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Critical Race Theory and its Application to Methodology in Studying Law and Political Science

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Critical Race Theory and its Application to Methodology in Studying Law and Political Science

A dissertation submitted in partial satisfaction

of the requirements for the degree of Doctor of Philosophy

in Political Science

by

Samantha Ruth Acuña

2022

ABSTRACT OF THE DISSERTATION

Critical Race Theory and its Application to Methodology in Studying Law and Political Science

by

Samantha Ruth Acuña

PhD in Political Science

University of California, Los Angeles, 2022

Professor Laura Gómez, Co-Chair

Professor Michael Chwe, Co-Chair

This dissertation focuses on how work grounded in critical race theory can provide perspective into the realm of political science. This dissertation intends to focus on experience and behavior when it comes to statistical analysis and the law. The first chapter explores the concept of statistical essentialism and how it applies to collection of data in connection to Latinos. The paper then expands this analysis by looking at Central Americans as a case study. The second chapter, looks at asylum judges and how their experiences shape judicial decision making. This chapter takes a closer look at not only the racial, ethnic and gender identity of judges when it comes to decision making but also the diverse experiences that brought them to the court room. The third and final chapter looks specifically at LGBTQIA+ immigrants and judge's tones when it comes to the definition of "reasonable fear" and "persecution" and explores how policing of gender and sexuality at the border has not stopped but changed form. This paper uses a text as data analysis to apply work grounded in critical race theory into a quantitative format. Finally, this dissertation will conclude with plans for overall future research suggestions in this field.

The dissertation of Samantha Ruth Acuña is approved.

David Hayes-Bautista

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University of California, Los Angeles

2022

DEDICATION

Para mis padres. Gracias por siempre apoyarme. Los amo, los adoro y son la razón de mis sueños. Son las personas que inspiran todo mi trabajo.

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Acknowledgements

First and foremost, I want to thank God for all the blessings in my life including the people I am about to mention.

I also want to thank my wonderful parents, Ruth and Manuel Acuña. Thank you for always supporting me, for raising me with so much love, and for inspiring me to do better.

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Vita

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Positionality Statement

I write this statement because I think it is always important as a researcher to both be grounded in the work you are doing and be grounded in who you are as you are writing the work. This statement is made so that I can be completely transparent both with my research and my intentions when conducting and eventually publishing this research. I acknowledge that like all individuals I have bias and I have certain privileges, positions and other factors that may prevent me from seeing something or understanding something. However, I also acknowledge that I feel comfortable conducting the work I am doing because it is work that integrates all my identities and communities that I am either a part of or adjacent to. This work is a culmination of experiences I have had or witnessed throughout my life. I see this work as part of a greater self-reflexive study.

I am the proud daughter of two immigrants. My father comes from a family of farmers in Costa Rica. He grew up in a small pueblo called Pejibaye, came to the United States to learn English for a couple years and then never went home. My father entered this country legally with a visa, then overstayed his visa. My mother is an immigrant from El Salvador. She became an orphan at eight years old and has fought hard to have the life she has every day since. My mother comes from extreme poverty, a civil war and a host of tragedies. She was not granted a visa to come to the United States and because of this she decided to cross the border on foot to seek a better life. She entered this country illegally and stayed here. Both of my parents were able to become legal citizens through policies implemented in the 1980s.

My parents lives have always shaped my life. They have always had different views on politics, policies and people in yet can often come together when it comes to a number of things. They come from two countries that could not be any closer in distance but could not be any

farther in experience. Yet somehow, they always get grouped together when it comes to U.S. discourse on politics, policy and people.

I have always personally felt that the label Latina never really fit me. Growing up my parents always said I was a half Salvadoran, half Costa Rican, a U.S. born child, or Central American for short. We never really discussed the term Latino and though I heard it often on Univision I never really thought of using the label. I grew up in a community that was predominantly Mexican American. Whenever someone asked me about my ethnicity, I always described myself as Central American. If someone asked me for more clarification, then I would specify the countries my parents are from. I never used the word Latina to describe myself growing up, the reason I never did this was because the minute I used the term Latina or Hispanic people would automatically assume I was Mexican. Whereas when I led the conversation saying I was Central American most of the time people would understand the distinction. Though, there have definitely been times when people, white or other Latinos have asked me or told me that Central America is just a part of Mexico or "it's the same thing."

All my life I grew up with this narrative. I also rarely saw representation of Central Americans in U.S. culture. However, in the political context, the U.S. media always talked about Central America and the older I got the more I learned in my higher education that a large contributing factor to the state of many Central American countries and other countries in Latin America was the United States.

