ASYLUM UNDER THE TRUMP ADMINISTRATION

Stephanie H. Jennings

University of California, Davis

Table of Contents

I. Introduction

President Donald Trump's asylum rules and regulations have had repercussions for migrants who are lawfully seeking refuge in the United States. Undoubtedly, these policies are being litigated in federal court to determine whether or not these policies are in accord with the United States Constitution. The purpose of my research is to unpack President Donald Trump's asylum rules and regulations in the context of United States immigration law, specifically in regards to queer migrations. Queer migration scholarship may help us situate the United States history of exclusion to the present day as well as understand the broader societal implications of these court decisions. Thus, queer theory will serve as my analytical framework for examining the federal court cases that have arisen out of the Trump Administration's asylum policies.

a. Research Questions

I have listed my research questions below:

1. How is the United States' federal court system interpreting the Trump Administration's asylum rules and regulations and what structural problems does queer migration scholarship reveal in this interpretation?
2. What are the differential effects of asylum jurisprudence across a group's positionality? Specifically, how does asylum jurisprudence affect people with different social positions such as women, children, and LGBTQIA+ people?

b. Research Objectives

In asking these questions, my hope is that my research will reveal the ramifications of strict judicial interpretation of the United States Constitution and laws for asylum seekers. I posit that queer migration scholarship will reveal the court's tendency to support Western values that safeguard and uphold nativist policies. Whose narratives are being highlighted and whose narratives become lost is an integral part of understanding how asylum jurisprudence functions

as a site of exclusion. If the courts are deeming the President's rules as constitutional or unconstitutional on the basis of textualist interpretations of the Constitution, then vulnerable groups will inevitably be deprived of their human right to seek asylum from persecution. Indeed, a strict interpretation of the Constitution and the laws of the United States may undermine an asylum seeker's claims by glossing over the moral and human issues at stake. Textualist interpretations do not freely adjust to excruciating circumstances that allow asylees to tell *their* stories as lived. Consequently, if asylees cannot persuade the courts of their persecution, then even legitimate claims may be deemed illegitimate due to the failure of the asylee to "properly" articulate their story.

In reference to the second question I posed above, my goal is to investigate how an individual's particular social position will influence how they move through the United States asylum system. Much of the scholarship on queer migrations revolve around an asylum seeker's ability to translate their lives into Western modes of storytelling. In other words, refugees who are able to tell a Western view of their persecution will be more likely to convince asylum adjudicators of their claims. Whose cultures and lives are being recognized by the Trump Administration and whose are not? By applying queer migration scholarship to the cases that have surfaced from the President's asylum policies, I hope to answer these questions.

c. Importance

Due to the current political climate on immigration and asylum in the United States, this research is especially important in understanding how asylum policy functions to exclude historically marginalized groups. The social stigma against the undocumented subject or the racial other is deeply embedded in the attitudes of the public as well as federal and state law. The 2016 presidential election bolstered these racist attitudes as it encouraged the public's hostility

towards minority groups (Williams). Consequently, asylum seekers are often left with the unjust burden of proving their worth of existence within the United States borders as well as their ability to assimilate into the nation. It is imperative that we study the issue now in order to better understand how the Trump Administration's asylum rules are impacting the livelihoods of asylum seekers in the present day.

d. Paradigms in the Research Field and Research Protocol

I will perform a discursive analysis of the federal court case decisions that have challenged the constitutionality of the Trump Administration's asylum policies. Through this analysis, I hope to understand how the President's asylum policies are being litigated in court. At this point, I will use queer methodologies to portray how these court case decisions work for or against asylum seekers who hope to reside in the United States borders. I intend on doing this research by searching through the University of California, Davis library reserves, online news articles, Nexus Uni, and other online search engines.

Queer theory is a useful framework to analyze how the Trump Administration's asylum policies are being adjudicated in court. This methodology may help us understand where immigrants stand in relation to the hegemonic structures that determines who may enter the country and who may not. Through valuing citizenship above the well-being and safety of the migrants seeking refuge, the President reinforces a dichotomous and oppressive immigration system. An intersectional analysis is needed to understand how the Trump Administration's policies on asylum have affected subjects differentially due to interlocking systems of oppression. There are several intersections of identities that must considered to better understand the scope or impact of the President's asylum policies. This analysis will be an integral part of

my research project as we cannot know how the laws should be reformed until we understand how persons with differential experiences are impacted by them.

Queer scholarship highlights the structural problems of the United States asylum system. In the context of the Trump Administration's asylum policies, queer theory showcases how migrants of color are systematically disadvantaged by Western concepts of identity. How asylum adjudicators in the Trump Administration support or oppose his asylum rules warrants review. How are the President's asylum policies being litigated in court? Do they demonstrate the historical and structural concerns that queer migration scholars highlight? I will apply the research I have done on queer migrations to the judicial decisions of President Trump's asylum policies in hopes that it will reveal the broader implications of asylum jurisprudence in the present-day.

e. Clarifying the Terminology: Migrants, Refugees, and Asylum seekers

Throughout my paper, I will be using the terms migrants, refugees, and asylees. To refrain from using these terms interchangeably as they each refer to a different category of people, I will refer to the United States Department of Homeland Security's (DHS) definitions of these terms. According to DHS, a migrant is a person who has left their country of origin ("Definition of Terms"). Amnesty National articulates that migrants may leave their home country for a variety of reasons including "work, study, join family…poverty, political unrest, gang violence, natural disasters or other serious circumstances that exist there" ("Key Facts"). Similar to migrants, refugees are persons found outside of their country of origin. Yet, a refugee's reason for leaving their country is due to a well-founded fear of persecution ("Definition"). Lastly, a refugee becomes an asylum seeker when they seek protection from another country because of their well-founded fear of persecution ("Definition").

f. Ethical Considerations

In conducting my research, it is important to recognize my standpoint in relation to the issues I am presenting. Feminist theorist, Sandra Harding, introduces the idea of standpoint epistemologies in her work "Borderlands Epistemologies." Through explaining standpoint theory, Harding argues that "its concern is with the assumptions generated by 'ways of life' and apparent in discursive frameworks, conceptual schemes, and epistemes, within which entire dominant groups tend to think about nature and social relations" (334). Ultimately, my worldview is influenced by my overlapping identities. Born in the United States, I have had the privileges of being a United States citizen. Yet, as a daughter of an immigrant who migrated to the United States from Peru, I am wary of the Trump Administration's regressive immigration policies. Thus, there are ethical concerns in how I interpret the research I am confronted with. While I do not want to speak on behalf of the immigrant community, I hope to generate knowledge on the issue as an ally. I want to make a contribution to the existing literature on immigration and asylum policies in the United States. Specifically, I want to incorporate a feminist and queer lens to immigration policy and bring forward the lived experiences of migrants seeking asylum. This research is for our neighbors, friends, and families that are impacted by the Trump Administration's rhetoric and policies on immigration.

II. Overview of Problem

To better understand the scope or significance of the Trump Administration's asylum regulations, it is helpful to compare the current statistics on asylees to prior administrations. The refugee admissions ceiling, which caps the number of refugees that may be admitted into the United States each fiscal year is decided between the President and Congress (Annual Flow Report). Before President Barack Obama left office in 2017, the refugee admissions ceiling was

set at 110,000 refugees (Lind). When President Trump began his term, he attempted to reduce the ceiling to 50,000 refugees that same year (Lind). Although he was unsuccessful in doing so, he was able to reduce the proposed number of refugee admissions to 45,000 refugees for fiscal year (FY) 2018 (Lind). In FY2019, he yet again reduced the ceiling to an all-time low of 30,000 refugees (Lind). The Trump Administration's current ceiling is less than one-third of what it was three years ago (Lind). In addition, these are the lowest ceilings imposed by the United States since the passage of the Refugee Act of 1980 (Annual).

Along with the ceilings imposed by the administrations, it is equally important to look at the number of refugees actually admitted into the country. Under the Obama Administration, refugee admissions fluctuated. Between 2009-2011, there was a slight decrease in the number of admissions, but rose sharply in 2012 due to "staffing increases and improvements in synchronizing security and medical checks for refugee families" (Annual). Indeed, in 2016, refugee admissions were up to 84,989 (Annual). Yet, when President Trump took office in 2017, there was a 37% decrease in refugee admissions due to stricter security procedures (Annual). In 2017, the number dwindled to 53,691 refugees (Annual). In FY2018, the numbers dropped again. This time only 22,491 refugees were admitted into the country (Rush). To compare, this is even lower than the number of admitted refugees *after* September 11th, 2001 when admissions dropped to 27,131 refugees (Rush). Certainly, the striking drop in refugee admissions is not without irreparable harm. If the Trump Administration is able to deny vast numbers of applications for asylum, then there must be a systematic or legal loophole that allows them to pass restrictive asylum policies.

