who is considered worthy or deserving of existing in this country based on US economic and foreign policy interests and narrow ideas of national identity and morality. Even the systems supposedly built on humanitarian concerns like asylum and refuge are heavily influenced by these principles. The enactment of immigration controls are closely tied to and heavily influenced by existing structural and societal systems of racism, nativism, xenophobia, classism, and homophobia that dehumanize and devalue certain identities and experiences, and render them undesirable, threatening, and thus excludable. In this way, the immigration system is an apparatus of state control over the biopolitical boundaries of the nation, both physical and ideological.

Chapter 2: Authenticity

Within the asylum system, the main goal is determining which applicants are authentic victims of persecution who are deserving of protection. Conversely, as asylum is surrounded by a culture of disbelief in which some asylum seekers are assumed to be deceitful and taking advantage of this system, discovering and denying applicants who are deemed inauthentic is equally as important. In the case of gay men seeking asylum based on their sexual orientation, my research indicates that there are expectations of authentic queer victimhood which every applicant is measured against. This notion of the correct gay victim has been constructed by the courts based on the convergence of normative understandings of gender, sexuality, and victimization. As the authentic gay victim standard is based on restrictive norms and treats any experience that deviates from these norms as evidence of inauthenticity, correctly embodying this figure becomes a near impossibility for asylum seekers. My research indicates that the asylum court system has systematically resisted recognizing gay men asylum applicants as authentic victims deserving of protection. Authenticity in these cases is twofold: the courts must agree that both the identity of the applicant *and* the persecution they faced or will face are authentic or genuine in order for them to fit the constructions of the perfect victim. Thus, identity and persecution become major sites where the legitimacy of an asylum claim is called into question. The culture of disbelief that plagues the asylum system is heightened when combined with judges' misconceptions about or biases against gay applicants. My analysis of several asylum court cases of gay men highlight how truly being viewed by the courts as an acceptable

victim is a near impossibility, plagued by stereotypes, contradicting expectations, and a tendency of the courts to place blame on gay asylum seekers for their own victimization.

Being deemed credible is a necessary prerequisite for being viewed as authentic. Credibility is a central aspect of asylum adjudication – an adverse credibility determination itself is sufficient to deny asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Part of the credibility determination is an assessment of the applicant's demeanor – which "the [Immigration Judge] alone is positioned to make determinations about… – by observing the alien and assessing his or her tone and appearance – and in that sense is 'uniquely qualified to decide whether an alien's testimony has about it the ring of truth'" (*Todorovic v. Att'y Gen. of the U.S.* 2010). However, this assessment must "rest on substantial evidence, rather than on conjecture or speculation" (*Todorovic v. Att'y Gen. of the U.S*. 2010). With such responsibility placed on the individual Immigration Judge (IJ) in assessing demeanor, it leaves a great deal of room for implicit or explicit bias of judges to impact the outcome of the cases. In several of the cases at hand, the authenticity of the applicant's identity is called into question because they did not conform to the judges assumptions that gay men are inherently effeminate.

Gay asylum seekers exist at the intersection of multiple norms surrounding gender, sexuality, and victimization. Though there are many ways that normativity is/can be defined, Alexis Shotwell understands "normativity to mean the process by which people claim that a given way of being is good or beautiful, or to be endorsed," (Shotwell 2012, 992). Regarding gender, normative expectations associate masculinity with men and femininity with women. Defining masculinity and femininity is difficult and the definitions can differ spatially and temporally, but they are always defined in alterity to each other, as a binary – what is masculine

is by definition assumed to be not feminine (Connell 2005, 70). In normative terms, masculine is what men are supposed to be, masculinity is what men are supposed to perform (Connell 2005, 70). It is notable that in a given society there can be multiple forms of masculinity that are hierarchically categorized. At the top of this hierarchy is a hegemonic masculinity, which is the dominant form of masculinity that is heralded as the ideal form masculinity in a given society and that legitimizes men's dominance over women (Connell 2005 77; Christensen & Jensen 2014, 62-63). This idealized and nearly unattainable hegemonic masculinity is constructed superior to marginalized men of color masculinities or subordinate gay masculinities (and to femininity) and reinforced by complicit masculinities that never attain the hegemonic form but nevertheless support hegemonic ideals (Connell 2005, 76-81).

Within this hierarchy, gay men are subordinated as "[o]ppression positions homosexual masculinities at the bottom of a gender hierarchy among men," and thus "gayness is easily assimilated to femininity" (Connell 2005, 78). The Western conflation between gay men and effeminacy has roots in the 18th century as ideas of distinct sexual identities emerged (Hennen 2008, 34). In the centuries since, normative constructions of gender and sexuality have solidified around expectations that heterosexual men must be masculine while queer men are effeminate. These binary norms have resulted in static and stereotypical understandings of identity that have shaped the expectations of asylum judges. The assumption that gay men are effeminate is utilized by the asylum judges both as a way of assessing the credibility of an asylum seeker and as a means of determining the likelihood of future persecution. In the former case, the presence of effeminate traits are assumed to confirm the credibility of the asylum seeker's identity and the basis of their claim, while absence of effeminate traits is read as potential evidence of deceit and

inauthenticity. In the latter case, judges assume a universal acceptance of the conflation between gay men and effeminacy and subsequently expect that gay men who they do not read as effeminate will not be recognized as gay and therefore will not face persecution. In this way, effeminacy becomes a central feature of the figure of the authentic queer victim.

In addition to determining the authenticity of the applicant's identity, the courts must also accept the authenticity of the persecution the asylum seeker has faced. Put another way, they must have been correctly victimized, they must embody the innocent and passive victim. The notion of victimhood is gendered, associated with normatively feminine attributes such as weakness, passivity, and a lack of agency , thus further embedding the connection between effeminacy and the figure of the authentic queer victim (Dunn 2012, 3447; 3461). However, truly achieving this status of a proper victim is complicated by the is an unwillingness of the courts to understand gay asylum seekers as *innocent* victims. The courts require asylum seekers to be "out," preferably because their effeminate nature makes hiding their identity impossible, both as proof of their identity and as evidence of the possibility of future persecution, yet they are not supposed to truly live a life of an out gay man. There are expectations of immigration judges that asylum seekers should have known that they could be targeted and avoided situations that would draw attention to their sexual orientation. This is reflective of the notion of 'behavioral responsibility for risk' in which "…some individuals are seen as more 'deserving' of violence and less deserving of victim status than are others on the basis of their 'behavioural responsibility' for risk avoidance." (Richardson and May 1999, 309). Put more simply, victim blaming. In the context of asylum cases of gay men, those that are viewed by the courts as having acted in ways that increases their risk of persecution, for example going to a gay bar, are

deemed at least partially responsible for their victimization. Subsequently, they are unable to achieve the status of the authentic gay victim because they are not deemed to be truly innocent.

Reading several asylum court cases in concert with each other exemplifies both how the authentic gay victim is imagined in asylum adjudication and how the courts evaluate the legitimacy of a claim and an individual by measuring gay asylum seekers against this impossible ideal. The case of Daniel Shahinaj evidences the demand of conforming to judge's expectations of gay men in order to be viewed as authentically gay. Shahinaj is an Albanian gay man who applied for asylum after he reported election fraud to officials in Albania who subsequently beat, raped, and threatened Shahinaj while using derogatory language related to his sexual orientation (*Shahinaj v Gonzales 2007*). The IJ doubted Shahinaj's credibility, arguing that "[n]either [Shahinaj]'s dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual, nor is there any indication that he engaged in a pattern or practice of behavior in homosexuals in Albania…" (*Shahinaj v Gonzales 2007*). Here, the IJ improperly relies on stereotypical notions of gay male behavior and appearance that prevent him from impartially and properly determining whether Shahinaj is eligible for asylum. While the judge does not explicitly refer to femininity/effeminacy in his determination that Shahinaj does not appear to be gay, the underlying subtext indicates that expectations of effeminacy are influencing this IJ's decision.

The Immigration Judge additionally places an emphasis on "outness," both in his comment on Shahinaj's lack of homosexual behavior and in a later comment where he argues that it is "implausible" that Shahinaj would not have reported his abuse to a LGBTQ organization in Albania (*Shahinaj v Gonzales* 2007). The expectation that if he were authentically gay Shahinaj would be involved in or know he could go to LGBTQ organizations

does not take into account the fact that Shahinaj was not out in Albania and therefore might not have been involved in the queer community there for a variety of reasons. The IJ made an adverse credibility determination as he doubted that Shahinaj was authentically gay, which meant that all forms of relief were denied. This decision was affirmed by the BIA, but the 8th circuit court of appeals found that the IJ's credibility determination was tainted by his homophobic bias and therefore the 8th circuit remanded the case back to the lower courts with a request that the case be assigned to a different IJ (*Shahinaj v Gonzales* 2007). This case is a prime example of how being closeted and not recognizably gay (in the eyes of the court) can be used as justification for questioning the credibility and authenticity of an asylee's sexual orientation and can serve to undermine an asylum claim.

