

VIOLENCE ON THE PERIPHERY: GENDER, MIGRATION, AND VIOLENCE  
AGAINST WOMEN IN THE US CONTEXT

by

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A DISSERTATION

Presented to the Department of Political Science  
and the Graduate School of the University of Oregon  
in partial fulfillment of the requirements  
for the degree of  
Doctor of Philosophy

June 2015

DISSERTATION APPROVAL PAGE

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Title: Violence on the Periphery: Gender, Migration, and Violence Against Women in the US Context

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Degree awarded June 2015

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## DISSERTATION ABSTRACT

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Doctor of Philosophy

Department of Political Science

June 2015

Title: Violence on the Periphery: Gender, Migration, and Violence Against Women in the US Context

This dissertation examines the role of US legal and administrative institutions in intimate partner violence (IPV) against immigrant women in two instances treated as separate in policy and scholarship: 1) women seeking asylum in the US on account of IPV, and 2) immigrant women facing IPV in the US. Through an analysis of congressional hearings, relevant policies and administration, court cases, and interviews with employees at non-governmental organizations that serve immigrant women, this dissertation analyzes the ways in which immigration law intersects with ameliorative policy intended to address IPV in these contexts. In so doing, I develop a broader understanding of how state institutions, policy frameworks, and policy implementation shape the lives of vulnerable immigrant women. Contrary to scholarship that views relevant policies and institutions in the US as well-meaning though inadequate, this dissertation examines the extent to which the state may be directly implicated in IPV against immigrant women and in fostering institutional conditions under which this violence continues to thrive.

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Miller, Kathryn, and Daniel Tichenor. "The Politics of US Immigration Policy."  
*Oxford Handbook of American Political and Policy History*. Oxford University  
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Miller, Kathryn. "Immigrant Detention and Deportation Under the Obama  
Administration." Judith Gans, Daniel J. Tichenor, and Elaine M. Replogle  
(Eds.), *Debates on US Immigration* (162 – 174). Sage Publications, Inc: New  
York, 2012.

## ACKNOWLEDGMENTS

Thank you to first and foremost to my dissertation committee—my chair, Daniel Tichenor, and my committee members Gerald Berk, Alison Gash, Sandra Morgen, and Priscilla Yamin—for their support, guidance, and advocacy along the way. I am particularly grateful for Gerald Berk’s invaluable ability and willingness to help me sort through my tangle of ideas, and for believing that I could do better.

Thank you to Anna Sampaio, for seeing in me what I could not see in myself. Her mentorship and kindness profoundly changed my life, and she will always have my deepest gratitude. Thank you also to Anita Chari for encouraged me to be my most authentic self, without apology, when I was feeling particularly embattled. Special thanks to the advocates and activists who took the time to speak with me about this issue and their work, and for the positive impact they have every day.

Thank you to my family: my sister, Sheila Miller, who has been there battling fire-breathing dragons with me since time immemorial (she is the reason that I am fireproof); my sister, Melanie Malaspina, who never doubted for a second that I could, and that I would (without her light I would be spelunking in the dark); my wonderful nieces, Gwen and Fiona, who make my heart melt every time, and inspire me to fight on; and my mom, Diana Thuma, who loved me with all her heart from the very beginning, and waited patiently while I unlearned a different story.

Thank you to my friends: Malori Musselman and Nicole Francisco, for being my co-conspirators and my rocks, in the best possible way; Josh Plencner, for (literally and metaphorically) being my belayer, and encouraging me to climb higher and harder, despite my fear of heights; and Robin Barklis, whose patience and kindness were

undeserved, and whose help and support is evident throughout this project; and to Christina Ergas for seeing me without flinching (she makes me stronger and braver, and will always be my favorite earthquake). Thank you to all of my wonderful friends and supporters who are not named here, but are nonetheless greatly appreciated.

Last but not least, thank you to the following centers housed at the University of Oregon for their generous funding and institutional support: Center for the Study of Women and Society; Center on Diversity and Community; Center for Latino/a and Latin American Studies; and the Wayne Morse Center for Law and Politics.

For Gwen and Fiona, in the hope that a better world is possible.

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# CHAPTER I

## INTRODUCTION

Intimate partner violence (IPV) is a widespread problem in the United States and around the world. It cuts across cultures, religions, classes, races, nationalities, and sexualities. The World Health Organization estimates that 35% percent of women globally have suffered IPV and/or sexual violence by someone other than their partner over the course of their lives (WHO 2014). In the US, the risks associated with IPV are compounded by other intersecting factors. For migrant women, restrictive immigration policy is often partially constitutive of their experiences of IPV, as immigration status is frequently used as a tool of coercion by abusers. For migrant women seeking asylum on account of IPV, immigration policy is closely tied to the experience of IPV, as independent immigration status of a grant of asylum can mean the difference between violence and relative safety, or even between life and death.

This dissertation focuses on the intersection of IPV and migration, examining two manifestations in particular—IPV against immigrant women living in the US, and IPV as the basis for asylum claims by immigrant women who face that violence elsewhere.<sup>1</sup>

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<sup>1</sup> This dissertation focuses on intimate partner violence (violence committed by an intimate partner) rather than “domestic violence” more broadly, which can include child abuse, and abuse by someone other than the intimate partner. Within that subset, I am focused on IPV committed by men against immigrant women. The World Health Organization defines IPV as “behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours” (WHO 2014). This dissertation focuses on IPV committed by men, against women, in opposite-sex intimate relationships. While this dynamic is by far the most common, it is by no means the only one. My particular focus in this project is in no way intended to deny or diminish the existence and

Specifically, I examine the relationship between IPV in these contexts and the US state. I ask, what is the relationship between state actions/inactions and the perpetuation and perpetration of IPV against immigrant women? What conceptual and institutional formations constitute the state's role in IPV against immigrant women. That is, *why* and *how* is the state acting upon these women?

This project contributes to a growing body of interdisciplinary scholarship focused broadly on the intersection of gender and migration (e.g. Silvey 2004; Benhabib and Resnik 2009; Bosniak 2009; Hyndman 2010). More narrowly, I am engaged with a body of scholarship by helping to better theorize the relationship between IPV, migration, and the state. The literature on IPV and migration is stratified into two categories that are generally treated as distinct—that dealing with refugee/asylum law as redress for women fleeing IPV, and that dealing with IPV against immigrant women in the US. With respect to asylum, legal scholars are the most prolific, focusing on jurisprudence, international and domestic law, adjudicative processes, and judicial precedent (Spijkerboer 2000; Anker 2001; Musalo 2007; Musalo 2010; Barreno 2011; Rodriguez 2011; Bookey 2013; Doedens 2014). The literature dealing with immigrant survivors facing IPV in the US does not address asylum claims by women who face similar situations abroad—it is primarily concerned with institutional responses, and the ways in which immigration law either addresses or fails to address IPV (Loke 1997; Menjivar and Salcido 2002; Erez and Buch 2003; Orloff, et al. 2003; Salcido and Adelman 2004; Wood 2004; Ammar, et al. 2005; Conyers 2007; Bhuyan 2008; Erez, et al. 2009; Ingram, et al. 2010; Hipolito 2010; Sokoloff and Pearce 2011).

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seriousness of partner violence in same-sex intimate relationships or IPV committed against men.

In this dissertation I first examine these two cases separately, dedicating a chapter to each, then argue that these two seemingly different iterations of IPV are similar in their relationship to the state. In the case of IPV taking place in the US, I primarily use a detailed analysis of important congressional hearings to contend that policymakers self-reflectively re-instantiate immigration law as a tool of coercion against immigrant women in intimate relationships. In a deliberate and self-reflective way, members of Congress delineate and negotiate the extent and limits of immigration relief policies for survivors of IPV, and the terms of that negotiation are deeply problematic. The result is that the role of the state both inside and outside the purview of policies intended to address IPV against immigrant women partially constitutes and contributes to the continuation of this kind of violence. In the case of IPV-based asylum-seekers, I examine the slow and incremental incorporation of IPV-based claims into an existing legal framework that excludes petitions based solely on gender. I argue that, on account of the specific form that these changes take, policy and court decisions intended to create space for *some* IPV-based claims in fact re-instantiate the idea that IPV is apolitical, and thus necessarily not persecution. While some petitions have been granted under this policy, it has the effect of obfuscating the role of state actors in the existence and remediation of IPV.

### **Conceptual Building Blocks**

Several important conceptual building blocks form the foundation of this dissertation—gendered actors, institutions, and outcomes; the public/private dichotomy; intersectionality; power; and the state. This section outlines each of these in turn and

offers a brief justification, rooted in relevant literature, for my particular conceptualizations.

*Gendered Institutions, Gendered Actors, Gendered Outcomes*

Throughout this dissertation I incorporate the idea that institutions, actors, and outcomes can be and are gendered. Feminist scholars have argued that immigration law is a gendered political institution in the US (e.g. Benhabib and Resnik 2009; Bosniak 2009). To say that it is a gendered institution is not simply to say that it has gendered effects (discussed below). Rather, as feminist sociologist Joan Acker explains, “[t]he term ‘gendered institutions’ means that gender is present in the processes, practices, images and ideologies, and distributions of power in the various sectors of social life” (Acker 1992, 567). By way of example, political scientist Priscilla Yamin (2012) posits an account of marriage in the US as a deeply raced and gendered institution. As an institution, she argues, marriage both shapes and is shaped by identities and hierarchies based on gender, race, class, sexuality, and nationality (Yamin 2012, 148). In this way marriage is a gendered institution *and* it is productive of gendered outcomes in its capacity to structure and re-instantiate sociopolitical hierarchies (Yamin 2012).

To posit that, for example, some institutional rule set has gendered outcomes does not presuppose whether those outcomes are “good” or “bad” for a particular gender, or from a particular ideological standpoint. It is only to say that it levies disproportionate harm or benefit on one or another gender. However, as Francesca Gains and Vivien Lowndes explain, “we cannot assume any particular relationship between gendered institutions and gendered policy outcomes (Gains and Lowndes 2014, 529). They explain

that laws with gendered effects can be, and often are, “[seemingly neutral] rules that are not specifically about gender but have *gendered effects*, largely because of their interaction with institutions outside the political domain” (Gains and Lowndes 2014, 528).

Moreover, they point out that those acting within institutions are also gendered. “Mapping institutional rules is not sufficient...[given that I]nstitutional effects are generated by ‘real human individuals’ [and] these are *gendered actors*” (Gains and Lowndes 2014, 228, citing Crouch 2005, emphasis in the original). They go on to argue that “[i]nstitutions matter in political life because of the way in which they shape behavior..., but actors are not institutional automatons. Actors design institutions and also interpret, apply, and adapt rules on a day-to-day basis in the context of changing environments” (Gains and Lowndes 2014, 228 – 229).<sup>2</sup> This is particularly important for my argument regarding the relationship between the state and actors operating within, and on the authority of the state.

### *Intimate Partner Violence and the Public/Private Dichotomy*

In one of his earliest pitches of the Violence Against Women Act (VAWA), then-Senator Joe Biden stated unequivocally that, “[t]here is nothing ‘domestic’ about domestic violence” (House Judiciary Committee Hearing 1994, 35). In the context of two decades of feminists’ political and social activism aimed at demonstrating the very public

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<sup>2</sup> In making this argument they rely on “[t]he sociological concept of ‘institutional work’...[which] seeks to break down any binary distinction between rule makers and rule takers by focusing on the agency involved in institutional creation, maintenance, and disruption (change and/or resistance)” (Gains and Lowndes 2014, 529, citing Lawrence, Suddaby, and Leca 2011).

and political nature of gendered violence in the home, Biden's comment does not seem particularly radical. As legal scholar Kimberlé Crenshaw (1991) argues, "battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class" (Crenshaw 1991, 1241). However, in spite of Biden's VAWA success, the broad sociopolitical appeal of the notion that IPV is a "private" matter has proven remarkably resistant to reform efforts.

One of the central tensions in this dissertation pertains to the ostensible dichotomization between that which is "public" and that which is "private." Contestation of this dichotomy spans across many academic disciplines, however, political scientist Virginia Sapiro (1998) argues that this issue "takes on special importance in political science," as it is "the one field whose disciplinary boundaries are conventionally defined by the public/private split" (Sapiro 1998, 70). For feminist scholars, the questioning of this divide led to serious challenges of what constitutes "public life" and what constitutes the political (Sapiro 1998, 71).

The problematizing of the divide between the public and the private was one of the central legacies of second wave feminism in the US was. In the 1970s, second wave feminists argued that the dichotomy between public and private contributed to gender discrimination in the workforce and under-representation of women in political institutions. Moreover, it was fundamentally permissive of violence against women and children in the home. It created a social, legal, and physical space in which rape, IPV, and child abuse were pervasive and not subject to public scrutiny. "The personal is political" became a rallying cry of the feminist movement, and "private" violence was subject to

critical examination as it had never been before. Feminists contended that this so-called “private” violence was an elemental component of women’s very public oppression (Schneider 1994; Davis 2003; Lee 2007).

The public/private dichotomy dates back to the seventeenth century and has its roots in early liberalism. Liberal individuals—the bearers of rights—were very explicitly white men, and this stipulation was very slow to change. The idea of privacy was integral to liberty, and a private sphere in which political subjects (white men) could exercise self-determination without state incursion was posited as integral to political citizenship and democracy (Okin 1998). As political philosopher Susan Okin explains,

the right of these individuals to be free from intrusion by the state, or by the church, or from the prying eyes of neighbours, were also these individuals’ rights *not* to be interfered with as they controlled the other members of the private sphere—those who, whether by reason of age, or sex, or condition of servitude, were regarded as rightfully controlled by them and existing within *their* sphere of privacy (Okin 1998, 118 – 119).

The problem, of course, was that those political subjects (white men) were not alone in “their” private spheres.

The famous refrain of second wave feminists, “the personal is political,” should not be equated with a rejection of the value of privacy. Instead, the slogan served as the rallying cry for a movement against the gendered violence that was epidemic in the “private sphere.” As these activists and scholars made clear, this violence was deeply political, as it produced and reinforced a system of domination and oppression that subjected women to violence and prevented women from fully exercising their rights to social and political participation and engagement. As Okin explains, “what happens in personal life, particularly in relations between the sexes, is not immune from the dynamic of *power*, which has typically been seen as a distinguishing feature of the political” (Okin

1998, 124). Moreover, those features we associate with either the domestic or the public spheres are very much intertwined (Okin 1998, 124). It is therefore not at all clear that we ought to talk about these spheres as *separate* even if we think of them as distinct (Okin 1998).

Though the deep power dynamic suggest that the home is (or can be) a public space, it is important to recognize the ways in which this dichotomy and the violence it enables has been institutionalized by the state. For example, it was (and still is) commonplace for law enforcement to refuse to intervene in incidents of IPV on the grounds that such things were “private matters.” Until the 1970s, it was legal for a man to rape his spouse in all 50 US states. This began to change on a state-by-state basis in response to the demands of second wave feminists. However, the shift was agonizingly slow, with the last two states not taking out their marital rape exemptions until 1993 (RAINN 2014). Far from being an antiquated relic of times-long-past, the institutionalization of the public/private dichotomy and the violence it permits are a highly resilient feature of the androcentric nature of liberalism.

Even the term “domestic violence” implies a “private,” a space outside of the social and political worlds, and in which the state must intervene on behalf of (predominantly) women and children. In this dissertation I do not use the term “domestic violence,” and this is deliberate. The distinction between the domestic and the public re-instantiates a dichotomy that is both politically imprudent, and descriptively inaccurate.

*Intersectionality*

In her germinal piece, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,” Kimberlé Crenshaw (1991) draws early attention to the intersectional, structurally generated vulnerability and oppression of immigrant women. She argues that, immigrant women’s “...actual experience of domestic violence, rape, and remedial reform [is] qualitatively different than that of white women,” on account of their location at the intersection of race, gender, immigration status, class, and other factors (Crenshaw 1991, 1245). While much has changed since Crenshaw’s piece was first published, many of the fundamental problems that she identified persist. In this dissertation I build on Crenshaw’s empirical work and on the intellectual legacy built by her and other intersectionality scholars (Davis 1981, 2003; Crenshaw 1991, 1998; Collins 2000; hooks 2000; Lorde 2007; Anzaldúa 2012). I further examine the ways that, for immigrant women, multiple forms of oppression converge to constitute their experience of IPV (Crenshaw 1991). The gender oppression constitutive of IPV is compounded by the discriminatory cooperation requirement applicable to immigrant women on account of their nationality/immigration status.

Political scientist Ange-Marie Hancock (2013) explains that there are two ways in which intersectionality has been used and interpreted by researchers. The first she calls “intersectionality-as-testable-explanation,” which she describes as an “approach [that] seeks to subject the claims regarding discrimination or lack of access asserted by normative intersectionality theorists to a standard positivist empirical examination” (Hancock 2013, 268). This approach, she explains, “operationalizes” identities as additive (i.e. gender *and* race, or race *and* class) rather than interactive or mutually constitutive (Hancock 2013, 260). The second approach, which she terms the “paradigm

intersectionality” approach, understands intersectionality as analysis. “It is...a research paradigm that identifies relevant questions left unanswered by prior race-only or gender-only approaches to empirical legal analysis” (Hancock 2013, 261). This operationalization is exemplified by Sociologist Patricia Hill Collins (2000), who defines intersectionality as “analysis claiming that systems of race, social class, gender, sexuality, ethnicity, nation, and age form mutually constructing features of social organization, which shape Black women’s experiences and, in turn, are shaped by Black women” (Collins 2000, 299).

Hancock argues that there are benefits and drawbacks to each of these approaches. The “intersectionality-as-testable-explanation” approach aligns well with mainstream legal and methodological approaches to research, giving it “pragmatic utility.” However, she argues, “its strength...is also its devastating limitation” as it “incompletely operationalizes intersectionality, which thus limits its ability to fully challenge...legal structures” (Hancock 2013, 295). In this dissertation, I align myself with the “paradigm intersectionality” approach, which Hancock argues is “far more consistent with the tenets of intersectionality theory, both as originally outlined by Crenshaw and Collins and in the years since by other normative theorists” (Hancock 2013, 295).

### *Power*

Power is, of course, a central concern of political scientists, and it is a conversation that goes well beyond Harold Lasswell’s classic conceptualization of power

as a question of “who gets what, when and how?”<sup>3</sup> Political scientists Peter Bachrach and Morton Baratz (1962) argue that there are two manifestations of power—the first manifestation is straightforward, with one person making decisions that directly affect another person. An example of this would be punishment policies that levy obvious material burdens on, for example, groups constructed as deviant. The second type, which is less easily detected, occurs when one person (or institution) takes direct or indirect steps to protect/create/reinforce institutions, and/or sociopolitical value systems that allow her to maintain power or prevent another group from bringing issues to the agenda (Bachrach and Baratz 1962, 948).<sup>4</sup> In this project I am particularly concerned with one iteration of what Bachrach and Baratz might call the first face of power—power as violence—and an iteration of the second face of power—coercive power. I am also concerned with a manifestation of power that does not seem to fit easily into their bifurcated framework—power as resistance to coercion and violence.

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<sup>3</sup> Helen Ingram and Anne Schneider (1993, 1997) contend that the social constructions of target populations are vital in understanding the reasons for, and ways in which policymakers distribute benefits and burdens. Recognizing these social constructions can allow us to see the logic behind why policymakers distribute beneficial policies to positively constructed, powerful groups, and dole out punishment policy to negatively constructed (usually weak) groups. This analytical angle, they argue, will allow political scientist to finally answer the question of “who gets what, when and how” (Schneider and Ingram 1993, 334)?

<sup>4</sup> In Ingram and Schneider’s framework, this might translate into a policy that demobilizes a population constructed as “contenders,” discouraging political participation through various political messages, thus entrenching (possibly discriminatory) systems of power. Bachrach and Baratz argue further that by understanding power in this way, researchers are able to analyze the specific “mobilization of bias” within the institution they are investigating. That is, identify who wins and who loses as a result of existing biases within the system of myths, values and procedures. They also contend that it is just as important to analyze the decisions not made (i.e. the status quo) and the consequences of deliberate or unintentional inaction on a given political issue (Bachrach and Baratz 1962, 952; Schneider and Ingram 1993).

Power as it manifests in intimate relationships is not, as discussed above, a “private” matter. As legal scholar Martha Mahoney argues, “[s]ocial and legal inquiry [that] focuses [exclusively] on the experiences of individuals, stripping away the societal context of oppression...hiding the ways in which a relationship between individuals in a particular case is similar to other abusive relationships” (Mahoney 1994, 60). Moreover, she says, the fixation on acts of physical violence obscures broader patterns of power and control (Mahoney 1994, 60). Within an abusive relationship, violence and coercion are wielded as mechanisms of control and domination. The power of an abuser in a relationship where the subject of violence is an immigrant is partially constituted by the state’s power and willingness to detain and deport her for immigration violations.

Importantly, power is relational and dynamic, not static and unidirectional, though it might seem that way at first blush. Political theorist Wendy Brown (2006) cautions against an understanding of power as a static ability:

[T]he etymological origin of power [(“to be able”)] suggests the importance of power as a quality (an ability) which, however important, diverts appreciation of power as a relation and one that induces effects, especially in the making of human subjects and social orders (Brown, 2006, 65).<sup>5</sup>

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<sup>5</sup> Political scientist Michael Parenti (1970) also talks about power as relational. He argues that, “just as one needs capital to make capital, one needs power to use power” (Parenti 1970, 527). He contests political scientists Robert Dahl (1961) and Nelson Polsby’s (1963) application of a “...double standard for the measurement of power” wherein upper-class, wealthy, well-educated elites are not viewed as exercising indirect power and political influence because it cannot be demonstrated “scientifically,” while the poor, less-educated, and unorganized who are clearly not part of decision-making processes in an overt way, are assumed to still be influential because they can vote (Parenti 1970, 506). The rules of the game of politics and government do not apply to all equally, he argues. In fact, the rules and norms themselves are part of the competition. “Rules that regulate procedures and priorities in any social system cannot be extricated from the substantive values and interests that led to their construction” (Parenti 1970, 529). Moreover, he contests the idea that there is inherent value in the rules as “a precondition for democratic politics” because such a view “overlook[s] the fact that for some groups such a commitment is tantamount to accepting a condition of permanent defeat since certain of

Political scientists Gerald Berk, Dennis Galvan, and Victoria Hattam (2013) offer a congruent description of power:

[P]ower is best understood relationally as social practices through which subjects and subjectivities, institutions and authority are established, challenged, and reconfigured. Power does not inhere in formal conditions. Rather power is secured through the ongoing negotiation of people, places and things into provisional assemblages that accord meaning to positions (Berk, Galvan, and Hattam 2013, 3).

An important part of the account I offer here is the notion that the power dynamics in abusive relationships and between survivors and the state are contestable. It is not an ability that needs to be taken away; rather it is a dynamic that can be contested and challenged. I understand this kind of power as resistance to systems of domination and oppression. This kind of power could manifest, for example, as a woman taking on the legal system in the US in order to contest both the domination of her abuser and the state.

### *Institutions and a Theory of Agency Within the State*

It is not possible to examine the role of the US state in cases of IPV against immigrant women without first delineating what is meant by “the state.”<sup>6</sup> In the broadest sense the state is an institution containing within it a plethora of other institutions—a complex web of sometimes concentric, sometimes deeply interdependent and mutually

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the rules as presently constituted...are, in fact, the weapons of a dominant interest” (Parenti 1970, 530).

<sup>6</sup> There is a large body of literature that discusses the development of the US state and evidence of its capacity (Skowronek 1982; Bensell 1990; Skocpol 1995; Plotke 1996; Berk 1997; Tichenor 2001). There is also a much broader literature on the state that I do not cite here. These citations are representative of a more select subset of the relevant American political development literature, and although I do not directly engaging with their arguments here, they serve as a foundation for this dissertation.

constitutive sub-structures.<sup>7</sup> Each of those sub-structures—institutions contained within the larger state—is constituted in part by sets of rules and norms that govern the behavior of those operating within them, as well as those over whom that institution has power and authority. They are not, however, impervious to change or individual agency (Giddens 1981; Sewell 1992; Young 2011). On the contrary; while institutions themselves have a profound disciplining affect on individuals acting in their capacity as agents of those institutions, individuals are nonetheless capable of exerting agentic pressure. This is true of all those acting within institutional structures, but it is particularly true at sites where the rules and norms that comprise the institutions are created, amended, or abolished. Because of this relationship, we can understand institutions and the agents acting within them as mutually constitutive. That is, the relationship between institutional rules and norms and institutional agents tasked with maintaining those rules and norms are constitutive of one another.

In *Responsibility for Justice*, political theorist Iris Marion Young (2011) explains that social theory has hosted a long and vigorous debate regarding “...whether conceptualizing social relations in terms of structures commits a theorist to the position

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<sup>7</sup> Catherine MacKinnon (1989) posits an understanding of the state in which “state power [is] male power” (MacKinnon 1989, xi). Her totalizing theory of the state is one in which “women’s interests” are not merely absent from law; they are foreclosed by it, as the state itself is masculine power (MacKinnon 1989). I too examine state institutions as productive of gendered outcomes, and as themselves gendered, but my conceptualization of the state in this dissertation is decidedly different. While I do invoke “the state” as a broad description of a set of institutions and actors, I do not understand the state as monolithic as MacKinnon’s theory requires (MacKinnon 1989). On the contrary, I understand the state as multidimensional, multifaceted, and fluid. Moreover, my analysis here is intersectional. To argue that the state is male in this way misses the myriad intersecting and overlapping forms of privilege, domination, and oppression—based on race, class, nationality, immigration status, etc.—both present in state institutions, and contested by actors partially constitutive of those institutions and outside of those institutions.

that persons in social structures are not really agents, or that their agency is something entirely independent of the structures, which operate according to their own laws” (Young 2011, 59). Young argues that people do act within institutions, however not in a way that can easily be separated from those institutions. Additionally, those individuals’ actions are informed by the structure of those institutions—e.g. rules, and norms—in a way that implicates the institution in the individuals’ actions. This relationship is important in identifying structural injustice:

Structural injustice...exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them. Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent of the repressive policies of a state. Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms” (Young 2011, 52).

In this view, individual agency can take multiple forms and its different forms enable and require different levels of analysis. Identifying structural injustice requires an examination of individuals’ actions in their capacity as institutional actors. In addition, it requires, as political scientist William Sewell (1992) and sociologist Anthony Giddens (1981) also argue, acknowledging that capacity of these institutional actors to generate (or not generate) institutional change (Giddens 1981; Sewell 1992; Young 2011).

If we think of the relationship between institutions and agency in this way, we can also think of agency as potentially collective, rather than as only ever individual. Sewell argues that, “...agency exercised by persons is collective in both its sources and its mode of exercise. Personal agency is, therefore, laden with collectively produced differences of power and implicated in collective struggles and resistance” (Sewell 1992, 21). In their

agentic capacity, he argues, individuals can coordinate and collaborate. I would argue that the collaborative capacity of individual agents can be seen in, for example, acts of Congress, congressional subcommittee recommendations, coordinated partisan voting, etc. Individuals pool their agentic resources in order to amplify the power afforded them by the institutional structure within which they operate. They do this to produce, or make more likely, certain outcome regardless of the substance of those outcomes (Sewell 1992).

In this project, the relationship between state institutions and those acting within them (and on their authority) is of central significance. In my analysis of institutional culpability and capacity, individual actors are important not so much as themselves, but as constituents of the institutions on whose authority they are acting. In Chapter III, for example, I analyze how the relationship plays out between legal institutions of immigration law and ameliorative policy like VAWA, and the individual actors operating within, and on the authority of those legal institutions. This is in line with Sewell's theory of structure in which he posits an understanding of agency "...not as opposed to, but as constituent of, structure" (Sewell 1992, 20). Similarly, Giddens tells us that structures need to be understood as "dual" in that they are "both the medium and the outcome of the practices which constitute social systems (Giddens 1981, 27). Put differently, "[s]tructures shape people's practices, but it is also people's practices that constitute (and reproduce) structures" (Sewell 1992, 4). Sewell goes on to argue, with Giddens, that individual agency is often lost in conversations about structure. He warns, "[a] social science trapped in an unexamined metaphor of structure tends to reduce actors to cleverly programmed automatons" (Sewell 1992, 2). This view of people acting within

an institution forces us to locate change outside of that institution, "...either in a telos of history, in notions of breakdown, or in influences exogenous to the system in question" (Sewell 1992, 3). These tendencies heavily color certain sub-sets of the scholarly work on IPV against immigrants.