During a speech in Reno, Nevada, United States Attorney General Jeff Sessions claimed: "[O]ur courts find that 80 percent of those who do file for asylum aren't qualified for it, do not

merit that relief" (Watch). The Trump Administration claims that the vast denial of asylum applications demonstrates that persons seeking asylum are coming on false pretenses. Yet, the number of successful asylum applications do *not* represent the number of "credible" claims (Watch). This is made apparent when taking into consideration that legal representation is essential for an asylee to successfully and legally enter the country. When an asylee has legal representation, their case has an approximate 50% chance of being accepted (*Asylum Representation Rates*). However, without representation, an asylee has a slim 10% chance of being accepted (*Asylum*). While the Trump Administration blames the people fleeing persecution for the United States' institutional problems, it is simultaneously manufacturing a crisis at the United States Southern Border in an attempt to bar migrants from seeking asylum.

a. Overview of Immigration Court

The 1870 Act to Establish the Department of Justice gave the Department of Justice (DOJ) and the Attorney General power to handle criminal and civil cases where the United States government is involved ("About DOJ"). The U.S. immigration court system operates under the DOJ's Executive Office for Immigration Review (EOIR) (Cerza). The EOIR was created on January 9, 1983 and was given the power to "[interpret] and [administer] federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings" ("About the Office"). Before the creation of the EOIR, immigration responsibilities lied within the various departments of the Executive branch, which occurred as a response to restrictive immigration legislation ("News").

There are 58 immigration courts in the United States. If an individual wants to appeal a decision of an immigration court, they may go through the Board of Immigration Appeals (BIA) (Cerza). The BIA hears and decides appeals by immigration judges and by district directors of

DHS (“Board of Immigration Appeals”). As opposed to conducting courtroom proceedings, the BIA conducts a “paper review” of cases (“Board”). 8 CFR § 1003.1 explains the organization, jurisdiction, and powers of the BIA. The BIA may “review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo” (8 CFR § 1003.1). BIA decisions are binding, but can be modified or overturned by the Attorney General or the federal courts (“Board”). If an individual loses their appeal at the BIA level, then they may file a petition for review in the Federal Courts of Appeal within 30 days of the BIA decision (Cerza).

The Department of Justice is led by the Attorney General (“About DOJ”). Under 8 CFR § 1003.1, the Attorney General has the power to refer immigration cases to themselves and overturn BIA decisions (Cerza). These decisions are binding (8 CFR § 1003.1). Although this power is not commonly used by the Attorney General, former Attorney General Jeff Sessions referred a record number of four cases to themselves (Marouf). In addition, under 8 CFR § 1003.10, the Attorney General has the power to appoint immigration judges, whom “shall act as the Attorney General’s delegates in the cases that come before them.” Consequently, the Attorney General has the power to guide the decision making of immigration judges towards an administration’s partisan objectives.

It is important to note that because immigration court proceedings are situated within the executive branch of government, they do not operate like federal court proceedings. For instance, individuals in immigration court are not entitled to the constitutional protections given to individuals navigating the federal court system (Marouf). As established by the United States Supreme Court in *Miranda v. Arizona* (1966), individuals in criminal court proceedings have the right to protect themselves from self-incrimination which includes the right to an attorney

present and the right to have one appointed should they not be able to afford one. In immigration court, defendants are *not* entitled to a court-appointed defense attorney (Marouf). As mentioned previously, because immigration judges are from the DOJ and under the direction of the Attorney General (as opposed to being situated in the judicial branch), their administrative duties guide their decision making in immigration court (Marouf).

For the purposes of this paper, I will focus on cases being litigated in the federal court system. Not only are lower immigration court proceedings difficult to find and process, but I want to narrow my attention to the constitutional and statutory questions that arise from the Trump Administration's asylum policies. Because the federal court system has authority to answer these questions, I will explore the federal court case documents including orders and opinions pertaining to the Trump Administration's asylum policies. Because the court cases I will be investigating have developed within the last few years, many are still being litigated and put on appeal. Thus, I will be analyzing the latest decision released from the federal courts whether that be in the district courts, appellate courts, or the United States Supreme Court.

b. Historical Background of Asylum in the United States

In response to the thousands of persons displaced from the Vietnam War, the 96th Congress created a system for the United States to be able to respond to persons fleeing persecution ("National Archives"). With the passage of the Refugee Act of 1980, the Immigration and Nationality Act (INA) was amended to include the definition of a refugee from the United Nation Convention relating to the Status of Refugee ("National Archives"). According to the INA:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country

> because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Because asylum cases revolve around the INA, it is important to know its language to understood how the judiciary may interpret it. It is also important to note that a refugee can only have a successful asylum claim if they can prove they are fleeing from persecution on one of the five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. As we will see, this act allows for broad as well as narrow interpretations of *who* may be considered a refugee.

The United States has historically excluded migrants on the basis of sexuality, gender, race, ability, and class by controlling the demographics of the populace through immigration policy (Luibhéid, xii). Logan Bushell investigates how U.S. immigration law and policies have systematically and historically excluded LGBTQ migrants in their work "'Give Me Your Tired, Your Poor, Your Huddled Masses' - Just as Long as They Fit in the Heteronormative Ideal: U.S. Immigration Law's Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual, Transgendered, and Queer Migrants." Bushell argues that the United States has historically implemented immigration laws based on who is "desirable," which consequently shaped who entered the country and who did not (675). For example, the original language and intent of the Immigration and Nationality Act of 1952 excluded persons who had a "psychopathic personality" or who were sex perverts – i.e. homosexuals (Bushell, 681). These attitudes came from the American Psychiatric Association labeling of homosexuality as a "mental disorder" (Bushell, 681). While this language was removed from the bill in 1952, the INA was eventually amended in 1965 to specifically and explicitly exclude migrants "afflicted with … sexual deviation" (Bushell, 683).

Although the Immigration Act of 1990 finally prohibited exclusion on the basis of sexual orientation, a complex patchwork of laws ensured that LGBTQ migrants continue to be denied entry into the country (Bushell, 676). The INA of 1990 prioritized family reunification and granted legal permanent residency to migrants who had a direct family relationship to someone in the United States (Bushell, 676). The passage of the Defense of Marriage Act (DOMA), however, ensured that homosexual familial relationships be excluded from the benefits of the Immigration Act. Because DOMA defined marriages as being between a man and a woman (Bushell, 677), it effectively defined "spouse" in immigration policy as a "person of the opposite sex" (Bushell, 690). In addition, DOMA excluded transgender migrants in immigration policy by defining marriage as between two people who are biologically "male" and "female" (692). As we can see, LGBTQ migrants have been continuously denied equal access from entering the United States' borders (Bushell, 677).

Bushell's exploration of U.S. immigration law as shaping a "desirable" citizenry hints at the country's long history with eugenics. Bushell has a strong critique on the United States ideal American citizen and brings incredible insight into how obvious modes of discrimination may be codified in law. Those who do not fit into the heteronormative conception of what it means to be an American will be excluded from entering the country.

c. Overview of Queer Migration Scholarship

Researching into the field of queer migrations, I have found five common themes or concerns regarding the United States asylum system. First, refugees must be able to articulate their story in the form of a narrative intelligible to the state in order to make a bona fide claim for asylum. Second, the asylum process demands that queer migrants be "socially visibly" or recognizable to asylum adjudicators' expectations. In doing so, an asylum seeker must

demonstrate their identity in a manner that may contradict their own norms and culture or even place themselves in a vulnerable position. Third, due to the social visibility component, it is difficult for queer migrants to convince the courts of their identities. Fourth, asylum adjudicators may utilize heuristics to understand a migrant's claim for asylum by conflating aspects of their identity. Fifth, while attorneys may help asylees win their individual cases, it often comes at the expense of maintaining harmful and erroneous discourses around gender, sexuality, race, and citizenship. I highlight these five concerns to consolidate the overarching problems that queer migration scholars have found with the asylum process.

i. The Importance of Telling a Story

The first and most important finding from my research on queer migrations is that migrants have the burden of articulating their story in a Western narrative that asylum adjudicators understand or identify with. Madeline Holland explores how asylees are forced to tell a narrative of their lives in her work, "Stories for Asylum: Narrative and Credibility in the United States' Political Asylum Application." Specifically, Holland looks at how Western literature and story-telling shapes what the courts recognize as truth (86). A successful application must be able to articulate the asylee's story in a manner that convinces the asylum officer or judge that they fit into one of the five protected asylum categories (Holland, 87).