In the case of Tarik Razkane, the authenticity of his identity was not questioned, yet his lack of effeminacy and the fact that he was not currently out in his country prompted the immigration judge to assume that he could continue to hide his sexual orientation and therefore would not face persecution. Tarik Razkane is a gay man from Morocco who was not open about his sexual orientation with his friends or family in Morocco due to fears of discrimination and ostracization (*Razkane v Holder 2008*, 3). However, despite his attempts to be discrete he was attacked by a neighbor who held a knife to his throat and said that "[his] death is better than [his] life since [he is] gay," (*Razkane v Holder 2008,* 3). After this incident, Razkane came to the US under the Fulbright Program. He eventually overstayed his visa resulting in the start of removal proceedings, after which he applied for asylum, withholding of removal, and protection under the CAT. Razkane was barred from asylum as he filed after the one year deadline, and in regards to withholding of removal and protection under the CAT the IJ found that "Razkane could not show

his status as a homosexual would likely lead to persecution in Morocco" (*Razkane v Holder* 2008, 5). In support of this decision, the IJ argued that Razkane's "appearance does not have anything about it that would designate [him] as being gay. [He] does not dress in an effeminate manner or affect any effeminate mannerisms," (*Razkane v Holder* 2008, 6). As in the case of Todorovic, the IJ relied on his on biased opinions about how a gay man should look, act, and dress.

The IJ further stated that Razkane had not "shown that it is more likely than not that he would be engaged in homosexuality in Morocco or, even if he was, that it would be the type of overt homosexuality that would bring him to the attention of the authorities or of the society in general," (*Razkane v Holder* 2008, 6). The logic used here differs slightly from Shahinaj's case. Here, unlike with Shahinaj, the IJ is not questioning whether or not Razkane is gay because of his failure to embody stereotypes of gay men, but rather whether those in Morocco would assume he is gay based on his appearance, mannerisms, or actions. Essentially, the IJ is arguing that because he does not think Razkane is effeminate enough to be immediately identified as gay that he should be able to be discrete and even have relationships without being noticed by the authorities or society. However, as Razkane was already attacked due to his sexual orientation despite his efforts to conceal his sexual identity, this assumption that he will not be persecuted as he is not effeminate has already been disproven. The IJ's reliance on the assumption that gay equals effeminate and his clear belief that this is a universal truth prevented him from recognizing the very real danger that Razkane could be in if returned to Morocco. The expectation that Razkane can and should hide his sexual orientation places all responsibility for preventing persecution on Razkane himself – by the IJ's logic, if Razkane faces persecution in

the future, it must be through some fault or action of his own because he is not naturally effeminate enough to be perceived as gay through appearance and mannerisms alone. Razkane does not meet the standards of the authentic gay victim because the prior violence he faced was discounted as not severe enough because "the attack he suffered had not resulted in injury" (*Razkane v Holder* 2008, 5) Further, his risk of future persecution is deemed to be avoidable because of his lack of effeminacy. By this logic any future violence he faced would be because he provoked the abuse as the result of his own actions and decisions, therefore Razkane would not be an innocent blameless victim and thus is not an authentic queer victim. This case indicates that in the eyes of the court, the correct gay victim must appear to be so effeminate that they are unable to conceal their identity and pass as straight.

The case *Todorovic v. Att'y Gen. of the U.S.* is yet another example of how normative expectations of identity and victimhood shape the adjudication of asylum claims. This case further demonstrates judges's expectations that the authentic gay victim must be both effeminate and entirely blameless. Todorovic is a gay man from Serbia who experienced homophobic violence throughout his life. Todorovic was beaten and kicked out of his home when his father learned of his sexual orientation. His father arranged that he would be forcibly conscripted into the army, where he suffered verbal and sexual abuse after he was outed. While out with his boyfriend, Todorovic was stopped by police, taken to the police station, forced to perform oral sex by the other inmates, and later interrogated and beaten by a police officer due to his boyfriend's connection to a gay rights organization. Additionally, he was beaten until he was unconscious outside a gay-friendly bar and was subsequently hospitalized for 10 days. (*Todorovic v Att'y Gen. of the U.S.* 2010, 3-5).

Todorovic's initial request for asylum was denied because he had not applied within the one year window and because the immigration judge found Todorovic to be not credible (*Todorovic v. Att'y Gen. of the U.S. 2010,* 7). He cited what he perceived as inconsistencies in Todorovic's testimony as part of the reason for his adverse credibility determination. Further, the IJ doubted that Todorovic would be persecuted upon return. The IJ began his discussion of credibility with this statement:

> The Court would first note that the respondent says that he is singled out for persecution because he is gay in his home country. The Court studied the demeanor of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay. The Court does not know whether he is or not, his testimony is that he is overtly gay and has been since he was 17 years old. Be that as it may, it is not readily apparent to a person who would see this gentleman for the first time that, that is the case, since he bears no effeminate traits or any other trait that would mark him as a homosexual. (Todorovic v Attorney General 7).

Here, the immigration judge calls the authenticity of Todorovic's identity and history into question. He implies that because he did not view Todorovic as effeminate, a 'trait that would mark him as a homosexual," that he would not be immediately recognizable as gay and therefore would not be persecuted, logic that mirrors that of the IJ in Razkane's case. This assessment indicates that the immigration judge is heavily influenced by normative expectations of gay men and victimhood, and assumes that the conflation between gay men and effeminacy is universal.

This case exemplifies the link between effeminacy and authentic persecution in the eyes of the court. While the IJ is making assumptions about Todorovic's potential for future persecution based on his lack of effeminacy, the ways in which the IJ ignores Todorovic's past persecution as evidence of potential future persecution is telling of the way the IJ conceptualized authentic victimhood. The IJ assumes that Todorovic's lack of effeminacy means that he would

be able to exist in the world without being recognized as gay and therefore would not be persecuted, yet Todorovic's past experiences with violence indicate that this is not the case. The IJ ignores these experiences because he does not believe they are authentic experiences of persecution. As in the case of Razkane, the IJ's emphasis on Todorovic's lack of perceived effeminacy indicates that for someone to be a legitimate victim of persecution based on their identity, that identity must be immediately obvious to the judge. If it is not obvious, there is an expectation that one should be able to hide their identity to avoid persecution and any violence they face is a result of their failure to avoid risk. This logic explains why the IJ discounted Todorovic's past abuse – he is not an authentic victim because he failed to avoid situations that put him in danger. Several of Todorovic's past experiences of violence occurred when he was interacting with the world as an out gay man – when he was walking with his boyfriend, and when he was at a gay-friendly bar. By ignoring these experiences of violence and determining that Todorovic is not credible, a determination made in part because of Todorovic's lack of perceived effeminicy, the IJ is essentially saying that he does not believe that these events occurred, but if they did, it must be due to Todorovic's actions or behavior because he is not effeminate enough to be recognized as gay otherwise. Todorovic is not an authentic gay victim both because the IJ doubts that he is authentically gay and because his lack of effeminacy precludes the possibility that he would be viewed as an innocent blameless victim in the eyes of the court.

It is notable that the 11th circuit court of appeals recognized that the IJ in Todorovic's case relies on unacceptable stereotyping that "taints his credibility determination as a whole, and thus prevents us from conducting any fair assessment of this record," (*Todorovic v. Att'y Gen. of*

the U.S. 2010, 16). Subsequently, the 11th circuit vacated the IJ and BIA's decisions, and remanded the case back to the lower courts "for a new factual hearing, free of any impermissible stereotyping or ungrounded assumptions about how gay men arex supposed to look or act" (*Todorovic v. Att'y Gen. of the U.S.* 2010, 18). The fact that the 11th circuit recognized and denounced the IJ's reliance on stereotypes is a sign of progress in the courts, and the fact that this case in particular was included in the RAIO training guide is important as asylum officers and immigration judges are theoretically familiar with this case and the precedent that the 11th circuit set with regards to reliance on overt stereotyping. However, the fact that such blatant stereotypes were allowed by the BIA is troubling, and raises questions about how more subtle forms of stereotyping or bias could continue to be left unproblematized by IJ's, the BIA, and the courts of appeals.

The cases of Shahinaj, Razkane, and Todorovic evince the ways in which norms about gender, sexual orientation, and victimhood have shaped the construction of the figure of the authentic queer victim. Not conforming to normative expectations central to this figure results in the courts questioning the authenticity of the applicant's identity and/or doubting the likelihood that they will be persecuted in the future. This doubt of future persecution relies on stereotypical and assumed to be universal expectations about what makes someone recognizably gay and places the burden of avoiding persecution onto those who the courts assume can successfully hide their identities due to their lack of effeminacy and current status as in the closet. The assumption that one can remain discrete and avoid persecution ignores, as in the cases of Razkane and Todorovic, that applicants have often already faced persecution based on their sexual orientations despite their perceived lack of femininity. These cases are revealing of how

gay victimhood is constructed in the US asylum system – for someone to be considered an authentic victim of anti-gay persecution, they must be so effeminate that a US IJ would read them as undoubtedly and unconcealably gay, and therefore they have no choice but to be out. If a judge thinks they can successfully hide their sexual orientation and pass as straight, then they are not an authentic victim as it is assumed by IJ's that they will not be persecuted, despite evidence to the contrary. This logic sets many applicants up for failure, for if they do experience persecution, it can be passed off as their own fault for putting themselves at risk and not successfully concealing their identity despite the IJ's belief that they could or should have.

