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FROM RECOGNITION TO REGULATION: FLOOD FEARS, GENDER VIOLENCE
AND ASYLUM LAW IN THE UNITED STATES

by

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A Dissertation submitted to the
Graduate School - New Brunswick
Rutgers, The State University of New Jersey

In partial fulfillment of the requirements

For the degree of

Doctor of Philosophy

Graduate Program in Women's and Gender Studies

Written under the direction of

Dr. Joanna Regulska

and approved by

New Brunswick, New Jersey

May 2013

ABSTRACT OF THE DISSERTATION

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Over the past twenty years, women’s human rights advocates have made significant gains in securing protection for women with gender-related claims of persecution within the United States. However, efforts to expand the legal rubric of refugee-asylum law to include gender-related forms of persecution have aroused controversy about inviting a flood of women from around the world fleeing gender violence. In this dissertation, I explore how fears of a flood of women asylum seekers have shaped the development of gender-based asylum jurisprudence in the United States. While it is envisioned as carrying out a humanitarian mandate, refugee asylum law continues to be embedded in and responsive to state efforts to systematically control the movement of populations across its territorial borders and to screen out asylum seekers deemed to threaten the composition of the nation. Through particular technologies of exclusion justified by flood fears, state actors undermined cases that could open pathways to citizenship for large numbers of migrants. Employing a methodology of feminist legal archeology combined with interviews of impact litigators, I demonstrate how efforts by feminist legal advocates to expand asylum protection to include gender-based persecution became

entangled in efforts by state immigration officials and adjudicators to exclude particular women from protection. Thus despite the humanitarian commitments of refugee-asylum law and feminist legal advocates' success in winning recognition of gender-based persecution, fears of an impending flood of refugees have resulted in exclusionary definitions of who can gain asylum on the basis of gender-based persecution.

Acknowledgements

I would like to express my deep gratitude to Professor Joanna Regulska for her constant support and encouragement throughout my graduate school experience. The sense of community she fostered along with her thoughtful advice were instrumental as I made progress toward completing the dissertation. I am also grateful to Professor Catherine Lee, Professor Charlotte Bunch and Professor Robyn Rodriguez for their guidance, insight and constructive critiques of this research project.

I am particularly grateful to my family. Many, many thanks to my in-laws, Becky and Frank Wilson for their unconditional support throughout my study, particularly during our frequent trips to New Jersey.

My parents have played a key role in sustaining me through this project. My father's eagerness to learn is a constant source of inspiration and his genuine enthusiasm and interest in my work has been truly rewarding. I also want to gratefully acknowledge my mother, whose experiences of migration and displacement instilled in me a curiosity that has driven my intellectual pursuits and also fostered a commitment to working for social change.

I am profoundly grateful to Bradley for the countless hours we spent talking through ideas together. His absolute faith and unwavering support sustained me throughout this project. Lastly, to my two girls, Lily and Zayda who are a constant source of joy and for whose love I am motivated to try to make the world more just. For that reason, I dedicate this dissertation to them.

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Chapter 1: Introduction

1. Introduction

Refugee-asylum law in the United States is grounded in international human rights, which are intended to apply to all people without bias. As a subset of United States immigration, refugee-asylum law provides surrogate state protection to persecuted non-citizens. Historically however refugee-asylum law was designed to protect male political dissidents tortured or imprisoned by their state (Musalo 2001). Following years of legal activism and advocacy, women may now gain political asylum in the United States having experienced “gender-based persecution,” which refers loosely to persecution that is carried out in a gendered manner (e.g. rape) as well as persecution targeting women specifically because of their sex or gender. Types of harm included within this rubric have included the threat or experience of female genital mutilation, domestic violence, honor killings, rape, coercive family planning, forced marriage, and coercive societal norms (Oxford 2005). Activists and scholars have hailed this extension of protection as a victory for women’s human rights, bringing domestic law into closer alignment with international standards. Yet, there is continued controversy over what falls under the rubric of gender-based persecution and subsequently who deserves protection through political asylum (Musalo 2007, Musalo and Knight 2001, Anker 2002).

Over the past twenty years, efforts to expand the legal rubric of refugee-asylum law to include gender-based persecution has aroused controversy in the United States over fear that recognizing violence against women will open refugee protection to “over half the world’s population” (Musalo 2007). Legal precedents and policy-making for

asylum in the United States therefore has developed amidst a persistent “alarmist specter” that refugee women from around the world will deluge the system (Smoot 2010).

According to this logic, the supposed “flood” of foreign women seeking protection can only be stopped by a selective “gate” of immigration control and regulation that grants women asylum for gender-based persecution in only very specific circumstances.

Therefore, debates over gender-based asylum claims have focused on how to account for gendered experiences of violence without “opening up” the asylum rubric to so-called abuse. Legitimate claims of who constitutes a refugee deserving of state protection therefore must always fit into classifications and categories that do not threaten the nation-state with a dangerous expansion of the gates to citizenship for foreigners, particularly women from the global South.

Geographer Timothy Cresswell (2004) claims that discourses depicting refugees as threatening to flood the nation serve as an organizing framework to legitimize and delegitimize their claims, justifying state action to exert control over immigration in response to a perceived crisis or emergency. Historically, refugees have marked a crisis in state power because they represent “out of place” subjects, whose mobility and fluidity threaten stable conceptions of place, culture, and nation (2004, 121). Rather than representing refugees as victims fleeing violence, their representation as a flood conflates their migration with so-called bogus rationales such as job seeking, welfare entitlements and even criminal activity. Framing refugees as a mass or flood of foreigners raises a specter of undesirable people who may stretch the resources of the state and transform the composition of the nation. Moreover, flood discourses often mask racist, classist, heteronormative, and other deeply prejudiced logics in the guise of a seemingly common

sense metaphor, that of uncontrollable and dangerous flow of water. In sum, the framing of refugees in terms of a flood “diverts attention away from the real reasons for migration” (e.g. the form of persecution) and focuses attention instead on the potential threat that granting asylum may pose at “home” (121).

Given these assumptions about dangerous waters, threats to the nation and the breakdown of state immigration control, flood discourses elicit a demand for a highly selective gate designed to exclude particular refugee-asylum claims to preserve the integrity of the nation-state. Yet, calls for a selective flood-gate produce and reproduce the notion of a state in crisis, one beset by uncontrollable refugee flows and bogus refugee-asylees. Rather than fulfilling the humanitarian mandate codified in global refugee conventions, protocols and campaigns, this perceived state of crisis then legitimizes the power of state agencies to control territorial boundaries through exclusionary immigration policies meant to keep ‘the tide’ in check.

In this dissertation I explore how fears of a flood of women asylum seekers have shaped the development of gender-based asylum law in the United States. Leading gender asylum advocates claim that the constant fear of a “rising tide” of female refugees is one of the most enduring obstacles to campaigns promoting the expansion of asylum protections in the United States (Musalo 2007; Smoot 2010). Although women seeking political asylum for gendered forms of persecution constitute merely 1% of the global refugee population and refugee-receiving countries have not experienced an increase in applicants for gender-related claims after adopting gender-sensitive reforms (Oxford 2006), in the United States feminist lawyers and human rights advocates must continually engage with fears of opening the so-called “flood-gate” as they seek legitimacy for

gender-based asylum policy, legal reforms and in arguing specific cases (see for example, Musalo 2007, Smoot 2010, Oxford 2005, Gomez 2004, Pell 1995). However, even as flood fears continue to thwart efforts to broaden interpretations of gender-based persecution in the United States, these concerns have garnered less attention in the feminist and critical legal studies literature. My dissertation therefore makes a significant contribution to feminist legal research and advocacy through a sustained and focused analysis of the consequences of flood fears on gender-based asylum law in the United States.

In this dissertation, I demonstrate how gender-based asylum intersects with broader patterns of U.S. immigration control designed to manage the movement of migrants fleeing persecution. While it is envisaged as carrying out a humanitarian mandate, my work illustrates how refugee asylum law, as an instrument of governmentality, continues to be embedded in and responsive to state efforts to systematically control the movement of populations across its territorial borders and to systematically include and exclude asylum seekers deemed to threaten the composition of the nation. Feminist legal advocacy for the recognition of gender-based persecution is tied to a longer history of struggle over the boundaries of asylum protection and the management of populations through immigration control. Building on the work of feminist legal scholars, transnational feminists and immigration scholars, I demonstrate how efforts by feminist legal advocates to expand asylum protection to include gender-based persecution became entangled in efforts by state immigration officials and adjudicators to systematically exclude particular women from protection.

I propose that flood-gate-keeping operates as a form of governmentality, or a rationality for governing migrating populations. The governmentality of flood-gate-keeping relies on the discursive representation of asylum seekers as a flood to justify state practices that restrict, exclude and undermine asylum seekers' access to asylum protection. As I examine through a series of precedent setting cases within gender-based asylum jurisprudence, certain women's experiences and certain forms of violence against women were excluded from asylum protection, thus relieving the state from responsibility for extending its humanitarian hand to those applicants. However, rather than functioning as an absolute barrier to entry, the governmentality of flood-gate-keeping creates an economy of humanitarianism by which state actors grant asylum, but do so using techniques that reserve protection for the exceptional few. Through particular technologies of exclusion justified by flood fears, state actors undermined cases that could open pathways to citizenship for large numbers of migrants, while recognizing cases that did not foster any significant expansion in state protection. Thus despite the humanitarian commitments of refugee-asylum law and feminist legal advocates' success in winning recognition of gender-based persecution, fears of an impending flood of refugees have resulted in exclusionary definitions of who can gain asylum on the basis of gender-based persecution. As I examine in this dissertation, as gender-based asylum cases opened new pathways to refugee status for women fleeing persecution, flood fears also served to legitimize exclusionary definitions of what constitutes violence, persecution, and by extension, who could be considered a refugee.

1.2 The History of Refugee-Asylum Law in the United States

The history of refugee admissions in the U.S. reveals a complex interplay of pressures between a humanitarian impulse to include and the regulatory impulse to exclude people seeking asylum that continues today. Indeed, the historical record shows that the designation of subjects worthy of humanitarian protection of refugee-asylum law has been the product of historically specific social and political contexts. Tichenor (2002) argues that official policies towards refugees began to take shape when the U.S. government recognized the geopolitical utility of such assistance in the wake of WWI. Until this period, refugee admissions were granted on an ad hoc basis in very small numbers because of strong anti-Semitism in the face of the growing refugee crisis in Europe. However, as the U.S. sought world leadership and a role in post-war reconstruction, presidents used executive presidential powers to admit refugees from “hostile” countries. Between 1948 and 1986, over 95 percent of all asylees admitted were fleeing Communist regimes (Schenk 1995, 11). Refugee designations not only amounted to a condemnation of the ‘sending’ country, but also fueled American nationalism as the land of freedom and protector of civil and political rights worldwide.

To many immigration scholars, refugee legislation during the Cold War typified the role of refuge-asylum law as an exclusionary policy (Van Selm 2003; Swanwick 2006). An overwhelming percentage of those admitted as refugees during the Cold War were fleeing communist countries. Indeed, the Hart-Celler Act of 1965 was the first law to establish the “refugee” as a distinct category for admission and it defined a refugee as any person-escaping communism (Tichenor 2002, 221; Ciampa 1996, 497). By the late 1970’s there was significant opposition to the sole focus on communist defectors to the exclusion of Chilean, Haitian, Filipino and South Koreans fleeing persecutions by their

states (Tichenor 2002, 223). As resistance to the geopolitical deployment of refugee designations grew, Congress passed the Immigration and Nationality Act (INA) in 1980 that included the 1980 Refugee Act. The 1980 Act was the first attempt by U.S. Congress to bring domestic law into compliance with international human rights standards as outlines in the 1951 Refugee Convention and 1967 Refugee Protocol (Ngai 2004, 236).

Human rights advocates recognize the 1980 Refugee Act as a pivotal moment in the evolution of U.S. refugee law (Thiele 2000). Through the 1980 Refugee Act, Congress sought to reform U.S refugee-asylum law based on international human rights standards by adopting a so-called objective approach to refugee admissions (Anker 1981, Helton 1984, Swanwick 2006, Graves 1989). The 1980 Refugee Act eliminated the geographic and ideological bias favoring communist dissidents by incorporating the 1951 Convention definition of a refugee (Anker and Posner 1981; Helton 1983). The Refugee Act also outlined a non-discriminatory policy requiring uniform procedures to ensure that refugee-asylum claims would be evaluated on a systematic and equitable basis. In sum, the Refugee Act represented a seemingly progressive move to bring U.S. law into alignment with the international human rights norms. Nevertheless, it failed to resolve many of the problems it set out to correct.

In particular, the promise of a uniform and neutral asylum system remained unfulfilled (Helton 1983). Throughout the 1980s, those fleeing communist dominated regions or countries such as a Nicaraguans, Cubans, Soviets, Eastern Europeans and Southeast Asians were given preferential treatment. Between 1982 and 1985 persons fleeing “hostile” (aka communist) countries were almost 3,500% more likely to be

recognized as refugees by the state department than those coming from non-hostile countries (Yarnold 1990a). In stark contrast, less than 1% of Haitians, Guatemalans and Salvadorians were granted refugee status in the 1980s (Tichenor 2002, 267). Although these groups were fleeing political unrest and violence, they were typically identified as “economic” migrants (ibid). Thus, even after passage of the 1980 Refugee Act, asylum adjudication continued to be dominated by foreign and domestic policy considerations (Swanwick 2006; Loescher and Scanlan 1986) and the federal executive, legislative, and judicial branches continued to disagree sharply over the basis of refugee determinations (Tichenor 2002, 244).

The plight of Central Americans seeking asylum during the 1980s serve as one example of how the political will of the executive branch translated into the exclusion of entire populations from the reach of political asylum. Legal scholars regard the discriminatory treatment of El Salvadorians and Guatemalans, in particular, as a low point in the history of U.S. refugee-asylum law (Churgin 1996; Swanwick 2006), in which their mass exclusion demonstrated the failure to fully implement the promise of objective and neutral human rights principles into practice. Approval rates for Salvadoran and Guatemalan asylum cases were under 3% in 1984. In the same year, the approval rate for Iranians was 60 percent, 40 percent for Afghans fleeing the Soviet invasion, and 32 percent for Poles (Gzesch 2006).

While the mass exclusion of Central Americans in the 1980s represents the failed promise of the 1980 Refugee Act, some scholars claim that the development of gender-based persecution hinted at the realization of human-rights centered, inclusive asylum adjudication (Musalo 1996, Anker 2002). Gender-based asylum cases have “pushed the

boundaries” of asylum law and expanded protection to new segments of society (Foster 2010). Gender based persecution refers to the forms of violence inflicted on women because of their sex or gender (Bahl 1997, 35-36). Gender-based persecution includes female genital surgeries, bride burning, dowry deaths, coerced prostitution, forced marriages, sexual slavery, widow rituals, rape, trafficking, and domestic violence (Visweswaren 2004). Gender-based persecution also encompasses restrictive and discriminatory social structures applying to women, such as prohibitions from certain activities like employment or education. It also includes persecution, or severe social ostracism and harassment, for disobeying repressive laws and for non-conformity to social mores, such as breaking certain dress codes, talking to men in public, having children out of wedlock or sex before marriage (Bahl 1997, 36). In 1995, the INS used the term “gender-specific” in a memorandum that outlined procedures for dealing with women’s claims to asylum. The guidelines asserted, “women often experience gender-specific types of persecution” that are not experienced by men (Germain 2009, 45-6).

After 1990, many feminist legal advocates and human rights activists called for recognition of gender-based asylum claims, arguing that the U.S. needed to come into closer alignment with international norms and fulfill the promise of the 1980 Refugee Act. Despite the exclusionary history of refugee asylum law in the United States, some have argued that advances in gender-based asylum suggests that asylum law is not always dominated by imperatives of national sovereignty and narrow-minded immigration control. As a leading asylum scholar Deborah Anker (2002) argues, a human rights framework was critical to the development of gender-asylum law. Indeed, to Anker and other analysts, gender-based asylum represents a “growing synchronicity” between

domestic refugee regimes and international human rights (2002, 138). In this sense, the development of gender-based asylum suggests that the U.S. has conceded some of its sovereign power over immigration control to comply with international norms. As I argue this is still very much up for debate.

1.3 Women's Human Rights and Gender-Based Asylum

Over the past two decades, asylum law has proven to be “one of the most (if not the most) controversial area of U.S. immigration policy” because of its systematic and/or sex (Anker 1999, 2). Since the 1980s, feminist scholars within legal studies have critiqued the gendered nature of the refugee subject, refugee-asylum arguing that it is andocentric and reproduces a public/private dichotomy that results in the systematic exclusion of female asylum applicants from protection (MacKinnon 1994, Romany 1993, Charlesworth 1991). Indeed, feminist and legal scholars draw on the history of refugee-asylum admissions in the United States to highlight how it first privileged European males displaced by war (Goldberg 1995, 346) and later educated, male elites fleeing communism (Lineralli 1996). This exclusion occurs because gender-specific persecution is dismissed as apolitical; gendered forms of persecution (ex. rape) are treated as personal problems; and the existing categories defining a refugee (social group, political opinion, religion, nationality) are defined by masculine norms. The public-private distinction embedded in the law renders not only gendered elements of women's experiences suspect, but also the women themselves as they find it harder to establish credibility.

The gendered nature of refugee-asylum law implicates both the substantive (written law) as well as the procedural (law in practice) aspects of refugee-asylum law. Refugee law protects persons who have been persecuted due to their race, religion,

nationality, political opinion and membership in a particular social group. Many legal scholars advocated for the inclusion of ‘gender’ as sixth category in the definition of a refugee (Bosi 2004, Condon 2002, Thiele 2000, Kelson 1997, Schenk 1995. McLaughlin 1994, Love 1993) to challenge the supposed “gender-neutrality” of the refugee definition (Thiele 2000, 3). The denial that gender is a constitutive element of experience, they argue, makes it harder for women to get asylum when gender is a salient factor in their narrative (Thiele 2002, 3).

Building upon a much longer history of campaigning for women’s rights as human rights, feminist scholars argued that the andocentric model refugee subject results in the systematic exclusion of female asylum applicants from protection. This critique was embedded in a much larger and comprehensive critique of international and domestic human rights regimes for failing to adequately account for violence against women (Bunch 1995a). Feminist scholars and advocates articulated critiques and campaigns around forceful politics of recognition aimed at spotlighting the masculinist assumptions in human rights discourses and specifically refugee-asylum definitions (Goldberg 1995, 346, Lineralli 1996). The historical record showed that the gender-specific persecution tended to be dismissed as apolitical, personal problems. Even when women’s claims fell squarely within the existing categories, any gendered aspects of their narratives made them ineligible to adjudicators. Feminists therefore have argued that refugee-asylum law reinforces a public/private dichotomy that renders women’s experiences of persecution as outside the bounds of existing asylum statutes. Because violence against women was assumed to be apolitical, women’s experiences were dismissed and they had a harder establishing credibility.

These efforts to expose the masculinist assumptions of refugee asylum law and to challenge states to reform refugee-asylum to recognize women-specific violence drew directly upon the energies and strategies developing out of women's human rights campaigns. Through the lobbying efforts of the United Nations Commission on the Status of Women, 1975 was designated as "International Women's Year" which included the first World Conference on Women in Mexico City. Following a recommendation by this Conference, 1976-1985 was designated the UN Decade for Women, designed to address the needs of women throughout the world. Feminist advocates organized world conferences focusing on women's human rights including Copenhagen in 1980, Nairobi in 1985 and Beijing in 1995. Advocacy at two World Conferences on Human Rights, the Human Rights conference in Vienna in 1993 and then Fourth World Conference on Women in Beijing in 1995, were particularly instrumental in establishing recognition that "the human rights of women and the girl child are an inalienable, integral and indivisible dimension of universal human rights" (Robinson 2001, 14). These global efforts were fed by the organizing and planning efforts of women in a diversity of local, regional and national locations (Bunch and Reilly 1994).

Campaigns addressing violence against women drew attention to the inadequacy of global instruments such as the 1951 Refugee Convention and 1967 Refugee Protocol to protect women refugees (Musalo and Knight 2001). Campaigns raised awareness of the historic failure of states to protect women and catalyzed key measures including guidelines, directives and legislation to incorporate gender perspective into the substantive and procedural aspects of the refugee determination process (Musalo 2003, 780-81). In 1985, the Executive Committee of the UNHCR issued its first conclusion on

refugee women recognizing that they had particular needs and vulnerabilities unmet under the existing conventions and protocols (Musalo 2003, 779). In the wake of this conclusion an NGO Working Group on Refugee Women formed and issued a report “advocating the ‘protection needs’ of women refugees,” recommending the expansion of the social group category of asylum to include a gender interpretation, protocols for adjudicating cases brought by women, and services to women victims of violence (Grewal 2005, 175). In 1989 the UN created the Women’s Commission for Refugee Women and Children under the auspices of the International Rescue Committee that drafted Guidelines on the Protection of Refugee Women and promoted them after their release in 1991. In 1993, the Executive Committee of the UNHCR specifically recommended that states develop gender guidelines to handle such claims. Canada followed suit in 1993, while the United States issued similar guidelines in 1995, Australia in 1996, UK in 2000, and Sweden in 2001 (Musalo 2003, 780).

The decade of the 1990s saw a significant growth in domestic and transnational advocacy by feminist legal advocates and NGOs to pressure their states to conform to these new international standards. In the United States feminist legal advocacy organizations such as the Women’s Refugee Project, Equality Now, Tahirih Justice Center, and specific legal advocates and scholars such as Deborah Anker, Nancy Kelley, Pamela Goldberg, and Karen Musalo played a key role in pressing for reform. The work of these groups have targeted internal adjudication policies, impact litigation for the creation of precedent-setting domestic case law, and lobbying for legislative reforms (Oxford 2006). In 1995, the INS introduced “gender guidelines” on adjudicating cases of

women bringing forth claims based wholly or in part on their gender (Coven 1995).¹ The only legislative changes was in 1996, through the Illegal Immigration Reform and Responsibility Act (IIRRA), which defined forced abortions and involuntary sterilization as acts of persecution. However, overall, the U.S. government demonstrated considerable inertia in the development of legislation or comprehensive policy guidelines for gender-based violence and has not prioritized expanding refugee asylum protections in the context of state-retrenchment, welfare reform, and shifting foreign policy priorities following the Cold War.

1.4 Gender-Based Asylum and Feminist Critique

Feminist literature on gender-based asylum has focused on two different concerns. The first concerns a politics of recognition, that is, women-specific forms of persecution and violence are not recognized by states as a legitimate rationale for extending humanitarian protection under refugee-asylum law. This literature tends to accept the role of the state as a protector and is embedded within a longer history of women's rights as human rights campaigning and legal advocacy. Feminist legal advocates at the forefront of this literature have played a key role in scholar-legal-activism to produce space for recognizing violence against women and establishing protections for refugee women. The second set of literature has critiqued how women refugees and violence against women from the global South are discursively framed by women's rights organizations, legal advocates and adjudicators in the global North to engender sympathies. Much of this work challenges assumptions about how violence

¹ The guidelines were issued in the form of a memorandum from Phyllis Coven, Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators (May 26, 1995), <http://www.uchastings.edulcgrslaw/guidelinstguidelinesus.pdf>. The guidelines were not binding, however asylum officers were expected to follow them unless there was a compelling reason to take another approach.

against women is 'recognized' in gender-based asylum cases. For instance, transnational feminist scholars illustrate the salience of colonial tropes related to "third world women" as victims requiring protection and depictions of violence against women that buttress binaries of traditional/modern cultures and civilized/barbaric societies. Such representations, transnational feminists argue, force refugee-asylees to conform to particular narratives of victimhood, to reproduce global imaginaries of violated women and their benevolent protectors that feed into nationalist sentiments and Western exceptionalism. Against the exceptionalist narrative, this literature tends to challenge the image of the state as a protector given its role in imperialist endeavors connected to both military and economic projects that create refugee flows.

Transnational feminists have argued that human rights, particularly women's human rights, has been used as a political tool by the U.S. state to produce an image of itself as a global protector, even amidst an aggressive policies of imperial expansion at home and abroad (Grewal 2005). The development of gender-based asylum in the post-Cold War era raises important questions regarding the role of women and gender politics in newly emergent nationalist sentiments. Ella Shohat (2002) urges feminist scholars to analyze critically the transnational asymmetries in immigration legislation and the spotlighting of particular asylum cases to avoid recycling old colonial tropes of the West as civilized and free from human rights abuses, acting as the rescuer of less civilized societies' women (74). Feminist scholarship examining the discourses about "protection" embedded in the development of gender-based asylum provide concrete examples of how human rights campaigns and state actors are intertwined with imagining the nation as benevolent and exceptional and are productive for U.S. nationalism. Transnational

feminists caution against assumptions about the concession of state power with the advance of gender-based asylum claiming that the production of “new” subjects for the state to rescue contributes great value in what Grewal calls the geopolitics of humanitarianism (1999, 340).

Transnational feminist and legal scholars have also argued that gender alone is insufficient as a category of analysis for examining and critiquing asylum practices (Grewal 1999, Visweswaran 2004, Oxford 2006). Different types of gendered harms are adjudicated differently in the United States because race, class, nation and sexuality tend to inform the application, preparation, and adjudication processes of gender-based asylum claims (Oxford 2006, 168). Gender-based asylum therefore is not a panacea.

Anthropologist Kamala Visweswaran (2004), for example, argues that successful cases of South Asian women fleeing domestic violence rely on static and patriarchal notions of culture, dangerously removed from any discussion of political systems.

Mountz (2010) argues that legitimate asylum claims are defined largely by narratives of egregious, rare and extraordinary forms of persecution and violence that differentiates such victims from the vast majority of potential refugees and other migrants. In treating asylum claims as extraordinary, they reduce pressure on the state to set a wider precedent for protecting certain victims of violence and persecution. Just as Mountz focuses on the way in which states selectively respond to human rights concerns, feminist scholars such as Berger (2009), Grewal (2005), Visweswaran (2004) and Oxford (2005) argue that interpretations of gender persecution and modes of adjudication function to classify who suffers from human rights abuses, thereby delimiting who can rightfully gain protection in the United States. Understanding refugee law as a kind of

filter through which sympathetic subjects may pass, feminist scholars raise the gendered question of who is recognized as a human rights victim, worthy of state sponsored refugee status and thereby enabled to pass through the immigration filter in the United States. Scholars note the very specific discursive frameworks that gender-based asylum cases must fit within to be successful. For instance, lawyers must present a truncated view of third world women as fleeing backward and culturally static societies, in need of rescue by Western societies such as the U.S. (Berger 2009, Grewal 2005, Visweswaran 2004, Oxford 2006). Disproportionate attention is given to forms of sexual violence and cultural traditions that pose bodily harm to women in the global south while eschewing interpretations of gender persecution that might be aligned more closely with forms of domestic abuse or poverty (Basu 2000; Freedman 2009).

Rather than divergent concerns, in this dissertation I attempt to bridge the gap between feminist legal literature and transnational and postcolonial feminist scholarship. While scholars and legal advocates promoting the politics of recognition have rightly highlighted the continued reticence of the United States to establish laws and policies that acknowledge and extended humanitarian concern regarding violence against women, transnational feminists rightfully highlight the ways that advances made by feminist legal advocates have also tended to translate into state practices that privilege particular forms of gender violence, have forced asylees and lawyers to frame women's experiences in terms of victimhood and cultural backwardness, and may even play into nationalist discourses that enable states to project a positive image within the geopolitics of humanitarianism (Grewal 2005). Building on insights in both literatures I argue for a renewed analysis of the politics of exclusion exercised by state actors to preserve state

sovereignty by extending humanitarian concern only in cases that do not force an expansion in state protection or open new paths to citizenship.

By focusing on the politics of exclusion, my work contextualizes gender-based asylum advocacy and adjudication within a longer history of struggle over the boundaries of asylum protection and legal definitions of a refugee. Extending the feminist literature, I investigate how, in the context of floodgate concerns, persecution must be defined narrowly enough to reduce the number of potential refugees while appearing robust enough to demonstrate the U.S. state's benevolence toward victims of persecution. I unpack "paradoxical inclusions and exclusions" (Mountz 2010) of refugees seeking asylum on the grounds of gender-based persecution through discursive analysis of precedent setting cases and interviews with lawyers and advocates. My dissertation highlights how the U.S. state constructs uneven access to border crossing and citizenship through refugee-asylum law by invoking the need to differentiate between legitimate and illegitimate migrant subjects (Razack 1999, Coutin 2007, Mountz 2010). In gender-based asylum, these border crossings most often take place in courtrooms and legal battles that define who is and is not a refugee. Therefore, it is these legal cases that I will now turn.

1.5 Legal Archaeology: A Feminist Legal Studies Approach to Gender-based Asylum

My research approaches gender-based asylum in the United States through feminist legal studies. Employing the methodology of legal archeology, I focus on precedent setting cases as struggles over particular legal outcomes, in addition to viewing the development of case law as a longer-term struggle over the definition of a refugee. Gender-based asylum has developed almost exclusively through case law. Case law refers to series of decisions linked together that establish new and legally binding

interpretations of the law. As the method of case law and judicial reasoning requires, all legal decisions must be articulated through references to statutory law and previous cases. Individual decisions can be cited as precedent in future cases based on the premise that similar cases should be decided in the same way. Case law therefore is distinct from statutory law, which is composed of statutes and codes enacted through legislative bodies; and from regulatory law which are regulations issued by the executive branch. The meaning and scope of “gender-based asylum” has been established through individual cases at the appellate level, which are then translated into other cases through judicial references to those cases. In an adjudication system that is highly decentralized and fragmented (Oxford 2006) these cases are very important battlegrounds in the fight to secure protection for women fleeing gendered forms of violence.

Using legal archeology, I focus on case law as a legal battleground in the definition of what constitutes gender-based persecution. Legal archaeology is a form of qualitative law analysis that approaches “cases” as embedded in broader social contexts and which grounds seemingly abstract legal reasoning in actual historical events, struggles, and confrontations. Conducting legal archaeology enables me to contextualize the formation of gender-based asylum case law and the discursive frames of gender and violence within a larger set of state strategies related to immigration control. Legal archeology provides a critical lens through which to examine flood fears and gender-based asylum because precedent-setting cases are high stakes events that serve as a benchmark for how future cases will be fought and adjudicated. My legal archeology revolves around two precedent-setting cases that are regarded by feminist legal scholar-

advocates as the most important in the past two decades: *Matter of Kasinga*² and *Matter of Alvarado*.

Fauziya Kassindja and Rodi Alvarado who were both granted asylum in the United States in 1996 on the basis of gendered forms of persecution. Fauziya Kassindja was the first woman in the United States to be granted political asylum because of the threat of “female genital mutilation”³ (FGM) in her home country of Togo. Rodi Alvarado fled to the United States after enduring a decade of abuse at the hands of her husband, a former soldier in the Guatemalan army. Initially, both cases represented an important victory for a broader women’s human rights movement seeking to expose the andocentrism of refugee-asylum law and pushing for female specific forms of violent persecution to be recognized as legitimate claims to protection (Alfredson 2006).

Matter of Kasinga set a favorable national precedent for women fleeing FGM to gain political asylum, and broke new ground in developing jurisprudence of gender based asylum claims. Kassindja’s case was not easily won. Upon arriving in the United States, she was detained and imprisoned for almost two years. Kassindja was initially denied asylum by an immigration judge who claimed that she was not a credible applicant and that FGM did not constitute a basis for asylum. Two years later, the Board of Immigration Appeals granted Kassindja asylum and published the decision as a

² Although the case name is spelled “Kasinga,” the correct spelling of Fauziya’s last name is “Kassindja.” When she first arrived at the airport in 1994, the INS erroneously spelled her name and this spelling was carried over into all the case documentation. In this dissertation, I use the correct spelling of her name unless I am referring to the judicial opinions on the case.

³ The term “female genital mutilation” is the subject of heated debate among scholars and practitioners. It is alternately called “female genital surgery” or “female genital circumcision.” For the sake of consistency when discussing how the adjudications and advocates framed it at the time of Kasinga’s case, I primarily use FGM.

precedent-setting case.⁴ The eventual success of Kassindja's case is attributed to effective legal advocacy and backing from national women's and human rights organizations.

Kassindja's plight garnered widespread support from state and non-state actors as well as captured the public imagination--her story appeared on all the major news outlets at the time (Center for Gender and Refugee Studies, 2009). Indeed, Kassindja's quest for refugee protection was arguably the most highly publicized political asylum case since the passage of the 1980 Refugee Act and raised widespread awareness of the limits of current refugee and asylum policy in the United States as well as the persecution of women worldwide (ibid). In the United States, the Kassindja case seemed to completely reconstitute refugee protection by setting a precedent for women to make claims for political asylum based on gender-specific persecution (Oxford 2005, 21).

Matter of Alvarado, which was decided in the same year by an immigration judge, drew upon the *Kasinga* precedent to argue that domestic violence fell within the gamut of political asylum.⁵ However, in 1999 the U.S. government reversed the decision to grant Alvarado asylum, claiming that her experience of domestic violence drew upon too wide of an interpretation of refugee protections which threatened to open the flood-gates to women from all over the world. Denying Alvarado asylum set another legal precedent that effectively excluded claims of domestic violence from asylum protection in the

⁴ The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws in the U.S. The BIA has nationwide jurisdiction to hear appeals from immigration judges and by district directors of the Department of Homeland Security (DHS) when the U.S. Government is one party. BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or Federal Court (<http://www.justice.gov/eoir/biainfo.htm>, visited June 17, 2012).

⁵ Rodi Alvarado was a woman from Guatemala who requested asylum after suffering more than 10 years of severe physical and psychological abuse at the hands of her husband, a former military soldier. According to her testimony, she had been unable to escape his reach within Guatemala and sought protection in the United States. The abuse was heinous and prolonged. According to court documents, Alvarado married when she was 16, and became pregnant soon afterward. Her husband beat her to induce an abortion, as well as dislocated her jaw and kicked her repeatedly. He also "pistol-whipped Ms. Alvarado, broke windows and mirrors with her head, punched and slapped her, threatened her with his machete and dragged her down the street by her hair," a court filing states (Preston 2009).

United States. For 14 years, Alvarado's case was embroiled in a legal battle unresolved by three consecutive presidential administrations. She only recently received asylum under the Obama administration in 2009. However, the final decision to grant Alvarado asylum was not issued as a precedent and therefore has no binding impact on future cases. According to her attorney, Karen Musalo, *Matter of Alvarado* has emerged not only as an "iconic case of domestic abuse as a basis for asylum," (Preston 2009) but also as representative of the "hostility towards gender claims for asylum" (Center for Gender and Refugee Studies 2009). While *Matter of Kasinga* seemed to represent an expansion of the gender-asylum rubric and win for women's human rights, Alvarado's case illustrates the U.S. state's resistance to gender-based asylum claims. Instead of extending the *Kasinga* legacy, gender-based asylum seems to be caught in a dead end following *Alvarado*.

Rather than treating these cases as separate, I argue that the *Kasinga* and *Alvarado* cases are entangled in a broader conflict over what constitutes gender-based asylum amidst fears of opening the flood-gate to women fleeing persecution. This conflict does not begin and end with *Kasinga* and *Alvarado* but rather extends back in time. In this dissertation, I work backward and forward from these cases, analyzing a total of 29 cases cited in or citing the *Kasinga* and *Alvarado* decisions to contextualize their legal struggles in broader social and legal conflicts since the passing of the 1980 Refugee Act. I also include policy documents and interviews with feminist lawyers and impact litigators who participated in or have intimate knowledge of these case trajectories to compose what Foucault (1973) calls a "dossier" on gender-based asylum precedents. Rather than seeing law as static, I open up these case histories to understand their

contingent logic and to offer insights into the formation of particular legal discourses. As I demonstrate, the *Kasinga* and *Alvarado* cases, as well as all gender-based asylum cases impacted by their precedents, are rooted in a much longer definitional struggle over who qualifies as a refugee following the 1980 Refugee Act.

1.6 Engendering the Refugee Definition

In the chapters that follow, I examine how flood fears have shaped gender-based asylum jurisprudence by examining the ‘definitional struggles’ over who constitutes a refugee. Definitional struggles refer to the ways that asylum seekers, lawyers and adjudicators articulate competing conceptions of who constitutes a refugee and what qualifies as violence deserving of state protection (See Appendix A for an overview of the stages of an asylum claim). I trace the definitional struggles in a series of precedent setting-cases that shape the parameters of how gendered harm can qualify for protection under the “membership in a particular social group” provision of the refugee definition. Definitional struggles tend to begin in reference to established legal criteria, whether statutory law, case law or policy. Examining definitional struggles in a series of precedent-setting cases provides insight into the individual struggles to qualify for protection but also the longer-term conflict over who qualifies for asylum protection. While definitional struggles take place in specific asylum proceedings, they also extend through time as precedent setting decisions are used and contested in future cases.

The concept of a definitional struggle challenges the assumption that refugee definitions are immutable. In the United States, qualifying for political asylum requires meeting the criteria outlined in the codified definition of a refugee:

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. INA §101(a)(42)(A).

Accordingly, individuals who can demonstrate they have suffered past persecution or have a well-founded fear of persecution based on one of the five enumerated grounds - race, religion, nationality, membership in a particular social group, or political opinion - may qualify for asylum protection. The stakes of meeting the definition are high. Those who meet the definition are granted protection and legal status, access to public benefits, a path to citizenship and the ability to give derivative status to immediate family members. Those who fail to qualify are placed in deportation proceedings. However, the ways that this definition is invoked or interpreted is contingent upon the circumstances of each case.

Rather than being fixed or stable, legal interpretations of who classifies as a refugee are fluid and variable. Every aspect of the refugee definition is subject to interpretation and contest, including what counts as “persecution,” “well founded fear,” being “unwilling or unable” to get protection from the state, the impossibility of internal relocation, and lastly what qualifies as persecution motivated by race, religion, nationality, membership in a particular social group or political opinion (see Appendix B). In cases that get published as precedent, the outcomes of particular definitional struggles are condensed or consolidated into what appear to be fixed legal artifacts. Through published decisions, specific interpretations of what constitutes a refugee are universalized as law.

The primary site of definitional struggles over gender-based asylum is the refugee provision for those persecuted for their “membership in a particular social group.” In the absence of a gender category, women fleeing gendered forms of persecution often use this category to explain their particular experiences of violence and persecution. Domestic policy and international protocols, conventions and guidelines advised placing gender-based persecution claims in that rubric rather than establishing gender as its own legal category. This strategy however, has generated considerable conflict over how women, sex or gender can be used to define a social grouping within society and the gendered nature of power and violence. Legal advocates who have unsuccessfully lobbied for the inclusion of ‘gender’ as sixth category in the definition of a refugee have highlighted the shortcomings of using the social group category. Indeed, the social group category is an embattled ground within U.S. asylum law because definitions of a social group are widely contested. My research on *Kasinga* and *Alvarado* illustrates how the particular social group category in U.S. asylum law links their cases to a legal history in which asylum seekers, lawyers, advocates, adjudicators and policy-makers have struggled over how social groups should be defined.

1. 7 Dissertation Structure

My dissertation is organized into seven chapters. In Chapter 2, *Humanitarianism and Immigration Control*, I present my methodology, research design and methods. I place my study of gender-based asylum law in the United States in the context of a broader conflict between the humanitarian mandate of refugee-asylum law and state sovereignty, all of which play out in a fragmented state. This chapter lays out the

historical and theoretical context of my research, as well as methodology of legal archaeology and my methods for case analysis and interviews.

Chapter 3, *Flood Fears and Definitional Struggles: The Social Group Category in U.S. Asylum Law*, illustrates how contemporary gender interpretations of the social group category are the outcome of specific contingent historical moments, events, and discourses responding to a perceived “crisis” in immigration control. I begin my legal archaeology in this chapter by examining the mass exclusion of Central Americans from political asylum during the final decade of the Cold War. I demonstrate how this mass exclusion left an indelible mark on the meaning of political asylum, specifically the social group provision of the refugee definition. My analysis focuses on two precedent setting decisions, *Matter of Acosta* (1985) and *Matter of Sanchez Trujillo* (1986), which form the foundation of social group jurisprudence in the United States. In both of these decisions, I illustrate how adjudicators developed restrictive social group definitions in response to fears that recognizing the applicants as refugees would “open the floodgates.” I argue that *Matter of Acosta* and *Matter of Sanchez Trujillo* exemplify how adjudicators create law as they decide on cases, defining the boundaries of asylum in response to particular conflicts over state protection. By establishing new definitional barriers to entry, or particular “gates of recognition,” for asylees to navigate, adjudicators attempted to reserve asylum protection for the exceptional few and to preserve adjudicators’ power to arbitrarily decide who is included and excluded based upon the perceived level of threat applicants pose to inviting a future flood.

In Chapter 4, *Gender-Based Persecution and the Problem of Exceptionality Requirements*, I examine how the newly established gates of recognition to qualify under

the social group provision created specific openings and obstacles for female asylees with gendered experiences of harm. While the *Matter of Acosta* decision created an opportunity for women to claim persecution based on their sex, this chapter illustrates the difficulty women had actually winning asylum under the social group provision. Based on analysis of three precedent setting cases, I illustrate how adjudicator's standards of exceptionality presented significant barriers in women's efforts to define themselves as refugees and to win asylum. I outline three major reasons that they "failed," all of which I find demonstrate flood fears. First, adjudicators found "gender" was too broad of a characteristic to define a particular social group, second they found sexual violence against women was too pervasive to count as persecution, and lastly, group-wide persecution of women undermined claimants ability to prove being 'singled out.' I argue that adjudicators subjected women to high standards of exceptionality because gender persecution generated a new set of flood fears, ones which were no longer confined to territorially based conflicts. Rather, the decisions in these cases represent flood fears and pre-emptive gate-keeping associated with the global prevalence of gender violence.

Chapter 5, *An Exceptional Case: Matter of Kasinga* explores the flood fears and gate-keeping engendered by new definitional struggles over gender violence produced by Fauziya Kassindja and "female genital mutilation." My analysis focuses on the definitional struggles leading up to and encoded in the final precedent setting decision. While the final legal victory was undoubtedly significant, Kassindja's case illustrates how her exceptional narrative played an increasingly significant role as her case moved through the appellate process and adjudicators debated how to best handle her case. Consequently, I find that the precedent decision operated as an "intricacy of exclusion,"

whereby adjudicators crafted an inclusive decision based on particular forms of exceptionalism that enabled the exclusion of other women. I examine two dimensions of this intricacy of exclusion. The first is that adjudicators designated FGM as the benchmark of gender-based harm, mobilizing cultural difference to define exceptionality, and secondly, adjudicators crafted an incredibly narrow social group precedent based on Kassindja's unusual circumstances. The positive decision thus functioned as a form of flood control because it applied to such a small portion of women with claims to gendered-persecution and furthermore, it preserved the power of adjudicators to grant asylum for gender-harm on a case-by-case basis rather than allowing for what agency officials called "routine availability."

Chapter 6, *An Unexceptional Case: Matter of Alvarado*, examines the definitional struggles in *Matter of Alvarado* over how domestic violence could qualify for political asylum. My analysis focuses on Rody Alvarado's 14 year legal battle to win asylum as a member of a persecuted social group defined by her experience of domestic violence. While *Matter of Kasinga* had created a potential opening for women to use the social group provision, *Matter of Alvarado* is considered the hallmark negative decision limiting access to asylum protection for gendered harm. To justify defining Alvarado as outside the boundaries of asylum protection, I examine how adjudicators employed flood discourses to characterize Alvarado and domestic violence as unexceptional and thus ineligible to meet the standards of asylum. Furthermore, I argue that the long and complex legal trajectory of *Matter of Alvarado* exemplifies several gate-keeping strategies used by adjudicators and executive decisions makers to restrict access to asylum protection, including stalled decision-making, perpetuating legal ambiguities, and

devolving decision making to the lowest level of adjudication. Alvarado's case illustrates not only the fragmented nature of the state, but the vital role this fragmentation plays in regulating immigration amidst flood fears.

In Chapter 7, *Governmentalities of Flood-Gate-Keeping*, I propose a reinterpretation of how gender based asylum has developed that emphasizes the role of state actors' concern for immigration regulation. Existing feminist scholarship tends to emphasize the exclusionary effects of gender biases or the consequences of predicating inclusion on forms of representation that rely on the 'cultural otherness' of third world women. My analysis suggests that the viability of naming gender in the asylum process is also mediated by adjudicators' anxiety about regulating and controlling access to the U.S. border and to legal status. By combining my legal archeology and interviews with impact litigators, I argue that the flood discourse and gate-keeping practices operate as a form of governmentality within gender-based asylum law. Rationalized by raced, gendered, and classed fears about immigration to the U.S., state actors employ a range techniques and resources to minimize the humanitarian scope of asylum law. The fragmented nature of the state and the law itself becomes critical tools in this process of restricting access, a process that ensnares asylum seekers and legal advocates in their quests to win asylum.

Chapter 2: Humanitarianism, Immigration Control and State Fragmentation

2. Introduction

Refugees crystallize the conflict between two faces of modern immigration, the humanitarian mandate to provide a safe haven for persecuted persons under human rights standards and the maintenance of sovereign state's power to control its territorial borders (Bhabha 1996, 3). The integration of universal human rights standards into particular domestic laws and policy often come into direct conflict with principles of state sovereignty, especially the power to set national standards of immigration control. Historically, the refugee subject developed as an international juridical-legal subject during a revival of the Westphalian model of state sovereignty, which emphasized territoriality and principles of non-interference by foreign parties in the affairs of states. The Westphalian model of state sovereignty imagined the international order geographically as a series of "mutually exclusive, territorially self enclosed, and unitary state actors" (Brenner et. al. 2003, 2). This conceptualization of sovereign state power rests on control over these territorial boundaries (ibid), and the right to choose who can enter into a state's territorial domain and reside lawfully (Ruggie 1993).

Refugee law and human right instruments set standards for how states must deal with migrants originating from other territories. Refugee law, an outgrowth of international human rights law, necessarily disrupts the absolute sovereign power of individual states. Signatories to refugee conventions are obligated to protect a subset of people who have been persecuted in their home countries. State power over securing its territorial border through immigration control thus conflicts with these obligations to

recognize and protect the rights of non-citizens. The paradoxical position of the refugee amidst these opposing governance regimes is well documented. By most accounts, national interests have prevailed over international norms in the implementation of refugee protection. For this reason, many human rights scholars and activists have been reluctant to engage with refugee law, considering it to be “too embedded in domestic immigration law and institutions” (Anker 2002, 134). Thus in spite of being rooted in international human rights law, because of the historically tight grip of national politics on refugee law and policy, many characterize the refugee regime as the “poor cousin” of human rights; part of a separate and dueling order (Anker 2002, 133).

The relationship between humanitarianism and state sovereignty is a robustly debated topic among refugee-asylum legal scholars. Refugee law scholars tend to frame the debate over state sovereignty in three ways. One perspective holds that asylum is grounded in legally binding norms dictated by international law that transcend and therefore place limits on the power of the state (Fitzpatrick 1994, Henkin 1994). A second perspective argues that asylum grants are a concession of sovereignty. In this view, international refugee laws are a “compromise” between a state sovereignty and the humanitarian impulse to “aid a stranger in necessitous circumstance” (Hathaway 1993). A third perspective holds that asylum grants are assertions of sovereignty, selective acts of generosity (Grahl-Madsen 1980). In this view, asylum is an extension of the sovereign exclusive right over its territory, permitting someone to stay, thus a generous asylum policy would signify a “vigorous sovereignty” (Fitzpatrick 1994, 24). While these three dominant conceptual approaches to the relationship between state sovereignty and international human rights all suggest a process of negotiation in the process of limiting,

conceding or asserting state sovereignty through refugee-asylum law and policy, they tend to reproduce dualistic assumptions about state power and international norms.

The history of international refugee-asylum standards suggests that sovereign states played a significant role in articulating and framing refugee conventions and protocols through the United Nations. States fought vigorously to establish provisions that were acceptable to them and omitted particular grounds for refugee status that were deemed ideologically or institutionally untenable (Bhabha 1996). On the other hand, the articulation of refugee-asylum within the broader human rights framework has also mobilized people within sovereign states to challenge existing domestic laws and policies and transform them to more closely reflect international norms. Yet, these debates raise questions about where, when, and how expressions of state sovereignty materialize in relationships between state institutions, state practices and actual people. How can we evaluate the effects of human rights standards on particular expressions of sovereignty in refugee-asylum law and policy? How have international human rights standards shaped the development gender-based asylum and state power in the United States?