Holland argues that asylees need to integrate the four aspects of story-telling – specificity, time, plot, and subjective input – to have a successful asylum claim (87). In fact, the very structure of the asylum application requires asylees to detail their persecution in a variety of who, what, when, where and why questions. This includes being able to divulge the names of events, dates, people, and other particular details about experiences that pertain to an asylee's claim of persecution (Holland, 86). Asylum seekers, however, may not always be able to

articulate information with the specificity that the asylum application requires for them to have a successful claim.

According to Stacy Caplow, a professor of asylum law, asylees need to be "detailed, plausible, and consistent" in telling their story (Holland, 88). This may have repercussions for asylees who may not be as articulate or educated to relay their story in a manner that convinces the asylum officers and judges of their persecution (Holland, 89). In addition, human memory cannot always recall particular details over time which may hinder an asylee's claim even if it is true (Holland, 91). Trauma may also prevent asylees from recounting their memories in detail or consistently because they may be attempting to protect themselves from the harm of re-telling their traumatic experiences (Holland, 91). Asylum seekers who cannot explain their story in detail risk being perceived as not telling the truth (Holland, 91). Ultimately, asylum seekers with legitimate claims of persecution may be turned away on the grounds that they cannot articulate their story in a persuasive narrative.

ii. Making Identity "Visible"

The second finding from my research on queer migrations is that migrants must "show" or express their identity in a manner recognizable to asylum adjudicators in order to have a bona fide asylum claim. In her work, "Gay and Lesbian Asylum Seekers in the United States: The Interplay of Sexual Orientation Identity Development, Reverse-Covering, and Mental Health," Kateri Berasi explains how the U.S. asylum process puts gender and sexual minorities in a vulnerable position by forcing them to "display" their sexual orientation. Because gender and sexual minorities may hide their true identities in their countries of origin for survival purposes, they revert to "covering" it up (Berasi, 209). Berasi criticizes immigration judges for demanding migrants to "reverse-cover" in order to prove their gender and sexual identities to the

courts (209). Berasi conducted interviews with 15 lesbian and gay asylum seekers and found that the process of reverse covering had negative mental health effects for the asylees (210-211). Not only does the asylum process force asylees to "out" themselves, but it may cause "depressive and trauma and stressor-related disorders, which can include suicide and post-traumatic stress disorder" (Berasi, 210). Forcing asylees to "come out" may even result in death for those deported back to their country of origin (Berasi, 210). Thus, Western expectations of identity not only undermine an asylum seekers experiences, but they may affect their application for asylum.

Alongside gender and sexuality, I found that race and class expectations also played a role in how asylum adjudicators viewed an asylum seeker's claims. Specifically, it appears that asylees have to support the "first" and" third" world distinction to support their asylum claims. Mayers criticizes U.S. asylum jurisprudence for vilifying other countries and casting them as perpetrators of violence as opposed to looking at structural factors that may lead to individualized violence (152). This supports Western discourses that homophobia and violence exist elsewhere (Mayers, 152). According to Mayers, "Applicants' experiences are…represented in accordance with a Euro-American model of stable, innate, "visible" gay identity, and other cultures are universally characterised by a singular, and unrelenting, misogynistic homophobia/transphobia" (159). This binary of what "America" represents and what "third-world" countries represent ignores the United States' problems at home while justifying interventionist approaches abroad. Again, asylees have the burden of making their identity – whether that be through gender, sexuality, race, or class distinctions – visible to the asylum adjudicators hearing their claims.

iii. Inability to Establish Credibility and Believability

The third theme I found on queer migrations was the difficulty for queer migrants to convince the courts of their identities. Rachel Lewis examines how the political asylum system casts queer and lesbian asylum seekers as "deportable subjects" in her work "Deportable Subjects: Lesbians and Political Asylum" (174). Lewis articulates that the 1951 UN Convention on the Status of Refugees was created without any regard towards refugees seeking asylum based on their gender or sexuality (177-178). The very language of the convention leaves out claims concerning women, gender identity, and sexual orientation (Lewis, 178). Although lesbians may find recourse by articulating their claim through the "particular social group" category, they may have a difficult time proving that they are a member of this group (Lewis, 179). According to Lewis, asylum adjudicators often have heteronormative assumptions about the LGBTQ community including that they perform their identities in stereotypical ways, share the same spaces, and are visibly "out" (179). Lewis reveals the difficulties for lesbian and gay migrants in the political asylum system and how asylum adjudicators' expectations determine who has a successful claim for asylum and who does not.

Because of asylum adjudicator's heteronormative assumptions about gender and sexuality, it becomes difficult for asylum seekers to portray their identities as lived and have a successful claim for asylum. Leifa Mayers investigates how an "immutable LGBT identity" is constructed through international human rights law, U.S. asylum law, and equal protection jurisprudence in her work "Globalised Imaginaries of Love and Hate: Immutability, Violence, and LGBT Human Rights." Mayers emphasizes that asylum law continues to view LGBTQ migrants with utmost suspicion as asylum adjudicators expect LGBTQ migrants to have a socially visible identity in order to fit into the particular social group category (147). Asylees seeking protection under the particular social group category must demonstrate that they have a

"fundamental characteristic" that is the cause of their persecution (Mayers, 148). This characteristic must be *visible* and *recognizable* (Mayers, 148). Thus, asylum cases in the United States hinge on the idea that there is a singular and essentialized LGBTQ identity (Mayers, 148).

Expectations of race, class, gender and sexuality shapes an asylum adjudicator's idea of *who* should be seeking asylum. Joe Rollins analyzes gay and lesbian asylum applications at the U.S. Court of Appeals in his work, "Embargoed Sexuality: Rape and the Gender of Citizenship in American Immigration Law." Rollins argues that asylum adjudicators in the United States have a racial or colored lens that results in disparities in whose asylum application gets accepted. Rollins articulates this through the example that Asian men are less likely to be accepted for asylum on the basis of rape as opposed to other gay men (531). Rollins draws from three theoretical frameworks – intersectionality, sexuality, and the gender of citizenship (523). Utilizing these three theoretical frameworks, Rollins concludes that successful asylum claims must "be situated among the least privileged members of groups defined at the intersection of sexuality, gender, and citizenship" (540). While asylum adjudicators should take into consideration the multiple aspects of a person's identities that may have produced their reasons for fleeing their country, they instead require migrants to tell a narrative that makes them "recognizable as victims" (Rollins, 524).

Rollins utilizes Sonia Katyal's three models of sexuality – substitutive, transformative, and additive – to demonstrate how asylum cases may support one or a variety of these models (524). Katyal claims that the United States has a substitutive model of sexuality whereby sexual identity often corresponds to sexual acts (Rollins, 524). The United States' understanding of sexuality, however, fails to understand other models of sexuality (Rollins, 524). For example, the transformative model of sexuality looks at how individuals who subsume the "bottom" or

"penetrated" role in sexual acts are "transformed" into a homosexual (Rollins, 524). Sexual identity is determined by the role assumed during sexual acts as opposed to engaging in the acts themselves (Rollins, 524). The additive model of sexuality on the other hand is best explained by individuals who have a heterosexual identity, but engage in homosexual acts (Rollins, 524). Because marriage frames the culture in these societies, people identify as heterosexual even if they engage in same-sex acts (Rollins, 524). These individuals see homosexual acts as an "addition" to their identities (Rollins, 525). Thus, persons seeking asylum under the transformative or additive model may not be able to convince adjudicators of their claims. Rollins demonstrates this through the Asian asylum applicants he investigates. Because these Asian men understood their sexuality under the additive model, the Courts did not recognize their claims (Rollins, 539).

iv. Conflating Identities

The fourth theme I observed is that asylum adjudicators conflate the different aspects of an asylum seeker's identity in order to understand their claims. For example, the United States has created a flawed framework of immutability for queer migrants by conflating sexual identity with gender identity. Mayers identifies *Hernandez-Montiel v. INS* (2000) as the first case to apply the standard of immutability as defined in *Matter of Acosta* to sexual orientation (150). Specifically, the court granted asylum on the basis that the asylee was a part of the particular social group of "gay men with female sexual identities" (Mayers, 150). In this case, the asylee's sexual identity was being conflated with their "visible" gender identity (Mayers, 150). To push this point further, why aren't gay men with "masculine sexual identities" granted the same protection. Cases like these demonstrate the United States' narrow conception of sexuality.