This form of victim blaming is exactly what happened in the case of Juan Pablo Maldonado. Maldonado is an Agentinian gay man who came to the US in 2002 and applied for asylum, withholding of removal, and relief under the CAT in 2003 on the basis that he feared persecution because of his sexual orientation (Maldonado v Attorney General 2006). While in Argentina, Maldonado was arrested and beaten by police after leaving a gay disco on at least 20 separate occasions (Maldonado v Attorney General 2006). The physical abuse was accompanied by homophobic slurs and death threats, for example this statement made by police during one of the incidents: "you f*ggots deserve to die," (*Maldonado v. Att'y Gen. of the U.S* 2006). These incidents were corroborated by eyewitness affidavits (*Maldonado v. Att'y Gen. of the U.S* 2006). The Immigration Judge in this case denied Maldonado all forms of protection on the basis that "he failed to establish persecution based on his membership in a particular social group," (*Maldonado v. Att'y Gen. of the U.S* 2006). The judge argued that the alleged persecution Maldonado faced was not due to his membership in a particular social group, but rather on account of his "'social preferences' (a desire to go to gay discos and leave early in the morning)"

(*Maldonado v. Att'y Gen. of the U.S* 2006). Here, the judge undermined Maldonado's asylum claim by refusing to acknowledge the connection between Maldonado's experiences of persecution and his sexual orientation, despite the officers verbally making that link through their statements during the abuse. The logic of the judge here is akin to the victim blaming that occurs in cases of sexual assault – you are not a true victim because you put yourself in this position by wearing that outfit, by getting too drunk, by walking alone at night, by going to a gay disco and leaving early in the morning. The logic used here is a prime example of the concept of "behavioral responsibility for risk" in action – Maldonado repeatedly faced violence after going to gay discos but continued to go, so by the court's logic the violence he faced is his own fault and he is not an innocent victim deserving of protection. The BIA affirmed the decision of the IJ in Maldonado's case, but the 3rd Circuit Court of Appeals concluded that Maldonado had in fact faced persecution and remanded the case for further reconsideration (*Maldonado v. Att'y Gen. of the U.S* 2006).

This case, in concert with the cases discussed previously, highlights the contradicting expectations of asylum courts: if one is not visibly recognizable as gay they will not be persecuted so they do not deserve asylum, but if they are openly gay and participate in activities associated with the queer community they are to blame for putting themselves at risk. Maldonado was out and openly went to gay clubs in Argentina and therefore the judge could not rely on the assumption that he should be discrete to avoid persecution as judges did in the cases of Todorovic, Razkane, and Shahinaj. Instead, the IJ discounted Maldonado's persecution by arguing that it was his own fault for going to gay discos and therefore the persecution was not based on his sexual orientation but because of his own decision to participate in queer nightlife.

The underlying subtext of this ruling was that Maldonado was "too out," too open about his sexuality. Maldonado was not the perfect victim in need of rescue because in the eyes of the judge he provoked the abuse through his "social preferences."

These cases indicate that achieving the status of the "authentic gay victim" is a near impossibility, plagued by stereotypes, contradicting expectation, and victim blaming. Based on these four cases, the ideal gay victim is constructed as someone who is so visibly recognizable as gay (read: effeminate) that they cannot remain discrete and must be "out", but who also does not engage in any activity that the courts could argue is the "real" cause of persecution. However, as the next case demonstrates, even when an applicant manages to conform to both of these competing expectations, authentic victimhood in the eyes of the courts is still an unattainable ideal. Jose Patricio Boer-Sedano is a Mexican gay man living with HIV who came to the US in 1990 to avoid further persecution and later applied for asylum. Boer-Sedano attempted to hide his sexual orientation for fear of persecution, but according to the courts "despite his attempts to conceal his sexuality, others could perceive it" (*Boer-Sedano v Gonzales* 2005). This assertion indicates that Boer-Sedano embodies the first expectation of "authentic" gay identity – being so recognizably gay that attempts to pass as straight are futile.

Despite attempting to conceal his sexuality, Boer-Sedano faced harassment and ostracization from family, friends, and in his place of work (*Boer-Sedano v Gonzales* 2005). In 1988, Boer-Sedano was walking with a friend when they were both arrested and detained for 24 hours because the officer assumed they were gay and believed they were going to a hotel together. This arrest took place despite the fact that being gay was not a crime in Mexico. After the initial arrest, the same officer stopped Boer-Sedano nine different times and forced

Boer-Sedano to perform oral sex on him under the threat that if he did not comply the officer would out him (*Boer-Sedano v Gonzales* 2005). During one incident, the officer

> warned Boer-Sedano that 'if he killed [him] and threw [his] body somewhere no one would ask about [him], because [he] was a gay person" and the officer would not be committing murder, but simply 'cleaning up society (*Boer-Sedano v Gonzales* 2005).

During another incident, the officer held a loaded gun to Boer-Sedano's head and said "if you are lucky this is going to be your fate" *(Boer-Sedano v Gonzales* 2005). Boer-Sedano quit his job and did not leave his house in order to escape the persecution, and eventually moved to Monterrey, Mexico to avoid the officer before saving enough money to come to the US (*Boer-Sedano v Gonzales* 2005).

The violence that Boer-Sedano faced appears to align with the construction of "authentic persecution" put forth by the previously discussed cases – Boer-Sedano was simply walking down the street with another man when a police officer guessed that he was gay and abused him repeatedly on this basis. The officer made it clear that the reason for the abuse was Boer-Sedano's sexual orientation and threatened his life because of it. Boer-Sedano did not engage in any activities that the courts could argue provoked abuse. The violence he experienced was at the hands of a governmental actor. By all accounts, Boer-Sedano appears to conform to the expectations of an authentic queer victim, yet he was denied asylum.

As justification for denying Boer-Sedano's asylum claim, the Immigration Judge stated that he "failed to establish past persecution on the account of a protected basis," arguing that gay men in Mexico did not constitute a particular social group, despite precedent dictating that sexual orientation can be a basis for asylum (*Boer-Sedano v Gonzales* 2005). Further, the Immigration Judge downplayed the persecution that Boer-Sedano faced from the police officer

was "simply a 'personal problem' he had with this officer" (*Boer Sedano v Gonzales* 2005). It is obvious that the IJ was unwilling to see Boer-Sedano as an authentic victim of persecution, and subsequently downplayed and discounted the violence that he faced. Depicting the repeated attacks on Boer-Sedano as simply a "personal problem" that he had with the officer, the courts diminish the severity of the abuse by placing responsibility on Boer-Sedano for his own victimization. Further, the phrase 'personal problem' takes the violence out of the realm of public violence that is privileged in asylum claims and relegates it to a private matter, which serves to remove the perpetrating officer from his role as an agent of the state and establishes a line between persecution and interpersonal violence. The abuse Boer-Sedano faced, in this logic, is situated firmly in the realm of interpersonal violence (read: not persecution) which the judge uses to undermine Boer-Sedano's claim.

The BIA affirmed the IJ's decision, but the 9th Circuit court of appeals found that the IJ erred in denying Boer-Sedano asylum and withholding of removal, and subsequently remanded the case for reconsideration (*Boer-Sedano v Gonzales* 2005). While it is a sign of progress that the court of appeals did not uphold the IJ and BIA's decisions in this case or in the cases of Todorovic, Razkane, Shahinaj, and Maldonado, the fact that these individuals had to go through the appeals process twice each to get a fair ruling is evidence of a systemic problem within our asylum system. How many applicants were unjustly denied protection but did not have access to lawyers to help them put together an appeal? Or who received the denial from the BIA and were discouraged from appealing again? Asylum applicants deserve a fair and unbiased hearing from the start.

These five cases indicates that the authentic queer victim is a fallacy, an ever evolving and virtually unattainable ideal. Systematically, the US asylum system is unwilling to recognize that gay men are victims of persecution and are deserving of protection in the US. While the biopolitical incorporation of persecuted gay asylum applicants is a theoretical possibility, in reality the construction of the authentic queer victim is an extremely restrictive and impossible ideal. It is built from biased and stereotypical understandings of gay subjectivity that do not reflect the reality of many asylum seekers and is plagued by an unwillingness of the courts to acknowledge that anti-gay violence can be persecution. This refusal to recognize the gay victimhood is in line with Diane Richardson and Hazel May's research on anti-LGBTQ violence that indicates that gay men are constructed as somehow 'deserving' the violence they experience (Richardson and May 1999, 320). This 'justification' of homophobic violence "derives at least in part from their attributed sexual status as inferior and immoral beings within a social order which privileges heterosexuality as 'natural' and 'normal,' (Richardson and May 1999, 320). Heteronormativity and the presumed deviance or failure of those outside of the normative expectations is yet another norm that the gay asylum seeker has to contend with.

Conforming to normative expectations is such an emphasis of asylum claims because those outside of the norm are constructed as threatening to the biopolitical nation. Biopolitics functions by mitigating threats through the disciplinary powers that work towards normalization or regularization of the population, and a tight control over immigration is one of the ways to ensure biopolitical control (Puar 2007, 115). The asylum system then becomes a disciplinary mechanism designed to ensure only the incorporation of the 'right kind' of person who not only does not pose a threat to the physical security of the nation but also does not threaten to

challenge dominantly accepted societal norms, in this case around gender and sexuality and victimhood. In asylum cases of gay men, constructions of authentic victimhood are closely tied to normative understandings of a victim as passive, weak, and feminine. The conflation between gay men and effeminacy that is relied upon by the courts and used as a standard by which the asylum seeker's authenticity is judged is reinforced by gendered associations of victimhood. As the concept of authentic gay victim was shaped through competing normative understandings of gender, sexuality, and victimhood and complicated by an unwillingness to accept the innocence of gay asylum seekers, the requirements for achieving this status of an ideal queer victim are so restrictive as to essentially exclude everyone. The correct gay victim does not exist, it is an unattainable ideal. As the asylum system is a mechanism of biopolitical control, what kind of subject it is willing to extend protection to (and what kind of subject it systematically refuses) demonstrates the values of the US as a nation. The authentic gay asylum seeker is an impossible ideal that serves to justify the exclusion of foreign gay men who are clearly still viewed as a potential threat to the population or unwanted as potential US residents and therefore are undeserving of protection.