My life in the U.S. has been a life built on the hard work and dedication of my parents. They both came to this country with nothing but dreams and aspirations. One parent had just enough money to hop on a plane while the other parent had just enough money to pay a coyote. I grew up with stories of the Salvadoran Civil War and listening to the worst kinds of things that

people are capable of no matter what party affiliation. I also grew up with stories of farmlands and big city dreams. Finally, I grew up in the United States in a small city just outside of Los Angeles. There, I was always made aware of my privilege. That privilege being having food on the table every night, having running water without the worry the water would just up and disappear, having no fear that soldiers would come into our home at night. I was always aware I grew up with privilege in that sense. I am also aware of the privileges I have going into this research and how that might shape my perception of things. As someone who was born in this country, I do not have to worry about being under an undocumented status. Over the years I have seen many relatives and friends worry about their undocumented status and I am well aware that many of the things I have been able to accomplish would not have been possible if I was undocumented. I also want to acknowledge that I have light skin privilege. Many people do not always assume I am Latina and I know this is because of the color of my skin and I am aware that this plays a part in the way I see and experience the world. I am also aware that I am a cisgender straight passing women and this also affects how people see and treat me and may also affect the work in some way. People usually never know I am bisexual until I outright say it. Finally, I also want to acknowledge that I do not have the lived experience of all the people I am writing about. While I have the lived experience of a daughter of Central American immigrants, I am not an immigrant and I am merely adjacent to these experiences and relate to them at some level. Because of this, I enter into this research as someone who is seeking to learn and hope that others will approach the work I am about to share through this perspective and lens as well.

While I acknowledge I have privilege and these things may affect the views I have with my research, I also want to say that my experience as a U.S. born Central American Latina growing up in the United States also shapes me and my work. My experience as a bisexual

woman in the Latinx community shapes me and my work. I am a first generation college student, the first generation of my family to be born in this country, and I am the proud daughter of two immigrants and this dissertation is dedicated to my parents without whom I would one hundred percent not be here.

Introduction: Critical Race Theory and This Dissertation

Critical Race Theory has been in the media as of late. With several states passing legislation to ban the teaching of Critical Race theory in public schools, many are left to wonder just what this school of thought truly is. Idaho, Arizona, Texas, Oklahoma, Tennessee and South Carolina have all signed bills into law to ban critical race theory in public school education. Further, other states such as North Carolina, Pennsylvania, Ohio, and Wisconsin have all proposed legislation to ban critical race theory (NBC News, 2021). With the rise in conversation involving Critical Race Theory and its teaching in schools it may seem like a recent phenomena but it has been a lens through which to look at the law and other disciplines for many years now. In this dissertation I hope to shed light on how Critical Race Theory can be seen as a rich source of theoretical framework that can apply to both research and teaching of politics and the law.

Critical Race Theory begins with the premise that law and policy can and will be affected by race and racism. The law is not merely a reflection of race but the law and legal doctrine both constitute an ideological narrative of what race and racism are (Harris, 2002). Traditionally, many times people tend to think of racism as a very individual, person to person issue. Racism is conceived from this "perpetrator perspective," meaning it is considered as an intentional, albeit irrational, deviation by a conscious wrongdoer from an otherwise neutral, rational and just way of distributing jobs, power, and wealth (Freeman, 1977). However, critical race theory takes a different view of racism. Critical race theory views the legislation of civil rights and the process that followed as "tragically narrow" and "a conservative picture of the goals of racial justice and the domains of racial power" (Freeman, 1977).

Critical race theory does not look at the law as distinct from politics. The law is often seen as objective and fixed while politics are often seen as subjective and full of ideology as well

as opinion. Critical race theory does not look at courts and the law as an objective place but rather as a subjective place. Through this framework, critical race theory can be used to look at the intersection of law and politics in a new way and can allow deeper conversations about race and white supremacy.

There are ten central tenets of Critical Race Theory. The first one is that "racial inequality is hardwired into the fabric of our social and economic landscape" (Carbado & Rothmayr, 2014). What this means is that the United States is built entirely on model of systemic racial oppression and colonialism and that without these tools the U.S. would not have the systems in place that it has today. As a result, white supremacy and racism are ever present in our society and critical race theory seeks to shed a light on that. This leads into the second tenet, "because racism exists at both the subconscious and conscious levels, the elimination of intentional racism would not eliminate racial inequality" (Carbado & Rothmayr, 2014). Racism and oppression not only exist at the individual level such as when someone acts in a discriminatory way towards an individual, these oppressions exist at the systemic level. Policies, and laws act against different groups and this legislation is built into the very structure of this nation. Since this is the case, eliminating the racism we can see clearly in our day to day lives does not necessarily mean we will eliminate the inequality we have.

The third tenet is "racism intersects with other forms of inequality, such as classism, sexism, and homophobia" (Carbado & Rothmayr, 2014). This tenet is one that is at the heart of my dissertation. My work looks at the intersection of different forms of inequality such as those dealing with gender and sexuality. Within my papers, I explore not only how racism may be functioning in asylum courts but also how perceptions of gender and sexuality may be having an effect on decision making. The fourth tenet is that "our racial past exerts contemporary effects"

(Carbado & Rothmayr, 2014). These two tenets highlight the fact that racism interacts with other forms of oppression and that the past informs the future. The fifth tenet of critical race theory is that "racial change occurs when the interests of white elites converge with the interests of the racially disempowered" (Carbado & Rothmayr, 2014). This fifth tenet describes interest convergence, an example of this would be Brown v. Board of Education where desegregation not only benefited black Americans but also benefited white Americans because the United States appeared better on the world stage during the Cold War (Bell, 1980). The sixth tenet of critical race theory is that "race is a social construction whose meanings and effects are contingent and change over time" (Carbado & Rothmayr, 2014). This is essential to the understanding of the Latino identity section of my dissertation. The definition of Latino in the racial narrative of the United States has changed over time and this has led to some confusion in how Latinos are categorized racially and this has potential implications for what we are missing when studying Latinos in political science.