U.S. courts impose and rely on Western understandings of identity to adjudicate asylum claims. Susana Berger investigates how successful asylum claims rest on universal discourses on gender and sexuality in her work, "Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States." By exploring how the courts interpret gender and sexuality in six asylum cases concerning Latina women, Berger finds that they are coded in colonial discourses which cast Latina women as the civilizational "other" (681). According to Berger, "Immigration legislation acts like a border around national identity" (659). In other words, the categories asylees must "fit into" in order for them to be recognized by the Courts revolves around what it means to be an American. Berger further criticizes advocates for casting asylees as fleeing from the "third-world" as it functions to ignore the persistence of violence against women in the United States (671-672). If asylum seekers are not able to narrate their experiences in this "third world" lens, then their adjudicators may not recognize them as legitimate.

v. Individual Successes Impede Long-Term Goals

Lastly, while adjudicators and attorneys supporting asylum seekers may win individual cases by articulating their cases through Western discourses, they are ultimately supporting flawed concepts of identity that will subsist in asylum jurisprudence. For example, Berger finds that advocates who petition for their clients in the short run create long-term discourses that "universalizes discourses around gender and sexuality" (661). If attorneys are manipulating their clients' cases to fit inadequate legal categories, then they are sustaining the unstable foundation of immigration law. Because asylees are required to prove that their government is implicated in their persecution, they must present a colonial narrative of their state as uncivilized (669). As opposed to challenging the existence of erroneous legal categories, actors aiding an asylee's individual case are actually supporting a flawed immigration system that is based on nativism.

The court's interpretation of the particular social group category, for instance, has undercut who may apply for asylum under that category. Owens investigates how the United States court of appeals has interpreted the 1980 Refugee Act between 1980 and 2013 in his work, "What is a social group in the eyes of the law? Knowledge work in Refugee-Status determination." Owens investigates how the interpretation of a "particular social group" phrase remains "unsettled" in the courts (1259). He explains how the Board of Immigration Appeals (BIA) has altered the meaning of a particular social group in different legal cases. To explain the disparities in case decisions Owens concludes:

> Close analysis of dispute chains dealing with unsettled statutory concepts in the US federal courts shows that, ironically, it is instances where judges engage in detailed inductive, incremental but non-empirical theorizing in an effort to meet a high standard of *formal* rationality that put the *substantive* rationality of asylum case law at greatest risk. (1275)

Owen's utilizes Max Weber's concept of formal and substantive rationality to better understand asylum jurisprudence (1275). While formal rational law may be explained by "clear rules," substantive rational law may be explained by applying facts to "general norms" (Owens, 1275). Here, Owens claims that in an attempt to be objectively "rational," the Courts actually undermine the "substantive rationality" of the case at hand (1275). From this analysis, perhaps the courts or Congress should incorporate mechanisms for asylum seekers to tell the "substantive" aspects of their claims.

Because asylum law is applied inconsistently, vulnerable persons will be the ones to face the consequences. Lacking the resources, education, and knowledge on the United States federal immigration system, these groups are put at a great disadvantage. Owen's analysis demonstrates how judicial precedent can make case law more unsettled. Thus, the information and analysis

Owens provides will give me insight as to how the Trump Administration can construe precedent to satisfy their political agenda.

d. Asylum Under the Trump Administration

I identified seven cases that challenge the Trump Administration's asylum rules. I summarized the Court rulings in the form of case briefs below.

i. *Al Otro Lado, Inc. v. McAleenan* (2017)

Al Otro Lado, Inc. v. McAleenan is an on-going case that concerns the Trump Administration's "Turnback Policy," which orders Customs and Border Protection (CBP) Officials to limit the number of asylum claims processed at ports of entry across the United States-Mexico border (*Al Otro Lado*, 2). In doing so, CBP officials turned away asylum seekers at ports of entry (*Al*, 2). One of the plaintiffs in this case is Al Otro Lado, a legal non-profit organization that aids deportees, migrants, and refugees in Los Angeles and Tijuana. Al Otro Lado and asylum seekers turned away at U.S. ports of entry sued the Department of Homeland Security for the unlawful policy.

In their Second Amended Complaint, the plaintiffs alleged that the Turnback Policy mandated "lower-officials directly or constructively turn back asylum seekers at the border" (*Al*, 3). In doing so, "CBP has used a variety of tactics – including misrepresentation, threats and intimidation, verbal abuse and physical force, and coercion – to deny bona fide asylum seekers the opportunity to pursue their claims" ("Challenging"). After several attempts by DHS to drop the lawsuit, the U.S. District Court of the Southern District of California issued an order denying the government's attempt to dismiss the plaintiff's complaint.

The Court does not accept the government's attempt to dismiss the plaintiff's claim on the grounds that they lack Article III standing. Specifically, the District Court denies the defendant's claim that the case implicates the Political Questions Doctrine on the grounds that

the plaintiffs have legitimate statutory claims (*Al*, 24). The Court finds that the plaintiffs have standing on Section 706 (1) of the Administrative Procedure Act (APA), which states that the courts "shall… compel agency action unlawfully withheld or unreasonably denied" (*Al*, 28). Plaintiffs assert that DHS has a "discrete agency action" to inspect aliens seeking asylum and refer them to an asylum officer under 8 U.S.C. § 1225 (a)(3), § 1225 (b)(1)(A)(ii), and § 1225 (b)(2)(A) (29). The Court determined that plaintiffs "plausibly show that CBP officers failed to take the discrete actions an immigration officer must take during the admission process for aliens" (*Al*, 31).

Lastly, the Court upholds the plaintiff's Fifth Amendment Due Process claim. Following case precedent, the Court notes that migrants in and out the United States may challenge the constitutionality of state and federal actions (*Al*, 69-70). The Court rejects the government's argument that the Fifth Amendment does not apply to "aliens outside the United States" (*Al*, 70). Due process protections apply at the United States' borders (*Al*, 74). Because immigration officers denied the plaintiffs their right to due process by violating the statutory provisions set forth by Congress on the asylum process, the plaintiffs have a legitimate Fifth Amendment Due Process claim (*Al*, 76).

ii. *Grace v. Whitaker* (2018)

Grace v. Whitaker (2018) concerns a Trump Administration policy that banned persons experiencing domestic violence or gang violence from being able to make a successful asylum claim on the grounds that they belonged to a particular social group. Attorney General Jeff Sessions initially implemented this policy decision in *Matter of A-B-* on June 11, 2018 (*Case Summary*). In *Matter of A-B-,* the Attorney General determined that domestic and gang violence was conducted by *private* individuals and could not meet "persecution requirements" (*Case*

Summary). Specifically, asylum seekers must demonstrate that they were persecuted because of their beliefs or characteristics, experienced severe harm, and that the persecution was conducted by the government or by persons the government was unable or unwilling to control (*Grace*, 13). In addition, DHS issued a policy memorandum as guidance for conducting fear interviews after the decision in *Matter of A-B-* (*Case Summary*). In accord with the Attorney General's decision, the DHS memorandum states that, "claims based on membership in a putative social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution" (*Case Summary*).

District Court Judge Emmet G. Sullivan found that the credible fear policies set forth by the Trump Administration violated the INA (*Grace*, 3). Specifically, Judge Sullivan found that the policies set forth in *Matter of A-B-* and the Policy Memorandum were "arbitrary" and "capricious" and went against well-established immigration law (*Grace*, 4). The Court argues that there is no legislative basis for the policies and it prohibit asylum officers from conducting an "individual analysis" of asylum cases (*Grace*, 56). Judge Sullivan emphasizes that credible fear determinations requires specific analysis of the facts in each individual case (*Grace*, 56). Moreover, the policies increase the standard for credible fear determinations, which contradicts Congress' intent that the standard be a low one (*Grace*, 57-58). These rules run afoul and violate the INA and the Refugee Act (*Grace*, 57).

After investigating the legislature's intent of the INA, the Court finds Congress intended to incorporate the United Nations' standards as defined in the United Nations High Commissioner for Refugees (UNHCR) Handbook (*Grace*, 51). According to the UNHCR Handbook, the United Nations intended to have an *expansive* definition of the particular social

group category (*Grace*, 51). Specifically, the PSG category may include persons with "similar background, habits, or social status" (*Grace*, 51). Judge Sullivan concludes that we can assume that Congress intended to interpret this definition because Congress did not alter the Convention's definition of a refugee (*Grace*, 51). Moreover, the Refugee Act was passed to respond to the needs of persons seeking asylum (*Grace*, 52).