The rise in homonationalsim and the subsequent biopolitical incorporation of the homonational homonormative gay man highlights that there is a possibility for the inclusion of a correct gay subject, but the victimized gay asylum seeker fails to meet this standard. Returning to the concept of hegemonic masculinity, the homonational gay man distances gay masculinity from its feminized and subordinated position in the hierarchy of masculinities. Instead, homonational gay masculinity becomes complicit, upholding hegemonic masculinity. The effeminacy expected of gay asylum seekers remains subordinate, now not only to hegemonic

masculinity but also to this new construction of correct gay masculinity. While the emphasis on effeminacy in asylum arose through the expectation that gay men are inherently effeminate, a conflation that is challenged by the masculinity of the homonational citizen, restrictive gendered expectations of victimhood prevent the figure of the authentic gay victim from including those masculine gay subjects who are now constructed as the ideal gay citizen.

Moving forward, it is possible that this restrictive construction of the correct queer victim is opening up. In all five of the cases discussed above, the courts of appeals recognized the biases or flawed decisions of the IJs and the BIA. In the case of Todorovic, the 11th circuit court of appeals acknowledges that "the IJ relied on impermissible stereotypes about gay people as a substitute for substantial evidence," (*Todorovic v. Att'y Gen. of the U.S* 2010, 14). As all of these cases were included in the 2011 USCIS training module *Guidance For Adjudicating Lesbian, Gay, Bisexual, Transgender, And Intersex (Lgbti) Refugee And Asylum Claims,* ideally asylum officers going forward should be aware that blatantly relying on stereotypes should not be tolerated.

However, normative expectations could continue to more subtly influence asylum officers and immigration judges. In order to prevent these biases, norms and binaries regarding gender, sexuality, and victimhood would have to be challenged. Alexis Shotwell's theories are extremely useful here – she posits that normativity itself is not the problem, but that the issue lies with restrictive normativities, with the assumption that there is a singular acceptable way of being (Shotwell 2012, 992). Instead, she argues for open normativities or "collectively crafted ways of being that shape subjectivities oriented toward widespread flourishing," (Shotwell 2012, 990). Rather than restrictive norms, if there were an unlimited number of ways of being that are

seen as "good, beautiful, or to be endorsed," asylum seekers would not be excluded on the basis that they fail to conform to normative expectations of someone with their gender, sexual orientation, and history of persecution (Shotwell 2012, 992). Further, biopolitical exclusion on the basis that an individual would threaten dominant norms by existing outside of them would cease. In terms of masculinity and femininity, "[a] non-polarized understanding of gender would allow masculinity and effeminacy to vary independently of one another. By this logic a person could be both more masculine and more feminine than another…" (35). Currently, in a polarized understanding of gender, "the presence of feminine traits automatically implies a deficiency in masculine traits," and positions the effeminate gay man as failing to adhere to the norm of masculine men (Hennen 2008, 35). Uncoupling femininity and masculinity from gender and sexuality would allow for a much broader range of subjectivities that are able to or allowed to flourish.

Chapter 3: Criminality

As biopolitics regulates and excludes that which it deems to be a threat to the nation, inclusion is dependent on not being seen as a threat, not being seen as criminal. Positioning individuals as a threat to the nation in order to justify biopolitical exclusion extends to LGBTQ migrants and citizens. As highlighted in the history of immigration, migrant sexuality was highly regulated. Fears that queerness was a threat brought into the US by immigrants justified LGBTQ exclusion and regulation of migrant sexualities (Mogul et al 2011 8-9). Within the US, queer folks were constructed as criminal both through enacting laws like those prohibiting sodomy and through discursively constructing queer folks as deviant, threatening, and violent. Criminalization of queerness is solidified and perpetuated by the creation of several "queer criminal archetypes," narratives of criminality tied to queer people that result in increased policing and punishment of those that do not conform to dominant heterosexual norms (Mogul et al 2011, 23). Notably, these archetypes overlap with criminalizing narratives of people of color, migrants, and poor people (Mogul et al 2011, 24). These archetypes include the "queer killer" ex. "gleeful gay killers", homicidal "man hating" or "man like" lesbians; the "sexually degraded predator" ex. "the male child molester, the gay prison rapist, the sexually aggressive Black lesbian, the promiscuous gay man, the degenerate transgender woman using the bait of gender impersonation to reel in one panicked heterosexual male after another"; the "disease spreader"; and "the queer security threat" (Mogul et al 2011, 27; 31; 35; 36). With the rise of homonationalism, those who hope to be folded into the nation must distance themselves from these criminal constructions and reassert that they are not like the "bad" queer folks embedded in

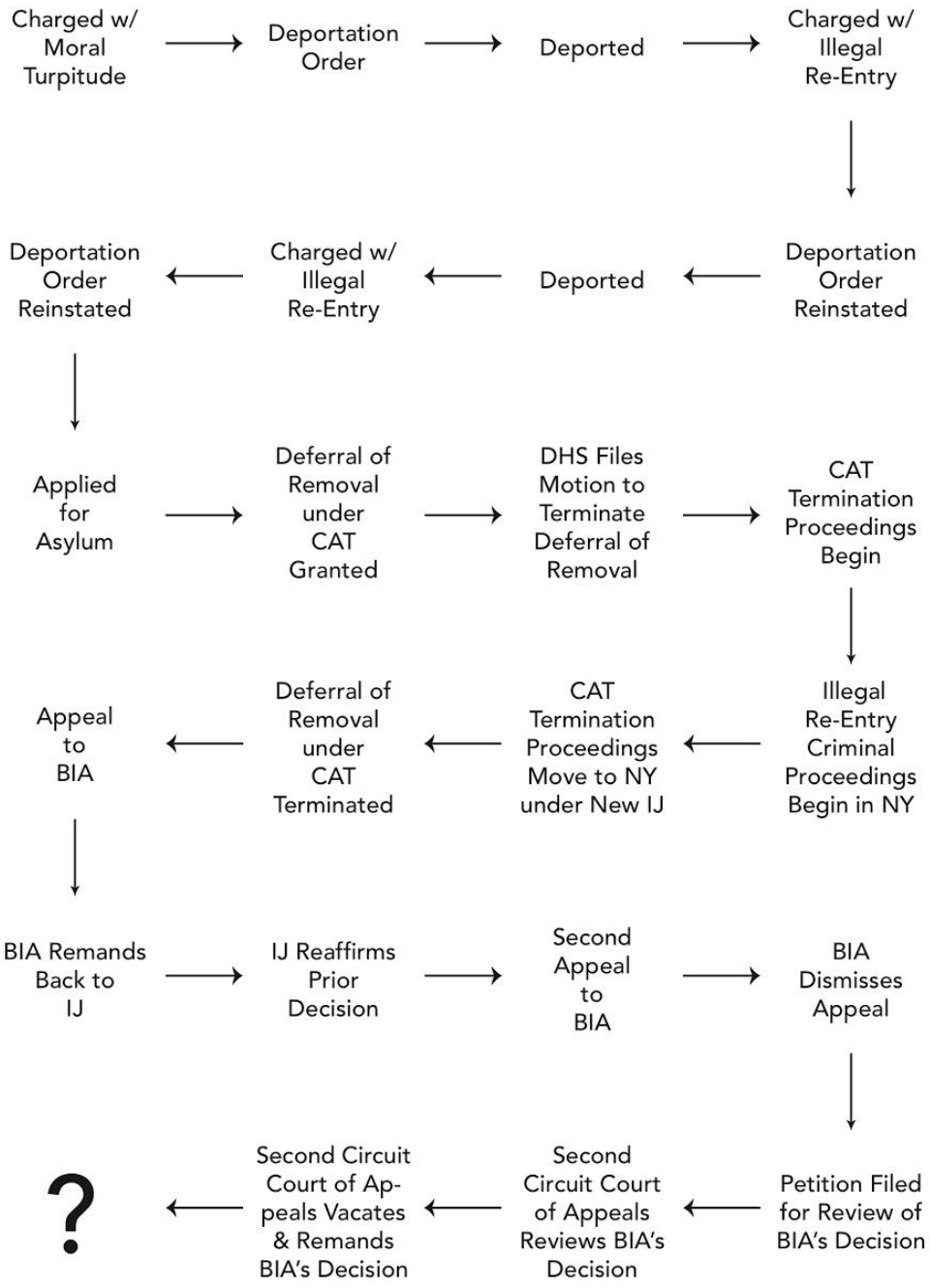
the criminal archetypes. For gay asylum seekers who hold many identities constructed as criminal and threatening to the US but whose admittance to the US depends on being seen as innocent authentic victims, distancing oneself from the presumed criminality is absolutely necessary. For those who actually have committed crimes, their conviction can be enough to not only bar them from biopolitical exclusion but place them in a necropolitical realm.