The seventh tenet is "the concept of colorblindness in law and social policy and the argument for ostensibly race-neutral practices often serve to undermine the interests of people of color" (Carbado & Rothmayr, 2014). This point illustrates that while many individuals and institutions may feel that not speaking on matters of race is the best thing to do it actually hurts and undermines underrepresented groups experiences. The eighth tenet is "immigration laws that restrict Asian and Mexican entry into the United States regulate the racial makeup of the nation and perpetuate the view that people of Asian and Latino descent are foreigners" (Carbado & Rothmayr, 2014). This tenet is another one that is at the heart of the bulk of this dissertation as I explore conceptions of race when it comes to the Latinx community as well as asylum seekers. The ninth tenet is "racial stereotypes are ubiquitous in society and limit the opportunities of

people of color" (Carbado & Rothmayr, 2014). Finally, the tenth tenet is "the success of various policy initiatives often depends on whether the perceived beneficiaries are people of color" (Carbado & Rothmayr, 2014).

This dissertation embraces Critical Race Theory as a framework. This dissertation takes some central tenets in Critical Race Theory and applies them using statistical methodologies commonly used in political science. This introduction was meant to lay the groundwork of what critical race theory is and how it is a form of studying the law and politics. Now I will get into details about the outline of each individual paper that will be in this dissertation.

The first article will be on the question of measuring the Latino or Latinx population in political science research. The purpose of the article is to explore the essentialism that goes on when measuring the Latinx community in political science. In order to do this, this article will first begin with an exploration of essentialism in critical race theory and how it is being used in this context. Then, this article will explore both the history of how Latinx individuals have been labeled in the United States in the law and in statistical analysis. The article will also cover histories and backgrounds of different Latinx communities in this country to illustrate the point that Latinx individuals are an incredibly diverse group with different histories, nationalities and racial and ethnic identities and should be measured as such. After covering this, the article will provide examples using measurements of Latinx people found in various surveys that have been conducted over the years. One could argue that statistical methodology in itself is essentialist because statistics and quantitative methodology depend on data that is broken up into categories. However, what I posit here is not that there is one single right way to measure Latino people in the United States, but that there can be a multitude of ways because of the multitude of identities. I am not arguing that the ways I measure Latinos in this first paper are the right way, because

that would be essentialist. However, what I am arguing here in this first paper is that the way I am looking at the Latino sample in surveys is one of the many different ways political science researchers can and should be looking at Latinos to get a better sense of the community as a whole and to push further away from essentialism. The methodology for this paper will be both an analysis of how questions are asked in major national political science surveys of Latinos and also a series of regressions looking at specific groups in general.

The second article in this dissertation focuses on lawyers and judges, assessing how their experiences in the profession affect their work. The article will center on immigration asylum judges as the case group. The article explores the phenomenon of judges having lower denial rates with their cases when they are in a court with more male judges. This paper also explores cohort effects with gender identity and how those intersect. This paper also looks at diversity in the undergraduate and law school experience but does not find anything significant with educational experience and judicial decision making. The methodology I am using for this second paper is a series of regressions using data from the Transactional Records Access Clearinghouse (TRAC).

The third article in this dissertation builds off of essentialism, as well as a subset of immigrant asylum claims and concepts related to gender and sexuality. The article analyzes LGBTQ asylum cases that are considered precedential and come from both the board of immigration appeals court and federal district courts in the United States. The article will explore both the concept of the reasonable person and the reasonable fear of persecution in the home country when it comes to LGBTQ asylum cases and it explores the discourse of judges in these cases. The methodology for this paper is both a quantitative analysis using text as data sentiment

analysis in R and a qualitative component looking at the text in connection to gender and credibility.

Finally, this dissertation concludes with possibilities for future research and a reflection on the findings in all three papers. This dissertation also sheds some light on how Critical Race Theory serves as a tool to be embraced and used within the social sciences.

Chapter 1: An Analysis on Essentialism and the Difficulty with Latino in Statistical Methodology

Introduction

In 2018, at the commencement of my graduate career I applied for the Ford Doctoral Fellowship. The Ford Doctoral fellowship was created to help increase the number of diverse faculty members in higher education. The message on their website reads:

"Through its program of fellowships, the Ford Foundation seeks to increase the diversity of the nation's college and university faculties by increasing their ethnic and racial diversity, maximize the educational benefits of diversity, and increase the number of professors who can and will use diversity as a resource for enriching the education of all students" (Ford Foundation).

I was excited at the opportunity to apply for such a fellowship. Being someone who is the child of Central American Immigrants, my mother from El Salvador and my father from Costa Rica, I believed I could add something to the diversity of the nation's colleges and universities. I looked at the application webpage and under the "Positive Factors for Selection" section I found something interesting.