The Court concludes that the persecution standard set forth in *Matter of A-B-* violates the Refugee Act's statutory language that persecution is inflicted by the government or by an individual that the government was "unable or unwilling" to control (*Grace*, 62). *Matter of A-B-* requires asylum seekers to demonstrate that the government "condoned" the actions of an individual or "demonstrated a complete helplessness to protect the victim" (*Grace*, 59). The Court rejects the government's interpretation of persecution and upholds the "unable or unwilling standard" as settled asylum law (*Grace*, 66).The Court orders injunctive relief on the grounds that the new policies resulted in flawed credible fear determinations and produced irreparable harm to the plaintiffs (*Grace*, 103-105). The Court vacates the new credible fear policies set forth by the Attorney General and DHS (*Grace*, 4). In addition, the Court orders the Government to return the plaintiffs that were deported back to the United States in order to provide them with new credible fear interviews (*Grace*, 4).

iii. *Innovation Law Lab v. McAleenan* (2019)

Innovation Law Lab v. McAleenan (2019) challenges the constitutionality of the Department of Homeland Security's Migrant Protection Protocol (MPP). Also known as the "Remain in Mexico" policy, the policy returned asylum seekers back to Mexico during immigration court proceedings (*Innovation*, 12). As opposed to being detained in the United States for expedited removal proceedings, asylum seekers would be placed in Mexico as an

alternate practice. Following regular removal proceedings, asylum seekers returned to Mexico would wait there until their claim was assessed by an immigration judge (*Innovation*, 11-12). Guidance issued by DHS established that migrants who are "more likely than not" to suffer persecution in Mexico were exempt from the policy (*Innovation*, 12). However, immigration officers were not required to ask whether an asylee fears returning to Mexico (*Innovation*, 12).

Specifically, this case concerns eleven Central American asylum seekers who were returned to Tijuana, Mexico (*Innovation*, 3). The Innovation Law lab, Central American Resource Center of Northern California, Centro De La Raza, University of San Fransisco School of Law, Immigration and Deportation Defense Clinic, Al Otro Lado, and Tahirim Justice Center sued the Department of Homeland Security for the malpractice.

The Ninth Circuit Court of Appeals affirmed the District Court's preliminary injunction of the MPP on February 28, 2020. At issue here is a provision from the Immigration and Nationality Act, which permits DHS to return migrants who are "not clearly and beyond entitled to be admitted" to a "contiguous-territory" (*Innovation*, 4-5). The Court found that the contiguous-territory provision does *not* apply to arriving aliens under §1225(b)(1) (*Innovation*, 24). The Court notes that applicants under §1225(b)(1) are persons traveling with fraudulent or no documents (*Innovation*, 25). Applicants under §1225(b)(1), on the other hand, are those who are "not clearly and beyond entitled to be admitted" (*Innovation*, 23). These applicants may include "spies, terrorists, alien smugglers, and drug traffickers" (*Innovation*, 32). The Court clarifies that §1225(b)(1) applicants do not pose a danger to the country like §1225(b)(2) applicants (*Innovation*, 33). They simply do not have the proper documents needed for admission (33). Furthermore, the Court notes that "for many such applicants, fraudulent documents are their

only means of fleeing persecution, even death, in their own countries" (33). §1225(b)(1) applicants may very well have a bona fide claim for asylum (*Innovation*, 33).

In addition, the policy violates the United States commitment to protect non-refoulment (*Innovation*, 6). Non-refoulment is a policy that prohibits the government from returning refugees to a country where they may face persecution (6). Non-refoulment was codified in immigration law through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which states:

> [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. (*Innovation*, 36)

The MPP violates non-refoulment by forcing asylum seekers to show they are "more likely than not" to be persecuted in Mexico, by not providing asylum seekers with advanced notice of their hearing with the asylum officer, and by not asking the asylum seeker whether or not they fear returning to Mexico (*Innovation*, 6).

iv. *Flores v. Sessions* (2018)

The Center for Human Rights & Constitutional Law, the National Center for Youth Law, and the Immigration Clinic of the University of California at Davis sued the Office of Refugee Resettlement (ORR) for violating the Flores Settlement by placing detained minors in residential treatment centers (RTCs), administering psychotropic drugs to detained minors without their consent or their parent's consent, and prolonging detained minors' detention (*Flores*). The U.S. District Court for the Central District of California held that ORR's policies and practices violated the Flores Settlement.

The Flores Settlement derives from the decision in *Flores v. Reno* (2018) and set a variety of standards for unaccompanied minors in federal custody (Lind). The Flores Settlement

states that the federal government cannot hold unaccompanied and accompanied children in detention for more than 20 days (Lind). Instead, the government must release children to a relative or family friend (Lind). In addition, children in custody must be in "the least restrictive conditions" (Lind).

The Government claimed that ORR had statutory authority to determine the suitability of a minor's sponsor before being released to them under the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) (*Flores*, 6). Because of this authority, the government argued that it superseded the Flores Agreement placement and suitability provision. However, the Court determined that the statutory authority given to the ORR does *not* conflict with the Flores Agreement and "the two can easily be reconciled" (*Flores*, 9). Thus, the Court overturned the Trump Administration's policies placing detained minors in inadequate conditions.

v. *Trump v. East Bay Sanctuary Covenant* (2018)

Trump v. East Bay Sanctuary Covenant (2018) questioned the constitutionality of a Trump Administration policy denying asylum claims at the United States – Mexico border. This policy was in response to the caravan of migrants traveling to the United States southern border. Whereas migrants were allowed to seek asylum no matter where they entered the country, the new rule would outright deny asylum to those who did not seek it at an official port of entry. In a 5-4 decision, the United States Supreme Court denied the Trump Administration's request to stay a district court order that required the Administration to enjoin the policy (Wang).

To better regulate the overburdened asylum system, the Attorney General and Secretary of Homeland Security issued a new rule on November 9, 2018 titled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" (*Trump*, 11).

This rule would prohibit migrants along the southern border from seeking asylum if they are "subject to a presidential proclamation" (*Trump*, 11). On the same day, President Trump issued a presidential proclamation denying asylum to *anyone* crossing the United States – Mexico border unless they sought it at an official port of entry (*Trump*, 11). The Ninth Circuit Court of Appeals agreed with the District Court ruling that the new rule paired with the presidential proclamation violated existing immigration law (*Trump*, 12).

The Court rejects the Government's request for a stay on the temporary restraining order issued by the District Court (*Trump*, 42). Specifically, the Court argues that the Government is unlikely to succeed on the merits because the Government has not met its burden in proving that the rule is procedurally and substantively consistent with the INA (*Trump*, 43). According to Judge Bybee, "It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact" (*Trump*, 44). In other words, the rule by itself does not restrict who may apply for asylum. Yet, when it is paired with the presidential proclamation, it effectively bars refugees from applying for asylum (*Trump*, 44). This is clearly inconsistent with the standards put forth by the INA (*Trump*, 45).

Furthermore, the Court ruled that the rule is arbitrary and capricious because it "conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum" (*Trump*, 45). The Court traces the original intent of the Refugee Act back to the Convention. Congress passed the law with the intent to accept asylum applications whether or not they went through a port of entry (*Trump*, 45-46). Crossing the border in a location where there is no port of entry does not correspond to whether or not that individual faced persecution in their home country (*Trump*, 47).

In addition, the Court rejects the Government's argument that this new rule is under the President's authority. While the President has the power to impose restrictions "on the entry of aliens" that he or she deems necessary, the Court notes that the rule simply penalizes migrants crossing the border by denying them asylum (*Trump*, 48). Moreover, the Court emphasizes that the Proclamation has in fact exceeded the President's authority and violates the separation of powers doctrine (*Trump*, 49). Judge Bybee asserts that the Executive does not have authority to alter the INA and "legislate from the Oval Office" (*Trump*, 49).

vi. *Ms. L v. ICE* (2018)

Ms. L v. ICE (2018) concerns the Trump Administration's zero tolerance policy, which criminally prosecuted persons who crossed the United States border illegally (*Ms*, 1). In order to conduct criminal proceedings, the Government effectively separated any minor child from their parent (*Ms*, 2). Although President Trump issued an Executive Order to formally end the malpractice and preserve family units, the Executive Order did *not* address the 2,000 children already separated from their parents (*Ms*, 2). Indeed, families were separated without any proper reunification mechanisms and communications between the agencies were non-existent (*Ms*, 2). The Court previously ruled that the Government violated the plaintiff's substantive due process rights to family integrity under the Fifth Amendment by separating them from their children without showing that they were unfit to care for their children (*Ms*, 3). Thus, the Court issued a preliminary injunction on the zero tolerance policy (*Ms*, 3).