Criminal status both legally and discursively bars an individual from gaining asylum. As discussed inthe introduction, tose who are convicted of a "particularly serious crime," an ambiguous term, are ineligible for asylum, withholding of removal under the Immigration and Nationality Act (INA), and withholding of removal under the Convention Against Torture (CAT). Therefore, deferral of removal under the CAT as their only opportunity for protection. In addition to legal barriers to protection, those asylum seekers convicted of crimes (even crimes not deemed particularly serious) face the challenge of existing as both a criminal and a victim deserving of protection, a theoretical impossibility due to the pervasiveness of the victim/criminal binary. Thinking back to the construction of the authentic gay victim, criminality alone precludes the possibility of meeting this standard as criminals are not seen as authentic victims. Excluding those with criminal histories from incorporation in the nation is an example of biopolitical control, where those deemed to be a threat are legally and/or and barred from remaining in the nation.

As highlighted in Chapter 1, immigrants have been depicted as a potential threat to national security since before the start of formal immigration regulation. Immigration restriction was and still is largely justified by the fear that immigrants will be a threat to the population's well-being. This concern is reinforced by rhetoric that associates immigration with criminality,

and thus portrays immigrants as criminals. This association both serves to justify increasingly harsh treatment of migrants during their immigration process and to discursively prevent immigrants from being incorporated into the national imaginary. Making the act of crossing a border without authorization illegal in and of itself and then labeling an entire group of people inherently "illegal" forms the foundation of the process wherein migrants are associated with criminality and therefore their potential for citizenship is rendered incompatible with the nationalist biopolitical agenda.

In the US, criminal status in and of itself is enough for an individual to be removed from biopolitical incorporation. Che Gosset argues, relying in part on the works of James Baldwin, that the prison is an "anti-black … and necropolitical enterprise," (Gosset 2014, 43). It is important to acknowledge, as Gosset does, the role of prisons in naturalizing bio- and necropolitical violence and the forms of discipline and surveillance needed to perpetuate violence (Gosset 2014, 33). The necropolitical repercussions of criminalization extend even after incarceration, with difficulty re-integrating into the community, job discrimination, and in some cases felony disenfranchisement. The long term impacts of criminalization serve as a prime example of the power of necropolitics to produce not only "literal, physical death, but also social, political, and civil death – the social relations of death, decay, and dying that emerge from prolonged exposure to violence, neglect, deprivation and suffering" (Lamble 2014, 161). The repercussions of criminalization are magnified when criminality is placed on gay immigrants, as criminality does not align with homonationalist constructions of what it means to be patriotically queer or with expectations of a feminized victim of homophobic persecution. The necropolitical repercussions of criminalization are exemplified by the asylum proceedings of Peter Conrad Ali.



This figure depicts Ali's complicated path through the legal and immigration systems.

Ali is a Guyanese gay man who came to the US in 1980, was convicted of nine theft-related crimes and two crimes of moral turpitude and was subsequently deported in 1997 (*Ali v Mukasey* 2008, 2-3). Ali was subsequently arrested upon return to Guyana because of his status as a criminal deportee, and during the time he was detained he was deprived of food, beaten until he lost consciousness, and later raped until he again lost consciousness (*Ali v Mukasey* 2008, 3-4). Before he was raped, the officers used a homophobic slur to refer to him (*Ali v Muckasey* 2008, 13). Ali was able to escape during a transfer to another facility and returned to the US, after which he was deported for a second time (*Ali v Mukasey* 2008, 4). After once again fleeing police custody, Ali returned to the United States and applied for asylum, withholding of removal, and relief under CAT (Convention Against Torture), on the basis of his East Indian ethnicity and criminal deportee status, and later added that he feared persecution on the basis of his sexual orientation. While little is said in the appeals document about the nature of Ali's fear of persecution based on his ethnicity, looking at the larger history of ethnic conflict can shed light on Ali's claim. Guyana has a history of ethno-political conflict between those with East Indian and African ancestry (Mars 2001, 359). During the years leading up to Ali's asylum claim, there was major political tension between the People's Progressive Party (PPP), backed by those of East Indian descent, and the People's National Congress (PNC), which is mainly supported by Afro-Guyanese people (Mars 2001, 356). The PPP won elections in both 1997 and 2001, and both times the PNC believed the elections were rigged, resulting in demonstrations and protests (Premdas 2004, 252-253).

During the initial asylum process Ali was not granted asylum because the Immigration Judge (IJ) found that he had not proved he was or would be tortured on the basis of his ethnicity (*Ali v Mukasey* 2008, 5). Further, Ali was not granted withholding of removal because despite the IJ finding that Ali's testimony credible and agreeing that he would likely be tortured upon return, the IJ felt that Ali would be "a danger to the US community" based on his criminal history (*Ali v Mukasey* 2008, 5). Instead, Ali was granted deferral of removal, and the INS was instructed to use their discretion in regard to whether Ali would be released from custody or if he would remain detained (*Ali v Mukasey* 2008, 5). The nature of Ali's criminal deportee status rendered him barred from biopolitical incorporation in either the US or in Guyana. Instead of being an individual the biopolitical state would monitor and protect, Ali was viewed as a threat to the population and subsequently positioned as the "living dead."

In 2003, the Department of Homeland Security (DHS) filed a motion to terminate Ali's deferral of removal on the basis that they gathered new evidence that indicated there was no systemic abuse of Guyanese criminal deportees, which undermined Ali's original case (*Ali v Mukasey* 2008, 6). Further, the DHS believed Ali would be a threat to the community and so they would not release him, but could also not detain him indefinitely. (*Ali v Mukasey* 2008, 6-7). Due to his criminalization and lack of citizenship the biopolitical mechanisms of discipline and control were unable to account for him, resulting in the DHS attempting to remove him from the nation entirely.

His criminal status and subsequent construction as a threat not only place him in a necropolitical limbo, but also undermine the ability of the asylum system to recognize his sexuality and victimization as authentic. Before the IJ could reevaluate Ali's deferral of removal

claim, Ali was charged with illegal re-entry in New York, resulting in the case being transferred to a new IJ (*Ali v Mukasey* 2008, 7-8). Before the termination of deferral of removal case began in NY, Ali attempted to add into evidence his fear of persecution based on his sexual orientation but was denied (*Ali v Mukasey* 2008, 10). From the start, IJ Vomacka called the authenticity of Ali's sexual orientation into question. Unlike the cases in the previous chapter, it is not Ali's lack of effeminacy that resulted in the judge questioning his identity, but rather doubt about Ali's motivations for revealing his identity and an assumed lack of credibility. Ali asserted that the reason he failed to bring up his sexual orientation in prior proceedings was "because he did not consider himself gay at that time" (*Ali v Mukasey* 2008, 13). The idea that someone's sexuality could change or that someone could realize their sexual orientation later in life is incompatible with the assumed life narrative that follows one linear path based on westernized expectations of what it means to be gay (Dawson and Gerber 2017, Llewellyn 2017).

Therefore, it is unsurprising that from the start, IJ Vomacka called the authenticity of Ali's sexual orientation into question. Additionally, there was no level of understanding on the part of IJ Vomacka as to why someone in Ali's position might be reluctant to reveal his sexual orientation to asylum adjudicators. In the subsequent proceedings, the IJ questioned the timing of Ali bringing up his sexual orientation, suggesting that Ali was trying to delay proceedings (*Ali v Mukasey* 2008, 11). As evidence, Vomacka argued that "[i]t [wa]s not easy for the Court to understand why a respondent would be willing to disclose forcible rape by jail guards, but not willing to discuss his own sexual orientations as a homosexual" (*Ali v Mukasey* 2008, 11). Ali stated that he did not initially disclose the fact that he had been raped during his detention in Guyana as he was too embarrassed to tell anyone, which indicates that he only disclosed the

abuse out of necessity (*Ali v Mukasey* 2008, 10). IJ Vomacka says himself that he could not understand why Ali would not have immediately disclosed his sexual orientation – Vomacka is implying that it does not make sense that Ali would have waited to disclose, and thus doubts the credibility of his claim. In reality, there are significant reasons as to why Ali might not have felt comfortable sharing this information with the courts. After facing persecution because of his sexual orientation, it is entirely understandable that Ali would be hesitant in revealing this information to authority figures. Further, sodomy laws were not ruled unconstitutional in the United States until 2003, which was after Ali's initial deferral of removal claim was granted. It is entirely understandable that Ali might have choose not reveal his sexual orientation to the asylum courts or to his lawyer until after sodomy was decriminalized. IJ Vomacka's lack of understanding reveals much more about how unqualified he was to be adjudicating sexual orientation based claims than it does about Ali's credibility. The IJ's final decision was that Ali had failed to provide enough credible evidence that he would be tortured if returned to Guyana and therefore he ruled that his deferral of removal should be terminated (*Ali v Mukasey* 2008, 11). Vomacka's inability to understand this delay in reporting, combined with his preconceived notions of Ali's credibility, contributed to Vomacka's decision to terminate Ali's CAT protection. Vomacka understood Ali to be a lying dangerous criminal who was a threat to the US, and subsequently was unable to see Ali's disclosure of his sexual orientation as anything other than a tactic to evade deportation.