To answer these questions I argue in this chapter that we need to make three conceptual maneuvers away from the existing assumptions about the state, human rights standards and refugee-asylum law. First, I claim that we need to challenge conceptions of the state as a monolithic and coherent unity. I draw upon work by Bob Jessop to demonstrate state fragmentation and its relation to refugee-asylum law and policy. Second, I argue that we need to explore the particular flood-gate concerns engendered by the threat of mass migrations that the state seeks to manage. Third, I argue that we need to understand the distinct dimensions of asylum law and policy as a form of refugee

protection. As my analysis suggests, asylum seekers create a particular crisis in immigration control to which the U.S. state responds by internalizing border control through legal proceedings. These three conceptual maneuvers, I argue, help us to better understand the expression of sovereign power in gender-based asylum law and how the humanitarian and regulatory impulses of asylum materialize in “intricate” forms of exclusion.

2.1 Fragmenting the State

The existing debates over the effect of international refugee-asylum norms on state sovereignty tend to reify the state as a fixed entity rather than a mutable site where contesting political forces collide. The appearance of a unified state, or “state effect,” may suggest that the institutions of the state work in unison to fulfill an essential goal (Mitchell 1991), for instance regarding adoption of international human rights norms pertaining to refugee-asylum seekers. However, any coherent unity among different apparatuses and institutions of the state, I argue following Jessop (1990), is constituted politically and highly contingent. State formation “is not a once-and-for-all process” but rather the state is constantly being reinvented, refunctionalized and repositioned (Jessop 2009, 416). Common language projects an image of the state as a unified subject and material entity wholly distinct from the society that it governs. Indeed, this ideal image is essential to the credibility and authority of the state and to the operation of the legal apparatuses of the state. However, I understand the state as site of struggle between local, regional and more global forces (Jessop 2004). Jessop argues that the state is composed of “a distinct ensemble of institutions and organizations” and that this

collection of units does not cohesively exercise power as “the” state per se because the state is not a unified body with a common goal (1990). As he states,

There is never a point when the state is finally built within a given territory and therefore operates, so to speak, on automatic pilot according to its own definite, fixed and inevitable laws. Nor...is there ever a moment when a singled state project becomes so hegemonic that all state managers will simply follow rules to define their duties and interests as members of a distinct governing class” (9).

In challenging the dominant dichotomous view of sovereign states and human rights standards that treat states as coherent entities, I argue that struggles over refugee-asylum laws and policies, particularly gender-based asylum, illustrates the fragmentary and contested nature of the state. Understanding the state to be fragmented is essential to the study of refugee-asylum law because the immigration regime in the United States is composed of a broad range of institutions and state actors, none of whom are drones robotically implementing one particular hegemonic project. This fragmentation is evident both within individual asylum decisions but also with asylum jurisprudence generally.

The prolonged conflict between the legislative and executive branch agencies over refugee-asylum determinations, the effectiveness of human rights campaigns to influence how law is interpreted, the disjuncture between systems of adjudication, the arbitrary power of immigration judges, the power of lawyers to frame and reframe their clients experiences as well as shifting socio-economic, (trans)national, and geo-political circumstances all play a role in defining and redefining who is a refugee and how state actors and institutions are set to work. As I demonstrate, neither international human rights standards nor domestic state laws have a necessary pre-given effect on the outcome of the cases that result in people gaining asylum in the United States. While refugee laws and policies produce the effect of a coherent and unified state with distinct boundaries, it

is state actors who enact the sovereign power of the state through a variety of techniques and practices, visible in events and encounters between state and non-state actors. These events, techniques and practices are not immutable but the result of real choices, decisions, conflicts, struggles and negotiations between actual people. They are shaped by ideologies, imagined threats and moral imperatives. Legal cases taking place in courtrooms and legal histories and legal precedents that decide the fate of asylum seekers in the United States offer a window into the fragmentary nature of the state and the very real exercise of sovereign power in deciding who can be included and excluded within the territorial and legal boundaries of the state. Since many refugee-asylum seekers are fleeing places where they face imminent danger, these decisions and the deportation proceedings to follow express what Foucault has called biopower (1978); that is the power over life, or what Mbembe (2003) describes as the power to decide who lives and who dies.

2.3 States of Siege: Flood Fears, Border Management and Refugee-Asylum Law

Although grants of asylum are supposed to be based on the merits of individual asylum claims, the scale of forced migrations most often shapes U.S. policy responses to refugee flows (Churgin 1996). In the United States efforts to prevent uncontrolled mass migration lie at the heart of refugee asylum law and policy. Legal scholar Joan Fitzpatrick (1996) described this as the "moral relevance of numbers," in which states respond to particular migration flows based on the number of claimants (Fitzpatrick 1994, 1996). Because of the regulatory impulse to prevent uncontrolled mass migrations, refugee-asylum seekers are often described in terms of a flood and immigration control as a gate. Given existing fears about large scale forced migrations to the U.S., the flood

discourse evokes a sense of crisis or emergency related to the state's ability to control its territory. As Agamben (2005) argues during times of crises the state is empowered and extends its reach in exceptional ways. Flood fears and anxieties about mass migration create a perpetual sense of crisis that legitimizes the exercise of state sovereignty in refugee-asylum law and policy that results in exclusion.

Migration is often referred to through hydraulic metaphors that describe how people leave and enter nation-states "contained" by international borders and immigration laws (White 2002, 1055). Immigration therefore is described in fluid terms such as inflows, outflows, waves, tides, surges, streams, and floods. Their representation as aqueous bodies and movements suggests that immigrants exert an external pressure on a bounded and contained nation-state. Once this pressure reaches a critical point, it will spill over and inundate, suggesting that immigrants will either overwhelm the resources of the state or dilute the cultural make up of the nation (Charteris-Black 2006, 572). While the metaphor of a flood mobilizes the familiar and everyday object of water to describe the entirely human activity of migration, as with all metaphor, its explanatory function is not a literal one. The utility of metaphor is that it can help to simplify complex and contradictory issues and make them intelligible or even commonsensical (Mio 1997).

Immigration, as a complex social process is often described through metaphor, because it allows for a simplified representation of a very difficult subject. Metaphors embody particular views of the world, and organize how people think and act (Lakoff and Johnson 1980). Metaphors are tied to explaining the wider world of social and political life (Cresswell 1997, 334). Metaphors can influence how social problems are conceptualized and thus how they need to be addressed. For example, Otto Santa Ana

(2002), argues that metaphorical language portraying Latinos as invaders, outsiders, burdens, parasites, diseases, animals, and weeds facilitated the passage of three anti-Latino referenda passed in California including the infamous anti-immigrant measure, Proposition 187.

Law plays a key role in turning metaphors into commonsense and re-circulating them through other social institutions. Referring to immigration metaphors in Supreme Court and Federal Court decisions, Cunningham-Parmeter argues (2011),

Through metaphors, Congress, the Court, and other cultural bodies facilitate a discussion among lawyers, commentators, and legislators about “the immigration crisis” and the proposed responses to the crisis. Thus, the Court’s metaphoric choices do far more than reflect popular understandings of immigration. By appropriating, repackaging, and circulating certain immigration metaphors, the Court joins other cultural institutions in creating a dominant account of who immigrants are and how they should be treated (1585).

Immigration metaphors in legal discourse therefore play a critical role in normalizing particular views of who immigrants are and how they pose a threat. Although legal reasoning is steeped in metaphoric thinking (Winters 2001), metaphors involving immigration are particularly pernicious (Cunningham-Parmeter 2011). They claim to capture the “essence” of immigration, while uncritically mobilizing ideas about race and ethnicity and the need for “self-protection.”

...if immigrants are viewed as illegal alien criminals, then they should be captured and deported. If immigration is an invasion from the south, then the government should construct a virtual fence across the border to resist the Mexican offensive. These “common sense” responses are made possible by selective metaphoric framing (Cunningham-Parmeter 2011, 1550).

Immigration metaphors thus have a very material effect on how people are defined and treated. Legal discourse is one of those primary mechanisms that create an air of truth around such constructed images of immigrants. Dead metaphors, those most taken for

granted, are the most dangerous because they mask their own political and ideological entanglements (Ellis and Wright 1998, Cresswell 1997, Foucault 1980).

These powerful metaphors are more likely the creation of people in power than people out of power. Perhaps more accurately, power helps determine which metaphors obtain wide circulations and “become dead,” camouflaged and unseen. For these reasons, researchers should exhume “dead” metaphors and treat all immigration and ethnicity metaphors critically and with caution (Ellis and Wright, 688). The process of “exhuming” salient metaphors related to immigration and ethnicity is necessarily an examination of power, a process of denaturalizing these particular presentations of the world that represent truth. As Ellis and Wright argue, immigration metaphors are not impartial, but effectively narrow down a vision of the social processes and implications of immigration (1998, 687).

In his work on public discourses of Latino immigration to the U.S, Santa Ana (1999, 2002) describes the flood metaphor in terms of the threat of “dangerous waters.” Representing immigrants as dangerous waters, mobilizes the flood metaphor to link size, force and direction into a threatening combination (2002, 75). Santa Ana’s analysis of dangerous waters offers three critical insights for my study of the flood metaphor in gender-based asylum law. The first is that flood metaphors like “dangerous waters” turn immigrants into a volume or relative number. Immigrants are only recognized as “aggregates of individuals,” or more specifically, “an undifferentiated mass quantity” (2002, 76). This volume discourse dehumanizes immigrants by stripping them of any individuality; “they” are all the same. The volume discourse, as Santa Ana argues, also tends to link up with racial fears (criminality, biological pollution of the nation),

economic fears (stealing jobs, not paying taxes and overwhelming the welfare system), and as I illustrate, gendered fears that combine with these racist and classist ideologies.

Second, Santa Ana argues that the movement of this immigrant mass is ascribed a kinetic energy. As the mass moves, it builds and accrues more energy, becoming more and more dangerous because its force increases (2002, 76). Actual numbers, in this sense, do not matter since one person, as the volume discourse already asserts, represents the mass. As Santa Ana claims, “only a trickle of water can be enough to signal an impending flood...” (Santa Ana 2002, 78). Because of the lack of individuality, the presence of one body foreshadows the presence of many; it is threatening because it signals increasing pressure. In the United States, the geography of this kinetic movement tends to be represented as an inevitable northward flow of migrants from Mexico. The metaphor of dangerous waters therefore represents a “scary” scenario in which uncontrolled volumes of free flowing immigrants spill over the border and inundating U.S. territory with a “brown tide” (Santa Ana 2002, 7).

The third dimension of the flood metaphor described by Santa Ana links the threats posed by both the volume and kinetic energy discourses to the need for control. Dangerous waters need to be controlled, “stemmed,” “held back” or “dammed.” The volumes and independent mobility of the masses is particularly threatening since water requires great power to control.

Water moves, and when placed under pressure cannot be compressed, but forces its way or is channeled in some direction...Greater volume and movement of water imply greater need for safeguards and controls, and more powerful human agency to control the water...Insufficient human control of the kinetic energy pent up in volumes of water can lead to flooding and other ravages (Santa Ana 2002, 75).

The discourses of control suggest that disaster will result if the dangerous waters are not held in check. As the perceived volume of water increases, it follows, the kinetic energy must be matched or surpassed by human force that safeguards and controls the water. If the masses are not kept at bay, they will inevitably breach the border. Just as levies attempt to hold back large bodies of water, the border is presented as a fragile dike that might burst at any moment, given the pressure coming from the alien flood (Cunningham-Parmeter 2011, 1581). Paradoxically then, the territorial borders of the nation-state, traditionally seen as static and imagined as a container, are envisaged as weak thus calling forth the need for flood control. In this sense, the flood metaphor brings the territorial border of the nation-state into crisis by evoking a sense of vulnerability. Thus while the flood metaphor relies on the notion that the nation-state is some kind of distinct entity that can be flooded, it also suggests the fragility of that contained space. Instruments and technologies are needed to safeguard or control the flood.⁶

In the context of refugees and asylum seekers, who represent a particular class of migrant, the flood metaphor takes on unique characteristics. Refugees by definition do not choose to move but are displaced. This generates a sense of sympathy and concern that is not transferable to non-refugees. The flood metaphor in reference to refugees tends

⁶ Changes in asylum law are embedded within broader debates about immigration in general. The bulk of cases that I examine in this dissertation occurred during a period of intense political focus on the border and dramatic increases in border enforcement. During the mid-1980s, there was a “sharp escalation of border policy” and it shifted from a low to high priority political issue (Andreas 2001, 8-9). The federal government channeled resources into the U.S.-Mexico border, building fences and increasing border control agents. The government defined the border problem through “images, symbols, and language” and public images portrayed the border as “out of control” (Andreas 2001, 8-9, quoted in Law 2010, 78). The utility of these enforcement practices were more symbolic than practical, demonstrations that something was being done about the problem. Law describes them as forms of “political theatre” or “symbolic politics in action.” This maneuvering also filtered into legislation during the 1990s. Although the Immigrant Act of 1990 expanded visa numbers for legal immigration categories, the remainder of the decade was marked by two pieces of legislation that dismantled alien’s rights (Law 2010, 77). Law and immigration policy were central instruments and technologies used to safeguard the border and control the flood.

to be invoked therefore in three ways that diverge from Santa Ana's heuristic. First, the concept of a flood of refugees suggests that there is no way to predict where refugees may come from. Linked to this idea is that wars, conflicts and other displacements that generate refugee movements are unpredictable. Cresswell (2004) argues that flood metaphors therefore focus our attention on the idea that refugees are fundamentally out of control (119). In other words, refugees are particularly threatening since their geographic origin is ever-changing.

Second, the flood metaphor acts as an equalizer that makes refugee displacements the same as all migratory movements, a flow among flows. Rather than being framed and treated as victims fleeing violence, their representation as a flood conflates their migration with agent-based rationales such as job seeking, welfare entitlements and even criminal activity. As Cresswell argues, referring to immigration control, "It is easier to make a case against people labeled economic migrants than refugees" (2004, 121). Discourses that posit refugees as a mass or flood of foreigners links them with a wider specter of undesirable people invading the nation, shifting attention away from their specific reasons for flight. Instead the flood metaphor links refugees to the wider threat that undesirable migrant bodies pose to the nation-state. As numerous scholars have documented, the image of the refugee tends therefore to be racialized, criminalized, or framed as "bogus" in ways to draw a more innocent analogy to prejudiced discourses against economic migrants. Cast in this way, refugees become enmeshed in fears about stretching the resources of the state and transforming the composition of the nation.

The third way that the flood metaphor is invoked is to establish a permanent need for state intervention and immigration control to keep refugee flows in check. As

Creswell suggests, refugees mark a crisis in state power because their “mobility and fluidity threaten stable conceptions of place, culture, and nation” (2004, 121). The use of flood metaphors in relation to refugees “insinuate that place, boundaries, floodgates and stability are under siege” (ibid). Here the flood metaphor, now a common sense expression of a permanent, unpredictable and potentially undesirable flow of people enables a shift to a depoliticizing question of how to manage flows, stem the tide or baton down the hatches. The concept of a state of siege in which people threaten the otherwise stable boundaries of the state serves as an organizing framework for legitimizing and delegitimizing refugee claims and justifying state action for immigration control. The flood metaphor masks otherwise overt racist language about protecting the nation from undesirable people by shifting to a discourse about the need for population management in the context of a siege, crisis or emergency. Such a need for management ultimately trumps the humanitarian impulse in refugee law and places refugees squarely within a broader regulatory framework.

2.4 Asylum Seekers and Legal Borderlands: Responding to the Flood

Refugee-asylum law and policy in the United States approaches the management displaced people seeking protection through immigration under two very different sets of procedures. One deals with “refugees” and the other with “asylum seekers.” These different definitions of displaced peoples are based upon their geographic location in relation to U.S. territories. Refugee procedures are designed to manage groups of displaced people seeking protection at distant and off-shore sites where the state maintains absolute control over evaluating, selecting and designating who will be offered surrogate protection. Refugee admissions are processed overseas either in refugee camps

or “in-country” at a U.S. consulate or embassy. Refugees are pre-screened, and U.S. officials pick and choose which refugees to admit. The size of the refugee group as well as the timing of their movement is highly controlled and strategic. Moreover, these refugee admissions decisions are not subject to judicial review or appeal. U.S. officials thus exercise absolute authority in decisions about whom to admit (Churgin 1996).

Asylum is very different. It is a special remedy available only to those already present on U.S. soil. Any non-citizen who has experienced persecution, regardless of how they entered the country, is entitled to apply for asylum according to international human rights law. The U.S. thus has no control over who applies for asylum because unlike refugees, asylees are already present within its territorial boundaries without pre-screening. Furthermore, asylum decisions are subject to administrative and judicial scrutiny. There is an elaborate process of review of asylum decisions. Applicants have further recourse through litigation, such as class action suits. And, these rights have proven critical for many individuals and groups to contest politically motivated or biased decisions and to challenge unjust asylum practices such as mandatory detention or expedited review. Thus whereas refugee admissions categories enable the state to prevent uncontrolled mass migration to the U.S, asylum is available to those who enter U.S. territory.

In an effort to control asylum admissions, the U.S. has pushed the border outward beyond the territorial boundaries of the state to deter migrants from setting foot on U.S. soil and accessing the claims making process. This includes interdiction at sea and offshore detainment (Mathew 2002; Pugh 2004, Fitzpatrick 1996). For asylees who have reached sovereign soil, scholars have tracked and theorized the “shrinking spaces of

asylum” in which states manipulate the relationship between geography and law in order to prevent access to claims making process (Mountz 2010, 2012). The U.S. government has also created inhospitable conditions to deter further migration, and undermine the viability of the asylum claims waged by those who have reached the sovereign territory. This includes the creation of tent cities along the border, automatic detention, and expedited hearings (Churgin 1996). All of these practices encourage “voluntary” departure, undermine access to fair hearings, and send “signals” that dissuade further migration.

As this array of practices suggests, the state employs a variety of techniques to prevent land access. Those who succeed in accessing the claims making process continue to face formidable barriers and obstacles (Mountz 2010). Since it is near impossible for states to live up to the mythical ideal of sealing their physical borders, I argue that the border becomes a legal one. Faced with the reality of “porous” and “leaky” territorial borders, asylum becomes an internalized border enacted through a multitude of legal struggles over who meets the definition of a refugee. This dynamic is best captured through the concept of “legal borderlands,” which refers to physical spaces in which the “territorial and legal limits of the United States” are negotiated (Hebard 2005). Asylees embody a crisis in state power because they have found their way through ports of entry, without necessarily being pre-screened, and their “transgression” of the border gives them a right to fight back against adverse decisions. Legal borderlands dislodge borders from the territorial edges of the nation-state, and focus attention on how borders are also legally constructed in the heart of the nation’s territory (Duzidak and Volpp 2005, Mountz 2010).

The idea of a legal borderland that is not geographically located at a territorial border troubles the stable conception of the nation-state as a container. I argue that through asylum law and its particular immigration procedures the border moves inward, enacted in sites serving as proxies for the physical border. Linda Bosniak (2007) uses the term “internalized border” to theorize the ways in which exclusion is not confined to the territorial edges of the nation-state but also operates on the territorial inside of the nation-state. As she states,

...it is the internalized border that defines aliens as aliens, that imposes conditions on their presence, and that claims that authority to detain and deport them in various circumstances. It is also the internalized border that is invoked to justify discriminatory and marginalizing treatment of noncitizens, or aliens, in a variety of contexts. So the border is not just "out there"; it is in here as well (2451).

In the case of asylum law, the law itself acts as a border and a grant of asylum is the difference between deportation and a path towards citizenship. Asylum adjudication, specifically precedent setting decisions, establishes the location of the border because these legal interpretations define the conditions of admissibility under refugee status. For ‘aliens’ who have already passed through the physical boundary of the U.S., statutory eligibility for refugee status is a frontier in the process of winning legal status.

Definitional struggles over the meaning of a refugee and political asylum therefore are sites of border construction and regulation. Asylum cases, as I understand them, are sites through which the limits of state protection are negotiated, and adjudicators are constantly in the process of producing the border through determinations of who is or is not a refugee. I argue that the border is internalized and produced through legal struggles over the definition of a refugee. The spaces of asylum also shrink as the legal categories are defined and redefined. Legal categories delineate the rights of passage and attribute

meaning to movements and people, validating some and criminalizing others. The nature of these categories and their usage thus become highly contested sites. The border is constantly being produced through legal categories that grant the right of passage. Adjudicators produce the border and the right of passage as they decide who qualifies as a refugee.

2.5 Constructing the Border: Definitional Struggles

In order to win political asylum, an applicant must demonstrate that they qualify under the legally codified definition of a refugee. Legal categories such as “refugee” bring into sharp focus the interrelationship between law and immigration because they differently define and legitimize movements and people. Qualifying as a refugee permits border crossing and bestows a particular set of rights, including a path to citizenship. Those who fail to meet the definition are placed in deportation proceedings. Meeting the definition of a refugee thus carries high stakes. This is true for the state as well.

As adjudicators assess individual use of legal categories such a political asylee or refugee to claim rightful passage, they are also assessing the criteria for inclusion and exclusion, the meaning of borders and crossings and the significance of belonging (Coutin 2000, 10). Because asylum is available to anyone present on U.S. soil, the state has relatively less control over who applies for asylum. As adjudicators determining who meets the statutory requirements of asylum law, they are presented with the opportunity to “pick and choose” who can enter the state’s dominion and also send a “message” about which types of migrant subjects the state will recognize. Consequently, negotiations over legal categories and who can identify with them are highly contested sites.

When adjudicators decide who is or is not a refugee, they decide who can rightfully pass the border and gain particular rights. Asylum decisions therefore construct and regulate borders that shift according to interpretations of who qualifies under refugee law. The legal border created through asylum law is thus not static. As my analysis demonstrates, the legal borderlands of asylum law are constantly in the making. This sharply contradicts a positivist account of the law, which holds that law exists as an abstract, formal framework, superimposed above the social realm. By this account, adjudicators carry out asylum law, they arbitrate justice and use the law to decipher the bona fide refugees from the bogus ones. This conception of the law is enacted as adjudicators justify their decisions to grant or deny asylum in relation to the statutory definition of a refugee. However, the notion that adjudicators simply assess statutory eligibility, or apply the law, masks their active role in producing the meaning of asylum laws. As legal scholar Anna Law (2010) aptly states, “to interpret the law is to make the law” (103). Precedent setting decisions bring this into sharp focus because they attempt to anchor the territorial and legal limits of the United States by issuing “binding” interpretations of the law. These decisions affect individual cases before the Court but also set the standards for subsequent cases.

I thus locate these “definitional struggles” over refugee status and political asylum as instances in which the border is constructed and regulated. As I illustrate throughout the dissertation, adjudication requires a great deal of discretion and interpretation. Their decisions also act as policies to create and regulate the border. But these decisions are not acts in which a sovereign power (The State) imposes the law through absolute right. Rather legal cases and their final decisions are produced through struggle and contest

(Foucault 1975), very much embedded within particular social and political contexts. The cases in this study are very aptly described as struggles because they are all cases that were decided on appeal, which means that the applicants were denied asylum within lower levels of adjudication (or their grants of asylum at the lower level were appealed by the government) after which they appealed the decisions, re-staking a claim to meet the requirements of a refugee. I argue that the interpretations of refugee law within these decisions become key sites of state power.

2.6 Methodology: Definitional Struggles and the Making of Legal Borderlands

My overall analysis of gender-based asylum attends to “definitional struggles” about whether individuals meet the definition of a refugee. The definitional struggles within precedent setting cases establish binding interpretations of how gender and gender violence fit within the asylum paradigm. Since precedent setting cases form the bulk of gender-based asylum jurisprudence in the U.S., these definitional struggles are essential to understand the negotiations over state protection. Analysis of cases also allows a particular depth of analysis because unlike federal regulations or congressional legislation that articulates laws or policies in an abstract way, adjudicators’ decisions are expressed in response to the facts of individual cases. Case law thus provides a unique view on how laws are created through struggles over who meets the legal definition of a refugee.

My approach differs from the existing literature because I view these precedent setting cases and the definitional struggles as a form of border control and law-in-the-making. Existing research on gender-based asylum examines processes of fitting into pre-defined categories or translating asylees narratives into existing discursive frameworks (see Coutin 2000, Berger 2009, Visweswaran 2004, Grewal 2005). Such studies suggest

that the law and these categories are somewhat stable technologies; they are “pre-defined.” My study demonstrates that the categories themselves are constantly in flux even once they’ve been officially defined. Coutin (2000) refers to this dynamic process by which the use of legal categories also results in their transformation,

On the one hand, applying for legal status reproduces immigration categories in that the undocumented claim to have met predefined criteria for deservingness. On the other hand, seeking to include another individual case in the subset of the ‘deserving’ requires further refining and sometimes redefining these criteria (12).

Individual claims to asylum can thus result in the refining or redefinition of the very categories that applicants use to claim legal status. This point is particularly relevant in the case of gender-asylum claims because many of the cases in this study were published as decisions because they addressed “novel” issues in asylum adjudication. In rationalizing their place within asylum law, adjudicators necessarily refined existing categories.

However, the cases in my study suggest that the process involves more than “fitting” cases into existing categories. As the term “definitional struggles” indicates, these are negotiations over the very meaning of asylum law and the structure of the legal categories. Even after a category has been “defined,” adjudicators (and litigators) can dramatically reformulate their meanings. As Miriam Tickin (2005, 362) argues, adjudicators in particular have the power to radically reinterpret laws and create law as they hear cases. Based on her study of the French refugee tribunal, she described the power of adjudicators to create law in the following way,

“...Francois [an adjudicator] went further than explaining the need to inhabit a legal narrative. He explained that most decisions were made on the basis of emotion; he said the judges all pretend their decisions are grounded in law, but they rarely are, particularly when one is so restricted as to who one can accept.

While law always involves interpretation and while it is always enacted in specific contexts that help determine its meaning, the difference *here is that law's production and execution are indistinguishable*" (Ticktin 2005, 362, emphasis added).

Tickin's passage depicts the law as wholly indeterminate. It is a tool used by those in power to justify their own emotional (and presumably non-legal) decision-making. Laws' implementation and creation is simultaneous.

This is not to suggest that adjudicators operate without any constraints. Indeed, I employ legal archeology to understand how previous iterations of the law create a discursive field within which adjudicators make decisions. However, what I glean from these assertions about law is that battles waged through individual cases over who can be considered a refugee shape asylum law. Adjudicators' interpretations of the law create asylum law itself. As the law is constituted through interpretation, in this dissertation I explore how the legal threshold and definitional border of asylum law is neither fixed nor stable.

Statutory interpretations are a source of judicial power and provide opportunities for adjudicators to pursue policy interests (Law 2010, 110). This is particularly the case when the language is vague, complex or employs words with "everyday meaning" (Law, 119). The complex nature of the refugee definition itself provides a great deal of leeway in how adjudicators interpret and assess individual claims. Consequently, decisions about who qualifies as a refugee are incredibly varied, conflicting and inconsistent.

2.6.1 Definitional Struggles in Gender-Based Asylum

Individual asylum cases have been the primary site of struggle for gender-based asylum in the U.S. in the absence of comprehensive legislation or federal regulations. In

1995, the INS issued guidelines on adjudicating gender claims, however the policies were internal to the agency and had no binding effect on higher-level adjudicators. Specific forms of gender violence have been designated as persecutory through legislation. In 1996, the Illegal Immigration Reform and Responsibility Act (IIRRA) defined forced abortions and involuntary sterilization as acts of persecution. However, efforts to address gender violence have been piecemeal, largely sidestepping bigger questions of asylum eligibility for applicants with gendered experiences of harm. Consequently, since the late 1980s, the vast majority of work to pressure the U.S. state to recognize women-specific violence has taken place in the court system. For most feminist lawyers and legal advocates, the “frontlines” of the struggle is securing precedent setting decisions that favor gender-based persecution. This precedent setting takes place through the social group category.

Given the absence of gender as an enumerated ground of persecution, the social group category has been critical in enabling access to asylum protection for women and to gaining traction for recognition that gendered harm is valid persecution. The acclaimed refugee law scholar Alex Aleinikoff describes these non-traditional claims as “pushing the boundaries of refugee law” (2001, 2). Aleinikoff’s statement refers both to an increase in number of asylees using the social group category and also to the diversity of social experiences embodied in these claims. The particular social group category has been critical in efforts to extend asylum protection to broader segments of society beyond the prototypical male political dissident fleeing communism. A wide range of “new” asylum claims, ranging from female genital surgeries, domestic violence, to sexuality and disability discrimination, invoke their social group status to claim asylum (Foster 2010,

2). Signatories to the Refugee Convention, such as the U.S, do not always welcome this “push” on the boundaries of refugee law. Indeed, much of the angst over the open-ended nature of the category is that it allows for the expansion of refugee protection. Thus the definition of the particular social group category becomes an issue of great concern to signatories. The high stakes carried by the definition of the term are apparent in the fact that none of the other refugee provision has been subject to the same level of critical scrutiny, debate and conflicting interpretation as the “nebulous” particular social group category (Foster 2010, 2).

The social group category is fertile ground to examine the tensions between humanitarianism and immigration control in asylum law. The particular social group category is unique in comparison to the other four categories enumerated in the refugee definition. Analysts claim that it lacks “self-evident” or “ordinary” meaning (Foster 2010, 2) whereas race, religion, nationality and political opinion seemingly have fixed referents. These other categories draw on assumptions about visible identity traits or forms of association that a persecutor and outside “objective” observer could presumably verify. However, according to the debates I review below there is no stable referent for a “particular social group.” While it is safe to assume that the words “social” and “group” necessitate the existence of more than one person, it is unclear exactly how many people need to be involved, the nature of their relationship to one another and what their ‘groupness’ is based on. The category “particular social group” therefore has no agreed upon meaning. The “unsettled” nature of the category therefore creates an opportunity for non-traditional claims, such as those based on gender-based persecution.

Typically, uncertainty about statutory language is resolved by looking at legislative intent, however the legislative history of the category is not detailed. By all accounts, the category was included “at the last minute” at the suggestion of a Swedish representative, Mr Petré, who stated that ‘experience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included’ (Foster 2010). However, there is no further record of debate that offers an explanation of the intended scope of the term. The lack of consensus about the term at the international level materializes within domestic jurisprudence. As I discuss, the category generates considerable controversy and anxiety.

Countless reports, summits and conferences have focused on the particular social group category. For one such UNHCR summit on the particular social group category, members of the International Association of Refugee Law Judges described in a position paper why the unsettled nature of the category provoked anxiety. In the following analogy, the authors liken the category to a “troubled youth” named MG.

Many years ago in a land far, far away five children were born. Their parents were justifiably proud of their offspring as they had been trying unsuccessfully for many years to have children. Of the five, four were robust and earned respect wherever they traveled for they supported human rights. The youngest of them – known fondly as “MG” to those close to him – was a more troubled youth. He seemed to vacillate and never to know just where he stood. Some, and indeed most, knew that he too stood for human rights but others were not so sure. They did not detect in him that characteristic; rather they saw an ambivalence. Some even accused MG of being interested in virtually everything so that he was squandering his talents. As he traveled the world, wise men and women met with him and tried to understand him; but they could not all agree. In the end he proved to be a puzzle... (Ross and Milligan-Baldwin 2006, 2)

The judges' analogy highlights the distinctiveness of the social group category in comparison to the other four refugee provisions. Unlike the other four provisions, the category is "troubled" because its scope and function are not clearly defined. Many interpret this open-endedness as negative: vacillation, ambivalence and interest in "everything" undermine a commitment to human rights. According to this line of reasoning, for human rights instruments to be effective, they must be limited in scope and have defined boundaries.

Other commentators, however, argue that the category was intended to be open-ended and serve as a "catchall" for persecution unaddressed by the other four provisions (Helton 1983, Graves 1989, Aleinikoff 1991, Kelly 1993, Goldberg 1993). Their interpretation of the legislative history is quite different. They argue that the term "social group" was meant to cover "all the bases for and types of persecution which an imaginative despot might conjure up" (Helton 1983, quoted in Graves 1989, 749). These scholars note the concern among the Convention delegations that using more specific language in lieu of "particular social group category" would have "negative implications" for those persecuted on the basis of reasons not explicitly mentioned. In their estimation, the elasticity of the category was purposeful and provided a way to accommodate unforeseen types of persecution.

While seemingly a progressive and pluralist strategy to opening up the category to new interpretations, this definitional elasticity has created conflicts and empowered adjudicators to apply their own interpretations of what a social group might encompass. Legal interpretations concerning social group status are battlegrounds in which competing perspectives on humanitarianism, national immigration control and state

sovereignty contend. The meaning and scope of the term have a direct bearing on state obligations to fulfill human rights commitments; they have specific commitments to those who qualify as a refugee, including those who are persecuted due to membership in a particular social group. Definitional struggles over who can qualify for refugee status through the social group category therefore provide a window onto larger tensions between humanitarianism, the implementation of human rights and refugee law and domestic imperatives to control immigration. As states attempt to retain control over whom they are obligated to protect on the basis of international conventions, they assert their power through controlling the meaning given to the category in national statutory law and case law. This issue of state sovereignty comes to bear directly on the process of defining the term. As Aleinikoff (2001) aptly describes,

“...a sensible interpretation of the term “membership in a particular social group” must be responsive to victims of persecution without so expanding the scope of the Convention as to impose upon states obligations to which they did not consent” (3).

Aleinikoff highlights the competing interests animating the process of defining the ‘particular social group’ category: it must be defined to protect victims of persecution, but it cannot be defined in a way that forces states to protect persons it does not wish to protect. In essence, the definition must be crafted wisely and the scope of the category must be narrow. But this necessarily raises several questions: Which victims of persecution will be included in this narrow slice of humanitarian protection? Which victims impose obligations on the state? How does the state disavow a responsibility to victims it does not wish to protect?

2.6.2 Feminist Legal Archaeology

In order to explore the construction of legal borderlands through gender-based asylum jurisprudence I designed a multi-method qualitative study. I conducted a legal archeology employing textual analysis of legal and policy documents and complemented that research with key informant interviews conducted with leading lawyers and legal advocates focused on gender-based persecution. In my legal archeology I examined the development of case law defining gender-based persecution specifically in relation to the social group category⁷ and the ways in which lawyers, as key players in the system, negotiate the floodgate discourse in their advocacy work. My case selection and analysis is guided by feminist legal archaeology, which I discuss below, followed by a discussion of my methods.

Legal archeology is a feminist methodology because of the shared epistemological commitments to contextualization and grounded theory and the concern for the gender bias embedded within the legal system (Treedy 2003, 2007). Legal archeology seeks to historically contextualize and therefore demystify the law as abstract knowledge. Legal archeology moves outward from the reported decision to consider the broader social and economic context, thereby creating a “thick” contextual case study of a single case (Treedy 2008). The reported decision thus becomes more than a detached expression of objective legal reasoning, rather an expression of the law grounded in a historical moment; an artifact of society. Legal archeology thus produces specific and historically grounded knowledge about cases. This differs significantly from traditional legal analysis, which focuses on law as a series of rules that are ahistorical and abstract.

⁷ This is not to suggest that women only use the social group category. Rather, many asylees use multiple categories. Gender-based asylum jurisprudence has also developed in relation to these other categories. I have selected the social group category as a focal point for the reasons outlined in this chapter related to its “unsettled” nature and what that reveals about how states implement human rights obligations.

Rather, archeology takes into account how particular facts of a case shape the “rule” of law produced by decisions. My work thus diverges from legal scholar’s traditional focus on the legal outcome of cases, and from scholarship that analyzes legal decisions in isolation.

Moving beyond the examination of single cases, Sally Engle Merry (2004) and Susan Bibler Coutin (2011) employ legal archeology to examine the social and political context of broader systems of legal reasoning. Merry describes legal archeology as an analysis of the “layers of legality and the historical contexts of their deposition” (570). Coutin (2011) argues that legal archeology also brings attention to the relationship between legal artifacts, or the documents and texts that comprise law. Coutin describes this as “entextualization,” or the process by which law is made of “pre-existing material” such that each iteration builds on previous iterations (4). Such an approach reveals law’s complex temporal quality. Laws are created in multiple historical moments, and have ongoing impact. Laws carry a “residue” from prior negotiations, “a residue that leads forward as well as into the past” (4). As Coutin describes, “[Legal artifacts] can influence subsequent legal innovations; some of them may be retroactively reinterpreted in light of new developments; and, in the case of court decisions and statutes, they are projected into the future in that they are expected to shape or govern events that have not yet occurred” (Coutin, 3). Coutin here suggests that the meaning and impact of legal texts are not static or frozen in time. Old legal artifacts can be conjured up and reinterpreted in new ways. Legal texts can also be crafted based on their anticipated future rather than immediate impact.

This temporal movement in legal interpretation extends a major tenant of critical legal scholarships that claims law is “indeterminate.” Part of this “indeterminacy thesis” is that existing law does not determine how a judge will resolve a legal dispute; there is uncertainty in legal reasoning and its application. Law is thus not “law” until an adjudicator has interpreted and applied it. In this sense, asylum decisions are refugee law - they are the interpretation and application of the legal principles outlined in the Refugee Act. Examining the law as entextualized suggests that law is not wholly indeterminate. The potential for radical reinterpretations are somewhat constrained by past definitions. Legal archeology thus focuses on indeterminacy as both produced and precluded by existing legal material. In other words, legal archeology provides a way to examine the range of possibilities enabling or limiting potential for radical transformations or reinterpretations. Coutin’s work, for example, illustrates how Central American youths’ susceptibility to deportation in the present is the product of their legal marginalization as unqualified for asylum protection during the 1990s. Although many Central Americans were granted temporary protected status, their vulnerability to changes in immigration laws is the product of their exclusion from political asylum. In the case of gender-asylum, my work will explore how radical “new” reinterpretations of law that fostered inclusion carry the traces of prior legal exclusions.

2.7 Case Analysis: Layers of Legality

In the United States, gender-based asylum is secured primarily through case law rather than comprehensive regulations or statutory amendments to the 1980 Refugee

Act.⁸ Case law consists of decisions by administrative bodies and federal circuit courts that establish binding interpretations of existing statutory laws and policies. These decisions on individual cases delineate what constitutes gender-based persecution and set guidelines for applicability in future cases. Cases that set these legal precedents thus articulate ‘the law’ on how gender-based persecution qualifies for political asylum. All claims to political asylum must be based one of the five enumerated grounds of persecution in the refugee definition. Since gender is not one of the five protected grounds, many gender-based asylum claims are argued under the existing “membership in a particular social group” category. This dissertation examines how gender-based asylum case law has developed within the particular social group category.

As I have discussed earlier, case law plays a central role in asylum decision-making⁹ because adjudicators draft their opinions by “following judicial decisions given in earlier cases” (Stewart 2006). Although adjudicators typically cite this case law in an abbreviated way - a one-sentence synopsis of prior decision – the methodology of legal archaeology emphasizes the importance of “excavating” prior iterations of the law in order to understand contemporary legal formations. My analysis of what becomes known as “gender-based asylum” thus includes excavating the legal formations that preceded the two key gender-based asylum decisions of *Matter of Kasinga* and *Matter of Alvarado*, as

⁸ Sources of authority for political asylum in the United States includes Congressional laws, policy, case law (administrative decisions and federal court decisions), policy internal to government bureaucracy (the DHS Office of the General Counsel and USCIS Office of the Chief Counsel), and international laws and guidelines (the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee (UNHCR Handbook) (Asylum Training Manual, “Sources of Authority” 2009).

⁹ In the United States, gender-based asylum jurisprudence has developed chiefly through a series of precedent setting decision that dictate how gender fits within the definition of a refugee. These precedents are then used in subsequent decisions to justify granting or denying asylum.

well as several key decisions that followed. In the next section I discuss how I selected cases for this legal archaeology.

2.7.1 Case Selection

In total I analyzed 29 cases,¹⁰ which I grouped into four categories. Out of these 29 cases, I selected 7 cases to be the primary focus of this dissertation. In this section I first briefly describe these four categories before explaining how I narrowed the cases down to 7. The first set of cases included early precedent setting cases that defined key terms from the 1980 Refugee act after its passage by Congress. Through these cases, adjudicators assigned meaning to parts of the Refugee act that were undefined, vague, or ambiguous. The second set of cases included claims brought specifically by women with narratives of persecution that related in some way to their sex or gender. These precedent setting legal cases created the context within which the discourse of ‘gender-based asylum’ became articulated in the third set of cases, which included the landmark gender-asylum cases of *Matter of Kasinga* and *Matter of Alvarado*. The fourth category includes cases that followed the landmark decisions of *Kasinga* and *Alvarado*. This last set of cases reflected the continued struggles over defining the meaning and scope of gender-related persecution and social group status.

The 29 precedent setting legal cases all played an important role in shaping how gender-based persecution qualifies under the refugee definition in the United States. The cases fall within a 14-year timeframe, between 1985 and 2009. To select these cases I reviewed the published decisions of *Matter of Kasinga* and *Matter of Alvarado*, policy documents, legal journals and also inquired during interviews with advocates. The policy

¹⁰ I accessed all of these cases online, either through the Department of Justice Virtual Law Library or the United Nations Refugee Agency “Refworld” website. Both of these sites house virtual archives of Attorney General, Board of Immigration Appeals, and federal circuit court decisions.

documents I used include the INS Gender Guidelines (Coven 1995) and the Proposed Federal Regulations (2000). Both of these policy documents reviewed cases pertinent to gender-based persecution. These policy documents advocated for comprehensive policy clarifying eligibility for gender-based persecution, and thus cited cases that demonstrated the contradictions, conflicts and disjuncture in existing case law. In addition to policy documents, I selected cases using secondary literature on gender-based asylum in legal journals and inquired during interviews about cases the lawyers or advocates believed to be important. Out of this larger pool of 29 cases, I narrowed my analysis to those involving the particular social group category and gendered persecution. Some of the cases I selected represented trends in adjudication and I reference these related cases throughout my discussion.

1. Cases Defining 'Membership in a Particular Social Group'

My case selection began with the cases that created the legal infrastructure for gender-based asylum jurisprudence. I narrowed down these cases to those related to the social group provision. As discussed in the previous section, the social group provision is the primary refugee category used for gender-related claims to asylum. In order to understand the terrain on which women's gender-related claims would later be fought, I began my legal archeology with the first cases that defined the meaning of the phrase 'membership in a particular social group.' The two foundational cases within U.S. social group jurisprudence include *Matter of Acosta* (1985) and *Sanchez-Trujillo vs. INS* (1986). In the wake of the 1980 Refugee Act, these decisions were the first that adjudicators used to define what could (and could not) constitute a particular social group.

By expanding my analysis on gender-based asylum to questions involving social group eligibility, my research generates unique insights because I begin my legal archeology much earlier than existing studies of gender-based asylum. In-depth analysis of *Matter of Acosta* and *Sanchez-Trujillo vs. INS* tend to be absent in feminist accounts of gender-based asylum because the two cases involved men. Yet, these cases provided critical insight not only into the gendered nature of the asylum system, but also the role of race and class in the creation of asylum standards. Furthermore, by examining these initial struggles over the social group definition, I came to see the contested nature of the social group category as fundamental to the legal outcomes of the subsequent *Matter of Kasinga* and *Matter of Alvarado* cases and to the evolution of gender-based asylum generally.

2. Early Gender and Social Group Status Cases

The second set of cases that I examined involved early claims brought by women with gender-related experiences of persecution. I selected three cases out of the larger pool because they addressed key issues related to the definitional struggles over social group status and gender-related persecution. Many of these early cases were articulated before there was any recognition that gender could be a factor in persecution. However, these cases spawned a feminist discourse on “gender-based asylum” and brought visibility to the gendered nature of persecution and asylum adjudication. The three cases that I focus on include two cases brought by Salvadorian women, *Campos-Guardado vs. INS* (1987) and *Gomez vs. INS* (1991). The third case, *Fatin vs. INS* (1993), involved an Iranian woman and marks a transition in which gender was more explicitly used to claim

refugee status. Coupled with *Matter of Acosta* and *Sanchez-Trujillo vs. INS*, these three cases directly shaped the legal grounds for *Matter of Kasinga* and *Matter of Alvarado*.

3. The Landmark Gender-Based Asylum Cases

As I described in Chapter 1, I selected the landmark cases of *Matter of Kasinga* (1996) and *Matter of Alvarado* (2009) for this research project because of their critical role in gender-based asylum jurisprudence. *Matter of Kasinga* was the first positive gender-based asylum precedent that validated a social group claim based partly on gender and identified a cultural practice solely targeting women as persecution. *Matter of Alvarado* is also critical to gender-based asylum jurisprudence because it was the hallmark negative decision that limited how gender and gendered violence could qualify for political asylum. Both of these cases became key battlegrounds over the meaning and scope of ‘gender-based asylum’ protection in the U.S.

Both *Matter of Kasinga* and *Matter of R-A-* have an unusual amount of publicly available information because they were both centerpieces of campaigns for gender-based reform of asylum law. I accessed the main decisions on the cases through the Department of Justice archives of case law. I was able to access additional material through the Center for Gender and Refugee Studies (CGRS), housed at the Hastings College of Law in San Francisco. CGRS houses archives on the legal battles of both the *Kasinga* and *Alvarado* cases because of their involvement in both cases. Karen Musalo, the director of CGRS was a key attorney in *Matter of Kasinga* prior to her involvement in CGRS. The Center also represented Rody Alvarado during her appeal. I briefly describe below the documents I analyzed from each of their archives.

From the *Matter of Kasinga* archive, I began analysis with a transcription of the oral decision of the Immigration Judge. During the appeals process, Kassindja's legal team and the INS exchanged two rounds of briefs totaling five documents (three from Kassindja's legal team and two authored by the INS). I analyzed each of these documents as well as the final decision by the Board of Immigration Appeals. Through assistance from a law librarian, I was able to locate the transcript of the BIA trial hearing, which I included in my analysis. The length of Kassindja's legal battle was relatively short (as compared to Rody Alvarado) so her case file did not have as many legal documents. However, the conditions of her detainment and her personal story played a central role in how the legal drama played out, so I included in my analysis texts that addressed these "outside" aspects of her case. I read newspaper articles published about the case in national newspapers including the *New York Times*, *Washington Post*, and the *Boston Globe*. I supplemented my readings of these texts with the biography on Kasinga co-authored with one of the law school students who was on her legal team, Layli Miller Bashir, *Do They Hear You When You Cry* (1998).

The *Matter of R-A-* case archive was significantly larger because of the prolonged length of her case, which lasted from 1995 to 2009, and because it was handled by an unusually high number of adjudicators. For Alvarado's case, I analyzed policy documents, briefs, and rulings. These texts included the 1999 BIA decision, the Ninth Circuit Court of Appeals order staying petition of review for the case, a 2001 Brief to Attorney General Janet Reno asking for review and reversal of the BIA decision, an Amicus brief to AG Reno, the 2000 Proposed Federal Regulations on Gender and Social Group Status, and the attached U.S. Citizenship and Immigration Services "Question and

Answer Fact Sheet” on the federal regulations, three Attorney General decisions, and a 2004 Department of Homeland Security brief. To supplement the legal and policy documents, I read six advocacy letters signed by members of the House of Representatives and the Senate on Alvarado’s behalf ranging from 1999 to 2003. I reviewed approximately 14 newspaper articles or editorials written about the case from a series of national and regional newspapers such as the *New York Times*, *Washington Post*, *New York Newsday*, *San Francisco Chronicle*, and the *Miami Herald*. As in the *Kasinga* case, these journalistic accounts provided some critical historical background information on different actors involved in the legal cases.¹¹

4. Post *Matter of Kasinga* and *Matter of Alvarado* cases

In order to understand the continued evolution of gender-based asylum and social group jurisprudence, the fourth set of cases I examined included cases that followed *Matter of Kasinga* and *Matter of Alvarado*. I selected those cases that highlighted trends, disjuncture, or contradictions in the development of social group case law. Several of these cases, including *Mohamed v. Gonzales* (2005), *Hassan v. Gonzales* (2007), *Matter of A-K-* (2007), *Matter of A-T-* (2009), and *Bah v. Mukasey* (2008), demonstrate the ongoing battle over how FGM is interpreted as a form of persecution. Advocates cited these cases during interviews and in legal publications as examples of the continued

¹¹ Following from legal archeology, I approached each case as a layered formation rather than analyzing the final decisions in isolation. As I discovered the texts leading up to the final decisions embodied incredibly rich debates among the applicants, their legal teams and INS officials, BIA members, Federal Circuit judges and Attorneys General. These documents contained differences of opinion and interpretation and suggested different courses of action. Analyzing these documents, as part of a “conversation,” was critical to my reading of the final decisions. Even though some parts of this conversation did not “win” a place in the final decision, understanding the issues that were debated leading up to the final decisions highlighted issues I may have otherwise overlooked. The compilation of documents also demonstrated that agencies framed problems differently in each case, and suggested different strategies for controlling the impact of the decisions. Moreover, examining the debates leading to the final decisions sheds light on what would have otherwise appeared to be unremarkable statements or positions.

hostility towards gender-based asylum and of the efforts to rescind existing protections for women. I discuss these cases in relation to the *Matter of Kasinga* precedent in Chapter 5.