Berk, Galvan, and Hattam (2013) caution against the maintenance of a "false duality of structure and agency" that "seek[s] to soften the distinction between institutional structure and human agency with concepts like 'layering' or 'ambiguity'" (Berk, et al. 2013, 1). For them, what is interesting about structure and agency is the ways in which they are mutually constitutive, and the ways in "...which people in plural settings experience and practice rules and roles" (Berk, et al. 2013, 2). They are coming from a position of discomfort regarding the tendency of institutionalism, as an analytical lens, to see structure and agency as contradictory and irreconcilable. There are deeper understandings and insights to be gained when scholars "refuse the relentless splitting of structure, agency, and change" (Berk, et al. 2013, 2). They urge us to "reimagine agency as relationality," which "...overcomes the structure-agency distinction by setting both in motion. From this perspective, neither the features of institutions—rules, roles, symbols—nor the identities or interests of actors have meaning apart from the changing roles they play in relationship to one another" (Berk, et al. 2013, 5 – 6).

When referring to the state in the abstract, it is easy to misplace or pass over the agency of individuals acting on behalf of, or in their official capacity as representatives of various state institutions. In the context of this project, we need to consider the actions of members of Congress, Immigration and Customs Enforcement (ICE) officers, Citizenship and Immigration Services (USCIS) officers, local law enforcement officers, and judges,

not as merely the actions of individuals influenced and disciplined by institutions, but as actors whose actions are partially constitutive of those institutions. That is to say, an analysis of their actions in this capacity is an institutional analysis. Correspondingly, in examining the actions of individuals operating in their official capacities, it is easy to lose sight of the state as a system or a structure that is neither clearly separable from its individual parts, nor is it clearly reducible to its individual parts (Young 2011). Yet, understanding the state as a structure not reducible to its parts (individual agencies and/or representatives of the state) should not distract us from the fact that those individuals act with the legitimacy, authority, and power of the state (Lipsky 1980; Morgen, Acker, Weigt 2010).<sup>8</sup>

Moreover, as I demonstrate in Chapter III, individual state actors, acting in their capacity to shape the rules, norms, and laws that constitute a major part of the state as a structure (e.g. members of Congress sitting on various relevant committees and subcommittees) can be, and *are* self-reflective about the ways that the structure of which they are a part interacts with those over whom it exercises power and authority. That is to say, although we can talk about the state as a structure irreducible to its parts, we can also

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<sup>8</sup> Political scientist Michael Lipsky (1980) argues that “...the decisions of street-level bureaucrats”—those workers tasked with policy implementation on the most basic and everyday level, such as police officers, public school teachers, those administering welfare programs—“the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out” (Lipsky 1980, *xii*). Most relevant to this dissertation, Lipsky posits an understanding of individuals, authorized by the state, are afforded an enormous amount of discretion and power in their implementation of policy directives, and their choices and decisions are partially constitutive of policy and the policymaking process (Lipsky 1980). Anthropologist Sandra Morgen and sociologists Joan Acker and Jill Weigt (2010) also shed light on the agency of individual bureaucratic workers tasked with administering, in this case, welfare policy. In their account, administrative discretion exercised by individual bureaucrats can open the door to, for example, racial bias in welfare policy implementation (Morgen, Acker, and Weigt 2010).

understand the state as capable of self-reflection, intentionality, and the instantiation and re-instantiation of power dynamics that are beneficial to some at the expense of others. We can see evidence of this kind of self-reflection in, among other things, the texts of laws and policies, the transcripts of congressional committee and subcommittee hearings, statements of administrative policy by presidents, court briefs and rulings, and other official sources and forms of discourse. Even individual utterances are situated within a collective entity that too has the capacity to act.

### **Chapter Breakdown**

Chapter II, “Methods and Methodology,” explains my research and analytical methods, my methodology, and my selection and use of empirical evidence. I use multiple interpretive methods in investigating the relationship between the state and IPV against immigrant women. I conducted feminist content and discourse analysis, historical legal process tracing, and interviews. Broadly, my analysis is feminist interpretive in form. This chapter also details my feminist methodological orientation, discussing the political and philosophical presuppositions that underlie both my research and my analysis.

Chapter III, “Intimate Partner Violence Against Immigrant Women in the United States,” is the first of two empirical case studies presented in this dissertation. Here I examine the relationship between state institutions and IPV against immigrant women living in the US. Crenshaw (1991) trained a powerful analytical spotlight on the intersectional experiences of immigrant women in the US facing IPV. However influential in the feminist community, Crenshaw’s article was largely ignored by

mainstream immigration scholarship, which persists in treating immigration policy and its effects as gender-neutral. In this chapter I re-focus on this issue, examining the role of state actors and institutions in this kind of violence, assessing how and why the state is acting upon these women.

Much of the literature on this issue assumes or asserts a largely beneficent state that, while it may suffer from policy and administrative shortcomings, mismanagement, or misunderstanding, is still passive and reactionary in nature. That is, the state is *responding* to a reality of IPV against immigrant women that exists external to the state's own institutional structures and capacities. I critique this idea through an analysis of congressional sub-committee hearings, which reveal self-reflection among and between lawmakers regarding the role of the state—in the form of immigration law and the enforcement thereof—in the perpetration and continuation of this violence. In analyzing these transcripts, I posit an understanding of the state as playing a more directly harmful role in the lives of immigrant women experiencing IPV.

Chapter IV, “Intimate Partner Violence-Based Asylum in the US: An Alternative Analysis,” is the second of two empirical chapters, and approaches the relationship between the US state and IPV against immigrant women from a different perspective. In this chapter I examine US institutional responses pertaining to women seeking asylum on account of IPV. Unlike Canada, the US policy does not allow for IPV alone to serve as grounds for an asylum claim. Nor does the US accept gender persecution per se as grounds for asylum claims, though this policy framework was recommended by the UNHCR over two decades ago. Officials have given a plethora of rationales for this policy, but as in the case of IPV occurring on US soil, the policy limits have considerable

negative impacts. Over the last two decades, a series of administrative and court decisions have led to protracted legal debates regarding the cases of a few such asylum-seekers, regarding whether or not such cases necessitate an exception to the general rule. In 2014, the Board of Immigration Appeals (BIA) made a much anticipated, and precedent-setting ruling in an IPV-based asylum case, conceding that IPV can be understood as persecution *in some cases*, as delineated by Congress.

The BIA's ruling has been praised by activists and advocates as move toward a more just and ethical asylum policy. I argue in this this chapter that, instead of moving us toward a more robust understanding of IPV as both public and political, the "exceptions" made in the Obama administration brief, and the BIA's precedent-setting ruling re-instantiate an understanding of IPV as apolitical. Indeed, these policies act to legitimate the idea that this form of persecution is apolitical, thus obfuscating the role of state actors in its continuation and its remediation. As in Chapter III, we can see these ostensibly progressive administrative policies not at as inadequate remedy or incremental progress, but as implicated in perpetuating the conditions under which this kind of violence continues.

In the final chapter, "Centering Peripheral Violence," I pull the two case studies together in an overarching theory of the relationship between the state institutions and the continuation of IPV against immigrant women. Here I examine the connections between these two cases, which are generally treated as distinct in both policy and in the academic literature. Drawing from feminist and immigration scholarship, this chapter draws out restrictive immigration policy as a form of gendered institutional violence when examined in these specific contexts. Rather than accepting restrictive immigration policy

as necessary or fundamentally just, this chapter explores alternative institutional formations capable of eliminating the use of immigration restrictions as a tool of coercion in abusive relationships.

## CHAPTER II

### METHODS AND METHODOLOGY

This dissertation is a constructivist-interpretive study of the relationship between the US state and IPV against immigrant women. This chapter serves two interrelated functions—outlining my research methods and explicating my methodological approach, including ontological and epistemological presuppositions.<sup>9</sup> In conducting my research and analysis, I rely primarily on feminist content and discourse analysis, and historical legal process tracing, and peripherally on interviews. The philosophical and methodological underpinnings of this work are important not only as presuppositions, but as an integral element of my data generation, analysis, and normative theoretical argumentation. These elements receive considerable attention in the latter part of the chapter.

#### Methods

##### *Feminist Content and Discourse Analysis*<sup>10</sup>

Feminist content and discourse analysis is the most robust method I use in this project. I examine five different sources of content—policies (both legislative and administrative), public statements of national policymaking, congressional hearings,

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<sup>9</sup> While “methods” here refers to the specific tools for data collection and analysis, “methodology”—in this case intersectional feminist methodology—refers to “...questions about theories of knowledge, strategies of inquiry, and standards of evidence appropriate to the production of feminist knowledge” (Hawkesworth 2006, 4).

<sup>10</sup> Examples of discourse analysis more broadly: Bhuyan 2008; and Newton 2008. Examples of feminist discourse analysis: Lazar 2005; Rojo and Esteban 2005.

judicial rulings on gender-based asylum claims,<sup>11</sup> and administrative briefs submitted to immigration courts in IPV-based asylum cases. As discussed in the previous chapter, each of these is partially constitutive of the state apparatus broadly understood, and the content of each communicates one or another aspect of institutional rule making, either in process or in outcome.

The purpose of this project is not simply to describe a certain sociopolitical reality, although evidence-based description certainly plays an important role. It is to provide an empirically grounded feminist theoretical analysis of certain observable phenomena. In this case, evidence of those phenomena manifest in the form of textual and spoken content, concepts, and discourse. Michelle Lazar (2005) argues that, “[a]nalysis of discourse which shows up in the workings of power that sustain oppressive social structures/relations is itself a form of ‘analytical resistance’ ...and contributes to ongoing struggles of contestation and change” (Lazar 2005(a), 6, citing van Dijk 1991). Critical content and discourse analysis has its roots in the tradition of critical theory, particularly in that it is interested in linking theory and praxis—leveraging theory and critique as tools in the fight against sociopolitical domination.

[Critical discourse analysis] is part of an emancipatory critical social science which...is openly committed to the achievement of a just social order through a critique of discourse...[F]eminist critical discourse analysts[’]...central concern is with critiquing discourses which sustain a patriarchal social order: that is, relations of power that systematically privilege men as a social group and disadvantage, exclude and disempower women as a social group (Lazar 2005(a), 5).

As Lazar explains, the impulse of a feminist content and discourse analysis differs from analyses that are similar in form, but without a feminist orientation in that it is concerned

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<sup>11</sup> For other examples see Loescher and Scanlan 1986; Spijerboer 2000; Anker 2001; Musalo 2010; Barreno 2011.

with systems of power and domination that pertain specifically to gender. My analysis in this dissertation differs from what Lazar describes in that I am concerned with intersectional forms of power and domination having to do with race, class, nationality, and immigration status, in addition to gender.<sup>12</sup>

### *Historical Legal Process Tracing*<sup>13</sup>

The changes and development of the legal apparatuses—be they administrative, legislative, or judicial—are also central to this research. The way this political development unfolds over time reveals much about the relationship in question here. Although there is a more than a century’s worth of policy history available for analysis in broad form, in the case of IPV against immigrants living in the US, the history of ameliorative policy is quite short; the first ameliorative policy did not appear until 1990 when Congress created the so-called “Battered Spouse Waiver” in an attempt to address the specific vulnerabilities created by the Immigration Marriage Fraud Amendment to the Immigration and Nationality Act of 1986. Similarly for IPV-based asylum claims, the policy history is brief; the first IPV-based asylum petition was filed in 1996. Though legislation pertaining to IPV-based asylum claims has remained constant over the last two decades, judicial precedent and administrative policies have shifted considerably, with the Clinton, Bush, and Obama administrations all taking different approaches. These

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<sup>12</sup> Karen Beckwith (2005) argues that gender can operate as both a category and a process (Beckwith 2005, 131). As a category, gender is “the multidimensional mapping of socially constructed, fluid, politically relevant identities, values, conventions, and practices conceived of as masculine and/or feminine, with the recognition that masculinity and femininity correspond only fleetingly and roughly to ‘male’ and ‘female’” (Beckwith 2005 131).

<sup>13</sup> For examples see: Tichenor 2002; and López 2006.

changes become particularly important in the context of legislative consistency on the matter.

### *Interviews*<sup>14</sup>

The interview portion of this research does not constitute my primary source of data; rather I use interviews for triangulation purposes. They serve to contextualize and ground information I obtain from congressional hearings and other legal documents. The interviews offer valuable insights. However, they do not, and were never intended to constitute a representative sample, either geographically or across experiences. I do generate data from these interviews, although not in the same way as from congressional hearings or court briefs. I conducted semi-structured interviews with key informants at three different levels of involvement with immigrant IPV survivors. At the elite level, I interviewed Doris Meissner, the former commissioner of the Immigration and Naturalization Service (INS)<sup>15</sup> under the Clinton administration. My discussion with Commissioner Meissner provided insights into the rationale behind certain administrative policy decisions. I also conducted interviews with immigration lawyers, some at prominent non-governmental organizations, in multiple locations across the country—New York, Washington DC, Colorado, and the Pacific Northwest.<sup>16</sup> Lastly, I talked with workers operating in some other capacity for NGOs providing assistance to immigrant

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<sup>14</sup> For examples see Gimpel & Edwards 1998; Tichenor 2002; García Bedolla 2005; Gash 2015.

<sup>15</sup> After the 9/11 attacks, the administrative duties of the INS were transferred to the newly formed Department of Homeland Security.

<sup>16</sup> For some of these interviews I do not specify the city for confidentiality reasons.

IPV survivors. NGOs are very often on the front lines of this issue, providing assistance to survivors, and facilitating the interaction between women seeking relief and the state apparatus tasked with providing that relief. This set of interviews was conducted in Colorado, New York, and the Pacific Northwest.

### *Feminist Institutionalism as an Analytical Tool*

Institutions are of central importance in this dissertation, and my analyses thereof most closely align with the burgeoning tradition of feminist institutionalism. There are several features that distinguish feminist institutionalism from other approaches to analyzing institutions in political science. According to Vivien Lowndes (2014), at its most basic, “[f]eminist institutionalism examines how the *gendered* organization of political life makes a difference” (Lowndes 2014 285). She explains

In shaping political behavior, institutions distribute power, differentially constraining and enabling actors in ways that ‘stick’ over time. [Feminist institutionalists’] concern is with the gendered nature of these power settlements. Political institutions can be seen as ‘gender regimes’ that reflect, but also help constitute the roles, relations, and identities of women and men in the political arena... (Lowndes 2014, 285 – 286).

She argues that, methodologically, a feminist institutionalist approach requires the researcher to contend with three fundamental questions. “How can we identify gendered institutions on the ground? How can we uncover the ways in which gendered institutions do their work? How can we link our methods to strategies for change” (Lowndes 2014 686)? This dissertation sets out to answer these questions in the specific context of IPV against immigrant women.

It is not enough to say that institutions are gendered or that they are productive of gendered outcomes—outcomes that benefit or harm a certain gender disproportionately.

To say that institutions are “productive of” some particular outcome is a passive statement, and in this case, I argue that the grammatical structure of this phrase is reflective of an underlying assumption regarding the role of agency in institutions. If we think about institutions only as sets of rules and norms that govern behavior, our understanding will be incomplete. “...[I]nstitutions and actors are mutually constitutive...but theoretically, these actors remain undifferentiated, and the relevance of the specific attributes is underinvestigated” (Gains & Lowndes 2014, 529). Gains and Lowndes stress that it is centrally important to examine interactions between (always already gendered) individual actors and institutional rules (Gains & Lowndes 2014, 529). What is at issue in this project is the *interaction* between gender, actors, institutions, and outcomes, rather than any one of these elements alone.

As explained in the previous chapter, it is possible to locate sites of agency within institutions that cannot be pinned either on the institutions themselves, or on those involved in the maintenance and production thereof. The fact of this mutually constitutive relationship does not render agency nonexistent or sufficiently complex that the concept of agency no longer applies or makes sense. Rather, it allows us to conceptualize that agency differently, as attributable to the actors operating within the institution *and* to the institution itself. With regard to state institutions, it is possible to locate agency in particular places. There are identifiable points at which we can observe the creation, maintenance, or dissolution of the rules and norms that partially constitute legal institutions, like immigration policy. Moreover, the process by which these actions are taken is often, though not always, accessible and transparent in the form of public hearings, debates in Congress, and legislative outputs.

The theoretical and methodological question here is whether or not we can attribute the actions of gendered actors within state institutions to the state itself. That is, given the mutually constitutive nature of the relationship between institutions and those operating within them, can we say that the state itself *knowingly* commits an act of gendered violence when the actors responsible for creating a legal apparatus themselves *know* the harm that will result? Can we attribute their self-reflective agency to the state, thereby understanding state institutions as themselves *self-reflective* and agentic? If so, what kind of evidence would justify such a claim, and how should a researcher approach that evidence methodologically?

With regard to method, an empirically informed theoretical argument like this would require that I demonstrate first and foremost that the institutional actors in question are indeed self-reflective about the outcomes resulting from their decisions regarding institutional rules (e.g. specific features of immigration law). It is also necessary to accurately identify those actors within the institution in question, and be able to explain the mutually constitutive relationship that grants those individual actors the internal (and presumably legitimate) power and authority to create, amend, dissolve, or re-instantiate the rules, norms and procedures that constitute this institution of immigration law. Substantiating a claim that those actors are self-reflective requires evidence; in this dissertation, I find evidence for these claims in congressional hearing transcripts. That is, I find evidence of self-reflection in this manner in transcripts of the conversations and testimonies of members of Congress during committee hearings on relevant laws.

What constitutes evidence in social science research has long been a contested issue, particularly for scholars whose theoretical and methodological approaches fall

outside the mainstream. With respect to feminist and intersectional theories and methods, this issue has been particularly contentious in light of political science's long and ongoing history as a masculinist discipline (Anonymous 2014, 440). "...[T]he discipline's substance and institutions were both established when the discipline was mostly, if not entirely, composed of male scholars, and those male scholars prized values associated with masculinity, such as objectivity, rationality, and competitiveness" (Anonymous 2014, 441).<sup>17</sup> The resultant epistemological and ontological orientations regarding what constitutes knowledge, and how that knowledge is arrived at have reinforced these founding disciplinary biases (Anonymous 2014). This dissertation is intended, at least in part, as an intervention into the hegemonic masculinism constituting the discipline.

### *Intersectionality as an Analytical Tool*

As an analytical tool, intersectionality was developed primarily by women of color "in their continuing struggle to correct the omissions and distortions of feminist analysis caused by failure to investigate the structuring powers of race, class, ethnicity, sexuality, and nationality" (Hawkesworth 2006, 207). Scholars of intersectionality emphasize the ways in which systems of oppression based on race, gender, class, nationality, sexuality, et al. are interactive and overlapping, not atomized or discrete (Anzaldúa 2012; Collins 2000; Crenshaw 1991; Crenshaw 1998; Davis 1981, Davis

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<sup>17</sup> This quotes comes from an article published anonymously in *Politics and Gender*, which discusses the state of the political science discipline with regard to gender. The authors' choice to remain anonymous itself speaks volumes about the professional risks of speaking out about the discipline's androcentrism.

2003; hooks 2000; Lorde 2007).<sup>18</sup> That is, these analytical categories are not additive—one cannot examine the effects of each category or site of oppression separately. Nor, as Ange-Marie Hancock (2013) explains, can the interactive patterns among and between these categories be attributed only to identities, be they ascriptive or otherwise (Hancock 2013, 259). “Instead, these categories are analyzed as social constructions that, through the diffusion of power relationships, have vastly material effects” (Hancock 2013, 259).

Intersectional analysis is central in this dissertation. It is a basic premise of this work that immigrant women’s experiences of IPV and their experience of the state and state power differ in form and in material effects from the experiences of citizen women (Crenshaw 1991). In light of these differences, general analyses of IPV are limited in their explanatory and prescriptive power. For many immigrant women in the US, immigration status becomes partially constitutive of their experiences of IPV, as it is often a feature of the abuse itself. For immigrant women seeking IPV-based asylum, adjustments to immigration status are the linchpin of their capacity to escape IPV. A meaningful intersectional analysis of this intersectional experience is a prerequisite for effective sociopolitical resistance to the systems of domination and oppression that enable this violence.

## **Methodology**

The puzzle at the heart of this project is this: what is the relationship between state actions and inactions and IPV against immigrant women? This question pivots around a central set of empirical observations, from which I generate the data for the

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<sup>18</sup> This list of intersectionality scholars is intended to be representative, but by no means exhaustive.

forthcoming chapters. Dvora Yanow and Peregrine Schwartz-Shea (2014) explain: “‘Data,’ in [a qualitative interpretive] approach, are not things given (*datum*, *data*, from the Latin ‘to give’), but things encountered, often by surprise, observed, and made sense of, interpreted. What is accessed are sources of data; the data themselves are generated...” (Yanow and Schwartz-Shea 2014, *xxi*). The first, and most basic observation is that intimate partner violence exists, and it exists both in the US and abroad. Second, immigrant IPV survivors are faced with an experience constituted by the complex relationship between their status as immigrants and their status as IPV survivors—an intersectional experience—whether or not the violence perpetrated against them is ongoing. Put differently, the challenges faced by immigrant survivors are distinct from those faced by US citizens on account of this intersectional relationship (Crenshaw 1991). Third, Congress has created policies to address IPV against immigrants in the US, and those policies are limited in scope, scale, and effectiveness. These limits are evidenced in part by the continuation of said violence. Lastly, in the context of legislative stagnation on gender-based asylum, asylum adjudicators have made space for some IPV-based asylum claims as exceptions within existing law.

Accompanying this puzzle is an equally important normative question: how *ought* we understand the role of US governmental institutions in IPV against immigrant women? Without a doubt, this normative question is fundamentally one about power, its distribution and uses, and the effects thereof. This normative question implies that the way in which we interpret observations about this relationship is not a foregone conclusion. As Yanow and Schwartz-Shea explain, “interpretive work of all kinds, in rendering tacit knowledge explicit, makes silenced discourses speak, thereby perforce

engaging questions of power” (Yanow and Schwartz-Shea 2014, *xxii*). How one chooses to make sense of these empirical observations is hardly trivial, as that interpretation itself has deeply political and ethical implications.

If, for example, one interprets this data as evidence that government relief policies are inadequate, she has revealed an underlying assertion that IPV is a sociopolitical *problem*, that it *ought* to be addressed by the state, and the state’s responsibility exceeds the outcomes of relief policies as they currently exist. However, both the “problem” and the “ought” here are underdetermined. To say that it is a problem does not presuppose that that problem is an ethical one; there are many reasons that one might consider a certain sociopolitical phenomenon to be a problem—political, practical, or budgetary reasons, for example. Even the world of possible ethical orientations toward this set of empirical observations is broad enough that to say they constitute an ethical problem is quite vague. Similarly, to say that we ought to address a problem does not presuppose a specific reason *why* we ought to do so.

While the ethical and normative underpinnings of an assertion that these observations constitute “a problem” that “ought” to be addressed are underdetermined, that is not to say that there is a normatively neutral position from which to analyze this issue. The research and analysis that I am presenting here is fully-furnished with a specific orientation toward both of these normative questions. That is, the substance of the problem at hand and the reasons for needing to address it are describable, intentional, and motivated by my own specific ethical and intellectual commitments as the researcher and an analyst. In making this orientation clear, I intend to lend legitimacy to my arguments

through transparency, rather than positioning myself opposite some set of *objective* academic research.

As many before me have argued, the positivist<sup>19</sup> claim to scientific objectivity in the study of politics is dubious at best, and assertions of objectivity serve only to obscure and leave uninterrogated inherent biases, positionalities, and systems of power at work in the study of politics itself (Harding 1993; Lazar 2005(a); Hawkesworth 2006; Hawkesworth 2012; Harding 2012; Yanow 2014). Mary Hawkesworth (2012) argues that, “[o]bjectivity...promises to free us from distortion, bias, and error in intellectual inquiry, to provide a path to truth that transcends the fallibility of individual knowers” (Hawkesworth 2012, 94). Feminists have contested both the “promise” of objectivity, as Hawkesworth describes it, and many of the knowledge claims bolstered by the authority derived from the language of objectivity (Hawkesworth 2012, 95). Feminist philosopher Sandra Harding argues that, “[o]bjectivity has not been ‘operationalized’ in such a way that scientific method can detect sexist and androcentric assumptions that are ‘the dominant beliefs of the age’—that is, that are collectively (versus only individually) held” (Harding 1993, 52). The concept of objectivity leaves researchers ill-equipped to account for hegemonic biases.

In line with this, many feminist scholars—standpoint epistemologists, for example—have also rejected the subject-object divide on which positivism presupposes theoretical frameworks that are independent of empirical data. Instead, interpretivists and

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<sup>19</sup> Mary Hawkesworth explains: “Positivism conceives the political scientist as a passive observer who merely describe[s] and explain[s] what exists in the political world. Postpositivism challenge[s] the myth of value neutrality, suggesting that all research is theoretically constituted and value permeated...[P]ostpositivism questions the fundamental separation between events in the political world and their retrospective analysis by political scientists” (Hawkesworth 2014, 48).

many feminists understand there to be a kind of co-production of knowledge between the research and the researched. Dvora Yanow (2014) explains that, “[p]hilosophically, interpretive work rejects the possibility that a human science research *can* stand outside the subject of study, which is the very definition of ‘objectivity’...” (Yanow 2014, 99). We are always already situated socially, politically, linguistically, discursively, etc., and that context matters greatly to our interpretations and analyses of empirical data (Hawkesworth 2012; Yanow 2014).

In the face of the claims of positivist objectivity, feminist scholars have questioned in principle, and deviated from in practice, “traditional assumptions about the possibility and necessity of value neutrality in research” (Hawkesworth 2012, 103). Knowledge production is nested in the complicated intricacies of social interaction—norms, rules, practices, standards, power, and so on. Power, and the distribution thereof, are central to this research as it is fundamental both to the subject at hand and to this project as a contribution to an academic discipline.

Many feminist scholars have long-argued that the “neutral” or “objective” position from which much of mainstream political science research is done is neither neutral nor objective; rather it reflects white, cisgender, heterosexual, male dominance in both the political science discipline and the subjects about which it asserts knowledge claims (MacKinnon 1987; Lazar 2005(a); Hawkesworth 2006; Yanow 2014) That is, the *status quo* does not constitute good practices if one is concerned with challenging the hegemony of white-male-patriarchy, and it is at the intersection of theory and praxis that feminism is at its most powerful as a counterhegemonic academic and political orientation.

The hegemonic power of this system is owed in part to the successful naturalization of the white, male, heterosexual subject position. That which is most often considered “neutral”—without race, without gender, without sexuality—is anything but. In our daily lives this manifests in ways that seem benign or even trivial—“unisex” t-shirts are actually men’s sizes; the world soccer championships for men is known as the World Cup, while the same event for women’s teams is qualified as the Women’s World Cup; articles published about scientific discoveries made by men rarely mention that the scientist’s gender (his just a scientist), yet news articles regarding commensurate discoveries by women nearly always mention the discoverer’s gender (as well as a how she manages to juggle her career with her “family life,” etc.). In sum, cisgender men are posited as being without gender, white men without race and gender, and white, male, heterosexual men without gender, race, or sexuality. This is reflective not of some objectively neutral subject position, but of the hegemonic dominance of that subject position.

Audre Lorde calls this the “mythical norm” (Lorde 2007). The “mythical norm,” Lorde argues, is a white, heterosexual, thin, financially secure, attractive, Christian male. The sociocultural/sociopolitical subject position presumed to be the “norm” is indeed a myth, and it is one that both inaccurately reflects reality (as it describes so few people in the US, and fewer still in the world) and wields immense social and political power. Yet the success of the naturalization of this subject position is not derived from an active crusade by those persons who fit the description of the “mythical norm,” rather, through a normalizing process that is decidedly more insidious and seemingly passive. Exposing and challenging this has been a fundamental tool in feminist scholarship and activism. It

is important, then, to make explicit not just *that* the set of observations at issue in this project represent a problem, but why and how they do so.

As Mary Hawkesworth (2006) explains, “[b]y making power dynamics visible—probing silences, absences, and distortions in dominant paradigms—feminist inquiry challenges established explanatory accounts and identifies new questions” (Hawkesworth 2006, 6). This research and analysis embrace feminist methodologies, rooted in challenging and contesting both the political status quo and the academic status quo. Although the political and the academic may seem to manifest themselves as two distinct arenas, they are deeply intertwined.

Feminist scholars argue that an explicitly feminist methodological orientation has the potential to add depth and richness to our understanding about the sociopolitical world, quite apart from, for example, positivist methodological orientations.<sup>20</sup>

Hawkesworth explains:

[F]eminist scholarship suggests that a tripartite commitment—to struggle against coercive hierarchies linked to gender, race and sexuality, to promote women’s freedom and empowerment, and to revolt against institutions, practices, values, and knowledge systems that subordinate and denigrate women—enhances the truth content and deepens the insights of feminist accounts of the world (Hawkesworth 2006, 7).