This decision to terminate CAT protection was appealed to the Board of Immigration Appeals (BIA) on the grounds that the former IJ found Ali's testimony to be credible, something the new IJ failed to consider and thus the IJ was erroneous in his adverse credibility

determination (*Ali v Mukasey* 2008, 12). The BIA remanded the case back to IJ Vomacka, who agreed to accept additional evidence and allowed Ali to move forward with his claim that he would be tortured for being gay. After hearing evidence and testimonies, IJ Vomacka reaffirmed his prior decision terminating Ali's deferral of removal. As justification, he cited what he considered the incompatibility of Ali's two claims – that he would be tortured because of sexual orientation and because of his status as a criminal deportee. IJ Vomacka asserted that "'violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people,' and therefore Ali was less likely to be viewed in Guyana as a member of either disfavored group." (*Ali v Mukasey* 2008, 14). This quote is laden with assumptions, stereotypes, and misconceptions, and highlights the ignorance of the IJ and his deeply entrenched stereotypical expectations. This notion that criminality and queerness are incompatible ignores the long and ever continuing history of criminalizing queer subjects, particularly queer people of color. It is notable that Vomacka made this assertion only two years after sodomy laws were ruled unconstitutional in the US and after hearing evidence in the proceedings that sodomy is criminalized in Guyana with a punishment of life in prison (*Ali v Mukasey* 2008, 13).

Outside of the legal realm, some forms of queerness have been and continue to be pathologized and criminalized in the national imaginary. The creation of the homonationalist citizen was dependent on the pathologization and inherent anti-Americanness of the 'other.' The homonationalist subject cannot exist without its antithesis, the terrorist – the feminized, perverse, evil figure embodied in Osama Bin Laden in the aftermath of 9/11 (Puar 2007, 46). The creation of the terrorist as a subject is dependent on racialization and perverse sexualization – the construction of Bin Laden as a violent and dangerous terrorist was predicated in part by

associations of him with femininity (Puar 2007, 38). Vomacka's discussion of "feminine contemptible homosexuals" pathologizes and devalues femininity in men, which is reminiscent of the very rhetoric utilized to construct Bin Laden as a violent, dangerous, inhuman terrorist. In arguing that "violent dangerous criminals and feminine contemptible homosexuals are not usually seen as the same people," IJ Vomacka clearly does not understand or intentionally ignores how gay effeminay has historically been constructed as pathological, deviant, dangerous, and criminal, and additionally invisibilizes or renders impossible the realities of queer folks with criminal histories like Ali.

If the problem here is not that queerness and criminality are viewed as incompatible, then how can we understand Vomacka's comment and decision? In arguing that criminality and queerness are incompatible, Vomacka is not drawing on historical or current realities but rather the construction of the acceptable queer victim. The queer refugee is always already reduced to their victimhood. They exist to be 'saved' and 'protected' from the homophobia of the nations that the US benefits from portraying as backwards and uncivilized. In this view, one cannot simultaneously be a victim deserving of protection and a criminal. Therefore, Vomacka's statement reflects the expectations of authentic queer victimhood and how criminality precludes being seen as an innocent victim. It is not queerness that is seen as incompatible with criminality, it is victimhood.

Further, the homonationalist construction of the correct gay citizen does not leave room for criminality. Homonationalism functions in part to distinguish between "good" and "bad" queer citizens – those "queer liberal subjects folded into life" and the "sexually pathological and deviant populations targeted for death" (Puar 2007, 24). In order to be one of the queer subjects

folded into life, one must prevent oneself from being associated with criminality as criminality on its own can be a reason for biopolitical abandonment. Criminality combined with queerness forecloses nearly all possibility of becoming a homonationalist and biopolitically incorporated citizen. Ali, a racialized criminalized gay immigrant, would most certainly be perceived as unable to assimilate to the norms and expectations that come with being a homonationalist subject and thus has no hope of biopolitical incorporation in the United States. Ali, as an Indo-Guyanese immigrant, has to contend both with the presumed whiteness of the homonatinal subject and with the presumed criminality of both men of color and immigrants. So when IJ Vomacka argued that Ali would not be persecuted because his criminal deportee status and sexual orientation were incompatible, the underlying subtext was that due to his criminal status, Ali would not be able to fit the mold of acceptable queerness and acceptable victimhood, and thus is not deserving of protection.

IJ Vomacka additionally justified his decision that Ali's sexual orientation was unbelievable by arguing that in order to be recognized as gay Ali would "need a [sexual/romantic] partner or cooperating person" (*Ali v Mukasey 2008*, 14). IJ Vomacka's discussion of Ali's potential for future sexual encounters is extremely invasive and outside the realm of what is necessary to adjudicate an asylum claim based on sexual orientation. As Vomacka doubted that Ali would be able to find a partner, he argued that "the picture of [Ali] as a proud, professed homosexual in Guyana seems to be more an expression of wishful thinking than something that's particularly likely to come true," (*Ali v Mukasey* 2008, 14). It is clear from Vomacka's statements that in order to be recognized as authentically or correctly gay, one must have a partner. This assumption is rooted in homonationalist constructions of gay male

subjectivity. In her discussion of homonationlaism, Jasbir Puar brings up the concept of the 'domestinormative' – the idea that "homonormative relationships that mimic heteronormative domesticity" are seen as more acceptable or are sanctioned by the state and society (Puar 2007, 123). This theory indicates that the underlying implication of IJ Vomacka's reasoning was that Ali's presumed inability to find a partner further pushed him outside the bounds of acceptable queerness.

In his justification as to why he believed Ali would be unlikely to find a partner in Guyana, Vomacka's prejudice against those with mental illnesses was blatant. In his reasoning, Vomacka noted that Ali is "a convicted criminal with 'professed mental problems' and 'some problems with his personality,'" (Ali v Mukasey 14). Vomacka is referring to Ali's "post traumatic stress disorder and severe depression" and the Division of Immigrant Health and Safety's assessment that Ali had "traits of paranoid, avoidant, dependent and obsessive compulsive personality disorder," (*Ali v Mukasey* 2008, 13; 11). It is notable that Ali's experiences of persecution and incarceration could cause or exacerbate these diagnoses. Incarcerated men are at a high risk for the development of PTSD (Krammer et al 2019). Survivors of sexual violence experience an elevated risk of PTSD and depression, and it is likely that the physical and sexual violence that Ali experienced at the hands of the Guyanese police are responsible for at least some of Ali's diagnoses (ISTSS 2018, 3). Holding mental illnesses against him that likely stemmed from the very persecution he is applying for asylum to avoid should be unacceptable.

IJ Vomacka is attempting to use Ali's diagnoses and criminal status as evidence Ali would be undesirable, thus unable to find a partner, thus not recognizable as authentically gay.

This assumption that Ali would be inherently undesirable due to his mental illnesses is not based in fact, but rather relies on Vomacka's own prejudices. This logic resembles the way in which people with disabilities are presumed to be asexual or undesirable (Kafer 2003, 82). Further, Ali's sexual desirability should not be relevant to his asylum claim. Ali is arguing that he will be persecuted on account of his sexual orientation, which is not conditional on having a partner. Ali faced past persecution for being gay despite not being in a relationship. Ali is in danger of persecution regardless of whether he lives up to Vomacka's expectations of a "proud, professed homosexual" (*Ali v Mukasey* 2008, 14). Vomacka attempts to discredit Ali's claim to asylum by once again challenging the authenticity of Ali's identity – he is essentially arguing that Ali's presumed inability to find a partner somehow makes him not authentically or sufficiently gay. This logic is just another layer of bias and discriminatory logic used to justify denying Ali protection. It is clear that IJ Vomacka's homophobic and ableist biases tainted his ability to impartially adjudicate this asylum case, a view that is supported by the 2nd Circuit Court of Appeals' decision to remand this case due to the biases exhibited by IJ Vomacka.

Ali's case and his treatment by IJ Vomacka highlight the ways in which the victim/criminal binary permeates asylum decisions and renders those asylees with criminal backgrounds, particularly those with identities already associated with criminality, unable to be accepted as true victims of persecution that deserve to be protected by the US. Besides being legally barred from gaining protection from persecution if their crimes are deemed "particularly serious" and thus having to prove they would be tortured, a much higher standard, those with criminal records have to contend with the biases of immigration judges and their assumptions about who can and who cannot be a victim. These assumptions are influenced by the

victim/criminal binary and complicated by narratives of criminality surrounding queer folks, people of color, migrants, and poor people. Ali's criminal history was a major factor in shaping his path through the asylum system and clearly clouded IJ Vomacka's perception of Ali and his willingness to give him a fair and thorough trial. In this way, the asylum system not only served as a mechanism of biopolitical regulation, but also functioned as necropolitical system with both the capacity and willingness to deny a man protection from torture and death because a judge was unable or unwilling to see past his own biased worldview about who is a valuable human being and who, by virtue of their criminal status and sexual orientation, is not.

HIV and Criminality

The necropolitical repercussions of the asylum system are blatant within a subset of cases that all involve men living with HIV who will be subject to detention due to their criminal deportee statuses if they are deported to their respective countries of origin (*Jean Pierre v Attorney General* 2011; *Lavira v Attorney General* 2007; *Bosede v Mukasey* 2008; *Eneh v Holder* 2010). These cases exemplify the pervasiveness of the victim/criminal binary and how criminal status can overshadow even the most severe instances of potential victimization. I discuss one of these cases, *Jean Pierre v Attorney General,* in depth. HIV (Human Immunodeficiency Virus), a virus that attacks the immune system, weakening it and making those living with HIV susceptible to other illnesses (Golumbic 1990, 170). In some cases, especially when left untreated, the weakening of the immune system can result in AIDS (acquired immunodeficiency syndrome). This stage marks the virtual collapse of the immune system, leaving the individual extremely vulnerable to contracting illnesses that their body can not fight off (Golumbic 1990, 171). Without treatment, the life expectancy of someone living

with AIDS is up to 3 years, less if the individual has contracted a dangerous illness (What Are HIV and AIDS? 2019). The dangers of HIV when left untreated place asylum applicants living with HIV who would be unable to access treatment upon return to their countries in a particularly precarious necropolitical position.