Ms. L fled the Democratic Republic of the Congo because of religious persecution as a Catholic (*Ms*, 4). Although Ms. L was determined to have a legitimate asylum claim, immigration officials separated her from her daughter, S.S., for approximately five months (*Ms*, 4-5). When the two first arrived at the San Ysidro Port of Entry, immigration officials did not

believe Ms. L that S.S. was her daughter. Consequently, they put Ms. L under expedited removal proceedings and classified S.S. as an "unaccompanied minor" under the Trafficking Victims Protection and Reauthorization Act (TVPRA) (*Ms*, 4). S.S. was then transferred to a facility in Chicago under the custody of the ORR and had limited contact over the phone with her mother (*Ms*, 4).

Although DHS issued a Fact Sheet to address reunification, the Court found that it was only concerned with reuniting families *after* criminal proceedings and at the time of deportation (*Ms*, 11). Because the Fact Sheet did not outline how the Government intended to reunite families right away, the Court granted extraordinary relief to the plaintiffs (*Ms*, 11).

Because the Government practice of separating families "shocks the conscious," the Court found that the Plaintiffs were likely to prevail on their claim that their substantive due process rights to family integrity had been violated (*Ms*, 12). Moreover, the Government did not find that the parents were unfit or presented a danger to their child (*Ms*, 12). Although the Court finds that the Government has authority to separate families where the parent is placed in criminal proceedings, the Government has no place to separate families who legally seek asylum at a port of entry (*Ms*, 13). Because seeking asylum is *not* a crime, families applying for asylum should *not* be separated (*Ms*, 13). The Court notes that while the government may keep detailed records of a detainee's personal property during criminal proceedings, the same is not so for keeping track of children (*Ms*, 14). The Court asserts:

> [T]he government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process. (14)

Because the Government deprived plaintiffs of their constitutional right to family integrity, the Government imposed irreparable injury to the plaintiffs (*Ms*, 17). Several parents cite that they experienced incredible agony and despair when they were separated from their children (*Ms*, 18). One father even committed suicide when he was separated from his wife and three-year old child (*Ms*, 18). The traumatic experience of being separated from their parents also hindered the children's physical and mental well-being (*Ms*, 19).

Ms. L was only reunited with S.S. after a thorough litigation process in the courts (*Ms*, 16). The Court finds that the onus currently put on the parents to find and locate their children is "backwards" (16). ORR's reunification process was intended for unaccompanied minor children who present themselves at the border *alone* (*Ms*, 16). Because the Government separated these families when they appeared at the border together, the Government is obligated to reunite them in an affirmative manner (*Ms*, 17).

The U.S. District Court of the Southern District of Columbia issued a class wide preliminary injunction (*Ms*, 22). The Court prohibited the Government from separating families without first making the determination that the parent is unfit or presents a danger to their child (*Ms*, 22). The Court also ordered that the Government may not keep minor children after their parents are released from DHS (*Ms*, 23). Moreover, the Court ordered the Government to reunite families within 30 days that the order was issued (*Ms*, 23). The Court also required the Government to implement regular communications between parents and children who are separated (*Ms*, 23). In addition, the Government must implement communications between the governmental agencies involved in the separation process (*Ms*, 24). Finally, the Court prohibited the government from deporting parents before reuniting them with their children (*Ms*, 24).

vii. *Padilla v. ICE* (2018)

Padilla v. ICE (2018) concerns Attorney General William Bar's decision not to allow asylum seekers who pass credible fear interviews to be released on bond while pending trial. The U.S. District Court of the Western District of Washington placed a preliminary injunction on the Administration's policy and the Ninth Circuit Court of appeals affirmed the decision in part. Specifically, the District Court found:

> this class of plaintiffs has a considerable private interest at stake: A constitutional right to press their due process claims, including their right to be free from indeterminate civil detention, and their right to have the bond hearings conducted in conformity with due process. (7)

In finding that migrants on U.S. soil have a fundamental right protected by the United States Constitution, the Court determined that the Plaintiffs were likely to succeed on the merits of their claim (*Padilla*, 5). The Court notes that the Constitution does not allow the Government to force asylum seekers to make an impossible decision between indeterminate detention and deportation to a country where they face persecution (*Padilla*, 9). While the Government claims that they have an interest in ensuring migrants appear for their court hearings, the District Court finds that this interest does not weigh over the plaintiff's "fundamental rights to liberty" (*Padilla*, 15).

Because the Court found that the Plaintiff's right to liberty was being jeopardized by the Government's policy, they equally found that the Plaintiff's suffered irreparable harm (*Padilla*, 15). Due to prolonged detention, migrants faced physical and psychological trauma, malnutrition, poor medical care, and depression (*Padilla*, 15). In addition, prolonged detention hinders a migrant's ability to demonstrate their eligibility for release by preventing them from gathering evidence and documents as well as communicating with attorneys (*Padilla*, 16). For the reasons stated above, the Court found that the balance of equities weigh in favor of the plaintiffs (*Padilla*, 18). The Government's interest in allocating limited resources does not weigh

over the plaintiff's fundamental constitutional right to due process and remedying the harms they suffered (*Padilla*, 17).

III. Findings

The Courts appear to be active agents in combatting the oppressive conditions the Trump Administration has imposed on asylum seekers. Every case I outlined above ruled in favor of the refugees implicated by the Trump Administration's asylum rules. In reading these seven cases, I discovered that the court decisions resonated with the United States principles of federalism and its own legislative history. In maintaining a strong horizontal separation of powers, the Courts were able to knock down or diminish the Trump Administration's asylum policies. Yet, it is important to note that the Courts were simultaneously sustaining the foundations of the prison industrial complex which unjustly detains human beings. Here, queer studies may inform us that the Courts are making decisions around the idea of the "deserving" immigrant.

a. Analysis and Explanation: Applying Theory to Cases

i. Federalism

The Courts in *Al Otro Lado, Inc. v. McAleenan*, *Grace v. Whitaker*, *Trump v. East Bay Sanctuary Covenant*, *Innovation Law Lab v. McAleenan*, and *Flores v. Sessions* each strongly rely on the United States principles of federalism to overturn the Trump Administration's policies. Because the Trump Administration passed several policies contradicting established asylum law, the Courts found that they were exceeding the powers granted to them by the U.S. Constitution. The Courts are very clear that the Executive does not have the power to make laws. Rather, this is a power directly given to Congress under Article I of the Constitution.

Although the Executive continues to fight against clear statutory guidelines, the Court adamantly defends the rights granted to asylum seekers by Congress. For example, the Court in *Al Otro Lado, Inc. v. Mcaleenan* supports the horizontal separation of powers between the

executive, legislature, and judiciary. The Court will not grant the Executive deference when they willingly violate immigration law. While DHS argues that CBP would not be able to regulate the flow of travel across a port of entry if they allow officers to inspect migrants without "appropriate travel documents," the Court finds that turning away prospective asylum seekers violates Congress' legislative intent for *all* asylum seekers to be processed and referred to an asylum officer at a port of entry (*Al*, 60). According to Judge Cynthia Bashant, "the Executive's recognized power over foreign affairs under Article II of the Constitution is not exercised in a constitutional vacuum" (*Al*, 23). Because the Turnback Policy violates the statutory procedures laid out by Congress on processing asylum seekers, the Court finds the policy unlawful (*Al*, 59). Thus, the Court enforces the nation's basic concept of federalism to limit the Executive's power to implement policies that ignore federal and constitutional law.

The Court in *Grace v. Whitaker* also found that the Trump Administration's credible fear policies violated the United States separation of powers doctrine. Specifically, the Court found that the new credible fear determinations violated the INA and the Refugee Act. According to Judge Sullivan, "because it is the will of Congress — not the whims of the Executive — that determines the standard for expedited removal, the Court finds that those policies are unlawful" (*Grace*, 3). Despite the government's clear attempt to sidestep the rights of asylum seekers, the Court here works to protect them.

Similarly, the Court in *Trump v. East Bay Sanctuary* also pushes forward a separation of powers argument articulating that the President may not "legislate from the Oval Office" (49). In fact, the IIRIRA explicitly states:

> [a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum. (16-17)

The government argues in *Trump v. East Bay Sanctuary* that the Attorney General may impose "additional limitations and conditions…under which an alien shall be ineligible for asylum" under 8 U.S.C. § 1158(b)(2)(C) (*Trump*, 19). However, the Court notes that the Attorney General may only do this if it is consistent with the law (*Trump*, 45). Thus, the Court sustained the district court's restraining order on the policy. By sustaining the division of powers between three co-equal branches of government, the Courts are able to invalidate the President's policies that directly disregard established immigration law.