Positive Factors for Selection

The following will be considered as ***positive factors*** **(not eligibility requirements)** in choosing successful candidates:

- Evidence of superior academic achievement
- Degree of promise of continuing achievement as scholars and teachers
- Capacity to respond in pedagogically productive ways to the learning needs of students from diverse backgrounds
- Sustained personal engagement with communities that are underrepresented in the academy and an ability to bring this asset to learning, teaching, and scholarship at the college and university level
- Likelihood of using the diversity of human experience as an educational resource in teaching and scholarship
- Membership in one or more of the following groups whose underrepresentation in the American professoriate has been severe and longstanding:
    - Alaska Natives (Aleut, Eskimo, or other Indigenous People of Alaska)
    - Black/African Americans
    - Mexican Americans/Chicanas/Chicanos
    - Native American Indians
    - Native Pacific Islanders (Hawaiian/Polynesian/Micronesian)
    - Puerto Ricans

As pictured above, I was surprised to find that the categories the Ford Foundation whose underrepresentation they consider to be "severe and longstanding" excluded people with Central American ancestry. Granted, the groups listed do have severe and longstanding

underrepresentation in academia but as someone who comes from a group not included in this list that also faces underrepresentation it just did not feel right but it did get me thinking about how often I do not see or hear much news from my parents' home countries talked about in the United States context. It also got me thinking about how I hear about the Latino vote but sometimes do not feel included in the conceptualization of what it means to be Latino in United States politics.

I tell this story because it brings up the fundamental puzzle this paper is presenting: The difficulty with measuring the Latino community through statistical methodology in political science and the exclusion and essentialism that occurs because of this difficulty. The problem is researchers collecting statistical data tend to ignore our distinctions when in reality we have to both embrace and celebrate our distinctions as well as our similarities.

Race is socially constructed. That is one of the tenets of Critical Race Theory. However, just because race is socially constructed does not mean it does not have real world consequences or dynamics. The first section of this paper will further introduce the discussion of the Latino community through first-hand accounts from people in the Latino community. People in this community have been having discussions about Latinos and distinctions and similarities among the people in the community for hundreds of years. Evidence of this, has been demonstrated through looking at various newspapers from different periods of time. More and more people are also having access to information through the rise of social media and can voice their opinions to a wider audience. Some of these conversations on race and ethnicity are productive, discussing various levels of race and confusions about race and ethnicity. However, some of these conversations can become gatekeeping. Some conversations single out some Latinos in one

group as more Latino than others. The latter has become more apparent through the rise of applications such as Twitter and Tik Tok.

Aside from an exploration of how conversations on Latinos have changed over time, this paper also provides a brief history on racial and ethnic categories in the United States and how those have shifted and changed through social norms and the interaction of the law making race. This portion of the paper explores the U.S. Census as primary race making tool and category builder. Third, this paper also has a discussion on the immigrant experience in the United States and how this also plays a role in how Latinos see themselves and the communities around them. Central Americans are discussed in this section as a group that has not been discussed enough in political science.

Finally, this paper ultimately conducts an analysis on survey data collected on Latinos from three major national surveys in Political science. These surveys are the Latino National Study (LNS), the Latino Immigrant National Election Study (LINES) and the Latino Sample from the Collaborative Multiracial Post Election Survey (CMPS). These surveys are analyzed to see how Latino is measured and how that differs across different nationally representative samples of Latinos.

From Newspapers to Tik Tok: A Trend of Connection and Disconnection

The discourse around what it means to be Latino is something that is not new. For many years, Latino people have been discussing their identity and labeling themselves and each other throughout public forums. One major example of this comes from news media including Hispanic Newspapers dating as far back as 1808. Many of these newspapers discuss political issues across the Americas and refer to the Latino community as “Hispano Americanos” (Hispanic American Newspapers). While many of these newspapers use this term, they also

identify different national origin subgroups and ethnic identities. Some newspapers even carry the names of these racial and ethnic identifications. Examples include El Mulato, Eco de Cuba, Voz de Chile y las Repúblicas Americanas, and many others. This understanding of difference but unity is something that has been carried through into the news media of today and also into social media.

This discourse on Latinos hasn't ever really stopped. It is getting more and more popular on platforms such as Tik Tok and Twitter. One user on Tik Tok stated, "we will never have a unifying understanding of what race is not only because race is made up but because race is changing"(Tik Tok, 2020), in reference to discourse around what Latino people look like. Other users on Tik Tok post videos showing various Latino public figures and distinguishing which ones are white and which ones are white passing and which ones are obviously Latino according to their own analysis. Another user posted a video that went viral on the platform showing herself with a census survey unable to answer the question of race because she is Latina. This original video received over 265,000 likes but what makes this more interesting is the fact that not only did the video go viral, but the sound did too. On Tik Tok, users can reuse sounds from other videos to make their own. The sound from the video was used in 105 other videos from different users. All of these videos showed Latinos struggling with the question of race but not all of them dealt with the census. One user made a video showing the COVID Vaccine demographic information, another mentioned the ACT, another showed random job applications, the DMV, DACA renewal forms, and so forth. This demonstrates the relatability among individuals seeing this video and also pointing to a common problem seen within the Latino community on what race we are considered.