Yet another layer to these cases is the treatment of HIV as a biopolitical threat in and of itself. In the 1980s, President Raegan signed an executive order that added HIV to the list of Dangerous Contagious Diseases, thus allowing the State Department and the Immigration and Naturalization Service (INS) to bar those living with HIV from immigrating to the US (Brier 2009, 79). This bar was set not only because of concern for public health, but also because of economic concerns related to both the cost of treating immigrants living with HIV and because it was assumed that the virus would impact the ability of immigrants to support themselves financially (Brier 2009, 105; Winston and Beckwith 2011). Thus, those living with HIV were conceptualized as biopolitical threats endangering both the health and the wealth of the nation. The exclusion of immigrants with HIV continued until 2010, which is significant here because all of the cases below occurred while the ban was still in effect (Winston and Beckwith 2011).

Jean Herold Jean Pierre is a man from Haiti living with HIV that has progressed to the stage of AIDS (Jean Pierre v Attorney General 3). He came to the US in 1992 on a temporary visa expiring the following year (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 3). He overstayed his visa and was later convicted of drug related crimes three times (Jean Pierre v Attorney General 3). In 2005, the DHS started removal proceedings against Jean Pierre whilst he was serving a two-year sentence for his third conviction (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 3). In response, Jean Pierre applied for withholding of removal under the Convention Against Torture

(*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 3-4). Jean Pierre claimed that if he was deported he would be detained upon return and tortured in a Haitian prison, as Haiti has a policy of indefinitely detaining criminal deportees (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 2; 4). He contended that he would be singled out for torture as he has AIDS, and is suffering from headaches, fevers, memory impairment, and hallucinations due to his infection (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 4). Without medication, his AIDS related illnesses would progress and result in further mental illnesses. In addition to AIDS, due to his compromised immune system Jean Pierre suffers from Cytomegalovirus, which caused him to become blind in one eye (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 4). Jean Pierre argued that, given his condition, his status as a criminal deportee, and the stigma against those with AIDS, deporting him would essentially be a death sentence. A healthcare professional confirmed that without treatment Jean Pierre would die within a month or two of deportation (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 6). Further, he contends that while in prison "he would he will be beaten with metal rods, confined for weeks in a tiny crawl space, and subjected to the Haitian practice of "kalot marassa" (severe boxing of the ears)," which was confirmed by expert testimonies (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 2).

The Immigration Judge denied Jean Pierre's CAT claim, finding that "the treatment the Respondent will encounter in the Haitian jail, while horrendous, does not rise to the level of torture as contemplated by the Convention Against Torture" (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 9). As Jean Pierre had been convicted of a "particularly serious crime," he was ineligible for asylum and withholding of removal under the INA, and subsequently the only form of protection available to him required that it was more likely than not that he would face torture.

Due to his criminal status, he was viewed as not deserving of even being considered for protection from persecution. Though the IJ denied Jean Pierre's claim, he deemed him to be a credible witness with a "clear, believable, and sufficiently detailed" testimony (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 8). The judge stated that he believed Jean Pierre's testimony about the abuse he would face and acknowledged that the treatment Jean Pierre would face is "horrendous," yet found it within the scope of the asylum system to deny him protection and allow him to be put into conditions that experts confirmed would result in his death within months (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 9). This case demonstrates the (de)valuing of migrants, those with criminal records, and those living with HIV. The decision to send Jean Pierre to certain death is a prime example of a necropolitical state apparatus exercising biopower, or the "power to foster life or disallow it to the point of death," (Foucault 1981, 138). Through the asylum system and its function as a mechanism of bio- and necropolitical control set on excluding all but the most deserving i.e. non-threatening, innocent victims, Jean Pierre's life was disallowed without regard for the potentially deadly consequences.

There are several reasons why THIS life was disallowed, why a migrant from Haiti with a criminal record who is living with AIDS was not able to gain protection from the US despite facing indefinite detention and death. The first is the pervasiveness of the victim/criminal binary. This binary is solidified in immigration law through the exclusion of those who are deemed to have committed 'particularly serious crimes' from gaining asylum and withholding of removal. By virtue of having committed a crime deemed to be 'particularly serious,' which in Jean Pierre's case was three possession of a controlled substance charges, he has no chance of gaining protection against persecution. He cannot simultaneously be recognized by the courts as a

criminal and a victim of persecution who deserves protection. This incompatibility serves the biopolitical goal of mitigating threats to the population – those who have been convicted of crimes are inherently constructed as threatening. For US citizens, biopolitical control results in removal from the population in the form of incarceration. For immigrants, biopolitics results in their removal from the nation entirely.

Another layer to the IJ's decision to deny Jean Pierre protection is the treatment of HIV as a biopolitical threat in and of itself. As mentioned previously, during the time of his case those living with HIV were legally excludable from immigration based on the fear that admitting immigrants with HIV would be a threat both to public health and to the economy (Brier 2009, 105; Winston and Beckwith 2011). In terms of the public health consideration, constructing admitting immigrants living with HIV as a public health threat is reflective of the queer criminal archetype "the disease spreader," (Mogul et al 2011, 34). This archetype is exemplified in the construction of those living with HIV as promiscuous, hypersexual, and immoral, without regard for the lives of others (Mogul et al 2011, 35). While this archetype focuses on gay men, it is notable that Black men were also depicted as hypersexual disease carriers through the media (Mogul et al 2011, 35). Through this construction, a Black man living with HIV is not only a threat to others but is in some ways at fault for contracting HIV in the first place. As evidenced in chapter 2, those who are perceived as responsible for their own victimization are unlikely to be perceived as true victims. The unwillingness of the IJ to grant Jean Pierre protection from the violence he would face upon deportation is reflective of the convergence of larger societal systems that construct those living with HIV and those who have committed crimes as

biopolitical threats with an asylum system embed with biopower designed to exclude and disallow all but the 'least threatening' individuals.

In terms of an economic threat, the long history of the necessity of proving one will not become a 'public charge' and the privileging of skilled laborers in immigration quotas highlights how both not being an economic burden and active economic contribution are major considerations in immigration legislation. Given Jean Pierre's diagnoses and the medication he needs to survive, he does not meet the expectations of the self-sufficient laborer and therefore is at risk of being conceived as a burden or an economic threat.

After the IJ denied his CAT claim, Jean Pierre appealed to the Board of Immigration Appeals, who affirmed the IJ's decision. Upon Jean Pierre's appeal of the BIA decision, 11th Circuit Court of Appeals vacated the Board's decision and remanded the case with instructions to fully consider Jean Pierre's claim that "he likely will be singled out for crawl-space confinement, kalot marassa, and beatings with metal rods as a result of AIDS-related mental illness," (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 22-23). The appeals court indicates that because Jean Pierre would be individually singled out for abuse and not just subject to "generalized mistreatment," Jean Pierre has a legitimate claim to protection under the CAT. While this is a positive ruling for Jean Pierre, the IJ and BIA's treatment of this case sheds light on the necropolitical power of the asylum system.

The BIA found that "the mere fact that the Haitian government does not exempt those criminal deportees who suffer from severe medical conditions from their detention policy, a policy we have found to be a legitimate and lawful sanction, does not constitute torture" (*Jean-Pierre v. Att'y Gen. of the U.S* 2007, 18). The assertion that the indefinite detention of

criminal deportees is a "legitimate and lawful sanction" is evidence of necropolitics at work. Here, both states are agreeing that these human beings, because they are immigrants convicted of a crime in the US, are not worthy of an autonomous life. Indefinite detention is a prime example of a necropolitical 'death world.' Those in prison are denied agency over their lives, are removed from society and family, and are subject to strict disciplinary powers. In the US, the supposed goal of rehabilitation takes a backseat to maximizing profit, and the prisons become not only a tool of biopolitics but also of capitalism (Pitofsky 2002). When detention is indefinite and combined with neglect and abuse, as in the case of Jean Pierre and asylum seekers held at the US Mexico Border, individuals lose all ability to plan for or imagine a future, a life outside of the death world that is their prison. They are, in effect, the "living dead" as conceptualized by Achile Mbembe (Membe 2003, 40). It is in this way that necropolitics functions – state violence is legitimized through a state apparatus (the prison) where "'inhuman humans' deemed to be beyond rehabilitation are not only physically removed from the social realm, but more fundamentally, are exposed to premature death" (Haritaworn et al 2014, 6). While in the case of Jean Pierre the "death world" he faces is not located in the US, by agreeing that the indefinite detention of criminal deportees is a "legitimate and lawful sanction," the Board of Immigration Appeals was exerting necropolitical power by refusing to extend protection despite knowing very well that deportation for this man would result in his death.

The cases of Peter Conrad Ali and Jean Herold Jean-Pierre illuminate the ways in which the victim/criminal binary brings out the necropolitical underbelly of the asylum system. Those that have criminal records are both legally barred from more easily accessible and complete forms of protection and have to contend with the ways in which criminality may overshadow

potential victimization in the eyes of those potentially making life or death decisions. Both Ali and Jean Pierre's convictions were for drug related crimes, both deemed to be 'particularly serious,' thus barring them from asylum and withholding of removal under the INA. The language of 'particularly serious crime' comes from a 1954 amendment to the 1951 Convention Relating to the Status of Refugees that added an exception to the principle of *non-refoulement* that prohibited countries from returning immigrants to a country where they would face persecution on one of the protected grounds.