I also analyzed three cases that had a direct bearing on the final resolution of *Matter of Alvarado*. This series of cases relate to gang violence in Central America and were decided while *Matter of Alvarado* was pending resolution between 1999 and 2009. These cases were important to include in my analysis because they established additional restrictions on how the social group category could be utilized. The cases include *Matter of C-A-* (2006), *In re A-M-E- & J-G-U-* (2007) and *Matter of S-E-G-* (2008). I discuss these cases in relation to Alvarado's protracted legal struggle in Chapter 6.

Analysis of Cases: I conducted my analysis of these legal cases in four stages.

1. Background Information: I began by collecting background information on the cases, including:

- Legal Trajectory
- The Applicant's Background and Claim
- Disputed Legal Claims
- Impact of Case

2. Definitional Disputes: Second, after collecting basic information on the cases, I began to analyze more closely the legal disputes in each case. I focused on the judicial opinions about whether the applicant did or did not meet the definition of a refugee and how this factored into their decision to grant or deny asylum. I employed the same series of questions for asylum agency documents and applicant briefs because these documents also make claims about how an applicant qualified as a refugee. I used the following questions to guide this stage of analysis:

- How do the legal parties involved argue the applicant does or does not qualify as a refugee? What are key areas of dispute or agreement?

- How are the proposed social groups formulated? Do these formulations change?
- How are the proposed social groups related to sex or gender? Race? Class? Nationality?

3. *Purposive Action*: To assess how flood fears may have influenced decision-making and gate-keeping practices, I first identified aspects of the cases, in particular within the definitional disputes, where adjudicators engaged in what Anna Law (2010) calls “purposive action.”¹² Purposive action refers to opportunities for adjudicators to behave intentionally to reach a particular result (102). These opportunities arise through discretionary acts and “creative statutory interpretation”¹³ (103). Law outlines several forms of discretionary actions, including the level of scrutiny brought to bear on the facts of a case, raising or lowering thresholds of belief when assessing credibility, and deciding when to accept or challenge lower courts’ decisions. Creative statutory interpretations arise when there are conflicting statutes (or case law), opaque or conflicting language, or words are prone to multiple interpretations. Each present of these instances provide adjudicators with the opportunity to interpret the law according to their preferences for particular outcomes. I used Law’s rubric and developed a more comprehensive framework as I read the cases and interviewed legal advocates.

- Discretionary Actions:
 - Degree of scrutiny
 - Threshold of belief
 - Response to lower court decision
- Creative interpretations of statute or case law
 - Forced distinctions from existing case law or “stretched” parallels
 - Disputes about words with “everyday” meaning

¹² Law argues that adjudicators’ purposive behavior may be more overt within asylum agencies because it is more acceptable in the Executive branch to act according to political objectives. Adjudicators within the judiciary are bound by particular institutional rules and norms, however they still have opportunities to “engage in behavior with intent to reach one legal result over another” (102).

¹³ There are many opportunities for creative interpretation because as Law points out “texts cannot be written to cover every conceivable permutation of human experience and behavior, nor can texts be guaranteed to illicit the same interpretation and understanding from multiple readers” (109).

○ Alternative interpretations of words that were vague or unclear
 By viewing these as opportunities for adjudicators to shape the decision making process, I questioned whether the particular legal outcomes restricted or expanded asylum protection for women with gendered experiences of persecution. I also questioned whether adjudicators could have reasonably arrived at another conclusion, in particular, whether alternative interpretations of statute language or case law existed.

4. *Flood Fears*: After critically examining these opportunities for purposive action and their role in the legal outcome of the cases, I analyzed the documents for evidence of flood fears. Specifically, I examined how flood fears were evident in adjudicator’s arguments about whether the applicant qualified as a refugee. I analyzed the articulation of flood fears in two ways. First, I explored different ways that adjudicators and policy-makers invoked discourses, metaphors and conceptualizations of applicants that referenced the fear of a flood. This analysis interpreted the concept of a flood across a spectrum of explicit or implicit references that drew upon Santa Ana’s rubric (2002) described above. Second, I explored different ways that adjudicators and policy-makers invoked the need for gate-keeping in response to these fears. This analysis focused on the ways that legal decisions explicitly or implicitly articulated the need for putting in place controls to regulate the movement or volume of asylum applicants.

- Flood fears and gate-keeping language:
- Do adjudicators make explicit references to a “flood” metaphor, or invoke related conceptualizations?
 - Mass: Are individuals framed as part of an aggregate mass?
 - Kinetic Energy: references to increased volume of immigrants?
- Threat: do adjudications suggest that granting asylum will have an amplified, negative effect?
- Control: Do adjudicators make explicit reference to their role as “gate-keepers” or as “safeguarding” the border or asylum system?

2.7.2 Impact Litigation

To further develop my analysis of gender-based asylum case law and the flood fear, I conducted 5 semi-structured key informant interviews with lawyers and legal advocates directly involved in the cases I studied in my legal archeology. I completed these interviews following my analysis of the legal cases. All of my informants engaged in what is called “impact litigation.” Impact litigation is a particular kind of “cause lawyering” or “political lawyering” that seeks broader legal change beyond securing protection for individual clients. While impact litigators seek a beneficial outcome for their clients, they also strive to effect a change in law or policy that will secure protection for a greater number of individuals. In sum, impact litigators make every effort to create positive precedents in refugee asylum case law that ultimately furthers their particular cause. I distinguish these lawyers and legal advocates from those whose primary focus is on securing protection for individuals. The lawyers and legal advocates I interviewed have extensive experience in asylum courts and policy-making. I selected them as key informants because they have a sense of the broader context of gender-based asylum and are engaged in thinking about the bigger picture of their work in affecting changes in refugee-asylum law in the United States. Each of my informants offer a critical perspective on gender-based asylum law and flood fears from the standpoint of legal practitioners who work on the frontlines of the definitional struggles I study.

Through the interviews I sought to gain further background on the cases in my study, to ask specific questions regarding the nature of definitional struggles in the cases and the affect of the flood discourse beyond the written texts. I interviewed four practicing attorneys and one public policy director working, representing four leading gender-based asylum organizations. I have withheld the identity of my informants and

their organizations for the purposes of confidentiality. The interview questions were grouped into four main categories, background information on the interviewee and the organization; perceptions of the obstacles to further gender-asylum reform; the influence of these obstacles on their legal practice, and specific question about their perceptions of the flood fear. The interview questionnaire is listed in Appendix C. Several questions in each interview were tailored to the individual attorneys expertise and experience with particular cases studied. Each interview lasted roughly one hour and all were conducted over the phone. I recorded each interview and took notes. I then coded the data collected in my interviews to compare and contrast responses to each question and to identify key themes. The perspective of my key informants advanced my research by confirming the validity of my findings on flood fears, challenging certain reductionist assumptions in my legal analysis, and offering new insights on the obstacles to legal reform. Their perspective was immensely beneficial in helping me to understand how flood fears affect legal practice and to interpret the results of my legal archeology in relation to contemporary efforts to affect changes in gender-based asylum law.

Chapter 3: Gates of Recognition: The Social Group Category in U.S. Asylum Law

3. Introduction

In this chapter I undertake an archaeology of the “particular social group” category in United States asylum law. The methodology of archaeology attempts to show how a particular system of thought is not the inevitable outcome of rational thinking but rather produced by contingent historical events (Foucault 1975). By examining the first cases to define the particular social group category in the United States, I attempt to denaturalize the established meaning of the category as an objective truth. Rather, I examine how the meaning of the category has developed in response to specific historical conditions and immigrant subjects seeking protection through political asylum. As this chapter examines, during a perceived crisis in immigration regulation in the United States in the 1980s the concept of a “social group” transformed from a catch-all provision to a defined and bounded category. I find that the social group category was established through a logic of exclusion. Precedent setting cases enacted this exclusion, erecting gates of recognition through which asylum seekers had to prove social group status.

In my research, I examined the creation of these gates of recognition and their relationship to the fear of a flood of asylum applicants from Central America. Central Americans during the 1980s and 1990s were denied en masse from political asylum in the United States. The systematic exclusion of Central Americans from protection, I argue, left an indelible mark on the meaning of political asylum. Many claims were litigated shortly after the passage of the 1980 Refugee Act and thus provided adjudicators some of the first opportunities to interpret and apply the Refugee Act. Focusing on two precedent

setting cases, one of which is cited as opening the door to female asylum seekers fleeing gender-based persecution, I examine the intricate legal interpretations used to render “displaced persons” as outside the bounds of asylum protection. Consequently, as I discuss in this chapter, the tactics of exclusion used to deny asylum to Central Americans are embedded within asylum case law and continue to have a direct effect on definitional struggles over gender-based asylum.

As I explained in Chapter 2, refugee law in the United States has developed primarily through layers of cases that establish binding interpretations of legal statutes, also known as “case law.” This is true of the particular social group category. The particular social group category is the least clearly defined and understood of the five protected grounds outlined in the definition of a refugee. In the United States, the category has been defined through a series of published decisions issued by administrative or federal appellate courts. Cases brought by Salvadorian applicants were central in this process of law making through published decisions. In what follows, I present a discourse analysis of the foundation of social group jurisprudence in the U.S. As I demonstrate, although these cases do not involve female applicants or what becomes known as “gender-based persecution,” they implant mechanisms of floodgate control into the very meaning of the particular social group category.¹⁴

3.1 Defining a Social Group: Case Introductions

¹⁴ I argue that examining these cases is critical to understand how gender-based asylum jurisprudence develops in the United States. The methodology of legal archeology requires “excavating” meaning from earlier legal artifacts because contemporary legal formations are shaped by prior iterations of the law. These early cases are important ‘layers’ of the law whose effect moves forward in time, limiting the possibilities for asylum law to be radically reinterpreted. As I argue, gender-based applicants must negotiate the legal formations produced by these first particular social group cases. In subsequent chapters, I discuss how the cases analyzed in this chapter directly impact how gender-persecution can become a legally viable route to asylum.

The two precedent decisions that I examine in this chapter established legally binding interpretations of the particular social group category. In the United States, the fragmented nature of the adjudication system (discussed below) has allowed the category to develop along two distinct lines of reasoning. My analysis begins with the first decision published by the Board of Immigration Appeals, *Matter of Acosta* (1985). According to *Matter of Acosta*, applicants needed to demonstrate that their social groups were constituted by qualities they either could not or should not be required to change. This became known as the “immutable or fundamental characteristics” test. Just one year after the *Acosta* decision, the Ninth Circuit Federal Court of Appeals issued their own decision defining a particular social group in *Sanchez-Trujillo v. INS* (1986).¹⁵ This decision constituted the second major definition of the category, which required applicants to demonstrate they were part of a close-knit group who shared a common “interest or impulse.” This decision established an entirely new test for voluntary association and close affiliation among group members. The two foundational interpretations of a particular social group thus define the category in vastly different ways.

Despite substantive differences, one important commonality between the *Matter of Acosta* and *Sanchez-Trujillo v. INS* decisions is that they both produced narrowing definitions of the particular social group category, largely in response to fears that the category was unrestricted (Graves 1989). Without restriction, adjudicators claimed that

¹⁵ Unique to U.S. asylum law, the definition of a social group has developed along two competing lines of reasoning. This is due partly to the structure of the U.S. immigration court system. Asylum adjudication falls within the executive and judicial branches of the federal government. The Board of Immigration Appeals is the highest administrative authority on immigration within the executive branch. However, their decisions can be appealed to the federal circuit courts. Federal circuit court decisions have authority over the BIA only within their particular circuit.

the social group provision would be used to dangerously expand asylum protection. As a result, these definitions were expedient, aimed at limiting access to asylum protection (ibid). As adjudicators themselves stated, the cases determined the “scope” or “outer limits” of the particular social group category. Consequently, as I demonstrate, the development of the social group category is not marked by a process of judicial discovery in which adjudicators unearthed a pre-existing and objective entity known as ‘social groups’ that legal forefathers envisioned protecting. Rather, my analysis focuses on how these decisions ‘defined’ the category in the truest sense of the word, by ending, bounding and erecting limits on what social experiences could qualify as constituting membership in a ‘particular social group.’

Although precedent decisions are intended to clarify statute language and provide guidance to future adjudicators, the *Matter of Acosta* and *Sanchez Trujillo vs. INS* decisions obfuscated asylum eligibility. When read against one another, they are mutually inconsistent and when read in isolation, their internal logics are “confused” (Graves 1989, 740). While the respective Judges claimed that their decisions were dictated by the statutory requirements of the 1980 Refugee Act, neither interpretation was a necessary outcome of Refugee statutes. Prior to the *Acosta* and *Sanchez* cases, no binding precedent on social group status existed.¹⁶ The *Acosta* and *Sanchez* decisions were instances of law-in-the-making, as adjudicators actively constructed the boundaries of asylum protection. These boundaries did not produce clear, coherent or cogent definitions of a particular social group, but were reactionary in nature. Each decision erected boundaries by establishing “threshold requirements” for social group status. Yet, as I demonstrate, these

¹⁶ The First Circuit Court issued a decision on social group status in *Ananeh-Firempong v. INS* (June 24, 1985) but did not define the scope of the category.

thresholds were developed in direct response to the particular applicants in the cases and the classes of applicants they supposedly represented. In this sense, the creation and deployment of law were inextricable. As I argue, the social group definitions that they produced were entangled in logics of exclusion, designed to render the applicants and the classes of additional applicants they represented as ineligible.

3.2 Exclusionary Histories: Flood Fears and Salvadorian Asylum Seekers

Matter of Acosta and *Sanchez-Trujillo vs. INS* were adjudicated amidst a civil war in El Salvador. As a result of this conflict, an unprecedented number of Salvadorians left the country and migrated north to the United States. Although they fled violence and persecution, decision makers and politicians characterized Salvadorians as “economic migrants” rather than refugees (Coutin 2011). Their exclusion from protection was buttressed in the court system. Salvadorian applicants (and Guatemalans) were systematically denied asylum protection in the U.S. because they fled countries the U.S. considered allies in the Cold War. While the geopolitical calculation of asylum adjudication become the subject of protest by human rights and immigrant rights activists, specifically those forming the Sanctuary Movement, the mass exclusion of Central Americans from protection fundamentally shaped the meaning of political asylum because many of the cases were adjudicated right after the passage of the 1980 Refugee Act.

Matter of Acosta and *Sanchez-Trujillo vs. INS* signal the formation of the flood discourse within social group case law. I illustrate how the legal interpretations produced by these decisions denied asylum to prevent “an excessive” volume of asylum applicants from Central America from winning asylum. I examine how adjudicators in each decision

framed the applicants as threatening to inundate the asylum system. The particular social group definitions generated by the decisions were thus crafted not only to deny the individual applicants asylum, but also to bar broader classes of applicants from qualifying for asylum protection. To characterize the applicants as tied to these broader classes of immigrants, adjudicators mobilized flood discourses and framed them as unexceptional – they were part of an undifferentiated mass of people displaced by the war who suffered from generalized harm rather than targeted persecution. Framing the applicants in these terms tied them to everyone in El Salvador affected by the war. To adjudicators, granting asylum in these cases would thus be dangerous, creating expansive precedents that would invite such a high volume of applicants that it would threaten the integrity of asylum and exceed its capacity.

Several factors marked Central Americans as a threatening presence in the U.S. During the Cold War, those who fled "friendly" regimes were rarely, if ever, granted asylum. Asylum grants, within a foreign policy framework, shamed or condemned the sending countries for violating the human rights of its citizens. Since the U.S. government was directly funding the government of El Salvador, granting asylum to Salvadorians would suggest that it was a failed state or a known human right abuser. In fact, according to U.S. law it was unlawful to fund governments that were violating human rights, so the Executive Branch had a vested interest in denying that human rights abuses occurred during the civil war (Gzesh 2006). Ideologically, this also contradicted claims that the U.S. supported democracy and freedom around the world during the Cold War.

Central Americans were also framed as undesirable because of their differences from the U.S. white majority (Graves 1989). Many who fled El Salvador were non-white, poor peasants from rural areas. Many lacked a formal education and did not speak English. Many of the Salvadorian immigrants had also been directly affected by the U.S. support of the Salvadorian government, which meant they were likely to be critical of United States foreign policy rather than perpetuating the ideological claims of Cold War politics (ibid). Lastly, the presence of Salvadorians and other Central Americans was threatening because of geographic proximity (Churgin 1996). In a letter addressed to 89 members of Congress requesting temporary relief from deportation for Salvadorian immigrants, the Attorney General expressed such a concern,

Because of the present and potential political and economic instability in other countries in close geographic proximity to the United States, any grants of conditional immigration benefits must be considered in light of its [sic] potential inducement to further influxes of illegal immigrants (cited in Aleinikoff and Martin 1985, 731-33).

As the Attorney General suggested in the letter, protecting Central Americans was considered risky since decision makers feared it would encourage others to follow. The political and economic instability of the region as well as access to the U.S. through the U.S.-Mexico compounded such fears. The letter also shows that by default, decision makers assumed anyone fleeing these countries were “illegal immigrants” rather than legitimate asylum seekers.

Coutin (2011) argues that Salvadorian asylees were defined as outside the meaning of political asylum. Rather than victims of political persecution, they were represented as an undifferentiated mass that experienced generalized harm, which fell below the standards of exceptionality required by asylum adjudicators. My analysis

supports and extends Coutin's claims. I examine how Judges structured ineligibility around people they characterized as either 1. part of an undifferentiated mass rather than individuals, and 2. victims of generalized harm rather than targeted persecution. My analysis focuses on how these characterizations are tied to flood fears. In particular, adjudicators used the characterizations of an undifferentiated mass/generalized harm to frame the applicants in both *Acosta* and *Sanchez* as displaced persons rather than bona fide refugees. In both decisions, adjudicators framed displaced persons as indistinct victims of wartime strife and unrest, which contradicted asylum requirements to have been singled out from the rest of the population.

Construed as part of the masses displaced by war, adjudicators claimed that *Acosta* and *Sanchez-Trujillo* failed to meet the definition of a refugee, and furthermore that they posed a threat of flooding the asylum system. Examining how adjudicators frame the applicants in these ways lends insight into how controls over group size shaped gender-based asylum cases. The distinctions created by these decisions became foundational to the meaning of a social group, and as I examine in subsequent sections, present formidable barriers for claimants with gendered experiences of harm to utilize the social group category. In the section that follows, I examine how the *Acosta* and *Sanchez-Trujillo* decisions achieved the political goal of excluding Salvadorian refugees from protection. This exclusion was possible, however, only by crafting entirely different definitions of a social group. I examine each case in turn.

3.3 *Matter of Acosta*

In 1985, the BIA issued its official definition of a particular social group through the published decision of *Matter of Acosta*. The decision required applicants to prove

they were targeted for persecution because of an “immutable” or “fundamental” characteristic to qualify for social group status. The decision is the cornerstone of social group jurisprudence in the U.S. because it was the first case defining the category in the wake of the 1980 Refugee Act. To this day, it is still the most often cited definition within domestic courts. Foreign courts¹⁷ and the United Nations also cite Acosta’s definition of a social group. Below, I will provide background on the *Matter of Acosta* case including a brief summary of the facts and the legal trajectory. In the sections that follow, I discuss the adjudicator’s assessment of Acosta’s claim to refugee status.

3.3.1. Background on *Matter of Acosta*

Matter of Acosta involved a 36 year-old Salvadorian man. In 1976, along with several other taxi drivers, he founded a taxi cooperative in San Salvador called COTAXI. Between 1978 and 1981, he held several management positions at COTAXI. His last position was general manager. Starting in 1978, COTAXI and its drivers began receiving phone calls and notes requesting that they participate in work stoppages. Although anonymous, COTAXI members believed them to be from anti-government guerillas that had targeted small businesses in the transportation industry for work stoppages. Board members of COTAXI declined to participate because the taxi drivers wanted to keep working. After refusing to comply, COTAXI received threats of retaliation (*Matter of Acosta*, 1985, 216).

Beginning in 1979, taxis from the COTAXI were “seized or burned, or used as barricades.” Several taxis drivers from the COTAXI were assaulted or killed in their taxis by “unknown persons” (ibid). Three of the murdered taxis drivers were friends of the

¹⁷ The *Acosta* social group definition has been used by the Canadian Supreme Court, the British House of Lords, and the Australian Tribunal.

applicant and had also been founding members and officers of the COTAXI. They had each been killed after receiving anonymous notes threatening their lives. The respondent subsequently received three written threats to his life addressed to him as the manager of COTAXI and as a taxi driver. The notes threatened to execute him as a “traitor” (*Matter of Acosta*, 1985, 216-7). In February 1981, three men beat Acosta in his cab and stole it, warning him not to call the police. Acosta believed his attackers to be guerrillas who were seeking to disrupt transportation services in the city of San Salvador but he also stated that the government mistrusted him because cooperative organizations were perceived to be socialist. After the assault and the threatening notes, Acosta feared he would be killed and subsequently left El Salvador in 1981 (*Matter of Acosta*, 1985, 217).

In 1983, the INS put Acosta in deportation proceedings for entering the U.S. without inspection. Acosta subsequently applied for asylum based on persecution for his political opinion and membership in a particular social group. After a two-day deportation hearing in July and August of 1983, an immigration judge denied Acosta asylum and found him deportable for having entered into the U.S. without inspection. The Judge did not dispute Acosta’s credibility as an applicant and believed Acosta had founded and participated in the COTAXI cooperative. However, the Judge focused on Acosta’s account of persecution. He disbelieved that Acosta received death threats or had been assaulted. He instead claimed this part of Acosta’s testimony was “self-serving” and fabricated for the purposes of applying for asylum. Because he dismissed Acosta’s assertion that he was targeted for persecution, the judge found that Acosta failed to meet the burden of proof for asylum and withholding of deportation.

Acosta appealed this decision to the Board of Immigration Appeals (BIA). On March 1, 1985, the BIA published its decision on the case. The Board dismissed Acosta's appeal and ordered that he be deported back to El Salvador. The Board's decision is lengthy and thorough, and was intended to be a "major statement of BIA standards in asylum cases" (Martin 1987). Indeed, the decision includes a detailed discussion on how the Board interpreted and applied the 1980 Refugee Act. While the BIA did not dispute Acosta's credibility (thereby accepting his testimony), their attention shifted to whether he qualified for asylum based on the statutes contained in the 1980 Refugee Act. The Board found that Acosta failed to qualify because he did not meet the definition of a refugee.

To qualify for asylum, it is necessary to prove that the persecution (or threat of future persecution) was motivated by a specific reason. The five reasons recognized by refugee law include: race, religion, nationality, membership in a social group, or political opinion. Applicants must also prove to adjudicators that their fear is "well-founded." Acosta argued that he feared persecution because of his political opinion and due to his membership in a particular social group. However, the Board denied that Acosta possessed a political opinion and that he was a member of a social group that would make him the target of persecution. Here I elaborate on the exclusionary logics behind both of these decisions.

3.3.2. Exclusionary Logic I: Apolitical Opinions

In their ruling, the Board denied that Acosta possessed any political opinion that would make him the target of persecution. Even though the actions of the guerrillas were politically driven, the Board found that Acosta failed to meet the statutory requirements

because *he* did not clearly articulate a political position. While they faulted him for not clearly articulating a political opinion, they erased the political nature of his neutrality in relation to both the guerrillas and government. Indeed, according to the ruling, the BIA concluded that Acosta would have had to publicly define his political alliances for/against the El Salvadorian government for adjudicators to recognize his claim.¹⁸ In sum, the Board found that Acosta did not possess a political opinion and consequently, the government or guerrillas had no reason to target Acosta.

As the former INS Director, David Martin argues, the Board interpreted political opinion in an “unduly narrow” manner in Acosta’s case (Martin 1987, 87). In order to legitimize this “narrow” interpretation of the law (and drown out the political dimensions of Acosta’s experience), the Board invoked the context of civil war. Indeed, they directly cited the need to subject him to a greater level of scrutiny over qualifying for a refugee on the grounds of political opinion. As they claimed, “not all harm with political implications, such as that which arises out of civil strife in a country qualifies an alien as a refugee” (*Matter of Acosta*, 1985, 234). According to the Board, the attacks and threats against Acosta could only be attributed to the “generalized violence” of the civil war. Thus despite Acosta’s expressed non-allegiance to the government or guerrillas, the political opinion imputed by his persecutors, and his affiliation with a cooperative organization, the Board refused to acknowledge his experience of violence as persecution. Acosta was rendered as an innocent bystander; outside the bounds of refugee protection.

¹⁸ The Ninth Circuit Court held similarly narrow interpretations of political opinions in *Bolanos-Hernandez v. INS* (1984) and *Argueta v. INS* (1985).

For the purposes of my broader argument, the dismissal of Acosta’s political opinion highlights the tremendous power that judges have in interpreting an asylum seeker’s testimony and issuing a decision. What is critical to acknowledge here is that this interpretation of what constitutes a political opinion was not determined by statute language. In fact, Courts had arrived at the opposite conclusion in other cases, finding the persecutor’s motives were sufficient and of primary importance regardless of the victims’ actual opinions.¹⁹ The decision placed an undue burden on Acosta to prove that his political opinion motivated his persecution. The Board overlooked the motives of Acosta’s attackers, while they described his experience as having only political “implications.” This reasoning demonstrated the ability of adjudicators to interpret any and all violence occurring within the context of civil war as random, chaotic and widespread. Supposedly lacking a political opinion, Acosta had to meet the standard of the social category to qualify for asylum. As I describe below, his effort to meet this standard left an indelible mark on the history of asylum law, particularly for gender-based asylum advocates.

3.3.3. Exclusionary Logic II: Immutable and Fundamental Characteristics

The most salient exclusionary logic of the *Matter of Acosta* decision was the social group definition constructed by adjudicators to deny him asylum. According to the court record, Acosta claimed that he was not only persecuted based on his political opinion but also as a member of a social group. His social group included “COTAXI drivers and persons engaged in the transportation industry of El Salvador” (*Matter of*

¹⁹ See *Hernandez –Ortiz v. INS*, decided by the 9th Circuit Court of Appeals in 1985 in which the Court found that the persecutor’s motives were of greatest importance. They stated that the victim’s opinions were irrelevant as long as the persecutors believed the victim to hold particular beliefs. Yet, the Board held Acosta to a higher standard and further claimed that his fear was more imagined than real because he did not possess a political opinion or a social position that were noteworthy enough to incite persecution.

Acosta, 1985, 232). The Board found that this was not a legally permissible social group. To rationalize their rejection of *Acosta's* claim, the Board offered their own definition, requiring social groups to be constituted by fundamental and immutable qualities that a person either could not or should not be required to change.

...we interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences (*Matter of Acosta*, 1985, 233).

The Board justified this interpretation as contiguous with the essence of the other four categories. Race and ethnicity categories, they reasoned, related to aspects of one's identity that were "immutable." While political opinion and religion could technically be altered, the Board reasoned that they were so fundamental to one's identity that a person should not be required to change them. These two factors became the tenants of the social group definition and the first major boundary around the undefined category.

Likening a social group to the other four grounds provided a seemingly logical boundary around the social group category (see Hathaway 2003). However, this definition of a social group is problematic in several ways. First, the social group category was included in the Convention in order to provide protection for those at risk for reasons not covered in the other four provisions; it was inserted to broaden refugee protection beyond race, religion, nationality or political opinion. Prior to *Acosta*, the category was used as a catch-all for people whose persecution did not fall easily within

the other four categories (Goodwin-Gill 1983, Helton 1983; Compton 1987; Graves 1989). As Graves argues, such usage was uncontroversial until *Matter of Acosta*, prior to which several courts considered social group cases without defining the term.

The Board also stated that the particular characteristics that would qualify under this definition remained to be determined in future cases. While they mentioned a few examples, such as sex, kinship or past military leadership or land ownership, there is no universal consensus on what aspects of person's identity are immutable or fundamental. It is clear, however, that the applicant and the adjudicators did not have equal power in deciding what was fundamental or immutable. In the face of this freshly minted definition, the Board found that Acosta's proposed social group failed. Indeed, they suggested his social group formulation was superficial.

The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice. Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was "persecution on account of membership in a particular social group" within our construction of the Act (*Matter of Acosta*, 1985, 234).

The Board's decision to frame Acosta's predicament as a result of his choices, placed him outside their newly crafted legal threshold for social group status. According to their analysis, Acosta's experience was one about the "right to work in the job of his choice" and the "refusal to participate in work stoppages." Acosta could have avoided harm by changing his attitude or behavior. Thus while the BIA had recognized the importance and

value of military leadership or land ownership, apparently Acosta's involvement in a worker's cooperative differed from these protected experiences. According to the Board, founding and directing a cooperative was not an immutable past experience, nor were Acosta's beliefs about political neutrality or cooperativism fundamental enough that he should not have been forced to compromise his beliefs.

Although Acosta's was singled out and targeted as a leader and driver in the taxi cooperative, the Board refuted that such actions were motivated by any quality or belief that Acosta possessed. In the absence of fundamental or immutable characteristics, adjudicators characterized Acosta's social grouping as surface level; an attempt to cordon off part of the wider populace displaced by war. Rather than an individual targeted for persecution because of a legitimate social grouping, Acosta's experience amounts to nothing more than harm produced by civil or military strife. Construing him and his experience in such ordinary terms enabled the Board to undermine the proposed social group; he was folded into an undifferentiated mass of 'displaced' persons, all of whom suffered from the generalized conditions of war and military strife. Acosta, the taxis coop officers, taxi drivers were like everyone from El Salvador: displaced. As the decision established, meeting the standards of a "particular social group" would require more than being a by-product of war.

3.3.4. Exclusionary Logic III: Displaced Persons as the Refugee's "Other"

At the time the BIA ruled on *Matter of Acosta*, there was no existing case law upon which to interpret the social group category. Until this point, the social group provision had been used flexibly, without restrictions placed on eligibility (Graves 1989). However, as I discuss in this section, through Acosta's case the Board began the process

of defining what could and could not qualify as membership in a particular social group in direct reference to the fear of a flood of refugees.²⁰ Adjudicators characterized Acosta's experiences as outside of the bounds of asylum because he represented a potential flood of people who might be subject to similar violence. According to the Board's standards in the *Acosta* decision, applicants wishing to gain asylum had to prove that they were singled out and targeted for persecution. To distinguish between those who met the standard of a refugee and those who did not, adjudicators discursively framed displaced persons as the refugee's 'other.' Here I explore how adjudicator's could assert that Acosta was a displaced person rather than a refugee by examining how they construct the concept of "persecution."

In the *Acosta* decision, adjudicators claimed that not all forms of harm amount to persecution. According to the Board, persecution must 1) target individuals, and 2) the persecutor must be motivated by the desire to "overcome" a belief or characteristic held by that individual. As the Board explained,

...harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome (*Matter of Acosta*, 1985, 223).

According to the BIA's decision, a refugee must be differentiated from other types of migrants because they are targeted as individuals for specific reasons. Persecution, thus defined, precluded so-called "universally applied" or "random" acts of violence. To illustrate this point in their analysis, the Board invoked "displaced persons" as the

²⁰ As evident in their assessment of Acosta's degree of fear and his political opinion, adjudicators were driven by the logic to exclude displaced persons. The distinctions created by adjudicators between refugees and displaced persons buttressed their ability to frame all violence that occurred within the context of war as just a horror of war and nothing more. However, the fact that violence occurs in the context of war should not bar victims from asylum eligibility and has no basis in Refugee Statutes (Graves 1989, 814).

antithesis of a refugee. According to the Board, displaced persons did not experience targeted, individualized harm or suffering.

The word [persecution] does not embrace harm arising out of civil strife or anarchy. In fact, Congress specifically rejected a definition of a refugee that would have included "displaced persons," i.e., those who flee harm generated by military or civil disturbances." This construction is consistent with the international interpretation of "refugee" under the Protocol, for that term does not include persons who are displaced by civil or military strife in their countries of origin (*Matter of Acosta*, 1985, 229).

The Board thus differentiated displaced persons from a refugee by arguing that they migrated due to indiscriminate or universally applied harm resulting from anarchy, civil or military strife. These states of unrest, they presumed, did not result in individualized and targeted harm but rather produced generalized conditions of suffering. The Board also described this as "generally harsh conditions shared by many other persons" (*Matter of Acosta*, 1985, 222). These conditions, adjudicators argued, produced displaced people but not refugees.

I argue that Adjudicators' attentiveness to the differences in the motivation and distribution of violence to differentiate refugees from displaced persons belied flood fears. To deny Acosta asylum, adjudicators had to erect new definitional barriers to qualify as a refugee. Adjudicators defined this refugee standard against a different migrant subject, displaced persons, whom they framed as migrating for reasons shared by (too) many others. Their afflictions were too widespread to be acknowledged under asylum law since the violence they experienced was shared by many people in the midst of anarchy and war-time strife. According to adjudicators, the displaced were thus undifferentiated in the eyes of the agents of violence but also undifferentiated from one another. Granting asylum to one displaced person created the risk of having to grant

asylum to all with similar claims. As adjudicators in the *Acosta* decision affirmed, refugees needed to distinguish themselves from this potential flood of displaced peoples. In turn, adjudicators asserted the need to distinguish refugees from displaced peoples to avoid abuse of the social group category; this effective “gate-keeping” was designed to cut down on potential abuse of the asylum system.

3.3.5. Expansions, or Exclusions? The Legacies of *Acosta* for Gender-Based Asylum

In *Matter of Acosta*, adjudicators drew upon their powers of interpretation to define *Acosta* as outside the boundaries of asylum law by framing him as a victim of generalized violence rather than an individual singled out and targeted for persecution. To justify their decision, the BIA introduced new requirements to qualify as a member of a particular social group. I argue that the BIA’s new definition was born out of flood fears and operated as a form of gate-keeping. Adjudicators developed the new requirements for immutable and fundamental characteristics in direct opposition to displaced persons, to exclude persons they considered to part of such a mass migration. *Acosta*’s case illustrates how this new legal standard granted adjudicators broad interpretive powers to decide not only “immutable” aspects of people’s identity, but make normative claims about what people should/not be expected to change; and by extension who the U.S. should protect. This had a direct impact on Central Americans’ claims to asylum, but also legitimized logics of exclusion that could be applied to other potentially large groups of asylees whose identities were not valued, such as women.

As I have argued, the *Acosta* decision was developed through an exclusionary logic, one that sought to curb access to asylum for so-called displaced persons. Ironically however, in the decade following the case, *Acosta* became critical in efforts to expand

asylum protection within the social group category and especially for gender-based asylum claims. The explicit recognition of sex in the legal decision was decisive for future gender-based asylum struggles, paving the way for women to make claims that drew upon that immutable and fundamental characteristic. *Matter of Acosta* affirmed advocates' claims that sex-based persecution had a rightful place within existing refugee laws, specifically within the social group category.

Upon my close reading of the case and its legacy however, I would argue that the *Acosta* decision was not gender neutral and did not greatly expand asylum protection, even if it recognized sex a basis for defining the threshold of who constitutes a refugee. The BIA's decision on social group status, I argue, established an exclusionary standard and perpetuated a masculine bias in asylum law. As the BIA stated, "The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." The exclusionary standards and masculine bias of this decision are visible in the two experiences that the BIA deemed immutable or fundamental: military leadership and land ownership. These strongly correlate with an assumed masculine subject, particularly in El Salvador and Central America more broadly.

It is unclear how the BIA arrived at such examples when constructing their definition of a social group. What is clear is that their examples relied upon masculinist and classist norms of subject positions that are based on an imagined public figure; one that can even be recognized as singled out. These reference points, as I illustrate in later chapters of the dissertation, become highly significant for future refugee cases, and especially for women. By describing military leadership and landownership as

fundamental characteristics of one's identity, the BIA deployed the example of a visible public figure with a particular position or resource; someone important against whom violence might be directed.

Through the implicit focus on a public figure and by definition a figure from an elite class, the BIA introduced into the legal record an assumed elite masculine subject as the standard for the social group definition. Even though the BIA made sex an immutable characteristic of a social group, the decision also implicitly discriminated against the vast majority of women who may be structurally excluded from such powerful positions due to gender inequalities. While their sex might be immutable, their position in society might not be 'fundamental' enough to invite persecution recognized as such. Indeed, even Acosta's profession as a taxi driver and his commitment as a founder and leader of his cooperative did not qualify. And due to his political neutrality and unclear political position, he was not deemed important enough to be the target of persecution.

In addition to this assumption about one's position in society, in their decision, the BIA also perpetuated assumptions about agency, choice and political subjectivity that reflect masculinist assumptions. Again, these assumptions, as artifacts in this precedent setting case, affect the interpretation of future refugee asylum cases. Two examples highlight the BIA's assumptions about agency, choice and political subjectivity. First, the BIA claimed that Acosta could have left his job to evade those that targeted him. The concept that Acosta may have been fundamentally invested in his job or that he did not have the choice to simply find other work escaped the explanation. Framing Acosta's predicament as an issue about choices erased the ways in which vulnerability to

persecution could be produced by structures of inequality that *reduce* people's options. Adjudicators' retort to 'choice' also granted Acosta full agency and control over his circumstances, which once again implicitly privileged a particular form of masculinity and class status.

Second, the BIA was also troubled by Acosta's desired political neutrality and his lack of political affiliation. Because he did not present a recognizable political position, (the BIA claimed), it was unclear to them why he might be a target of persecution. Refugees, it was assumed in the written decision, must be recognizable to the perpetrators of violence and to adjudicators in the United States as political subjects. Indeed, the BIA went so far as to claim that if Acosta was so politically neutral he could have participated in the work stoppages to evade persecution by guerrillas that targeted him (even though he may then become a target of state police for his presumed political alignments). If he was to be deemed a refugee, it could not be based on a lack of a public position or political neutrality. Such a threshold for meeting refugee designations systematically excluded women's experiences of structural inequality that undermined free choices and also, in many cases, expounded women's existing marginalization from political participation. These qualifications were solidified into case law through *Sanchez-Trujillo*, which I discuss next. As I argue in later chapters, adjudicators' assumptions about legitimate political activity and choice were major obstacles that women had to negotiate in their pursuit of asylum.

3.4 *Sanchez-Trujillo v. INS*

In 1986, the Ninth Circuit Court of Appeals added further limits on social group eligibility. Just one year after *Acosta*, the Ninth Circuit Court published *Sanchez-Trujillo*

v. INS, which established a radically different definition of particular social groups, yet one that perpetuated an exclusionary logic based on flood fears. Their 1986 decision required social groups to demonstrate “cohesiveness” and “voluntary association” among group members. According to this line of reasoning, a social group needed to look and act like a group, not merely demonstrate possession of immutable or fundamental characteristics. This was vastly different from the *Acosta* test that suggested one could be persecuted because of a social identity or past experience. As I demonstrate in this section, adjudicators’ rationale for denying asylum to Sanchez-Trujillo illustrates how the requirement for voluntary association is based on an exclusionary logic designed to prevent large social groups from qualifying for protection.

3.5.1. Background on *Sanchez-Trujillo v. INS*

Like *Acosta*, *Sanchez-Trujillo* involved El Salvadorian refugees. Therefore, the historical and political context of the *Sanchez-Trujillo* case continues to be important for analysis of the decision. The case was litigated by advocates in the Sanctuary Movement in an effort to challenge politically biased asylum adjudication dictated by the executive branch’s foreign policy goals. During the 1980s, adjudicators systematically denied asylum to Salvadorians and Guatemalans since they came from countries considered allies in the Cold War. The *Sanchez-Trujillo* case was one among many cases²¹ waged by applicants who claimed that their youth, gender, working class status and neutral political opinions made them targets of persecution. Yet adjudicators consistently claimed that

²¹ See for example: *Chavez v. INS* (9th Cir. 1984), in which the Court found that the applicant’s “status as a ‘young urban male’ [was] not specific enough for political asylum.” Also, *Zapeda-Melendez v. INS* (9th Cir. 1984): a “male of military age who has sworn allegiance to neither faction” in the Salvadoran conflict failed to establish eligibility for asylum because the danger faced by the applicant was the same danger faced by other Salvadorans at that time. See also, *Vides-Vides v. INS* (9th Cir. 1986), in which the court rejected the claim of a young man who wanted to remain politically neutral in El Salvador and feared retaliation.

such cases fell outside the protection of political asylum. In the Sanchez-Trujillo decision, the Court took the opportunity to legally justify this pattern of exclusion.

The case of Sanchez-Trujillo involved two Salvadorian brothers, Luis Alonzo Sanchez-Trujillo and Luis Armando Escobar-Nieto, who entered the U.S. without inspection and were placed in deportation proceedings (1980). During their deportation hearing two years later they applied for asylum (1982). In their application, they claimed persecution due to their membership in a particular social group and political opinion. The proposed social group consisted of “young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador” (*Sanchez-Trujillo v. INS*, 1986, 1574). They claimed that the government of El Salvador persecuted young men who were urban, working class who did not express support for the government because it believed them to be disloyal and assumed they were guerilla sympathizers. This suspicion intensified if young men refused to join the armed forces (Compton 1987, 918).

The applicants claimed that their membership in such a group entitled them to asylum protection. To support their claim of group persecution, they submitted evidence collected by international non-profits showing that young males comprised 67 percent of non-combatant disappearances in El Salvador. Of those young men who disappeared, 72 percent were from the urban San Salvador area. Government forces or groups with relationships to the government were responsible for between 70 to 80 percent of the disappearances of young men from urban San Salvador (cited in Compton 1987, 918-19). Daily announcements broadcast by Salvadoran government on radio and television identified young men who refused military service as ‘subversives and communists. This

announcement encouraged other citizens to turn in such people and provided a phone number for this purpose (ibid).

The applicants claimed they were directly targeted within this context and also cited a fear of persecution based upon political opinion. Escobar-Nieto avoided military service by hiding in his house during conscription raids. He had been present at two demonstrations that had been violently dispersed by government security forces. Sanchez-Trujillo was singled out for detention, interrogated, searched, and threatened on four occasions (*Sanchez-Trujillo v. INS*, 1986, 1573). Escobar-Nieto was later abducted by government security forces, accused of being a guerrilla, and beaten (Compton 1987, 911-19).

Sanchez-Trujillo was also a member of a Catholic youth organization. Although the Court did not acknowledge this in their decision, the Catholic Church played an important role in opposing the government of El Salvador and thus associating with a youth organizations would have carried particular political connotations. Sanchez testified that following a demonstration that he participated in near his church, the Priest who led the organization disappeared for a month, returning with signs of abuse and torture (*Sanchez-Trujillo v. INS*, 1986, 1573). After he left El Salvador and entered the United States, Sanchez was also involved with an organization that protested conditions in El Salvador.

In a September 1982 decision, an Immigration Judge denied Sanchez-Trujillo and Escobar-Nieto's applications for asylum on the basis that they failed to prove they were individually targeted for persecution and because their proposed social group was too large. They appealed their case to the BIA, which dismissed their appeal. The applicants

petitioned the Federal Court of Appeals for the Ninth Circuit to review their case, but the Court also dismissed their request. The Ninth Circuit Court's published decision established the second major definition of a social group in U.S. jurisprudence. In the section that follows, I examine how adjudicators expressed concerns about the size of particular social groups in their decision.

3.4.2. Exclusionary Logic IV: The Threat of Sizable Groups

Similar to *Matter of Acosta*, the *Sanchez-Trujillo* decision expressed apprehension about extending asylum protection to people fleeing war-torn countries via the social group provision of refugee law. Adjudicators summarily argued that persons fleeing such conditions did not meet the requirements of refugee status. As the Court stated,

Major segments of a population of an embattled nation, even though undoubtedly at some risk for general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country (*Sanchez-Trujillo v. INS*, 1986, 1577).

The Court's acknowledgment that social group status would be difficult to achieve for persons fleeing war-torn areas indicated their concern about the volume of applicants they would receive. They argued that during conflict, political violence affected major segments of the population. This echoed sentiments in the *Matter of Acosta* decision, in which the BIA claimed displaced persons were ineligible because they experienced "generalized" harm. The Court was more explicit in the *Sanchez* decision. They contended that opening social group eligibility up to people who fled embattled nations would result in a near universal grant of asylum to those fleeing unrest or violence in El Salvador and other countries.

Every aspect of the Court's analysis emphasized the size of the applicant's proposed social group. Citing the Immigration Judge who first denied Sanchez-Trujillo asylum, the Court stated that their proposed social group formulation was not cognizable because it was a "large division of the population." The Court's language conveyed this sense of excessive scale. As they stated,

The term [particular social group] does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance (*Sanchez-Trujillo v. INS*, 1986, 1576).

Rather than a group, adjudicators framed them as representing a "segment of the population" and a "demographic division." Each of these phrases depoliticized the attributes that Sanchez-Trujillo identified as motivating their persecution. The Board recast the social group as one based on impersonal, inconsequential and solely descriptive attributes. Thus, rather than encompassing a social group vulnerable to state violence, the Court claimed that Sanchez-Trujillo's group had been arbitrarily defined. The Court suggested the group was too broad to share any relevant social experience other than as a 'segment of the population.'

By claiming the proposed social group's only relevance was statistical, adjudicators advanced the idea that the group was absent of any socially or politically meaningful characteristics. They equated the proposed social group to a hypothetical group of "males taller than six feet" (*Sanchez-Trujillo v. INS*, 1986, 1576). The Court explained that while this group of males taller than six-feet existed statistically speaking, it could never constitute a "particular social group," even if they were subject to "greater risk of persecution than the general population" (*Sanchez-Trujillo v. INS*, 1986, 1576). By likening 'males taller than six feet' to 'young, working class men without military

experience and who willfully did not align with a political faction' during the Salvadorian civil war, the Court rendered all the features of Sanchez-Trujillo's proposed social group as irrelevant to an asylum claim.

After diminishing the significance of the social group characteristics, as well as focusing on its breadth, the Court claimed it would be dangerous to recognize such a claim. To the Court, Sanchez-Trujillo posed the threat of a dangerous expansion in asylum protection because their proposed social group was large, diffuse, and too representative of the population in El Salvador.

This [class of young, working class, urban males] may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum or withholding of deportation would render the definition of 'refugee' meaningless (*Sanchez-Trujillo v. INS*, 1986, p. 1577).

To the Court, Sanchez-Trujillo's proposed social grouping failed because it was wide-ranging and inclusive of a lot of people. It was so large they claimed that if they granted Sanchez-Trujillo asylum, they'd have to welcome everyone. Opening such a gate to asylum, the Court claimed, was threatening. If they granted asylum to such a high volume of applicants, it would nullify the very meaning of "refugee."

The size of Sanchez-Trujillo's group factored into the adjudicators' decision about whether they qualified for asylum protection. In their estimation, Sanchez-Trujillo's case not only failed to qualify, but also presented a threat to the asylum system, potentially opening asylum up to all of El Salvador. The Court thus enacted its gate-keeping role to safeguard asylum through the *Sanchez-Trujillo* decision. To the Court, exclusion was necessary to preserve the very mechanism of humanitarian protection. Although there is no statutory basis to deny asylum because of the size of the persecuted

group, the Court created one in case law through their decision in *Sanchez-Trujillo*. As I discuss in the next section, their definition of a social group introduced a logic of exclusion into case law that now enabled adjudicators to invoke precedent, as an objective legal standard, designed to control for group size.

3.4.3 Exclusionary Logic V: Voluntary Association

Sanchez Trujillo claimed they belonged to a particular social group defined by age, gender, urban residence, class status, lack of military service and political neutrality. Many aspects of their social group were factors over which they had little or no control. Theoretically, some of these features could have qualified as immutable or fundamental characteristics under the *Acosta* precedent. However, without making reference to the *Acosta* decision, the Court in *Sanchez-Trujillo* re-crafted a definition that introduced different requirements. Rather than focusing on characteristics that a person could or should not change, as in *Acosta*, the Court arrived at virtually an opposite conclusion. As the Court stated:

... the phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group (*Sanchez-Trujillo v. INS*, 1986, p.1576).