With regards to Twitter, hundreds of tweets get posted in different contexts. In 2020, when the Emmy nominations came out some controversy struck the platform. Many people took to twitter to discuss a Los Angeles Times article titled: “Emmy 2020: Black Nominees gain ground, Latino representation still abysmal.” Many users agreed with the article with one user in particular stating, “Why can’t we Latinx have a piece of the pie? We are the largest ethnic group in America and missing as if we don’t exist!” (Twitter, 2020) However, in the year prior to this at the 2019 Emmys Jharrel Jerome who is Afro Dominicano won the Emmy award. One user pointed this fact out and said, “Not even a year later, those of y’all only onboard for white Latinx or mestizx representation,” pointing to the fact that users were erasing Afro Latinos as Latinos.

While this discourse provides some insight into how younger Latinos are coming into themselves, there is a huge issue with this. Some people feel alienated and attacked, clinging on to their identity because others are suggesting they are not truly part of the group. This division could lead to issues within the Latino community, particularly when it comes to building solidarity and collective action in the community. On the other hand, social media can also be seen as a tool in bringing people together and can demonstrate relatability among Latinos across state lines.

Essentialism

Within Political Science, there is a lot of talk about the, “Latino vote.” There is also a lot of conversation about immigrants in the United States. However, when looking at both these conversations, many times national origin groups, and their potential significance is not fully explored. The majority of work done in Latino politics looks at the Latinx community as one cohesive group. Some research exists in political science looking at Cuban Americans, Puerto Ricans, Mexican Americans and how they are politically socialized. However, a lot of work has

not been done on other groups, including people coming from countries in Central America, within the realm of political science.

There is essentialism going on when we discuss the idea of Latino in Political Science. While in recent years more work and research has been done exploring other national origin groups when it comes to the study of Latino politics there are still so many groups that have yet to be explored. This first paper in this dissertation intends to explore two major concepts in the study of the Latinx community in political science. First, how we measure Latinx respondent's multi-racial and ethnic heritage in popular political science surveys. Second, how we account for the nuance between different national origin subgroups in popular Latinx community surveys. These two questions demonstrate the need for less essentialism and more work on other subgroups in the community.

The concept of essentialism is best summarized as being about generalization, while the opposite of essentialism is about specificity. Essentialism was first explored in Critical Race Theory by Angela Harris in an article dealing with feminist legal theory. In this paper, Harris brings up the concept of "gender essentialism—the notion that a unitary 'essential' women's experience can be isolated and described independently of race, class, sexual orientation and other realities of experience" (Harris, 585). Within the article, Harris also argues that essentialism brings about the privileging of some people's voices at the cost of other people's voices. In the case of gender essentialism, Harris posits that black women are silenced in order to privilege others.

In this same way I posit the idea of a statistical essentialism happening within the study of Latinx politics. While it is true that many Latinx people behave similarly and share similarities, within the current research there is not much visibility for different national origin

subgroups. In fact, many of the subgroups are not well represented in national surveys. Some surveys do not ask any questions with regards to national origin. On the one hand, this may not seem like a major issue but upon a closer look it is important to look at national origin groups both in conjunction with other Latinx people and the shared experience of living in the United States but also in the separate experience of the nuance their national origin identities bring. However, national origin cannot be looked at in a vacuum either because this is essentialist as well. Which is why not only does national origin need to be looked at in political science but racial identification also has to be looked at. Within this paper I argue that both these categories need to be looked at more thoroughly within the Latino community.

The question of essentialism in the study of Latinx people in political science also does not stop at national origin. Many people often discuss Latinx people as a racial category. While it is true that Latinx people are racialized within the U.S. context, it is also true that the Afro Latinx experience will be different from the white Latinx experience or the experience of someone who is indigenous with roots from Latin America.

This approach in looking at diverse racial/ ethnic groups has already been done looking at the Asian American community in the United States. Work by Wong, Ramakrishnan, Lee and Junn 2011 find differences in immigrant and non-immigrant political participation, as well as some distinction among national origin subgroups in Asian American communities. The authors illustrate this nuance in measuring Asian American community political participation as a problem that needs to be resolved so that there are not repercussions for Asian American political participation tomorrow.

Looking at essentialism in connection to the Latinx community is not a new or unique idea either. Essentialism has been explored by various scholars of Lat Crit theory. Montoya put it

best, “Lat Crit has developed into a cohesive community of critical intellectuals who reveal and voice legal issues and analyze them by applying progressive principles and perspectives based on an ethos of anti subordination and a strategic anti essentialism” (Montoya, 2006). In other words, Lat Crit has been combatting the idea that all Latinx people are the same for some time. Through the use of demographic facts it has been demonstrated that not all people who identify as Latino or Latinx are of the Roman Catholic religion, not all Latinx people speak Spanish, not all Latinx people identify as Latinx or Hispanic, and not all Latinx people are immigrants or even children of immigrants some Latinx people have been in this country for generations (Coombs, 1997).