Though it is an oft repeated refrain that feminist research is “biased,” Hawkesworth argues that it is in fact research that does not account for these “coercive hierarchies” which produces biased accounts. Feminist scholarship, by contrast, helps to counter the disciplines already existing androcentric biases.

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<sup>20</sup> It is important to note that many, though not all, self-identified feminist researchers reject the premises of positivism (for example see Chafetz 2004).

Even in accepting this argument about feminist methodology on the whole, it is necessary to clarify the terms as embraced in this project. As many scholars have pointed out, feminist research is varied and diverse in everything from method to what exactly is meant by “feminist.”<sup>21</sup> As a political movement, bell hooks argues that, “[f]eminism is a struggle to end sexist oppression. Therefore, it is necessarily a struggle to eradicate the ideology of domination the permeates Western culture on various levels...” (hooks 2000, 26). For hooks, feminism is not, and can never be trained on gender alone, and to the exclusion of other intersecting systems of domination, including race, class, sexuality, et al. I embrace an intersectional feminism, in line with hooks, that understands other intersecting forms of oppression to be central to feminism and feminist concerns.

### *Feminism as Theory and Praxis*

Feminist theory and feminist praxis are necessarily intertwined, and dedication to the dissolution of systems of domination and oppression requires feminist scholars to challenge the ostensive bias-neutrality of mainstream political science research. For Lazar, it is not simply that research and praxis are intertwined, in the sense that they interact, it is that they can actually be mutually constitutive. “A feminist political critique of gendered social practices and relations is aimed ultimately at effecting social transformation” (Lazar 2005(a), 6). Sociologist Sharlene Hesse-Biber (2012) explains this relationship differently:

To engage in feminist theory and praxis means to challenge knowledge that excludes, while seeming to include...Feminists ask “new” questions that place

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<sup>21</sup> Sociologist Susan Archer Mann (2012) argues that there are many feminisms and, “precisely because there are many and diverse feminist perspectives, the term *feminism* defies any simple explanation” (Mann 2012, 2).

women's lives and those of "other" marginalized groups at the center of social inquiry. Feminist research *disrupts* traditional ways of knowing to create rich new meanings, a process that Trinh (1991) terms becoming "both/and"—insider and outsider—taking on a multitude of different standpoints and negotiating these identities simultaneously (Hesse-Biber 2012, 3).

This commitment also requires a feminist scholar to be vigilant and self-reflective regarding her own social position(s) both inside and outside the academy, interrogating her own privilege as well as her relative oppression (Naples 2003, 199).

One major and visible way in which feminist scholars distinguish themselves from the mainstream and challenge claims of bias-neutrality is through explicit labeling. For example, Lazar (2005) explains that, since in the mid-1990s, there has been a push to distinguish feminist discourse studies from mainstream discourse studies by explicitly labeling them as such; this is in response to the fact that "...the mainstream research has been characterized by a supposedly neutral and objective inquiry, which feminist scholars operating within it have challenged" (Lazar 2005(a), 2). That is, the labeling in itself is a challenge to the biases of the mainstream. She goes on to assert:

A critical praxis-oriented research... cannot and does not pretend to adopt a neutral stance; in fact... it is scholarship that makes its biases part of its argument. To critics who discount overtly political research as lacking in "objectivity" and "scientificity"... the feminist position has been to raise as problematic that all knowledge is socially and historically constructed and valuationally based (Lazar 2005(a), 6).

The feminist challenge in this regard is not intended to spur or facilitate a recalibration of what constitutes neutrality, but to problematize the very idea of neutrality in social science research.

## *Theory as Politics*

The work of this dissertation is distinct from an empirical study that attempts to make causal claims or inferences, and I am not concerned here with the generalizability of my analysis—my argument may or may not apply to other cases. The veracity of my claims does not hinge on falsifiability or verifiability because I am not simply seeking accurate description of meaning objectively reflected on; rather, my analysis is an exercise in meaning-making that I, as the researcher, help to create with my subject of study. I reject the epistemological premise of positivism that presupposes a subject-object divide allowing for a theoretical framework that is independent of empirical data. Wendy Brown (2002) argues that, “[t]heory violates the self-representation of things to represent those things and their relation—the world—differently. Thus, theory is never ‘accurate’ or ‘wrong’; it is only more or less illuminating, more or less provocative, more or less of and incitement to thought, imagination, desire, possibilities of renewal” (Brown 2002, 574). What Brown is offering here is a defense of the power and importance of theory in politics, not because theory has (or does not have) direct bearing on street-level political realities, but because theory has the capacity to offer alternative ways of thinking and ways of talking about political realities. Brown goes on:

Theory is not simply different from description; rather, it is incommensurate with description...As a meaning-making enterprise, theory depicts a world that does not quite exist, that is not quite the world we inhabit. But this is theory’s incomparable value, not its failure. Theory does not simply decipher the meanings of the world but recodes and rearranges meanings to reveal something about the meanings and incoherencies that we live with (Brown 2002, 573 – 574).

In this way, we can see the production of meaning as a deeply political endeavor that is neither contained within, nor bound by the academy as an institution.

## **Conclusion**

This dissertation is a broadly interpretive, intersectional feminist analysis of the relationship between state actions and inactions and IPV against immigrant women. I use primarily feminist content and discourse analysis and historical legal process tracing, and I use interviews secondarily for triangulation purposes. The evidence that I examine in answering this question is rooted in experience—immigrant women’s experiences of IPV and of state institutions with which they interact—and the state’s role in that experience, as demonstrated in congressional hearings, immigration court rulings, case briefs, and other textual documents. Yanow and Schwartz-Shea (2014) assert that, “[g]overnmental, legal, organizational, communal, and other social actions and their analysis are a human activity, and human perception is not a ‘mirror to nature’ . . .but an interpretation of it” (Yanow and Schwartz-Shea 2014, xxv). The philosophical underpinnings of the research presented in this project are informed by an understanding of research and analysis as always ever interpretive in nature, and the methods I use are reflective of that orientation. Through my interpretive framework, this dissertation is a study of political phenomena that ties together theory and praxis. In so doing, it is also itself a political project both in the arguments I make, as well as the philosophical and methodological underpinnings that motivate the substance and style of my research and analysis.

## CHAPTER III

### INTIMATE PARTNER VIOLENCE AGAINST IMMIGRANT WOMEN IN THE US: REAPPRAISING AMELIORATIVE STATE ACTION

#### Introduction

In the US,<sup>22</sup> there is a demonstrable and yawning gap between the numbers of immigrant women facing IPV, and those afforded state amelioration (e.g. immigration relief in the form of visas or grants of asylum); insofar as they exist, state responses have not adequately addressed this form of gendered violence. In a trend illustrative of this gap, United States Citizenship and Immigration Services (USCIS) has, for the sixth consecutive year, issued the maximum allowed number of U visas—issued to crime victims, including victims of IPV and sexual assault (see Appendix for list of qualifying crimes)—before the end of the fiscal year, leaving tens of thousands in limbo (See Table 1). In the fiscal year that started on October 1, 2014, the available pool of 10,000 U visas

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<sup>22</sup> In the general US population, according to a 2010 report by the Centers for Disease Control and Prevention, “[a]bout 1 in 4 women (24.3%)...have experienced severe physical violence by an intimate partner...at some point in their lifetime” (Black, et al 2011). More than one in three survivors of IPV “experienced multiple forms of rape, stalking, or physical violence...” (Black, et al 2011). While men also experience IPV, in any given year, rates of IPV against women are as much as four times rates of IPV against men (Truman 2011). Of the 41 million immigrants in the US, 51% are women, and well over half are not naturalized citizens (are here either on visas or without authorization). Around 70% gain residency through family-based visas (Kandel 2013, 5). It is difficult to determine the experiences of unauthorized immigrants in particular (Runner, et al 2009), and research is not consistent regarding whether or not the rate at which immigrants in general experience IPV is greater than for the general population. However, in a statement made before the House Immigration and Claims subcommittee, Lesley Orloff, legal scholar and Director of the National Immigrant Women’s Advocacy Project (NIWAP) at American University Washington College of Law testified that rates of IPV among immigrant women in the US is around 10% higher than in the general population (BIWPA Hearing 2000, 168).

was exhausted by early December of that same year (USCIS 2015). Although the need for U visas is clearly outstripping the supply, Congress has been steadfast in its refusal to raise, much less eliminate the seemingly arbitrary cap.<sup>23</sup> As of May 2015, the number of applicants on the waitlist had swelled to just under 43,000 (USCIS 2015).

**Table 1: U Nonimmigrant Status I-918 Petitions by Year and Status (2009 – 2015)<sup>24</sup>**

<b>Fiscal Year<sup>†</sup></b>	<b>Petitions Submitted</b>	<b>Petitions Approved</b>	<b>Petitions Denied or Withdrawn<sup>25</sup></b>	<b>Petitions Pending</b>
<b>2009</b>	6,835	5,825	688	11,863
<b>2010</b>	10,742	10,073	4,347	7,403
<b>2011</b>	16,768	10,088	2,929	10,184
<b>2012</b>	24,768	10,122	2,866	19,899
<b>2013</b>	25,432	10,030	1,829	33,540
<b>2014</b>	26,039	10,020	4,056	45,898
<b>2015 (by quarter)</b>				
<b>Oct. – Dec.</b>	7,469	10,008	570	42,995

<sup>†</sup>Data prior to fiscal year 2009 is unavailable.

In the US, immigrant women are among the most vulnerable to IPV. As Leslye Orloff (2011) explains, “[f]or reasons related to family, employment, the problem of human trafficking, limited English proficiency, and lack of knowledge about their legal rights, immigrant women [in the US] are particularly likely to suffer abuse, violence, sexual assault, and other crimes” (Orloff 2011, 11). Drawing on the diverse literature on

<sup>23</sup> During the most recent debate over the reauthorization of the Violence Against Women Act, the Senate passed S.1925, which included a provision that would have increased the annual U visa cap to 15,000 by allowing unused visas from the two years prior to the issuance of the first U visas in 2008 to roll over (Kandel 2012, 12). This provision did not make it into S.47, the version of the bill signed into law in 2013.

<sup>24</sup> Data obtained from US Citizenship and Immigration Services (USCIS 2015).

<sup>25</sup> The database does not specify how many of the petitions in this category were withdrawn versus how many were denied.

the topics of gendered violence and US immigration policy, this chapter offers an analysis of the politics and policy pertaining to IPV against immigrant women living in the US, in order to better understand the shape and nature of their interactions with, and relationships to the state. In particular, I focus on the politics and implementation of certain provisions of the Violence Against Women Act (VAWA).

Originally passed in 1994, VAWA was intended to offer services and protection to survivors of domestic and sexual violence (Hanson 2013). The Battered Immigrant Women Protection Act of 2000 (BIWPA) amended the original VAWA with the intention of “...remov[ing] immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships...” (VAWA 2000, Sec. 1502 (a)(1)). This chapter offers an analysis of state action both inside and outside the purview of this and other ameliorative policies.

The central concern of this chapter is how we should understand the role of US governmental institutions and actors, particularly ameliorative efforts like VAWA and the BIWPA, in IPV against immigrant women. That is, what is the relationship between state actions/inactions and the perpetration and perpetuation of IPV in these circumstances? What conceptual and institutional formations constitute the state’s role in IPV against immigrant women—*why* and *how* is the state acting upon these women? Significantly, much of the relevant literature assumes a largely beneficent US state that will protect or save immigrant women subject to IPV is the framing of policies, administration, and adjudicative processes were just so. The state’s involvement in the issue is framed as passive and defensive, a reaction to unintended consequences of other policies. The (often devastating) consequences of the limits of relief policy are

understood as having been the passive result of shortfalls and inadequacies. Yet, to view the state in this way—as passive, defensive, or reactionary—and to focus on incremental legal or policy shifts as apparent success stories, obscures another crucial question: Does the state play a more active—and not so beneficent—role in the experiences of immigrant IPV survivors? In this chapter I explore the possibility that the US state plays a more directly harmful role in the lives of immigrant women experiencing IPV.

In this chapter, I argue that the role of the state both inside and outside the purview of policies intended to address IPV against immigrant women contributes to the continuation of this kind of violence. I also push beyond that, examining the ways in which state actions may constitute gendered violence in themselves. That is, the state is not merely complicit in this violence by virtue of its ongoing failure to adequately address it in law and administration. Rather, the state's actions and inactions, in the form of policy and administration, themselves constitute a kind of gendered harm, forcing IPV survivors into positions of vulnerability through certain stipulations of relief policies themselves. Moreover, in its enforcement of restrictive immigration law, the state acts as the actualizer of threats that constitute a major form of coercion used by abusers to trap women in violent situations. In this dynamic, the state is an agent of harm in these abusive relationships. The harm committed by the state is enabling of IPV against immigrants, and is gendered institutional violence on its own term. In my analysis, I demonstrate that the harm is committed self-reflectively.<sup>26</sup>

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<sup>26</sup> See Chapter I for a detailed explanation of how I conceptualize the relationship between the state and the agency of lawmakers.

## **Chapter Road Map**

I begin this chapter with a brief review of some key literature, followed by an overview of the relevant immigration policy and VAWA immigration relief policy pertaining to IPV survivors. This section details the gendered effects of immigration law in circumstances of IPV, and the policy mechanisms in place to address those gendered effects. I then move into an analysis of VAWA immigration relief policy, with a particular focus on the certification of cooperation requirement in place for all U visa applicants. I rely heavily on interview data in my analysis of the VAWA provisions. I then shift to an analysis of the ways in which the boundaries of relief policy, often conceptualized as demarcating the border between state action and inaction, are in fact as site of lively and self-reflective state action. Through an analysis of a House hearing on the BIWPA and a Senate hearing on a later iteration of VAWA, I demonstrate the ways in which policymakers are self-reflective regarding the role of immigration law in IPV against immigrants and of the effects of limiting relief policy. I conclude by tying these two analyses together with a discussion of gendered institutional violence.

## **A Note on Method**

I use three primary methods in this chapter—historical legal process tracing, interviews, and feminist content and discourse analysis. My content and discourse analysis is primarily focused on a foundational House Immigration Subcommittee hearing pertaining to the BIWPA in 2000, and a subsequent Senate hearing on the reauthorization of VAWA in 2011. I discuss the logic behind my case selection in detail below. As discussed in Chapter II, the interviews do not constitute my primary source of

data; rather I use interviews for triangulation purposes. They serve to contextualize and ground information I obtain from congressional hearings and other legal documents. I conducted semi-structured interviews with key informants at three different levels of involvement with immigrant IPV survivors. At the elite level, I interviewed Doris Meissner, the former commissioner of the Immigration and Naturalization Service (INS)<sup>27</sup> under the Clinton administration. I conducted interviews with four immigration lawyers, some at prominent NGOs, in multiple locations across the country—New York, Washington DC, Colorado, and the Pacific Northwest.<sup>28</sup> Lastly, I talked with three people operating in some other capacity either for, or in connection with NGOs providing assistance to immigrant IPV survivors. This set of interviews was conducted in Colorado, New York, and the Pacific Northwest. Interview data is incorporated throughout this chapter.

### **Brief Literature Overview**

The literature dealing with immigrant IPV survivors in the US is primarily concerned with institutional responses, survivors' interactions with those institutions, and the ways in which immigration law that either addresses or fails to address IPV itself produces gendered outcomes. Some focus on the dynamics of local law enforcement (Ammar, et al. 2005), or legal inadequacies (Wood 2004), while others focus on the capacity for immigration law to trap women in abusive relationships through the threat of deportation, family reunification laws, and conditional residency (Narayan 1995; Loke

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<sup>27</sup> After the 9/11 attacks, the administrative duties of the INS were transferred to the newly formed Department of Homeland Security.

<sup>28</sup> For some of these interviews I do not specify the city for confidentiality reasons.

1997; Erez & Bach 2003; Salcido & Adelman 2004; Erez, et al 2009; Sen 1999; Sokoloff & Pearce 2011). Broadly speaking, there are two major themes in how this literature conceptualizes the state in discussing IPV against immigrants. Although there is often overlap between these two categories, one tends to see and discuss the state as generally beneficent in its orientation toward this population and in the policies it creates to address this problem (Loke 1997; Menjívar and Salcido 2002; Conyers 2007; Bhuyan 2008; Ingram, et al. 2010). The other group of scholars tend to understand the state, whether beneficent or not, as hapless—inadequate or ineffective in its policy approaches and the executions thereof (Erez and Buch 2003; Orloff, et al. 2003; Salcido and Adelman 2004; Wood 2004; Ammar, et al. 2005; Erez, et al. 2009; Hipolito 2010; Sokoloff and Pearce 2011). The analysis I offer in this chapter builds on, and dovetails well with the work of two scholars in particular—social work scholar Rupaleem Bhuyan (2008), and critical race theorist and legal scholar Kimberlé Crenshaw (1991).

Rupaleem Bhuyan's (2008) analysis diverges from those cited above in that she examines the formation and deployment of discourse, specifically that of the "battered immigrant" woman. She attempts to identify the ways in which the discursive formations of the "battered immigrant" are incorporated into the ideology and undertakings of non-state actors. She is primarily concerned with non-state actors such as activists and organizations advocating for survivors of IPV, and the ways in which they are both interpreters of the law and the discursive formations of the "battered immigrant" imbedded in it, as well as active in challenging and shaping those discursive formations (Bhuyan 2008, 156 – 157). She examines the ostensibly ameliorative legal apparatuses put in place to assist women trapped in abusive relationships, arguing that, while they are

a step in the right direction, they are ultimately ineffective. Like others (for example, Loke 1997; Salcido & Adelman 2004), she argues that “[b]attered immigrants are often trapped by regulatory state policies, as well as by their abusive partners” (Bhuyan 2008, 168).

Bhuyan also goes beyond this, arguing that the legal requirements that women must meet in order to benefit from these ameliorative policies represent a form of state control that re-instantiates, rather than contests, the social and political positions of women that create the space for this abuse in the first place.

[T]he process of applying for immigration relief relies on mechanisms of control that discipline subjects according to dominant ideologies of gender, race, ethnicity, and heteropatriarchy. Immigrants who choose not to or who are unable to conform to ideal constructions of battered immigrants are virtually left outside the parameters of standard domestic violence advocacy and support (Bhuyan 154).

In her analysis, the productive relationship between policy and sociocultural constructions of the “battered immigrant” is mutually constitutive. The legal requirements for eligibility employ existing sociocultural ideologies, thus forcing lawyers and advocates to act within particular discursive and ideological frameworks, while still maintaining their ability to affect future discursive formations in policy. While this analysis acknowledges a form of state action that is itself a kind of harm, my analysis goes further, arguing that the state is doing violence, not just creating or re-instantiating a sociocultural space.

The issue of gendered violence against immigrant women raises obvious questions about intersectionality. For immigrant women facing IPV in the US, both ascriptive and descriptive identities, and varied and intersecting experiences all inform their lives, and imbue their experiences of violence with particular meanings. An

immigrant woman's experience of gendered violence is informed not only by her gender, but also by her sexuality, marital or relationship status, immigration status (whether she is a legal permanent resident, an unauthorized immigrant, a visa-holder, etc.), race, class, ethnicity, language, level of education, and many other intersecting factors and identities. For example, an immigrant woman, whose authorization status is contingent upon her relationship with an abusive partner, might be vulnerable to forms of coercion that a non-immigrant woman in a similar situation could not be (e.g. she might be coerced into remaining with her abuser in order to avoid deportation). Economic vulnerability, language barriers, or lack of access to information or resources regarding U visas or other legal remedies might worsen this experience. This reality is central to this project, just as it is to immigrant women's lives.

In her seminal piece on intersectionality and violence against women, Kimberlé Crenshaw (1991) posits that the experiences of immigrant women facing gendered violence can be understood through the lens of what she calls structural intersectionality. That is, immigrant women's "...actual experience of domestic violence, rape, and remedial reform [is] qualitatively different than that of white women," on account of their location at the intersection of race gender, immigration status, class, and other factors (Crenshaw 1991, 1245). While experiences of gendered violence might be pervasive in women's lives, those experiences themselves are not universalizable across intersecting structural factors like immigration status, and intersecting identities like race, class, language, culture, and others. Simply put, "...patterns of subordination intersect in women's experience of domestic violence" (Crenshaw 1991, 1249). These factors vary significantly even within the group "immigrant women," and as Crenshaw points out,

“[i]mmigrant women who are socially, culturally, or economically privileged are...”

better positioned to take advantage of resources and remedial programs (Crenshaw 1991, 1250).

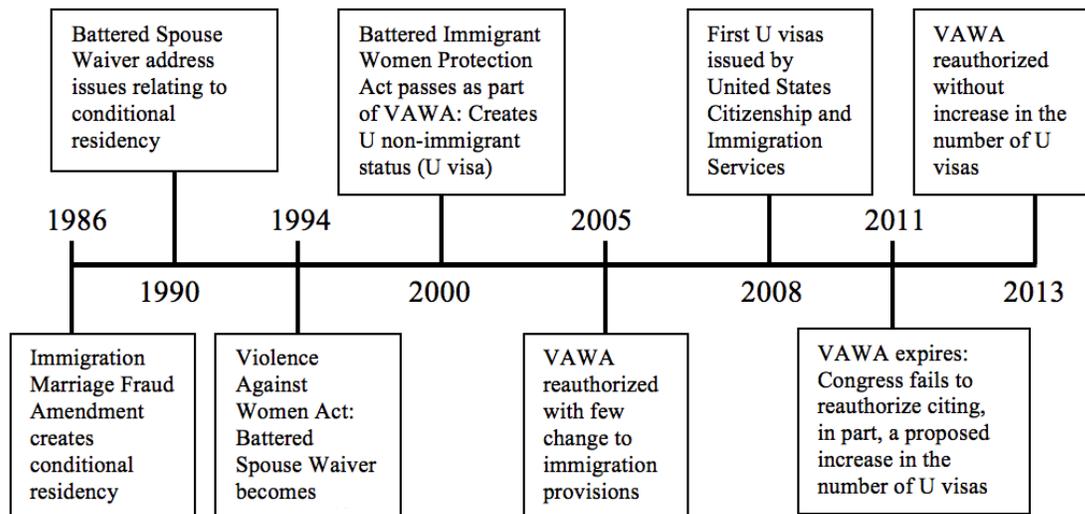
Crenshaw too frames the relevant policy and policy makers as having *failed* to address intersecting factors. “By failing to take into account the vulnerability of immigrant spouses to domestic violence, Congress positioned these women to absorb the simultaneous impact of its anti-immigrant policy and their spouses’ abuse” (Crenshaw 1991, 1249 – 1250). She adds, “modest attempts to respond to certain problems can be ineffective when the intersectional location of women of color is not considered in fashioning the remedy” (Crenshaw 1991, 1250). That is, Congress’ failure leads to ineffective policy, and imposes a certain positionality on immigrant women that compounds their subordination and makes them all the more vulnerable. However, in focusing exclusively on the state’s failures and inaction, we miss other possible conceptualizations of state action. Accounts that frame the state as passive, defensive, or merely inadequate may obscure many forms of harm. What are we missing about state action when we continually frame the state as a passive or a reactionary actor? I address this gap by expanding the concept of harm in order to account for the state’s role in the perpetration and continuation of this kind of violence.

### **Ameliorative Policies for Immigrant Women Facing IPV**

There are two major avenues by which immigrant IPV survivors can access immigration relief in the form of adjustments to their status. The policy most appropriate for any given woman depends on a variety of factors (this list is not exhaustive): the

crime(s) committed against her; her relationship to the abuser; the immigration or citizenship status of her spouse (if he is the abuser); whether or not she has conditional residency; the severity of the abuse she has suffered; and her willingness to cooperate with law enforcement and prosecutors in the investigation of the crime(s) and prosecution of the abuser. Table 2 provides a brief timeline of the development of immigration relief policies pertaining to IPV survivors.

**Table 2: Timeline of Immigration Relief Policies for Immigrant Survivors**



In 1986, Congress passed the Immigration Marriage Fraud Amendment to the Immigration and Nationality Act (INA), creating a conditional residency status, which was intended to address the use of fraudulent marriages as an avenue to lawful permanent residency. Conditional residency makes the status of the non-citizen or non-resident contingent upon the continuation of their marriage to the citizen or resident. In order for the person with the conditional status to get her own legal permanent residency, both she and her spouse must go together to sign the paperwork within 90 days before the end of

the two-year conditional visa (Olavarria & Fisher Preda 2014, 1 – 2). Congress created the Battered Spouse Waiver in 1990 in recognition of the vulnerable position that this requirement puts women experiencing IPV in. Although the waiver placed a tremendous evidentiary burden on IPV survivors, it allowed women able to meet the requirements to petition to have the conditions on their residency removed *without* the signature or knowledge of their spouse (Olavarria & Fisher Preda 2014, 2 – 5). This provision was then amended again by VAWA 1994, and is now referred to as the “VAWA self-petition.”<sup>29</sup> Like the Battered Spouse Waiver, the VAWA self-petition is intended for those with conditional residency status that ties them, through marriage, to a legal permanent resident or a citizen.

Although it was a significant legislative acknowledgement of the particular vulnerability of immigrant women to IPV and other forms of gender violence, VAWA '94 only temporally (as opposed to substantively) extended the remedial provisions established by the Battered Spouse Waiver (Kwong 2002, 138). Moreover, “[s]ubsequent changes and additions to immigration law unintentionally eliminated or rendered inaccessible many of the VAWA [‘94] protections for battered immigrant women” (Kwong 2002, 138). One such change forced immigrant survivors to leave the country before they would be granted lawful permanent residency. Any protections that the survivor had procured while in US territory, such as a restraining order, would be

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<sup>29</sup> VAWA was intended to address a range of gender violence issues, but it also included provisions specific to immigrant women. VAWA is Title IV of the Violent Crime Control and Law Enforcement Act of 1994. Title IV, Subtitle G (Sections 40701 – 40703) is the Protection for Battered Immigrant Women and Children provisions. Subtitle G—amended the Immigration and Nationality Act.

inapplicable outside the US, leaving her vulnerable to further violence and/or retaliation while she is out of the country (Kwong 2002, 138).

Other subsequent attempts to address this issue failed to take into account the complexities of the interactions between immigration law, domestic criminal law, and on-the-ground bureaucratic manifestations of state power and authority. For example, while seemingly beneficial, a law establishing domestic violence as a deportable offense had “...the empirical effect [of]...increase[ing] the deportation of *battered women* who were convicted of crimes that were both committed in self-defense and related to the domestic violence” (Kwong 2002, 138, emphasis in the original). This example brings into sharp relief the possibility for, and reality of an extremely problematic and counter-effective disconnect between ostensibly-ameliorative policy and the dynamics of violent intimate relationships.<sup>30</sup> Moreover, it makes considerable assumptions about the capacity and willingness of what Michael Lipsky (1980) calls “street-level bureaucrats” to distinguish between offensive and self-defensive uses of violence, the results of which are significantly gendered, and miss the mark with regard to justice for survivors.

Another significant issue with the aforementioned policies is that they do little to assist IPV survivors who have suffered, or are suffering violence at the hands of an intimate partner who is not a spouse, and/or is not a citizen or legal permanent resident.

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<sup>30</sup> Political scientist Kristin Bumiller (2006) analyses the problematic dynamic by which criminalization of certain acts, with the intention of protecting women, can have the effect of increasing state power and violence. That expansion of state power can, in turn, negatively impact those the criminalization was originally intended to help (Bumiller 2006).

The 2000 iteration of VAWA<sup>31</sup> attempted to address some of the issues mentioned above. Among other things, the Battered Immigrant Women Protection Act of 2000 (BIWPA)—Title V of the Violence Against Women Act of 2000—created the U nonimmigrant status, commonly referred to as the U visa. “The U-visa was developed to provide the protection of immigration benefits to victims when the abuser is not a spouse (e.g. a father-in-law, brother), is a boyfriend, is the father of the victim’s child, or is a spouse who is not a citizen or lawful permanent resident” (Orloff & Garcia 2013, 1). However, unlike in the case of the VAWA self-petition, the number of U visas is limited to only 10,000, and that cap has not changed to date.

### **Ameliorative State Action: U Visas and the Battered Immigrant Women Protection Act**

NGOs and immigration lawyers, many of whom do this work pro bono, often facilitate interactions between state institutions, institutional representatives, and immigrant women seeking state redress. In order to garner insight as to the nature of this relationship, and see how relief policies are actually being administered, I conducted interviews with lawyers and other people working at NGOs serving this population in Colorado, New York City, Washington DC, and the Pacific Northwest. The information I gathered from these interviews corroborates the existence and severity of many of the problems delineated in the literature, and points to systemic issues with both the ameliorative policies and their implementation. This section offers an analysis of a

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<sup>31</sup> VAWA 2000 is Division B of the Victims of Trafficking a Violence Protection Act of 2000.

particularly problematic component of the U visa application process—the victim cooperation certification.