The Court thus claimed that social groups acquired their “fundamental” characteristic through their affiliation and voluntary association with others. By their account, group members had to gather together and know one another, based on a common desire or interest. Legitimate social groups were actuated through their own group dynamics rather than the “outward” perceptions of a persecutor (Graves 1989). Choice and active

participation thus played a central role in the Court's definition of a legitimate social group.

Yet, inconsistencies in the Court's reasoning belied their concern for numbers and group size rather than developing a sound universal theory of social groups. On many levels, the requisites for voluntary association and close affiliation forcefully narrowed social group status so that only small units would qualify. Even the prototype offered by the court did not stand up to the requirements they articulated,

Perhaps a prototypical example of a "particular social group" would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people (*Sanchez-Trujillo v. INS*, 1986, p. 1576).

Later, they added that the family was ideal because it was "a small, readily identifiable group." While family units may be small and easily recognized, in other respects the family group fails the Court's own test. Family ties are not relationships in which people voluntarily enter, in fact, these ties can be difficult to sever (for example, an abused wife may be denied a divorce by her husband). Furthermore, family members can be quite different from one another, possessing different interests, lifestyles or political leanings. Although family members may affiliate with one another, they do not necessarily share the same interests nor do they necessarily associate voluntarily.

While the Court wrongly assumed homogeneity among family members, they claimed that diversity within Sanchez-Trujillo's proposed group was a problem. The Court described Sanchez-Trujillo's proposed social group as so large and loose that it represented too many different types of people,

...[i]ndividuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests,

diverse cultures, and contrary political leanings (*Sanchez-Trujillo v. INS*, 1986, p. 1577).

Rather than manifesting any natural cohesion, according to the Court, those who “fell” within this gigantic grouping were too different to be regarded as a closely affiliated group. The Court also implied legitimate groups were ones that formed around things like lifestyle, culture or politics.

In the absence of voluntary association or affiliation, the Court suggested there was nothing meaningful about the proposed social group of Sanchez-Trujillo. By shifting the threshold of eligibility to voluntary association, the Court argued that the social identities of the proposed group were merely demographic distinctions. This erased the ascribed aspects of their social grouping, the ways in which guerillas or the government perceived Sanchez-Trujillo and other young men in El Salvador. As the applicants had claimed, their age, gender, class status and neutrality made them politically suspect to both guerillas and the government during the conflict, subjecting them to violence and persecution. The government assumed they had a political opinion and also viewed them as ideal fighters. The Court’s decision rendered their willful neutrality as apolitical and confirmed the right of the state of El Salvador to force young men into armed conflict, regardless of how the state directed use of that violence (for example, to kill and terrorize its own citizens). By focusing on social groups as actualized only through voluntary association, however, all of these points became irrelevant to their claims of persecution.

3.4.4. Exclusionary Logic VI: A Demographic Division of the Population

As legal scholars have argued, the narrow application of the 1980 Refugee Act in the *Sanchez-Trujillo* decision was not determined by statute (Graves 1989, Compton 1987, Helton 1983). Rather, like the *Acosta* case, the *Sanchez-Trujillo* decision imposed

limits on social group status in response to the fear of mass migration from El Salvador. A close reading of the decision, understood within the historical context of the case, demonstrates that adjudicators went to great lengths to dismantle Sanchez-Trujillo's claim to political asylum and strip it of persecutive dimensions. For example, the applicants in this case submitted an exceptional amount of evidence supporting the claim that their proposed social group experienced a higher rate of violence than the rest of the population, thus attempting to prove that they were distinguished from the rest of the population. The file of oral and documentary evidence presented at the deportation hearing resulted in 1,860 pages of transcript from 15 days of hearings with 13 witnesses, as well as 51 exhibits covering 1,200 pages (*Sanchez-Trujillo v. INS*, 1986, p. 1577). The evidence and documentation submitted for the case were substantial, far in excess of the norm for such cases. The Court, however, maintained that the evidence was insufficient.

Despite the considerable evidence and testimony submitted in Sanchez's case regarding the vulnerability of their proposed social group to persecution, the Court claimed the evidence was not persuasive because the claimants were from El Salvador. As they stated, it was inconclusive or "subject to varying interpretations" because of the wider context of conflict. While the Court acknowledged that the "concrete evidence" of the case demonstrated that young males were at risk of political violence, they argued it was not persecution because it occurred amidst a civil war.

Although a substantial number of the victims have been young males--which would hardly be surprising in any violent conflict--the IJ and the BIA reasonably found that the evidence was inconclusive to establish that mere age and gender, even when combined with labor class background, urban residence, or political neutrality, had any bearing on the likelihood of persecution (*Sanchez-Trujillo v. INS*, 1986, p. 1577).

Although the applicants proved the members of their purported group were singled out and targeted, the Court normalized this as simply a feature of conflict. The violence inflicted on these young men was thus beyond the humanitarian scope of asylum law.

The Court imposed a similar logic onto their political opinion claims, which they tersely addressed. The Court did acknowledge that the evidence submitted in the case pointed to political opinion (rather than social groups) as the main cause of persecution in El Salvador. However, the Court found that the applicants also failed to prove persecution in this respect because it was a condition faced by the whole population of El Salvador,

... the evidence indicates that the risk of persecution relates principally to the existence of actual or imputed political opinion. *This factor applies equally to all segments of the population of El Salvador*, and its existence turns upon individual circumstances (*Sanchez-Trujillo v. INS*, 1986, p. 1577, emphasis added).

As all segments of the population in El Salvador risked persecution because of their political opinion, the Court claimed that the individual applicants had to prove their distinctness from the population. Yet, according to the Court, the applicants failed to differentiate themselves enough and prove they had been singled out.

3.4.5. Demographic Threats: The Legacies of *Sanchez-Trujillo* for Gender-Based Asylum

Like the case of *Acosta*, the Salvadorian conflict shaped how the Court interpreted *Sanchez-Trujillo*'s claims. As adjudicators stated, persons fleeing war-torn areas would rarely qualify as particular social groups because of generalized climates of violence effecting entire populations. Recognizing such claims would lead to a flood of applicants, diluting and destroying the institution of asylum. In the *Sanchez* decision, the claimants were framed as representing a major segment of the population. While they claimed to

be part of a group with immutable and fundamental characteristics, the adjudicators deemed the group to be too large. The decision thus went to great lengths to reject their social group status by requiring voluntary association. Paradoxically, this was precisely how Acosta sought to differentiate himself through his voluntary association with COTAXI and which, ironically, they claimed he could have voluntarily stopped associating with to escape harm. Voluntary association was deployed as a way to further limit social group status to “discrete” groups that had fundamental and immutable characteristics and who voluntarily associated.

Whereas the *Acosta* decision invoked the discourse of “displaced persons” to justify deny protection, adjudicators in *Sanchez-Trujillo* excluded the applicants by claiming that they represented too many people, or what they simply called a “demographic division of the population.” Adjudicators claimed the variables defining their social group were arbitrary and undefined. Construing asylum applicants in these terms illustrates flood-gate keeping. By framing the applicants’ social group as too broad and all-encompassing, adjudicators rationalized their exclusion as necessary to protect asylum from overuse. This decision added another burden to qualifying for asylum, having to associate with group members to prove one would be targeted for persecution. The *Sanchez-Trujillo* decision diverted access to asylum away from those persecuted because of their identities and instead required group members to have some voluntary relationship to one another. The Court developed this test to prevent large groups from winning protection through the social group category. By introducing requirements for personalized, voluntary groups, adjudicators dramatically hampered access. The Court was now empowered, through their own decision on the case, to deny asylum to anyone

who proposed a social group that was too large. As I will discuss in Chapter 4, adjudicators denied women asylum on those very grounds.

Although the *Sanchez-Trujillo* decision makes no explicit reference to sex or gender, I find that the precedent it sets reinforced women's exclusion from asylum protection. The imagined subject of the court's decision was undoubtedly gendered, race and classed because it was one that possessed full agency and free will. Quite distinct from *Acosta*, adjudicators relied on the premise that social identities were not only chosen but also fully realized by active association with others (as if they had some kind of civic club in mind when drafting their decision). The ability to self-identify rather than be identified by others is a privilege not equally enjoyed among social groups, but rather those in positions of power and privilege. The Court's decision thus instituted an implicit bias against subjects from marginalized groups with restricted choices and options. Sanchez-Trujillo and his brother argued that the state preyed upon them as young, urban working class men. The Court dismissed these characteristics as inconsequential and purely descriptive demographic markers, a refrain often repeated in later gender-based asylum cases.²²

²² The legal standards for voluntary and close affiliation, in addition to implicit assumptions about the proper behavior of men, became a problem for cases related to non-hegemonic forms of masculinity and sexuality. In particular the *Sanchez-Trujillo* decision privileged particular forms of visibility that discriminated against applicants who intentionally concealed their identities in order to protect themselves from violence. In 2000, the Ninth Circuit Court of Appeals published *Hernandez-Montiel v. INS*, which involved an applicant who sought asylum as a member of a social group of "gay men with female sexual identities in Mexico" (1087). Hernandez-Montiel had been harassed, beaten and sexually assaulted on several occasions by the police because of his sexual identity. His family also considered his sexuality to be a problem and ostracized him. An Immigration Judge and the Board of Immigration Appeals denied him asylum, rejecting his claims to belong to a social group. The IJ found that Hernandez-Montiel's social group was not immutable or fundamental and characterized it as "homosexual males who wish to dress as a woman" (1089). The BIA concurred, finding that how one "chooses" to dress was neither fundamental nor immutable (1090). The Ninth Circuit found that "gay men with female sexual identities in Mexico constitute a 'particular social group' and that [Hernandez-Montiel] is a member of that group" (1087). The Court found that his sexual identity was an immutable characteristic and "inherent in his identity" (1087). This case demonstrated the unnecessarily restrictive requirement for social groups to "closely affiliated",

3.5 Conclusion: Flexible Exclusions and the Fear of Refugee Floods

The *Matter of Acosta* and *Sanchez Trujillo v. INS* decisions established new gates of recognition for refugees in the United States. In order to qualify for protection under the social group provision, asylees would have to prove possession of either fundamental or immutable characteristics or demonstrate participation in a discrete group of people with common interests. As I have illustrated, these social group definitions and standards were not based upon static interpretations of statutory language, but established through cases of El Salvadorian migrants who threatened adjudicators with setting precedents that might open the flood gates. Therefore, I find that the decisions and their precedent setting interpretations were based a series of exclusionary logics which enabled the court to deny asylum to the applicants by connecting them to groups that threatened to overwhelm the institution of asylum. Consequently, adjudicators went beyond denying asylum to the applicants to institutionalize this exclusion through binding interpretations of the social group category.

This binding interpretation solidified what Coutin (2011) terms “standards of exceptionality,” whereby winning asylum is contingent on representing applicants as individuals who were singled out and treated differently than the population at large. *Acosta* and *Sanchez* failed these exceptional standards because adjudicators characterized them as part of an undifferentiated mass, all of whom suffered from the same kind of harm as everyone else. By crafting new requirements for fundamental/immutable characteristics and voluntary association to prove social group status, adjudicators turned

used to prevent Salvadorians in the 1980s from qualifying for asylum. In this case, the Court changed their definition, highlighting the flexibility of these seemingly fixed definitions. After years of denying claims based on the *Sanchez* test, in this decision the Court synthesized both the *Sanchez-Trujillo* and *Acosta* tests, claiming that a PSG could be determined following either approach. Aleinikoff (2001) referred to this formulation as “...a capitulation to the *Acosta* standard without a willingness to admit defeat”(21).

the problems of group size into legally codified deficiencies. When assessed against these new standards, both applicants lacked the characteristics adjudicators now claimed defined legally permissible social groups. Consequently, their experiences could be classified in ways other than persecution and the state had no responsibilities towards them.

In a close reading of the cases, it is clear that adjudicators went to great lengths to reduce the threat posed by Acosta and Sanchez-Trujillo in the context of U.S. border control. While adjudicators claimed to simply “apply” asylum law, the cases demonstrate how the state was in a process of generating the meaning of what constitutes a refugee and defining the boundaries of asylum protection in response to particular conflicts over state protection. Through these cases, adjudicators began the process of narrowing access to asylum. Yet, this process of narrowing access required great contradictions in legal reasoning visible in the tension between individualized and group experiences. Paradoxically, adjudicators emphasized Acosta and Sanchez-Trujillo’s shared social experiences and identities to undermine their claims to belong to social groups that warranted state protection.

The cases of Acosta and Sanchez-Trujillo demonstrates the incredible flexibility and fluidity of asylum law. When read against one another, the decisions offered competing and conflicting accounts of what constitutes a social group and thus who could qualify for protection. Indeed, these two cases demonstrate disagreement and conflict over the interpretation and application of the social group provision within the law. Yet, as I argued in Chapter 2, these struggles over the definition of a refugee were sites of border control. Rather than being waged on the territorial periphery, however these

battles were waged in the adjudication of individual asylum cases. In their decisions about how to interpret and apply asylum law in *Matter of Acosta* and *Sanchez-Trujillo*, the BIA and Circuit Court created interpretations based on the presumed wider impact of their decisions on immigration control.

These decisions directly shaped the course of asylum law in the United States. While the decisions claimed to present universal definitions of a social group, in reality they were quite flexible because they preserved the power of adjudicators to decide who is included and excluded. Despite key differences, both social group formulations gave adjudicators the power and tools to render asylees as ineligible for asylum by transforming individuals into elements of an overwhelming, and therefore threatening, population. Asylees had a new burden to prove that they were exceptional, i.e. that they were uniquely singled out for abuse or subjected to violence greater than the general population. In Chapter 4, I examine how female applicants with sex and gender-based claims were denied based on these logics of exclusion. Through four precedent setting cases, I examine how adjudicators invoked these standards of exceptionality to deny female applicants by finding that sex and gender did not sufficiently differentiate the female applicants.

Chapter 4: Gender-based Persecution and the Problem of Exceptionality Requirements

4. Introduction

The statutory language of the 1980 Refugee Act and the legal paradigm that developed through judicial interpretation of the Act systematically favored men over women (Berger 2009). Historically the prototypical asylee had been a male figure tortured or imprisoned by his state for political dissidence. This paradigm also assumed that state actors carried out persecution, or an agent enabled by the state, in a public place (Luibhéid 2002; Musalo 2003). Scholars and practitioners have documented how this normatively male model directly minimized women's access to asylum. While women do experience persecution in this manner, they may also be subjected to gender differentiated persecution. This could include acts solely targeting women (forced abortion, female circumcision), or forms of violence more commonly inflicted on women as opposed to men (rape, domestic violence). Women may also frequently experience persecution at the hands of non-state actors, such as individuals or family member, who do so with impunity. Often, women have been targeted within spaces considered to be part of the "private" realm, whether in homes or communities.

As a result of this bias, many women have struggled to fit their experiences into the masculine legal paradigm of political asylum (McKinnon 2010). This was particularly acute prior to the 1990s when a discourse that politicized gender violence emerged. The cases I analyze in this chapter mark this transition. In the 1980s there was little recognition in the asylum courtroom that people could be persecuted based on gender.

The overtly discriminatory treatment of women's cases fuelled practitioners and scholars' efforts to articulate how women's gendered claims fit within the asylum paradigm. While some positive decisions began to embed recognition of gendered claims within case law, the definitional struggles during the 1990s that used a gendered discourse met significant resistance from adjudicators. Women continued to face the challenge of being legible to adjudicators as political subjects rather than victims of personal or private problems. Consequently, progress towards embedding a gendered discourse within case law was piecemeal.

Yet the emergence of, and continued struggle over gender based asylum, I argue, cannot be removed from the struggle of other groups to access protection. In the previous chapter, I examined how the exclusion of Salvadorians from protection shaped the formation of social group case law in the U.S. I argued that early case law developed through an exclusionary logic whereby adjudicators required applicants to prove their exceptionality as a form of gate-keeping around the 'undefined' social group category. Rather than the application of static legal standards however, the *Matter of Acosta* and *Sanchez-Trujillo v. INS* decisions demonstrated how adjudicators simultaneously created and applied asylum law in response to the "immigration crisis" from Central America. Adjudicators developed narrow social group definitions that effectively defined the applicants as outside the meaning and scope of political asylum. Behind a seemingly innocuous concern for regulation, these decisions solidified exceptionality as a precondition to win asylum. The applicants failed to sufficiently distinguish themselves from the rest of the population, a population that exceeded the capacity and concern of U.S

humanitarianism. However, as I argued, both decisions relied up elitist and gendered flood discourses to render the claimants ineligible and threatening.

This chapter examines three precedent setting cases that demonstrate the difficulties women had meeting the definition of a refugee, specifically the social group provision. Although precedent existed for women to use the social group category to claim persecution based on their sex (*Matter of Acosta*), adjudicators continued to deny that women qualified. The series of precedent setting cases I examine in this chapter were part of broader patterns of gendered exclusion that catalyzed the movement for gender-based asylum. My analysis attempts to link this gender bias with those issues of exceptionality I discussed in Chapter 3. Requiring applicants to meet standards of exceptionality was a way for adjudicators to regulate women's access to the social group provision. In this chapter, I examine how exceptionality requirements fostered particular definitional struggles for women with gendered claims of persecution. I outline three major reasons that they "failed" to be exceptional according to adjudicators, all of which I argue relate to flood discourses.

The first way that adjudicators construct gender as unexceptional is by depoliticizing sexual violence against women. Through the case of *Campos-Guardado v. INS* (1987), I examine how adjudicators normalized sexual violence and portrayed it as apolitical. Adjudicators in the case refused to recognize Campos-Guardado's social group because the gendered dynamic of the violence she experienced failed their expectations of how a refugee should be singled out for persecution. Through the case of another Salvadorian woman, *Carmen Gomez v. INS* (1991), I illustrate the second issue raised by adjudicators, which is the failure of "gender" to qualify as the basis of a particular social

group because it was considered an “overly broad” characteristic. Third, the case of *Fatin v. INS* (1993) illustrates how adjudicators treated gender specific harm as unexceptional in contexts where entire classes of women were subjected to discrimination. This third point illustrates a paradox of social group status that pits an individual against others in her oppressed social group to prove exceptional status.

4.1 *Campos-Guardado v. INS* (1987)

In the following section, I examine how adjudicators rendered gender and sex as apolitical by normalizing sexual violence in the context of civil war. *Campos-Guardado vs. INS* involved a woman who claimed she was persecuted based on a social group defined by her family, all of whom were targeted for their role in the agrarian reform movement. While both of the seminal decisions *Matter of Acosta* and *Sanchez-Trujillo* identified the family as a prototypical social group, adjudicators denied Campos-Guardado asylum. As I examine below, adjudicators used gendered differences in persecution to argue that she was not targeted for persecution but rather was an innocent bystander. Below I provide some background on the case and then examine the decision in detail.

4.1.1. Background on *Campos-Guardado vs. INS*

Sofia Campos-Guardado, a Salvadorian woman, entered the United States without inspection in the fall of 1984 and was apprehended by the INS. Once in deportation proceedings, she applied for asylum based on her particular social group and political opinion. Campos-Guardado reported that she was persecuted along with some of her family members because of their role in the agrarian reform movement. She recounted a series of experiences starting with a visit to her uncle to repay a debt owed by her father.

Her uncle was the president of an agricultural co-operative. Campos-Guardado recounted that when she arrived at his farm, her uncle was apprehensive because a paramilitary group had come to the farm the previous day demanding money from the cooperative. During her visit, the group of armed men and women returned to the farm and again demanded money from the cooperative. When her uncle refused,

...[t]hey dragged Ms. Campos, her uncle, a male cousin and three female cousins to the rim of the farm's waste pit. They tied all the victims' hands and feet and gagged the women. Forcing the women to watch, they hacked the flesh from the men's bodies with machetes, finally shooting them to death (*Campos-Guardado vs. INS*, 1987, 287).

Campos-Guardado and her female cousins were subsequently raped, while the female attacker shouted political slogans. Campos-Guardado and her female cousins were verbally threatened and set free. They fled to a hospital in San Salvador, where Campos-Guardado suffered a nervous breakdown and remained in the hospital for two weeks. After her release, she remained in the city and began work in a factory. During a visit to her parent's home, two men arrived at the house and her mother introduced them as her cousins. She recognized one as her attacker. After this incident at her parent's house, Campos-Guardado reported that she "knew she was being watched." The attacker tracked her down several times, threatening to kill her and her family if she revealed his identity. Later, the factory where she worked was burned down. She left for the United States after this incident.

In her asylum application, Campos-Guardado stated that she was persecuted because of a political opinion attributed to her because of her family's role in the agrarian reform movement. She also claimed that she was persecuted on account of her membership in a social group comprised of her family, all of whom were targeted

because of their position in the cooperative movement. Campos-Guardado's case was denied asylum by three levels of adjudication, first the Immigration Judge, the BIA and finally the Third Circuit Court of Appeals.

This case is often overlooked in analyses of social group jurisprudence because the Court focused exclusively on Campos-Guardado's imputed political opinion and did not assess her claim to social group status. However, I argue that the denial of her asylum claim on both political opinion and social group status offers insight into the lengths that adjudicators would go to deny asylum to women who experienced gender-based persecution. As I illustrate, adjudicators make social group and political opinion contingent upon one another. To deny her asylum claim they first argued that Campos-Guardado was not a member of a social group (her family) because she possessed no clear political opinion of her own. As I argued in the last chapter, this was precisely the kind of gender bias perpetuated in asylum proceedings. Second, they argued that the kind of violence perpetrated against Campos-Guardado (rape) was not political either. Indeed, the adjudicators claimed that rape was simply a personally motivated act perpetrated by the paramilitary officers against her whereas the murder of her uncle was a politically motivated act. In other words, at the scene of the violence in El Salvador, Campos-Guardado's uncle was murdered in front of her for political reasons while she was raped for personal reasons. In sum, to deny Campos-Guardado's claim she was removed from her family, their ties to the cooperative movement, stripped of her political subjectivity and the political significance of sexual violence against women during wartime.

4.1.2. Exclusionary Logic VII: No Opinion of Her Own

As I argued in the previous chapter, adjudicators subjected Central American applicants to unduly high and restrictive political opinion standards. Applicants fleeing conditions of widespread violence were classified as displaced persons whose experiences of violence resulted from generalized harm. As the Court stated in *Acosta*, imputed political opinions were not enough for applicants fleeing El Salvador since all actions had “political implications” during conflict. Like *Acosta*, in the *Campos-Guardado* decision, the Court explicitly invoked a higher standard in excess of statute language. They claimed that, in the context of civil war, applicants had to distinguish themselves as individuals who were singled out because of overt, visible and public political activity to win asylum regardless of the attackers motives.

To achieve this exclusionary outcome, the adjudicators had to downplay Campos-Guardado’s claim to be a member of a social group, her family. To do this, the Court had to first separate Campos-Guardado from the family and then frame her as an apolitical individual. By separating Campos-Guardado from her social group claim, the Court avoided previous precedents that would have recognized that she was “immutably” and “fundamentally” tied to her family. Moreover it denied that she was voluntarily associating with them and sharing close affiliation. Rather, the Court stated that her social group claim was contingent on her political opinion.

Because Ms. Campos's claim of persecution on account of "group membership" relies upon the attackers' alleged attribution of political opinions to the family group, we focus on the scope of the statutory term "political opinion (*Campos-Guardado vs. INS*, 1987, 288).

Rather than analyzing her claims to social group status and political opinion separately, the Court collapsed the relationship between the two and prioritized the political opinion, thus erasing immutable and fundamental characteristics of kinship from the discussion.

Here Campos-Guardado would have to demonstrate, in a sense, that she held and practiced the same political views of her family to be persecuted. The Court's claim that the political opinion and social group status were contingent on one another backhandedly undermined Campos-Guardado's connection to a social group, her family, and what would have been a viable claim to asylum.

The Court actively severed her from her family and claimed her individual political opinion was lacking. Citing the BIA's decision, the Court used the civil war to claim that she needed to articulate an actual political opinion that motivated the attacks. Social group affiliation would not be enough. The Court argued that

...showing that a persecutor's conduct furthers his goal in a political controversy is insufficient to establish persecution on account of "political opinion" within the meaning of the Act. Instead, the alien must show that it is his own, individual political opinion that a persecutor seeks to overcome by infliction of harm or suffering (Campos-Guardado vs. INS, 1987, 288, emphasis added).

Thus although the Court originally claimed that her membership in a social group relied on the political opinion of the family group, the Court's analysis focused on Campos-Guardado as an individual who was distinct from the family. They justified their logic as necessary in times of civil war, because all actions had the appearance of being political. The Court even acknowledged her uncle's political views as a motivating factor. The Court thus severed her from the family group and thereby the political motivations of the attackers. Citing the BIA's decision, the Court claimed that,

*[a]lthough the Board assumed the veracity of Ms. Campos's account of the events at her uncle's house [the murder and rape], and that *the attack resulted from her uncle's political views, it nevertheless concluded that Ms. Campos "had not shown that the attackers harmed her in order to overcome any of her own political opinions"* (Campos-Guardado vs. INS, 1987, 288, emphasis added).*

While they recognized her uncle's political opinion and the political nature of the attack on her family, they found Campos-Guardado to be distinct and detached from her family. In an astonishing logical leap, adjudicators accepted the political motivations of the attackers and the political views of her uncle but denied her as a party to that political opinion or motivation. This was only possible by denying her social group claim; that she was not a member of a family with a political opinion or that she might have a political opinion "of her own." According to the Court's previous statements, this should have been enough for Campos-Guardado to prove the family group was an imputed a political opinion and that the attackers may have persecuted her either individually or to induce fear within the family group.

While the Court recognized all the other male actors at the scene of the violence as political subjects, the Court found Campos-Guardado to be so different that they could not imagine that she would be attacked for the same reason. As they stated,

...the record does not establish that [Ms. Campos] was persecuted on account of any political opinion she herself possessed or was believed by the attackers to possess (*Campos-Guardado vs. INS*, 1987, 289).

Campos-Guardado resisted the efforts to depoliticize her and her experiences during the appeals process. She pointed out how unreasonable it was for the Court to assume that the persecutor's motives for attacking her were any different from their political motivations for torturing, executing and raping her family members. However, her arguments went nowhere. To adjudicators, she was only a private figure without a political opinion. As a third world woman of color whose family was involved in agricultural and rural work, they refused to see her as a subject possible of engaging in the political work of her family or being perceived as such. As McKinnon states, "The

persecutors were recognized as acting out of political goals, but political goals against a nonpolitical subject” (2010, 88). In sum, to adjudicators, everyone else was a political subject but Campos-Guardado and they used this to undermine her claims to belong to the family as part of a social group.

4.1.3. Exclusionary Logic VIII: Sexual Violence as Apolitical

The second aspect of this case that is critical to my dissertation concerns the way that adjudicators interpreted sexual violence itself as apolitical. To the Court, Campos-Guardado just happened to be at the wrong place at the wrong time, her presence at the scene of a politically motivated murder was rendered as circumstantial, and sexual violence was treated as a personal rather than political decision of the attackers. As they stated,

The Board further found it unlikely that the attackers had targeted Ms. Campos as a victim, because they could not have expected her to be present at her uncle's home that day (*Campos-Guardado vs. INS*, 1987, 288).

While her male relatives’ torture and murder was clearly political to adjudicators, Campos-Guardado was construed as the victim of random violence that was not politically motivated. The logical leaps made by the adjudicators to separate Campos-Guardado from the scene of persecution enabled them to claim that she fell squarely outside the bonds of asylum protection. As they stated, asylum law was reserved for those who were targeted rather than randomly victimized. In their estimation, rape was not a targeted act, but was simply a “harm from civil disturbances,” which Congress had expressly not included within the gamut of asylum protection (*Campos-Guardado vs. INS*, 1987, 290). Sexual violence was thus reproduced as simply a misfortunate outcome

of war rather than a political act.²³

By focusing their full attention on the attackers, the adjudicators erased any rationale as to why Campos-Guardado herself would be at her uncle's home that day, for instance due to her own support for the agrarian reform movement or simply because she was part of a social group, i.e. the family. Ultimately, the Court dismissed the rape she experienced by referring to her attacker's motives as "personally motivated" and that any future fear of persecution was baseless because it was unlikely that the individual attacker would continue the abuse (*Campos-Guardado vs. INS*, 1987, 288). To arrive at this decision, the adjudicators had to effectively deny that she was present at the scene of a political murder, that she was a member of her family, that she had a political opinion and that violence against women was a specific tactic used in war to instill fear and persecute enemies.

4.1.4. Ordinary Sexual Violence: The Legacy of *Campos-Guardado* for Gender-Based Asylum

In the *Campos-Guardado* case, the Court relied on and reproduced the notion that women were apolitical subjects and that sexual violence was ordinary. The decision relied on the grounds of exclusion developed in *Acosta* and *Sanchez-Trujillo* associated with rendering potential asylum seekers as apolitical. While she may have been singled out for sexual violence, Campos-Guardado was not political or significant enough for that violence to register as persecution and therefore for her to meet the definition of a

²³ Campos-Guardado appealed her case to the U.S. Supreme Court. However, the Solicitor General endorsed the views of the Fifth Circuit Court. In the brief denying her appeal to the Supreme Court, he characterized Campos-Guardado's case as a "sad fact of life" and an example of how "those who have political ends sometimes wreak violence on wholly innocent, apolitical victims" (7). The brief also cited *Sanchez-Trujillo* to describe her as "being at the wrong place at the wrong time" (8). (Cert. Denied. Brief for the Respondent in Opposition, *Campos-Guardado vs. INS* 1987, No. 86-1969). <http://www.justice.gov/osg/briefs/1987/sg870401.txt>

refugee. The decision thus demonstrates the difficulty women faced to be recognized as political subjects to asylum adjudicators. This rationale was achieved through logical leaps that ultimately rendered Campos-Guardado as absent during a violent scene with political motives where she was terrorized and raped. While the Court acknowledged the rest of the scene of violence as persecution they normalized the sexual violence against her by stripping it of any and all political dimensions. In doing so, they claimed that she did not face “persecution,” as such and therefore did not qualify as a refugee. In a sense, Campos-Guardado therefore exemplifies precisely the kind of discrimination against women asylum seekers that have motivated feminist lawyers to attempt to expand refugee definitions.

As human rights and feminist legal scholars have claimed, sexual violence was long been viewed as a private, personal harm rather than a political assertion of power and control (for example, see Peters and Wolper 1995). Feminist legal scholars have argued that gendered experiences of persecution were illegible to judges because they conflicted with masculine norms governing refugee statutes and procedures. According to Anker (2002), the effort to erase the political nature of sexualized violence in asylum proceedings like Campos-Guardado was common. Adjudicators dismissed cases as apolitical where the physical harm was sexualized in any way (140). Rape was privatized and considered the outcome of an “unrestrained and unrestrainable male appetite” (ibid). Yet, Campos-Guardado’s experiences illustrated very clearly the logic and political nature of gendered persecution. The men and women at the scene of the violence were separated based on their sex and then given differential treatment: the men were tortured and murdered; the women were forced to watch and then were raped. Campos-

Guardado's well-founded fear of future persecution was rooted in her belief that she would be violated again if deported to El Salvador. From a feminist perspective, this was a clear example of gender biased adjudication. Indeed, the case illustrates the great lengths that adjudicators go to deny asylum claims, particularly for women.

My legal archaeology however offers an additional insight. By tracing the grounds for exclusion in the *Campos-Guardado* case I find that restrictionist interpretations of political opinion and definitions of persecution were already established in the *Acosta* and *Sanchez-Trujillo* precedents. This converged with adjudicators' efforts to police how the social group provision could be used to prevent those fleeing Central America from 'taking advantage' of this undefined category. As the Court explained their rationale in the *Campos-Guardado* decision, they suggested that Congress did not intend asylum to protect displaced persons who suffered from "harm from civil disturbances" (*Campos-Guardado vs. INS*, 1987, 290). Such language about displaced persons and civil disturbance captured precisely the kind of discursive artifacts that characterized the flood fears in the previous cases of *Acosta* and *Sanchez-Trujillo*. I argue that the grounds for excluding Campos-Guardado were not only perpetuated on universalist gender bias in asylum adjudication, but as such language implicates, she was also excluded on a highly specific set of concerns about large numbers of Central American asylum seekers fleeing civil war. I argue that the refusal to evaluate Campos-Guardado's social group claim and the excessive scrutiny of her political opinion were maneuvers in response to broader flood fears and gate-keeping practices designed to exclude El Salvadorian migrants.

However, Campos-Guardado's case demonstrates how these flood fears were also feminized, raced and classed. She was marginalized not only as Salvadorian, but as a

third world women of color and a *campesina*. As McKinnon (2012) argues, adjudicators read her as a poor, third world woman of color and mobilized culturally racist assumptions visible in their refusal to grant her any public or political subjectivity (91). Her identity and social position were not ones of value or importance to adjudicators. The violence she experience could thus only be read as random. Indeed, by depoliticizing sexual violence, adjudicators broadened the scope of violence swept under the amorphous category of generalized harm arising from conflict, and broadened their scope of populations whose access to asylum would need to be regulated, controlled and contained.

4.2. *Gomez v. INS* (1991)

In the case of *Gomez v. INS*, I extend my analysis of flood fears and early gender-based asylum claims to illustrate how adjudicators sought to narrowly define the social group category to exclude women asylees from Central America who were fleeing sexual violence. The Courts were reluctant to recognize women claiming social group status based on their gender because Judges feared this would open up the floodgates of asylum to all women. This fear about group size was particularly acute when coupled with the notion that sexual violence was a form of generalized harm, affecting an indefinite amount of women. Using sexual violence to claim persecution on account of gender thus presented a considerable threat to adjudicators. The following case echoed sentiments in the *Campos-Guardado* decision, which normalized sexual violence as a fixture in the context of conflict. As a form of violence affecting all women, adjudicators dismissed applicants using gender to claim social group status because they presented the danger of encompassing too many women.

Gomez v. INS also closely echoed the flood fears of the *Sanchez-Trujillo* case, which was used as a precedent to deny Gomez asylum. Similar to *Sanchez-Trujillo*, adjudicators denied Gomez asylum because the proposed social group was considered too large to represent a distinct class of refugees.²⁴ In *Gomez vs. INS*, the Second Circuit Court invoked the grounds for exclusion in *Sanchez-Trujillo* to deny social group status to a woman repeatedly raped by armed militants. The applicant in the case, Carmen Gomez, argued that she belonged to a social group targeted for persecution because of age and gender. As I discuss, the Court drew upon the normalization of sexual violence and the fear of large groups to claim that gender was insufficient to demarcate a legitimate social group.

4.2.1. Background on *Gomez v. INS*

The applicant in the case, Carmen Gomez, was a Salvadorian woman who had been the target of militant violence. She reported being raped and beaten on five separate occasions because her family did not support a particular rebel faction. Each time her life was threatened and her home vandalized. She came to the U.S. in 1979 at the age of 18, entering without documentation. Over the years, she worked at several odd jobs to support herself, including as baby sitter and beauty shop attendant. However, in 1988, “Gomez was unable to pay her rent and began selling cocaine” (*Gomez v. INS*, 1991, 662). She was arrested for selling cocaine and placed in deportation hearings. When she refused to designate a country of return, the INS chose El Salvador. Subsequently she applied for asylum (*ibid*).

²⁴ In *Sanchez-Trujillo*, the Court denied asylum to Salvadorian men who claimed membership in a social group defined by gender, age, working-class status and political neutrality and in response issued standards that required social groups to be small and discrete.

Gomez sought asylum based on her past experiences of persecution. She argued that she belonged to a social group of “women who have been previously battered and raped by Salvadoran guerillas.” This “discrete group,” she argued, “is subject to, and singled out for, persecution in El Salvador” (*Gomez vs. INS*, 1991, 663). In 1990, an IJ denied her applications for both withholding of deportation and asylum. She appealed to the BIA, which dismissed her claim. She appealed to the 2nd Circuit Court of Appeals, which also dismissed her appeal. The 2nd Circuit Court of Appeals concurred with IJ and BIA, finding that Gomez failed two critical aspects of the refugee definition, namely that she had a well-founded fear of persecution and that she was part of a social group.

4.2.2. Exclusionary Logic IX: Youth and Gender are Too Broad

The case of Carmen Gomez highlights the difficulties for victims of gender-based violence to use the social group category. In their decision, adjudicators capitalized on the ambiguity created by competing definitions of a particular social group and created their own conglomeration. When assessing Gomez’s social group claim, they included elements of the close affiliation (*Sanchez-Trujillo*) and fundamental characteristics (*Acosta*) tests, in addition to their own emphasis on visibility/recognition by outside observers. While they claimed that race, religion, nationality and political opinion were “recognizable and discrete,” according to the Judges, youth and gender failed each of these requirements.

The Court claimed that Gomez failed to prove she belonged to a "discrete group subject to, and singled out for, persecution in El Salvador." As they stated,

The phrase "particular social group" has been defined to encompass "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish

them in the eyes of a persecutor--or in the eyes of the outside world in general. Like the traits which distinguish the other four enumerated categories--race, religion, nationality and political opinion--the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group (*Gomez v. INS*, 1991, 664).

As the Court stated, youth and gender failed because they are “broadly-based characteristics.” The Court’s reasoning belied a concern that recognizing youthful women as subjects of persecution would adversely affect social group case law. Here they drew a direct parallel to the *Sanchez-Trujillo* Court’s concern about the dangers of accepting social groups that were too broad.

This case, however, extended concern about the breadth of social groups because it was intertwined with the normalization of violence against women. The Court normalized sexual violence by simultaneously recognizing that women were the primary victims while undermining any explanation of why such violence occurred. In affirming the lower court’s decision to deny Gomez asylum, adjudicators tacitly recognized that women were the subjects of rape while denying a reason for this vulnerability.

Here, Gomez’ claim that she is a member of a particular social group was properly rejected. As the BIA noted, Gomez failed to produce evidence that women who have previously been abused by the guerrillas possess common characteristics--other than gender and youth--such that would-be persecutors could identify them as members of the purported group. Indeed, there is no indication that Gomez will be singled out for further brutalization on this basis. Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman. Accordingly, because Gomez has not presented evidence that she has a fear of persecution on account of her race, religion, nationality, political opinion or membership in a particular social group, she has not proven her status as a refugee (*Gomez v. INS*, 1991, 664).

According to the Court, Gomez failed to qualify for refugee status because gender and youth did not sufficiently demarcate a social group that persecutors would seek to harm. Persecutors apparently would not pick people out of a crowd based on youth and gender. Yet, the Court also asserted that the problem with age and gender was that Gomez could not distinguish herself from other young women. Undifferentiated from other women, Gomez failed to show that she would be “singled out” for further brutalization because all women presumably were subject to or risked getting raped. Gomez’s explanation of the rapes as violent acts targeting her as a young woman because of not supporting a militant group thus failed in the Court’s estimation.

4.2.3. Gender Plus: The Legacy of *Gomez* for Gender-Based Asylum

Like in the *Campos-Guardado* case, the Court refused to acknowledge that sexual violence was a targeted act, carried out according to gendered logics of power and control. Rather, they described the rapes against Gomez as perpetrated without motive, as “wantonly inflicted” (*Gomez v. INS*, 1991, 664). The Court refused to accept gender and age as motivating factors because they again stripped these social group characteristics of political significance. Within a court system designed to address political persecution, sexual violence was framed as random, apolitical and too widely experienced. In the end, the Court claimed that Gomez was not unique enough; she faced the same risk as other women, and therefore failed to prove she was being singled out. Her experiences were rendered as common: she was subject to sexual violence just like all young women could be. To win asylum, she would have had to stand apart from others and present some kind of an exceptional claim. However, because she failed to show that she was exceptional in relation to other women, she failed to qualify for refugee status.

The case of Carmen Gomez represents another important pattern in which adjudicators claimed that gender was insufficiently “narrow” to qualify as part of a particular social group, even when coupled with one or more modifiers such as age. Despite widespread acceptance of the *Acosta* social group definition, adjudicators refused to accept gender alone as a basis of persecution. Some practitioners refer to this as the “gender-plus” issue, in which a combination of other characteristics must be added in order to sufficiently define and delimit gender in a proposed social group. Rather than satisfying calls for an intersectional understanding of gender, these complex gender-plus social group formulations respond to the need for groups to be sufficiently narrow so as not to provoke flood fears.

The modification of gender through other factors to explain persecution is not the result of applicants’ ability to name the conditions of their abuse in a contextualized and intersectional manner. Rather, they must navigate adjudicators’ expectations. Indeed, the *Gomez* decision, and the issue of “gender-plus” highlights the incredible power of adjudicators to decide how and when gender matters in women’s accounts of persecution. Claimants must be wary of triggering flood fears, and thus avoid groups that are broad. Yet, advocates point out that complex social group formulations can also be self-defeating (Smoot 2010, 15). The following case, *Fatin v. INS* elaborates on this unpredictable and complex terrain of formulating social groups for gender-related claims that were neither too broad nor too narrow.

4.3 *Fatin vs. INS* (1993)

In this section I explore the first ruling following *Matter of Acosta* that confirmed sex as the basis of a social group claim. In the case of *Fatin v. INS*, the Court suggested

that sex could be a permissible social grouping for Iranian women who transgressed the social mores of their country. Gender-based asylum advocates regard this as positive decision because the Court explicitly stated that sex on its own constituted a particular social group as defined in *Matter of Acosta (Fatin v. INS)*, 1993, 1239, see also Chan 2011, 182). While this recognition bolstered advocates' claim that gender-related cases rightfully fell within the social group provision, it also demonstrates the incredible vulnerability women experienced because of gendered logics of exclusion and flood fears.

Although adjudicators acknowledged that sex could form the basis of a social group, the applicant in this case was ultimately denied asylum (like *Acosta* and *Sanchez-Trujillo*). Judges accepted the Iranian government's discrimination against all women as proof that they existed as a social group. However, because all women suffered equal mistreatment, adjudicators faulted Fatin for not distinguishing herself enough from other women. In other words, while the persecutory treatment of all women validated her claim that a social group existed, it undermined her ability to prove that she was individually targeted. This paradox illustrates one way in which flood fears undermined women's access to asylum protection.

4.3.1. Background on *Fatin v. INS*

The applicant in the case, Parastoo Fatin, left Iran in 1978 when she was 18 years old and entered the U.S. on a non-immigrant student visa. She completed high school in Philadelphia and continued onto college in the same area. In 1986, while attending college, she applied for political asylum. Fatin explained that while in Iran she had been involved with a pro-Shah student group who opposed the Ayatollah Khomeini and had

also been involved with a women's group associated with the Shah's sister. She had also refused to wear the veil, a symbol of support for the fomenting opposition. Fatin stated that if she returned to Iran, she would be interrogated, publicly punished (stoned or whipped), jailed and forced to practice Islam. She identified herself as a feminist whose beliefs directly contradicted Iranian laws targeting women.

An advisory opinion from the Department of State stated that she did not establish a well-founded fear of persecution, and subsequently in 1986 the INS District Director denied her asylum application. At a hearing before an immigration judge in 1987, Fatin elaborated on the nature of her political activities in Iran and her involvement in women's rights groups. She expressed fear about the government ruling the country and her desire to choose her religion rather than be forced to practice Islam. The immigration judge denied her case, stating that she would be subject to the same discriminatory treatment as all other women in Iran. As he stated, she would not be singled out, there was "no indication that there is a likelihood that the Iranian government would be particularly interested in this individual and that they would persecute her" (*Fatin v. INS*, 1993, 1236). Rather, he characterized her fear of return as "based upon uncertainty and the unknown" (*Fatin v. INS*, 1993, 1236-7).

On appeal to the BIA, Fatin elaborated that she would be persecuted based on her political opinion and membership in a particular social group of "the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals" (*Fatin v. INS*, 1993, 1237). She also stated that she had a "deeply rooted belief in feminism" and in "equal rights for women, and the right to free choice of any expression and development of abilities, in the fields of education, work, home and

family, and all other arenas of development" (ibid). The Board rejected this argument and once again stated that there was no evidence that she would be "singled out" for persecution. Instead, the Board observed that she would be "subject to the same restrictions and requirements" as the rest of the population (*Fatin v. INS*, 1993, 1237).

Like in all of the cases reviewed in this dissertation, the *Fatin* case illustrates how adjudicators reinterpreted legal standards to arrive at a particular legal outcome. When the Third Circuit Court of Appeals reheard the case, they established a three-part measure for her to pass: (1) identify a group that constitutes a "particular social group" within the Acosta definition, (2) establish that she is a member of that group, and (3) show that she would be persecuted based on that membership (*Fatin v. INS*, 1993, 1240). As the Court stated,

In [the Acosta decision], the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted (*Fatin v. INS*, 1993, 1240).

The Court thus accepted that women were treated in a persecutory manner in Iran, warranting their recognition as a particular social group.

The Court went on to argue that *Fatin* had proposed a social group that was narrower than women in general. Indeed, the Court praised her proposed social group because it consisted of enough specificity that narrowed down a broader class of Iranian women to a very specific subgroup of women who might be singled out. In this sense, they argued that her claim fulfilled the gender-plus standard made clear in the *Gomez* case. The Court explained their interpretation in the following manner,

The petitioner's primary argument, in any event, is not that she faces persecution simply because she is a woman. Rather, she maintains that she faces persecution because she is a member of "a very visible and specific subgroup: Iranian women who refuse to conform to the government's gender-specific laws and social norms." This definition merits close consideration. It does not include all Iranian women who hold feminist views. Nor does it include all Iranian women who find the Iranian government's "gender-specific laws and repressive social norms" objectionable or offensive. *Instead, it is limited to those Iranian women who find those laws so abhorrent that they "refuse to conform" -- even though, according to the petitioner's brief, "the routine penalty" for noncompliance is "74 lashes, a year's imprisonment, and in many cases brutal rapes and death" (Fatin v. INS, 1993, 1241, emphasis added).*

In sum, the BIA found the gender-plus argument sufficiently convincing for Fatin to meet the first test. While the Court praised the narrowed down class of Iranian women Fatin proposed, they trumped up the focus on the "very visible and specific subgroup's" opposition. They subsequently turned their attention to whether she met the standard of this grouping. The BIA, in other words, still had to decide if she actually demonstrated membership in such a group.

4.3.2 Gendered Exclusionary Logics: A Willingness to Comply

In evaluating Fatin's social group, the Court honed in on and emphasized just one aspect of the group description, their opposition to societal norms. Their interpretation specifically emphasized how this smaller class of women would visibly oppose the laws of Iran. The visibility of the opposition, they reasoned, was what signified the degree to which the beliefs were fundamental or immutable, and therefore whether the group fell within the scope of asylum protection. Through a line of reasoning designed to discount the fundamentality of Fatin's beliefs, the BIA imposed their views of what constituted an acceptable amount of opposition. They claimed that the fundamentality of someone's beliefs in this group could only be evident through their willingness to suffer for non-compliance. In their estimation the "refusal to conform" translated into a willingness to

be injured or even die for one's beliefs. Such was the only acceptable way, the BIA claimed, that Fatin could be recognized as a member of this social group.

if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as "so fundamental to [her] identity or conscience that [they] ought not be required to be changed" (*Fatin v. INS*, 1993, 1241).

The Court thus tacitly established that "profound" beliefs were evident only when a woman would choose to suffer the grave consequences of non-compliance. Through a complex and puzzling line of reasoning, the Court found that Fatin failed to meet the measures that the Court outlined. As I illustrate below, they claimed that if she were a member of this social group she would need to be willing to accept the abuse the Iranian state would inflict upon her (being whipped, imprisoned, raped or killed).

The Court argued that Fatin did not express the degree of resistance such a group mandated. Fatin did not refuse to conform, thus the Court argued that her beliefs were not profound. As they explained, she had only stated that she would "avoid compliance." To the Court, that was not enough.

The petitioner's difficulty, however, is that the administrative record does not establish that she is a member of this tightly defined group, for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required (*Fatin v. INS*, 1993, 1241).

In the Court's estimation, Fatin did not show that she abhorred Iranian dress and gender-specific laws "so profoundly" that compliance would amount to persecution. While Fatin claimed to fundamentally oppose the gender specific laws of Iran, her actions did not match adjudicators' expectations of what that opposition would look like. Thus, while they accepted that the punishment for not adhering to Iranian gender-specific laws would

be amount to persecution, they made refugee status contingent on Fatin actually subjecting herself to such treatment.

Fatin did not prove she had the “missionary fever”²⁵ expected by the judges (which would have distinguished her from other women), so the Board claimed that she in fact belonged to the much larger class of women in Iran who simply did not like the government’s laws and did not “wish” to comply (*Fatin v. INS*, 1993, p. 1241-2). In a complete disavowal of how gendered power relations function, and a callous disregard for the fear of persecution for her beliefs, the BIA claimed that Fatin’s desire to evade persecution amounted to a loss of social group status. Women’s willingness to comply, according to the Court, meant that they were not persecuted. Thus Fatin failed to prove “she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender”(*Fatin v. INS*, 1993, 1240). Rather, Fatin faced what they described as “generally harsh conditions shared by many other persons” (ibid).