This exception contended that the principle of non-refoulement did not apply to those who had been convicted of a "particularly serious crime" (PSC) and were considered a danger to the community (McGary 2010, 215-216). This exception was meant to be extremely narrow, used only in the most extreme cases (McGary 2010, 216). However, since 1980 when the US adopted the 1951 Convention into US law, the crimes that are deemed to be "particularly serious" have broadened significantly and are not limited to violent crimes (Holper 2017, 1095). In 1988 the Anti-Drug Abuse Act (ADAA) created the term "aggravated felony," defined narrowly as crimes involving murder, drug trafficking, and weapons trafficking (McGary 2010, 219). The intention of this term was to help clarify what crimes were "particularly serious" for the purposes of asylum, and the Immigration Act of 1990 deemed all aggravated felonies to be considered particularly serious (McGary 2010, 219). This 1990 act and several more in the years that followed continued to expand the list of crimes deemed to be aggravated felonies (Holper 2017, 1103). In the late 1990s, Congress solidified that for withholding of removal, aggravated felonies with a sentence of 5 years or more are PSCs, and for asylum all aggravated felonies are PSCs (Holper 2017, 1103). It is notable that in the original conception of aggravated felony in

1988, when the war on drugs was in full force, the only non-violent crime included was drug trafficking. The inclusion of drug related crimes paved the way for other non-violent crimes to be considered "particularly serious" (Holper 2017, 1110). This expansion of PSCs continues, as the Trump administration has proposed a rule to expand the list of offenses that bar asylum to include minor crimes that would not have met the 'particularly serious' requirement (Kanno-Youngs 2019).

The potential for queer immigrants of color to be arrested for and convicted of particularly serious crimes is magnified by the presumed criminality of queer folks, immigrants, and people of color. The racialization of the war on drugs has been well documented, as have racial disparities in the criminal legal system (Johnson 2015, 968-969; Provine 2007; Bobo and Thompson 2006; Pemberton 2015). Under the particularly serious crime bars to asylum and withholding of removal, the disciplinary mechanisms of the criminal legal system and the immigration system coalesce to legally justify the removal of criminalized asylum seekers from the nation despite the US's international obligations to protect those in danger of persecution. The 'particularly serious crime' exception to the principle of non-refoulement has been taken advantage of by US law that has expanded the scope of this term to well beyond its original purpose. Instead of being used sparingly in only the most extreme of cases where refoulement is necessary to protect national security, the US asylum system has co opted the PSC exception and used it as a tool to expand its bio- and necropolitical control over whose life it will foster, and whose it will let die.

Conclusion

Through this research I explored the ways in which the asylum system functions as a biopolitical regulatory mechanism with regards to gay men seeking asylum and investigated to what extent this system could be considered necropolitical. By positioning migrants as outsiders, as 'others,' the state's biopolitical obligation to foster and protect the lives of its population does not extend to immigrants. On the contrary, by constructing migrants as criminals, as threatening to the American way of life, the lives of migrants are disallowed for the sake of "protecting" the population. This is why there is a longstanding resistance to accepting asylum seekers – biopolitics dictates that the state foster the lives of its own citizens, protect its own citizens, even at the expense of the lives of the 'other.' When asylum seekers are constructed as outsiders, as fraudulently trying to take advantage of the asylum system, as inherently threatening, their protection through asylum is assumed to be at the detriment of the existing population. This is why we see the emphasis on authenticity and denouncement of criminality: there is a need to confirm that asylum seekers are genuine victims deserving of protection, and that they are not criminals, i.e., not threatening.

However, as discussed in both Chapters 2 and 3, this conception of who can be a genuine victim is complicated by a long history of criminalizing and pathologizing queer folks. That people can apply for asylum now on the basis of sexual orientation and gender identity is a testament to the work of lawyers and activists that have and are continuing to advocate for change on a variety of levels and are working to spread awareness and information about the challenges LGBTQ immigrants and asylum seekers face in the immigration system. The cases of

Shahinaj, Razkane, and Todorovic discussed in Chapter 2 were all victories for queer asylum seekers in that the courts of appeals in these cases indicated that reliance on stereotyping of or biases against gay men in order to determine asylum eligibility is unacceptable. The rulings of the Courts of Appeals in the cases of Maldonado and Boer-Sedano both made progress by recognizing that the violence they faced was motivated by homophobia, and was not, as the lower courts argued, based on "social preferences" or a "personal problem" with the violating police officer respectively (*Maldonado v. Att'y Gen. of the U.S,* 2006; *Boer-Sedano v. Gonzales* 2005). All of these rulings, and many others, are evidence that the courts have made progress in understanding and recognizing the validity of sexual orientation based asylum claims.

The 2011 USCIS training module "Guidance For Adjudicating Lesbian, Gay, Bisexual, Transgender, And Intersex (LGBTI) Refugee And Asylum Claims" also demonstrates attempts to educate and inform those who are involved in the asylum decision process (USCIS 2011). This training module was made in collaboration with Immigration Equality, a LGBTQ immigrants rights non-profit organization (Johnson 2012). While this guidance is a step in the right direction, it is far from sufficient to address the challenges gay asylum seekers face. An updated and more comprehensive version of this guidance, made with input from a variety of LGBTQIA organizations, is necessary. Additionally, there need to be accountability mechanisms to ensure that the asylum officers and judges are following the guidelines. In several of the cases I examined, the court of appeals remanded the case back to the lower courts with instructions to assign the case to a different immigration judge due to the bias the judge exhibited. Changing the immigration judge may be helpful in those individual cases, but it does nothing for individuals

who will have to contend with the biases and misunderstandings of the judges in the future, especially those who do not have the means to appeal their cases.

The lack of systematically holding judges accountable is closely related to the problems that arise from the lack of data collection and reporting on the number of SOGI applicants and the statistics on asylum grants or denials. While the government is not making data widely available, there are independent organizations working towards collecting and sharing data. There is a website called TRAC Immigration that provides information on many aspects of immigration, including asylum decisions, border patrol arrests, outcomes of deportation proceedings, and many more. They also track asylum decisions made by each individual immigration judge. This site indicates that IJ Vomaka, the judge for most of Ali's case, is still currently an immigration judge in New York. Although this is an excellent and valuable resource, it is limited by the information collected by the government. If there were more complete data on immigration judge's decisions by social group, and if immigration judges were systematically denying SOGI cases, it could be more easily known and addressed.

While advocating for SOGI asylum seekers through the courts is extremely important, legislative change is necessary alongside progress in the courts. Case law or precedent can be overruled and protections can be rolled back. This is exactly what is happening in the courts right now, as asylum protection for victims of gender-based family-based persecution is being challenged. As mentioned in Chapter 1, former Attorney General Jeff Sessions reversed an asylum grant in 2018 that subsequently overturned the decision *Matter of A-R-C-G* that allowed domestic violence survivors to apply for asylum on the basis of membership in a particular social group. Similarly, Attorney General Barr intervened in a BIA case with the justification that a

family was not a particular social group, despite decades of case law and precedent indicating otherwise (Dias 2019). As membership in a particular social group is the predominant category under which those seeking asylum on the basis of sexual orientation and gender identity fall, their ability to gain protection through asylum under the MPSG ground could also be at risk in the future.

The fact that asylum is conditional on the courts continuing to agree that sexual orientation and gender identity can form the basis of a particular social group demonstrates the systemic flaws in the asylum and refuge. We still rely on a refugee definition and determination process created in 1951 to address the very specific issue of displaced people in Europe after the second World War. This system is not sufficient to address current and future issues that result in widespread displacement, as the system does not recognize people rendered stateless or displaced by generalized violence, natural disasters, and climate change. This system was not intended to address issues of gender-based violence, homophobic violence, and transphobic violence. The emphasis in this system of government actors as the agents of persecution poses challenges for those most likely to be impacted by violence from non-state actors, as it is difficult to prove that governments are unwilling or unable to address persecution. This is especially true in states where there are legal protections for victims of gender-based, homophobic, and transphobic violence, but in actuality the government or law enforcement does not take the violence seriously and enforce the laws. While fitting SOGI asylum seekers and refugees into the existing framework is necessary to defend the lives of those needing protection now, the refuge/asylum system is not adequate to address the contemporary experiences of violence, persecution, and displacement and needs to be reformed or reconceptualized. As it

currently stands, the asylum system and its underlying assumptions about authentic victimhood result in a process where gay asylum seekers, especially those with criminal records, are not taken seriously as survivors of violence who deserve to exist without constant fear of persecution.

On a wider scale, if the theory of biopolitics holds true and the state has the responsibility to ensure the life of its population at the expense of the 'other,' so long as migrants are positioned as outsiders and potential threats, the immigration system will function as an exclusionary biopolitical mechanism. However, if we challenge this idea that immigration is inherently threatening to the existing population and override the systems and structures that hierarchize and differentially value lives based on factors including race, religion, nationality, gender, gender identity, sexual orientation, criminal history, ability, and class, we could alter the structures and assumptions that the system is built on and mitigate the perceived need to disallow lives. Until this becomes a possibility, it is essential to continue advocating for migrants, challenging stereotypes and misconceptions about LGBTQ folks, dismantling the victim/criminal binary, and working to create concrete legal and structural change.

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