### *U Visa Victim Certification of Cooperation*

In order to be eligible to apply for a U visa, “[t]he victim must have information about the criminal activity and a law enforcement official (e.g. police, prosecutor) or a judge must certify that the victim has been helpful, is being helpful, or is likely to be helpful in detecting, investigating or prosecuting the criminal activity” (Orloff, et al 2013, 2). Each of the NGO workers I interviewed indicated that this requirement is a significant hindrance in the process of putting together a survivor’s U visa application.

The requirement that immigrant survivors cooperate with law enforcement in this way places a burden on them that is not present for IPV survivors in the general population. That is, for immigrant survivors, access to their right to be free from violence is contingent upon their willingness to expose themselves to law enforcement (report an act of violence), and participate in the investigation and/or prosecution of that crime. Importantly, citizen women’s access to their right to be free from violence is not restricted in this way—they are not required to participate in the law enforcement process in this capacity. For example, if an unauthorized immigrant woman calls the police in response to an act of IPV committed against her, the requirement that she cooperate with law enforcement and prosecutors in order to gain access to a U visa forces her to choose between cooperation on the one hand, and the very real possibility of deportation on the other; neither avenue ensures that she will be free from violence. By contrast, a citizen in a comparable circumstance would not be compelled to participate in the law enforcement

process in this capacity in order to leave the relationship, given that such a move would never put her citizenship in jeopardy. This is one of the ways in which immigrant women's experience of IPV is intersectional. That is, for immigrant women in this situation, multiple forms of oppression converge to constitute their experience of IPV (Crenshaw 1991); the gender oppression constitutive of IPV is compounded by the discriminatory cooperation requirement applicable to immigrant women on account of their nationality/immigration status.

The process by which women are meant to acquire law enforcement certifications is cumbersome at best, and highly discriminatory at worst. Bad practices on the part of the police (e.g. language discrimination or failure to file a report or take the woman's statement) are among the many hurdles that women face in their attempts to obtain certification of cooperation. Bad practices are not at all unique to cases involving immigrant women, however their importance is magnified by immigrant survivors' reliance on law enforcement in the certification process (Orloff et al. 2003).

Olivia<sup>32 33</sup>—an immigration lawyer working with this population at a prominent organization in New York City—explained in an interview that the barriers to accessing U visas begin when a survivor first makes contact with law enforcement officials. She detailed what language discrimination looks like in these cases, and how it further endangers survivors in a tangible way, while simultaneously serving to prevent women from accessing U visas. She gave an account of the wide-reaching trend in law enforcement of many survivors calling the police only to be met with indifference,

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<sup>32</sup> Pseudonym.

<sup>33</sup> Olivia asked that I not quote her directly so discussions of her statements from this interview are paraphrased.

discrimination, ignorance, or incompetence. Olivia relayed the story of a Portuguese-speaking client of hers who called the police to a domestic violence incident. The officer that responded did not speak Portuguese, but instead of calling the language translation service (Language Line) or an agency interpreter as per protocol, he wrote on the police report that she had refused to give a statement. Even though she did not actually refuse to give a statement, the fact that the officer wrote that in the report made it difficult for Olivia and her colleagues to obtain a certification of the woman's cooperation with law enforcement, which is required in order to obtain a U visa. Olivia explained that, while officers are supposed to contact translation services whenever necessary in the field, there are many factors at play pertaining both to individual officers and problems of institutional oversight. Clearly, in these cases, institutional rules do not adequately ensure that non-English speakers have access to translators. As street-level bureaucrats, individual officers' discretion is at least as important as protocol in these cases.

In another instance, reported in New York's *Daily News*, a Mexican woman called the police after her estranged husband, against whom she had a protective order, came to her home and changed the locks, preventing her from entering. When the police arrived at her home, she presented them with the temporary protective order against her husband. However, rather than honoring the order and removing her husband, the police told her that she needed to leave, and she found herself out in the cold. Unlike most, this woman had the "moxie," as Olivia described it, to report the incident to the NYPD command, which ultimately led to her husband's arrest and eviction from the apartment (Moore 2014).

Most incidents of language discrimination are never rectified in this way. These accounts are similar in content to those given by all of the NGO workers that I interviewed. However, language barriers and language discrimination are important not just because of their implication for access. When policy and/or street-level bureaucrats permit language to be a barrier, the power of language defaults to the abuser. Survivors' lack of access to support in this way translates into de facto power for the abuser because it acts to concretize his control over her environment. Language can be a powerful and effective tool in isolating survivors and controlling their access to information (Orloff, et al. 2003) An interview with Anna,<sup>34</sup> who works with immigrant women at a domestic violence safe-house in Colorado, reveals the insidious way in which language discrimination can manifest in instances of IPV.

Anna described an atmosphere of openness and cooperation between the city officials (i.e. the District Attorney's office and local law enforcement), immigrant organizations, and anti-domestic violence organizations. "[T]heir collaborative efforts [are] generally really good," she explained. "What's great is that we've got a DA's office that's really immigrant friendly and very much wanting to make sure that...immigrants that are not documented feel comfortable reporting and come forward." She went on to describe a sincere willingness on the city's part to address the specific circumstances of immigrant IPV survivors, which manifest as close coordination with the safe-house and other organizations, including training sessions, outreach, a domestic violence hotline, and incorporating the NGO into their victim's advocate program as first responders. However, in spite of the city's exceptional mobilization in this regard, Anna lamented

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<sup>34</sup> Pseudonym.

that law enforcement officers still regularly used children as interpreters were called to a scene of an incident of IPV, rather than calling the language translation service. She explained:

“In general the legal system is not very user friendly...I think there’s still a lot of anti-immigrant sentiment and that you get that [at] the on-scene response. I definitely hear from victims that are monolingual Spanish-speaking that they did not get translation or interpretation on-scene. There’s no reason for that. They’ve got Language Line. Yes, it takes a while, but... You’ll see, you know, ‘they didn’t take my side of the story’ because their perpetrator speaks English...I’ve definitely seen them using children to interpret...They’ll even say it, you know, ‘I spoke to nine-year-old on-scene who is the biological child of both parties’...It’s one thing to get a witness account of what happened. It’s another thing when they start to tap into that child for interpretation. ‘So tell me what Mommy said, and what did Daddy do?’ and ‘What’s Daddy saying right now?’...So I think that the lack of interpretation on-scene or the lack of sensitivity around immigrants country-wide, as well as state-wide, and locally is [a problem].”

My interviewees in the Pacific Northwest and New York relayed similar stories to me, corroborating the findings of other scholars (Orloff et al. 2003; Orloff 2011).

In addition to the obvious problems that a situation like this could have on the children involved, it is potentially problematic for the person suffering the abuse as well, particularly in light of the cooperation requirement for U visas. For any number of reasons, a child asked to translate for her or his mother in the aftermath of a violent conflict might not be reliable—for example, even if the child was a capable translator, she might refuse to accurately translate her mother’s account of fear of or for her father. This, in turn, could lead to problems in obtaining a certification of cooperation from law enforcement.

In a March 2014 interview I asked Doris Meissner—commissioner of Immigration and Naturalization Service under the Clinton administration and current senior fellow at the Migration Policy Institute in Washington DC—about the logic behind

this kind of involvement of state and local law enforcement in the administration of immigration law.<sup>35</sup> As a former high-ranking administration official, her comments regarding this logic are significant. She asserted: “If you have serious abusers, they need to be arrested and prosecuted. And if you...find a way to bypass [the involvement of local law enforcement] entirely, you’re also not being fully responsible to public safety,...to the realities of communities and families.” Her comment clearly demonstrates serious concern regarding the presence of this kind of violence in communities around the country, and an understanding of the sometimes-problematic dynamics between federal and local officials. However, as Anna pointed out to me,

[r]eporting doesn’t necessarily equal safety...[Police’s] view of that and our view of that is different. There’s so many reason why someone just does not want to disclose...or report—so many barriers to that. You know, police they just want to get in, do the investigation, and make sure that, you know, if there’s a crime that’s been committed that they get the person arrested and it’s going through prosecution. And for us [advocates] it’s like, yeah slow it down. The legal train is a runaway train sometimes for some people.

Furthermore, Commissioner Meissner did not specifically address the fact that the burden of responsibility for public safety in this circumstance is being placed on immigrant IPV survivors themselves, a condition that is not mirrored in the handling of cases involving citizens. By virtue of having suffered this violence, immigrant survivors are forced to shoulder the responsibility of law enforcement in order to have access to the immigration relief necessary to protect themselves from further violence. Even if we accept that the cooperation of survivors in these cases is integral to law enforcement, garnering survivor

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<sup>35</sup> While Commissioner Meissner did not oversee the administration of the U visa program, talking to her provided me with interesting insight into the mindset of those high up in the immigration enforcement apparatus regarding concerns about visa fraud, and the role of law enforcement in preventing fraud.

support in prosecution and/or investigation need not necessitate using immigration relief as leverage.

Commissioner Meissner also posited that the involvement of local law enforcement was necessary because fraud is a “...perpetual reality about visas.” Their involvement is necessary for weeding out the ostensive fraudulent claims of IPV, so as to prevent undeserving people from getting visas for which they are unqualified. However, setting aside the dramatic underreporting of IPV in the general population, it is difficult to see the incidental exclusion of some “legitimate” applicants as a justifiable outcome of fraud prevention.

In addition to having to bear this responsibility for public safety, the requirement also exposes these women to the politics and biases of individual law enforcement officers, DAs, and judges charged with certifying their cooperation. As Olivia pointed out, there is no federal oversight of these certifications, and there is no federal requirement that local officials sign the appropriate paperwork. Alex, an attorney working with immigrant IPV survivors at a prominent NGO in New York City explained that getting the U visa certification is

a pretty onerous process. [It] can be a really hard step and it can stop people from applying...Because if you don't have the certification you can't file the U [visa]. [W]e have a lot of cases where we've requested certifications and don't get them. You get denied and so then you can't file [for a U visa].

Both Alex and Olivia emphasized that the certification requirement gives individual officials a tremendous amount of power over whether or not immigrant women are able to access the U visa application process. Moreover, this is true regardless of whether this power manifests in a way that is beneficial or detrimental to any given immigrant's petition. For example, Anna said, with regard to obtaining the certification in her

jurisdiction, “I don’t want to say easy, but their good about it.” Even so, with this amount of bureaucratic discretion, they become the gatekeepers. Olivia explained to me that there are certain jurisdictions, like Maricopa County, Arizona, which have blanket policies against signing these certifications of cooperation. Law enforcement officials’ political positions and/or sociocultural biases become barriers that can, and do, prevent some women from having access to the U visa application process. While Maricopa County is notorious for its anti-immigrant politics, Olivia explained, the problems that women face in many other jurisdictions commonly result from a lack on information on the part of officials, or reluctance to get involved with what they see as a federal issue.

As other scholars have pointed out (Erez, et al 2009; Ammar, et al. 2005; Orloff 2011), the ways in which this requirement restricts women’s access to badly needed immigration benefits has the effect of trapping them in abusive relationships and otherwise vulnerable positions. Even if only unwittingly, the certification requirement has the effect of limiting access for survivors in need of relief. However, it is important not to focus exclusively on these policy inadequacies. Looking at the role of the state beyond the purview of these ameliorative policies allows us to examine and account for state action as it relates to IPV against immigrants in a more expansive way that is made possible when looking only at relief policies.

### **Restrictive Immigration Law: State Action Outside the Scope of Ameliorative Policy**

Much of the scholarship on this topic focuses on ameliorative state policies themselves, understanding the space outside the purview of those policies as defined by state *inaction*. The state’s ameliorative policies (e.g. BIWPA) clearly delineate which

immigrant IPV survivors can access state assistance and which cannot. However, as I argue in the sections that follow, the space outside the scope of these policies is not defined by the absence of the state or of state power, though its influence in this realm takes a very different form.

As I discuss in detail below, VAWA and the BIWPA explicitly acknowledge the use of immigration status and the threat of deportation by abusers as a coercive mechanism intended to trap women in abusive relationships. This dynamic exists in relationships in which the survivor's immigration status is contingent upon the continuation of the relationship with the abuser—as is the case with conditional residency for spouses of legal permanent residents or citizens—and in relationships in which the survivor is unauthorized to be in the country. In the former case, an abuser might threaten to divorce his wife or not co-sign for the removal of conditions on her residency status, causing her to lose her legal status altogether and be subject to deportation. In these cases, the abuser might also threaten to take away her children in the process. Moreover, deportation back to one's home country might be a dangerous or scary prospect in itself, on account of certain social, political, or economic conditions there.

While VAWA created a mechanisms by which some women in this position can “self-petition”—petition, without her husband's signature or knowledge, to have the conditions on her residency removed—it is often the case that those with conditional residency do not know about these mechanisms, or will not be able to meet the requirements for one reason or another (Erez et al. 2009). In the latter case, an abuser might threaten to expose her to ICE, revealing that she is in the country without authorization, leading to her detention and probable deportation. This, again, might be

accompanied by the threat that she will lose her children (assuming she has any) in the process. This is a common and very effective form of coercion that, as other scholars have pointed out, creates the space for IPV to continue and thrive (Loke 1997; Salcido & Adelman 2004; Bhuyan 2008, 168).

In her testimony for a 2011 Senate hearing<sup>36</sup> on the reauthorization of VAWA, Leslye Orloff explains this compounded vulnerability:

In abusive relationships, abusers with control over their wives' and children's immigration status use threats of deportation and separation of mothers from children to keep them from seeking help or calling the police. When a woman seeks legal immigration status based upon a family relationship (as most do), she may languish for many years in a long queue for a visa. If she needs to work, she must do so without legal immigration status, making her vulnerable to exploitation, sexual harassment/assault, and retaliation by unscrupulous employers (Orloff 2011, 12).

Citing a number of studies that examined both women's experiences after immigrating to the US, and their interactions with law enforcement and immigration services (e.g.

Ammar, et al. 2005), Orloff goes on to explain:

Many battered immigrant women report an increase in abuse after immigrating to the United States. Among immigrant battered women from diverse cultures, 65% report that their spouses used threats of deportation and not filing or withdrawing immigration papers as a coercive control tactic in the abusive relationship (Orloff 2011, 12).

Nawal Ammar, et al. (2005)<sup>37</sup> explain that women's immigration status—whether or not they have conditional residency—has a significant impact on the likelihood that they will contact law enforcement in the event of IPV. In their study of immigrant Latinas facing IPV, those with "...stable immigration status were almost twice as likely to call police

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<sup>36</sup> Orloff's testimony was submitted to the Senate Committee on the Judiciary on July 13, 2011 regarding Senate Hearing 112 – 132.

<sup>37</sup> Leslye Orloff is a co-author of this study.

(43.1 per cent) than those with either a temporary legal immigration status (20.8 per cent) or those who were undocumented (18.5 per cent)” (Ammar, et al. 2005, 236).

Another reason that this form of coercion is so effective is that it is by no means a hollow threat. The Obama administration has ramped up deportations to unprecedented levels, citing the need to rid the country of criminal aliens as its ostensible motivation (Orloff & Garcia 2013). However, a recent analysis conducted by *The New York Times* concludes that, “...since President Obama took office, two-thirds of the nearly two million deportation cases involve people who had committed minor infractions, including traffic violations, or had no criminal record at all” (Thompson and Cohen 2014). The upshot being, of course, that one need not be a criminal to be deported, all assurances to the contrary notwithstanding. As other scholars have argued, this dynamic creates space for the abuse to happen and continue (e.g. Bhuyan 2008; Erez et al. 2009). However, I argue that in its capacity and willingness to deport (i.e. enforce restrictive immigration law), the state acts as the *agent* of harm, by literally carrying out an abuser’s threat of deportation. The state substantiates the abuser’s use of coercive power in the abusive relationship.

The state’s exercise of police power in this particular way bestows very real power on the abuser by substantiating his coercive threats. Though perhaps unwittingly, the state commits a very tangible form of harm on behalf of the abusive person in these relationships. Moreover, abusers’ use of this form of coercion is, in fact, *legal*—an unprosecutable form of coercive abuse, as was recognized in the text of the BIWPA.

[T]here are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported and the Immigration and Naturalization

Service cannot offer them protection no matter how compelling their case under existing law (BIWPA 2000, § 1502 (a)(3)).

Though not directly state-sanctioned *as* abuse, it is nonetheless state-sanctioned as it aligns with the enforcement of immigration law. As discussed above, there are some avenues by which a woman with conditional residency (those married to legal permanent residents or citizens) can, at least in some cases, undermine the abuser's coercive control over whether or not she must remain in the relationship. However, restricting access to information regarding these kinds of relief is also a very common, and often concomitant, form of abuse. "Immigrant women in the U.S. report that abusive husbands threaten to call [ICE], withdraw petitions for their [legal permanent residency], or destroy legal paperwork...Social isolation, limited economic mobility, and language barriers associated with immigration also constrain battered women's safety strategies" (Salcido and Adelman 2004, 165). That is, even where ameliorative mechanisms exist, access to them is certainly not guaranteed. Moreover, even women empowered to report violence or seek immigration relief might be rebuffed by law enforcement, or be unable to access legal assistance (Erez, et al 2009, 51 – 52).<sup>38</sup>

It is problematic to assert that abusers are merely *appropriating* state power in a way that absolves the state of responsibility for the dynamic. In order for that argument to be compelling, the state would have to be either unaware of this dynamic, or incapable of addressing it, neither of which is true in this case. Clearly "the state" does not possess a monolithic consciousness in a way that would allow for some linear analysis of its

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<sup>38</sup> Information that I gathered in my interviews corroborated the finding of these and other scholars in this regard.

expressions of agency.<sup>39</sup> However, my analysis below demonstrates that we can identify sites of institutional self-reflection in the statements and testimonies of policymakers, as they manifest in congressional hearings pertaining to relief policy.

### **House Immigration Subcommittee Hearing on the BIWPA: A Self-Reflective State**

The early iterations of VAWA (1994 and 2000) were particularly important in the creation of a policy framework intended to address IPV and other forms of gender violence. In July of 2000, the House Subcommittee on Immigration and Claims held a hearing on the BIWPA of 1999, which became part of the VAWA reauthorization act of 2000. Unlike other VAWA hearings, this hearing was dedicated exclusively to the provisions pertaining to immigrants. Because of this, the BIWPA hearing provides detailed insights into the founding logics that went into the VAWA's immigrant provisions in a way that the House and Senate hearings in 1994 do not.<sup>40</sup> Moreover, the logics revealed in the BIWPA hearing are illustrative of the congressional debate about the immigration provisions in the 2005 and 2013 iterations of VAWA. Importantly, the transcript of this hearing allows us to see the careful and explicit way that lawmakers reflected on the role of immigration law in the dynamics of IPV against immigrant women. In the first part of this section I analyze the testimonies of expert witnesses and

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<sup>39</sup> See Chapter I for an in depth discussion of how I am conceptualizing the relationship between the state and agents acting within, and on the authority of, the state.

<sup>40</sup> This is not intended to be an exhaustive inventory or analysis of all logics and debates that manifest over the lifetime of VAWA. Instead, I am concerned with the initial founding logics, delineated in the BIWPA and the House Immigration Subcommittee hearing.

members of Congress, both for and against the policies proposed in the BIWPA.<sup>41</sup> The latter part of this section discusses a 2011 Senate Judiciary Committee hearing on the reauthorization of VAWA, as an illustrative example of the way the logics from the BIWPA hearing carry through to later policy debates.

The hearing consists of statements by lawmakers both in support of and in opposition to the new provisions included in the BIWPA. An analysis of this hearing's transcript reveals a number of significant trends. First is the broad bipartisan awareness and acknowledgement of the use of immigration law as a tool of coercion in abusive relationships. Second is the explicit awareness of the scale and severity of this problem. Third, committee members clearly reflect on the gap between the extent of the problem and the extent of relief policies (i.e. that there are people in need of immigration relief who are unable to access it on account of policy limits). The hearing also reveals that the logics for limiting the scale and scope of relief policy hinge on the idea that "innocent victims" are the appropriate recipients, and that policy limits are necessary in order to prevent fraud and a flood of new and unwanted immigrants. Embedded in this is the idea that the paternalistic state is able to differentiate, through policy and administration, which survivors are deserving of state assistance, and which are not, for reasons deemed relevant by policy directive or administrative discretion. Lastly, both opponents and proponents of the changes proposed in the BIWPA expressed support of the idea that relief policies of this nature ought to be limited in scale and scope, and they are quick to assuage fears that expansive ameliorative policies might, as Illinois Democrat Janice

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<sup>41</sup> The hearing was held on July 20, 2000.

Schakowsky put it, “...open the floodgates to undocumented or unwanted immigrants” (BIWPA Hearing 2000, 19). I elaborate on each of these trends below.

### *Immigration Law as a Tool of Coercion*

We can see Congress’ explicit awareness regarding the role of restrictive immigration law in abusive relationships in a number of places relating to VAWA 2000—the text of the BIWPA itself; the House Judiciary Committee Report on VAWA 2000 (as HR 1248); the Conference Committee Report on the final version of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), of which the BIWPA is Title V; and, most extensively, the House Subcommittee on Immigration and Claims hearing on HR 3083, the Battered Immigrant Women Protection Act. Centrally, the stated logic of the BIWPA, as cited in the text of the law itself is “to remove immigration laws as a barrier that [keeps] battered immigrant women and children locked in abusive relationships” (BIWPA 2000, §1502 (a)(1)). Awareness of this dynamic is reiterated throughout the other documents as well. The Conference Report on the VTVPA states:

[I]n the...case of the abusive relationship, an abusive citizen or lawful permanent resident can use control over his or her spouse’s visa as a means to blackmail and control the spouse. The abusive spouse would do this by withholding a promised visa petition and then threatening to turn the abused spouse in to the immigration authorities if the abused spouse sought to leave the abuser or report the abuse (Conference Committee Report 2000, 111).

The most substantive demonstration of this awareness, however, can be seen in the House Immigration Subcommittee hearing.

The subcommittee hearing clearly demonstrates broad and bipartisan awareness and acknowledgement of the use of immigration law as a tool of coercion in abusive relationships. The expert witnesses, as well as the members of Congress speaking in

support of the bill—Rep. John Conyers (D-MI), Rep. Sheila Jackson Lee (D-TX), and Rep. Janice Schakowsky (D-IL)—make this evident both explicitly, and through their use of real-world examples. As Rishty clarified in her testimony, the concerns these experts raise “...are not speculative...” (BIWPA Hearing 2000, 124). She explains that, for example, “[m]any of the Catholic Charities’ local agencies have directly seen the impact of the abuser’s power in these situations” (BIWPA Hearing 2000, 124). Importantly, Subcommittee Chairman Lamar Smith (R-TX), an open critic of some of the proposed provisions, also acknowledges the capacity of immigration law to be used as a coercive tool in abusive relationships. While his doing so is implicit, rather than explicit in his testimony, it is nonetheless indicative of his acceptance of IPV against immigrant women as complicated by its interaction with immigration law. He argues that the existing legal framework provided by VAWA 1994 is adequate for addressing the issue at hand, and that additional provisions are unnecessary and/or internally inconsistent with the stated logic (BIWPA Hearing 2000, 61 – 64).

Representatives Jackson Lee, Conyers, and Schakowsky were far more direct in their recognition of immigration law’s role in IPV against immigrant women. Schakowsky states: “Prior to 1994, abusive citizens and permanent resident had total control over their spouse’s immigration status. As a result, battered immigrant women and children were forced to remain in abusive relationships” (BIWPA Hearing 2000, 86).

In his testimony, Conyers states:

[P]rior to the enactment of the Violence Against Women Act in 1994, the immigration laws permitted abusive husbands to have too much control over the immigration status of their family members. Battered immigrant women and children were not able to appeal to law enforcement agencies and courts for

protection because they simply feared being reported to the INS and deported (BIWPA Hearing 2000, 65).<sup>42</sup>

In her argument regarding the logic behind the bill, Jackson Lee states:

[F]ar too often the pleas for help of these innocent victims are not heard because of language or cultural barriers. They do not know where to turn. Moreover, many victims remain silent because...the threat of deportation looms over them and their children and they may be separated from their children. As a result, immigrant women are caught in an intersection of immigration, family and welfare laws that does not positively reflect on their needs or life experiences, leaving them vulnerable to exploitation with few options to redress their situation (BIWPA Hearing 2000, 69).

In a similarly stark portrayal, Schakowsky states:

In essence, what our immigration policy is saying to abused spouses is, ‘put up with the abuse, risk your life and the lives of your children, and maybe you’ll get legal immigration status’ (BIWPA Hearing 2000, 81).

Much of the expert testimony also emphasizes the fact that “[a]busers can...leverage current law to continue their abusive relationships” (BIWPA Hearing 2000, 123).

However, perhaps the most profound recognition of this dynamic comes from Barbara Strack, then Acting Executive Associate Commissioner for Policy and Planning of the INS:

We know that fear of deportation or removal mean that abused family members are less likely to report domestic violence or to leave an abusive household because an abusive spouse or parent has *a powerful weapon* by controlling the immigration process” (BIWPA Hearing 2000, 91, emphasis added).

Strack’s acknowledges that immigration status is not just *used* by abusers in some passive sense. Rather, it is a “powerful weapon” derived directly from the state.<sup>43</sup>

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<sup>42</sup> Conyers did not clarify what he meant by “too much control,” nor did he explain his position regarding what he believed to be an acceptable amount of control for an abuser to have over the immigration status of his family.

<sup>43</sup> Though my focus in this chapter is primarily the *founding* logics of this legislation, this self-reflectiveness is maintained in congressional hearings and floor debates relating to

The clarity of this acknowledgement indicates a level of awareness and self-reflectiveness regarding the role of the state in IPV against immigrants. Understanding members of Congress as individual state actors who are participating in the project of shaping laws, rules, and norms that constitute a significant part of the state structure, imbues their self-reflectiveness in this matter with all the more significance. The above statements, and others like them, indicate a clear understanding of the ways in which the state—in this case manifesting as immigration law—interacts with those over whom it exercises power and authority in these instances. This is true irrespective of whether or not these specific members of Congress played an active role in shaping other legislation acting on immigrant IPV survivors (i.e. IIRIRA 1996).

They are self-reflective both about the ways in which existing immigration law operates on this population, and about their capacity, responsibility, and authority to change the nature or outcomes of that interaction. The purpose of the BIWPA is to act on exactly that responsibility and authority. Policymakers, acting on the authority of the institution of which they are a part, are debating and negotiating rules and norms (laws) in a process that is both productive of and partially constitutive of the institutions themselves. If we understand this *process* as itself partially constitutive of the institution

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later iterations of VAWA. Though later hearings do not address the immigration provisions of VAWA in as much detail as the 2000 hearing on the BIWPA, they nonetheless demonstrate an awareness of the role of immigration law in IPV. In a demonstrative example of this, the “Background and Purpose” section accompanying the Senate Judiciary Report on a Senate version of the VAWA reauthorization (S. 1925) states: “Since its inception, the Violence Against Women Act has incorporated provisions to protect battered immigrants whose noncitizen status can make them particularly vulnerable to crimes of domestic and sexual violence. The abusers of undocumented immigrants often exploit the victims’ immigration status, leaving the victim afraid to report the abuse to law enforcement and fearful of assisting with the investigation and prosecution of associated crimes.” (Senate Judiciary Committee Report 2012, 12).

then we can see the subcommittee members' self-reflection as a kind of institutional self-reflection. If we understand the state as capable of self-reflection and intentionality in this way, we can see this testimony as evidence of the self-reflective instantiation and re-instantiation of a certain set of power dynamics that are beneficial to some at the expense of others. The shape of those power dynamics is visible in the concepts and categories employed both in defense of the bill, and in opposition to it.

### *Scale and Severity of the Problem*

Accompanying this self-reflectiveness regarding the role of immigration law in these abusive relationships is a clear awareness of the extent and severity of IPV broadly speaking. The hearing testimony indicates that the members of Congress understand this problem to be expansive in both scale and scope. Smith starts off the hearing stating that, “[d]omestic abuse is a major and disturbing problem in this country and throughout the world. When the abused is an alien, the problem becomes more complex” (BIWPA Hearing 2000, 61). Schakowsky substantiates this general statement with statistics:

Every 15 seconds, someone in our country is battered. Every day, four women die in this country as a result of domestic violence. That's over 1,400 women a year. In addition, at least 170,000 violent incidents are serious enough to require hospitalization, emergency room care or a doctor's attention. Every incident of domestic violence should be of concern to us. Every person...should feel safe at home and in their neighborhood (BIWPA 2000, 85)

However, when the testimony moves to immigrants in particular, the discourse shifts in a bifurcated manner. In justifying the relief policies, Schakowsky describes the target population as a “...small but needy group of victims” (BIWPA Hearing 2000, 88). By contrast, when justifying the limits of the relief policies, the conversation shifts to a vast and uncountable flood of potential new immigrants seeking this relief. This move

parallels a conversation regarding the gap between the numbers of immigrants in need, and the extent of the relief policy.