“Generally harsh conditions,” as defined through *Acosta*, fell squarely outside the scope of asylum protection, the Court argued. Not only was Fatin subject to the same treatment as all other women, but furthermore they asserted that persecution could not include “all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional” (*Fatin v. INS*, 1993, 1240). This included Fatin’s situation. There was a danger, they argued, of expanding asylum protection to include all treatment that Americans disliked. As they claimed, “a significant percentage of the world's population would qualify for asylum in this country -- and it seems most unlikely that Congress intended such a result” (*Fatin v. INS*, 1993, 1240). To avoid such a low standard and the

²⁵ The 8th circuit used this language in a similar case *Safaei vs. INS*, in which they directly relied on the Fatin precedent to deny an Iranian woman asylum because she did not demonstrate enough opposition.

expansion in protection that would result, the Court needed to require more than “mere repugnance” to a governmental policy (*Fatin v. INS*, 1993, 1240).

The case of *Fatin v. INS* exemplified how adjudicators used what they considered to be the societal wide oppression of women to deny claims of individual persecution. Even though Fatin expressed resistance to the gender-specific laws of Iran, judges did not believe this objection was strong enough, nor would they accept the generalized conditions of the gender-specific laws as persecutive. In their decision, the Court thus accepted the universal persecution of women as *status quo* and required Fatin to distinguish her persecution from that confronting the average woman. This logic was employed in a series of similar cases at the time.²⁶

The adjudicators rationale is yet another example of how Court subjected particular applicants to higher levels of scrutiny. In *Fatin*, the Court turned refugee protection into a “reward for heroism, martyrdom or exceptional bravery” (Bhabha 1996, 16). A standard which was unmet by the vast majority of those granted asylum for fleeing Communist regimes. This higher standard, however, served the function of turning asylum into an “extremely scarce commodity,” one available only to those who presented exceptional claims (*ibid*). In this case, exceptionality was articulated through the demand for daring rebellion against societal norms. Not only did this contradict the aims of the Refugee Convention, but it also signaled a major problem with the immutable and

²⁶ At least three other cases of Iranian women demonstrated similar logic. In *Fisher vs. INS* (Court of Appeals, 9th Circuit, 1996), the applicant was denied asylum on the basis that she was subject to laws that applied to all women. In *Sharif vs. INS* (Court of Appeals, 7th Circuit, 1996), the Court found that neither persecution shared by the population nor punishment for violating laws of general applicability resulted in persecution. In *Safaie v. INS* (Court of Appeals, 8th Circuit, 1996), the Court denied the petitioner asylum because a social category based solely on gender “is over-broad, because no fact finder could reasonably conclude that all Iranian women had a well-founded fear of persecution” (*Safaie v. INS*, 1996). Furthermore, the Court claimed that Safaie had not resisted her persecution with a “missionary fever” and the opposition she encountered was not “of the depth and intensity required” for a grant of asylum (quoted in Ciampa 1996, 5).

fundamental characteristics requirement of the *Acosta* definition of a social group.

Adjudicators were empowered to decide what was immutable or fundamental to one's identity, and subsequently the standards by which applicants could prove they possessed those qualities.

For women, *Fatin v. INS* also signaled a problem for how their claims would be read against the social context from which they arose. At the most basic level, the social group category was intended to recognize harm related to a shared attribute, yet this case demonstrated that if the attribute was too widely shared, it could undermine the chance to win asylum. This paradox for social group claims would later be described as the need to formulate groups that were "neither too broad, nor too narrow" (see *Matter of R-A-* 1999, 290). Applicants had to somehow define their social groups to hit a sweet spot, avoiding a breadth that would provoke flood fears but not defining it so narrowly that judges could claim the group was unrealistic and fabricated for legal purposes. Furthermore, evidence of group wide persecution also enabled adjudicators to raise the bar of exceptionality, making it harder for women to prove they had been singled out.

4.4 Conclusion

In this chapter, I examined how women's claims to social group status based on gender-related persecution failed. Adjudicators framed the claimants as unexceptional in three overlapping and interconnected ways. The first was that sexual violence was normalized and depoliticized. Rape was considered to be both universal (affecting all women) yet random (not a targeted act). Consequently, adjudicators argued that gender and youth were characteristics that were too broad to provide the basis of a social group. Since all women could be raped, such violence did not sufficiently single a woman out as

part of a social group. Lastly, when group-wide persecution of women was recognized, it undermined individual claimants ability to argue that they were singled out for abuse. I argue that these three characterizations of gender and gender violence fit within the “undifferentiated mass” and/or “generalized harm” flood discourses.

While these cases highlight several critical issues that bear the trace of floodgate regulation in earlier social group cases, they also demonstrate how those legal formations transform with the increasing recognition that persecution can be gendered. As I demonstrated in the previous chapter, adjudicators defined the particular social group category to exclude social groups they considered to be too large. Thus although *Acosta* mentioned “sex” as an immutable and fundamental characteristic, social groups based on sex presented a problem for immigration control. The Court found gender to be an overly broad characteristic. Additional limiting modifiers could acceptably narrow gendered social groups, yet also posed the problem of being too narrow that applicants could not prove their membership in their own proposed groups.

The fear that gender was “too broad” to constitute a social group figured prominently in cases where the harm was “pervasive,” whether in the form of sexual violence or governmental policy. Gender-wide oppression could validate social group status but undermine claims to be individually targeted. Demonstrating group-wide persecution of women validated the claim that women were a distinct social group, but dually invoked concern about recognizing a pervasive form of harm as persecution. Mere membership in such a persecuted group was not enough. To restrict access to asylum protection, adjudicators scaled up standards of exceptionality. Applicants had to prove they were exceptional in some way to differentiate themselves from the general

population of women. In the following chapter, I examine in more detail how adjudications assuaged flood fears related to gendered claims of asylum in the landmark legal battle of Fauziya Kassindja.

Chapter 5: An Exceptional Case: *Matter of Kasinga*

5. Introduction

In 1996, Fauziya Kassindja, a young woman who fled Togo to avoid “female genital mutilation” was granted political asylum in the United States. After a two-year legal battle, during which she was detained, the Board of Immigration Appeals (BIA) granted Ms. Kassindja asylum. The decision set a nationally binding precedent that forms the bedrock of gender-based asylum jurisprudence. Advocates and scholars regard the case as “opening the doors” to gender-based asylum in the United States because the BIA recognized a gendered cultural practice as persecution and accepted a social grouping based partly on gender. Indeed, the case was the first of its kind to be granted by an appellate court based on *Matter of Acosta*, the 1985 decision that identified “sex” as a valid basis for social group membership. In this chapter, I examine how the decision to grant Kassindja asylum was informed by an exclusionary logic. In particular, I examine how flood fears and gate-keeping shaped Fauziya Kassindja’s struggle to meet the definition of a refugee. I argue that asylum officials and adjudicators predicated Kassindja’s inclusion on her exceptionality as a third world woman and on FGM as an extreme form of cultural practice. By defining the threshold for gender-based persecution through exceptionality, adjudicators were able to simultaneously exclude a broader class of women with gendered claims of persecution.

Although the *Matter of Acosta* decision (discussed in Chapter 3) created an opportunity for women to claim social group status based on their sex, in Chapter 4 I examined how this remained an unfilled reality for women. Based on my analysis, I

found that women were denied social group status because they failed adjudicators' standards of exceptionality. Standards of exceptionality refer to flexible measures by which adjudicators required the applicants to differentiate themselves from the general population. Adjudicators justified denying asylum by characterizing the female claimants as either part of an undifferentiated mass or as victims of generalized harm. As I argued in Chapter 3, these characterizations are expressions of flood fears that justify gate-keeping strategies. As concerns over controlling women's usage of the social group provision emerged, in each of the cases I examined, adjudicators invoked standards of exceptionality to reject gendered social group membership. The legal codification of gender was mediated by flood-gate-keeping, as adjudicators found that gender alone was insufficient to qualify as a basis of social group membership, that sexual violence was a widespread but personal problem, and lastly, that the widespread oppression of women undermined claims to being "singled out."

Kassindja was initially denied asylum by an immigration judge, and her struggle to win asylum became part of a nationally recognized fight to reform the asylum system. This chapter examines the definitional struggles leading up to and encoded in the final precedent setting decision granting Kassindja asylum. In this chapter, I demonstrate how Kassindja signaled flood fears associated with the global prevalence of gender violence to the adjudicative bodies of the Immigration and Naturalization Services (INS)²⁷ and BIA. In response, I find that they developed new regulative mechanisms to extend humanitarian protection in her case while minimizing its impact on immigration control.

²⁷ On March 1, 2003, the INS underwent massive reorganization and moved from the Department of Justice. Its functions were transferred into three different components within the newly created Department of Homeland Security, including the U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).

Such regulations relied on reconfigured forms of exceptionalism that differentiated certain kinds of gendered harm as eligible to pass through the gates of asylum. While the final decision by the BIA to grant Kasinga asylum is undoubtedly a positive one, my analysis focuses on how the decision operates as an intricate form of exclusion. I examine two dimensions of this intricacy. The first is that adjudicators designated FGM as the benchmark of gender-based harm, mobilizing cultural difference to define exceptionality, and secondly, adjudicators crafted an incredibly narrow social group precedent based on Kassindja's unusual circumstances. These aspects of the decision were later mobilized by adjudicators to limit eligibility for FGM claimants and for women seeking asylum for other kinds of gendered violence.

This chapter proceeds with background information on Fauziya Kassindja. I provide a detailed explanation of Kassindja's story, starting with her life in Togo and reasons for flight, her arrival at the Newark, NJ airport and her two year-detainment in U.S. prisons, and the legal battle. Laws are "artifacts" produced within particular historical contexts and Kassindja's story becomes increasingly important during the appeals process. The remainder of the chapter examines the appellate process, which consisted of several rounds of legal briefs exchanged between Kassindja's legal team and the Immigration and Naturalization Service (INS), representing the executive branch of the government. Through legal briefs, both sides presented their perspectives on whether Kassindja qualified as a refugee to the Board of Immigration Appeals (BIA).

Unlike the cases examined in Chapters 3 and 4, I had access to a broader range of case files in addition to the final published decisions, which allowed me to examine the 'internal' debates leading to the final decision. By examining the case as it moves

through different moments and levels of adjudication, my research highlights the regulatory impulse at the core of asylum law, a key factor that gender human rights and transnational feminists give little attention. While legal scholars and advocates identify the flood discourse as a key obstacle to favorable asylum reform (Smoot 2010, Musalo 2007), my analysis seeks to move beyond its explicit references to also examine the submerged and invisible iterations, the ways in which the metaphor is hailed without being stated (Lakoff and Johnson 1980).²⁸

Ultimately, my analysis demonstrates that the regulatory impulse, spurred by concern about a flood, plays a key role in Kassindja's case adjudication. The imperative to control/manage, while expressed differently by various adjudicators, is prompted by the threat Kassindja posed of an impending flood of future applicants. While the fear of a flood of immigrants was not a new one, this chapter illustrates the particular fears elicited by gendered claims to asylum and how state agencies managed the flood through inclusion not by denying entry. The final decision, rather than creating a broad precedent for gender-based asylum claims, actually served more as a safety valve, designed to release pressure on the state's humanitarian mandate while creating a narrow opening for future claimants.

5.1. Kassindja's Story

This section describes Kassindja's life in Togo, her family background and reasons for fleeing, as well as the details of her detainment and legal battle in the United States. This history was gleaned from legal affidavits submitted during the appeals process and from the memoir she co-authored, *Do They Hear You When You Cry* (1998).

²⁸ Lakoff and Johnson use the example of expressions such as "He's empty-headed" or "She's full of ideas" as ways of talking about the metaphor of THE MIND IS A CONTAINER (1980).

Kassindja's story formed the basis of her claim to asylum, but also provided necessary context for her case representation and adjudication. Many events occurring "outside" the adjudication system influenced the case trajectory as it moved from an anonymous, individual claim to become the poster-child of a national campaign to reform asylum. While some elements of her experience are extraordinarily unique, others aspects were tragically representative of many immigrants experiences in the United States. As Kassindja herself expressed in her memoir, she was one of many immigrants subjected to humiliating and degrading treatment, pushed to desire refoulement over continued detention. Her story speaks to the specific vulnerability of female asylees seeking protection from gendered harm, subject to the whims of individual adjudicators, and to the complicity of high-level decision makers in containing her as a "threat." Yet, Kassindja's gendered vulnerability and treatment in detention later catalyzed massive support on her behalf, putting significant pressure on the Appellate Courts to grant Kassindja asylum, forever changing asylum law in the United States.

Kassindja's narrative begins in her home country of Togo. As she described in her affidavit, she was a member of the Tchamba-Kunsuntu Tribe from northern part of her country. Her tribe was Muslim and very small and close, in which circumcision was a custom required before marriage. She was the youngest of four girls and two boys in her family. Her father was a successful businessman who owned a trucking company and she described him as a "well traveled and educated man" (1). He was relatively wealthy and she grew up in a middle class family. Because of this class status and her father's personal beliefs, Kassindja had very different experience than most girls in her tribe. Kassindja's father did not believe in female circumcision, forced marriage, polygamy or

the limited educational opportunities for girl children. Although girls were normally circumcised at the age of 15 in her tribe, her father shielded her from the practice. Kassindja's mother was from a tribe in Benin where circumcision was prevalent, but she had not undergone the practice because her older sister had died as a result. As Kassindja described, her father intentionally married an uncircumcised woman. Her father also encouraged all five of his daughters to pursue an education beyond the standard norm for Togolese women. He sent Kassindja to school in Ghana and she completed two years of high school at the time of her father's death. He encouraged his daughters to enter into monogamous marriages with a spouse of their choosing. Although the family was subjected to community criticism for rebuffing these norms, he was able to go against custom because of his class status. Kassindja was the only unmarried daughter when her father died.

Kassindja's father died in 1993 while she was at school in Ghana. After the funeral services, she returned to school to finish her year. As per local custom, her paternal aunt became the family authority figure four months and ten days after the death of her father. Upon return home for summer break, Kassindja found that her mother had been ousted from the family home and that her aunt, now in control of the family money, would not allow her to finish school. When Kassindja was 17, her Aunt introduced the idea of marrying an influential man in the local community who already had three wives. Kassindja refused for several months. One day her aunt announced that she would be married that day. The aunt and the future husband planned for Kassindja to be circumcised after the wedding ceremony before the marriage was consummated. Despite her resistance, Kassindja was married in a traditional wedding ceremony in which the

bride and groom were in different locations. Kassindja refused to sign the marriage certificate. That night, with help from her sister, she fled from Togo after the marriage ceremony. She drove with her sister to Ghana. Knowing that her aunt and husband could locate her there, she bought a plane ticket with money her mother inherited from her father. She boarded the first plane out of the country, which was headed to Germany.

In the Berlin airport, she explained that she was disoriented and looking for other Africans to help her. After a few hours, she struck up a conversation with a German woman in English. After hearing her story, the woman offered to give Kassindja a place to stay until she decided what to do next in exchange for cleaning and cooking duties. She lived with this woman for almost two months. One day on the way to a shopping center, she met a Nigerian man, Charlie, the first African she had met since her departure. They struck up a conversation and she explained her situation. Charlie offered to sell Kassindja his sister's British passport so she could go to the US where she had an aunt, uncle and cousin. A few days later, she purchased the passport and tickets with money given to her from her sister. She arrived at the Newark Airport December 17, 1994. Upon entering the airport in Newark, New Jersey, she immediately requested asylum. She told the interviewing immigration official that she fled a forced polygamous marriage to a man three times her age and that as a result of this marriage, she would be forced to undergo a practice called female circumcision. Following her statement, Kassindja was held in a small room and her personal belongings were confiscated. After a few hours, an immigration supervisor declared that the reasons laid out in her statement were not a basis for asylum. That night, she was handcuffed, shackled and told she was going to jail. So began Kassindja's battle to get asylum in the United States. She did not win her case

until June 13, 1996. During this time, she was detained in four different institutions, ranging from an immigration detention facility to a maximum-security prison.

5.1.1. Kasinga's Detention & Legal Battle

Once Kassindja was put into detention, her cousin who lived in Virginia, hired an immigration lawyer for her, Eric Bowman. Simultaneous to her legal battle to win asylum, Kasinga was also struggling to survive in detention. The conditions in the four detention centers/prisons were often appalling, and had documented problems of abuse and harassment. During her 17-month incarceration, she was handcuffed and shackled, strip-searched, verbally abused, harassed and constantly subject to degrading and humiliating treatment. At the Esmore facility, she was forced to take cold showers, denied sanitary napkins, and given dirty and ill-fitting clothes (including two sandals for the same feet). The most difficult problem she relayed enduring was being prevented from practicing her religion, Islam. She was put in isolation for attempting to perform her ablutions before praying, punished for trying to obtain a clean sheet to pray on, harassed by the guards for not eating during Ramadan, and lied to about being served pork (Br., March 13, p. 2-4). She was given inadequate medical care for acute problems, one doctor even prescribed "reading the Bible" to heal a skin rash (Br., March 13, 1996, p. 4). The "scariest" experience at the Esmore facility, however, was a riot instigated by the male prisoners. During the riot, she was beaten by the police, tear gassed, and had important documents about her persecution confiscated (which were never returned).

As a result of the riot, on June 18, 1995 a small group of immigrants were taken to the Hudson County Correctional Facility, a state prison in Hackensack, NJ. During transit, Kassindja recounted being verbally abused and berated by the officers for trying

to immigrate to the country (Br., March 13, 1996, p. 5-6). At this facility, she was housed with “tough criminals” and the other female inmates harassed her. Specifically, she recalled being prevented by other inmates from using the telephone to call her lawyer (Br., March 13, 1996, p. 6).

On Friday June 23, 1995, she was once again moved, this time to York County Prison (although a guard told her they were going to Atlanta, Georgia). She described feeling helpless and alone as she was moved “farther and farther” away from her family (Br., March 13, 1996, p. 6). York County Prison is a maximum-security prison and she was subject to routine strip searches. She was put into a cell with someone who smoked, and as a result started “coughing and vomiting blood” (Br., March 13, 1996, p.6). Despite her allergic reaction to smoke, her requests to be moved to the non-smoking wing were denied. She was housed in these conditions for almost two months.

The constant shuffling to different facilities not only strained communication with her lawyer and family, but would ultimately put her in the jurisdiction of a now infamous judge for her Merits Hearing. Just one month before her Hearing in August, she was moved to yet another facility, Lehigh County Prison. At this facility she was put in isolation for three weeks without any explanation (Br., March 13, 1996, p. 7). This was apparently an attempt to quarantine her because of possible tuberculosis infection, yet no medical records or x-rays were ever located. As a result of this solitary confinement, she lost 30 pounds. Her skin was “so dark from all the dirt” because she was not able to bathe during this time. A week after this ordeal, on August 25th, she had her first hearing before Immigration Judge Donald Ferlise in Philadelphia.

As described in the previous chapter, the Judge denied her asylum application²⁹ on the basis that Kassindja was not a credible witness. He further found that she failed to meet the statutory requirements because FGM and forced polygamous marriage did not qualify for asylum or withholding of deportation. Importantly, at this hearing Kassindja was represented by a third year law student clerking for her lawyer, Layli Miller-Bashir. After the case was denied, Miller-Bashir approached Karen Musalo, the Director of the Human Rights Law Clinic at American University to request that the Clinic take on the case. Musalo agreed and immediately began preparing a request for parole from detention, preparing the appeals brief, securing Congressional support, finding expert witnesses and contacting media (Kassindja and Bashir, 410-411).

The savvy legal team now representing Kassindja worked fastidiously on reaching out to the media and mobilizing congressional support. On December 10, Kassindja's name appeared in a *New York Times* article on the New York City based group Equality Now's anti-FGM campaign. The article cited the Immigration Judge's denial of Kassindja's claim and her detention. As a result, a series of newspaper articles exposing Kassindja's situation began to emerge. The first focused solely on her case appeared in the *Washington Post* a month later.³⁰ This article garnered even more media attention and public support (Kassindja and Bashir, 435-6). While significant momentum was building in favor of her case, Kassindja described increasing anxiety and desperation, as her conditions in detention were unchanged. At one point, she told her lawyers she wanted to return to her fate in Togo.

²⁹ Karen Musalo would later argue in an Appeals Brief, that Kassindja's attorney, Eric Bowman, inadequately represented her.

³⁰ "When Judge's Fail" by Judy Mann, Jan 19, 1996, *Washington Post*

In January 1996, Kassindja was moved back to York County Prison, where she was housed in maximum security. She was once again placed in a smoking wing despite record of her allergic reaction to smoke. It took her attorney “three days of constant calls” to have her moved into a non-smoking area (Br., March 13, 1996, p. 8). She described seemingly random harassment and malicious treatment by the guards in addition to routine humiliating strip searches and sexual harassment from other inmates. Contact with her attorney was difficult. Her attorney was not able to contact her directly, instead all immigrants had to call from a special collect phone in a noisy area which had pre-recorded interruptions and that automatically cut off after 10 minutes (Br., March 13, 1996, p. 9). If others were in line to use the phone, she had to wait her turn in line before calling her attorney back. Within these conditions, Kassindja wrote a second affidavit focused solely on her experience in detention. This affidavit was part of the second brief that Musalo submitted during the appeal.

Kassindja’s legal team was now embroiled in two intense battles: preparing her case for the BIA hearing and getting Kassindja out of detention. This second brief described Kassindja’s experience in detention as well as the failed efforts to secure her release. The brief was accompanied by a medical evaluation that described Kassindja’s declining physical and emotional health (Br., March 13, 1996, p. 2). The psychological evaluation indicated that she was suffering from extreme depression as a result of her internment. The evaluation expressed a sense of urgency given her young age and condition, requesting that she be removed immediately and placed in a “warm, loving home atmosphere either with a friend or relative” (Br., March 13, 1996, p. 3-4).

Kassindja's detention was not the result of oversight or neglect, but a willful effort by several government officials to contain her as a threat. The INS District Director, Scott Blackman, first denied a request for parole from detention in November 15, 1995. This District Director later denied the request of his own General Counsel, David Martin, who was persuaded by Musalo to change his position after negative media attention (Kassindja and Bashir, 448). In February 1996, the legal team sent a petition to Janet Reno with 26 Congressional signatures asking for Kassindja's release and the proper training of Immigration Judges on FGM (ibid, 437).

With limited options remaining, in March 1996, Kassindja's counsel filed a Petition for Writ of Habeas Corpus in U.S. District Court for Middle Pennsylvania, requesting that the Court find the denial of parole to be an abuse of discretion (Br., March 13, 1996, p. 3). The suit named Scott Blackman, the York Prison and its Warden, INS Commissioner Doris Meissner and the Attorney General Janet Reno as culpable for the illegal detention of Kassindja³¹ (Kassindja and Bashir, 461). This document cited the prison abuse, Kassindja's failing health and young age, the severally inadequate medical care in detention, as well as the family and community willing to support Kassindja upon her release. Four days after the Writ was denied, another large expose on her case was published in the *Washington Post*.³²

³¹ The Writ was denied by the court. Kassindja's reaction to this decision illustrates Agamben's notion of "bare life". "It was a long elaborate legal document that said all kinds of things, all of which boiled down to one basic point: even if the INS and the York Prison and District Director J. Scott Blackman had done everything my attorneys were claiming they'd done, so what? Mt attorneys seemed to forget something. I was an illegal immigrant. I was in "exclusion proceedings." In the eyes of the law, I basically didn't exist. The INS, Blackman and York Prison couldn't violate my rights. I didn't have any rights to violate" (467).

³² Linda Burstyn, March 17, Washington Post, "Asylum in America: Does Fear of Female Mutilation Qualify," March 17, 1996, Sunday Edition

Given the mounting negative publicity, the Board of Immigration Appeals ordered the INS to submit an Appeals brief on the case.³³ The INS had initially declined to do so, fully endorsing the Immigration Judge's decision. The INS complied, ironically now requesting an extension because of the "complex" and "important" issues raised by the case (Musalo 2010, 55). The INS General Counsel, David Martin, was directly involved in authoring the Brief (Kassindja and Bashir, 448). The INS abandoned much of the Judge's findings and conceded that Kassindja had a well-founded fear of FGC. They argued, however, that the case required a new framework to explain how it qualified as persecution and that it should be remanded back to the Immigration Judge. Kassindja counsel, on the other hand, argued that she was protected under existing refugee laws and did not warrant special treatment but adjudication that adhered to the principles of the law. As these legal arguments were exchanged in preparation for the BIA hearing, Kassindja remained in detention and her condition worsened. (She was later diagnosed with an acute peptic ulcer after being released from prison). She described getting sicker and sicker, to the point that her legal team filed for a "temporary restraining order" so she could seek emergency medical care because the imprisonment was a serious threat to her health and possibly her life (Kassindja and Bashir, 468). A U.S. District Judge denied this request (Kassindja and Bashir, 471).

Kassindja described her mounting desperation and desire to return to Togo. Events were happening quickly outside the prison, however, that garnered increasing support for her case. Most significant was that Celia Dugger from the *New York Times* visited Kassindja in prison to conduct an interview. The article appeared on the front-

³³ The INS justified prolonging Kassindja's case because of the "complex" issues it raised. The Board later chastised the INS, questioning how her prolonged detention resolved these questions.

page of the *New York Times*. It attracted so much attention that Equality Now had to set up a separate hotline for phone inquires about how to help Kassindja (Kassindja and Bashir, 470-1).

Nine days after the *New York Times* front-page article appeared, Kassindja was released from detention without explanation. The BIA hearing on her case took place on May 2. In two unusual moves, the Board met *en banc* to review the case and also allowed for oral arguments from the two parties. Their decision, which was issued on June 13, 1996, granted Kassindja asylum. The BIA published the decision, creating a national precedent binding on all Immigration Judges and Asylum Officers. The decision recognized that FGM can be persecutory and that Kassindja was part of a social group based partly on gender.

5.2. Gender-Based Advocacy Amidst Anti-Immigration Sentiments

As I explored in the previous chapters, the evolution of the “social group” category revolved around exceptionalism. Case law required applicants to prove they have been singled out or subjected to a risk of violence higher than that experienced by the population at large. Adjudicators continually used this principle to circumscribe access to the particular social group category. As evident from Central American cases, this standard was invoked when there were fears of a flood of applicants from a particular country or region. In *Re: Kasinga* (the immigration judge’s decision) illustrated the difficulties women fleeing gendered harm confronted in attempting to use the social group category. The judge denied her asylum because he found that she faced harm that was pervasive among women in her tribe. Yet, Kassindja’s claim emerged at a watershed moment for gender-based asylum. In 1995 just before her case was heard in the

Immigration Court, the INS had issued guidelines to support the claims of female asylees fleeing gendered harm, directly mentioning FGM as harm that should be eligible. The Immigration Judge's decision illustrated the incredible amount of discretionary power in the hands of judges who could deny asylum at will and ignore their governing agency's guidelines.

In many respects, Kassindja's initial rejection could be seen as a product of the old mechanisms of flood control in which the judge rejected her claim because she faced something that all women in her tribe did (the "pervasive harm" problem). During the appeals process however, her case took on new dimensions. The INS used her case to warn the BIA of new crisis: a flood of women fleeing gendered cultural practices. This is apparent in the INS briefs, in which they supported granting Kassindja asylum, but expressed alarm about what such a decision would signify to women across the globe if the decision became a precedent. Would the United States become a destination for over half the world's population? As a result of these concerns, I argue that her case became a forum to develop new regulative mechanisms that would allow for humanitarian protection of third world women without jeopardizing asylum's role in immigration control. In other words, her case became a vehicle for creating an expansion in refugee protection without significantly opening gateways for other women.

As legal archeology suggests, the case was an artifact of the times. The nature and content of the legal battle reveals much about how the case was embedded within other important domestic and global changes and transitions. *Matter of Kasinga* forged an expansion in refugee protection that was hard won. The case emerged during a time of uncertainty about the role of U.S. asylum protection post Cold War. Anti-immigrant and

pro-restrictionist groups lamented the supposed decrease in state sovereignty signaled by the increasing convergence of asylum provisions with international human rights standards. For example, groups such as Federation for American Immigration Reform argued the government had lost control over asylum by expanding the definition of a refugee to include gendered harm. The definitional struggles in *Matter of Kasinga* reflected this dispute over the future of asylum, whether it would be scaled back or expanded to new areas after the loss of the Communist defector as its primary subject (Swanwick 2006).

Decision makers in the case were not immune to increasing pressure from the public in support of Kassindja. The massive support for Kassindja and outcry over circumcision were the fruit of decades-long international work to bring attention to FGC practices as a violation of women's human rights. State-level bills in California and Washington D.C. outlawed FGC preceding the Kassindja case. After *Matter of Kasinga*, Congress outlawed FGC in the United States. This legislative action illustrated the "internationalization" of domestic laws (Gunning 1999) and suggested widespread support for the idea that women's rights are human rights. In many ways, the recognition of FGC as criminal and that a female specific form of harm could qualify for political asylum were victories for women's human rights advocates. For legal scholars, *Matter of Kasinga* also meant the U.S. was keeping pace with progressive gender-sensitive asylum policies in other industrialized nations such as Canada.

The work of critical feminist scholars however provides a much different reading of the focus on FGC both within and outside the courtroom. Asylum's regime of protection undoubtedly relies on racialized and imperialistic dynamics, summarized

poignantly by Gayatri Spivak's critique of the role of the subaltern in global imperialism, or "white men saving brown women from brown men" (1985, 121). White, western feminists have long been complicit in such efforts to "rescue" nonwhite women and women in the global south (Mohanty 1988, Grewal 1998, Abu-Lughod 2002).

This dynamic has been source of criticism of the international women's movement, which has disproportionately focused on sexual violence and cultural repression (Basu 2000). While framed as a universal concern among women, the focus on sexual violence was racialized, often pointing to women from the global south as the primary victims and subjects of rescue (Tickton 2011). This is symptomatic of the much larger power dynamic animating human rights discourse, argues Inderpal Grewal. Often used as a tool of nationalism, Grewal argues that human rights instruments elide the geopolitical contexts of their deployment and the ways that human rights discourse constructs the global South as "other", while maintaining the North as the protector of human rights abuses. Here the U.S. becomes the land of freedom and human rights, able to condemn other countries (Grewal 1999). The international women's movement she argues, mimics this dynamic because it is steered by hegemonic Western feminism which universalizes and stabilizes the category "women" based on Western white women's experiences. The resulting "ethnocentric universalism" essentializes non-Western women and their experiences.

Oxford (2005) argues, however, that Third World Women are not treated monolithically, but rather receive differential treatment in asylum based on whether the harm is "familiar" or "exotic." Oxford suggests that FGM cases are readily accepted: "Female circumcision claims, unlike other gender-based claims, are met with the

resounding assurance that they constitute persecution prior to an asylum seekers account of harm” (2005, 24). She attributes this acceptance to how female circumcision signifies cultural backwardness, unlike other forms of harm such as domestic violence (24). Similarly, McKinnon (2011) argues that Kassindja’s case was accepted because the patriarchal values underpinning FGM did not implicate U.S. patriarchy, but fed into a modern/traditional split between the U.S. and Togo. The focus on U.S. nationalism and imperialism leads both scholars to assert that FGM is embraced and that floodgate fears only plague other forms of harm such as domestic violence.

Critical Race Theorist Isabelle Gunning (1999) highlights the connections between debates about FGM in the West to racism, national dominance and immigration control. She argues that given the disparities in adjudication for FGC cases, *Matter of Kasinga* was positive attempt to create uniformity. However, she argued it was a symbolic gesture that had little weight outside of rhetoric. As a symbolic condemnation of the practice, it reinforced an imperialized and racialized division of the world’s cultures into civilized and barbaric nations, and gave the state an opportunity to condemn “them” (all Africans) for human rights violations while ignoring those committed in the U.S. In making her point, Gunning juxtaposes public and congressional support for Kassindja and the subsequent passage of the 1996 Illegal Immigration Reform and Responsibility Act (IIRRA). The IIRRA was hostile towards immigrants in general and lumped asylum seekers into the mix of potential threats to the nation. Specific provisions within the IIRRA made it more difficult for asylum seekers to win protection, such as expedited removal for claimants using false documents and decreased access to the

appeals process. Many of the measures in this act would have directly prevented Kassindja, and other women like her, from ever receiving asylum.

Yet, this anti-immigrant Act was also the vehicle through which Congress outlawed FGM in the United States. Gunning's critique highlights this tension between support for Kassindja during a "virulently anti-immigrant moment in U.S. history" (Gunning 1999, 48). Kassindja's experiences in detention is further evidence of the animosity directed towards immigrants who were increasingly regarded as threats due to fears of fraudulence, dependency, criminality, and terrorism. Gunning's juxtaposition of support for Kassindja amidst direct efforts to exclude immigrants and dissuade immigration suggests that her acceptance was not an open embrace. As I shall argue, the case illustrates how inclusion can function as a form of exclusion.

My work provides important insight into *Matter of Kasinga* and FGM jurisprudence, and the more subtle forms of floodgate fears. Legal archeology makes an important methodological contribution by focusing on the relationship between texts constituting the Kassindja file as well as between gendered and non-gendered cases prior to and following this important precedent. My analysis demonstrates not only the existence of floodgate fears in her case, but the important role such fears play in shaping the case representation and outcome. Based on this analysis, I argue that while imperialism and nationalism may be important factors structuring admissibility, the flood is an ever-present fear that steers adjudication towards restrictive interpretations of eligibility. As I discuss in the next section, the extraordinary framing of FGM was a mechanism to simultaneously validate and restrict access to asylum for gendered harm.

As my analysis demonstrates, Kassindja's case became a negotiation over changes in the state's immigration control and humanitarian protection. During each stage of her case, adjudicators expressed alarm about an overly expansive interpretation of protection and the attendant flood of applicants it would invite. The various adjudicators, I argue, responded to this fear through employing a series of regulative techniques that ranged from outright exclusion to controlled expansion. The immigration judge's decision was one of outright exclusion enabled by the high level of discretionary power afforded to asylum adjudicators. The Judge invoked an existing rhetorical tool to render as Kassindja ordinary, and thus an illegal migrant rather than refugee.

Through the Kasinga case, the INS feared (indeed, imagined and produced) a new crisis brought on by a rising tide of female asylum applicants. They suggested that this new subject of humanitarian concern put a considerable strain on the asylum system. While they supported a grant of asylum for Kassindja, they attempted to circumscribe any opening it would create for other cases. Their appeals briefs, which I turn to next, most clearly illustrated efforts to exclude through inclusion. By extending protection to Kassindja based on the extraordinary nature of FGM, the INS attempted to foreclose access to asylum for a broader group of women.

5.2. INS' Gate-Keeping Strategies for *Matter of Kasinga*

The section examines the appellate process during which Kassindja's legal team and the INS (representing the executive branch of government) submitted briefs to request a hearing before the BIA. Protocol for an appeal allows for each side to submit briefs to persuade the Board of their position. Once Kassindja's legal team filed the

appeal, the INS declined to do so.³⁴ The INS assumed it was not a viable appeal since the Judge had ruled against Kassindja in the “most damaging way” with an adverse credibility finding (Kassindja and Bashir, 424). However, unlike many cases that remain anonymous, Kassindja’s plight began to attract considerable attention from the media and became the object of political and public attention and sympathy. The fascination and outcry over Kassindja’s detention as well as the practice of FGM spurred the BIA to take action.

In response to the negative attention, the Board of Immigration Appeals ordered the INS to submit a brief in the case. It was at this point that the INS suggested that the Kasinga case might threaten the existing scope of asylum law. Although they had initially accepted the Immigration Judge’s decision, the INS began to distance themselves from his position and formulate a position on how the case should be handled. Based on my analysis, I characterize the INS’ response as a form of crisis management by the executive branch, in which they attempted to appease mounting pressure to grant Kassindja asylum without jeopardizing any control over immigration. The INS directly expressed the fear that a favorable decision would invite a flood of women. This fear also shaped their overall strategy during the appeal. The INS used the case to urge the BIA to issue a decision that would create a restrictive policy on gender and social group status. In this sense, the INS wanted the BIA craft their decision based on its potential future impact’ to create a preventative precedent. In this way, to the INS Kassindja triggered flood fears and threatened to be a harbinger of masses of women seeking to gain entry into the United States.

³⁴ Testifying to the amount of power in the hands of the immigration judge, the INS at first blindly endorsed his decision, stating: “the decision of the immigration judge correctly states the facts and law of the case” (Musalo 1999).

One effect of the floodgate discourse is that people are stripped of their individuality and uniqueness (Santa Ana 1999, 2002). The flood metaphor turns people into “dangerous waters.” Rather than unique individuals, aggregates of individuals are transformed into undifferentiated mass quantities. Like actual flood-waters, this mass of people cannot be contained and thus pose the threat to inundate and overwhelm. Yet, “only a trickle of water” can be enough to trigger the threat of an impending flood (Santa Ana 2002). Analysis of the INS brief indicated that Kasinga was the “trickle” that signaled a coming flood. During the appeals process, Kassindja had to fight to be viewed as an individual, rather than a composite figure representing masses of women waiting to seek asylum in the U.S. The INS actively constructed her as representing a flood crisis, simultaneously producing this fear and outlining regulations to contain it. Kassindja’s legal team had to remind the Court, “The only case before the Board is Ms. Kasinga’s case. The only decision the Board is asked to make is whether a person who establishes the requisite likelihood of FGM and forced polygamy is eligible for relief” (BR, 15-16). As her attorney described, they had to remind the court to give her case a principled reading rather than one steered by the fear of opening a floodgate.³⁵

The INS attempted to manage this crisis by first requesting that the case be remanded back to the Immigration Judge. This was clearly an effort to limit its potential impact on asylum case law because Immigration Judge’s decisions are not binding. If granted at that immigration court level, the decision would have no impact beyond her individual grant of asylum. Furthermore, the case would have been remanded back to the

³⁵ The second Brief for Kassindja (March 13, 1996) argues that although the BIA has not decided a case under the refugee act for FGM and forced polygamous marriage, “ample guidance is provided by precedent” (13). Not only do traditional jurisprudential principles make her eligible, but recent cases, such as *Fatin vs. INS*, recognized gender as an attribute of social group membership (14-15).

same Immigration Judge who denied Kassindja asylum. Legal counsel for Kassindja pointed out the ridiculous nature of this request, given that the INS itself rejected much of the Immigration Judge's decision. During the hearing, a Board Member also challenged this request, asking the INS Counsel, "Aren't you really asking, Mr. Martin, this Board to give the Immigration Service another chance to defeat a case...?" (*Matter of Kasinga*, Transcript). The INS' request for the BIA to create a restrictive framework was tied to their claim that existing law was inadequate to adjudicate the case. Rather, they claimed that the Kassindja case required a new framework to clearly define the conditions under which circumcision and a broad array of other female specific forms of cultural practices could qualify for asylum.³⁶ This framework prevented making asylum "routinely available" for all FGM cases and limited admissibility for a diverse range of cultural practices, which they claimed, were not as serious as compared to FGM. I shall now turn to INS' arguments about how Kassindja's case tested the limits of asylum and how they proposed resolving the crisis.

5.3. INS' Flood Fears and *Matter of Kasinga*: Humanitarian Protection v. Immigration Control

The INS framed *Matter of Kasinga* as challenging asylum's existing balance between immigration control and humanitarian protection. In their first brief, the INS suggested that the case threatened immigration control. According to the INS, her case represented a real-time rise in the volume of asylum applications from women based on cultural practices, and if granted, could potentially invite an even higher volume. The INS thus proposed a way to accommodate Kassindja's claim through a very controlled

³⁶ This was a central issue during the appeal. Kasinga's legal team was adamant that her case qualified under existing refugee law.

expansion in protection that would preemptively circumscribe access to asylum protection for others kinds of gendered harm.

In the appeals brief, the INS described the tension animating asylum law. They argued that Congress passed asylum provisions for twofold reasons which were “avoidably in tension”: “(1) to provide real protection for those seriously jeopardized if returned to their home countries, but (2) to sustain the broad fabric of governmental immigration control that has been a common feature of international relations for well over a century” (14-15). Here the INS suggested that while asylum must protect those “seriously jeopardized,” this protection had to be carried out in a manner that sustained the state’s power to control immigration.

Indeed, my analysis suggests that the INS latched onto the Kassindja case precisely because perceived it as altering the balance between immigration control and humanitarian protection. The INS cautioned the BIA to be attentive to these two imperatives when deciding the case,

...the Board’s interpretation in this case must assure protection for those most at risk of harms covered by the statute, but it cannot simply grant asylum to all who might be subjected to a practice deemed objectionable or a violation of a persons human rights. Careful application is necessary for the asylum system to remain true to the intentions of its creator and also to sustain public support that is necessary if it is to continue to perform its important, but focused, humanitarian office (15).

The humanitarian scope of asylum cannot be overly generous according to the INS.

While protecting those most at risk, they argued that it could not be expanded to include “everyone”, or more precisely women, who suffered a human rights violation nor those subject to “objectionable” practices. The INS reminded the BIA that asylum’s

humanitarian office is “focused,” signaling their concern about the potentially unwieldy “expansion” that Kassindja’s case would engender.

The INS’ concern that the Kassindja case would tip the existing balance between humanitarianism and immigration control is a direct outcome of their contention that granting asylum to Kassindja, and all women subjected to cultural practices, required a *new* legal framework. In other words, they argued that gender-violence required special accommodations; an expansion in asylum protection. Kassindja’s legal counsel vehemently opposed this assertion, instead claiming that gender-based harms were rightfully protected under existing legal statutes but had been excluded because of biased adjudication and a longer history of andocentrism. As Kassindja’s lead attorney, Karen Musalo was quoted saying, “The question is not should we make allowances for FGM, the question is, do we or don’t we have a commitment in our laws to protect people who flee persecution? We’re not asking for special consideration. We’re asking for protection under laws that are already there” (Burstyn 1996).

To the INS, Kassindja represented a much larger group of new and emerging claims based on gendered cultural practices targeting women. The INS used the appeals process to question whether these “broad cultural practices” constituted valid asylum claims. In the following quote, the INS argued that such claims were challenging precisely because they were both widely practiced and shocking or offensive.

This case asks the Board to venture into new and difficult territory, exploring issues increasingly raised in political asylum cases. For this case requires the Board to apply asylum and withholding provisions of the INA to cultural practices that have broad application in the country of origin but which are offensive, even shocking, to American judgment and sensibility. There is no doubt that most such practices are validly the object of vigorous human rights protection. The more difficult question, and the question presented here, is the extent to which such customs give rise to valid asylum claims. These issues are potentially posed by a

wide variety of practices: initiation rites of certain ethnic groups, mandatory clothing requirements such as the veil required of women in some cultures, imposition of arranged marriage on unwilling individuals, restrictions limiting profession or activities such as driving automobiles based on gender or caste, and many others (12).

The assertion that “broad application” of a practice would make it inadmissible echoes the Immigration Judge’s decision, which evoked the issue of pervasiveness to deny Kassindja asylum. The INS, however, presented the American response to the practice as a mitigating condition: what if it is broadly practiced and “offensive, even shocking, to American judgment and sensibility”?³⁷ Indeed, this is what made this territory “new and difficult.”

In distinguishing a valid asylee from a human rights victim, the INS emphasized its earlier point that asylum protection had to be extended in a focused way that did not jeopardize immigration control. If the U.S. could not protect everyone through asylum, then whom should it protect? The INS proposed that eligibility be based on the severity of the cultural practice, identifying circumcision as an “extreme” variety. Following a list of cultural practices that ranged from prohibitions on driving to veiling, the brief stated,

Here the practice at issue is one of the most extreme within this description: the imposition of female circumcision or female genital mutilation in accordance with tribal custom... (12).

By classifying FGM as an extreme cultural practice, the INS resolved the asylum dilemma of providing protection while also controlling immigrant inflows. The extreme nature of FGM justified protection, unlike the other forms of cultural practice whose presumably milder nature did not outweigh their “broad application”. In classifying circumcision/FGM as “extreme” or extraordinary, the INS permitted Kassindja to be

³⁷ This is perhaps in direct response to the media attention garnered by the case.

granted asylum without validating a broader class of gendered cultural practice claims; they retained control over managing a gendered expansion in refugee protection.

5.3.1 Kassindja and the ‘Problem’ of FGM: One of Eighty Million Females

Although they supported Kassindja’s eligibility, the INS argued that the BIA needed an entirely new regulative framework to decide her case. This was the INS’ attempt to foreclose wider eligibility for asylum. To the INS, Kassindja’s case posed the threat of opening the floodgates not only to gendered cultural practices, but also to all women who are subject to FGM. The INS clearly stated that FGM had been practiced on over eighty million females worldwide (13). While they conceded that “certain potential victims” of FGM may establish eligibility, they clarified that “this class does not consist of all women who come from the parts of the world where FGM is practiced, nor of all who have been subjected to it in the past” (15). The INS attempted to preemptively foreclose any access that a favorable decision might create for gendered cultural practices and diverse range of potential FGM claimants.

To aid in this effort, the INS proposed a way of selecting deserving cases. This test was known as the “shock the conscience test” (12). As the name suggests, it offered (subjective) guidance on determining if cultural practices were extreme enough to warrant protection. The tri-part test included waiving the requirement for malignant or punitive intent if the harm “is so extreme as to shock the conscience of the society from which asylum is sought” (Ibid., 17). They argued that in order to “shock the conscience”, (1) the harm must be extreme; (2) the harm must be inflicted on an “unconsenting or resisting” individual; and (3) the individual must actually be “seized and subjected” to the

conscience-shocking violation, and not “merely” suffer the consequences, “albeit burdensome,” for refusal (17–18).

The test was a prime example of postcolonial and transnational feminist scholars’ criticism of the colonial tropes and imperialist binaries animating gender-based asylum. The more foreign and shocking a practice was to ‘American culture,’ the more readily it would be protected by the nation. While the test reinforced a binary view of the world as made up of barbaric and civilized nations, I argue the INS employed this logic to do more than assert U.S. nationalism. This “shock the conscience” logic provided a way to manage gender claims, to recognize gender-persecution but in a narrow way. Faced with mounting political and public pressure in favor of Kassindja (evident in their acknowledgement of the public’s response to the practice), the INS could not deny asylum without seeming inhumane. Creating a new “test” provided a means to ensure that any precedent created by the case would not be too generous. This new test narrowed eligibility among the broader pool of gendered cultural practices by framing FGM as extraordinary, but it also further narrowed which types of FGM victims could qualify

One of the concrete ways that the INS framed FGM as extraordinary was by modifying the definition of persecution. Traditionally, persecution required malicious motives of the persecutor. However, the INS argued that FGM stood outside of this norm.

The persecutor’s intent is normally to visit a bad outcome on the persons who are regarded as different in a way that must be corrected or eradicated. If malignant or punitive intent on the part of the actor were always required before persecution is found, then FGM would rarely be considered persecution. Presumably most of its practitioners believed that they are simply performing an important cultural rite that bonds the individual to society (16).

They continued to argue that the exceptional nature of the practice superseded the persecutor's motives,

But in some circumstances, the intention of the actors pales in significance in the face of evidence about the nature of the practice itself. Such occasions should be rare, but they occur when the practice, visited upon a resisting recipient, is so extreme as to shock the conscience of the society from which asylum is sought. We submit that FGM, as least in its more severe forms, is such a practice. FGM shocks the conscience because it amounts to a extreme bodily invasion, an extreme that is compounded when it is imposed under crude and unsanitary conditions as is often the case. It is imposed "for reasons that our country does not recognize as legitimate"...likewise, it is inflicted in a manner condemned by civilized governments...(17)

The INS concluded that FGM could constitute persecution regardless of punitive intent. In other words, the act of FGM was so horrific it outweighed the motives for inflicting it. Emphasizing the gravity of FGM in this way allowed the INS to distinguish FGM from other kinds of gendered harm, and thus support Kassindja's claim to asylum without advocating extending protection to other kinds of gendered claimants.

By establishing FGM as exceptional through waiving the requirement for punitive intent, I argue, the INS attempted to limit access to asylum for other kinds of gendered claims. The exclusionary effect of this becomes clear in domestic violence cases, as I will explore through Rody Alvarado's case in Chapter 6. In Rody Alvarado's case, adjudicators denied asylum partly based on their finding that her husband's motives for abuse were unclear. Domestic violence, in other words, was not "extreme" enough to waive the need to establish persecutor's motives.