One may argue that essentialism is ever present in statistics. Since statistical methodology is based on categorizing people into groups it is easy to see how essentialism would be involved. However, I argue here that this is not the case, or rather, it does not necessarily have to be the case. Within this paper, I am not posing the one solution that will solve essentialism in the statistical studies of Latinos, but I am saying that there is a multitude of possibilities. The Latino community is diverse and multifaceted and methods used to study this community should be this way as well. The regressions, analysis and categories I present here today are not meant to be the final word on this but they are meant to be the first step in a direction towards recognizing smaller subgroups within the community. The way I have categorized things in terms of looking at Central Americans and immigrants is based on the community I am most familiar with and feel most comfortable exploring.

The Law, The Census and Latinos

The number of Latinos who identify as multiracial has increased over time. In 2010, 3 million Latinos identified themselves as multiracial in the U.S. census. In 2020, 20 million Latinos identified as multiracial (U.S. Census 2020). This growth in multiracial Latinos comes mostly

from Latinos who identify as white and some other race. This population grew from 1.6 million to 17.0 million (Pew Research).

The United States census serves as a way to count people in this country and has political power in terms of representatives and taxes being apportioned based on the data collected by the U.S. census. The way Latinx people have been counted in the census has been quite messy from the start. Latinx people were first counted in the 1850 census but the way they were classified racially varied from place to place and from enumerator to enumerator (Gómez, 146).

In the 1970s, there was a switch from enumerators classifying one's race for the census to people being able to identify their own race themselves. In the 2000 census people were finally allowed to select more than one racial category for their race (Gómez, 153). However, Latinx respondents often chose other when having to describe their racial category. This led to officials of the census using a strategy called "hot-decking" to reclassify Latinx respondents who had chosen the "other" category. This led to Latinx respondents being categorized as White or Black based on how other people in their household responded or on how other people in their community responded (Gómez, 154). Thus, unlike for others, Latinx people have not generally been able to clearly choose their racial self-identification as have others.

In the past, enumerators would base their judgment on their own conception of race, now, individuals mark down their own race. Over time we have gone from a third-party identification to a self-identification but the confusion over what it means to be Latino has not changed. The nuance has remained. It is also important to note that the category of Hispanic in the U.S. census did not appear until the 1970 census. In fact, in the 1960 census, Latinos were classified as white. However, Latino activists protested this action because being classified as white did not allow them to represent themselves as underrepresented minorities (Mora, 2014). The classification of

Latino/ Hispanic when it comes to gathering information for public policy is important, however, many in the Latino community fit into more than one group and that should be recognized. In 2001, the Washington Post declared in an article that the Hispanic population of the U.S. had "drawn even" with the African American population in size. However, this statistic was only true if Black people who responded as more than one race were not counted as Black and if Black people who identified as Hispanic were only counted as Hispanic (James, 31). It is also important to note that Hispanic/ Latino people are labeled as an ethnicity but are often compared to other groups that are considered a racial category (James, 31). The U.S. also tends to operate in a binary, with black and white or white and nonwhite being the main categories. However, some evidence has been shown demonstrating that Latinos see race as being on a spectrum, with race being a combination of nationality, national origin, ethnicity, culture and skin color (Rodriguez and Codero-Guzman, 1992). Colorism is also very present in the Latino community and skin color may play a big role in how Latinos identify in terms of race. Approximately 62% of Latinos in the United States agree with the claim that having a darker skin color hurts the ability to get ahead in the U.S. (Pew Research).

In this same way that the government can adjust racial classifications found in the U.S. census when it comes to counting Latinx people, researchers also have a lot of power when it comes to classifications being made in connection to surveys and studies being done on the Latinx community. Decisions are often made with studies on whether to include Latinx people that marked more than one racial category, whether surveys should have Latino/Hispanic as a race, on whether Spanish people count as Latino in survey research, whether having an overwhelming amount of one national origin subgroup will have an effect on the data, whether Latino should be a racial category or not and so forth. Researchers have a lot of discretion when

it comes to these decisions in looking at the Latinx community and one is left to question how much is not being shown when researching Latino politics in political science.

The Migration Factor

While immigrants come and make a new life in this country, they do not leave behind their past but rather their past and present are interconnected as one and their past can affect future generations as well. Collective memory was a term coined in 1950 by Halbwachs. Collective memory is defined as, "the memory of one group of people, passed from one generation to the next" (Oxford). In the present, the most extensive survey work on collective memory has been done by Howard Schuman. A portion of his research looks at adults in the United States and shows that generational affects among this group are a result of the intersection of both personal history and national history (Schuman and Scott, 1989). In his research, Schuman uses two measures, the first being the memory itself and the second being the importance of the event. The way he executes this is by asking adults in the survey to name an event they regard as most important. (Schuman and Scott, 1989). Some recent research in political science has looked at how collective memory can lead to influencing collective action (Harris, 2006). Harris focuses on the civil rights movement and how recollection of specific events may have had a larger impact on the movement than was previously thought. Harris finds in his qualitative and quantitative analysis that the murder of Emmett Till had a larger effect on future black political activism especially among people who were young adults at the time. Therefore, Harris concludes that collective memory of specific events has a large effect on political activism.

In another article, Dr. Antoine Bilodeau investigates how pre migration experiences in oppressive regimes affects immigrants' participation in political protests in Canada and

Australia. He finds that immigrants coming from more repressive regimes are less likely to protest. He also finds that the greater the repression in the home country the more likely it is that an immigrant will abstain from protest activities (Bilodeau, 2008).