*The Extent of the Problem vs. the Extent of Relief Policies*

The hearings indicate awareness regarding the gap between the extent of the relief policy and the extent of the need, and it is at this point that the relief policy and its limits come into direct conflict. In an illustrative example of this, Schakowsky states:

The intent of these protections was that no one should be forced to choose between deportation and abuse. But, despite some successes of the immigration provisions of VAWA '94, subsequent legislation and the complexities of immigration law continue to place barriers in the way of the very people who need relief the most...[The BIWPA] balances the INS' need to maintain the integrity of our immigration system with the delicate special needs of battered immigrant women and their families (BIWPA Hearing 2000, 86).

Here, the desire to neutralize immigration law as a “powerful weapon” in abusive relationships comes up against the desire to uphold the discretionary power of the state to exclude outsiders through restrictive immigration law. My analysis reveals an interaction between three logics that emerge as the members of the subcommittee and their witnesses hash out the details of the of these limits: first, that “innocent victims” are the rightful recipients of relief; second, that limits are necessary to prevent fraud; and third, that limits are necessary to prevent a “flood” of new and unwanted immigrants. I examine each of these in turn in the sections that follow.

## **Innocent Victims, Fraudsters, and Floodgates**

### *Protecting Innocent Victims*

Proponents and opponents of the BIWPA's provisions alike rely heavily on the category "innocent victims" in their statements of problem definition, and it serves a similar function for both. The category does the work of delineating who among immigrant survivors will be afforded state assistance and who will not. Helen Ingram and Anne Schneider (1993) might talk about this as the "social construction of target populations" (Ingram and Schneider 1993).<sup>44</sup> In this case, I argue, the deployment of the category "innocent victim" does more than delineate who is deserving and who is undeserving of relief; it actually permits the violence being committed against those who fall outside the scope of the relief policy to continue.

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<sup>44</sup> For Ingram and Schneider, the "social construction of a target population" "refers to (1) the recognition of the shared characteristics that distinguish a target population as socially meaningful, and (2) the attribution of specific, valence-oriented values, symbols, and images to the characteristics. Social constructions are stereotypes about particular groups of people that have been created by politics, culture, socialization, history, the media, literature, religion, and the like. Positive constructions include images such as 'deserving,' 'intelligent,' 'honest,' 'public-spirited,' and so forth. Negative constructions include images such as 'undeserving,' 'stupid,' 'dishonest,' and 'selfish'" (Ingram & Schneider 1993, 335).

In a similar study, Lina Newton (2008) does a discourse analysis of immigration policy in the late 20<sup>th</sup> century using Schneider and Ingram's social construction theory (Newton 2008, 5). Newton argues that target populations are being constructed in immigration policy through the use of what she calls "policy narratives"—images, stories, and symbolism (Newton 2008, 4 – 5). These narratives serve to paint certain immigrant groups as deserving and good, while simultaneously painting other immigrant groups as deviant, invaders, undeserving, and bad. They rely heavily on emotion and national myths, which then supersede any kind of legitimate policy analysis that might expose the ineffectiveness of resulting policies. She maintains, however, that these narratives are not used simply to conjure up popular support or hide some ulterior motive harbored by the congressmen and women who employ them. Instead, she argues, "...policy narratives and social constructions of the target populations embedded in these narratives are essential to understanding how lawmakers divide and subdivide the immigrant population to achieve policy goals" (Newton 2008, 4).

Political theorist Bonnie Honig (2001) posits a useful theoretical frame in her analysis of the relationship between democracy and foreignness. Honig argues that contemporary liberals often still rely on nationalist discourse and values when trying to defend immigration and immigrants, which sets up a “xenophilic embrace of foreigners” that actually feeds, rather than defeats xenophobia (Honig 2001, 1). It does this by setting up a juxtaposition between “good” and “bad” immigrants, in which the existence of one (the good) implies, and fuels hatred of the other (the bad). Unauthorized immigrants are almost always the “bad” foreigners, as they are presumed to be here both without “our” consent, and without consenting to “our” laws. She also points out that this popular mythology marginalizes, or flatly denies the other foundings based on conquest, slavery and genocide, none of which jibe well with the rhetoric of democratic and liberal consent (Honig 2001).

We can see Honig’s theoretical frame mirrored in the discourse around women’s victimhood in the House hearing. In discussions about IPV, the category “innocent victim” operates in a way very much like Honig’s “good immigrant” or “good foreigner.” We again see liberal discourse aimed at advocating for and defending immigrant IPV survivors’ invoking notions of innocence and victimhood, and these notions become central justifications given for relief policies.

The hearing testimonies show the careful deployment and creation of the “innocent victim” frame. The category is constructed in part through narratives, stories about survivors, offered by members of Congress that are shared in the hearing as a way of demonstrating the need for the BIWPA and justifying its existence. The following narrative, provided by Schakowsky, is illustrative:

Marta was stabbed by her permanent resident spouse. He was arrested. Marta wanted to cooperate in the criminal prosecution of her spouse, but was afraid since her immigration status was dependent on him maintaining his legal status. This decision proved deadly as Marta was later killed by her husband. He was subsequently convicted of domestic violence. Immigration and Naturalization Service is now initiating deportation proceedings against her spouse (BIWPA Hearing 2000, 77).

The narratives are about innocent victims—good immigrants who are clearly deserving of state assistance and incorporation into the political community. Importantly, these narratives fill the category of the “innocent victim” with certain traits. The innocent victim is subject to horrific and brutal physical violence; she is filled with fear; she seeks state protection from this violence; she cooperates with law enforcement; there is no mention of her using violence against her abuser in self-defense; and she fits unproblematically into heteronormative family structures (married or monogamous, opposite-sex couple). Correspondingly, these narratives paint a very specific picture of the state. The state is a protector of innocent victims, it successfully prosecutes abusers, it enforces restraining orders, and so on.

A major problem, of course, is that this categorical frame excludes many IPV survivors. It operates as a category of exclusion, much as the “perfect victim” frame does in a broader rape culture. IPV does not always take the form of brutal (and/or visible) physical violence. IPV usually does not require a hospital visit or stitches—there are many forms of less visible or invisible physical violence, verbal, emotional, and psychological abuses, financial abuse, and isolation. IPV survivors often do not seek state protection, or are not willing to cooperate in prosecution. And IPV happens in non-heteronormative relationships.

As with Honig’s “good foreigner,” the “innocent victim” frame requires an opposite—a survivor of IPV who is conceptualized as something other than innocent. These are women against whom violence does not warrant state intervention. However, it is *not* claimed that violence is not being committed against them. Instead, the innocent victim frame props up, and is propped up by a corresponding narrative about unwanted unauthorized immigrants. In this narrative, the violent crimes committed against “bad” immigrants are rendered either implicitly acceptable or invisible.

In the face of the subcommittee’s repeated acknowledgement of the extent and severity of the problem, there is a sudden discursive shift when they talk about whether and how to limit the scope of relief policy. There are two underlying logics—accepted by proponents and opponents—for limiting relief. First, to broaden the scale or scope of relief policies would lead to fraud—abuses of the system—which would permit otherwise “undeserving” immigrants to access relief. Second, such a move would result in a “flood” of new, unwanted, and undesirable immigrants. As discussed previously, these categories are delineated and offered as justification for policy expansion and policy limits in the context of the participants full awareness and acknowledgment of the severity and extent of the problem as well as their self-reflection regarding the role of restrictive immigration policy in IPV against immigrants. In the section that follows I discuss the creation and deployment of these categories, and how they operate as justificatory frames.

### *Floods and Fraudsters*

Rather than discussing the many ways in which IPV manifests itself, or women’s varied experiences of IPV, the hearing testimony shifts. Those who fall outside the

category “innocent victim” quickly become suspect, their experiences of violence are erased, their numbers become a “flood,” and their motives for seeking immigration relief are treated as dubious. The issue of paternalistic state protection of innocent victims turns to fraud, unauthorized immigration, and the threat of inundation. The way this move is articulated in the subcommittee hearing is especially striking. The following statement from Schakowsky’s testimony is elucidative:

Let me begin by emphasizing what my bill will NOT do: It will NOT open the floodgates to undocumented or unwanted immigrants. According to experts, this bill will increase the number of VAWA filings and approvals by at most 10 percent. Last year that would have amounted to 190 additional approvals. It is important to understand that almost all of the individuals who would benefit from this bill would, but for the abuse, have access to legal immigration status. Let me say that again: Nearly all potential beneficiaries of this bill would be eligible, through traditional family based immigration policy, to legalize their immigration status (BIWPA Hearing 2000, 80).<sup>45</sup>

This questions, posed by John Conyers further demonstrates this move:

[T]he main question hanging over the...bill is simply this: Is this going to open the door for everybody to make excuses that my spouse battered me and beat me up and so now I want to become a citizen? That is the main problem here (BIWPA Hearing 2000, 103).

Schakowsky does not make a corresponding move to deny that the “undocumented or unwanted immigrants” in her story are not also facing IPV. Importantly, the alleged fraudster’s story is never told. She who does not fit the bill of an “innocent victim” is herself washed out. Her experience is chalked up to “making excuses.” Her need for immigration relief is equated with a desire to cheat a system intended for “innocent victims.” Clearly she is not an innocent victim, but it is also not claimed that violence has

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<sup>45</sup> This logic carries through to later debates about VAWA’s immigration provisions. “We have numerical caps on many visa programs. We have caps for a reason. The U.S. can’t take everybody who comes to our shores, as much as many would like to. Caps are a way to control the flow of people. They are a stop-gap measure against fraud” (Grassley 2012).

not been committed against her. Instead, her story is subsumed under a different narrative—the narrative about unauthorized immigration, floods, and fraud.

The hearing testimonies also portray a consistent understanding of the state as well-meaning, and expressed broad acceptance of the paternalistic notions of protective policy for “deserving victims”—embedded in this is the idea that the paternalistic state is able to differentiate, through policy and administration, which survivors are deserving of state assistance, and which are not, for reasons deemed relevant by policy directive or administrative discretion. Conyers’ flippant question, quoted above, was directed at Barbara Strack who responded by ensuring Conyers that the layered nature of the process guarded against fraud and a flood of new applications being approved. She further pointed out that fraud had not been a major problem thus far (BIWPA Hearing 2000, 104). To which he followed up: “So you do not see the floodgates opening up, so to speak” (BIWPA Hearing 2000, 104)? She replied that she did not have reason to think that this would occur (BIWPA Hearing 2000, 104).

That the problem of IPV against immigrant women is widespread does not appear to factor in to the discussions concerning the potential “flood” of new and ostensibly-fraudulent applications that the bill could potentially result in. Similarly, their acknowledgment of the reality that some otherwise-qualified women were unable to access VAWA immigration relief as a result of issues internal to the intersecting legal structures themselves, and having nothing at all to do with fraud, was conspicuously absent in their conflation of their worries about floods and fraudsters. Concerns about large numbers of new immigrants enticed by changes in policy assume that the key factor preventing people from migrating to the US is immigration policy itself. This also ignores

the reality that international migration is an extremely costly endeavor that the vast majority of the world's population cannot access. Moreover, the conversations about numbers distracts from the ethical implications of knowingly excluding women who would otherwise be eligible for relief, even if their numbers constituted a "flood."

This move by supporters of the bill is similar to that employed by opponents. For example, former INS Senior Spokesman, Dwayne "Duke" Austin, framed immigrant survivors' use of VAWA as a means to attaining legal residency as itself a potential loophole in otherwise legitimate immigration law. He argues that the bill

encourages those who are abused to opt out of the abusive relationship by granting them immigration status to which they otherwise may not be entitled. In this process, a vast loophole of potential fraud and abuse is opened for illegal immigrants who seek to obtain legal residence (BIWPA Hearing 2000, 108).

Austin grants the existence of abusive relationships, then decouples it from an entitlement to legal residency. In his account, the reality of an abusive relationship becomes an undeserved opportunity to obtain status otherwise unavailable to many immigrants. The implication of his argument is either that abuse will be fabricated, that abusive relationships will be entered into strategically for the utilitarian purpose of exploiting the immigration system, or that simply being abused is not grounds for residency status. Even if this kind of fraud was in fact a problem at the time, Austin's charges are not substantiated with evidence in the hearing. As with the supporters' comments above, Austin's account treats petitions by those he views as being not entitled to relief—"bad" immigrants—as highly suspect at best and fraudulent at worst.

Schakowsky's defensive comment that her bill would not "...open the floodgates to undocumented or unwanted immigrants" makes an equally problematic leap. Both assertions act to draw categorical boundaries around the violence committed against

“innocent victims” on the one hand and that committed against “illegal/unwanted immigrants” on the other. This logic underlies both sides of the debate. Moreover, these categories are heavily policed and mark which survivors are taken under the wing of the paternalistic ameliorative apparatus as well as those who are willfully excluded, allowing the violence committed against them to continue and keeping the coercive power of restrictive immigration law intact.

Significantly, the worries about floods and fraud are not empirically substantiated in the hearing. Instead you see them mobilized as *empty concepts* that invoke fear. The concept of fraud invokes fear because fraud undermines rule of law. Fraud exemplifies the accessing of benefits that are not deserved. To commit fraud is to cheat and to steal. Invocations of fraud have power that operates on the debate independently of the whether or not it is, or can be, empirically substantiated. The flood trope had a long history as a tool for invoking fear about incoming immigrants. In this case, “flood” operates similarly to “fraud.” Floods overwhelm and inundate—a flood is something you drown in, something over which you have no control. It is a numerically large category that represents excess, and the flood trope is extremely effective.

In his book on the social and political construction of Latina/o immigrants in the US, cultural anthropologist Leo Chavez (2013) discusses the power of using such large numbers, however unsubstantiated, in conjunction with the flood imagery.

The...display of such large numbers carries meanings apart from their mathematical references. Because it is difficult to assess the accuracy of such numbers and what they mean—for example, their relative impact in a nation as large as the United States—such numbers become images...[N]umbers...invoke simplified responses—low/high, good/bad, affirmative/alarmist, assurance/fear—depending on the prevailing sentiment toward immigration (Chavez 2013, 29).

These kinds of binary responses can have a powerful emotional impact on their target, which is filtered through sociopolitical discourse around immigrants at any given time.

Like others, Chavez recognizes the powerful role that immigration and immigrants play in the American cultural and political imagination. Whether the narratives are positive or negative, immigration evokes strong emotional responses. In the case of Mexican immigration, that imagery and the responses it produces exists in the context of the US's colonial history in the Southwest. The constant contestation—whether actual, perceived, or feared—and the negotiation of national cultural borders has given rise to a particular flavor of immigration politics. As Chavez points out, the flood imagery is closely tied to Mexican immigration in particular and the idea that Mexicans immigrating to the US en mass constituted an invasion (Chavez 2013).

In his book *Covering Immigration: Popular Images and the Politics of the Nation*, Chavez (2001) examines representations of immigration and immigrants in the visual media. Specifically, he looks at the images on the covers of magazines. Media imagery, he argues, is centrally important in reflecting *and* creating certain sociopolitical sentiments and discourses around immigration. Chavez reminds us that,

[a] flood is not a normal occurrence, but an event that is a problem by definition and one for which a solution must be found as quickly as possible. Floods often wreak havoc on an area and the people living there. As a metaphor for immigration, the flood...has come to stand for the movement of people into the country...[Moreover,] a flood is conceived of as large in magnitude and uncontrollable (Chavez 2001, 73 – 74).

In the context of immigration from Latin American, and Mexico in particular, the flood imagery is often coupled with racial fear. In the BIWPA hearing, the use of the concept of an immigrant flood is not merely linguistic, it evokes a visual image that is

commonplace in our national conversation about immigration. Moreover, the flood imagery is a far from being race-neutral (Chavez 2013; Santa Ana 2002).

In his study of the discourse surrounding immigrants and immigration in the time period leading up to the passage of California's Proposition 187 in 1994—which was designed to limit or eliminate unauthorized immigrants access to an array of social services, including public education and health care<sup>46</sup>—sociolinguist Otto Santa Ana (2002) looks in depth at the use of flood imagery in the social construction of Latinos. Santa Ana argues that the metaphors deployed in support of Prop. 187 “are not merely rhetorical flourishes, but are the key components with which the public's concepts of Latinos is edified, reinforced, and articulated” (Santa Ana 2002, *xvi*). One key cluster of metaphors pertaining to immigration that he identifies relies heavily on water related imagery. He calls these the “dangerous waters” metaphors, which often take the form of “...*rough seas, treacherous tides, [and] surges*” (Santa Ana 2002, 73 emphasis in the original). Importantly, he argues, these metaphors act to strip their subject of all humanity apart from their race and ethnicity. Those constituting these floods are afforded human attributes only insofar as they are ascribed a race—specifically, they are brown and Latin American (Santa Ana 2002, 73).

In his analysis of newspaper articles covering Prop. 187, Santa Ana finds clear themes in the way these water metaphors operate. The flood and water metaphors used to describe immigration “is a coupling and mapping of the semantic ontology of dangerous waters onto the domain of immigration. It established semantic association between the

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<sup>46</sup> By late 1997, much Proposition 187 had been found unconstitutional on the grounds that it interfered with the Federal government's exclusive authority over matters of immigration (McDonnell 1997).

two meaning domains, taking the well-developed framework of everyday knowledge of floods and tides and imposing it on an entirely human activity” (Santa Ana 2002 74 – 75). According to Santa Ana, this relationship between immigration and floods has four features. First, and most basic, is that immigration is the substance of the flood. The second is that the US is the entity both susceptible to, and subject to that flood. Third, increased immigration constitutes and increased threat to the US. Lastly, the US’s “...vulnerability to flooding corresponds to its susceptibility to change” (Santa Ana 2002, 75).

However, as Santa Ana describes in detail, the power of the flood evokes the necessity of its containment through equal or greater exertions of power.

[The] dynamism [of water] implies kinetic and hydraulic power, and control of the movement of water also required power... Greater volume and movement of water imply greater need for safeguards and controls, and more powerful human agency to control the water (which of course is not human force). Insufficient human control of the kinetic energy pent up in volumes of water can lead to flooding and other ravages (Santa Ana 2002 75 – 76).

In the hearing, the containment of the flood is achieved through the limits on relief policy, whether those limits manifest as high burdens of proof, numerical caps, or other barriers. In Santa Ana’s account, the flood is a non-human force, which relieves those controlling it of moral responsibility to account for the human costs of their actions.

Karen Musalo (2006 – 2007) talks about a very similar fear of “floodgates” manifesting in arguments against gender-based asylum, including claims based on IPV. She identifies the fear of floodgates as the “overarching basis for the opposition to gender claims” (Musalo 2006 – 2007, 132). “The spectre of thousands—or tens of thousands—of women arriving at the borders of the United States to request asylum is raised as a reason to not recognize their legitimate claims to protection” (Musalo 2006 – 2007, 132). As

with arguments against expanding relief policies for immigrant IPV survivors in the US, the floodgates argument in the context of asylum operates as a versatile empty concept that can be filled with fear-provoking imagery. It is useful not because it is an accurate representation of possible outcomes that will result from a given policy, but because of its capacity provoke and justify a certain reaction.

Santa Ana argues that, “the main effect of invoking the dangerous waters semantic domain to characterize the immigration domain is to transform aggregates of individuals into an undifferentiated mass quantity” (Santa Ana 2002, 76). In the case of the BIWPA hearing, the invocations of fraud and floods are operative. They operate as a justification for excluding some survivors in the absence of evidence. Exclusion, in this case means that, for certain immigrant IPV survivors, the use of immigration law as a tool of coercion does not warrant an affirmative state response. There is no necessary relationship between the “flood” trope and survivors who are not being afforded immigration relief.

### **Administrative Discretion**

One of the significant features of the categories employed in this hearing is the idea that the state can and does in fact justly differentiate in policy, and adjudicate in administration, which survivors are deserving of state assistance and which are not. This boundary is delineated by policy directives and by administrative discretion. In an example of this, Jackson Lee asks Barbara Strack what the INS does to identify fraudulent applications in the VAWA self-petition process. Strack responded by outlining the main ways in which bureaucrats at the Vermont Service Center—the INS service

center that deals with VAWA self-petitions—use their expertise and discretion to differentiate between legitimate and illegitimate claims. They look for internal inconsistencies in applications, and for multiple attempts on the part of the petitioner to contact the INS. She assured the subcommittee that they were also able to protect against fraud “...by having a small, dedicated unit at the Vermont Service Center. They are highly trained people. They review a number of cases. They are available to speak with one another and compare notes on cases, and this allows them to identify duplicate use of documents—patterns, essentially—that could indicate fraud” (BIWPA Hearing 2000, 102 – 103).

While the assertion that bureaucrats have the capacity to differentiate between legitimate and illegitimate petitions would surely be a part of any proposed ameliorative policy, it is questionable to assume that this capacity can or should be exercised without considerable scrutiny. Embedded in her description of how individual state actors negotiate claims—in this case individual bureaucrats adjudicating individual applications—is an acknowledgement of the broad authority they have to exercise discretion in their application of policy directives. The problem with her account, however, is that it assumes a certain outcome regarding the exercise of that discretion, and that assumption is not necessarily in line with how the process plays out. It assumes that “legitimate” petitions will be granted and fraudulent ones will not. Correspondingly, it assumes that those not granted were rightly denied, and vice versa.

Olivia, the immigration lawyer in New York, pointed out in our interview that, when assisting women with the U visa applications (all of which are also processed at the Vermont Service Center), she has run into problems with the dedicated staff to which

Barbara Strack referred in her testimony. According to Olivia, these problems were particularly pronounced when the Vermont Service Center hired new staff, which was made obvious by unusual requests for evidence not required for the processing of an application. She gave the example of a U visa application that she was working on for a rape survivor that had been returned to her with the request for evidence of “harm.” She lamented that this was indicative either of the staff person’s inexperience with the process and the legal requirements or of a lack of attention paid to the applications details in the first place, as clearly rape itself constitutes harm irrespective of any other physical injury or the lack thereof. It could also be illustrative of broader institutional norms. Alex echoed Olivia’s experiences in this regard.<sup>47</sup>

Alex explained to me that, with respect to the processing of applications, “[t]hings have been getting worse lately rather than better.” For example, she said, “I had a request for proof that my child, a crime victim, assisted [in the law enforcement process], that we didn’t submit enough evidence of that.” She went on to explain that “[t]here are some egregious things like that, but I think that, for the most part, if you get them in the hands of the right person you can get [problems with processing an application] corrected...I think it’s just a training issue, when you bring new people in.” The view that Olivia, Alex, and Barbara Strack share in this regard is that the individual government agent with whom a survivor comes into contact in the application process is granted the authority to determine whether or not a claim is “legitimate” or a specific survivor is “deserving” of state assistance in the form of immigration relief. The on-the-ground examples emphasize the significance of this by substantiating the potential for this exercise of discretion to

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<sup>47</sup> Pseudonym.

deviate from the assumptions made by policymakers. Moreover, it demonstrates the ways in which the categories of deservedness delineated in policy can potentially interact with the individual biases, political beliefs, or incompetence of individual state adjudicators.

### **Fraud in Later Iterations of VAWA**

Although VAWA was reauthorized in 2000 and 2005 without incident, the 2011 iteration ruffled feathers on account of proposed additions intended to further extend assistance and protection to previously excluded groups. Among the proposed additions was a modest increase in the number of U visas, and the possibility that U visa holders could eventually apply for permanent residency (Weisman 2012). Although U visas, created by the BIWPA in 2000, were already included in previous versions of the law, the expanded protections were met with fierce Republican opposition (Weisman 2012). The U visa increase was not included in the final bill, and much to the frustration of many. Alex asked, rhetorically, “[i]f the whole point of the [U] visa is to help law enforcement, why would you limit the number?” Her question suggests an answer having less to do with the policy’s stated logic, and more to do with the narrative surrounding the target demographic.

Fraud, one of the founding logics for restricting the relief policy that we see in the BIWPA, reemerges in this debate. In a July 2011 hearing before the Senate Judiciary Committee on one of the proposed VAWA reauthorization bills, this debate is spearheaded by Rep. Chuck Grassley. Grassley’s concerns about fraud are two-fold—first, that fraud will result in illegitimate access to immigration benefits; and second, that the victims of that fraud will in fact be Americans who are either abused by foreign

nationals or falsely accused by foreign nationals (Grassley 2012). In the second frame, the immigration relief policy itself becomes the tool of abuse against American citizens. Grassley remarked: “I am concerned about the reports that some of the procedures employed by Citizenship and Immigration Services actually help facilitate immigration marriage fraud, and some of it is further entrenched by provisions under this law” (VAWA Senate Hearing 2011). In this hearing, Grassley presents evidence of this fraud in the form of an anecdote, offered by Julie Poner, an American citizen who tells her story before the Committee. Poner tells of her own abusive relationship with her husband, a 6’2” tall ex-hockey player who is a Czech national. He demanded of her that she file for a divorce once they had been married long enough for him to sever his visa status from her citizenship, but when she attempted to do so, federal authorities threatened to charge her with marriage fraud. Her abusive husband then filed a fraudulent VAWA self-petition, claiming that his citizen wife was abusing him. She ends by saying “I have spoken with countless other men and women who have similar stories” (Senate Judiciary Hearing 2011).

Though Poner’s story is alarming, it is not clear that this phenomenon is common. I asked Christina, an immigration lawyer in the Pacific Northwest who represents women in VAWA cases, whether or not she had ever hear of a fraudulent VAWA self-petition. “No,” she replied. “Right now, I would say it would be extremely, extremely, extremely hard [to commit VAWA self-petition fraud].” In an analysis conducted for the Congressional Research Service, William Kandel (2012) found that immigration attorneys with whom he conducted interviews also

question[ed] the ease with which foreign nationals could perpetrate immigration fraud using VAWA. According to these attorneys, documentary evidence of abuse

required by the Vermont Service Center is relatively stringent, petitions are reviewed thoroughly, and even slight inconsistencies found among the evidence supporting petitions often trigger additional requests for information and raise the threshold for petitioners to establish legitimate abuse cases (Kandel 2012, 10).

As in the BIWPA hearing, the call for limits and restrictions lean heavily on anecdotal invocations of fraud. However, in this case, the victim of this fraud is both the state, and American citizens. Doubt notwithstanding, Grassley uses Poner's harrowing story to argue for the need to increase the burden of proof required of VAWA self-petition and U visa applicants (Senate Judiciary Hearing 2011).

Grassley introduced an amendment to that VAWA reauthorization bill that he claimed would address this fraud. Among other things, the proposed amendment would have required petitioners to "...[provide] a copy of written documentation, signed by a licensed medical doctor, verifying that he or she suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity" (Senate Report 2012). Though he uses Poner's story as justification, and under the rubric of preventing fraud, provision after provision of Grassley's amendment draws into question the credibility of all immigrant women as witnesses to the violence committed against them. Although his amendment was ultimately thrown out, it reveals a disconnect between the alleged problem and the proposed solution.

As before, the focus of increasing barriers as a way of preventing fraud wedges out a conversation regarding the consequences of the barriers for those who are not committing fraud, but whose experiences might not fit perfectly into the innocent victim frame. Those who warrant protection are the women whose experiences align with problematic categories of victimhood that correspond with a certain outward manifestation of that victimhood, which most often takes the form of extreme physical

violence. In Grassley's view, immigrant women wishing to access U visas should have to have their status as an "innocent victim" *verified* by a medical professional. In a public statement, as cited in *The New York Times*, Grassley asserted that, "the legislation 'creates so many new programs for underserved populations that it risks losing the focus on helping victims'" (Weisman 2012). For an immigrant woman to self-report that she has experienced IPV is automatically suspect; she must *prove* her victimhood. Alex reflected on this debate in our interview:

It's frustrating for me...For this type of visa...there are these women who are breaking free of abusive relationships, getting their children into safer situations,...reporting family members for terrible things that they've done, and it just bothers me that they get brushed with this whole illegal alien paintbrush. This person put a rapist in jail. That's an amazing thing that they've done, and it's good for society...The fact that the VAWA reauthorization process was so contentious was really upsetting. I mean, who's against this?

The congressional debates surrounding supposed fraud and unauthorized immigrants does not reflect the experiences of the NGO workers that I spoke with. Alex's comment draws attention to the contradictory tendency to simultaneously deputize immigrant IPV survivors as partially responsible for the law enforcement process *and* treat them as always already suspect. Moreover, when attempts to prevent fraud manifest as higher burdens of proof that any given woman is in fact being abused, the de facto burden of preventing fraud is placed on the survivors themselves.