The INS actively attempted to limit any ripple effect that Kasinga's case might foster. They recommended making asylum protection available for FGM only in instances when the harm was imminent, or as they stated "the claimant would actually need to be seized and subjected to FGM if returned to their home country" (18).

Protection would not be given to women if they had any other choice, even if it meant social or family pressure, ostracism or economic pressure. “The home society persecutes if it forcibly subjects uncircumcised women to the knife” (18-19). By focusing only on the very act of circumcision, the INS excluded past victims or anyone who would not be *physically* forced to submit. Their position also implicitly required particularly overt and visible forms of resistance to qualify. Indeed, the INS’ attempt to dramatically narrow access to asylum for victims of FGM led them to the troubling conclusion that if FGM was inflicted on a small child, that would assume that the child consented or at least “acquiesced” and would therefore be ineligible (18-29).

By outlining such narrow parameters for FGM eligibility, the INS avoided developing an analysis of gender that would support other kinds of women’s claims. As the legal counsel for Kasinga would later argue, the INS refused to recognize the wider social and cultural context within which FGM was practiced and therefore what role gender could play in women’s unique experiences of persecution. The INS’ reluctance to recognize FGM as a basis for asylum protection in these briefs leading up to the BIA ruling undermined claims that the INS and BIA readily accepted FGM as a basis for asylum in an effort to propagate U.S. nationalism. Rather, the INS was incredibly stingy in their concern for FGM, and sought to limit access to only women who faced imminent harm from FGM.

Efforts to frame FGM in such a restrictive manner were tied directly to flood fears. As the INS stated, recognizing the broader context within which FGM was practiced would lower asylum standards and lead to welcoming claims from anyone facing differential treatment in their country.

[Kassindja cannot meet the nexus argument by proving that FGM plays a] “deeper political role or help perpetuate a system of male domination...for nearly all distinctions in treatment or outcome, on virtually any social or economic bias in any country of the world, could be recast as instruments of political control or domination. It could be claimed for example, that economic suffering inevitably reflects deliberate political decisions by the ruling authorities. And yet it is quite clear that economic suffering, by itself, does not give rise to a valid asylum claim, even if supplemented by a showing of political manipulation or corruption by the ruling elite that deepened economic deprivation” (20-21).

The INS thus intentionally avoided an analysis that would ‘open the gate’ to other kinds of generalized, pervasive conditions such as “economic suffering” (the “economic migrant” is a reoccurring foil for a “valid refugee”). The INS’ proposed social grouping reflects this reticence to recognize sex as an attribute that others seek to “overcome”, or that gender is a factor in oppression. They recommended the social group of “young women of the Tcamba Kunsuntu people who have not been circumcised in accordance with tribal custom.” After which they state, “No broader definition of the particular social group should be necessary” (21).

As I discussed in Chapter 3, asylum case law has tended towards restrictionist interpretations rather than expansive ones in order to prevent large groups of (unwanted) immigrants from qualifying for asylum. The particular social group category is a contested area within asylum jurisprudence because of the lack of clear guidance on its meaning and standards. It is particularly contested because the idea of social group suggests that one could be persecuted for reasons shared by a collective of people. Yet, adjudicators continuously attempted to circumscribe access to the category and raise difficult and confusing standards for what constituted a group. Gendered harm claims directly confronted this issue and faced fears that recognition of gendered harm would create eligibility for all women as a group.

As visible in the INS position on the case, they advised the BIA to grant the case in a way that did not expand access to too many women. By arguing the Kassindja should be granted asylum based on very specific circumstances, they attempted to allow eligibility for a very narrow class of women. Although the BIA did not accept much of the INS reasoning as outlined above, the INS' position on the Kassindja case leaves a residue that would shape the legacy of the case's precedent. Key battles would later be fought over whether past FGM qualified for asylum and whether parents of minors could be granted asylum in order to protect their children.

5.4 The BIA's Decision

In this section, I examine how the BIA addressed their fears of the flood through legal interpretation of the case. While largely departing from the INS' recommendations, the BIA decision materialized the legal 'safety valve' called for by the INS. Their decision validates FGM as an extraordinary harm worthy of protection, while simultaneously preserving the role of discretionary power for lower level judges in gender-asylum claims. Their decision, while favorable, limited access to asylum by clearly protecting only a narrow class of FGM applicants defined by the extraordinary circumstances of Kassindja. The decision avoided bigger questions of how the decision affected other gender-asylum claims, and thus perpetuated the precariousness faced by other types of gender-asylum claimants within the asylum system.

The BIA was well aware of the import of this case and its potential to dramatically reshape political asylum in the United States. *Matter of Kasinga* was the first case based on gendered harm to reach the appellate level. The Board met *en banc* to hear the case, with all members in attendance for the first time (hearing transcript, 10).

This was an “unusual posture,” reserved for cases that were complex and carried great import for the public (Bello, et al. 1997). The case, however, was really no longer about Kassindja, for all parties were now in agreement that *she* should be granted asylum on the basis of FGM. The “fundamental issues” identified by the BIA, however, were whether the case should be remanded back to the IJ and “the parameters of FGM as ground for asylum in future cases” (BIA 1). Future access to asylum was at stake, making the structure of the judicial opinion granting her asylum vitally important.

The Board did not remand the case back to Immigration Judge but rather issued a published decision on the case, which became nationally binding on all immigration judges and asylum officers.³⁸ Rejecting most of the Immigration Judge’s analysis, the Board found Kassindja to be credible and that FGM, as practiced by her tribe, constituted persecution. Most important for my discussion here is the Board’s recognition that FGM could be persecutory and that Kassindja belonged to a social group based partly on gender.

Without accepting the INS’ “shocks the conscience” test, the Board recognized that FGM was persecutory. Their decision however still relied on framing FGM as extraordinary. They found that FGM was so harmful that it qualified as persecution regardless of punitive intent (BIA 9-10). They only addressed FGM in the context of those would be forcibly subjected to the practice if returned to their home countries, and left unanswered the question of past FGM cases.

The Board found that Kassindja was part of a social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who

³⁸ Although Kassindja’s legal team submitted additional evidence, the BIA ruling was based on the existing record (which meant their assessment was based on the same record as that used by the immigration judge).

oppose the practice” (BIA 2). This social group was narrower than the one put forth by Kassindja’s counsel (gender and tribe) and by the INS (gender, tribe, status as uncircumcised). This construction was most telling of the Board’s efforts to control the impact of the decision on gender-asylum because the decision affirmed that gender was not enough to constitute a social group. Indeed, the BIA’s social group consisted of four factors: gender, tribe, status as uncircumcised (by FGM as practiced by that specific tribe), and opposition to the practice. In combination, these characteristics reflected the very particular circumstances of Kassindja.

The BIA’s framing of this social group is significant because Kassindja was exceptional on many levels. As described in her narrative, Kassindja’s personal journey was unique. Against the local norm of circumcision, marriage and education, she was extraordinary and this absolutely formed the basis of her claim to asylum. Unlike other girls in her tribe, she was shielded from circumcision at the age when girls typically underwent the procedure. It was also unique that Kassindja was uncircumcised at the time of her marriage and that she was able to escape during the small window between the marriage and the circumcision (evidence that she would be forcibly subjected to the practice if returned home). She was old enough to travel on her own and had the funds available to do so. The amount of people who would be in her exact position was quite limited. Furthermore, as other scholars have noted, she had an unusual amount of documentation to prove her case.

The BIA’s very narrow and fact-specific social group formulation thus belied a cautious approach to extending asylum protection. Their move could be likened to releasing pressure on the system similar to a safety valve rather than the opening of a

gateway. During the trial, all parties agreed that Kasinga should be granted asylum. The debate thus revolved around the basis on which Kassindja could fit into the existing legal categories of asylum; how the grant of asylum should be worded in light of the impact it would have on jurisprudence. Charles Piot (2007) highlights this focus in his critique of how Togo was represented in the case. Discussion did not revolve around what an actual social group might be; the lawyers and adjudicators were unconcerned with sociological or anthropological questions of what constitutes a social group. As he argues, they rejected the only “locally cognizable” grouping (women + tribe) because it was too broad and would potentially invite thousands of women to apply for asylum (Piot, 160). Instead, the INS proposed an “invented” category, one that only boasted one member: Kassindja (Piot, 161). While Piot cited these exchanges as examples of how polarized and simplistic representations of Africa circulated in the case, the trial debates also illustrated how legal interpretations were steered by the desire to prevent precedentially defined social groups that could be inclusive rather than restrictive.

Validating a “social group” with unknown or limited membership enabled the inclusion of Kassindja without producing an overly expansive reinterpretation of refugee law. Alas, this kind of controlled expansion seemed to be precisely the goal of the BIA. While the INS advocated for preventative action and a clear policy on eligibility to restrict immigration, the BIA took a different approach and declined to issue guidance beyond the situation at hand. As they stated in the opening of their decision, “In deciding this case, we decline to speculate on, or establish rules for, cases that are not before us” (BIA 1). In declining to articulate a broad, binding framework for cultural claims or FGM, the Board allowed Kassindja to be granted asylum without clearly making the

precedent an open gateway. This ambiguity would later create opportunities for adjudicators to circumscribe the scope of the precedent.

5.4.1 Safeguarding Discretionary Power

While the INS advocated for clear guidelines to define admissibility for gendered cultural practices and FGM, the BIA instead took a more reactionary approach that safeguarded the discretionary power of adjudicators in the asylum system. Their decision affirmed the fragmented design of the asylum adjudication system. Comments in the majority BIA opinion and concurring opinions highlighted the divergent strategies advocated by the INS and BIA. Indeed, Board Members' responses to the INS highlight their intent to maintain a reactive position on the issue of FGM.

The following exchange occurred during the BIA hearing. Here the INS and Board clashed over what the scope of the Kassindja precedent should be. The INS wanted to foreclose opportunities for past FGM claimants, which led them to claim that Musalo's (Kasinga's attorney) social group construction was too broad and would make "any woman who had been subjected to [FGM] in the past" qualify for asylum. Here the INS pressed the BIA to address the question of whether women who had already undergone the procedure would qualify if Kassindja was granted asylum.

Mr. Schmidt [Board Member]: Excuse me, Mr. Martin—

Mr. Martin [INS Counsel]: Yes.

Mr. Schmidt: --if I may—does this case involve any claim of past persecution at all in any way?

Mr. Martin: This case does not, to my knowledge but we believe it's important here to establish—to deal with the full range of issues here and it's important to understand the implications of a particular interpretation.

Mr. Schmidt: But I mean this issue isn't in the case, right?

Mr. Martin: That issue is not in the case. That's correct.

Mr. Schmidt: But you think we need to think about that issue in order to understand what we're doing in this case?

Mr. Martin: Obviously, the Board—we--would expect that the Board has in mind the possibility of issuing a precedent decision—that’s why the Board is gathered en banc.

Mr. Schmidt: That’s what both of you [the INS Counsel and Kasinga’s Counsel] are asking us to do, I take that...

Mr. Martin: And in that case, obviously, the precedent decision of the Board have wide application and are very important for providing guidance for Immigration Judges and for Asylum Officers in deciding these cases in the future. It would help to consider, at least here in this particular setting, whatever the Board may do in its opinion, to consider its application in other sorts of circumstances.

Mr. Martin went on to assert that these related issues were not merely “hypotheticals,” as Musalo argued. In other words, the INS urged the BIA to decide the case in a way that anticipated how it would be used in “other sort of circumstances,” even though Kasinga’s cases did not directly raise these particular issues. The INS further argued that a positive decision could be used in other kinds of gendered cultural practices.

The Board however took a decidedly different approach. In a concurring opinion, Judge Filppu argued that the role of the BIA was at odds with the INS’ request.

...the Board engages in case adjudication. It decides those issues that lead to the resolution of the cases before it. Our published rulings act as precedent under the regulations...and can affect related cases. But the Board is not well positioned, in the context of a single disposition of a novel case, to established comprehensive rules or guidelines for the adjudication of all cases presenting variations on the case at hand. Yet, it is the cases that are not before us that seem to draw much to the Service’s attention in its brief (internal citation omitted, 17)

The Board criticized the INS’ attempt to enact flood control through restrictive policy. Indeed, the amount of time the INS devoted to circumstances other than Kassindja’s became a subject of commentary by the Board. As Filppu and Heilman stated, “...It is the cases that are *not* before us that seem to draw much of the Service’s attention in its brief” (emphasis in original, 3).

Two other Board Members also tried to make sense of the INS' preventative approach, pointing out that the framework did not seek to correct existing discrepancies in adjudication or to create an overarching theory but rather "avoid routine availability" for FGM claimants (Filppu and Heilman, *Matter of Kasinga*, BIA 18). These Board Members expressed uncertainty about the necessity of such a comprehensive framework, suggesting that legislation or regulations were the appropriate avenue for the INS' policy concerns goals rather than case adjudication.

Although the Board Members criticized the INS for attempting to avoid 'routine availability,' it is important to note that the INS sought clear guidance on how gendered cultural practices could qualify for asylum, albeit with the goal of restricting access. Issued by the BIA, such a framework would have created standards that were binding on all asylum adjudicators, jeopardizing the power of adjudicators and decision makers to use their discretionary power to decide how women with gendered claims of persecution could qualify for asylum in the U.S. Indeed, as I explored in Chapter 3, case law following the 1980 Refugee Act preserved the power of adjudicators to decide on a case-by-case basis who qualified under refugee statutes. A veteran gender-asylum lawyer and policy analyst I interviewed explained that resistance to guidelines was a way for adjudicators to avoid "accountability" for their decisions. As she explained, without a binding framework to guide their decision-making, adjudicators were free to decide cases based on their own interpretations without being held accountable to their previous decisions or to a national standard (Advocate B).

The INS and BIA thus pursued different strategies for resolving *Matter of Kasinga* and the threat the case posed of expanding access to women with claims of

gender-persecution. The INS sought to remand the case to the Immigration Court, where a decision would have no impact on case law. Alternately, they requested that the BIA issue a restrictive policy on gendered cultural practices and FGM if they decided the case.

The BIA declined to establish a broader framework to address gendered cultural practices as well as the various questions about FGM eligibility. Rather, their decision was succinct and limited to Kassindja's situation, perpetuating ambiguity around the broader issues of gender and asylum. In particular, as Judge Filppu stated in a concurring opinion, the majority opinion did not clarify critical questions about gender and social group status. Filppu claimed that the record sheds "little light" on the social group question, even though clarity was needed given the dearth of case law in the area. He adds that he may have supported a remand back to the Immigration Judge for further exploration of whether the statute was meant to include "groups defined primarily in relation to the harm feared"³⁹ (*Concurring opinion* p. 4, footnote 3). Filppu's comment highlights how the decision perpetuated uncertainty about how to frame gender cases in relation to social group status. One critical question involved whether a social group could be defined in relation to the harm itself. This was an unsettled, but central issue within social group case law. Yet, the BIA skipped over this critical question about Kassindja's social group, further attesting to how they framed Kassindja's case and her

³⁹ In addition to bringing attention to the issue of group size, Board Member Filpu also alluded to another debate within social group case law regarding whether social groups needed to be "visible" or defined through "social perception." As he stated, "We simply do not know from this record whether the similar social groups proposed by the parties are recognized as groupings for any other purposes within Togolese society aside from the serious personal harm at issue here. The record does not disclose whether this group is seen as a distinct body within Togo or within the tribe both before and after the infliction of FGM on its members, or whether it is a group that exists exclusively in relation to the particular offensive practice at issue here" (4). In *Gomez vs. INS* (1991), the Third Circuit denied asylum to the applicant on the basis that her social group was defined in relation to rape and that women raped by guerillas were not a socially recognized group. Through *Matter of C-A-* (2006), the requirement for groups to be "socially visible" became solidified in case law, which I discuss in Chapter 6.

plight of impending FGM as exceptional. The question was raised in the footnote of a supplemental opinion.⁴⁰ In the end, the BIA accepted a social group defined by the harm feared.⁴¹

The Board did not act decisively to clarify key questions about gender and social group eligibility in the *Kasinga* decision, which I argue can be traced to concerns about how the case might modify the definition of a refugee.⁴² This anxiety hinged on the notion that recognizing gender as the basis of a social group would create an uncontrollable expansion in refugee protection. Board Member Lory Rosenberg alluded to this in her critique of the overly complex social group construction of the majority opinion.⁴³ Rosenberg drew a comparison to *Matter of H-*, which involved a member of a subclan in Somalia. In *Matter of H-*, the court found “without difficulty or the need to qualify” that a man was persecuted on account of his membership in a clan. Rosenburgh continued to state, “The only distinguishing characteristic about this case [*Matter of*

⁴⁰ The BIA also framed the case as exceptional by distinguishing FGM from forced sterilization, while the immigration judge had claimed they were analogous. This enabled the BIA to claim that *Matter of Chang* (1989) did not control their decision-making. The BIA differentiated forced sterilizations from FGM by claiming that although both practices were physically invasive and widely applied to the population, FGM had no “recognizable, underlying purpose” (*Matter of Kasinga*, 672). Conversely, they claimed that the Chinese policy served a purpose of population control (*Matter of Kasinga*, BIA trial transcript). Such a distinction not only served to frame FGM as exceptional but is also an example of purposeful action, in which adjudicators distinguished the case from existing case law because it conflicted with their intended legal outcome.

⁴¹ A central question in particular social group jurisprudence is whether a social group can be defined in relation to the harm feared or inflicted. Internationally, the consensus is that it cannot, but U.S. case law is contradictory. *Matter of Kasinga* serves as an example of how adjudicators can decrease their level of scrutiny on this issue if they choose.

⁴² A legal issue at the heart of the appeal is whether the case requires a new framework or can be decided under existing legal principles. One of the Board members, Lory Rosenberg, references this anxiety in a concurring opinion. She refutes the claim that a distinct category is needed for women’s asylum claims, stating “There is nothing about a social group definition based upon gender that requires us to treat it as either an aberration, or as an unanticipated development requiring a new standard” (3). She argues that although FGM is a novel issue, the courts have addressed social group membership in a number of cases.

⁴³ Board Member Rosenberg stated that the social group category was supposed to be a catch-all category for those falling outside the other enumerated grounds. She argued that Kassindja did not need to show her opposition to FGM to prove social group membership. To her, it was a “superfluous” requirement because *Kasinga* had already established possession of a shared characteristic that the persecutor sought to overcome. She should not have had to prove that the persecutor was incited by an opinion or activity.

Kasinga] that I can perceive to set it apart from others we have already decided is that it involves a woman” (4). While tribal affiliation was sufficient basis for social group membership in *Matter of H-*, adjudications found it necessary to construct a considerably narrower social group formulation to grant Kassindja asylum. The Board thus solidified earlier trends that in which gender alone could not constitute a social group. By outlining three additional qualifiers for the social group, the Board’s social group formulation was preventing broader usage of the precedent. Thus, while Kassindja was granted asylum, the social group category was still not an easy category for women to utilize. Rather than proactively clarifying how gender could qualify, thereby correcting the masculine bias governing the asylum regime, adjudicators in the case treated gender as an aberration that would be appealed, but also controlled, contained, and managed.

This anxiety was also visible thru some marked silences in the decision. With the exception of one concurring opinion, the entire decision made no reference ‘gender-based persecution’ or ‘gender-based asylum.’ Nor did the Board reference the INS guidelines on gender asylum aside from their review of documents in the case file. The omission of gender further marginalized women because it avoided validating these non-binding guidelines and raising their authoritative stature. Thus, while the decision did not bar entry to Kassindja, it perpetuated uncertainty about how gender-based persecution could qualify for political asylum. As one legal scholar described, the decision did not provide a “clear road map” for future gender-asylum applicants (Bello, et al. 1997).⁴⁴ As I argue, this lack of clarity functioned as a means to restrict access to asylum.

⁴⁴ Board Members disagreed among themselves about the role of the BIA and the intended impact of *Matter of Kasinga* precedent. Member Lory Rosenburg, suggested that as the designee of the Attorney General, the BIA could create agency policy through case adjudication. She argued that they had set an example of how to adjudicate gendered-harm claims through their reading of the *Kasinga* case. “In sum, we

5.4.2 The Role of Legal Ambiguity in Limiting Access to Asylum

As a published decision, this precedent did create new opportunities for women, but it applied unequivocally only to a narrow class of women. While the BIA had rebuffed the INS for requesting a clear policy on gendered cultural practice and FGM, the BIA's decision limited access for women through its ambiguities rather than through exclusion. In arguing this point, it is important to understand the decision within the boarder landscape of asylum, which is decentralized and incredibly fragmented (Anker 1990). The only comprehensive guidelines on adjudicating gendered claims were issued by the INS themselves in 1995, but these guidelines were non-binding and issued only to lower level adjudicators. Immigration Judges, such as the one hearing Kassindja's case, and adjudicators at the appellate level, were not obliged to follow these recommendations (and often did not).

The majority opinion in *Kasinga* prevented making asylum "routinely available" for women with gendered forms of persecution. Rather than achieving this through proactive and preventative policy, the BIA issued a narrow precedent and declined to explain how the case would impact other kinds of FGM and cultural practice applicants. The Board left many questions unanswered. They did not address whether forced polygamy constituted persecution, only FGM. Nor did they address whether past FGM constituted a valid asylum claim. In deciding not to decide, the Board did not resolve the existing ambiguity around gender and asylum eligibility. The Board also retained the power to decide future cases by deferring decision-making. By retaining the power to

have, in the majority opinion, set forth a roadmap for analysis appropriate for this case, which may easily be extrapolated and applied in upcoming adjudications, not only of gender-based asylum claims, but in many other asylum applications" (*Matter of Kasinga*, Concurring opinion, 5). This opinion was the only one to make mention of gender-based asylum more broadly, to reference the gender guidelines and to cite the decision as a positive step towards the development of jurisprudence in this area.

decide later, the Board gave itself time to reassess and strategize. As Filpu and Heilma stated,

It may be that the Board will end up with an analysis along the lines proposed by the Service as it confronts various issues involving asylum and FGM in the future. Then again the Board may settle upon a different view, which may be better or worse from the perspective of particular parties. But I am fully in agreement with the majority's decision not to attempt to set forth a comprehensive analytical framework in the context of this one case (Filppu and Heilman, 5).

The BIA thus reserved its right to resolve some of these critical issues in the future. The legacy of the *Kasinga* decision, it seemed, would be decided on a case-by-case basis within an incredibly fragmented, decentralized and inconsistent system based on the logic of lower court discretion. Preserving the discretionary power of decision makers to decide on a case-by-case basis, perpetuated the precariousness faced by female asylees seeking protection from gendered harms, such as Kassindja, who are denied protection as a result of prejudice, gendered bias, and fraught legal reasoning (at first endorsed by the INS).

Matter of Kasinga created an expansion in refugee protection that facilitated eligibility for a small group of FGM claimants. The fear of a flood of new applicants, however, played a central role in how this expansion was designed. While the INS and BIA responded to the flood fears differently, both acted with the intent to avoid an overly expansive reinterpretation of refugee law. In the end, the case was more about negotiating future admissibility of gendered harm and FGM rather than Kassindja's particular case. In this way, rather than creating an open gateway, I argue the *Matter of Kasinga* decision served more as a safety valve. Granting Kassindja asylum relieved pressure on the state and allowed for a controlled, measured expansion that avoided a complete flood. The INS and BIA took different approaches to creating this safety valve, however through

entextualization it is possible to see the linkages between their responses. The extraordinary nature of FGM, both as a cultural practice and as immanent harm, was critical to the ways this safety valve was constructed. Designing inclusion around exceptionality allowed for Kassindja to be recognized as a refugee, while fostering further inclusion for only a narrow class of applicants.

5.5 A Precarious Legacy

Matter of Kasinga's legacy demonstrates that the BIA did not intend for the decision to create a broad precedent for gender-based asylum claims. As I discuss in this section, various Courts in the last two decades have attempted to erode some of the gains from *Matter of Kasinga* by exploiting ambiguities in the precedent. While the decision has provided protection for countless women seeking refuge from FGM, the scope of the legacy is embattled. One major area of dispute involves whether FGM is a one-time harm or an ongoing harm. In 2005, the 9th Circuit Court of Appeals published *Mohammed v. Gonzales*, which found that genital mutilation constituted a "permanent and continuing" act of persecution within the context of asylum. Past FGM thus automatically proved that applicants had a well-founded fear of future persecution. Circuit Court decisions, however, are only binding within that particular Court's jurisdiction. In 2007, the BIA issued a conflicting decision aimed at circumscribing access to asylum protection for women with FGM claims. In *In re: A-T-*, the BIA found that FGM was a one-time harm.⁴⁵ In this case, the BIA found that women who were already circumcised had no

⁴⁵ The *Matter of A-T-* decision came in the wake of three unpublished decisions that barred applicants from asylum based on their past experiences of FGM. The applicants in these three unpublished cases pursued their claims to the federal circuit court of appeals and became the applicants in the *Bah v. Mukasey* (2008, 2nd Cir.). Soon after the BIA issued the unpublished decisions in these three cases, the BIA issued a three-member published decision affirming the denial of a claim for withholding of removal based on female genital mutilation, for reasons substantially similar to those given by the BIA in the present cases.

basis to fear further harm and thus had no basis for an asylum claim.⁴⁶ Once again, this decision capitalized on a ‘loophole’ in the Board’s *Kasinga* decision in which they had only explicitly recognized the fear of *future* FGM. Basing the precedent on *Kasinga*’s exceptional circumstances⁴⁷ had enabled such a narrow framing. The *In re: A-T-* decision is binding in all circuits, except the 9th Circuit.

Although the *Kasinga* precedent had addressed future FGM claims directly, this was challenged through another series of cases involving FGM protection for dependant children. In 2007, the BIA in *Matter of A-K-* denied the claim of a Senegalese father who sought withholding of removal to protect his minor daughters who would be forced to undergo circumcision if returned to their home country of Senegal. The BIA denied his claim and stated that no law existed for child-to-parent Withholding of Deportation. The Board also found that the applicant did not prove his own life or freedom would be threatened.⁴⁸ Although the BIA did not assess his asylum eligibility, asylum officers and immigration judges have “misconstrued and mistakenly expanded” the decision to deny refugee protection (Frydman and Seelinger 2008, 1073). This decision exemplified how the BIA in *Matter of Kasinga* precedent sought to extend protection for FGM in very narrow circumstances. *Kasinga* had been the exception among her peers, uncircumcised at the normal age of 15. When she did face the procedure, she was old enough to travel

⁴⁶ This was also the subject of an appeal in 2008 before the 2nd Circuit Court of Appeals. In *Bah v. Mukasey*, the Court considered the claims of three Guinean women who suffered past FGC who had been denied withholding and barred from asylum for failing to meet the one-year deadline. The Immigration Judge and BIA both found that since all women were circumcised in the past, there was no possibility of future persecution.

⁴⁷ *Kasinga* had officially been married (although she never signed the marriage certificate) before being circumcised. This was compelling proof that she would have been forced to undergo the procedure if she was returned to Togo.

⁴⁸ "An alien may not establish eligibility for asylum or withholding of removal based solely on fear that his or her daughter will be harmed by being forced to undergo female genital mutilation upon returning to the alien’s home country."

independently. By disallowing a parent to win asylum for a minor daughter, *Matter of A-K* prevented many who faced future persecution from applying. The BIA thus capitalized on the reality that relatively few young girls would be able or willing to travel alone, let alone engage in the legal process of applying for asylum.⁴⁹

This array of conflicting decisions about the scope of asylum protection for FGM has functioned as a form of restriction itself. As advocates have noted, these decisions have been used to block claims raised by women who have suffered FGC in the past and who fear FGC for their daughters in the future. Exclusions have occurred at all levels: within the asylum office, in immigration court, and by the BIA. As legal advocates Frydman and Seelinger claim (2008), they have also been used aggressively to prevent women who may have been eligible, as adjudicators and asylum agents have wrongfully denied women's claims to protection (1073). Furthermore, confusion about eligibility has also allowed the DHS to reopen previous grants of asylum and override circuit court precedent recognizing FGC as ongoing harm (ibid).

5.6 Conclusion

Flood fears manifested in various forms throughout Kassindja's legal battle to qualify as a refugee, eliciting different regulative responses from asylum agencies and adjudicators. By examining the definitional struggles leading to the final decision, I find that exceptionality played a central role in how adjudicators resolved the dilemma of

⁴⁹ The BIA made a similar ruling in several cases including *Hassan v. Gonzales*. The case involved a Somali woman who had been circumcised. The BIA denied the claim by finding that past experience of FGC rebutted fears of future persecution. In 2007, the 8th Circuit Court of Appeals overturned this decision and granted asylum based on her social group of "Somali females." The Court argued that Hassan did not need to suffer the exact harm to win asylum based on FGC. Rather, they viewed FGM as an indication of the secondary status of women, which was sufficient to prove that the applicant would likely face other kinds of harm.

needing to give Kassindja asylum without significantly altering asylum law (or as the INS stated, jeopardizing immigration control by being too humanitarian). Gendered social group status and gendered persecution became legally validated and universalized (as case law) by framing Kassindja and FGM as exceptional; on a local scale, she was unlike other women in her tribe, and on a broader scale, FGM was extreme unlike other forms of gendered cultural practices. This was a technique of exclusion that the Board used to circumscribe the impact of the decision even as they issued a ruling that expanded protection. In addition to mobilizing exceptionality, the decision perpetuated existing ambiguity around gender and social group status. Without guidance on the wider implications of their analysis, the BIA left *Kasinga's* legacy to be decided by individual adjudicators within the asylum system. The BIA thus buttressed the ability of adjudicators within a fragmented system to decide cases without accountability to a clear and fixed policy. As a result, the ambiguities left by the case became future opportunities to limit eligibility.

I thus argue that understanding the role of flood fears and gate-keeping provide critical insight on the legal codification of gender in asylum law. My analysis demonstrates that asylum officials and adjudicators put considerable effort into figuring out how to recognize gender in a manner that would avoid inviting continued migration from women globally.⁵⁰ Framing recognition of gender around exceptionality enabled the

⁵⁰ The cultural critique of gender-based asylum cannot fully account for how gender and gender-based persecution has been incorporated into asylum law. While relevant and important, it often leads scholars to suggest that FGM - as the epitome of a barbaric cultural practice - is readily accepted as a basis of asylum (see for example Oxford 2005). While framing FGM as an exotic harm was certainly part of the definitional struggle in *Matter of Kasinga*, my analysis demonstrates that a regulatory impulse, spurred by concern about a flood, played a key role in Kassindja's definitional struggle. Focusing on the horrific and barbaric nature of FGM in the context of Kassindja's definitional struggle was a tactic used by agency officials to differently classify gendered cultural practices in order to define some as outside the purview of state protection. In other words, these colonial and imperial discursive frameworks were put to the service

inclusion of gender-based persecution in an exclusive manner. My analysis thus extends feminist scholarship that problematizes how gender is defined within asylum law and practice. The imperative to control/manage, while expressed differently by the various adjudicators, was prompted by the threat *Kassinga* posed of encouraging a mass migration of third world women to the U.S. and thus was informed by less overt raced, gendered and classed logics. Examining how state agencies attempted to manage the flood in framing FGM in this exceptional way sheds light on the nature of the *Kassinga* decision and why the legacy has become such an embattled area within the last two decades.

In the next chapter, I examine the case of Rody Alvarado and her struggle to get asylum based on domestic violence. Rody Alvarado's case highlights another key area of contest over defining gender and gendered harms as asylum worthy. Alvarado was granted asylum based on the social group precedent in *Kassinga*, yet her grant of asylum was appealed by the INS and denied by the BIA. Chapter 6 explores how adjudicators defined Alvarado and domestic violence as "unexceptional" and thus outside the bounds of asylum protection. Alvarado's case made clear the intention of both the INS and BIA to reign in the impact of *Matter of Kassinga* and shut down access to the precedent it created for women with gender-related claims of persecution.

of regulation in order to create humanitarian exceptions worthy of asylum protection, justifying the "limited focus" of asylum protection.

Chapter 6: An Unexceptional Case: Matter of Alvarado

6. Introduction

For a period of three years following *Matter of Kasinga*, the Board of Immigration Appeals was silent on the issue of gender-related persecution. In 1999, they issued their follow-up statement on gender-related claims by denying asylum to a Guatemalan woman who had experienced over 10 years of domestic violence. The BIA reviewed the case at the request of the INS, who had appealed the decision of an immigration judge granting Ms. Alvarado asylum. Alvarado's ensuing struggle to qualify under the definition of a refugee spanned a 14-year period and became emblematic of the broader struggle to recognize gender-related persecution in the U.S. asylum system. In this chapter I argue that flood fears and gate-keeping tactics played a central role in Ms. Alvarado's definitional struggle.

In the previous chapter, I argued that while *Matter of Kasinga* was a positive decision, it was also constructed through logics of exclusion. Kassindja's eligibility for asylum was predicated on the exceptional nature of her circumstances and FGM. This focus on exceptionality created barriers for women to utilize the precedent, and further embedded flood discourses within social group case law. I build on these findings in this chapter by examining how *Matter of Alvarado* demonstrates the exclusionary effects of the discourse of exceptionality evident in *Matter of Kasinga*. While *Matter of Kasinga* became the exception to the rule of exclusion, and the benchmark necessary for inclusion, Alvarado became her counterpoint, the rule defining the boundaries of exclusion.

Through *Matter of R-A-*, the BIA constructed unexceptional forms of gender violence as a backdrop against which the exception was defined.

My analysis in this chapter focuses on the BIA's decision to deny Alvarado asylum and the subsequent (and prolonged) battles that ensued. Constructing domestic violence as unexceptional rather than exceptional harm was one mechanism employed by the courts to push Alvarado's claim outside the bounds of political protection. By normalizing this violence, adjudicators fed into fears that recognizing domestic violence would burst open the floodgates of asylum. The BIA's decision sparked a national campaign in support of Alvarado and protection for battered women, eventually leading to the issuance of proposed federal regulations on gender-asylum. This case history, which the proceeding sections analyze in more detail, demonstrates both the possibility of profound change in asylum law as well as material resistance to domestic violence as asylum-worthy. As evident in the case trajectory, I argue that flood fears motivated a key gate-keeping tactic, delayed decision-making, which ultimately drove Alvarado's case back down to the lowest adjudication level, eliminating its impact on gender-asylum case law.

Rody Alvarado's asylum claim was based on over 10 years of spousal abuse at the hands of her husband. Her story was one of recurring violence inflicted at will and carried out with impunity. Her narrative of abuse described these acts of violence, their apparent triggers and Alvarado's failed attempts at securing protection in Guatemala. Alvarado's case was the first heard by the BIA after *Matter of Kasinga*, and set the tone for how gender-based harm would be received in the aftermath of the landmark decision. Spanning the course of 14 years, Alvarado's case was treated by adjudicators and policy-

makers with the utmost scrutiny. With the exception of the Supreme Court, the case reached every level of the asylum adjudication process, passed through the hands of five Attorney Generals, and sparked an effort to pass federal regulations. *Matter of R-A-* became a focal point in the fight to secure protection for gender-based harms in the context of flood fears and flood-gate-keeping. I argue that asylum eligibility for battered women posed the threat of “opening the floodgates” to asylum and that this concern played a central role in Alvarado’s unusual and prolonged legal battle. In order to examine key moments in her legal journey, I first provide an overview of the case.

6.1 Background on *Matter of R-A-*

Rody Alvarado was born and raised in the department of Jutiapa, Guatemala a few hours outside of the capital city. In 1984, at the age of 16, she married a former military soldier, Francisco Osorio, who was five years her senior. They moved to Guatemala City shortly thereafter and eventually had two children, a girl (1987) and a boy (1992). Alvarado’s husband abused her for the entire duration of their marriage. For 10 years, Alvarado’s husband subjected her to extreme physical abuse and mental anguish. She was unable to secure any protection from government authorities, family members or to escape to any other location within Guatemala (*Matter of R-A-* 1999, Brief, p. 1). Osorio would employ various forms of intimidation.

Her husband would insist that the respondent accompany him wherever he went, except when he was working. He escorted the respondent to her workplace, and he would often wait to direct her home. To scare her, he would tell the respondent stories of having killed babies and the elderly while he served in the army. Oftentimes, he would take the respondent to cantinas where he would become inebriated. When the respondent would complain about his drinking, her husband would yell at her. On one occasion, he grasped her hand to the point of pain and continued to drink until he passed out. When she left a cantina before him, he would strike her (*In re: R-A-*, 1999, p. 908).

Over the course of their marriage the intensity and frequency of his abuse escalated, occurring in their home and out in public.

He dislocated the respondent's jaw bone when her menstrual period was 15 days late. When she refused to abort her 3- to 4-month-old fetus, he kicked her violently in her spine. He would hit or kick the respondent "whenever he felt like it, wherever he happened to be: in the house, on the street, on the bus." The respondent stated that "[a]s time went on, he hit me for no reason at all (*In re: R-A-*, 1999, p. 908).

On one occasion, Osorio asked where Alvarado had been. When she replied that she had been at home waiting for him he, "became enraged, struck her face, grabbed her by her hair, and dragged her down the street" (*In re: R-A-*, 1999, p. 909). Because Osorio worked as a private security guard, he had access to weapons that he would use to threaten and intimidate her (Musalo 1999, 1178). Osorio continuously sexually abused Alvarado as well.

He would beat her before and during the unwanted sex. When the respondent resisted, he would accuse her of seeing other men and threaten her with death. The rapes occurred "almost daily," and they caused her severe pain. He passed on a sexually transmitted disease to the respondent from his sexual relations outside their marriage. Once, he kicked the respondent in her genitalia, apparently for no reason, causing the respondent to bleed severely for 8 days. The respondent suffered the most severe pain when he forcefully sodomized her. When she protested, he responded, as he often did, "You're my woman, you do what I say (*In re: R-A-*, 1999, p. 908)

Alvarado attempted to flee several times unsuccessfully to her brother's and parents' homes. One time she attempted to flee with the children and rented a room outside the city. Her husband found her and beat her to unconsciousness in front of her children. Subsequently, his abuse intensified.

One night, he woke the respondent, struck her face, whipped her with an electrical cord, pulled out a machete and threatened to deface her, to cut off her arms and legs, and to leave her in a wheelchair if she ever tried to leave him. He warned her that he would be able to find her wherever she was." (*In re: R-A-*, 1999, p. 909).

She described Osorio as believing he could treat her as he liked and the violence was seemingly random and prompted for no reason at all. He would pistol whip her and use her head as a battering ram if she did not consent to his wishes. He threw machetes at her hands and would punch her if she asked where he was. She once attempted suicide and he reacted by saying, "If you want to die, go ahead. But from here, you are not going to leave" (*In re: R-A-*, 1999, p. 909).

Alvarado's attempts at gaining protection from the police failed. The police issued three separate summons for Osorio to appear in court, all of which he ignored. The police did not take further action. On two occasions, she called the police and they did not respond. When Alvarado appeared before a judge, he told her that he would not interfere in "domestic disputes" (*In re: R-A-*, 1999, p. 909). Her husband was familiar with the attitudes of governmental officials given his experience in the military, and he confirmed that her efforts to secure protection were futile. Alvarado did not know of any domestic violence shelters or other support organizations within Guatemala. Given the escalating abuse and lack of protection, Alvarado feared her husband would kill her (*In re: R-A-*, 1999 Br., p. 5). Alvarado decided to leave permanently in May 1995. She entered the U.S. in Brownsville, Texas. Even after her departure, the threats continued. A witness who testified on her behalf learned through Alvarado's sister that Osorio promised "to hunt her down and kill her if she comes back to Guatemala" (*In re: R-A-*, 1999, p. 910).

On September 20, 1996, Immigration Judge Mimi Schooley Yam in San Francisco granted Rody Alvarado asylum. The Immigration Judge found that Alvarado was a credible witness and that she did meet the statutory requirements of a refugee. The harm Alvarado suffered, the IJ argued, amounted to persecution and the government of

Guatemala was unable or unwilling to protect her. Furthermore, the judge found that Alvarado was persecuted on account of her political opinion and her social group. The IJ defined the social group by nationality, gender, and marital status: “Guatemalan women, who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” (*In re R-A-* 1999, p. 193).

Utilizing the *Acosta* definition of a social group requiring immutable or fundamental characteristics, the IJ found that Alvarado’s gender and marital status were characteristics that she should not or was not able to change (Musalo 1999, 1180). The IJ further found that “she, and others like her, are targeted for persecution specifically *because* they are women who have been intimately involved with their male companions, who believe in male domination” (emphasis in original, cited Musalo 1999, 1180). The judge found that Alvarado’s husband held the belief that women were to be subordinate to men. As such, Alvarado’s opposition to male domination constituted an actual or imputed political opinion.

In order to prove the casual link or “nexus” between the social group/political opinion and persecution, the IJ drew directly upon *Matter of Kasinga*. The judge explained that the decision recognized FGM as a form of persecution, which assured male control and domination. The judge claimed that domestic violence operated in a similar way. As she stated, “In similar ways, the acceptance of spousal abuse assures male domination and exploitation by enabling men to exert control over their female companions through threats or acts of violence” (cited in Musalo 1999, 1180). The IJ thus found that Alvarado was a refugee because she held a political opinion and belonged to a

social group, both of which motivated the harm committed against her. *Matter of Kasinga* provided legitimacy to her decision.

The INS acted swiftly to contest the IJ's decision by appealing the case to the BIA. In their notice of appeal, the INS stated that Alvarado had "not demonstrated that she suffered harm or persecution based upon race, religion, nationality, political opinion or membership in a particular social group" and therefore was not a refugee (INS Br., quoted in Musalo 1999, 1181). Specifically, they challenged the premises that domestic violence was persecution, that Alvarado held a political opinion, that belonged to a social group, and that her husband was motivated to abuse her *because* of the political opinion or her social group. In sum, the INS launched a comprehensive assault on Alvarado's claim to meet the definition of refugee.

In a sharply divided ruling, on June 11, 1999, the BIA reversed the asylum grant claiming that what she suffered was only a "private act of violence" (*In re R-A-* 1999, p. 922). In a ten-to-five vote⁵¹, the Board denied Rody Alvarado asylum and ordered her to be deported to Guatemala. The BIA's decision had immediate negative effects on a wide range of cases related to gender and social group status in addition to domestic violence cases (Musalo and Knight 2001, 57).⁵² The decision also created "tremendous controversy" among scholars and practitioners and highlighted the INS' contradictory

⁵¹ Board Member Guendelsberger wrote the dissenting opinion and was joined by 4 other members. The dissenting opinion disputes each of finding of the majority opinion, claiming rather that Alvarado was persecuted because of her social group membership and political opinion. As Alvarado's attorney, Karen Musalo (1999) argued, both the majority and dissenting opinions cited the *Matter of Kasinga* precedent to support their arguments (1181). The ability for adjudicators to invoke this decision to support opposite legal outcomes illustrates the "flexibility" of legal interpretation.

⁵² As Musalo and Knight note, "...immigration judges began to deny not only domestic violence claims, but a broad scope of gender-asylum cases – sometimes even refusing to hear testimony on the claim [...] In addition to such denials, the INS appeared consistently to appeal any grants of asylum that were entered by immigration judges" (2001, 56).

position on gender-related asylum (ibid). Alvarado's legal counsel appealed the decision to the Ninth Circuit Court of Appeals, and at the request of both parties the Court put the case on hold to await a response by the Attorney General.

Meanwhile, the Center for Gender and Refugee Studies spearheaded an 18-month campaign urging the Attorney General Janet Reno to review the case. As Musalo and Knight (2001) describe, the campaign involved congressional lobbying, grassroots mobilization and media attention (57-58). As a direct response to the campaign to overturn *Matter of R-A-*, on December 7, 2000 the Department of Justice issued a proposal entitled *Proposed Federal Regulations on Gender and the Social Group Category*.⁵³ On her last day in office before the start of the Bush administration, Reno responded to the campaign by vacating the BIA decision. However, rather than issuing her own decision on the case, on January 19, 2001 Reno remanded the case back to the BIA with instructions to "reconsider the decision in light of the final rule" on gender and social group status issued in the regulations (*Matter of R-A-*, 22 I&N Dec. 694, A.G. 2001).

The proposed federal regulations, however, were never approved. For the next two years various organizations and Congress Members advocated on Alvarado's behalf until the next Attorney General reviewed the case. Then on March 19, 2003 Attorney General John Ashcroft assumed jurisdiction over the case, prompting fear and speculation that he would uphold the BIA decision and deny access for battered women. Yet, media attention and support for Alvarado grew, encompassing organizations from across the political spectrum, including the conservative Concerned Women for America. In 2004,

⁵³ Proposed Regulations on Gender/social group -- Asylum and Withholding Definitions 76588, Federal Register/Vol. 65, No. 236/Thursday, December 7, 2000/Proposed Rules

the UNHCR⁵⁴ and the newly formed Department of Homeland Security submitted briefs to Ashcroft in support of Alvarado. In January 2005, rather than finalizing the federal regulations or making a decision on the case, Ashcroft again remanded *Matter of R-A* back to the BIA. Ashcroft's decision *not* to take action on the case drew media attention to the issue again. However, Alvarado's legal status remained unresolved.

In September 2008, Attorney General Michael Mukasey took over jurisdiction of the case. Mukasey lifted the requirement for the BIA to await the finalized regulations to issue a decision. In lieu of regulations, Mukasey highlighted several BIA decisions that set new precedents on social group membership. Each of these cases established new requirements to qualify as a member of a social group.⁵⁵ In order to satisfy these new requirements and submit new evidence, Alvarado's legal counsel and the DHS requested that the case be remanded back to the immigration judge. On December 4, 2008 the BIA granted a motion to remand the case back to the San Francisco immigration court to be judged on the basis of new social group requirements established through case law.

The devolution of Alvarado's case to the lower courts ultimately suppressed its impact as a precedent. Finally on December 10, 2009, an immigration Judge in San Francisco granted Rody Alvarado asylum. After fourteen years, Alvarado's case was

⁵⁴ The UNHCR's opinion highlighted the importance of Alvarado's case, "Her case is significant both nationally and international, as it presents important issues of interpretation of the international criteria for refugee status in an area of the law which is experiencing rapid development. At the bottom, the question is whether women who are fleeing gender-related persecution, particularly in the form of domestic violence, can fall within the internationally accepted definition of a refugee" (2). The Brief further urged Ashcroft to view her claim in light of global trends towards gender-sensitive jurisprudence, in particular how the social group provision needed to be understood in an "evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms" (7).

⁵⁵ While Alvarado's case was pending between 1999 and 2008, several additional cases were issued as precedent refining the requirements for social group status. Given the complexity of these new requirements and uncertainty about how a claim of domestic violence could be articulated, the DHS issued a brief in another lesser known case of domestic violence, *Matter of L-R*. The DHS brief outlined how battered women could be eligible for asylum under the new social group requirements. Using this guidance, Alvarado formulated her new claim to asylum.

decided in a lower court with no positive impact on case law. Her case was ultimately resolved in a one-sentence statement. While decided in Alvarado's favor, it did not generate systemic change that many hoped it would.

In the next three sections, I examine the BIA's decision on *Matter of R-A-* and the techniques they used to render Alvarado ineligible for asylum protection. My analysis illustrates how the Board implicitly and explicitly framed Alvarado and domestic violence as ordinary and therefore unqualified to meet the exceptionality standards necessary to win asylum protection following the *Kasinga* ruling. As the seminal 'follow-up' to *Matter of Kasinga*, I argue that the *Alvarado* decision solidified exceptionalism as a logic of exclusion in gender-based persecution cases. In the sections that follow, I examine several key aspects of the decision including the BIA's assessment of Alvarado's social group claim and their discussion of whether her husband's abuse was related to her social group status.

My analysis focuses on two related aspects of the decision, social group status and the "nexus" or casual link between grounds/persecution arguments. Given the complexity of these cases, it is important to explain that the Board had several individual findings in their decision, which I group into two sets. The first set of findings rejected the statutory "grounds" necessary to prove refugee status, or Alvarado's political opinion and social group. The rejection of the statutory grounds essentially removed the foundation of Alvarado's claim. In the second set of findings, the BIA targeted the "nexus" arguments, or causal links between the protected grounds (social groups/political opinion) and the motives for persecution. The nexus requirement involves proving that the persecution was carried out *because* of the protected grounds, in this case social group or political

opinion. These findings are fundamentally linked, because rejecting the political opinion and social group status critically destabilizes the nexus; it is difficult to prove that a non-existent political opinion or social group motivated the persecutor. By dismantling the statutory grounds and nexus claims, the BIA comprehensively unraveled Alvarado's claim to refugee status. Their rationale, which I examine in this section, demonstrates the contortions and distortions they performed in order to deny her claim.