While collective memory can be a useful way of thinking about how immigrant experiences shape political behavior and action, collective memory is also about how these experiences shape future generations. This is especially important when thinking about the Latino community, approximately 67% of the Latino population in the United States was born in the U.S. (Pew Research). Many Latinos in the U.S. are children of immigrants, grandchildren of immigrants and so forth. Even though not all Latinos experience migration, thinking about collective memory is important because those migration experiences and the political views that come with it could potentially shape political attitudes.

There are many theories on political socialization. The influence of the family, school, peer groups, and the mass media have all been found to be significant in how Americans form their ideas about politics and political systems as well as partisanship. However, none of these views or interpretations account for partisanship development or any other form of political development among immigrants in the United States. In fact, some of the work looking at immigrants more recently makes claims about how immigrants come to the United States and see things as strange, foreign and unfamiliar (Luthra et al.,). Theories surrounding immigrants and their political development in this country lean on assumptions that immigrants arrive with a clean slate and do not really think about U.S. politics before arriving in the U.S. However, the U.S. is one of the most powerful countries in the world and its news is broadcast throughout the world. U.S. film and television is also broadcast globally. Therefore, suggesting immigrants do

not really know what is going on in the U.S. when they get to this country could potentially be a very irresponsible misconception.

When immigrants come to this nation they have different stories, different experiences they bring with them. In studying partisanship development in the United States one must account for the millions of naturalized citizens in this nation. In the last decade alone, there have been more than 7.4 million people who have been naturalized (USCIS). To not account for the different ways in which political development may be occurring in this group within American society is leaving out a significant chunk of the American political experience.

Latino Ethnic Identity and Political Science

Within Political Science, the topic of ethnic identity has gained considerable traction in recent years. Some scholars argue that wedge-issue politics that target Latinos can lead to large political turnout and awaken the "sleeping giant" (Pantoja et al, 2001). However, since the majority of people studied and surveyed are of one national origin, the nuance of subgroups is likely being lost. Mexicans make up 60-70 percent of the Latino population in the United States, and most studies of Latino Politics are heavily influenced by the Mexican American experience. Further, the distinction among immigrant groups and the way they socialize politically is important for understanding the political socialization of the American voter as a whole. One cannot deny that the experiences of immigrants are different, so ignoring these differences is tantamount to ignoring an entire population in the United States. Some Latinos have fled war and/or poverty while others have been in this country for generations. In yet, most of the body of current work groups Latinos as one pan ethnic identity and it is imperative a closer look be taken especially when considering policy issues related to these groups. The Latino pan ethnic vote is perhaps more varied than one may originally have assumed. One example is, a recent study that

argued Mexican Americans should have been most mobilized among Latino groups to vote against Trump in 2016 because their Mexican origin was under attack in the campaign (Garcia-Rios et al, 2018). This article makes clear that national origin identity does matter to Latino politics, however it is imperative that a closer look be taken at other subgroups in the United States.

The Central American Example

As stated earlier, I am going to be doing a statistical analysis on Central Americans in U.S. politics for the purposes of demonstrating differences among groups in the Latino community. When I use the term Central Americans, I am referring to people who trace their national origin to one or more of the seven countries of El Salvador, Costa Rica, Belize, Guatemala, Honduras, Nicaragua and Panama. First, I want to acknowledge that grouping the people of these different nations together is a form of essentialism. However, the reason I am doing this is because the sample of any one national origin subgroup is too small to make comparisons with the much larger sample in any one of the surveys with Mexican Americans. I see this analysis not as the final appropriate analysis, because each national origin subgroup and racial category should be explored on its own, but as a step in the right direction. This analysis will serve as a way to demonstrate a small step moving away from essentialism but not as the final nonessentialist methodology. As stated earlier, the role of this paper is not to have the final say in what groups should be studied but to simply make the point that other groups should be looked at by giving an example of one grouping of people in particular.

A lot of media attention has been given to the migrant caravans at the southern border which is made up mostly of Central American migrants. The caravan at the border includes people mostly coming from the countries of Honduras, Guatemala, and El Salvador; the so called

"Northern Triangle." Donald Trump attacked these caravans for months through not only his policies but his words as well. He made several references to how there may be criminals in the caravan and how they posed a threat to national security. He has also referenced the gang MS13 in a lot of his rhetoric when referring to the potential criminality of these migrants. More recently, in the Biden administration, a lot of attention has been given to these countries in terms of trying to stop the flow of immigration from these nations into the United States. Kamala Harris recently went to Guatemala and asked the people there not to migrate. Harris and Biden also called out El Salvador's president for what they deem to be problematic governing. However, the problems we see in these countries and in other parts of Central America are not new and they are not resolvable by the U.S. simply saying stop or its not ok. Nor has the U.S. ever fully acknowledged the part it has played in the crisis we see in these countries (Gómez, Chapter 1). While Central Americans have been in the news a lot, this is not the only time there has been a crisis among this group where there has been a need to flee the home country. Also, because of a long history of migration there is now a significant population of Central Americans in the U.S.