### **Gendered Institutional Violence**

My analysis of the BIWPA hearing reveals policymakers' decisions to limit immigration relief policy for IPV survivors as a moral *choice*, made actively and self-reflectively, not passively or haplessly as the literature suggests. In their capacity as

institutional rule-makers, the subcommittee members demonstrate that they are self-reflective regarding the state's direct involvement in IPV against immigrant women. Moreover, they demonstrate a self-reflective understanding that the state's involvement in this abuse is not abstract, esoteric, or metaphorical; rather, that as agents of the state—ICE officers—will quite literally carry out an abuser's threat of deportation, albeit under the auspice of immigration law. Importantly, those being self-reflective in this case are in a position to do something to alter the power dynamic derived from immigration law in these relationships. Lawmakers' choice to limit relief policies implicates the state in the continuation of the use of immigration law as a coercive tool in abusive relationships. The state's role in IPV against immigrant women who fall outside the purview of immigration relief policies is permitted to continue, and it is re-instantiated in the process of justifying the limits of relief policy.

Their justification pivots around notions of innocence and victimhood, on the one hand, and the invocation of fraud and floods on the other. Policymakers are not merely passively mirroring existing hierarchies and systems of power, however. Instead, the BIWPA hearing demonstrate the active deployment of these categories in both delineating and justifying access. Policymakers are deciding which survivors get access to immigration relief *not* on the basis of evidence; instead, they are making a choice with serious ethical implications on the basis of an arbitrary classificatory scheme that pivots around the category “innocent victim.” In doing this, the state is not reactionary, beneficent, or hapless. As other scholars before me have made clear, the state can and does regularly commit acts of discriminatory institutional violence (e.g. Davis 1981;

Acker 1992; Alexander 2010). In this case, I argue, we ought understand the state's self-reflective action as gendered institutional violence.

Barbara Strack's statement in the hearing is illustrative here. "We know that fear of deportation or removal mean that abused family members are less likely to report domestic violence or to leave an abusive household because *an abusive spouse... has a powerful weapon by controlling the immigration process*" (BIWPA Hearing 2000, 91, emphasis added). I argue that this "powerful weapon" is not a byproduct of legislative fumbling or inadequacy, or an instance of the limits of state beneficence. Instead, the self-reflective maintenance of this dynamic constitutes gendered institutional violence. This "powerful weapon"—control over the immigration process—has been self-reflectively re-instantiated as a tool of oppression in the lives of some survivors and not others. The result is that many survivors who need immigration relief in order to escape IPV are being prevented from accessing it, and the state is implicated in this outcome.

## **Conclusion**

Both inside and outside the purview of policies intended to address IPV against immigrant women, the state contributes to the continuation of this kind of violence, whether directly or indirectly. Rather than understanding the state as merely complicit in this violence by virtue of its ongoing failure to adequately address it in law and administration, the state's actions and inactions themselves constitute a kind of harm, forcing immigrant IPV survivors into positions of vulnerability or forcing them to remain in dangerous situations. The law enforcement certification required for U visa applications under VAWA burdens immigrant IPV survivors with the responsibility of

holding their abusers legally accountable for their actions in a way that non-immigrant IPV survivors need not do. The certification also renders access to immigration relief (limited as it may be) highly contingent upon the competence, politics, and policies of individual law enforcement officials and jurisdictions. As other scholars have argued, these restrictive policies have the effect of trapping immigrant women in abusive relationships and otherwise vulnerable positions. In this way, the state is clearly implicated in the continuation of this violence in many circumstances. However, as I argue in this chapter, state action is not restricted to these ameliorative policies or the lack thereof.

If we see restrictive immigration policy not as tangentially related the conditions under which IPV against immigrant women occurs, but rather as integral to that violence, we ought not consider the legal space outside the purview of ameliorative policy as being a space defined by state *inaction*. Instead, the state's willingness to carry out deportations in this context directly implicates it, as the exercise of state power in this way becomes a feature of the IPV itself. My analysis of the House Immigration Subcommittee's hearing on the BIWPA and interviews with key informants reveal the foundational logics for restricting relief and demonstrates that the state is self-reflectively acting as the agent of harm in abusive relationships in which the abuser uses the threat of deportation as a tool of coercion and control.

**CHAPTER IV**

**INTIMATE PARTNER VIOLENCE-BASED ASYLUM IN THE US: AN  
ALTERNATIVE ANALYSIS**

Perhaps the best-known, and most protracted, case of an intimate partner violence-based asylum claim in the US is that of a Guatemalan woman named Rodi Alvarado Peña.<sup>48</sup> The notoriety of Alvarado Peña’s case is due in large part to the fact that it was the first of its kind to be considered by a precedent-setting US immigration court. Her case also attracted attention on account of the harrowing experiences that led her to pursue asylum in the first place.

In 1995, Alvarado Peña fled Guatemala to the United States in order to escape the horrific violence inflicted upon her by husband, Francisco Osorio. They married when she was just 16 years old and he was 21, and the violence began immediately (Musalo 2007). Court documents describe a harrowing experience of violence. Osorio raped, beat, and isolated Alvarado Peña, moving them to Guatemala City, away from her social and familial support networks. He threatened to kill her and, when she became pregnant with their first child, he beat her mercilessly in an attempt to induce a miscarriage (In re R-A-, Respondent 2001). According to court papers filed on Alvarado Peña’s behalf, Osorio

explained his repeatedly striking her, whipping her with an electrical cord, threatening her with a machete, pistol whipping her, raping her, sodomizing her, breaking a mirror over her head, kicking her in the spine, attempting to abort their

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<sup>48</sup> Although the terms “refugee” and “asylee” (or asylum-seeker) are often improperly conflated, there is an important distinction between the two. Those seeking asylum or refugee status must meet the same legal criteria, however, refugee status is only granted to those who have (in most cases) already been displaced from their home country, but are still outside the US, while asylum is reserved for those already in the US (Bruno 2015). The cases discussed in this chapter are all asylum cases—the petitioners were all already in the US when they applied to stay here on account of persecution in their countries of origin.

second child, slamming her head into furniture and dragging her by the hair, and knocking her unconscious, as his right as her husband (In re R-A-, Respondent 2001).

This violence and abuse continued “almost daily” for more than a decade (DHS Brief in *Matter of R-A-2004*, 8). She tried on many occasions to escape Osorio’s brutality, but he would hunt her down, once beating her unconscious upon finding her (DHS Brief in *Matter of R-A- 2004*, 10). When she sought the help of Guatemalan authorities, she was repeatedly rebuffed (DHS Brief in *Matter of R-A-2004*, 12; Musalo 2010, 56). After a failed suicide attempt, she was left with no choice but to flee Guatemala to the US, leaving her two young children behind with their paternal grandparents (In re R-A-, Respondent 2001; DHS Brief in *Matter of R-A-2004*; Preston 2009).

In 1996, knowing that returning to Guatemala would put her safety and her life in grave danger, Alvarado Peña filed a petition for asylum in the US. In the 14 years that followed, she was subject to a legal rollercoaster as immigration courts and three successive presidential administrations attempted to hash out a policy position on IPV based asylum claims.<sup>49</sup> In 2009, she was finally granted asylum after an Obama administration court brief, submitted in a similar case, spurred a shift in judicial interpretation of relevant statutory frameworks.

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<sup>49</sup> While this process is often described as one in which officials are attempting to hash out an *interpretation* of existing refugee law as it has been put forth by Congress, such a description fails to recognize the extent of the executive’s discretionary power built into said laws (DHS Brief in *Matter of R-A-2004*). In the absence of legislative or regulatory guidelines, the interpretations are themselves a form of policymaking.

## Introduction

The previous chapter examines the relationship between IPV against immigrant women and the state when that violence is happening on US soil. Emphasizing the coercive power of restrictive immigration law in abusive relationships, I posit an account of this dynamic that understands state institutions as self-reflective—actively and demonstratively aware of the state’s role in that violence—rather than reactionary, hapless, or beneficent. In this chapter I continue examining the role of the state in IPV against immigrants, but shift my analytical lens to those who have migrated in search of asylum on account of IPV. In Chapter V, I tie these two cases together positing a theory that draws out the commonalities in each case’s relationship to the state.

The issues surrounding gendered violence and migration have attracted the attention of scholars in many different disciplines, including sociology (Falcón 2001; Piper 2006; Sokoloff and Pearce 2011), geography (Oswin 2001; Hyndman 2010), anthropology (Salcido and Adelman 2004; Parson 2010), political science (Bumiller 2006), psychology and social work (Bhuyan 2008; Waugh 2010), and others (McKinnon 2011). With respect to asylum for survivors of IPV in particular, legal scholars have been the most prolific (Seith 1997; Anker 2001; Musalo 2007, 2010; Doedens 2014; Barreno 2011; Rodriguez 2011; Bookey 2013).<sup>50</sup> Not surprisingly, much of the legal scholarship tends to focus on the adjudication of asylum claims, and/or the establishment of judicial precedent (for examples see Anker 2001; Barreno 2011; Loescher and Scanlan 1986; Musalo 2010; Spijkerboer 2000).

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<sup>50</sup> These lists of citations are illustrative, not exhaustive.

In this chapter, I too examine specific institutional sites of administrative policy and judicial precedent pertaining to asylum for survivors of IPV. However, my analysis focuses on the state more broadly rather than the trajectory of precedent and adjudication. I examine the shift in Alvarado Peña's case, the case of L-R-,<sup>51</sup> and the precedent-setting decision in *Matter of A-R-C-G- et al.*, which was decided by the Board of Immigration Appeals (BIA or Board)<sup>52</sup> in August of 2014. While other scholars have studied these cases at length with a focus on legal processes per se,<sup>53</sup> I consider them from a different angle. I analyze the process by which the Obama administration and the BIA have intervened through the creation of elaborate subject positions<sup>54</sup> intended to fold a select few IPV-based asylum claims into existing policy frameworks that otherwise exclude most IPV-based claims. Specifically, I conduct an in-depth content and discourse

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<sup>51</sup> Asylum-seekers names are usually redacted from proceedings available in the public record. Their initials are used instead to protect their identities.

<sup>52</sup> “The BIA serves as the highest administrative tribunal adjudicating immigration matters, and has responsibility for interpreting and applying immigration laws nationally” (Miller, et al. 2015, 9).

<sup>53</sup> These accounts focus primarily on the court proceedings, legal precedent, guidelines for adjudication of these cases, and the outcomes thereof, rather than the examining what these details say about broader state institutions.

<sup>54</sup> I am using “subject position” in a particular way in my analysis, and I discuss in detail below. Successful asylum petitions must demonstrate that the petitioner is positioned in a particular way vis-à-vis society and the government. That is, they need to present a linguistic construction of their sociopolitical position that renders their experience persecution (determined by its relationship to the state) while demonstrating that that persecution was based on one of the five enumerated grounds on which one can seek asylum (race, religion, nationality, membership in a particular social group, and/or political opinion). In short, it is linguistic phrase that constructs both the subject (the asylum petitioner) and her sociopolitical position.

analysis<sup>55</sup> of a number of relevant documents—a Department of Homeland Security (DHS) brief submitted to the BIA in April of 2009 concerning the case referred to as *Matter of L-R*, and a BIA decision in *Matter A-R-C-G- et al.*, which mirrors the DHS’s proposal in *Matter of L-R*. The brief, though explicitly a statement of the Obama administration’s policy position on that case and others like it, is not a binding document. Similarly, the Immigration Judge’s (IJ) grant of asylum for Alvarado Peña did not produce judicial precedent, given that it is a lower court. By contrast, the BIA decision in *Matter A-R-C-G- et al.* was precedent-setting, and will therefore have lingering effects on similar cases in the months and years to come.

Both the DHS brief and the BIA decision in *Matter A-R-C-G- et al.* initially indicate movement toward an asylum policy that is more inclusive of IPV-based claims. By articulating alternative formulations of the petitioners’ subject positions—the ground on which they are petitioning for asylum—DHS and the BIA are bringing these claims into line with criteria for grants of asylum under existing law. In doing so, the Obama administration appears to validate the petitioners’ claims that IPV is in fact persecution.<sup>56</sup> However, as I will argue, these alternative subject formations in fact further entrench problematic, apolitical interpretations of IPV. The hyper-specificity<sup>57</sup> of the alternative

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<sup>55</sup> See Chapter II for an explanation of this method.

<sup>56</sup> The positions of future presidential administrations could very well shift, which would prove important in ways that cannot be predicted, particularly in the absence of statutory changes. However, it is reasonable to expect that the precedent set by the Board’s ruling in *Matter of A-R-C-G- et al.* will be resistant to changing pressure from future presidential administrations.

<sup>57</sup> As I discuss extensively below, attempts to make space for IPV-based claims within existing law have manifest as the creation of hyper-specific and elaborate subject positions. By this I mean, articulations of subject positions that involve a laundry list of

subject formations perpetuate a disconnect that has long been recognized in the literature between refugee/asylum policy and the reality of violence in women's lives. Indeed the policy also acts to *legitimate* the idea that this form of persecution is apolitical, thus obfuscating the role of state actors in its existence and its remediation. On account of this legitimation, we can see the amended policy not as an inadequate remedy, or incremental progress, but as itself implicated in perpetuating the conditions under which this kind of violence continues. These ought not to be understood as merely a series of instances of bad or inadequate policy. Rather, as I will argue, these state actions and inaction, as they exist, constitute gendered institutional violence.

### **Rodi Alvarado Peña: *Matter of R-A-* as Illustrative**

Alvarado Peña's case is particularly important in the history IPV-based asylum in the US. "Prior to the BIS's decision in *Matter of R-A-*, issued on June 11, 1999, no precedent decisions by the BIA or the Courts of Appeals, nor binding regulatory guidance existed regarding domestic violence as a basis for asylum" (Bookey 2013, 112). The agonizingly protracted nature of Alvarado Peña's case is owed to a number of factors; most foundational among them is the fact that IPV is not statutorily recognized as a form of persecution than can serve as the grounds for a grant of asylum in the US (Musalo 2010, 63). As a result, Alvarado Peña needed to convince an IJ that she was facing persecution on account of one of the existing grounds—race, religion, nationality, membership in a particular social group, and/or political opinion. The lack of statutory

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descriptors, each of which edges the petitioner further away from a category that might be more broadly socially applicable. In this practice, the widespread and epidemic nature of IPV is obscured by the specificity of a particular case.

guidance for IPV asylum claims like Alvarado Peña's created a further complication; any decisions rendered were subject to the political and policy shifts that accompany each new presidential administration. The reason for this is that immigration courts, including the BIA—the highest immigration court—all fall under that jurisdiction of the Executive, rather than the Judiciary. The sitting US Attorney General, therefore, has the authority of vacate BIA decisions, remand cases back to the lower immigration courts for reconsideration, and issue new guidelines regarding those decisions.

Alvarado Peña's case was subject to each of these pivots in turn. An IJ initially granted her asylum, but upon appeal by the Immigration and Naturalization Service (INS), the BIA overturned the lower court's decision in 1999 (Musalo 2010, 56 – 57). In its ruling, the BIA conceded that Alvarado Peña's experience did in fact constitute persecution, but that she had not demonstrated that that persecution had been on account of her political opinion or her membership in a particular social group (Musalo 2010, 57). In 2001, Attorney General Janet Reno vacated the BIA's decision and remanded the case back to the Board, instructing them to reconsider it in light of new Department of Justice (DOJ) regulations pertaining to IPV-based asylum claims, the development of which was a response to the uncertainty revealed by Alvarado Peña's claim (Musalo 2010, 58).

However, the would-be new DOJ regulations was never finalized or implemented, so Alvarado Peña was forced to wait even longer in limbo. In 2003, further complicating matters, Attorney General John Ashcroft certified the stalled case to himself, although he did not render a decision. In 2008, in light of the fact that the new rules were never finalized, Attorney General Michael Mukasey lifted the stay that was preventing the BIA from reconsidering her case, or any similar cases (24 I&N Dec. 629, A.G. 2008). "Insofar

as a question involves interpretation of ambiguous statutory language, the Board is free to exercise its own discretion and issue a precedent decision establishing a uniform standard nationwide.” Mukasey added, “[p]roviding a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws is one of the key duties of the Board” (24 I&N Dec. 629, A.G. 2008). The Board did not issue such a precedential decision in this case, however, instead remanding it to an IJ who granted Alvarado Peña asylum in 2009.

Alvarado Peña’s case is illustrative of the deeply problematic way in which IPV-based asylum claims have been, and are handled in the US. I argue that it is not, however, dysfunctional. On the contrary, the process for adjudicating (or refusing to adjudicate) IPV-based asylum claims functions quite well as a system of exclusion, in line with the broader structure of restrictive immigration law. Even if we accept the principle of exclusion as a foundational right of nation-states, the handling of these cases raises legitimate questions about the gendered effects of certain statutory, administrative, and judicial frameworks for determining which claims are legitimate, and which are not.<sup>58</sup>

The discretionary character of asylum cases is not limited to claims at issue in this

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<sup>58</sup> Broadly speaking, while statutory guidelines lay out the criteria for grants of asylum, it is up to the specific adjudicators in a given case to decide whether or not an individual petitioner meets those criteria. In cases of IPV-based asylum claims this is particularly important as it compounds the “he said/she said” dynamic often found in proceedings regarding IPV with the fact that the perpetrator is not present in the proceedings. This combination of variables increases the discretionary power of adjudicators in these cases (Doedens 2014 111 – 112). Legal scholar Blaine Bookey (2013) adds that, prior to the BIA holding *Matter of A-R-C-G et al.*, “whether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all” (Bookey 2013, 147 – 148). Political scientists Banks Miller, Linda Camp Keith, and Jennifer S Holmes (2015) also posit an account of the immigration court system in which much rests on the discretion of individual IJs (Miller, et al. 2015).

chapter (Doedens 2014, 111; Miller, et al. 2015). That said, it is in these cases that we see both the gendered nature of the statutory regimes, and the gendered outcomes of adjudicatory processes.

The remainder of this chapter is organized in the following manner: I focus first on the broader background of refugee and asylum policy in the US and its link to international law, followed by a discussion of the gender specific dimensions of asylum law. Second, I offer an analysis of the Obama administration's supplemental brief submitted in *Matter of L-R-*. In this section I am particularly focused on analyzing the way in which the administration brief makes its case in favor of the specific asylum petitioner at issue, and the subject positions it constructs in so doing. Third, I examine the BIA's precedent-setting ruling in *Matter of A-R-C-G- et al.* My analysis of this ruling is concurrent with that of the administration brief. Finally, I analyze these policy shifts in light of the concept of non-refoulement—the act of returning a refugee or asylee back to into harms way.

### **Refugee and Asylum Policy Background**

US refugee and asylum law closely resembles international refugee law delineated in the 1951 UN Convention Relating to the Status of Refugees, and the subsequent 1967 UN Protocol Relating to the Status of Refugees. International refugee law has its roots in horrors of World War II, and reflects a particular concern with the plight of those persecuted by their own governments. It is a history steeped in the language of

righteousness, morality, and protectionism.<sup>59</sup> Refugee/asylum politics has long been closely tied to US foreign policy interests, with grants of refuge or asylum very often linked to other politically expedient factors (Loescher and Scanlan 1986; Portes and Rumbaut 1996; Miller, et al. 2015). As political scientists Banks Miller, Linda Camp Keith, and Jennifer Holmes (2015) explain, “[a]sylum adjudications are enmeshed in a complicated web of domestic immigration law, U.S. treaty obligations, and federal jurisprudence” (Miller, et al. 2015, 1). Despite the US’s long history of involvement in the development of international refugee/asylee, it was not until Congress passed the Refugee Act of 1980 that US statutory law explicitly incorporated refugees and asylees (Miller, et al. 2015, 6).

As codified in the Refugee Act of 1980, refugee status or asylum is available only to those who cannot or will not return to their country of origin on account of persecution, or a well-founded fear thereof. There are five enumerated grounds on which one can claim eligibility for refuge or asylum—persecution on account of race, religion, nationality, membership in a particular social group, and/or political opinion.<sup>60</sup> My

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<sup>59</sup> The reality of how this protectionism played out is quite a lot darker than the discourse surrounding it might suggest, as is so often the case. Foreign policy concerns, political squabbling, racism, sexism, and nativism leave this history littered with the forgotten bodies of so many. An early example of the profundity of the West’s betrayal of its own newly minted laws can be seen, as so often, in its treatment of Jews. Though the Nazi’s treatment of European Jews was persecution at its most quintessential, ships full of Jewish refugees were denied port in the US, and Jews “liberated” from concentration camps were forced by the allies to stay, imprisoned for many months without food, freedom, or refuge (Wyman 1968; Tichenor 2002; Musalo 2006 - 2007).

<sup>60</sup> “In order to qualify for refugee status, a principal applicant must (1) be of special humanitarian concern to the United States; (2) meet the refugee definition as set forth in section 101(a)(42) of the INA; (3) be admissible under the [Immigration and Nationality Act (INA)]; and (4) not be firmly resettled in any foreign country” (Martin and Yankay 2014, 2).

analysis in this chapter is focused on IPV-based asylum claims, rather than refugees. All of the most visible applications for asylum by women seeking to escape IPV use the “particular social group” ground as the basis of their claims (Barreno 2011). Often, petitioners will have faced multiple forms of persecution simultaneously, and, while this occurrence can strengthen a given individual’s legal appeal, it not always a factor. In IPV-based cases that do emphasize overlapping grounds, the second ground is most often political opinion (Bookey 2013).

Unlike refugee status, one can petition for asylum either affirmatively or defensively. If one is unauthorized or caught entering without inspection, she can file a defensive petition for asylum and ask for the removal (i.e. deportation) order to be suspended. If one is authorized to be in the country, she can file an affirmative petition for asylum. The Asylum Division of USCIS handles affirmative petitions while the Executive Office of Immigration Review, housed in the DOJ, handles defensive petitions. For both types, asylum seekers have only one year from their date of entry to file their petition (Martin and Yankay 2014). Unlike for refugees, there is not a cap on the number of people who can be granted asylum in a given year (Bruno 2015; Burt and Batalova 2014).<sup>62</sup>

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<sup>61</sup> Legal scholar Karen Musalo (2010) explains that this definition of a refugee/asylee “is understood to require a harm grave enough to constitute ‘persecution’ which has a causal relationship, or bears a ‘nexus’ to the asylum seeker’s race, religion, nationality, membership of a particular social group or political opinion” (Musalo 2010, 121). That is, the relationship between the nature of the harm and the reason for the harm coincidental, it is necessarily causal.

<sup>62</sup> This is in contrast to the way that refugee admittance is handled. The president, in consultation with Congress, makes an annual determination about the refugee admission ceiling—the cap on the number of refugees that can be admitted in a given fiscal year

## Intimate Partner Violence-Based Asylum in the US

Some gender refugee/asylum claims have been incorporated into the US statutory framework since the Refugee Act of 1980. Specifically, “[t]he 1996 Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA] expanded [the] definition [of refugees/asylees] to include persons who have been forced to abort a pregnancy, undergo a forced sterilization, or have been prosecuted for their resistance to coercive population controls” (Burt and Batalova 2014). Legal scholar Talia Inlender distinguishes between two types of gender related violence—gender-specific and gender-based violence. Gender-specific violence refers to the form, as opposed to the motivation, of persecution. That is, a woman can be subject to gender-specific violence like rape, or forced abortion, on political, religious, or related bases. Gender-based violence, on the other hand, is that committed against women *because* they are women, irrespective of the mode of that persecution (Inlender 2009, 357).

The expanded definition in IIRIRA incorporates gender-specific claims but not gender-based claims. For example, it would incorporate a claim by a woman who was forced by government officials to undergo an abortion (a gender-specific form of harm), if that forced abortion was motivated by, for example, that woman’s race. This distinction

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(Bruno 2015). Since 2004, this annual cap on refugees has fluctuated between 70,000 and 80,000. This global cap is then distributed by region. The total cap for FY2015 is 70,000, and the “...regional allocations are, as follows: Africa (17,000), East Asia (13,000), Europe and Central Asia (1,000), Latin America/Caribbean (4,000), and Near East/South Asia (33,000)” (Bruno 2015). The remaining 2,000 slots can be allocated at the president’s discretion in response to a shortfall in a particular region, a geopolitical crisis, or some other exogenous event (Bruno 2015). In the decade that followed the 9/11/01 attacks, the numbers of refugees admitted to the US was consistently lower than the annual caps (Bruno 2015). For example, in FY2006, the cap was set at 70,000 but only 41,223 were granted refugee status. By contrast, the number of refugees admitted in FY2013 and FY2014 came very close to the 70,000-person cap.

is particularly important in the context of IPV because the *motivation* for IPV is not easily incorporated into the existing enumerated grounds—it is often perceived of as a private and personal matter.

In a study of unpublished data of IPV-based asylum claims, immigration attorney and legal scholar Blaine Bookey (2013) demonstrates that the outcomes in these cases are highly inconsistent, and she attributes this to a serious lack of transparency concerning the adjudication of IPV-based petitions (Bookey 2013). In fact, “IJ decisions as well as Asylum Office (AO) and many BIA decisions are not published or available in any publicly searchable database” (Bookey 2013, 109 – 110). This means, she adds, that “[n]o official statistics exist regarding the number of asylum cases adjudicated in the United States that involve domestic violence as a basis for persecution” (Bookey 2013, 117). As legal scholar Joline Doedens (2014) points out, the fact that these decisions are unpublished also creates a barrier for attorneys trying to argue similar cases (Doedens 2014, 129). As an attorney at the Center for Gender and Refugee Studies (CGRS) at the University of California, Hastings College of Law, Bookey was able to access records that are not available to the public.<sup>63</sup> According to Bookey, IJs have been highly

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<sup>63</sup> The CGRS and its attorneys are directly involved in many IPV-based asylum cases. The data for Bookey’s study comes from the CGRS’s database, which is derived directly from the attorneys in these cases (Bookey 2013, 210). While the CGRS dataset is incomplete, her analysis does shed light on some trends. Of the 206 IPV-related case outcomes that she examines, all of which were decided between December of 1994 and May of 2012, 140 petitioners were granted asylum and 63 were denied (Bookey 2013, 119 – 120). Of those decisions, only eight were issued by the BIA while the rest were issued by IJs (Bookey 2013, 120). She finds that “[t]he most common reasons given for denial were the lack of a cognizable social group or the failure to demonstrate nexus to a protected ground” (Bookey 2013, 121). Importantly, she finds that “the absence of applicable norms and the shifting policy positions on the part of DHS have continued to produce contradictory and arbitrary outcomes in domestic violence asylum cases” (Bookey 2013, 147).

inconsistent in their interpretation of DHS briefs and existing precedent. This problem, she argues, has been exacerbated in IPV related cases “because IJ and BIA decisions have received scant review by the Courts of Appeals—the result of a decade-long halt on the adjudication of domestic violence claims at the lower levels—whose decisions are publicly available” (Bookey 2013, 110).

Having the right to petition for asylum is altogether different from having the resources to do so. There are a number of hurdles to access that regularly prevent people from seeking asylum—access to legal counsel, limited availability of *pro bono* attorneys, and the complicated nature of asylum law broadly speaking. As Doedens (2014) points out, asylum lawyers do extensive research and put incredible amounts of time into constructing and arguing each case, which is a burden the vast majority of individual claimants would be unable to bear, even if they happened to have the legal expertise (Doedens 2014, 130). Furthermore, she emphasizes, “since Immigration Court is an administrative court and since immigration law is not considered equivalent to criminal law, individuals in immigration proceedings are *allowed*, but not *entitled*, to have legal representation...” (Doedens 2014, 130). This is significant in light of the fact that, with legal representation, only 54% of applicants were granted asylum in FY2010, compared with 11% without an attorney (Doedens 2014, 130). The stakes could not be higher for asylum-seekers who lose their petitions, which makes remaining in the country without authorization look like an appealing option (Doedens 2014, 130).<sup>64</sup>

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<sup>64</sup> Natalie Oswin’s (2001) focus is on those who are able to apply for asylum, but she reminds us that, while feminist attempts to carve out legal avenues and rights for women seeking asylum have met with some success, those successes are tempered by the reality that most women never make it to the receiving countries to begin with (Oswin 2001, 347).

## **Analyses Beyond the Courts**

Legal scholar Natalie Rodriguez (2011) attempts to move beyond description of adjudicative processes by taking stock of immigration politics more generally. In her account fluctuations across administrations regarding whether or not survivors of IPV can appeal for asylum using the “particular social group” ground can be attributed in part to the broader political positions of the president (Rodriguez 328 – 329). She argues that the tone of court briefs submitted to the BIA by the Department of Justice and the Department of Homeland Security, and the behavior of the respective Attorneys General has directly reflected the distinct political positions of the presidents Clinton, George W. Bush, and Obama with respect to immigration more generally. Both Clinton and Obama publicly expressed more egalitarian views on immigration, which, Rodriguez argues, translated into administrative actions in support of these kinds of asylum claims specifically (Rodriguez 328, 332).