6.3 The BIA Decision and Flexible Exclusion

Although adjudicators claim to simply “apply” asylum law to evaluate individual claims to asylum, I have argued throughout this dissertation that refugee asylum law is not static or fixed. Rather the law itself is actively produced in response to particular cases under review. Although adjudicators draw upon “standards” outlined in precedents, in reality they maintained great latitude in interpretation. As I have demonstrated, the lines of inclusion and exclusion in asylum protection are quite flexible and often (il)logical. The BIA's response to Alvarado's claim, especially the social group formulation clearly illustrates how adjudicators simultaneously produce and execute the law (Ticktin 2005, 362).

In order to ‘legally’ reject Alvarado's social group claim, the Board members had to reformulate the law based upon new standards. Alvarado based her claim on a proposed social group of “Guatemalan women, who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” (*In re: R-A-*, 1999, p. 917). The BIA admitted that this social group formulation met the existing legal standards outlined in *Matter of Acosta* because it “satisf[ied] the basic requirement of containing an immutable or fundamental individual

characteristic” (*In re: R-A-*, 1999, p. 918). Indeed, an immigration judge had already granted Alvarado asylum on this basis.

However in Alvarado’s case, the Board decided that social group standards needed to be higher. Departing from their own case law in *Acosta*, the BIA now claimed that *Acosta* only established *minimum* requirements rather than providing an exhaustive definition of social groups. The BIA argued that possession of fundamental or immutable characteristics were mere “starting points” or “threshold requirements” (*In re: R-A-*, 1999, p. 919). As if conscious of this impromptu law making, the Board struck a defensive tone stating, “We never declared...that the starting point for assessing social group claims articulated in *Acosta* was also an ending point” (*In re: R-A-*, 1999, p. 919). By claiming that *Acosta* was simply a “starting point” the BIA asserted the power to modify their own case law to fit the case before them. Furthermore, by claiming that there was no “end point,” the Board also suggested that they could devise more stringent requirements indefinitely, if they saw fit. As they did to Alvarado, the BIA could enact this power to change the law in the face of an applicant who had already met established requirements and won asylum in the Immigration Court. As I have argued in previous chapters, this power of flexible exclusion within asylum adjudication consistently frustrated efforts by lawyers to foster a more inclusive set of protections for refugees, particularly women fleeing gendered forms of persecution.

6.3.1 Exclusionary Logic: The Perceptions Test and Speculative Power

Breaking from existing precedents, the BIA introduced three new requirements related to social group status in assessing Alvarado’s case. All of these requirements revolved around the concept of “perceptions of who belongs” to a social group, or as the

2008 Attorney General described it, “cognizability.” As the BIA stated, it mattered “how members of the grouping are perceived by the potential persecutor, by the asylum applicant, and by other members of society” (*In re: R-A-*, 1999, p. 907). This concept of perceived social grouping deviated dramatically from the *Acosta* test.⁵⁶ While sex was an fundamental and immutable attribute under the *Acosta* ruling, by focusing on social perception the BIA found a way to dismiss this immutable characteristics as merely “descriptive.” In other words, the BIA asserted that Alvarado had crafted a social group based on empty identity markers in order to make an unfortunate personal problem seem politically relevant. Alvarado, it was argued, was not part of a social group because others in Guatemalan society did not see her as part of a group, nor did her husband.

This social group perception test, I argue, sought to poke holes into a sound argument for social group status. This test also placed tremendous speculative power in the hands of the BIA members who empowered themselves with interpreting the perceptions of other people around Alvarado to deny the legitimacy of her social group claim. This power of interpretation by adjudicators afforded them tremendous flexibility to exclude, and echoes those logics employed in the case of *Campos-Guardado* in which the BIA ascribed the motives (or the lack thereof) of paramilitary attackers behind her rape in El Salvador. As I previously illustrated in Chapter 4, the BIA’s decision in *Campos-Guardado* illustrates how adjudicators implicitly used a perceptions test to their advantage by claiming that members of the paramilitary raped her for personal reasons rather than political ones. This was pure speculation on the part of the BIA and Ms. Campos-Guardado vigorously disputed their claims to no avail. Indeed, to demonstrate

⁵⁶ In certain respects this perception test relates to the *Sanchez-Trujillo* standard of “visibility” associated with voluntary association.

the extent to which such power can go in reconstructing events, the BIA ascribed political opinions (perspectives) to everyone at the scene of her rape, but denied the rape itself was motivated for political reasons. This kind of speculative power to interpret perceptions ultimately translated into the BIA's power to creatively interpret Alvarado's husband, Osorio's motivations to abuse her.

In *Matter of R-A-*, adjudicators depoliticized the violence itself by obfuscating the motives of Osorio. To legally be considered persecution, abuse has to be *motivated* by one of the protected grounds. By questioning Osorio's motives, the BIA took aim at a critical aspect of Alvarado's claim to be a refugee. The Board claimed that Alvarado's husband's motives could not be ascertained from the record (*In re: R-A-*, 1999, p. 927). Nevertheless, even though the Board claimed that his motives could not be deciphered, they did not hesitate from filling the void of interpretation by offering their own speculative explanations. They offered a series of reasons Osorio beat Alvarado, which included a "warped perception of and reaction to her behavior," "jealousy," "growing frustration over his own life," and "simple unchecked violence tied to inherent meanness of his personality..." (*In re: R-A-*, 1999, p. 926). Later they described his motivations as a result of "psychological disorder," "pure meanness" and "no apparent reason at all" (*In re: R-A-*, 1999, p. 927).

Each of the reasons identified by the BIA were personal, pathological or circumstantial reasons. In their estimation, Osorio abused Alvarado because he was just a mean, bad or disturbed person. Framed in this way, the Board depicted Alvarado as trying to make 'bad' behavior *seem* politically relevant. Without clear motives, the Board asserted that even atrocious actions could not qualify a person for protection.

...asylum law is not simply about the construction of various presumptions and inferences for bringing inarguably atrocious human action within one of the five grounds for which relief may be granted, particularly when those presumed or inferred motivations are undetected by both the abuser and the victim (*In re: R-A-*, 1999, p. 926).

The Board claimed that Alvarado made up the reasons her husband abused her. The irony of their statement is that they interjected their own presumptions and inferences into Alvarado's story, in spite of Alvarado's gendered analysis of the abuse. Indeed, they refused to even name gender as a factor in the abuse. Rather they described it as "atrocious human action". In spite of Alvarado's account of the abuse and their own speculations, the Board argued that Osorio's actions were unexplainable. Without knowing *why* he harmed her, the BIA argued that even atrocious behavior would not qualify as persecution.

6.3.2 Exclusionary Logic: Government Inaction is Not Enough

The BIA's assessment completely contradicted the Immigration Judge's interpretation and decision. According to the general intent of refugee and asylum law based in international human rights law, the Guatemalan government had failed to protect Alvarado. The U.S. government by all other measures should have provided protection to Alvarado. By the IJ's account, domestic violence was carried out against women with social and governmental sanction; Osorio abused Alvarado because he knew he could. As a woman and as his wife, Osorio knew he could abuse Alvarado with impunity. In sum, the IJ who granted Alvarado asylum found that (1) governmental inaction in response to domestic violence and (2) societal bias against women who reported violence actually supported Alvarado's claim to part of a social group in Guatemala. The Board however, discounted these factors by arguing that government inaction and societal bias had no

bearing on Osorio's motives. In fact, they claimed that a focus on governmental inaction and social norms was a *distraction* from her husband's lack of punitive intent – or motivation – which as I argued earlier, they reduced to pathological meanness (*In re: R-A-*, 1999, p. 922). In other words, they accused Alvarado of focusing on governmental inaction to *cover up* for an illegitimate claim of persecution. Lack of governmental action, they argued, was not enough to elevate a “private act” to the level of political relevance. In their own words,

In construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the “on account of” [nexus] requirement in the statute” (*In re: R-A-*, 1999, p. 923).

The Board not only directly stated that domestic violence was a “private act,” but also attempted to further depoliticize it by claiming that governmental inaction on the issue was irrelevant. While there is a solid area of case law protecting refugees from non-state actors whom the state is unwilling or unable to control (including *Matter of Kasinga*), in Alvarado's case the BIA argued that governmental inaction was irrelevant. Indeed, in the case of *Kasinga*, invoking state inaction was not a barrier but has been a basis for her eventual grant of asylum. Yet, for Alvarado, the BIA raised it as an obstacle.

6.3.3 Gendered Logics of Exclusion: Domestic Violence as Tragic Personal Circumstance

Reproducing the gendered exclusionary logics I described in Chapter 4, the BIA further dismantled Alvarado's claim by depoliticizing and trivializing her experience of persecution. Rather than providing the sound basis of a social grouping, the Board accused Alvarado of presenting a “legally crafted description of some attributes of her

tragic personal circumstances” (*In re: R-A-*, 1999, p. 919).⁵⁷ By framing violence against Alvarado as personal and tragic, the Board mobilized the same gender-bias that had long led to the marginalization of women’s experiences of violence outside the political calculus of U.S. state protection and refugee law. Rather than viewing domestic violence as a targeted action rooted in social and political structures that subordinated women, adjudicators constructed the kind of violence Alvarado experienced as an unfortunate but random form of abuse that was personal and private (Sinha 2001). Through these gendered logics of exclusion, the Board actively undermined the connection between domestic violence and social and political inequality.

The BIA’s characterization of Alvarado’s experience of abuse as tragic and personal reproduced the gendered logics of exclusion so heavily critiqued by feminist scholars (Rhode 1991, Schneider 1994, Copelon 1994, Minow 2000). At the time that the BIA heard Alvarado’s case in 1999, feminist scholars and activists had made significant advances in arguing that domestic violence was an issue of power and control rather than an isolated, personal problem. Feminist argued that domestic violence was a systematic expression of patriarchal domination. Alvarado’s brief contained substantial scholarly references challenging the framing of domestic violence as merely personal or pathological, and offered extensive research and testimony from experts in Latin America claiming the prevalence of the practice by men with impunity. Even the 1995 INS gender guidelines authored by Phyllis Coven directly identified domestic violence as an example of gendered persecution. The BIA however, refused to accept such gendered analysis

⁵⁷ The BIA’s language here is reminiscent of the 9th Circuit Court in *Sanchez-Trujillo vs. INS*, in which the court dismissed the applicants social group as based on demographic descriptors and also suggested it was a group fabricated for legal purposes.

and instead chose to undermine any link between the violence and Alvarado's social group or political opinion.

The Board's analysis radically departed from accepted understandings of domestic violence and from the basic intent of international refugee standards which called for surrogate states to protect non-citizens who are not protected by their states. The ruling went so far against established human rights protections that even the UNHCR was moved to write an opinion pointing out its erroneous logic (UNHCR 2004). Yet, when viewed in the legal archeology of BIA decision-making the logic was sound. Violence targeting women had always been held to a higher standard of scrutiny, and adjudicators simply extended that history of gendered exclusions by rejecting Alvarado's attempts to name domestic violence as a political act. Like in the cases reviewed in Chapter 4, violence against women was rendered as ordinary and thus ineligible to be included in the emerging recognition of gendered asylum protection. To dismantle Alvarado's claim, I argue, the BIA reconstructed the violence she experienced as unexceptional. The significance of framing domestic violence as unexceptional becomes clearer through a comparison to the BIA's evaluation of *Matter of R-A-* and *Matter of Kasinga*.

6.4 Gendered Logics of Exclusion: The Standard of Exceptionality

As I have argued, the BIA's ability to flexibly exclude asylees is evident in the impromptu use of higher standards to deny Alvarado asylum. As discussed above, the BIA prevented Alvarado from using the social group category defined in *Matter of Acosta* by erecting new hurdles. They also drew upon their power of interpretation to reduce the domestic violence she experienced to a personal problem and the

government's inaction to stop her husband as irrelevant. In this section, I argue that the BIA used *Matter of Kasinga* as a new standard against which to test Alvarado's claim. In effect, the BIA argued that domestic violence was not as globally reprehensible as FGM, was too pervasive and therefore could not meet the standard of "persecution" to be recognized as a refugee as outlined in existing U.S. case law.

The respondent in this case has not demonstrated that domestic violence is as pervasive in Guatemala as FGM is among the Tchamba-Kunsuntu Tribe, or, more importantly, that domestic violence is a practice encouraged and viewed as societally important in Guatemala. She has not shown that women are expected to undergo abuse from their husbands, or that husbands who do not abuse their wives, or the nonabused wives themselves, face social ostracization or other threats to make them conform to a societal expectation of abuse. While the respondent here found no source of official protection in Guatemala, the young woman in *Kasinga* testified that the police in Togo were looking for her and would return her to her family to undergo FGM (*In re: R-A-*, 1999-, p. 924).

The Board's analysis faulted Alvarado for not directly mirroring the precedent setting case of *Kasinga* in three ways. First, they argued that whereas FGM was pervasive and culturally significant among the tribe, domestic violence was not similar in Guatemala nor was it expected of women even though Alvarado's legal team provided evidence to the contrary. The BIA claimed that Alvarado did not prove that spousal abuse was "itself an important societal attribute, or in other words, that the characteristics of being abused is one that is important within Guatemalan society" (*In re: R-A-*, 1999, p. 924). Second, the police in Togo actively sought out Kassindja because she was married and was expected to undergo FGM, and they thus claimed that the *Kasinga* decision established a relationship between the state and the persecution, even in the context of its inaction to stop FGM. The inaction of the Guatemalan state to protect Alvarado however, did not amount to complicity in violence according to the BIA.

Third, whereas FGM was “expected” of all girls, they found fault with the fact that Alvarado’s husband only abused *her* (ibid). Here, paradoxically, the BIA went so far as to develop a hypothetical situation in which they did recognize Alvarado’s social group only to argue that she provided no evidence supporting the assertion that her persecutor recognized her as one of a population of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” (*In re: R-A-*, 1999-, p. 925). Here it is clear that the distinction drawn by the BIA between Kassindja and Alvarado focused only on the abuse itself rather than the social group category. Kassindja, it was argued, was persecuted because she was expected to undergo FGM as part of cultural, tribal practice. The BIA argued that Alvarado was not expected to live with and bear the consequences of her abusive husband. The logic of their argument becomes particularly absurd as they asserted that Osorio, or other men, would not recognize Alvarado, or other women, as a part of a social group expected to live under male domination. The BIA stated that,

...the respondent has not shown that Guatemalan males who believe in male domination and have been intimate with Guatemalan women actually target their intimate partners for persecution because of the victims’ presumed group membership. The proposed social group represents a description of persons who may or may not experience harm. But it fails, on this record, as an adequate explanation for the surface, or even the more deep-rooted, factors that motivate the abusive behavior (*In re: R-A-*, 1999-, p. 925).

The BIA, in sum, required Alvarado to demonstrate that Osorio was motivated to abuse her on the basis of a patriarchal culture of male domination. In other words, it challenged the very concept of gendered domination as a motivating factor in Osorio, or any men’s actions against partners who they are intimate with.

The BIA's strict requirements for Alvarado to prove punitive intent conflicted directly with their decision in *Matter of Kasinga*. Prior to 1996, punitive intent was required to prove harm constituted persecution. However, in *Matter of Kasinga*, the BIA modified this definition and established that "punitive" or "malignant" intent was *not* required for harm to constitute persecution. As I argued in Chapter 5, this modification was one of the concrete ways adjudicators constructed FGM and Kasinga's case as exceptional. The practice of FGM was so "extreme," the BIA found, that it outweighed the need to assess a persecutor's motives. FGM was deemed so reprehensible that it did not need a motive. The motive itself was culturally, socially and geographically bounded and therefore needed no further explanation. According to the BIA, domestic violence on the other hand was too generalizable, seemingly arbitrary and its victims could be ordinary people like women in marital relationships.

According to the BIA, Kasinga's exceptional standard represented a critical way to narrow the social group category to deny Alvarado asylum. However, the majority opinion was not uniformly accepted. A conflict between the Board members indicates that denying Alvarado asylum was not an inevitable legal outcome, but rather one that was achieved through particular interpretive techniques. According to dissenting Board members, the majority created a new "laundry list of hurdles" for asylees to use the social group provision (*In re: R-A-*, 1999, Dissenting Opinion Guendelsberger, p. 930). As this opinion pointed out, the majority defined Alvarado as outside the bounds of asylum protection by adding additional requirement in excess of *Acosta* and by contriving distinctions between her case and *Kasinga*. The dissenting Board Members indicated in their opinion on the case that the majority's findings resulted precisely from a desire to

restrict access to the social group category. The dissenting opinion argued that these hurdles were based on differences between the two cases that the majority “contrived.”

According to their analysis, the two cases were very similar.

Both cases involve a form of persecution inflicted by private parties upon family members. In both cases, the victims opposed and resisted a practice that was ingrained in the culture broadly sanctioned by the community, and not prevented or punished by the state. In both cases, the overarching societal objective underlying the cultural norms was the assurance of male domination (*In re: R-A-*, 1999, Dissenting Opinion Guendelsberger, p. 932).

The dissenting opinion highlights important similarities between the cases. While the majority opinion distinguished the cases, the dissent’s perspective was embedded within a broader analysis of the gendered dynamics of power and violence. Kassindja and Alvarado, they argued, were both targeted for violence because of their gender status as women. Both forms of violence were produced by and reproduced male domination. The dissent’s perspective situated domestic violence in the context of gender inequality sustained by cultural, social and political arrangements.

In Alvarado’s case, however, adjudicators honed in on her husband’s motives and used it as a basis to reject her claim. The harm of domestic violence, in other words, was not perceived as extreme enough to outweigh the need to prove punitive motives whereas FGM needed no discussion of motives. To adjudicators, the link between FGM and male dominance was clear. Yet, they actively dismantled and dismissed any link between domestic violence and male domination, not only by privatizing and pathologizing her husband’s actions but also dismissing the relevance of governmental inaction. Reading the cases against each other, it is possible to see that by subjecting the cases to disparate legal standards, adjudicators tacitly framed domestic violence as an unexceptional and ordinary rather than an extreme form of gendered violence like FGM, particularly in the

extreme case presented by Alvarado. It is clear from the record that adjudicators' concerns exceeded Alvarado's case. Like in all of the cases I have reviewed in this dissertation, by framing Alvarado as unexceptional adjudicators could establish a negative precedent to stem the presumed rising tide of female applicants from Latin America who might pursue asylum on the same basis as Alvarado.

The BIA's decision illustrates the exclusionary logic at the root of flood-gatekeeping. By denying Alvarado, the BIA provided a means to arrest the development of gender-based asylum. This move harkens back to words of caution the INS raised during the *Matter of Kasinga* trial. The INS Director David Martin had advised the BIA to word their decision wisely so that they would not lose control over how the precedent was used, or how it could be used in "other sorts of circumstances" beyond those faced by Kassindja (Trial Transcript, *Matter of Kasinga* 1996). *Matter of Alvarado* became the opportunity for the BIA to define what those excludable "other sorts of circumstances" were.

6. 5 Unexceptional Violence and Flood Fears

While adjudicators invoked supposedly abstract and universal definitions of social groups in their decision-making, I have illustrated how these requirements were developed in direct response to the cases under review. Flood fears inform the logics of exclusion that adjudicators rely upon in their decision-making on these cases. To define particular applicants as outside the bounds of protection, adjudicators transformed asylees from individuals into mass groups of people. In so doing, adjudicators suggested that they represented a threat to the asylum system if the human rights violations they endured were recognized. Following the *Kasinga* ruling, asylees had to meet a new burden of

proof that they were exceptional and the BIA held the ultimate interpretive power to decide what were ordinary and extraordinary forms of harm. As I argue in this section, adjudicators were motivated to rule on *Matter of R-A-* through fears about a flood of battered women.

In the BIA ruling, adjudicators stated that Alvarado's claim posed a threat of lowering asylum standards. In reference to Alvarado's social group, the BIA stated, it would "virtually swallow up the entire refugee definition if common characteristics, coupled with meaningful level of harm, were all that need be shown" (*In re: R-A-*, 1999, p. 919). Here the Board claimed that if they were to cater to such a low standard, the meaning of asylum would be lost because it would be overused. Adjudicators justified rejecting Alvarado's claim by suggesting that granting her asylum would result in being "swallowed up." The threat of being swallowed up had potency, I find, because adjudicators framed Alvarado's experiences as common and unexceptional. In other words, the threat of inundation could be real only if Alvarado represented a lot of other women. Indeed, this is exactly what the BIA claimed, that Alvarado's story was one that "fits many other victims of spouse abuse" (*In re: R-A-*, 1999, p. 919). Yet, the Board went further than claiming her experience was typical among other battered women. Addressing Alvarado's resistance to her husband, the Board claimed that she acted like any *human* would. Consequently, granting her asylum would have dangerous consequences. As they stated,

As we understand the respondent's rationale, it would seem that *virtually any victim of repeated violence who offers some resistance could qualify for asylum*, particularly where the government did not control the assailant" (*In re: R-A-*, 1999, p.916, emphasis added).

Framed as representative of battered woman and simultaneously as a genderless human, adjudicators thus argued that recognition of her proposed social group would open asylum up to anyone subject to repeated violence. Alvarado's case, they argued, undermined the integrity of the refugee definition and the meaning of asylum protection. Recognizing the validity of her claim would have a domino effect and open up asylum to entire classes of people now ineligible.

A focus on the adequacy of governmental protection would also shift the analysis in cases of refugee claims arising from civil war, as well as any other circumstance in which a government lack the ability effectively to police all segments of society (*In re: R-A-*, 1999, p. 923).

Alvarado's assertion that domestic violence fit within refugee provisions, the BIA argued, would essentially open the door to a flood of applicants.

Board's reference to civil war in Alvarado's case conjured up the long history of gendered, classed and racialized logics of exclusion based on so called "generalized violence" that had restricted use of the social group and political opinion category since *Matter of Acosta*. As I discussed in Chapter 3 and 4, this logic could be regularly deployed to invalidate particular identities and social positions adjudicators did not find important enough to be protected by the U.S. government. As a Guatemalan woman who was not an elite or public figure, adjudicators essentially rendered Alvarado's identity as unimportant enough to motivate harm nor to warrant protection from the State. This bias was compounded by the BIA's dismissal of populations who experienced unequal protection from the state. States often protect those citizens that they value the most. Thus, one material consequence of being marginalized within social structures because of race, class or gender is precisely what Alvarado experienced, inadequate protection from the state. For women, this has often been justified through retorts that domestic violence

is a personal problem outside the realm of “real” political issues and state interests. Indeed, the BIA callously disputed this major focal point of feminist human rights scholarship and activism in *Matter of Alvarado*.

6.6 Delayed Decision Making and Gate-Keeping Tactics

By normalizing domestic violence, the BIA fed into fears that validating Alvarado’s social group would burst open the floodgates of asylum to ordinary women fleeing unexceptional circumstances. The BIA ruling did not go unchallenged, but in fact spawned efforts to 1) overturn the decision and 2) ensure protection for battered women through federal regulations. However, as I discuss in this following section, both of these goals were frustrated by delayed decision making. While Attorney General Reno vacated the BIA’s decision on *Matter of R-A-*, she made the final legal outcome contingent on the passage of federal regulations. The coupling of the Alvarado’s case with federal regulations expounded existing flood fears. The proposed regulations specified how gendered claims of persecution qualified under the social group provision, which would be binding through administrative law. I argue that this motivated decision makers and agency officials to enact gate-keeping tactics, which are visible in their treatment of Alvarado’s case. As informants described during my interviews, flood fears are not only expressed through words but are also visible in how a case is handled. The ongoing battle over *Matter of R-A-* following the BIA decision demonstrates how flood fears shaped the legal trajectory of her case and ultimately the role it played in the development of gender-asylum case law.

The conflict between the majority and dissenting opinions in *Matter of R-A-* indicate how the case became a micro-struggle in a bigger debate about the meaning and

scope of gender-related persecution. By rejecting Alvarado's claim, the majority of the BIA contained positive case law on gender, gender violence and social group status to the specific facts and circumstances of *Kasinga* and FGM. The regulations attempted to lift this blockade by removing the barriers created by *Matter of R-A-* for domestic violence applicants and clarifying "that gender can form the basis of a particular social group" (65 Fed. Reg. 76588). The regulations would have supported granting Alvarado asylum, but also addressed the systemic issue of conflicting social group case law that left many gendered claimants' fate to be determined by the discretionary whims of adjudicators. While no panacea, the regulations presented a clearer roadmap for gender related claims in part by clarifying interpretive conflicts and making adjudicators accountable to one set of social group standards.

While the regulations were promising, they were never approved or finalized. As Berger (2009) argues, although administrative interest in the case may have diminished due to the attacks on September 11, 2001 and the subsequent reorganization of the INS and Department of Homeland Security, the case was a visible site of dispute within the government (688). The delay in other words, was not the result of ignorance or oversight. I argue it demonstrates intentional, deferred decision-making. John Ashcroft, who followed Reno as Attorney General, reviewed Alvarado's case, but ultimately sent it back down to the BIA with the same order to make a decision after the regulations were passed. Ashcroft never explained why he did not make a ruling on the case (or pass the regulations), however my analysis suggests that flood fears motivated this complacency. Politically, it would have been unpopular to deny Alvarado asylum and foreclose

opportunities for battered women.⁵⁸ However, if she were granted asylum (and the regulations passed), the DHS expressed concern that it would open up the asylum floodgates. These fears are evident in a brief the DHS authored to Ashcroft on the case. In the 2004 brief, the DHS clearly stated that while they supported Alvarado's case, they did not extend this support to domestic violence claims broadly. Indeed, the brief attempted to distinguish her from other battered women by claiming that her case was "unique," she suffered "particularly horrendous abuse" and that the case had "very unusual facts and exceptional circumstances" (DHS, Brief *Matter of Alvarado*, 2004, 2). By focusing on her uniqueness, the DHS emphasized that only exceptional cases of domestic violence, (and by implication not the 'normal' ones) should win asylum.

The DHS explicitly coached Ashcroft on several gate-keeping tactics that would allow him to grant Alvarado asylum without jeopardizing existing gates preventing a broader class of women from qualifying. Their primary strategy was to isolate the decision by remanding the case back to the BIA and requiring them to issue a terse decision. As they explained,

The DHS believes the case is moot and move the Attorney General to remand the case to the Board with instructions to summarily grant asylum to the alien with the following language: "Pursuant to the order of the attorney general, the alien is granted asylum under section 208 of the Act." The instructions to the Board should make clear that the Board is not to summarily affirm the IJ's decision. The facts of this case [...] do not offer an appropriate vehicle for developing the kind of comprehensive administrative interpretive approach needed for the adjudication of particular social group cases (DHS Brief *Matter of Alvarado*, 2004, 2-3).

⁵⁸ A former administration official quoted in the *New York Times* described that although Ashcroft was initially against a favorable ruling, he faced "enormous pressure" to support the regulations from conservative groups such as Concerned Women for America⁵⁸ and World Relief, as well as from the DHS. To rule against protection for battered women would be unwise politically (Swarns 2004), but to rule in favor would open a floodgate.

The DHS statements echo earlier concerns about the original IJ decision, which had granted asylum to Alvarado via *Kasinga* and *Acosta*, thereby firmly grounding protection for battered women in existing case law. By coaching Ashcroft on how the BIA should word the decision, the DHS sought to break any link between *Acosta*, *Kasinga* and Alvarado. They expressly stated the need to prevent any social group case law from developing around the facts and circumstances in Alvarado's case. The Alvarado case, they argued, was not an appropriate vehicle for developing social group policy.⁵⁹ Rather, the DHS' urged Ashcroft to retain control over social group case law by containing the impact of the case.

Although Ashcroft had requested briefs on the case, he ultimately decided not to move the case forward and instead remanded it once again to the BIA to await regulations. It was not until 2008 that Attorney General Mukasey took over jurisdiction of the case and lifted the requirement for the BIA to await the finalized regulations to rule on *Matter of Alvarado*. While this moved the case past a long-standing stalemate, I argue it was also an important gate-keeping strategy. The Attorney Generals' deferred decision-making had opened the opportunity for the BIA to continue developing restrictive social group case law. Between 1999 and 2008, while Alvarado's case was pending, the BIA issued new precedents that imposed additional requirement, including "social visibility" and "particularity" (*Matter of C-A-* 2006, *Matter of S-E-G-* 2008).⁶⁰ However, rather than

⁵⁹ Rather the DHS advocated for regulations that would "...allow social group definition to be *tailored narrowly*," because as they stated, it would "...avoid the kinds of *overbroad social group definitions* that have confused the analysis of cases in the past" (emphasis added, DHS 2004, 3).

⁶⁰ Although the BIA first introduced social visibility and particularity as "considerations" in 2006 *Matter of C-A-*, in their 2007 decision *In re A-M-E & J-G-U-* and 2008 decision, *Matter of S-E-G-*, the BIA required permissible social groups to be socially visible and defined with particularity (Frydman 2010).

clarifying case law, advocates describe these new social group requirements as “confounding” and “muddled” (Musalo 2010, 60; Frydman 2010).

Mukasey’s decision enacted gate-keeping in two ways. First, Mukasey justified de-coupling Alvarado’s case from the regulations by redirecting attention to this emerging case law. In other words, in lieu of regulations (which sought to clarify and create a uniform standard), Mukasey argued that these new precedents on social group membership were sufficient. Yet, advocates and attorneys have pointed out that these BIA decisions were unclear and had been interpreted and applied in confusing and contradictory ways by the federal circuit courts.⁶¹ Consequently, attorneys struggled to satisfy the new requirements (Frydman 2010). Mukasey’s decision side stepped the regulations and affirmed the continued development of confusing and conflicting case law. This perpetuated uncertainty and ad hoc treatment of claims rather than creating a clear administrative law addressing systemic issues plaguing gender-related claims.

Secondly, Alvarado’s case had the potential to change asylum policy through administrative law because it was being reviewed at the appellate level. Mukasey’s endorsement of the newly formed BIA precedents requiring particularity and visibility, however, meant that Alvarado had to meet new social group requirements and submit new evidence. In order to do so, her case had to be remanded back down to the lower

⁶¹ As Frydman (2010) explains, “Some decisions explain social visibility as the precondition that the *applicant* literally be identifiable as a group member (essentially requiring that anyone looking at the individual on the street would identify her as a member of the group), while others require societal recognition of the *defined group*, or evidence of distinct treatment toward group members. “Particularity” in essence is a question of whether the group is defined with enough specificity to identify who is in the group, and who is outside of the group; decisions explaining this requirement are also unclear. In addition to being analytically confusing, BIA decisions often conflate social visibility and particularity with other elements of the refugee definition, such as whether the causal link (nexus) to a protected ground has been established and whether there is sufficient likelihood that the applicant would be targeted for future persecution. While these decisions assert that the various social groups the BIA had formerly approved would all meet the social visibility test, they fail to explain how or why.”

level courts. When Alvarado did finally win asylum on December 4, 2008, it was in an immigration court in San Francisco. While this was undoubtedly a personal victory, since the case had been remanded down to the IJ level, the decision had no precedential value. Mukasey's decision to affirm the BIA case law thus meant that *Matter of R-A-* was devolved down to the lowest adjudication level, which in effect isolated, individualized and contained its potential to radically alter U.S. law. While decided in Alvarado's favor, it did not generate systemic change as it once had the potential to do.

6.7 Conclusion

Rody Alvarado sought political asylum by arguing that the abuse she experienced was related to her political and social position as a Guatemalan woman married to an abusive partner. While case law existed to support such a claim, INS and DHS officials and BIA adjudicators contested her claim in large part because of the flood fears it generated. Rody Alvarado materialized the INS' earlier concerns about how the *Kasinga* precedent would be used for cases beyond those recognized in *Kasinga*. As the seminal 'follow-up' to *Matter of Kasinga*, the BIA decision reasserted control over the development of gender asylum case law by issuing a negative decision limiting the use of *Kasinga*. Through the *Alvarado* decision, they solidified exceptionalism as a logic of exclusion. In order to define Alvarado as outside the boundaries of asylum protection, BIA members implicitly and explicitly framed Alvarado and domestic violence as ordinary and therefore unqualified to meet the exceptionality standards necessary to win asylum protection. Framing Alvarado and domestic violence in this way mobilized flood discourses and that legitimized not extending protection in the case.

The overall case trajectory of *Matter of R-A-*, I argue, demonstrates the role of flood fears in individual adjudication but also in the development of gender-based asylum case law. Flood fears and gate-keeping were an animating feature of the continued battle over *Matter of R-A-* and the manner in which the case was finally resolved. Based on my analysis, asylum agency officials and attorney generals were concerned that a positive decision and the passage of the regulations would expand access to asylum protection, resulting in a loss of control over immigration, enabling ordinary women from the third world to lawfully gain access to protection and a path to citizenship in the U.S. Thus, once her case rose to the level of prompting broad based change for battered women and other gender-related persecutions, it stalled. Decision makers avoided regular and predictable legal standards, in favor of fragmentation, which disproportionately effected cases that were already marginalized by a system that favored elite, public and masculine figures.

The implications of Alvarado's case are significant for analyzing the relationship between humanitarianism and immigration control within political asylum. Adjudicators, agency official and executive decision makers all participated, albeit in a disjointed way, in policing the use of the social group provision and guarding against it being "over-used." The trajectory of the case embodied the rationality of the flood fears, at first normalized and framed a part of an uncontrollable (and undesirable) mass of people, Alvarado's case had to be controlled and contained; prevented from altering the structure of asylum law. This shift from examining whether Alvarado's reasons for flight matched up with the objectives of refugee protection, to the impact of her case on asylum law signaled gate-keeping tactics. At a deeper level it also conveyed a rationality of

governance that humanitarian concern for women through political asylum would need to be economical. The state should not have to protect everyone who experienced human rights abuses, particularly women, and that a policy related to the social group provision would have to be mindful of controlling group size and numbers. In the next chapter I discuss the concept of the ‘governmentalities of flood-gate-keeping’ to argue that these rationalities animate the operation of asylum law.

Chapter 7: Governmentalities of Flood-Gate-Keeping

7. Introduction

The Refugee Act of 1980 marked an important moment in the development of humanitarian protection for refugees and asylum seekers in the United States. Through this act, U.S. Congress affirmed a commitment to assisting victims of persecution, and embraced the standards outlined in international human rights instruments related to refugees. The shift from a model of refugee protection based on Cold War foreign policy to a human rights framework outlined in U.N. protocols created an opening for a wider interpretation of the kinds of responsibilities the US state had to people fleeing violence. This alignment with the human rights principles of international protocols established fertile ground upon which women's rights advocates and lawyers could press for greater recognition of violence against women as a basis for refugee asylum protections. For nearly twenty years, lawyers and advocates have carved out a space for the recognition of gender-based asylum claims inside and outside the courtroom. The establishment of precedent setting case law acknowledging sex and gender as a basis for social group status has been a critical part of the development of gender-based asylum jurisprudence.

Despite rhetoric of growing recognition for gender-based asylum claims, in this dissertation I have demonstrated the complicated legal barriers to asylum protection that women (and men) continue to face in the United States. After the adoption of the international human rights definition of a refugee, the social group provision became a

critical point of entry for non-traditional claimants previously unrecognized by U.S. asylum law. The highly exclusionary response to Central American refugees and the emergence of gender-related asylum claims in the years immediately following the 1980 Refugee Act demonstrated how the “undefined” boundaries of the social group provision became a critical site in setting the boundaries of asylum among human rights advocates, adjudicators and agency officials. The early social group claims generated concern among adjudicators that the category would be used by populations with “mundane,” or “unremarkable” experiences of violence, whether they were Salvadorian men “displaced” by war or women experiencing political acts of sexual violence. These non-traditional cases upset the existing asylum paradigm and presented, in the eyes of state officials, a chaotic scenario which deviated from the traditional male, politically important, elite figures historically at the center of U.S. refugee protection. The concept that “ordinary” people might suddenly be able to achieve asylum protection from the U.S. state, especially people from particular race, class, gender and national backgrounds provoked these fears. Efforts to expand asylum to recognize gender-based persecution and to represent the experiences of women fleeing gender-based violence were caught in the vortex of these fears about the loss of border control and the reduction of state sovereignty. As I have argued, women asylum seekers triggered an acute anxiety often framed in terms of a fear of a flood.⁶²

⁶² Flood fears are embedded within broader concerns about immigration and sovereign control over state territory. The flood discourse relies upon images of the nation-state as a contained space under pressure. Immigration and immigrants are framed as exerting a pressure, akin to liquid, which eventually mounts to the point that the boundary defining the contained space of the nation is perforated. The result is a natural disaster; the damaged boundary enables “inflows” or “outflows” of water, resulting in the inundation of the once contained space (Charteris-Black 2006, 569). Likening immigration to flood waters suggests that the movement of people is dangerous and uncontrollable. The metaphor conjures up a state that has lost control of its boundaries, jeopardizing the safety and security of the ‘native’ residents. Immigrants threaten to bring (negative) social, cultural or economic change (Charteris-Black 2006, Santa Ana 2002, Cresswell 2004).

As gender-based asylum cases opened new pathways to refugee status for some women fleeing persecution, fears of opening the flood-gates to too many people also served to legitimize exclusionary definitions of what constitutes violence, persecution and by extension who could qualify as a refugee. By employing different legal tactics and definitional strategies, adjudicators overseeing precedent setting cases for gender-based asylum created highly selective and obscure “gates” meant to prevent certain populations from accessing asylum. Through an archeology of case law in gender-based asylum jurisprudence, my analysis demonstrates that despite a stated concern for women and violence, in reality adjudicators created laws and legal interpretations that were exclusive and reserved for only the most exceptional subjects. I have referred to these as standards of exceptionality. While appearing to open up asylum through new and expansive interpretations, standards of exceptionality had the opposite effect. They established barriers to entry. By holding up the standard of exceptionality, adjudicators sought to regulate refugee flows by only recognizing and protecting women who had experienced the most extraordinary forms of gender violence and who did not pose a threat to open the door to a large number of asylum seekers of particular race, class, sexual and national identities.

The flood metaphor deindividualizes and dehumanizes immigrants, shifting attention away from their experiences of persecution and instead frames them as threatening. Through the flooding metaphor, immigrants are turned into objects that are part of an inanimate process rather than human participants with life stories (Santa Ana 2002, Charteris-Black 2006, Cresswell 2004). The sense of perpetual crisis provoked by these flood fears necessitates state action to control territorial boundaries and to implement exclusionary immigration policies to keep ‘the tide’ of immigrants in check. In this dissertation, I have shown how this sense of crisis over border control extends to refugees and asylum seekers. Asylees elicit concerns about the states ability to control movement across its borders because states have obligations to those migrants who qualify under refugee laws (Churgin 1996, Fitzpatrick 1994). Asylum law is one such avenue, it is conceptualized as a merit based form of protection for those who qualify under the standards outlined in refugee law. Concerns about immigration control are particularly acute for the U.S. state because applicants are not pre-screened abroad (as they are for refugee resettlement programs) but must already be present on U.S. soil, thereby diminishing the state’s power to pick and choose who to recognize as legally present (Churgin 1996, Fitzpatrick 1994).

In this chapter I argue that standards of exceptionality are legitimized through governmentalities of flood gate-keeping through which the U.S. state manages the flow of populations and restricts access to the territorial border. Rather than expanding protection for women fleeing gender based persecution or enabling the U.S. state to enact benevolence, governmentalities of flood gate-keeping seek to reduce the state's responsibilities toward non-citizens. This argument diverges from the dominant theoretical discussions and debates within the feminist literature about gender-based asylum. As I argue below, feminist scholarship tends to focus on two areas (1) the failure of state institutions to recognize gender-based claims and (2) the problematic representation of third world women in asylum cases that reproduce imperialist and colonial imaginaries of state benevolence. My work offers a third perspective that shifts the focus from recognition and representation to the regulatory logics of the state.

My discussion proceeds in three stages. First, I re-embed my argument within feminist debates over recognition and representation in refugee-asylum law. While these approaches offer critical insight into the dynamics of gender-based asylum, I argue that we cannot fully understand how gender has been incorporated into asylum law without accounting for adjudicators' anxiety about regulating and controlling access to the U.S. border and to legal status. Second, I develop the concept of governmentalities of flood gate-keeping to argue that the struggle to recognize women as full subjects of human rights is mediated by a rationality that the state must economize its humanitarian concern. I focus on how exceptionality becomes a key mode of this economy, regulating access to asylum for women with claims of gender-related harm. Third, I examine how the governmentality of flood-gate-keeping creates obstacles and opportunities for asylum

legal advocates of gender-based asylum. As advocates seek to open pathways for women, the governmentality of flood-gate-keeping shapes the possibility of naming gender as a factor in their experiences of persecution in ways that further embed and normalize exclusionary logics.

7.1 Recognition, Representation and Regulation

Early advocacy pressing for the recognition of women-specific violence and gender-based asylum claims was directly tied to campaigns to recognize women's rights as human rights, and therefore sought to establish that women were legitimate subjects of refugee protections. The human rights paradigm has been critiqued for holding men as the invisible standard against which women's experiences and concerns was treated as "special interests." A major interpretive obstacle to the full recognition of women's claims was the public-private dichotomy foundational to liberal political theory. The gendered public-private dichotomy relegated women's activities to the private, domestic sphere and men to the public, political realm (Pateman 1992). Feminist legal scholars and practitioners argued that asylum law materialized this androcentrism, defining persecution according to a male subject and experience of persecution (Crawley 1999). These feminists argued that not only was gender absent from the definition of a refugee, but also that the existing categories within the definition were interpreted based on a male norm. Forms of persecution that solely or primarily targeted women, such as rape, female circumcision, forced marriage, domestic violence, and forced sterilization, were dismissed as private harms rather than persecution. To counter this bias, some advocated for the addition of a sixth category for gender, others called for a reinterpretation of the existing paradigm to counter the gender bias.

Gender-based asylum scholarship and advocacy has also generated considerable concern among transnational feminists who have critiqued the forms of representation propagated in the name of recognizing violence against (third world) women. In particular, scholars argued that recognition of gender-based claims relied upon gender essentialism and the use of colonial and imperial tropes. Transnational feminists argued that women's rights advocates privileged sex and gender to the erasure of differences based on class, race, and nation. Reflecting critiques leveled against Western feminists at the time, critical scholars claimed recognition of gender-based asylum reproduced the "universal category woman" in such a way that gender became inextricable from "culture" and "tradition." These critiques can be traced back to Mohanty's critique of Western feminists' construction of the "average third world woman" who was figured as leading an "essentially truncated life based on her feminine gender (read: sexually constrained) and her being 'third world' (read: ignorant, poor, uneducated, tradition-bound, domestic, family-oriented, victimized, etc.)" (1991, 56). Recognition of gender-based violence, scholars have argued, perpetuates the trope of third world women as objects in need of benevolent rescue (Grewal 2005, Visweswaran 2004). Successful asylum claim, they argued, became contingent on these narratives of cultural backwardness, barbarity, exotic forms of harm, and isolated gender oppression, feeding into American nationalism and exceptionalism.

Following this logic, transnational feminists have argued that women asylum seekers need a "cultural hook" (Sinha 2001) to trigger these sentiments and win asylum; a politically fraught strategy that reproduces rather than challenges a white western imperialist feminist vision of governance. In order to win asylum, these scholars argue

that women have to be represented as victims of dysfunctional and exceptionally patriarchal cultures and states that can be distinguished from the West (Razack 1995, 50). This strategy relies on cultural racism to fight sexism. Adjudicators, it is argued, are more willing to accept “exotic” forms of culturally based violence as persecution rather than those that are more “familiar” (Oxford 2006). These imperial frames reproduce the binary of the west/civilized and east/uncivilized, requiring women to represent themselves as a cultural other to be recognized. Such claims not only isolate gender and simplify power relations within and among nations (Berger 2009), but also rely upon static and essentialized conceptions of “culture” (Visweswaran 2004).

My research has demonstrated that while a cultural hook may play a role in distinguishing women and making them visible as subjects within asylum adjudication, the rationale and tactics employed to establish and enforce standards of exceptionality are far more complex and contradictory. While culturally specific gender violence and humanitarian sentiments might shape the sympathies of adjudicators in some instances, particularly in lower level courts⁶³, I argue that standards of exceptionality are not based, first and foremost, on such benevolent rationales. Indeed, as I have shown, standards of exceptionality are designed to exclude large numbers of potential asylum seekers from a portal to protection, residence and citizenship rights. In precedent setting decisions, adjudicators exerted their discretionary power to regulate legal borders. In the cases I examined, the discursive frameworks that recognized and validated women, gender and gender violence as asylum worthy served this end goal. Exceptionality requirements

⁶³ The vast majority of this scholarship examines isolated precedent decisions or cases within the lower level courts as opposed to my study which examines cases that are published as precedents and thus constitute ‘the law’ on asylum.

function as a technology of exclusion through which asylum seekers are classified into ever more isolated and idiosyncratic categories that defined who is deserving of entry and who is not. My legal archeology shows that precedent setting decisions are calculated tactics of exclusion designed to erect legal borders that limit the number of people who have access to U.S protections. Gender-based asylum, while appearing from some feminist perspectives as a particular strategy for expanding recognition of violence against women and implementing women's human rights, is also embedded in a retooling of state regulatory techniques focused on managing migratory populations and securing border controls.

My emphasis on state regulation contributes to a shift in feminist analysis by illustrating the "fragmented" nature of the asylum system (Anker 2002, Oxford 2006) as a designed feature of border control. This account of the asylum system supports theories of the state that challenge the existence of a strict division between state/society and which tend to treat the state as a monolithic, "majestic" entity (Jessop 1990, Mitchell 1991). As Jessop (2004) argues, the state is embedded within historically specific and contingent social and political systems (2004, 12). Rather than a monolith, the state apparatus is comprised of "a distinct ensemble of institutions and organizations" (1990, 341). While particular state practices and projects may give the appearance of a unified and distinctive state entity, Jessop claims that, "the state does not exist as a fully constituted, internally coherent, organizationally pure and operationally closed system" (1990, 346). Rather this ensemble is emergent, contradictory, and hybrid and does not have any inherent substantive unity among institutions. I draw up Jessop's argument to

demonstrate how state fragmentation is visible across a spectrum of state institutions, of which the asylum system provides one example.

Consistent with Jessop's theory of the state, the series of apparatuses and institutions that comprise the asylum system have competing and conflicting interests. The process of creating case law, federal regulations or agency guidelines are practices that state actors use to impose a "measure of coherence" upon the state (Jessop 2008, 37). However, as visible in the cases I examined, the multitude of state actors involved in the asylum process, whether the Attorneys General or those in the Immigration and Naturalization Services, Department of Homeland Security, Department of Justice, the Board of Immigration Appeals, and Federal Circuit Court, did not operate uniformly, but rather held differing views on individual cases and the broader issue of gender-based persecution. Agency officials deviated from their own agency's policies and guidelines and efforts to pass federal regulations authored by the attorney general failed. Adjudicators interpreted and applied refugee statutes and case law in disparate, conflicting and confusing ways. Within this fragmented and decentralized system, complex, contradictory and uneven case law related to gender-asylum evolved and erected complicated legal languages and logics that frustrated feminist attempts to expand recognition for gender-based persecution and to effectively represent asylum seekers. By linking these insights about state fragmentation to flood fears and gate-keeping practices I illustrate how the competing and conflicting interests of different actors as well as the contradictory logics of law-making and legal interpretation serve to frustrate any efforts to establish wide recognition of gender-based persecution in U.S. asylum law. As I argue below, through a closer look at the governmentality of flood gate-keeping, this represents

a rationality of governing populations and securing borders. It is fragmentation by design.

A focus on regulation also brings the feminist debate over asylum law into relation with a growing body of literature in geography on the spatial politics of border control (Johnson Et. al, 2011). In recent years, scholars have documented shifting spatial practice of border enforcement in refugee “receiving” countries after they have become signatories to refugee conventions (Mountz 2010, Churgin 1996, Fitzpatrick 1996). The United States, like other countries, has responded to refugee laws and protocols by attempting to restrict asylum seekers access to national territory, pushing “out” the borders through the policing of international waters and by establishing extra-territorial detention centers. My work adds to this literature by examining how, through asylum law, the border has also moved inward into courtrooms where struggles over the criteria of what constitutes a “refugee” or “persecution” establish who is inside and outside of state provisions. The cases in this study encapsulate moments in this ongoing conflict over a legal border enacted as certain people (women) and certain forms of violence (against women) are brought in contact with and become entangled in the legal apparatus governing U.S. immigration.