While these Court decisions are supporting asylum seekers, queer migration scholarship may tell us that these decisions are being made on unstable grounds. Similar to how asylum adjudicators may help their clients in the short-term at the expense of sustaining erroneous long-term discourses, the Courts are sustaining a system that would support these policies if they were passed by Congress as opposed to the Executive. For example, the IIRIRA is responsible for the increased criminalization of immigrants (Lind). In the IIRIRA, Congress added a list of crimes that made an immigrant deportable (Lind). The Court in *Trump v. Easy Bay Sanctuary* sustains the provision in the IIRIRA and claims that asylum seekers are exempt from it. I must ask, however, why it would ever be okay to use deportation as a tool against any immigrant. While this particular case protects asylum seekers, it is sustaining an unstable framework that seeks to punish migrants for coming into the United States' borders. I will elaborate on this idea further in the section titled "Prison Industrial Complex" below.

ii. Legislative History

Despite the Trump Administration's attempt to support their policies with immigration law, the Court does not hesitate to reiterate the law in light of its history. Specifically, the Courts in *Innovation Law Lab v. McAleenan, Grace v. Whitaker, Flores v. Sessions,* and *Trump v. East*

Bay Sanctuary emphasize the historical importance of the Refugee Act of 1980 to knock down the Trump Administration's policies. The Courts make clear that through its passage, the United States made a larger commitment to protect the rights of refugees.

The Court in *Innovation Law Lab* notes that its commitment to protect non-refoulment comes from the United Nations Protocol to the Status of Refugees (35). By passing the Refugee Act, the United States committed itself to follow the goals set up by the 1951 Convention Relating to the Status of Refugees (*Innovation*, 6). Indeed, the Court found that the plaintiffs in *Innovation Law Lab* presented sufficient evidence that persons subjected to the MPP faced "targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States" (12). Even though the Trump Administration attempted to justify the MPP with the contiguous-territory provision, the Court continues to reaffirm the United States stance on protecting vulnerable persons.

This Court in *Flores v. Sessions* also strongly upholds the law and refuses to give in to the Administration's attempts to re-write it. The message from the Court is clear. If the Trump Administration is willing to violate the law, then the Courts will knock it down. In *Flores v. Sessions*, the Court reaffirms its commitment to upholding the Flores Settlement despite serious pushback from the Trump Administration. Specifically, it appears that the Administration will push against any established immigration law in the hopes that it will be repealed. For example, as opposed to abiding by the Flores Agreement's definition of a licensed program as a guide to make suitable placements for minors, the Trump Administration plainly ignores the provision. Because the Shiloh RTC in Manvel, Texas is a locked facility with 24 hour surveillance, the Court found that it clearly violated the Flores Agreement's provision mandating licensed

programs be “non-secure” (Flores, 13). The Administration will defend the most ludicrous acts, but they will not always convince the Courts of their claims.

Similarly, the Court in *Grace v. Whitaker* goes through an extensive history of the Refugee Act of 1980 to strip the Trump Administration’s policy on domestic and gang violence from any legislative authority. The Court highlights that the purpose of the act was to commit the United States to upholding human rights and to grant asylum seekers protection (*Grace,* 5-6). Although the IIRIRA created an expedited removal process for migrants without “proper documentation,” the IIRIRA exempted asylum seekers from expedited removal (*Grace,* 7-8). In fact, Congress required credible fear determinations to be conducted under a “low screening standard” to prevent bona fide asylum claims from being denied (*Grace,* 8). Thus, legislative intent has allowed the Court to protect refugees of their human right to seek asylum.

How U.S. asylum law continues to define persecution, however, will be problematic for future asylum cases. Specifically, the Refugee Act explains persecution as “suffering inflicted by the government or by persons the government was unable or unwilling to control” (*Grace,* 13). If the people of a country make up its government, then why is it not enough for persons fleeing its violence, whether it is “private” or “public,” constitute a legitimate asylum claim? As Mayers rightfully identities, there are structural factors that lead to individual violence (152). The plaintiffs in *Grace v. Whitaker* included twelve women and their children who suffered physical and sexual violence in their countries of origin (*Grace*, 2). Several plaintiffs experienced physical beatings and rape over several years, witnessed the deaths of loved ones, and were even threatened to be killed by local gang members (*Grace*, 18-19). They applied for asylum in the United States and were interviewed by asylum officers (*Grace*, 2). Despite the authenticity of

their claims, the new policy under *Matter of A-B-* directed the Government to conclude that they did not have a "credible fear of persecution" (*Grace*, 2).

As opposed to challenging the existing problems with asylum law, the Court in *Grace v. Whitaker* only fought to make the Trump Administration's interpretation of it unconstitutional. For instance, the Court does not address the public/private distinction that the Administration's policies are bolstering. Instead, the Court simply argues that asylum adjudicators must look at the facts of each individual case. Moreover, they dismiss the Administration's heightened standard for credible fear interviews by upholding the "unable or unwilling" statute. While the interpretation of this statute can be used to justify an asylum claim, it may be interpreted in the future against an asylum claim.

iii. The Prison Industrial Complex

The Courts in *Ms. L v. ICE* and *Padilla v. ICE* both sustain policies that perpetuate the prison industrial complex. On the one hand, the Courts are rightly bolstering the rights of asylum seekers. As we see in *Ms. L v. ICE,* Judge Dana Sabraw upholds the Plaintiff's substantive due process rights. In doing so, the Court recognizes that migrants have fundamental rights beyond procedural protections. According to Judge Sabraw, "We are a Country of laws, and of compassion" (*Ms. L*, 14). This is incredibly important in a time when immigrants are continuously being criminalized by the Trump Administration. On the other hand, the Courts are creating an erroneous dichotomy between deserving immigrant families and unworthy criminals.

While invalidating the Trump Administration's zero tolerance policy, the Court in *Ms. L v. ICE* simultaneously upholds the law that allows the government to separate families where the parent is placed in criminal proceedings. In regards to the broader system of "criminal justice," we need to ask ourselves if it is ever warranted to separate families. The Court holds that it does.

While the Government may not separate families who legally seek asylum at a port of entry because seeking asylum is *not* a crime, the Government may legitimately separate families where one *is* convicted of a crime. However, shouldn't everyone be entitled the right to family integrity? This is a right that can be extended to protect those who are unjustly incarcerated or detained in our system of governance. Thus, I offer a broader critique on the carceral system and how it functions today.

The Court in *Ms. L v. ICE* cites the devastating consequences that occur when families are separated, but I argue that this may also be applied to folk navigating our carceral system today. Due to being put in immigration detention, the parents who were separated from their children experienced agony and despair (*Ms. L*, 18). One father committed suicide (*Ms. L*, 18). The children too were adversely affected. Again, I wonder how this may be applied to the parents and children affected by the United States prison industrial complex. How many people going through this system have found themselves in agony, despair, or suicidal? How does the prison industrial complex affect mental and physical health for both the people going through it and their children who are affected by it? Doesn't the Government currently cause irreparable harm to people going through its criminal justice system? Why should this system be upheld as legitimate when it is deemed illegitimate for asylum seekers?

Similarly, the Court in *Padilla v. ICE* creates another dichotomy between who should and should not be subject to civil detention. While the Court in *Padilla* finds that asylum seekers should be protected from indeterminate civil detention, people who are *not* asylum seekers still face indeterminate detention in the United States. For example, a person may be held in custody in the United States carceral system before ever being found guilty of a crime. In 2017, 70% of people in local jails were not convicted of any crime (*Prison Policy*). Again, I offer a critique on

how the Court sustains the very conditions that they are protecting asylum seekers from. The Court holds that this violates asylum seekers' constitutional right to due process, but it ironically does not address how other folk are forced to navigate this unjust system.

IV. Conclusion

Queer migration scholars emphasized the importance of casting a *visible* identity for asylum seekers to successfully articulate their claims. The Courts here uphold the Refugee Act's definition of persecution, which requires "suffering to be inflicted by the government or by persons the government was unable or unwilling to control." Specifically, the decision in *Grace v. Whitaker* supports the idea that there is "public" and "private" persecution. This requires refugees to demonstrate that the Government is implicated in their persecution, which can be difficult to establish. Thus, queer migration scholarship may inform us that the visibility of persecution is also essential for migrants to articulate a bona fide asylum claim.