Similarly, the relevant policies of the George W. Bush administration, and the actions of his Attorneys General reflected President Bush’s “... ‘hard-line’ approach to immigration reform” (Rodriguez 329). Rodriguez’s analysis attributes quite a lot to the presidents’ positions on immigration generally, but it does not account for the gendered nature of the issue and the politics that surround it. Her analysis clearly provides valuable insights, it is nonetheless problematic to reduce the issue of IPV-based asylum claims to an issue of immigration politics, particularly given the fact that presidential politics and presidential directives do not necessarily dictate the actions of administrative bureaucrats

or immigration courts.<sup>65</sup> This kind of analysis misses much of the operative discourse embedded in documents pertaining to these cases.

By contrast, Sara McKinnon (2011) focuses on the legal concepts and categories applied in these contexts and how they can be, and indeed are, used by the state for more than just redress of grievances or harms. McKinnon argues that the concepts and categories embedded in asylum law are used to mark certain victims as “good,” and thus deserving of protection and incorporation, and other victims as “threatening” and undeserving of protection (McKinnon 2011, 178). Moreover, she argues, “...women claimants...[can be] appropriated by the state because their ‘otherness’ provides an image that the United States can deploy in demonstrating itself as the ‘good’ state that protects and supports women” (McKinnon 2011, 178).<sup>66</sup> In McKinnon’s analysis, the function of the law goes well beyond its ability to deal with the nuances of given gendered asylum claims. My own analysis in this chapter dovetails with and adds to McKinnon’s account.

### **Public vs. Private Violence**

The meaning of the term “persecution” is not delineated in statutory policy in the US. Given that no US laws pertaining to refugees and asylees actually define the term

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<sup>65</sup> Where a given asylum claim is adjudicated depends on whether the claim is defensive of affirmative. Defensive applications for a asylum (those filed in response to existing removal proceedings) are handled by IJs within the Department of Justice, while affirmative applications for asylum (applications filed prior to any removal proceedings) are handled by asylum officers in the in the Department of Homeland Security (Barreno 267). According to Barreno (2011), there is considerable inconsistency in the standards applied, and the outcomes produced by these two sites of adjudication (Barreno 267).

<sup>66</sup> This argument is similar to that made by political scientist Theda Skocpol (1995) regarding the protectionist policies of what she terms the “maternalist welfare state” (Skocpol 1995).

“persecution,” “arriving at a uniform and consistent definition and interpretation of the term” has been an ongoing legal struggle hashed out in the courts and the bureaucracy (Rodriguez 2011, 320). A generally agreed upon definition has emerged through case law, which regards persecution as harm committed either by the state (in any of its many iterations) or by an entity or person that the state is not able or not willing to control (Rodriguez 2011, 321). A 2009 manual used by USCIS in the training of new asylum officers is more specific, however, explaining persecution as follows:

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the government of the country where the applicant fears persecution, or by a person or group that the government is unable or unwilling to control. The entity that harmed the applicant must be a government actor, or a non-government actor that the government is unable or unwilling to control, or the applicant has not established past persecution (USCIS RAIO 2009, 43).

While the lack of statutory specificity regarding the nature of persecution is potentially problematic, this is not the case merely because it causes confusion with regard to the administrative or judicial adjudication of individual cases. It also raises significant questions regarding the sociopolitical position of certain types of violence. This is particularly true with regard to gendered violence.

Through administrative policymaking and judicial precedent, persecution has very clearly come to signal a set of behaviors (be they violent or otherwise) that are *public* and *political* in nature. They are made public through their relationship to the state. Even when that relationship is defined by the state’s absence or inability—rather than as action explicitly taken by the state in the affirmative—it is implied that it is the responsibility of the state to adequately address these qualifying behaviors. The Ninth Circuit Court’s decision in *Garcia-Martinez v. Ashcroft*, a case that pertained to an asylum petition filed

by a woman who was raped by soldiers in the Guatemalan military, exemplifies this shift in judicial precedent. According to court documents, Garcia-Martinez’s “village [was] targeted by the government for military reprisals due to the residents’ suspected sympathy for the rebel guerrilla forces” (CGRS Brief 2003, 1). Garcia-Martinez’s appeal was initially rejected by the BIA, which claimed that the gang rape she suffered was a personal criminal act, rather than an act of political persecution (Musalo 2010, 121 – 122). Legal scholar Karen Musalo (2010) explains that, in cases involving politically motivated rape, “[n]otwithstanding the political context, it is often argued that the assault was ‘personal’ rather than political” (Musalo 2010, 212).<sup>67</sup> The Ninth Circuit Court’s decision to overturn the BIA’s ruling in this case signaled a considerable shift in judicial precedent toward an understanding of persecution as public and political in a more general sense. More specifically to the issue of sexual violence, the Court’s decision was legally binding recognition that rape is, at least in some cases, public and political, rather than personal and private (Musalo 2010).

If we recognize IPV as symptomatic of, or partially constitutive of, a larger sociopolitical system of gender oppression (Davis 2003, 30 – 31), it seems intuitively clear that it ought to be considered a form of persecution per the USCIS definition. However, as Inlender (2009) points out, “[g]ender is conspicuously missing from among [the enumerated] categories” —race, religion, nationality, political opinion, and membership in a particular social group—on which one can petition for asylum (Inlender 2009, 356). That is, in the US, one cannot file a petition for asylum on the grounds that she has been persecuted because of her gender. As the Board held in *Matter of Kasinga*—

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<sup>67</sup> See Chapter I for a detailed treatment of the relationship between personal/private/domestic on the one hand and political/public on the other.

a case involving female genital cutting (FGC)—“an applicant can establish membership in a PSG [particular social group] defined by gender *in combination with* other characteristics,” but not gender alone (Bookey 2013, 112 – 113, emphasis added). Gender alone has been held to be too broad a category to be cognizable.

### **Gender as a Particular Social Group**

The halting and qualified way in which IPV asylum claims are treated in the US is by no means a foregone conclusion. In 1991, the UNHCR published a document entitled, “Guidelines on the Protection of Refugee Women,” in which it offered strong suggestions to states regarding the treatment and consideration of women refugees and asylees and their legal petitions. In these guidelines, the High Commissioner recommended that all states accept “...the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status” (UNHCR Guidelines). The document clarifies that, although gender was not among the original five enumerated grounds, gender oppression is significant enough to warrant the incorporation of gender per se as a particular social group, therefore allowing for claims of gender-based persecution. Noting that women make up that large majority of global refugees, it urges that, “...international protection of refugee women must be understood in its widest sense” (UNHCR Guidelines). The Guidelines do not advocate the addition of gender as one of the

enumerated grounds, however, because “a proper interpretation of the refugee definition ‘covers gender-related claims’” (Musalo 2010, 51).<sup>68</sup>

The US has declined to incorporate the UNHCR guidelines at any point over the course of the last two and a half decades, claiming that gender, as a social group, is too broad to meet the particularity standard. That is, the category “gender” is too broad and represents too large a subset of people (Inlender 2009). However, the US’s course of (in)action in this regard is not a foregone conclusion. Soon after the UNHCR released these updated guidelines—in 1993—Canada issued its own new set of guidelines relating to gender-based claims. The new Canadian guidelines went even further, recognizing domestic violence<sup>69</sup> in particular as a ground on which one can petition for asylum. It is neither impossible nor without precedent to accept IPV as the basis for asylum claims. On the contrary, Canada has been doing just this for over two decades—since 1993 (Musalo 2010).

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<sup>68</sup> The debate about gender related claims is not new. The 1991 UNHCR Guidelines were not the first high-level recognition of the international refugee law’s gender problem. In 1984, for example, both the European Parliament and the Dutch Refugee Council issued directives calling upon policymakers to incorporate sex as a formal ground (Immigration and Refugee Board Guidelines 1996, 13). The Dutch Refugee Council’s directive reads as follows: “It is the opinion of the Dutch Refugee Council that persecution for reasons of membership of a particular social group, may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection” (Immigration and Refugee Board Guidelines 1996, 13). The Council emphasizes the institutionalized nature of the gender discrimination while also recognizing that the distinction between public and private actors obscures the larger sociopolitical nature of the system.

<sup>69</sup> The Candia guidelines use the term “domestic violence.”

Since implementing the new policy, Canada has not seen an increase in the number of refugees and asylees admitted. In fact, the number of women refugees in Canada dropped significantly in 1993. From 1993 to 2013, the number of women refugees has fluctuated normally between 9,000 and 17,000, with a median number of 12,192 refugees admitted per year (Canada Department of Citizenship and Immigration 2014). Given that it does not share a border with a relatively-poorer country, Canada does not face the same immigration pressures as the US. Nonetheless, the policy shift did not lead to an opening of the proverbial “floodgates.” This is a point that DHS itself made in the *Matter of L-R*- brief stating that “[a]ccording to Canadian authorities, Canada has not experienced a surge of [IPV] cases. Canada received a total of 315 gender-related asylum claims in 1995 (including all other types of gender related claims as well as those involving domestic violence), 270 such claims in 1996, 182 in 1997, 218 in 1998, and 175 in 1999” (DHS Brief *Matter of L-R*- 2009, 13).

Inlender (2009) takes issue with the notion that gender’s incorporation as a particular social group would suffice. She argues that, even if gender is considered a cognizable particular social group, the five enumerated grounds on which one can file for refugee status or asylum still cannot adequately protect women from gendered violence in all instances (Inlender 2009, 356). Inlender argues that the existing categories are sufficient for dealing with gender-specific violence, but that gender-based violence cannot be appropriately addressed without the creation of a sixth ground for asylum claims. (Inlender 2009, 357). That is, rather than incorporating gender into the “particular social group” category, it should be added as its own enumerated ground.

It is beyond dispute that favorable judicial precedent and/or statutory reform would likely benefit some, or even many survivors seeking relief. However, in focusing on these elements, we miss something about the larger institutional structures at play, and the ways in which those institutions wield and distribute power. Rather than viewing the state in these cases as inadequate or reactionary, we ought to recognize that the state's action and inaction in cases of women seeking asylum from IPV as integral to the continuation of IPV. Moreover, as I argue in Chapter V, we need not understand the state's use of its power to exclude these survivors—deny asylum, deport, or detain—as predetermined, necessary, or just.

### **Subject Formation and Intersectionality**<sup>70</sup>

Of course, for women seeking asylum on account of IPV, issues pertaining to intersectionality are front and center. An asylum-seeker's experiences of IPV and of the state are informed not only by her gender, but also by her sexuality, marital or relationship status, immigration status (whether she is a legal permanent resident, an unauthorized immigrant, a visa-holder, and so on), race, class, language, level of education, and many other intersecting factors and identities. Economic vulnerability, language barriers, lack of access to information and resources regarding the availability of asylum or other legal remedies, and the ever-present possibility of deportation back to her abuser all converge to inform, and even partially constitute an asylum seeker's unique experience of gendered violence.

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<sup>70</sup> See Chapter I for a detailed discussion of the intersectionality literature used in this analysis.

Policy administration consists of a complex and multifaceted web of actors, sites of adjudication, and adjudicative apparatuses. But, as Wendy Brown (1997) argues, it is also an important site of subject formation. Policy administration is collectively a site of affirmative state action, not merely passive implementation. Questions remain about the law's role in subject formation, and whether or not intersectionality, as an analytical tool for understanding complex subjects and forms of oppression, gets us to where we would like to be. Brown takes issue with the idea that we can simply account for a multitude of intersecting identities, because the "intersection" metaphor itself cannot account for the reality of the unified and un-dissectible subject. Brown explains:

On one hand...subjects of gender, class, nationality, race, sexuality, and so forth, are created through different histories, different mechanisms and sites of power, different discursive formations, different regulatory schemes. On the other hand, we are not fabricated as subjects in discrete units by these various powers: they do not operate on and through us independently, or linearly, or cumulatively (Brown 1997, 86).

She goes on to argue that, "to treat various modalities of subject formation as additive...is to elide the way subjects are brought into being through subjectifying discourses" (Brown 1997, 87). If we look at the law and policy administration as merely reactionary actors that have failed to account for intersecting forms of oppression, we miss their capacity for active subject formation.

As Brown points out, issues of intersectionality are present in the policy process on multiple levels. She argues that the law's floundering when it comes to intersectionality are likely due in part to the difficulties of understanding subjection, and to the law's inability to respond to that complexity.

We appear not only in the law but in courts and public policy either as (undifferentiated) women, or as economically deprived, or as lesbians, or as racially stigmatized, but never as the complex, compounded, internally diverse

and divided subjects that we are. While this could be seen as a symptom of the law's deficiency, a sign of its ontological clumsiness and epistemological primitivism, more significant...is what it suggests about the difficulty of analytically grasping the powers constitutive of subjection, a difficulty symptomatized by the law's inability either to express our complexity or to redress the injuries carried by this complexity (Brown 1997, 92).

In the case of IPV-based asylum claims, this issue is further complicated by the fact that the creation of elaborate subject positions is only necessary in light of the US's refusal to incorporate gender persecution as such into the legal framework. That is, the question in this case is not merely one of correctly describing a given petitioner's subject position or subjection in order that she may access immigration relief in the form of asylum. In the sections that follow, I analyze both the Obama administration and the BIA's moves in this regard.

### **Department of Homeland Security Briefs (Case Selection)**

Two primary considerations went into my decision to analyze the specific documents and cases that I do in the section that follows. The first, and most significant, is the fact that very few court documents relating IPV-based asylum cases are publically available, as discussed above. Lower court decisions are not part of the public record, and very few appellate court decisions have been made available (Bookey 2013). The second consideration was the relative impact of the documents on the adjudicative landscape.

Alvarado Peña's case stretched across three presidential administrations, each of which exerted some influence over the outcome. In 2004, after Attorney General Ashcroft remanded Alvarado Peña's case back to himself, DHS submitted a brief arguing that her asylum petition should be granted. As in the case of the DHS brief filed in *Matter of L-R-* in 2009, which I discuss in detail below, DHS suggests a particular social group

construction that it believes would permit Alvarado Peña to gain asylum under the existing structure of judicial precedent.<sup>71</sup> However, in the 2004 brief, DHS suggests that Ashcroft not hand down a precedent-setting decision. Instead, DHS asks him “to remand [the] case to the Board with instructions to grant asylum without an opinion” until the Department of Justice finalizes the proposed domestic violence asylum regulations (DHS Brief in *Matter of R-A-* 2004, 43). Ashcroft did just that, but the Board did not grant Alvarado Peña’s petition. Instead, after deciding that there was a need for more evidence, the Board remanded the case to an IJ (Musalo 2010 59 – 60).

An IJ eventually granted Alvarado Peña asylum, with DHS’s blessing,<sup>72</sup> but that decision was not precedent-setting. Although it was filed in a different IPV-based case, the 2009 DHS brief in *Matter of L-R* ended up being central to the IJ’s 2009 decision to grant Alvarado Peña asylum in a way that the outdated 2004 DHS brief was not (Musalo 2010, 60). For this reason, I focus my analysis on the 2009 DHS brief, which is both illustrative and ultimately more impactful.

Unlike the DHSs’ briefs, the BIA’s holding in *Matter of A-R-C-G- et al.*, is precedent-setting. Although it is too soon to tell how that precedent will play out in the lower courts, the case is an undeniably significant new development. Moreover, the BIA’s holding in this case mirrors the DHS brief in many respects and is therefore

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<sup>71</sup> The brief states: “DHS argues that ‘married women in Guatemala who are unable to leave the relationship’ is the proper social group formulation in this case” (DHS Brief in *Matter of R-A-* 2004, 19)

<sup>72</sup> On October 28, 2009, DHS officially responded to Alvarado Peña’s supplemental filings to the IJ. In its short response, DHS maintained that Alvarado Peña was eligible for, and should be granted asylum (DHS Response in *Matter of R-A-* 2009).

centrally important to my analysis of subject positions in IPV-based asylum cases more broadly.

### **Obama Administration Supplemental Brief In *Matter Of L-R-***

Proposed changes to DOJ guidelines drafted in the final weeks of President Clinton's second term would have made gender-based asylum claims far easier, but they were never adopted.<sup>73</sup> DHS's 2009 brief was not intended to be a resounding endorsement of asylum for IPV survivors. It states that, "...DHS accepts that *in some cases*, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that the abuse was or would be persecution on account of such membership. This does not mean, however, that every victim of domestic violence would be eligible for asylum" (DHS Brief *Matter or L-R-* 2009, 12, emphasis added). While, at first blush, this change seems to be a step closer to a more ethical policy, I argue that it further entrenches problematic apolitical interpretations of IPV. Moreover, it yet again declines to recognize gender itself as a "particular social group" toward which gender-based and gender-specific violence (as defined above by Inlender) is routinely directed.<sup>74 75</sup>

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<sup>73</sup> "The proposed regulations retain the definition of 'particular social group' from *Matter of Acosta* concerning the existence of a 'common, immutable characteristic' [but] indicate that gender and marital status may fall under this definition..." (Barreno 2011, 239).

<sup>74</sup> Inlender argues that "...the creation of a gender ground in asylum law need not presume that all women the world over suffer equally from state-sanctioned ruled and violence that targets women. Rather, it would make eligible for relief those women who are able to demonstrate that they fear persecution for any number of gender-based reasons..." (Inlender 2009, 370).

The narrow, hyper-specific subject formations endorsed in the brief, while they may indeed apply to some women, perpetuate and legitimate the notion that, until proven otherwise, IPV is a private and apolitical issue rooted in the specific circumstances of the people involved. This as opposed to one that takes into account broader sociopolitical acceptance of gendered violence, as well as other systemic factors. Furthermore, this obfuscates the role of state-actors in the continuation and remediation of IPV, both in the US, and in the countries from which these specific asylum-seekers come. This distancing from the state also allows for an interpretation of the amended policy as an inadequate remedy at worst, and incremental progress at best. That is, it obscures the ways in which the state implicated in perpetuating the conditions under which this kind of violence continues to thrive.

#### *Subject Formation and the “Particular Social Group” Ground*

The DHS brief to the BIA in *Matter of L-R-* lays out the administration’s position that it is appropriate to grant asylum in some domestic violence cases, provided that all relevant criteria have been met. The brief, which the department understands as

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<sup>75</sup> Though she does not look at operative subject formations themselves, Mattie Stevens (1993) points out that “[t]he... approaches to recognizing women's refugee claims rely on methods that place a great deal of discretion in the hands of judges who are largely white, male, conservative, and unelected. These approaches do not openly challenge the biases against women inherent in the process of petitioning for refugee status” (Stevens 1993, 214). She goes on to argue that “... merely incorporating gender-based violations into the already existing categories is an insufficient approach to removing the inherent biases women currently must overcome in order to obtain refugee status” (Stevens 1993, 214). Ultimately, she argues that this issue can only be adequately addressed through the addition of a sixth ground—gender—on which women can apply for asylum (Stevens 1993). Although I do not outline the difference here, the argument for gender as a sixth ground, and the argument for gender as a “particular social group” are distinct (Inlender 2009).

constituting guidance for litigants and adjudicators (DHS Brief *Matter or L-R-* 2009, 5), clarifies: "...members of a particular social group must share a common immutable or fundamental trait, must be socially distinct or 'visible,' and must be defined with sufficient particularity to allow reliable determination about who comes within the group definition" (DHS Brief *Matter or L-R-* 2009,16). Contrary to the position taken in the brief, I argue, with Barreno, that gender itself meets all of these criteria (Barreno 2011, 255 – 256). Furthermore, although the US has not adopted this stance, the UNHCR's Guidelines on the Protection of Refugee Women recommends that, "gender should be considered...a social group for the purpose of determining refugee status" (UNHCR Guidelines 1991).

The brief deviates from tradition, however, in that it goes beyond critique of the respondent's own articulation of her "particular social group," which was serving as the basis for her asylum claim. Instead, DHS offers two alternative formulations that it sees as more appropriate and better suited to her purpose. The brief rejects L-R-'s articulation—"Mexican women in an abusive domestic relationship who are unable to leave"—on the grounds that it is "impermissibly circular" because it is "centrally defined by the existence of the abuse they fear" (DHS Brief *Matter or L-R-* 2009, 5, 6). The alternative formulations they pose are "Mexican women in domestic relationships who are unable to leave," and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" (DHS Brief *Matter or L-R-* 2009, 14).

While explicitly intended to assist L-R- in her appeal, these alternative formulations raise some important questions about subject formation, and the implications thereof. What does the articulation of this kind of painfully specific subject

gain us in the context of asylum seekers trying to escape IPV? Though this kind of specificity serve to create space for these claims within existing asylum law, as the brief claims, it still miss the larger picture, creating subjects so contrived that they bear little resemblance to the women whom they purport to describe. Wendy Brown argues that,

to treat various modalities of subject formation as additive...is to elide the way subjects are brought into being through subjectifying discourses. We are not simply oppressed but *produced* through these discourses, a production that is historically complex, contingent, and occurs through formations that do not honor analytically distinct identity categories (Brown 1997, 87).

If we take seriously Brown’s argument that subjectifying discourses produce, not merely oppress the subjects to which they apply, then what is at issue in the formation of asylum seekers’ “particular social group” in this context is not merely its functionality (Brown 1997, 87). That is, the subject formations used in these appeals and those found in the DHS brief are not merely benign legal categories through which the state can offer protection. By virtue of the particularity and specificity of the subject formations under the “particular social group” category, the DHS brief fails to recognize the political, systematic, and endemic nature of IPV against women. Likewise, the functionality of these subject formations, vis-à-vis the adjudication of any given asylum petition and during any given administration, serve to obscure the systemic, and ubiquitous nature of this kind of gendered violence.

In the DHS’s first alternative formulation—“Mexican women in domestic relationships who are unable to leave”—the violence committed against L-R- rises to the level of persecution only by virtue of the ways in which gendered violence is itself qualified. That is, since gender alone is not accepted as a “particular social group” under US law, and IPV is not a ground on which one can claim asylum under US law, the acts

of gendered violence against L-R- constitute “persecution” only by virtue of the ways in which that violence is qualified—i.e. that she was in a domestic relationship, and that she was unable to leave that domestic relationship. The subject positions embedded in these formulations *articulate*, rather than simply abide by, a certain politics around IPV. Embedded in these formulations is the notion that IPV is not in itself political, and only becomes political when the woman is in a domestic relationship and unable to leave. This in turn requires that those seeking to frame it as persecution do a kind of conceptual gymnastics in articulating their subject position—the particular social group to which they belong, and on account of which they need to demonstrate that they have been subject to persecution.

The exclusivity of the category “domestic relationship,” which is found in both of the alternative articulations of L-R-’s “particular social group,” privileges the institution of marriage in such a way as to delegitimize violence in non-marital intimate relationships—namely, same-sex relationships in places where same-sex marriage is not legal, other non-marital intimate relationships that may or may not involve co-habitation, and so on. Citing the need for “particularity” in the articulation of the “particular social group,” DHS explicitly accepts the conceptualization of “domestic relationships” found in Section 237(a)(2)(E)(I) of the Immigration and Nationality Act which defines “crimes of domestic violence” as being

against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic of family violence laws of the jurisdiction where the offense occurs (DHS Brief *Matter or L-R-* 2009, 19, citing Section 237(a)(2)(E)(I) of the Immigration and Nationality Act).

This definition relies heavily on heteronormative<sup>76</sup> ideas about intimate relationships, and on the institution of marriage, which is closely tied to the so-called “separate spheres” ideology—the idea that there is a clear distinction between the public and private “spheres,” and that marriage and family exist in the “private sphere.” In the brief’s articulations, L-R-’s subject is *itself* partially defined by her position outside the public view (i.e. that she is in a “domestic relationship” from which she cannot leave). That is, violence was committed against her not as a woman, but as a woman out of view, who has been stripped of agency. The Department’s inclusion of this conceptualization of what constitutes a “domestic relationship” in its articulation of L-R-’s “particular social group” also obfuscates the role of state actors in the remediation of IPV that does not meet these criteria, regardless of whether or not it *ought* to be understood as persecution.

This is particularly important in light of the fact that asylum seekers must demonstrate state-sponsorship in order for the acts committed against them to rise to the level of persecution. Or, when it is perpetrated by a non-state actor, the applicant must demonstrate the state’s unwillingness or inability to address that persecution. Inlender argues that “women—who often suffer at the hands of ‘private’ actors, including family and local community member whose behavior in fact is condoned by the ‘public’ sector—are saddled with the extra evidentiary burden of ‘proving that the government would be unable or unwilling to aid them’” (Inlender 2009, 361). She goes on to argue that “similarly, *gender-based* claims risk being denied because ‘privately’ held beliefs that lead to gendered or non-gendered forms of harm must be shown to be government-

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<sup>76</sup> While same-sex relationships are not the focus of my analysis, this limitation is nonetheless important as heteronormativity has certain disciplining effects on all relationships, including opposite sex relationships.

sanctioned in order to be cognizable” (Inlender 2009, 361). The DHS formulations compound this problem by defining the petitioner’s subject itself as out of the public’s view. Put differently, according to the DHS formulations, in order for the acts of violence committed against her to rise to the level of persecution, her subject is defined as out of the public’s view.

Given that this discursive move is circular, it closes off the legal space in which IPV could be recognized as public persecution. It is circular because petitioners must convince adjudicators that the harm they suffered is public—a definitional characteristic of persecution, according to the DHS—yet in so doing, they must accept a description of their subject(ion) that reifies an understanding of that same harm as private, domestic, and out of public view. Any grant of asylum on account of IPV is therefore an exception to the rule. The significance of that exception can be interpreted in two ways—as an open door through which IPV survivors can gain access to an ameliorative apparatus that is otherwise unavailable to them; or, a re-instantiation of archaic patriarchal arguments about the inherently private nature of IPV, which operates as a mechanism by which gendered systems of power and violence are reinforced and normalized. While these two interpretations are not mutually exclusive, they represent distinct political and institutional priorities. If, however, we accept and act on the first interpretation—that the new legal space created by the DHS brief is progress per se—we risk losing sight of the potentially damaging consequences of abiding by the terms of gendered institutions.

The second proposed particular social group, “Mexican women who are viewed as property by virtue of their positions within a domestic relationship,” also leans heavily on the category “domestic relationship.” Beyond that, however, this articulation moves in

a different direction. It distinctly describes a gendered relationship that looks very much like that historically established by marriage—i.e. and institution by which men took ownership of women as property. Given that, at least in Mexican law, marriage no longer operates as an explicit institution of ownership, the use of this language clearly signals the administration's recognition that gender inequity can be (and is) deeply engrained socially. However, in doing this, the articulation unnecessarily obscures the persecutory relationship at play. While it may very well be true that L-R-'s husband committed acts of violence against her because he viewed her as his property, and/or that local authorities refused to intervene for that same reason, that information is incidental to the larger system of gender oppression at play.

Rather than contesting the notion that IPV is apolitical, or that it does not rise to the level of persecution in its own right, the new formulations actually legitimate and perpetuate these notions. In her discussion of subject formation, Brown describes a paradox, which is relevant here:

...despite the diverse and often even unrelated formations of the subject according to race, class, nation, gender, and so forth, subject construction itself does not occur in discrete units as race, class, nation, and so forth. So the model of power developed to apprehend the making of the particular subject/ion will never accurately describe or trace the lines of a living subject. Nor can this paradox be resolved through greater levels of specificity in the models themselves (Brown 1997, 93 – 94).

The increasingly specific subject formations found in the DHS brief move us further away from accepting IPV as a legitimate ground for asylum claims, and further away from accepting gender as a cognizable “particular social group,” precisely because of their hyper-specificity. This, however, is obscured by the fact that there is indeed some

small number of women—most notably L-R- herself—in some specific set of circumstances for whom this formulation could potentially work.

**Board of Immigration Appeals Interim Decision in *Matter of A-R-C-G- Et Al.***

Legal scholars and activists have long argued that there was a desperate need for a precedent-setting ruling granting an IPV asylum claim (e.g. Barreno 2011). Without precedent, and in the absence of statutory reforms, they were subject to the variegated decisions handed down in lower courts. While, as Alvarado Peña’s case demonstrated, it was possible to get a favorable ruling in the lower courts, those rulings provided no foundation or guidance for the construction of future cases. In August of 2014, the BIA provided just such a precedential ruling in *Matter of A-R-C-G- et al.*<sup>77</sup> Armed with the DHS brief from *Matter of L-R-*, lawyers and advocates were successful in convincing the BIA that the respondents experienced persecution on account of their membership in a particular social group. However, the Board did not grant the respondents asylum, instead remanding the case back to the IJ to resolve the outstanding question of the statutory eligibility. The precedent in this case, then, is the notion that IPV can rise to the level of persecution when/if the subject(ion) is outlined in such a way as to be a satisfactory particular social group (26 I&N Dec. 388, BIA 2014).