My dissertation illustrates that adjudicators see themselves as guarding the territorial borders via their legal decision making and act in such a way as to restrict entry. Adjudicators construct the border to legal entry into the United States as they make decisions about who does/not meet the definition of a refugee. They prevent “easy access” to legalization by not allowing for lax interpretations or open-ended precedents, and thus not creating opportunities or incentives for people to migrate to the U.S. or

opening up a passageway to legal status for those already present within the territorial borders. Asylum seekers make their case to meet the criteria outlined in the definition of a refugee, and adjudicators make assessments as to whether they have in fact met the standards of asylum. There is much room for discretion in the interpretation of asylum law and considerable scope for making law through precedent setting cases. The fragmentation of the state grants adjudicators great latitude in their decision-making and in these moments of judgement fears about losing control over asylum admissions shape decisions about who can qualify as a refugee. Without being accountable to fixed or clear standards, adjudicators are empowered to continuously narrow access to asylum, closing down loopholes from previous decisions in order to maintain control over asylum admissions. In the next section, I draw upon the concept of governmentality to demonstrate how flood discourses evoke concerns about losing control over asylum admissions.

7.2 The Governmentality of Flood-Gate-Keeping

Examining flood fears within asylum adjudication brings our attention to how the scope of humanitarian protection is mediated within decision-making by concerns about the movement of migrant populations across the border. Flood fears have a material impact on who can access political asylum in the United States. In this section I use the concept of governmentality to connect the flood fear, as a discourse about society, to particular exclusionary state practices. Rather than isolated forms of biases, I argue that flood-gate-keeping animates how asylum law operates, functioning as a mode of governing third world women.

Michel Foucault used the term “governmentality” to refer to the “art of government” or the “rationality of governing” (Foucault 2010). As Gordan (1991) explains, a rationality of government is,

...a way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed), capable of making some form of that activity thinkable and practicable both to its practitioners and to those upon whom it was practiced (1).

Governmentality rationalizes arrangements of the governed/governing, and gives purpose to governing in practice. The sense of purpose is tied to particular “descriptions and problematizations” of society. These particular descriptions of society and its problems in turn create the need for specific forms of governance or “techniques” to address these problems (Foucault 1991, Rose 1993). While Foucault described governmentality as that which makes society governable, Dean (2010) elaborated on this by stating that governmentality focuses on the connection between abstract societal discourses and everyday material practices. Societal discourses represent particular “mentalities” or commonly held views that can be communicated through a variety of discourses (Ettlinger 2010, 538). These mentalities are tied to techniques of power or “calculated tactics” (Dean 2010, Ettlinger 2010).

The concept of governmentality captures how particular practices of governing are intertwined with discourses about the nature and problems of society; rationalizing particular practices to address these problems. Foucault identified law as one such technique that can be deployed within these rationalities. Foucault is known for disavowing the law as a subject of study because of its association with sovereign power, in which the law is an expression of an absolute and unified power. In reference to governmentality, however, he argues that the law is not exercised as a form of absolute

power, but rather derives its authority and legitimacy from its utility in realizing a particular end goal.

...with government it is a question not of imposing law on men but of disposing things. That is of employing tactics rather than laws, and even of using laws themselves as tactics –to arrange things in such a way that, through a certain number of means, such-and-such ends may be achieved (1991, 95).

Examining the role of law in governmentality thus brings attention to how law becomes enmeshed in serving particular purposes. Law is legitimized as a means to ‘put things in their place,’ so that some greater purpose can be achieved. Again, the legitimacy of law is grounded in the function it serves towards a goals; it is a tactic to remedy problems identified within societal discourses. As I argue, discursive frames that represent asylum seekers, and other migrants, as a flood lead to the rationalization and legitimization of particular governing tactics within asylum adjudication.

7.3 Flood Fears

Fears of opening the flood-gates pervade the asylum legal system in the United States. This concern for numbers does not necessarily have a basis in statutory law. Indeed, all of the provisions within the refugee definition identify characteristics or beliefs shared by large numbers of people, whether race, religion, political opinion or nationality. Yet, my case analysis and interviews with key informants illustrated that concerns about regulating numbers of potential asylum seekers were particularly pronounced with cases involving the social group category, and specifically those concerning gender-based asylum. As discussed previously, because the boundaries of the social group provision are “unsettled,” it is the category most often used by non-traditional asylum claimants. This push on the boundaries of asylum through the social group provision exacerbates an already acute anxiety about asylum seekers and

immigration control. Unlike refugee programs, asylees are already present in the U.S. and entitled to an evaluation based on internationally defined criteria rather than national priorities. Flood fears however shift adjudicator towards a discourse about the need for population management in the context of a siege, crisis or emergency. Such a need for management ultimately trumps the humanitarian impulse in refugee law and places refugees squarely within a broader regulatory framework, justifying legal measures to restrict these non-traditional claimants from accessing asylum.

During interviews I conducted with leading gender-based asylum lawyers and advocates, they identified the flood fear as one of the key obstacles in the continued development of protection for women with gender-related experiences of persecution. Flood fears, however, can be hard to pinpoint in clearly stated language because the “outright expression” (Advocate A) of the flood fear is considered an “ignorant position” and it is legally unjustifiable (Advocate A, Advocate B). While explicit references to opening the flood-gates might be used strategically to “whip up frenzy,” (Advocate A), or to enable an adjudicator to rationalize an exclusionary decision, they do not constitute a “real principled nor legally justifiable” (Advocate A, Advocate B, Advocate C) basis for asylum decision-making. Lawyers I interviewed argued that asylum is a merit-based form of protection: if a given treatment amounts to persecution, it should be irrelevant whether the persecution targets a single person or many people.

Despite its illegitimacy, four of the interviews described flood fears as a major obstacle in their work. They described flood fears as “ever-present” (Advocate B) and something they have navigate in “all the work that they do” (Advocate C). As one interviewee argued, flood fears informed how adjudicators thought about and responded

to cases. To illustrate her point, she likened flood fears to “people who are racist unconsciously.” The parallel, she pointed out, was that flood fears “animate how people operate, informing their actions” (Advocate A). Within precedent setting adjudication the sense that a given decision on an asylum seeker might open the flood-gates often “triggered the need for denial” and a calculated legal rationale for doing so. While lawyers claimed that the flood fears were hard to pin-point, in my analysis I found that asylum seekers tended to be framed by adjudicators as a flood in two related ways: (1) as part of an “undifferentiated mass” and/or (2) as a victim of “generalized violence.” To be clear, however asylum seekers did not present their individual claims in this way, but rather their claims were de-individualized by adjudicators concerned with opening the flood-gates.

These discursive frames are examples of how state actors internalized border control through legal proceedings in response to the crisis in border control provoked by asylum seekers. In the first discursive frame, adjudicators invoked the language of an undifferentiated mass to describe a very large group of people who were indistinguishable from one another. By emphasizing the sheer volume of people included within this “mass,” adjudicators trivialized the significance of the kind of persecution or social experience of individual asylum seekers and instead judged against the imagined population. In these decisions they suggested that the applicants, by virtue of the size of their group, were unremarkable and commonplace, and thus unlikely targets of persecution warranting asylum. In the second discursive frame, adjudicators invoked the concept of generalized violence to describe forms of harm that were carried out indiscriminately or could target anyone and everyone. Violence and the harm experienced

by asylum seekers under these circumstances had no clear target group or clear perpetrator. It was a kind of violence that was universally applied, which meant that the victims were random and unpredictable, rather than victims of targeted acts related to identity or beliefs.

These discursive frames operated as technologies of exclusion, shaping the possibilities for who could be recognized as legitimate subjects of political asylum within the U.S. Asylum seekers framed as a part of an undifferentiated mass or as victims of generalized violence struggled to meet the standard of asylum amidst a restrictionist imperative driven by fears of opening the flood-gates. The consistent framing of asylum seekers as part of an unclassifiable social group or experiencing unpredictable violence served to de-individualize them, thereby raising the specter that more people of similar social experience might also gain asylum on the same basis. By de-individualizing asylum seekers, adjudicators could set barriers to entry and even close the door on particular social groups deemed threatening; in my analysis this included women generally or anyone displaced from Central America. These discursive frames, which encapsulated flood fears, exemplified how state actors governed the movement of immigrants. Such concerns about the number of potential future applicants shape how adjudicators govern through adjudication for they are not isolated to individual cases, but played a key role in the foundational social group precedents, *Matter of Acosta* and *Sanchez-Trujillo vs. INS* and extended through the gender-based asylum cases of *Kasinga* and *Alvarado*. Indeed, as I argue, case law itself in the social group category offers a living testament to a desire to secure borders and manage populations. Through these

two discursive frames, I argue that the flood fear emerged as a powerful force in legal decision-making.

7.4 Gate-Keeping Practices

Flood discourses depict immigration as a problem that requires certain forms of state intervention. Asylum law is one way that the state can manage the movement of people across U.S. borders. Understanding asylum law in this way diverges dramatically from the assumed humanitarian concerns and foreign policy agendas traditionally used to describe this area of immigration. Rather than protecting all migrants, asylum law actually arranges, differentiates, categorizes and classifies people in order to designate some as humanitarian subjects and other as deportable. Flood fears justify exclusionary technologies that restrict and limit who can qualify as a refugee, and ultimately result in narrow definitions of who can gain asylum on the basis of gender-based persecution.

As my dissertation has demonstrated, precedent setting in the social group category and by extension for gender-based persecution are based upon a history of exclusionary decisions. Against the backdrop of an impending influx of undesirable asylum seekers, my case analysis illustrates that adjudicators assumed a role of safeguarding the U.S. border. To prevent floods, adjudicators denied asylum, thereby preventing “lax” legal standards from developing or avoiding the creation of opened ended precedents that could be taken advantage of. Flood fears conveyed a sense of crisis and state actors made decision to prevent such crises from ensuing. They made their decisions according to the presumed impact it would have on immigration control, rather than assessing claims within the broader aims of refugee protection, which is to provide protection to those who are not protected by their states. The practices of flood

gate-keeping through asylum law can be traced over time through particular techniques of exclusion used to limit access to asylum in the United States.

I argue that the legal artifacts in these cases, shaped so completely by flood fears, can be understood as technologies of exclusion to be deployed by future adjudicators. By techniques of exclusion I mean to draw a clear link to the concept of governmentality by emphasizing the flexible, discretionary, interpretive power of judges to both make and exercise the law. In the cases I reviewed, techniques of exclusion included a variety of related conceptual and interpretive tools that adjudicators wielded to undermine the claims of very particular asylum seekers who they believed might threaten to open the flood-gates to future claims from large numbers of people. Adjudicators sought to de-individualize applicants by depicting their identities or experiences of violence as commonplace and (too) widely shared. As I demonstrated in my research, judges sought to retain control over the number of people who qualified for asylum in the social group category by managing the definition of key terms such as “refugee” and “persecution” as well as sub-categorical terms such as “political opinion” or “social group” that provided the means for asserting individual claims.

By managing this legal language, adjudicators effectively controlled the means of interpretation and through that power, they also controlled the legal borderland. In *Sanchez-Trujillo vs. INS*, adjudicators argued that acknowledging his and his brothers claims and granting them asylum would “render the definition of ‘refugee’ meaningless” by “extending refugee status to every alien displaced by general conditions of unrest or violence” (1577). In *Matter of R-A-*, the BIA argued that Alvarado’s claim would “obviate, perhaps entirely” the requirement to prove the motivation of the perpetrator and

that her social group also would “virtually swallow the entire refugee definition up” (919). Alvarado’s case, the BIA argued, would invite “any victim of repeated violence,” whether fleeing civil conflict or unequal state protection (916). In response to these definitional concerns adjudicators went on the offensive to make the law (and the border) through new language meant to de-individualize that asylum seeker and other future asylum seekers who might flee a similar form of violence. While these actions were clearly designed to exclude particular social groups from asylum protection, adjudicators couched and de-politicized their decisions in an abstract obligation to preserve the meaning of asylum protection.

To arrive at an exclusionary decision, I argue that adjudicators crafted their findings through contortions and distortions of legal logic and rhetoric to retain their flexible discretionary power over who could use the refugee category. In the cases I reviewed, adjudicators raised new standards for the social group category based on demonstrating immutable or fundamental characteristics, which were later juxtaposed against rival social group standards based on “voluntarily association,” and then complicated even further by requirements of demonstrating both “particularity” and “visibility.” Adjudicators refused to grant asylum to those whose social group was too “broadly-based” or “encompass[ed] many variables.” Adjudicators required social group applicants to present claims that involved only “recognizable and discrete” groups but were not a “demographic division of the population.” All of these textual legal artifacts were, as two lawyers I interviewed said, both “contradictory” and “unprincipled” based upon the core requirements of refugee-asylum law. Yet, I argue that these legal artifacts

reflected a very consistent state desire to exclude by maintaining control over refugee definitions and classifications.

Adjudicators made precedent setting decisions that would not "invite" others to follow or would not trigger a greater volume of asylum claims. If they 'let one in,' they would have to 'let them all in.' The notion that these individual applicants threatened to damage asylum was necessarily tied to fears about numbers, for they presumed that the applicants' identities or experiences were commonly held or widely experienced. Consequently, any changes spawned by their cases would have a domino effect or create a slippery slope for eligibility, leading to an influx of similarly situated people. In defense of their efforts to exclude, judges often turned attention to the "negative" impacts of that would result from granting asylum in the case. Often they suggested that cases would expand protection. Expansive protections, they argued in their decisions, were not what Congress intended when they passed the 1980 Refugee Act (*Matter of Acosta*, 1985, 229). Yet, it was not Congress, but judges who were charged with interpreting the law in its ambiguity. Indeed, it is critical to remember is that there is nothing in either U.S. refugee law or international refugee protocols that refer to the numbers of potential future applicants as a basis for granting or denying asylum.

I argue that by drawing attention to the presumed flood of future applicants, adjudicators actually distracted attention away from the highly paradoxical nature of how they interpreted these individual cases and the exclusionary logics they used to render these asylum seekers ineligible. In effect, adjudicators reframed their exclusionary logics on the basis of a duty to preserve the meaning of asylum for a chosen few or those who they considered to be *truly* deserving. Such a discursive move represented a clear

exertion of state sovereignty by adjudicators to (re)define the meaning and scope of human rights within these legal cases. In stark terms, by basing their decisions on flood fears they not only indicated that they did not have to protect all victims of human rights violations, but that the decision was also rooted in an effort to preserve state protection only for particular people. To do otherwise, according to adjudicators would create a breach in the flood-gate and bring the institution of asylum itself into crisis. Expressing state sovereignty therefore was not about condemning large numbers of people to be excluded from asylum protection. Rather, in a twist of moral reasoning, their exclusionary logic and sovereign power was ultimately couched in terms of preserving the institution of asylum itself against deteriorating standards that might undermine its ability to protect lives.

By framing themselves as the preservers of asylum, their actions to control against a flood of future immigrants projected an image of neutrality and impartiality. However, under the surface text of these legal decisions, it is clear which lives were deemed truly deserving. Concerns about groups size were not neutral, but reflected geopolitical, gendered, classed, raced fears that were tied to concerns about a pathway to legal residence and citizenship for those fleeing conflicts in Central America. The applicants in these cases were working class men and peasant women rather than political elites, upper class citizens or high profile public leaders. In a very literal way, adjudicators sent a message that they could not let “just anybody” in, and thus normalized and reproduced unequal access to recognition, residency and citizenship. Adjudicators sent this message by defining the ‘undefined’ social group category; outlining what could constitute a legitimate social group and ultimately who could be recognized as an

individual. While seemingly unbiased, these definitions were designed to prevent access for immigrants that adjudicators found were not sufficiently distinguishable from the wider populace, to preemptively regulate the volume of asylum seekers with legally justifiable claims to protection.

In addition to the fragmentation of the state, the second critical aspect of the governmentality of flood-gate-keeping is its gendered nature. Women faced higher barriers when confronted with the need to demonstrate that they were individuals, singled out, targeted, and distinguishable from others in the population. Women were already marginalized by the presumed male figure of human rights laws, framed as outside the realm of real politics through which asylum law was imagined. Throughout the early gendered cases brought by women following the 1980 refugee act, adjudicators reproduced gender and gender violence as a mundane and unexceptional feature of the human experience, far outside the realm of politics. Their cases were thus particularly susceptible to being dismissed through characterizations of undifferentiated mass/generalized harm. Campos-Guardado's experience serves as an example. Her narrative fit within a traditional model of political persecution, with the exception of how the violence was enacted. The act of persecution followed a gendered logic (she was raped, the men were tortured and killed), so she stood outside a normative male account of violence. The judges dismissed her rape as "personally motivated," but further claimed her case was an example of the "civil disturbances" produced by war. While rape is widespread during conflicts, it is not necessarily random, but can be a targeted act used to terrorize people and communities. Thus despite literally standing amidst a highly politicized scene of violence, adjudicators somehow found that she was void of any

political opinion (of her own) and was rather an ‘innocent bystander,’ ‘at the wrong place at the wrong time,’ a victim of generalized violence (288).

Framing rape as unremarkable, as apolitical or genderless, enabled adjudicators to de-individualize female asylees fleeing gender based persecution. Yet, women asylum seekers in these early cases also faced the barrier of demonstrating that they were not part of an undifferentiated mass because of their sex and gender. In the case of *Gomez vs. INS*, adjudicators claimed that Gomez’s social group was ineligible because age and gender were “broadly-based characteristics” (664). Furthermore, since all women were presumably at risk of rape, she could not prove that she was singled out and differentiated from other women via the violence she experienced. In essence, the judges claimed she did not qualify because she was just a part of an undifferentiated mass of “young women” in El Salvador and that rape was too generally inflicted on women for her claim to count as persecution. Adjudicators’ assessment of *Fatin vs. INS* illustrated a similar logic, but in this case it involved the actions of the Iranian government. Fatin argued that she did not believe in the Iranian government’s gendered policies and that women who refused to conform to these laws were subject to persecution. In this case, adjudicators did concede that Iranian women were a valid social group, but continued to deny her claims because of their concerns about the size of such a group. To deny her claim they noted that all women were subject to the same laws, so she would have to differentiate herself from other women. In the end, they denied her claim because she had not shown she would subject herself to torture or possible death for her views (1241).

7.5 Kasinga and Alvarado: The Exceptionality Trap

The crisis of flood control generated by gender-asylum and the undefined nature of the social group provision was partly ‘resolved’ by making asylum protection contingent on exceptionality. Early gender-based asylum cases exemplified the need for applicants to distinguish themselves by proving they had been “singled out.” Standards of exceptionality were not a legal requirement for asylum protection under either U.S. or international refugee protocols. Rather these standards of exceptionality were a means to legalize an otherwise “unprincipled” concern for the number of potential refugees who might use asylum as a gate to protection, residency and citizenship. The ability for applicants to meet exceptionality requirements, as I demonstrated, were highly discriminatory, relying upon sexism, racism and classism as a means of defining who was important enough to warrant protection. The requirement that people individualize themselves played a significant role in shaping which identities and experiences were legible and deemed significant to adjudicators. Indeed, standards of exceptionality often erased the violence, persecution and lived experiences of refugees by turning attention to idiosyncratic and often illogical arguments meant to deter or restrict the use of asylum law.

My analysis focused on how exceptionality became a mechanism of exclusion that operated not through an outright bar on entry but rather by creating very narrow and hard to attain standards of inclusion. *Matter of Kasinga* was a celebrated case because it established a positive precedent for women. However, as I have discussed, the precedent was formulated in highly circumscribed fashion to distance FGM from other forms of gender-violence, in addition to limiting which types of FGM applicants could utilize the precedent. The rationality of the decision was described by one interviewee as “stingy

sympathy” (Advocate B); the U.S. would recognize and validate gender and gender violence, but only in a controlled and contained manner. The existence of a sympathy – symbolized by granting Kasinga asylum – rationalized a broader “stinginess” of sympathy for other kinds of gender-related cases. I described this as the exceptionality trap because the cases itself becomes a mechanism for adjudicators to close down opportunities for other women because their apparent failure to reach those standards set in Kasinga. In a sense, exceptionality creates an impossibility of replication. By giving legal precedent to possible types of refugees, adjudicators also articulate the limits of that precedent. Exceptional cases therefore function in such a way as to close down opportunities for alternative interpretations by establishing a legal record of (im)possible subject positions.

While the *Matter of Kasinga* decision was momentous for its recognition that gender could in part form the basis of a social group, I claim that that the BIA enacted flood-gate control in their final precedent setting decision by isolating very specific aspects of her case as a basis for asylum. This was achieved in two ways, first by defining FGM as an exceptional form of gender persecution and second by highlighting the exceptional circumstances of Kasinga (as a potential future victim of FGM). The decision validated FGM as an extraordinary or “extreme” form of gender violence, (which reiterated earlier INS claims that FGM was distinguishable from other forms of gendered cultural practices).⁶⁴ While validating that FGM could be persecution, it also

⁶⁴ The *Matter of Kasinga* decision *unequivocally* protected only a narrow class of women who would be “faced with the knife” if returned home. The restrictive effects of this narrow framing enabled efforts to circumscribe the decision’s legacy, which became embattled for “past victims” of FGM and also for child-parent claims. In this sense, regulative concerns exceeded sympathies generated by representing violence against women through imperialist and culturalist frame. The administrative impulse for restriction had a significance influence on the legal codification of gender and FGM in asylum law.

became a means to establish an exclusionary standard to deny those presumably “less extreme” forms of gendered harm, such as domestic violence. This exclusion was fully realized in the BIA’s seminal follow-up statement on gender-related harms, *Matter of R-A-*.

The differences between the majority and dissenting opinions in *Matter of R-A-* demonstrate how the decision became a micro-struggle in a bigger debate about the meaning and scope of gender-related persecution. By rejecting Alvarado’s claim, the majority of the BIA contained gender and gender violence to the specific facts and circumstances of Kasinga and FGM. Flood fears motivated this attempt to curtail access. Here, I argue, is the crux of why the flood fear is so critical in any feminist analysis. The BIA justified their denial of domestic abuse as a form of persecution because they argued that it would open the floodgates to women fleeing domestic violence. But the deeper subtext was far more comprehensive. Adjudicators were really arguing that the state should not have to protect everyone who experienced human rights abuses; that the state needed to economize its humanitarian mandate. Consequently, adjudicators in *Matter of R-A-* asserted their power to preserve a narrow definition of how women could be recognized as refugees under the social group category.

The interplay between these cases illustrates clearly how the governmentality of flood-gate-keeping directly shaped the legal codification of gender within asylum law. Alvarado needed to be denied asylum because the state could only handle being accountable to certain kinds of women and certain forms of violence against women. This became legal through standards of exceptionality. Thus, the BIA validated gender and gender violence but only in a highly calculated and limited manner (*Matter of Kasinga*)

that allowed them to later reign in and further circumscribe which types of women and under what circumstances that portal could be used (*Matter of Alvarado*). These decisions materialized the rationality that the scope of humanitarian protection needed to be limited because the asylum system, and by extension the nation, could easily be overwhelmed. Yet, adjudicators' concerns about who presented the threat of overwhelming asylum/nation were informed by raced, classed and gendered fears, which constructed certain women and types of violence as always, already too much of a presence. Unlike Kassindja, whose mobility was tied directly to her economic and social class, to adjudicators Alvarado represented the average Central American brown woman who had already perforated the boundaries of the U.S. territory, or at least the many women like her who could access the U.S. Mexico land border. The discursive constructions of un/exceptional gendered violence (evident in contrasting the *Kasinga* and *Alvarado* decisions) were technologies of governing the imagined movement of this population of women.

The judicial opinions granting/denying asylum on the premises of exceptional/unexceptional claims exemplify actual state practices of gate-keeping; the acts of inclusion/exclusion were directly tied to the notion that adjudicators' decisions should not have consequences that overburdened the state rather than serving as evaluations of whether the women satisfied the principles outlined in the Refugee Conventions. The ramifications of this governmentality of flood-gate-keeping are significant, for it suggests that qualifying for refugee status – as defined through the process of case law – is not a transparent process of satisfying the provisions outlined in the refugee definition. Rather, the governmentality of flood-gate-keeping encapsulates

how meeting the definition of a refugee also requires assuaging adjudicators' fears of numbers. As I have argued, these flood fears are embedded within concerns about the movement of raced, classed and gendered immigrant populations and therefore serve to reinforce unequal access to border crossing and citizenship.

7.6 Working In and Against Flood Gate-Keeping: Obstacles and Opportunities?

The development of gender-based asylum jurisprudence, I conclude, does not represent an expansion in refugee protection but rather is embedded in a highly calculated regulatory process that functioned through both expansions and contractions. To be clear, there has been some recognition of women and women's experiences of persecution, resulting in expanded access to asylum. However, I argue that the avenues open to women have been formulated in ways that further embed and normalize exclusionary logics. Stated differently, the particularities of how women and gender violence have been recognized also affirm certain forms of restriction, exclusion and undermine recognition of the myriad ways women's experiences of persecution can be shaped by gender. Within definitional struggles to press for greater recognition of particular human rights abuses or protection for particular marginalized groups, such as women, we can see how adjudicators seek to preserve their discretionary power and at the same time produce ever more comprehensive barriers to recognition under the social group provision. As I discuss in this section, lawyers and their clients find it very difficult to counteract both dominant exclusionary logics designed to restrict access to the social group category as well as the constant efforts to preserve the power of adjudicators to make discretionary decisions driven by flood fears. In a sense, lawyers and their clients become ensnared in

the U.S. state's attempts to further fragment the asylum system so as to mitigate a flood of migrants.

Rather than a uniform operating procedure, the governmentality of flood-gate-keeping maintained control over immigration through asylum law by creating a complex layer of legal obstacles. Lawyers and advocates navigate these obstacles in their work to win asylum for gender-related harms. While fragmentation opens up small pockets of opportunity to win cases, the forms of recognition and representation it fosters serve the broader goals of limiting the channels available to asylum seekers to reach the claims making process. Efforts by impact litigators to seek change at a systemic level to correct these irregularities, create uniformity, or improve gender sensitive rulings have failed to achieve their lofty goals.

The governmentality of flood gate-keeping and the fragmentary nature of the state have directly blocked efforts to seek broad-based change for systematic and regular interpretation of gender and asylum eligibility. During an interview, one legal advocate explained that the “fear of the flood causes disagreement on how to handle cases.” While regulations could remedy this disagreement, she added that “there are no standards because the [agencies] can't agree” (Advocate D). As another lawyer explained, “Just getting agencies to agree is a considerable obstacle” (Advocate B). One attorney described the disagreement between agencies as “infighting,” highlighting the different priorities for the refugee and asylum system (Advocate D). This lawyer described how the “there was such contention in Congress that we were advised not to pursue this route for clarifying eligibility for women's claims” (Ibid). For these reasons, although the passage of federal regulations once seemed a possibility, now “federal rule making has

become cumbersome” (Advocate B). One advocate described how efforts to push for further reforms at the legislative level have been halted due to concerns about eroding existing gains. As she stated, “It is an extremely contentious environment. Nothing is moving. In fact, we are back in a position where we are concerned about retrenchment” (Advocate D). Thus while the fragmentary nature of the state enabled “muddled” standards to develop, it also stalled efforts to clarify gender and asylum eligibility and arrested efforts to seek broad-based change. Indeed, the price of trying to make progress could be triggering an even greater backlash. The same interviewee described one instance in which proposals to further protect women were met with counter proposals that were even more restrictive than the current system.⁶⁵ As a result, advocates “backed off,” choosing stasis rather than risking existing gains.

Stalled federal regulations and a lack of comprehensive policy on social group status and gender-related claims make legal representation for gender-based asylum seekers very difficult. As one interviewee described, most of the gender-asylum cases are already considered “fringe cases” that “nobody else wants” (Advocate E). Marginalized within the asylum system, these cases take a great deal of “creative lawyering” to fit into the legal paradigm (Advocate C). However, the difficulty of working within such a disjointed system was that there was no assurance that adjudicators would interpret cases with any regularity. This made it difficult to be a “creative lawyer” because “you do not

⁶⁵ The interviewee was specifically referring to an effort to repeal the one-year filing deadline for asylum seekers, which has adversely affected women’s ability to seek asylum. As she explained, “It is an extremely contentious environment. Nothing is moving. In fact, we are back in a position where we are concerned about retrenchment. Trying to make progress may trigger a backlash rather than progress. For example, in 2005-6 there was an attempt to get rid of one year filing deadline and it was attached to another piece of legislation. The counter proposal from the opponent was, ‘sure, let’s get rid of the 1 year deadline but instead of eliminating it, let’s make it 30 days.’ So, advocates pursuing elimination of the deadline backed off” (Advocate D).

know what you're up against" (Advocate E). It was as if the terms of engagement were always subject to change according to adjudicators' whims and the political climate.

The interviewees' comments illustrate clearly how state operates through fragmentation, but also how this fragmentation converges with the governmentality of flood-gate-keeping, restricting access to asylum protection for women. Lawyers had difficulty preparing cases because standards and rules were always subject to change, and there was no certainty about how adjudicators would interpret cases in relation to these standards. To convey the extent of this ambiguity and unpredictability, one lawyer likened submitting a gender-related claim to a "crap shoot" (Advocate D). Drawing a parallel between submitting an asylum claim and a risky, unpredictable gamble testifies to the profound effects of this fragmentation. Asylum seekers and their lawyers could put together cases using the best available sources of authority, but were still subject to unpredictable, seemingly arbitrary decision making, which was exacerbated by confusion about the meaning of social requirements.⁶⁶

Not only were women's cases denied as a result of this confusion, uncertainty and arbitrary decision-making, but these conditions also created procedural lags that ended up limiting access to protection for women in indirect ways (Advocate A). As one lawyer described, cases that "drag on" and have to go through a "procedural ping-pong to be

⁶⁶ To illustrate her point about flood fears and the unpredictable, seemingly arbitrary nature of decision making, which was compounded by confusion about the meaning of social requirements, the interviewee cited the example of a domestic violence case which had used a widely accepted social: "There was a was a domestic violence case in which the judge denied asylum because he rejected the social group formulation. However, the social group formulation was one that was being widely used by Department of Homeland Security, a lot of attorneys, and was accepted by other immigration judges in domestic violence cases. The social group was defined by 'being in the relationship and being unable to leave.' The judge rejected that formulation and said "that group is not visible or particular, but it's too bad because I really think the right social group here is women; I really believe this is happening because you're a woman. However, I can't grant that group because I know the BIA does not like such broadly defined social groups. But if you ask me, that's really the social group and it's visible and its particular..." (Advocate C).

resolved” were endemic to the system (Advocate D). These cases were prolonged because there was “administrative shuffling between courts.” This put a strain on both lawyers and their clients. As she explained, it “wore down the clients” as they “waited in limbo” (Advocate D). These procedural delays, which were a result of confusion and disagreement about social group standards, were particularly difficult for asylees whose experiences of persecution involved traumatic events, which they subsequently needed to relive over and over during the many stages of their legal battle. This also created a “systematic drain” on the organization. Often, she explained, “we have to close intake because we are at max capacity” (Advocate D). Given the amount of prolonged and pending cases, they were not able to take on as many cases.

While the lack of coherent guidance within such a fragmented system created considerable obstacles, it could also create opportunities for advocacy since adjudicators were not bound to particular standards to decide these cases. In other words, if adjudicators were empowered to use their discretion to deny cases, they could also use their discretion to grant cases. One of the interviewees described how the fragmentation and lack of clear guidance had created a positive adjudicative environment that could potentially be threatened by the passage of regulations.

The lack of affirmative guidance from the Board or Agency, whether the DHS or DOJ, is a mixed bag. As advocates, we are having success at the local, lower level. So it is working in our favor. While a lot of people are pinning their hope on guidelines or regulations from the Board I feel like we’ve been winning these cases in a sort of vacuum, by piecing together the best arguments from what exists. We hold onto *Acosta*, *Fatin*, asylum office guidelines, and international law. We construct arguments that fly. So a lot of people would say the lack of affirmative guidance is an obstacle, but in our experience it’s been okay. So, I don’t know how to answer [your question]. My fear is that the Board issues a decision that makes the lay of the land worse. Then those [restrictive guidelines] would be an obstacle (Advocate C).

By this attorney's account, the lack of federal regulations or binding BIA guidelines allowed advocates to creatively piece together persuasive arguments from other non-binding material such as international law or the training manual for asylum officers. Efforts to systematize interpretation and eligibility could jeopardize this flexibility, since they always carried the potential of imposing greater restriction than currently existed.⁶⁷

As the only interviewee to offer this perspective,⁶⁸ her comments are worthy of further examination. In fact I argue that the 'opportunities' created by the fragmentation of the state illustrate a key dimension of how flood fears and gate-keeping ultimately operates as a form of governmentality that constricts access to the claims making process. In her comments, this attorney referred to working in a "vacuum," suggesting that her experience was not generalizable and that this successful advocacy occurred within a niche. When I inquired further about this characterization, her explanation shifted to the quality of representation the clinic provided.⁶⁹

The high quality legal representation that the lawyer described involved piecing together existing materials to make persuasive arguments for the clients. This illustrated again the need for "creative lawyering," such as thinking outside the box and making due

⁶⁷ It is also important to note that this interviewee worked almost exclusively at the asylum office and immigration court level. As she described, most of their cases won without the need for appeal. The positive reception to gender-related claims she described could thus relate to differences in adjudicative environments within the various asylum levels, whether the Asylum Office, Immigration Court, BIA or Federal Circuit Courts.

⁶⁸ This interview challenged one of my assumptions going to the research about what could be considered impact litigation. I had originally considered impact litigation to include work focused within the appellate courts. She still considered her work to be "impact litigation" because the clinic she worked with authored amicus briefs for other gender-asylum cases and because of the effects they had on the local network of adjudicators.

⁶⁹ Her response was "It's not a vacuum. We've been able to piece together good arguments from outside the box. There are plenty of resources to draw upon, they are just not the usual sources of law - like the asylum office training materials, that's not a typical thing to draw on, *Acosta*, a case from 20 years ago, international case law and guidance. We use these other kinds of legal instruments that are not necessarily binding but have normative value and are persuasive."

with available resources. Her comments however also highlight the importance of the localized adjudicative process. She described the “impact” of the clinic’s work as normative.

Our direct client representation does not impact case law, but it does normatively help, in terms of training judges and asylum officers to recognize these grounds, these claims. Our cases are usually resolved before they reach appellate courts. The more the asylum officer and immigration judges see these cases, the more willing they are to accept these kinds of claims. I think it has an impact on law in that way (Advocate C).

Her comments here describe the “vacuum” which she referred to in her earlier comments. The clinic had successfully “trained” the network of asylum officers and immigration judges in their area about the complexities of gendered cases; they had effectively created a sympathetic niche within the national asylum system. While this is a positive dimension of the fragmented state, it also functions to restrict access because success gets contained within localized environments. Not only is success contingent on accessing the claims making process from certain locales, but it is also contained within the lower courts where decisions have no binding impact beyond an individual grant of asylum.

Another critical dimension of the ‘opportunities’ of fragmentation is that these localized environments required highly specialized, time- and resource- intensive legal expertise. Indeed the “quality” of the representation described by the interviewee were a direct response to flood fears. As she described, putting together a “really good case” was about individualizing the clients as much as possible.

[we focus on] really developing the facts in each case. Each person does have a very individual claim and each case is different. It is important to really do the casework thoroughly, really distinguish cases from one another (Advocate C).

The work required to individualize and distinguish applicants however required a lot of time and resources.

Well, we meet with each of our clients for hundreds of hours so everybody's life story is really individual. When you submit a personal affidavit from one of the clients, which is many pages long, it really shows who they are. That is the work we do on the cases, focusing on each person's claim, showing the context, family background, the country conditions and where they fit in. We use tons of supporting documentation, expert affidavits. We can do all these things because we are a clinic at a law school and we have the help. We can go the extra mile to show and make the person come to life through the paper and through their testimony (Advocate C).

As this lawyer described, making a client "come to life" (to humanize them) required framing them as much as possible as an individual, and furthermore, as individual whose narrative was distinct from other cases. In other words, the success of their cases comes from representing them as unique individuals set apart from other cases. In order to sufficiently individualize the clients, this clinic spends hundreds of hours with each applicant. As she identified herself, this takes an incredible amount of time and resources. The emphasis on making sure each applicant is a distinct individual, set apart from other cases, reinforce the logics of exclusion instilled by flood fears.

The broader impact of the process described by the interviewee while described as positive affirms flood fear and gate-keeping practices. The need for time and resource-intensive representation as well as a highly trained expertise is the antithesis to a regular, systematic distribution of justice. Rather it creates dependency on the highly trained advocacy networks who themselves must have access to time and resources to sufficiently counter flood fears. On a broader level, this strategy reinforces the existing marginalization of gender-related claims because success is contingent on *not* seeking

change; winning asylum becomes contingent on avoiding pushing the boundaries of case law in the upper level courts.

7.7 Conclusion

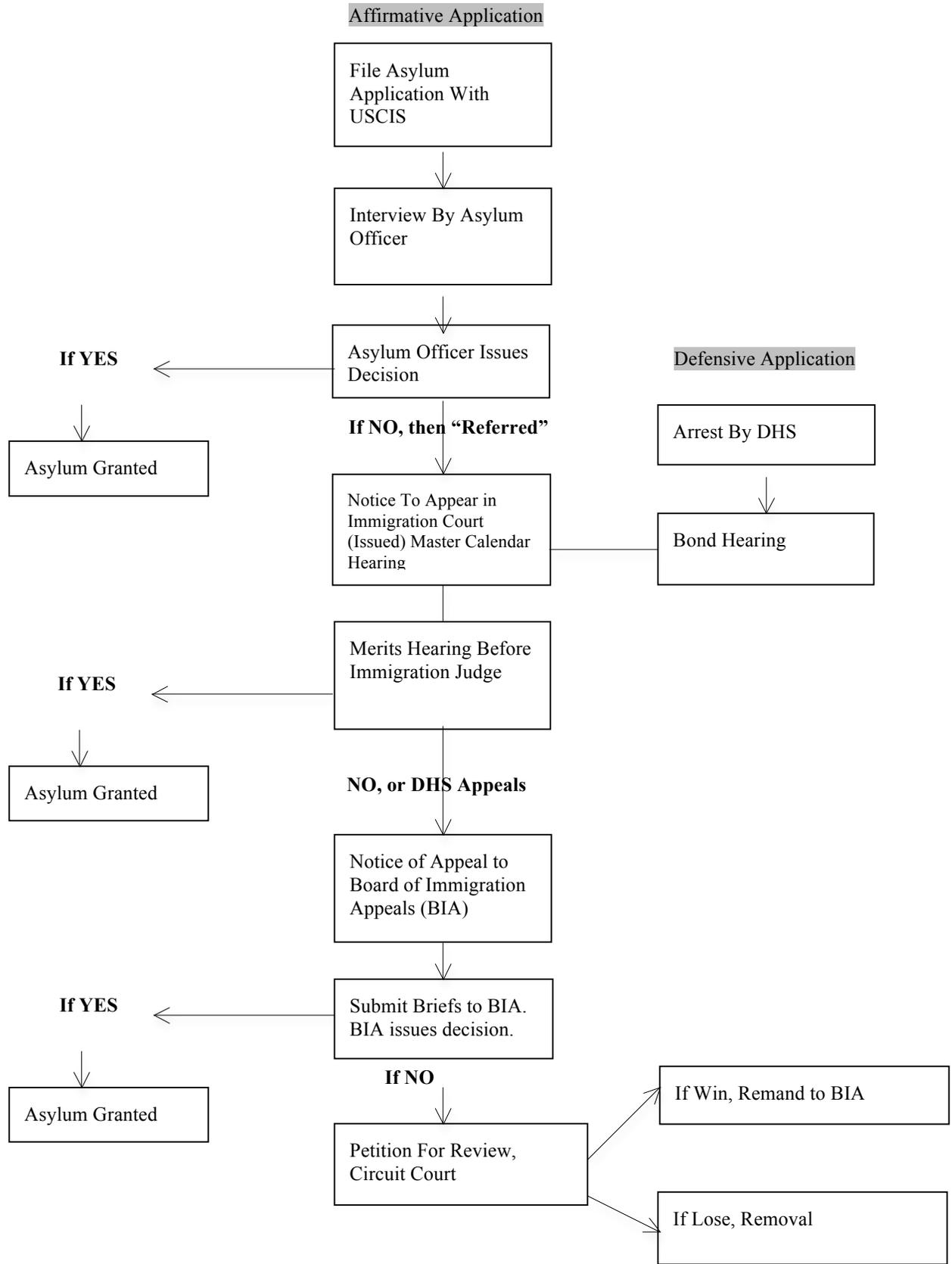
Despite rhetoric of protecting refugees, state actors within the U.S. asylum system have over the last 30 years created legal barriers in order to minimize the number of asylum seekers who qualify for protection. The series of precedent setting cases in this dissertation related to gender and social group status demonstrate how state actors continuously attempted to restrict access to asylum by issuing precedent setting decisions that delimited who could qualify. I argue that these exclusionary practices materialize governmentalities of flood gate-keeping, which ultimately function to reduce the state's responsibilities toward non-citizens. Gender-based asylum has been a key battlefield in which feminists and lawyers have sought to expand the responsibilities of the U.S. state. While advocates and lawyers have made strides in challenging adjudicators and state actors to acknowledge gender based violence in the asylum legal system, in this dissertation I have also demonstrated the limits of this narrative. Asylum seekers, particularly women, confront significant barriers to gaining protection in the United States. Instead of seeing gender as a site of struggle for recognition, I have argued that gender is also a critical site for state regulation. Put differently, state actors have used gender to erect 'flood-gates,' using a variety governing tools including exceptionality as a mode of exclusion, fragmenting the state, and normalizing an economized humanitarian concern.

Consequently, state actors have created an extremely difficult terrain for asylees and their advocates to navigate in order to meet the criteria of a refugee to win asylum.

Behind the guise of legal rationalities and practices, these seemingly unbiased tools of governance erected barriers in the form of complex, unpredictable, and ever-changing legal standards. Flood fears rationalized these barriers, masking otherwise overt raced, classed and gendered language about protecting the nation from undesirable people and shifting legal discourse to the need for population management in the context of a siege, crisis or emergency. Such a need for management ultimately trumped the humanitarian impulse in refugee law and placed refugees squarely within a broader regulatory framework. This argument diverges from the dominant theoretical discussions and debates within the feminist literature about gender-based asylum by drawing attention to how state actors attempted to retain control over whom they were obligated to protect on the basis of international conventions. My analysis focused on how the legal proceedings used to define the categories that enable border crossing became an internalized borderland. Although this border was supposed to be rooted in objective, fixed human rights standards, my analysis has shown that assuaging flood fears became part of a complex legal labyrinth that applicants and their advocates had navigate to stake a claim to asylum via the social group provision of the refugee definition. This directly shaped women's access to asylum. Within case law, flood fears have fostered a constellation of legal standards and interpretive practices that allow gender to be named only in ways that do not threaten the nation-state with a dangerous expansion in the gates to citizenship for foreigners, particularly women from the global South. Thus as gender-based asylum cases opened new pathways to refugee status for women fleeing persecution, flood fears also served to legitimize exclusionary definitions of what constitutes violence, persecution and by extension who is a refugee. As advocates and asylees negotiate this

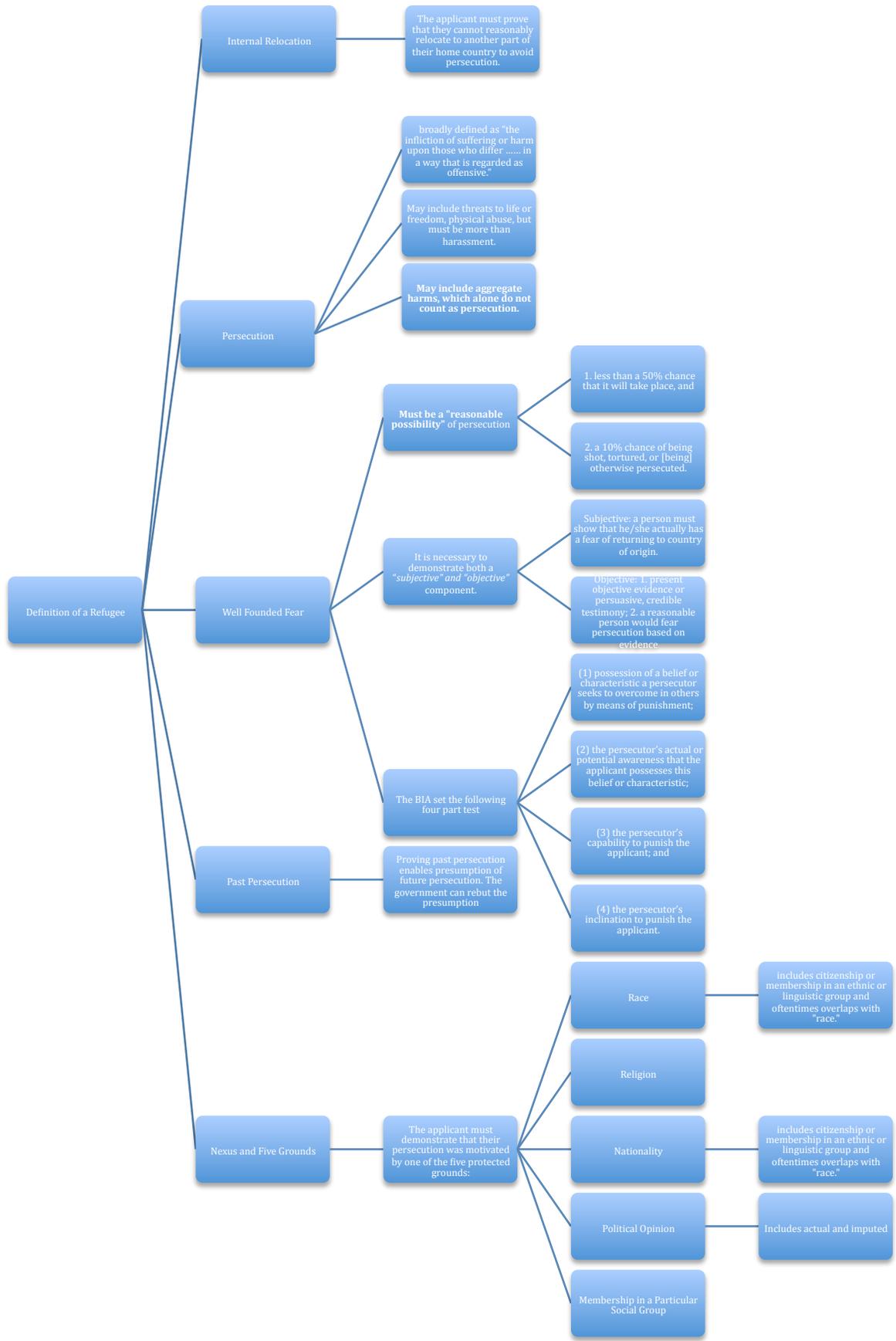
fragmented, complex and unpredictable process, they necessarily become entangled in these modes of regulating access to asylum. This creates an almost impossible dilemma in which winning asylum for individual clients can feed into and reproduce flood-gate-keeping rationalities, while seeking broad-based change comes with the risk of losing piecemeal gains.

Appendix A: Stages in the Asylum Application Process



Adapted from National Immigrant Justice Center (May 2009)

Appendix B: Satisfying the Definition of a Refugee



Appendix C: Interview Questions

Background Information

- How long have you been working in your current career?
- For how many years have you worked on gender-based asylum cases?
- Approximately, how many cases have you represented in this area of law?
- Can you describe, in general terms, the range of cases you have worked on (including country of origin, type of harm, grounds for asylum, defensive/affirmative applications, etc).
- What has been the legal outcome for most of the cases?
- How do you select cases? Who can access your legal services?

Challenges and Obstacles

- What are some of the major challenges or obstacles you confront in your work on GBA?
- What do you consider to be the major challenges and obstacles to the further development of protection for women with gender-related claims of persecution?
- How would you describe the current environment within the asylum system regarding GBA claims?
- How do current laws, policies, regulations and precedent cases shape your work?
- Why do you think attempts at securing legislative change or regulations have failed?

Legal Practice

- Do particular kinds of cases face more resistance than others from adjudicators? If so which kinds and cases and why do you think this is the case?
- Can you describe your strategies for putting together ‘particular social group cases’?
- Is the fear of ‘opening a floodgate’ something you have to navigate in your own work? If so, how?
- Do you think there are specific triggers for these fears?

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