In addition, queer migration scholars emphasized that while asylum adjudicators may be able to convince the Courts of their claims, it is done at the expense of sustaining erroneous discourses and laws. Indeed, several of the cases I analyzed here compared asylum seekers to an "unfit" group of people. While the Courts held that asylum seekers are exempt from the Trump Administration's policies, they allowed other forms of those exact policies to stay in place for people who are convicted of "real crimes." Thus, the decisions made a distinction between the deserving asylum seeker and the undeserving criminal. I would argue that we should look at extending these judicial opinions to people who go through the United States criminal justice system in general.

a. Revisiting My Thesis

In the beginning of my project I stated that "queer migration scholarship would reveal the court's tendency to support Western values and safeguard and uphold nativist policies." While I did find that queer migration scholarship highlights how the Courts support Western forms of punishment and incarceration, I also found that the Courts were simultaneously combatting the Trump Administration's policies which undermine the rights of asylum seekers. Thus, the Courts today are strongly upholding asylum law as it is written by Congress. In justifying their decisions back to the United Nation Convention Relating to the Status of Refugees, the Courts are moving away from the United States history of nativism. By protecting people's human right to seek asylum, the Courts are affording asylum seekers protection from the Trump Administration's oppressive practices.

From these decisions, however, it is also clear that the Courts are sustaining a punitive form of our criminal justice system. Moving forward, advocates for immigration reform may benefit from supporting and networking with prison abolitionists. As it seems, both groups face similar problems regarding unjust detention and having their rights minimized or taken away by the Government. While the Courts may be adamantly protecting the rights of asylum seekers, it is imperative that we look at the broader goal of social justice if we want to the Courts to go further in protecting the rights of refugees.

References

"About DOJ." *The United States Department of Justice*, The United States Department of Justice, 7 Nov. 2018, www.justice.gov/about.

"About the Office." *The United States Department of Justice*, The United States Department of Justice, 14 Aug. 2018, www.justice.gov/eoir/about-office.

Al Otro Lado, Inc. v. Nielsen, No. 3:17-cv-02366-BAS-KSC, *United States District Court Southern District of California*, Filed July 17, 2017.

Berger, Susana. "Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States." *Signs: Journal of Women in Culture and Society*, vol. 34, no. 3, 2009, pp. 659–685.

Berasi, Kateri. "Gay and Lesbian Asylum Seekers in the United States: The Interplay of Sexual Orientation Identity Development, Reverse-Covering, and Mental Health." In: Güler A., Shevtsova M., Venturi D. (eds) *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective*. Springer, Cham, 2019.

"Board of Immigration Appeals." *The United States Department of Justice*, The United States Department of Justice, 15 Oct. 2018, www.justice.gov/eoir/board-of-immigration-appeals.

Bushell, Logan. "'Give Me Your Tired, Your Poor, Your Huddled Masses' - Just as Long as They Fit in the Heteronormative Ideal: U.S. Immigration Law's Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual, Transgendered, and Queer Migrants." *Gonzaga Law Review*, vol. 48, no. 3, 2012, p. 700.

Case Summary: Grace v. Whitaker. PennState Law: Center for Immigrant's Rights Clinic, 21 Dec. 2018, pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Grace%20v.%20Whitaker.pdf.

Cerza, Sydney. “Fact Sheet: Immigration Courts.” *National Immigration Forum*, National Immigration Forum, 7 Aug. 2018, immigrationforum.org/article/fact-sheet-immigration-courts/.

“Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers.” *American Immigration Council*, American Immigration Council , 5 Mar. 2020, www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers.

“Definition of Terms.” *Department of Homeland Security*, 16 Mar. 20/.18, www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms#12.

Flores, et al. v. Sessions, III, et al. (2018), No. CV 85-4544-DMG (AGRx), *United States District Court Central District of California,* Filed July 9, 2018.

Grace v. Whitaker (2018). *Memorandum Opinion*. Filed December 19, 2018.

Harding, Sandra. “Borderlands Epistemologies.” *Just Methods: An Interdisciplinary Feminist Reader*. Editor Allison M. Jagger. London: Paradigm Publishers, 331-341.

Holland, Madeline, et al. “Stories for Asylum: Narrative and Credibility in the United States’ Political Asylum Application.” *Refuge*, vol. 34, no. 2, 2018, pp. 85–93.

Innovation Law Lab v. McAleenan (2019), No.19-15716, *United States Courts of Appeals for the Ninth Circuit,* Filed May 7, 2019.

“Key Facts about Refugees and Asylum Seekers’ Rights.” *Refugees, Asylum-Seekers and Migrants | Amnesty International*, Amnesty International, www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/.

Lewis, Rachel. "Deportable Subjects: Lesbians and Political Asylum." *Feminist Formations*, vol. 25, no. 2, 2013, pp. 174-194. *ProQuest*, https://search.proquest.com/docview/1444998075?accountid=14505.

Lind, Dara. “The Disastrous, Forgotten 1996 Law That Created Today's Immigration Problem.” *Vox*, Vox, 28 Apr. 2016, www.vox.com/2016/4/28/11515132/iirira-clinton-immigration.

Luibhéid, Eithne., and Lionel Cantú. *Queer Migrations : Sexuality, U.S. Citizenship, and Border Crossings*. Minneapolis: U of Minnesota, 2005. Print.

Marouf, Fatma. “What Makes Immigration Court Different From Typical Judicial Proceedings?” *Pacific Standard*, The Social Justice Foundation, 25 June 2018, psmag.com/social-justice/how-does-immigration-court-work.

Mayers, Leifa. "Globalised Imaginaries of Love and Hate: Immutability, Violence, and LGBT Human Rights." *Feminist Legal Studies*, vol. 26, no. 2, 2018, pp. 141-161. *ProQuest*, https://search.proquest.com/docview/2035476574?accountid=14505, doi:http://dx.doi.org/10.1007/s10691-018-9375-2.

Miranda v. Arizona, 384 U.S. 436 (1966).

Ms. L v. ICE (2018), No. 18cv0428 DMS (MDD), *United States District Court Southern District of Columbia*, Filed June 26, 2018.

“National Archives Displays the Refugee Act of 1980.” *National Archives and Records Administration*, National Archives and Records Administration, 20 Nov. 2015, www.archives.gov/press/press-releases/2016/nr16-23.html.

“News and Information.” *The United States Department of Justice*, The United States Department of Justice, 30 Apr. 2015, www.justice.gov/eoir/evolution-pre-1983.

Organization, jurisdiction, and powers of the Board of Immigration Appeals. 8 CFR § 1003.1.

Owens, B. R. (2018). What is a social group in the eyes of the law? Knowledge work in Refugee-Status determination. *Law & Social Inquiry, 43*(4), 1257-1278. doi:http://dx.doi.org/10.1111/lsi.12369.

Padilla v. ICE (2018), No. 2:18-cv-928 MJP, *United States District Court for the Western District of Washington,* Filed June 25, 2018.

Prison Policy Initiative, Prison Policy Initiative, Mar. 2017, www.prisonpolicy.org/graphs/pie2017_jail_detail.html.

Rollins, Joe. "Embargoed Sexuality: Rape and the Gender of Citizenship in American Immigration Law." Politics & Gender, vol. 5, no. 4, 2009, pp. 519–544.

Tichenor, Daniel. "The Historical Presidency: Lyndon Johnson's Ambivalent Reform: The Immigration and Nationality Act of 1965." *Presidential Studies Quarterly* 46.3 (2016): 691-705. Web.

Trump v. East Bay Sanctuary Covenant (2018). *Respondents' Opposition to Application for Stay.* Filed December 17, 2018.

Wang, Cecillia. "Symposium: Supreme Court Not Ready to Give President Carte Blanche over Immigration." *SCOTUSblog*, SCOTUSblog, 25 July 2019, www.scotusblog.com/2019/07/symposium-supreme-court-not-ready-to-give-president-carte-blanche-over-immigration/.

"Watch Jeff Sessions' Full Speech in Reno on June 25, 2018." *Reno Gazette-Journal*, Reno Gazette Journal, 25 Jan. 2018, www.rgj.com/videos/news/politics/2018/06/25/watch-jeff-sessions-defends-trump-border-policy-reno-june-25-2018/731421002/.

Williams, David R, and Morgan M. Medlock. "Health Effects of Dramatic Societal Events - Ramifications of the Recent Presidential Election | NEJM." *The New England Journal of*

Medicine, The New England Journal of Medicine, 8 June 2017, www.nejm.org/doi/full/10.1056/NEJMms1702111.