In this case, the BIA adopts a formulation of the respondents’ particular social group that is very similar to that articulated in the DHS brief. The Board’s holding was as follows:

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<sup>77</sup> In this case, it was the respondents who appealed the IJ’s ruling denying asylum.

We find that the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship” (26 I&N Dec. 388, BIA 2014).

Much like in the DHS brief, the Board constructs a complicated social subject position for the respondent. However, unlike the DHS, the Board explicitly relies on the concept of marriage. While the DHS’s formulation uses the position “domestic relationship,” which was derived for elsewhere in immigration law, the Board is narrower still.

Marriage is an established legal institution, and the term leaves little room for interpretation.<sup>78</sup> Political scientist Priscilla Yamin (2012) argues that, as a political institution, marriage “has a broad and discernible purpose; sets norms rules and roles; and clearly distinguishes between those inside the institution and those out” (Yamin 2012, 7). Given that this is a precedent-setting decision, the use of marriage to define her particular social group is all the more significant, as it could have a limiting effect regarding the subject formations permitted in future cases. This is especially worrisome for those who are suffering abuse in non-marital and/or same-sex relationships.

In two previous cases, the Board “...held that an applicant seeking asylum based on his or her membership in a ‘particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question” (26 I&N Dec. 388, BIA 2014). However, they insist that, “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group” (26 I&N Dec. 388, BIA 2014). This is significant in the context of the Board’s refusal to accept gender as a particular social

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<sup>78</sup> Yamin argues that marriage is a political institution as it “constructs multiple hierarchies by shaping the meaning and practices of the obligations and rights of citizens” (Yamin 2012, 7).

group. In this case—and in line with the Board’s holding in *Matter of Acosta* that “sex” is an immutable characteristic—the Board finds that “...the group [to which the petitioners belong] is composed of members who share the common immutable characteristic of gender” (26 I&N Dec. 388, BIA 2014). However, given their position that “gender” by itself does not have sufficient particularity to define the particular social group, the lead petitioner needed to add characteristics to her subject position, or “particular social group.” To this end, the Board also finds that it is possible for marital status to be an immutable characteristic—one that a person either cannot change, or cannot reasonably be expected to change in order to avoid persecution. In this case, the Board treats these characteristics—gender and marriage—as additive, but still insufficiently precise.

The final addition to the lead petitioner’s subject position does not concern an identity characteristic in the way that we might think of gender or marriage. Instead, it describes a relationship to agency. More precisely, it describes a social position in which group members have no agency. They are “unable” to leave their relationships, and this ascribed inability is treated as an identity-conferring characteristic of the group. However, the subject(ion)s being posited in the Board’s holding are not mere description of a state of powerlessness in the face of oppression. On the contrary, the petitioner is tasked with positioning herself as stripped of all agency, and therefore in need of the US state’s protection. Moreover, the group is then partially defined by a symptom of their oppression, a move that is characteristic of victim blaming in other contexts as well. The stated purpose of creating subject position like this one is that it will allow for the recognition of IPV-based claims. Yet, this added “characteristic” abstracts even further

from a recognition of IPV as a gender-based crime, and it accomplishes its task only in the face of the Board's refusal to accept it as such.

In discussing the lead respondent's claim that she was subject to IPV on account of her membership in the particular social group "married women in Guatemala who are unable to leave their relationship," the BIA argues that, "[i]n evaluating such claims, adjudicators must consider a respondent's own experiences, as well as *more objective evidence* such as background country information" (26 I&N Dec. 388, BIA 2014, emphasis added). Here again, as is often the case, women's credibility as witnesses to the violence committed against them is questioned. In this case, it is drawn into question through the BIA's juxtaposition of a women's experience with "more objective evidence." The Board understands its role in defining the petitioner's particular social group as *creative*, rather than descriptive. The holding states that, "[i]n some circumstances, the terms can combine to create a group with discrete and definable boundaries" (26 I&N Dec. 388, BIA 2014). Yet the Board juxtaposes "experience" with "objective evidence" when discussing the respondent's burden of proof. Even in the context of its explicit recognition that the formulation of these subject positions is creative rather than descriptive, the survivor's experience is treated as questionable evidence. The survivor's testimony, then, is treated as a "she said" in the absence of an opposing "he said," which is ultimately the position taken by the state.

The success of her claim rests in part on her ability to convince the BIA that the violence committed against her was public violence, rather than a private matter between two private individuals. In not accepting the profoundly public nature of so-called "private" violence, like IPV, the onus is placed on each individual petitioner to position

the violence committed against her vis-à-vis the state. That is each petitioner, on a case-by-case basis, must convince US adjudicators that her case is an *exception* worthy of addressing. Yet, as feminist scholars have been arguing since the 1970s, the relegation of IPV and child abuse to the so-called “private sphere” (juxtaposed with some other “public sphere”) is not merely and inaccurate representation of the public nature of that violence, it is itself a factor in the continuation of that violence (Schneider 1994; Okin 1989; Okin 1998).

This decision was the first of its kind in the US, and it clearly opens up new possibilities. However, it suffers from the same inadequacies of other non-statutory policies—that is, it is much more susceptible to change and unfavorable interpretation—and it is an expression of the same incrementalist approach to recognizing IPV as persecution as the DHS brief in *Matte of L-R*. As I argue in the next section, these seemingly progressive moves are subject to another interpretation as well, and it is one that moves us further from recognition of gendered violence as persecution.

### **Gendered Institutional Violence**

Article 33 of the 1951 UN Convention Relating to the Status of Refugees codifies, as binding international law for signatory states, the so-called principle of “non-refoulement.” The Convention states: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion” (UN Convention, Art. 33(1)). Miller, Keith, and Holmes argue that this “core principle of *non-*

refoulement underpins the international refugee regime” (Miller, et al. 2015, 5). Setting aside the question of international law’s efficacy broadly speaking, the US legal framework concerning refugees and asylees mirrors the Convention on most counts. A fundamental feature of US asylum law is that one need not have authorization to be in the country when she files a petition for asylum. When someone files a defensive asylum petition, her removal from the country is deferred until the claim is resolved—until it is determined whether or not she is in fact fleeing persecution. This mechanism prevents the asylum-seekers from being deported back to their persecutors, and is one of the ways that the principle of non-refoulement manifests itself in US domestic law.

The idea behind the principle of non-refoulement is that, to return a refugee or asylee back their persecutor(s) is to do them a grave harm—the returning state makes it possible for the persecution to begin again, and can therefore be seen as partially responsible for the persecution that follows. Refoulement is not merely negligence or complicity; it is, very precisely, harm in itself. Moreover, it is self-reflective harm, by definition. The act of refoulement is an act committed against someone who has the right to be recognized as a refugee or asylee—if a state returns a person that it recognizes as a refugee or asylee, it is necessarily committing the harm inherent in refoulement self-reflectively. I argue, however, that to deny that someone is a legitimate refugee or asylee when they ought to be recognized as such—irrespective of whether or not that state chooses to grant asylum or refuge—does not absolve said state of responsibility for the harm of refoulement.

The force of my argument here is not that the US is in violation of international law when it deports IPV-based asylum seekers back to their abusers, though that may be

the case. Instead, it is that the decision to deny the public and persecutory nature of IPV per se—an act which might seem to absolve the US state of responsibility for harm committed against IPV survivors upon their return—is itself harm equivalent to the harm of refoulement. In this case, we can see the self-reflectiveness of the state not in the denial of certain IPV-based claims, but in the *acceptance* of other IPV-based claims. The DHS brief and the BIA have both clearly acknowledged that “in some cases” IPV can serve as the basis for grants of asylum. Each institution made it clear that they were not conceding that IPV *qua* IPV is persecution, as evidenced by their insistence that only subject(ion)s abstracted from the acts of gendered violence themselves could form the basis of successful claims. However, the cases for which they have made these allowances are not exceptional or unique—they are quintessential, representative of precisely the systemic and public nature of IPV as a sociocultural phenomenon. Therefore, we can see the acceptance of these claims as *de facto*—though perhaps unintentional—recognition that IPV *ought* to be considered persecution in and of itself.

The refoulement of women seeking asylum on account of IPV is an act of gendered institutional violence. It is violence on account of its likely consequences—the continuation of the persecution that motivated the asylum claim in the first place. It is institutionalized by the lack of statutory acceptance of gender-based violence as persecution, and by the judicial precedent now governing the adjudication of these claims. And it is gendered because IPV is gendered—predominantly perpetrated by men, and suffered by women and gender minorities.<sup>79</sup>

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<sup>79</sup> The term “gender minorities” here refers to gender non-conforming and transgender individuals.

To understand the violence of this particular exercise of state power as existing only in individual acts of deportation or refoulement, however, is incomplete. The justificatory basis for those deportations lies in the denial of asylum for all IPV survivors who are unable to successfully establish their membership in a satisfactory “particular social group.” Petitioners are tasked with demonstrating the public and persecutory nature of the violence committed against them, to representatives of a legal system that explicitly does not recognize persecution on account of one’s gender as legitimate grounds for an asylum claim. Therefore, we ought to understand the institutional hurdles placed in front of these petitioners as gendered institutional violence as well. The acceptance of certain claims *as exceptions* to the unchanged rule legitimates this exclusionary system, even as it extends the protection of asylum to a lucky few. The institutional recognition that there exist IPV-based asylum claims that ought to be granted demonstrates an awareness of the persecutory nature of IPV in principle. The denial of other claims, and the refoulement of other petitioners, viewed in the context of this awareness, ought to be understood as institutional violence committed self-reflectively.

## **Conclusion**

The 2009 DHS brief in *Matter of L-R-* and the 2014 BIA holding in *Matter of A-R-C-G- et al.* have been taken by many to signal a significant shift toward a more ethical asylum policy for survivors of IPV. However, the alternative subject formations articulated in both the brief and the Board’s holding, functional though they may be in particular cases, rely heavily on a laundry list of specific descriptors, each of which moves further away from recognizing gender itself as a “particular social group,” and

IPV as a cognizable form of persecution. These formulations further entrench and legitimize an apolitical conceptualization of IPV, which serves to obfuscate the role of the state and state actors in its continuation and remediation. As a result, the amended policy acts to perpetuate, rather than contest, the conditions under which IPV continues to thrive.

The Board's precedent-setting ruling in *Matter of A-R-C-G- et al.* concedes that, "in some cases," IPV is persecution, though it maintains the extraordinary institutional hurdles to access. Viewing the US state's actions in light of the principle of non-refoulement permits a different understanding of the relationship between the state and the continuation of IPV. DHS and the Board's concessions that IPV can be understood as persecution changes the way we ought to conceptualize the deportation of IPV-based asylum-seekers for whom the institutional barriers were insurmountable. The harm constitutive of refoulement is self-reflective, and in the case of IPV-based asylum, it is decidedly gendered in its effect. On account of this, we ought to understand the multidimensional state actions—deportations, grants of asylum, and denials of asylum—in these cases as gendered institutional violence, committed self-reflectively. When viewed through this lens, we can see the acceptance of some IPV-based asylum in this particular way as moving us further away from a more just and ethical asylum policy.

## CHAPTER V

### CONCLUSION: CENTERING PERIPHERAL VIOLENCE

One of the central contributions of this dissertation is in drawing together two cases that are generally treated as analytically and politically distinct—IPV based asylum, and IPV against immigrants in the US. These two cases are adjudicated differently by the state; they are the subjects of separate policies; and scholars analyze them separately. There are, however, some significant and fundamental ways in which these cases can be viewed as reflective of the same phenomenon and reliant on the same set of structuring rationales. This chapter examines the connections and differences between these cases.

#### **Case Comparison: Institutional Location**

There are a number of important differences between these cases, one of the more prominent being the institutional focal point of each. Chapter III focuses on Congress and the bureaucracy, while Chapter IV focuses on the immigration courts and upper echelons of presidential administrations. These institutions operate differently from one another, serve different functions, are bound by (some) different sets of rules and norms, and operate on different mandates. These institutional sites do, however, share some important commonalities; in the broadest sense, each operates on the authority of the larger state institutional structure, each wields the power and authority of the state in some way, and each engages in some level of policymaking (broadly defined) and discretion. On account of this, each institutional location is, at least potentially, a site at which the state can and does change, exert authority, and converge with the agentic

capacities of individuals and collectives thereof. The content of this confluence manifests in dissimilar ways—e.g. a district attorney’s refusal to sign a U visa applicant’s certification of cooperation forms; a Board of Immigration Appeals ruling permitting an IPV-based asylum claim as an exception to existing asylum law; or a congressional body’s decision to limit immigration relief for immigrant IPV survivors. However, even in light of these differences, the two cases share similarities that are both empirically and theoretically important, which I address below.

As discussed in Chapter I, I conceive of the state as a plethora of deeply interdependent, overlapping, and mutually constitutive sub-institutions, each of which is composed in part of sets of rules and norms that govern the behavior of those operating within them as well as those over whom they have power and authority. Moreover, the state as an overarching institution and the sub-structures of which it is comprised are both subject to, and partially constituted by the agency of individuals (and collectives thereof) operating within them (Giddens 1981; Sewell 1992; Young 2011). That is, while an institution has profound disciplining effects on those acting on its authority, they are nonetheless able to exert agentic pressure. That agency is itself partially constitutive of the institution from which the agent derives her authority, even when it is expressed as institutional transformation or reform. An emblematic example of this relationship is the capacity (and authority) of members of Congress to participate in the making, remaking, and/or dissolution of the rules, laws, and norms that partially comprise the institution(s) of which they are a part, and from which they derive their authority.

In Chapters III and IV I argue that, when we recognize the mutually constitutive relationship between institutions and the individuals operating on their authority, we can

see a kind of institutional self-reflection regarding the actions and inactions of the state in each of the cases. In Chapter III, I examine the House Immigration Subcommittee hearing on the BIWPA, arguing that lawmakers are explicitly self-reflective regarding the role of restrictive immigration policy in IPV against immigrants, the extent of the problem, and the limitations of existing relief policies. Given their roles as institutional lawmakers, this can be understood as a kind of institutional self-reflection. In light of this, we can understand the role of the state in IPV against immigrants not as passive inaction, but as intentional and self-reflective action.

In Chapter IV, this institutional self-reflection takes a different form. There I examine the tension between the maintenance of statutory scaffolding that excludes gender based asylum claims on the one hand, and the judicial and administrative recognition that IPV (as a gender based claim) can in fact be considered persecution. The discontinuity between policy and its implementation is indicative of the complex, interactive, and often-incongruous nature of the various institutions comprising the state. However, it is important to recognize that, like Congress, the BIA and DHS are both acting on and wielding the authority and power of the state in ways that have tangible material consequences for IPV survivors. Moreover, while various state institutions may be in tension with one another on this issue, that tension exists in the context of the BIA and DHS's explicit recognition of IPV as persecution in some cases. The recognition of IPV as persecution *as an exception* to the rule is a legitimation of the capacity of the state to continue excluding most cases. Amidst internal institutional differences, however, restrictive immigration policy is a broad overarching commonality. In the section that follows I examine the theoretical significance of this commonality in the context of IPV.

## **In the Shadow of Restrictive Immigration Policy**

Legal scholar Michelle Alexander (2012) argues in her book, *The New Jim Crow*, that reducing the prison population sizes does not, by itself, do anything to “disturb the basic architecture” of institutionalized racism in the US prison system—a system that she calls “the New Jim Crow” (Alexander 2012, 14). In Alexander’s account, the prison system is fundamentally flawed, rendering surface level reforms ineffective—like putting a Band-Aid on a gunshot wound. Alexander’s account provides a potentially fruitful analogy. Increases in the scope and scale of legislative amelioration will always be limited in their capacity to “disturb the basic architecture” of restrictive immigration law as a feature of IPV against immigrants, even as those very same reforms provide relief to some individuals.

The cases I present in Chapters III and IV demonstrate a profound link between restrictive immigration policy and IPV against immigrant women. In Chapter III, which discusses IPV committed against immigrant women living in the US, the state plays a multi-dimensional role—the ways in which the state comes into contact with immigrant women are many and complex. Underlying all discussions of the details of these cases is the fact of restrictive immigration policy in the broadest sense. Inherent in immigration restrictions is the *possibility* of detention, deportation, or other forms of punishment by the state for immigration law violations, and that possibility then translates into the potential for immigration law’s use as coercive power wielded by abusers in relationships where immigration status is relevant. That is, immigration policy’s capacity to be used as a tool of coercion by abusers is a feature of immigration policy itself, in addition to being a feature of IPV against immigrants. Importantly, this dynamic exists independently of

the state's awareness of it. Immigration law has the capacity to manifest as gendered institutional violence whether or not the state is self-reflective or even has the capacity to self-reflect. Moreover, this feature of immigration policy exists even when that very same structure creates the space in which some survivors are granted access to relief. However, I argue that the state does in fact engage in self-reflection regarding its role in this violence, and that this self-reflection changes the way we ought to understand this relationship.

As discussed in Chapter III, restricting access to information about immigration relief is a common control tactic of abusers (Salcido and Adelman 2004). Relief policy then, however broad, will always be limited in its effectiveness by abusers themselves. As long as an abuser is able to prevent the person he is abusing from either knowing about or accessing state relief, he maintains his capacity to use immigration law as a coercive weapon. Therefore, we can understand this coercive capacity as a feature of restrictive immigration law itself rather than only as a feature of these abusive relationships. What new analytical purchase could be gained if we shift our focus away from the *use* of immigration laws in this way—conceptualizing immigration law as a tool in these abusive relationships— and instead understand these abusive relationships as a feature of restrictive immigration law itself? Conceptualizing its coercive capacity in this context as a feature of restrictive immigration law directly challenges the framing of the state as the savior or protector of IPV survivors. It requires that we reconsider the way we understand the state's responsibility in addressing this harm and suggests that we ought to redistribute culpability.

The case of IPV-based asylum claims looks somewhat different on its face—the international context seems to position asylum-seekers differently vis-à-vis the US state. However, it is profoundly similar to that discussed above in important ways. The IPV serving as the catalyst for migration took place in a different country and (presumably) in the past.<sup>80</sup> On account of this, it is not immediately obvious that we ought to consider the US state to be directly involved in this violence. Importantly, in both cases, those subject to that violence are looking to the US state for relief in the form of independent immigration status—i.e. permission to stay in the US in a way that allows them to separate themselves from their abusers. This reveals the power of the US state not as external to the violent dynamic of the abusive relationships themselves, but as folded into them. In its capacity to either grant asylum or deport the asylum-seeker back to her abuser, the US state becomes inextricably involved in the IPV itself. To see the state in this scenario as the (potential) protector is problematic because it requires that we accept an outcome in which a woman is deported back to her abuser as a legitimate or justified exercise of state power, rather than as an iteration of gendered institutional violence, as I argue in Chapter IV.

Even a much more progressive asylum policy—for example, one that accepts IPV alone as grounds for a legitimate asylum claim—would be incapable of addressing the inevitability that some asylum claims will be rejected and some IPV survivors deported back to their abusers. This outcome can either be viewed as an inevitability or as a consequence of a contingent set of assumptions about the relationship between nation-

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<sup>80</sup> The presumption that the IPV is temporally contained in the past is deeply problematic, and only holds if we fail to account for the ongoing threat of violence should the asylum-seeker return (or be returned) as partially constitutive of IPV. In that sense, we ought to consider the IPV as ongoing, at least until this threat is eliminated by a grant of asylum.

states and the right to exclude (i.e. determine, in discretionary fashion, whom to allow in and whom to keep out). When viewed in light of the cases examined in this dissertation, the state's exercise of its right to exclude manifests as an institutionalized form of gendered violence. Moreover, I make the case that this institutionalized violence is committed self-reflectively.

### **The State's Right to Exclude**

As discussed in Chapter IV, Canada has long-since incorporated the UNHCR's recommendation that gender be included as a particular social group, and it explicitly accepts asylum claims based on domestic violence (Musalo 2007, 133). Since implementing the new policy, Canada has not seen an increase in the number of refugees and asylees admitted. In fact, the number of women refugees in Canada dropped significantly in 1993 when the policy was first adopted. From 1993 to 2013, the number of women refugees/asylees from all categories fluctuated normally between 9,000 and 17,000, with a median number of 12,192 refugees admitted per year (Canada Department of Citizenship and Immigration 2014). More to the point, "gender claims consistently constituted only a miniscule fraction of Canada's total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines" (Musalo 2007, 133).

Given that it does not share a border with a relatively-poorer country, Canada does not face the same immigration pressures as the US. Nonetheless, the policy shift did not lead to an opening of the proverbial "floodgates." The fact that Canada did not experience a surge in applicants was cited by the DHS in its *Matter of L-R*- amicus brief

as a way of assuaging concerns about a flood of new asylum-seekers (DHS Brief *Matter of L-R*- 2009). The idea being that the Canadian experience is an argument in favor of the US permitting IPV-based asylum claims, given that such a policy change would not inevitably lead to a “flood” of new asylum-seekers.<sup>81</sup>

Be that as it may, there is a significant problem with using the stability of the Canadian refugee statistics as evidence that IPV-based claims ought to be, in the normative sense, incorporated as gender persecution; to make this move is to accept the premise that an increase in the number of claims resulting from this policy shift would be a legitimate argument against it. It also assumes that one can make an ethically defensible claim that any single person fleeing IPV, who would otherwise qualify for asylum, can justifiably be excluded. Other scholars have made this point as well. For example, Musalo (2007) argues that, “opposition based on fear of floodgates is...unprincipled because the response to a fear of floodgates should not be to return victims to situations where their rights will be violated” (Musalo 2007, 120). The underlying foundation of the argument Musalo and I are contesting is the notion that sovereign states have a right to exclude.

The view that states have the right to exclude is widely held, both popularly and in the academic scholarship; however, as a minority of scholars have argued, it is nonetheless open to contestation. Political theorist Joseph Carens (2013) points out that,

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<sup>81</sup> While the opening of the proverbial floodgates is not an explicit concern for DHS, it is a common refrain in the broader national conversation. Musalo argues that “the overarching basis for the opposition to gender claims is the fear that acceptance of these cases will result in the floodgates” (Musalo 2007, 132). She quotes David Ray from the Federation for American Immigration Reform (FAIR) as an illustrative example: “You can’t just say ‘I’m in a bad situation and therefore I’m a member of some new social group[.]’ If the categories grow so large as to include millions of people, asylum policy is going to crumble” (Musalo 2007, 132, quoting David Ray).

even if we accept that states have the right to exclude at will, “[s]tate sovereignty and democratic self-determination are morally constrained. The decisions of a sovereign state may be morally wrong even if the state is morally entitled to make those decisions” (Carens 2013, 7). Therefore, one need not directly contest states’ moral right to exclude in order to contend that said exclusion could be morally wrong. For Carens this serves as a springboard into an argument for open borders as the only way to fully account for the injustices caused by exclusionary policies.<sup>82</sup> However, it is not necessary to entertain the idea that states should open their borders in order to interrogate the restrictive immigration policy on moral grounds. Carens reminds us that while a person or entity may have the moral right to engage in a certain behavior, that does not shield them from moral judgment of the outcomes (Carens 2013). Put differently, even if we accept the state’s right to exclude in principle, that by no means binds us to accept the outcome should the state exercise that right. The case of IPV against immigrants suggests that an intersectional feminist analysis could add depth to the theoretical debate around open borders. Moreover, the work of this dissertation sheds light on the gendered material

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<sup>82</sup> Many scholars have argue for open(ing) borders to various degrees, and for various reasons. Legal scholar Bill Ong Hing (2010), for example, argues that the US, Canada, and Mexico should establish a multilateral union much like the EU as a way of addressing our immigration system in crisis, and the incredible economic inequity created by the North American Free Trade Agreement (NAFTA) (Hing 2010). Similarly, sociologist Saskia Sassen (1999) aims to dislodge our understanding of international migration as a crisis and challenges the dominant “invasion” imagery. She argues that, “[i]nternational migrations stand at the intersection of a number of economic and geopolitical processes that link the countries involved; they are not simply the outcome of individuals in search of better opportunities” (Sassen 1999, 1). Moreover, globalization and increasing economic interconnectedness are at odds with the immigration policy that “...remains centered on older conceptions of the nation-state and national borders” (Sassen 1999, 5). She argues that the US has something to learn from the EU where the liberalizing of economic relations was mirrored by an opening of borders between EU member states (Sassen 1999).

effects of restrictive immigration policy, making borders tangible and consequential in a particular way. That contextualization brings another set of material concerns to bear on the question of open borders as a theoretical position and a policy proposal.

In linking the theoretical debate with material consequences, my analysis forces questions regarding alternative institutional structures that might alter restrictive immigration policy's role in IPV in a way that traditional institutional scholarship either misses or brackets off too quickly. Given that relief policies housed within broader sets of immigration restrictions can only ever mitigate rather than eliminate this dynamic, what other institutional forms are possible? Is it possible, then, to make an intersectional feminist case for open borders—an immigration policy that would eliminate immigration law as a form of gendered institutional violence by eliminating immigration restrictions? When we recognize the capacity of immigration law to manifest as gendered institutional violence, the urgency of this question is revealed in full force.

### **Areas of Further Research**

The work presented here suggests that there is much to be done in the way of further research and theoretical development. There are a couple of areas in particular that I would like to emphasize in this regard. Given the multidimensional nature of the state and the many sites at which there is a potential for institutional self-reflection (or not), policymaking, and state action and inaction, it would be fruitful to expand my analysis to further account for bureaucratic implementation and discretion. The certification of cooperation requirement for U visas that I examine in Chapter III is indicative of much broader involvement on the part of street-level bureaucrats. One

potential way to expand my analysis in this area would be to examine bureaucratic decisions made at the Vermont Service Center, which could potentially be elucidated through interviews with those directly involved in the issuing of or denying immigration relief under VAWA.

With regard to IPV-based asylum, there are a number of ways to build on my analysis. The way that IPV-based asylum claims play out in the immigration courts is preceded by other instances of the discretionary exercise of state power. This is an important part of the story that could contextualize decisions and policy made in the courts and in higher levels of the administration. Many defensive asylum claims are made at immigrants' first point of contact with immigration officials, such as at the geographical borders. This is a site at which street-level bureaucrats exercise an incredible amount of discretion regarding whether and how to proceed with individual requests for asylum. Bringing together these accounts would help to further explicate the interaction between IPV and restrictive immigration policy and its implementation.

Throughout this dissertation I delineate and analyze myriad ways that immigration law is a source of oppression in the lives of immigrant women, trapping them in abusive relationships, strapping them with financial hardship, and actualizing the coercive threats of abusers. The solution to the epidemic of gendered violence in any of its manifestations cannot be the impossible (and undesirable) *dissolution* of gender difference. Neither can the solution to the intersectional violence of IPV against immigrant women be the impossible dissolution of difference. Young argues that, "social justice...requires not the melting away of differences, but institutions that promote reproduction of and respect for group differences without oppression" (Young 1990, 47).

Utilizing feminist analytic lenses allows for challenging examinations of immigration law and policy that draw out the importance of gender difference. In practice this means that we have an opportunity to intervene in a broad set of literatures by looking not only at more recent areas of policy development, such as VAWA and IPV-based asylum, but also in the historical development of these dynamics and institutional formations.

Through a feminist framework, we can disrupt dominant ways of knowing the past and see how gender has, at least likely, always played a major role in contingent moments of law and policy formation.

## APPENDIX A

### U NONIMMIGRANT STATUS QUALIFYING ACTIVITIES†

Abduction	Murder
Abusive Sexual Contact	Obstruction of Justice
Blackmail	Peonage
Domestic Violence	Perjury
Extortion	Prostitution
False Imprisonment	Rape
Female Genital Mutilation	Sexual Assault
Felonious Assault	Sexual Exploitation
Fraud in Foreign Labor Contracting	Slave Trade
Hostage	Stalking
Incest	Torture
Involuntary Servitude	Trafficking
Kidnapping	Witness Tampering
Manslaughter	Unlawful Criminal Restraint
	Other Related Crimes*

\*Includes similar crimes, and solicitation, attempts, or conspiracies to commit any of these above crimes.

†US Citizenship and Immigration Services. 2014. (<http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>)

## **APPENDIX B**

### **LIST OF ABBREVIATIONS**

AG: Attorney General

AO: Asylum Officer

BIA or the Board: Board of Immigration Appeals

BIWPA: Battered Immigrant Women Protection Act

DHS: Department of Homeland Security

DOJ: Department of Justice

DV: Domestic Violence

ICE: Immigration and Customs Enforcement

IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act

IJ: Immigration Judge

INS: Immigration and Naturalization Service

IPV: Intimate Partner Violence

PSG: Particular Social Group

USCIS: United States Citizenship and Immigration Services

VAWA: Violence Against Women Act

VTVPA: Victims of Trafficking and Violence Protection Act

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