Much of the existing work on Central Americans tends to focus either on remittances and transnationalism (Guarnizo, 2003) or studying Central American countries rather than Central American populations in the United States (Gammage, 2006). Some literature on political participation exists in other fields such as sociology. The extant research on Central Americans is also primarily qualitative in nature that has a tendency to consist of accounts of the immigrant experience. Some of this work includes the important fact that while many Central Americans could be categorized as refugees not many of them actually are classified this way because the U.S. refuses to see people as refugees when coming from Central America (Abrego et al, 2017).

This is an interesting point. Distinctions in refugee status being granted is a difference in a political experience. This could potentially signal a difference in how many Central Americans view the government and could in turn affect their political socialization as opposed to other groups that are granted refugee status and other immigrants coming to the U.S. looking for greater economic opportunity.

Much of the previous work in the fields such as sociology and anthropology has also focused on collective consequences of the invisibility of Salvadorans and other Central American groups within the U.S. (Abrego, 2017). Other scholarship considers historical memory, also known as collective memory, and how the traumas experienced by many Central American immigrants in their home countries has negatively impacted their political participation in the United States (Arias, 2003).

Hypotheses

Hypothesis 1: Numbers of race subcategory group survey respondents will vary widely when it comes to surveys done in political science with some surveys having too small a number to use for analysis of specific groups. One group in particular being Afro-Latinos.

Hypothesis 2: Numbers of national origin group survey respondents will vary widely when it comes to surveys done in political science with some surveys having too small a number to use for analysis of specific groups.

Hypothesis 3: Distinctions in political interest and sense of having things in common with other Latinos will be seen between Central Americans and Mexican Americans, with Mexican Americans having higher political interest and Central Americans feeling they have less in common with other Latinos.

Hypothesis 4: Distinctions in public opinion will be seen among groups with different immigration backgrounds.

Hypothesis 5: None of the surveys will be able to account for who identifies as being mixed race/ multi ethnic in the sense of an understanding of mestizaje, and who chooses this category in the sense of coming from a biracial household and having a parent that identifies as Latino and a parent that does not identify as Latino.

Methodology

For this work I use three nationally representative surveys, including the Latino National Survey (LNS) from 2006, the Latino Immigrant National Election Study (LINES) from 2012, and the Latinx sample from the Collaborative Multiracial Post Election Survey (CMPS) in 2016.

The Latino National Survey (LNS) from 2006, was collected via telephone and online. This survey has a large, nationally representative sample of Latinos and distinguishes them by national origin subgroup. The LNS also has a question that asks the respondent to list their ethnicity within the Latino population and gives them the option to mark Central American as an ethnicity as well as Salvadoran, Mexican, Hispanic, Cuban, Dominican, and Puerto Rican. This will be key in my analysis among distinctions between subgroups. Another critical question within this survey is the survey asked respondents the reason they came to live in the United States. They are given the options to mark education, family reunification, my parents brought me as a child, improve economic situation, and escape political turmoil.

The Latino Immigrant National Election Study (LINES) from 2012 is another nationally representative telephone survey. The majority of the participants in this survey were not U.S. citizens and the survey was also administered in two waves. The topics that were the main focus of this survey were immigrant civic engagement, political socialization, as well as attitudes and

opinions on electoral and non-electoral behavior. The survey also asks respondents what country they were born in.

The 2016 CMPS is a national survey of voters and nonvoters conducted after the presidential election. The 2016 CMPS was administered entirely online and is one of the only national surveys that provides enough data on different racial groups to be able to do a cross racial analysis.

How the Question of Latino is Asked

The LNS

In the LNS from 2006 the question used to gage whether or not someone is Latino reads as: "Do you consider yourself Hispanic or Latino or a person of Spanish origin?" If the individual questioned answered yes, then the survey continues. The next question with regards to Hispanic/Latino identity is: "The most frequently used terms to describe persons of Latin American descent living in the United States are 'Hispanic' and 'Latino.' Of the two, which do you prefer, or do you not care about this terminology." From then on, the person in the survey is referred to by whatever they listed they preferred. It is important to note that there is a specific question asked of New Mexicans in this survey, the question reads: "Many Hispanics in New Mexico refer to themselves as New Mexicans, Hispanos, or nuevomexicanos rather than as Mexicans, Latinos, or Hispanics, from your point of view are these terms the same as Latino or Hispanic, the same but just meaning Hispanics from New Mexico, something different?"

Then within this survey we come to the question of national origin. The survey reads:

"B4. **ANCESTRY** (1-8) Families of (Answer to S4) origin or background in the United States come from many different countries. From which country do you trace your Latino heritage?

IF MORE THAN ONE RESPONSE GIVEN READ: "Which country does most of your family come from?"

IF RESPONSE IS “U.S.,” THEN ASK:
Do you trace your Latino heritage, however many generations back, to any country other than the U.S.?”

At this point all countries of Latin America are listed and Spain is also listed. Another question that gets asked of those surveyed is where they were born and all countries are again listed. There is also a specific question on whether or not the person was born in Puerto Rico. Those born in Mexico are specifically asked what state they were born in.

A few portions of the survey are striking in terms of measuring Latino identity. Firstly, it is important to note here that in the national origin portion of the question for those tracing back their family heritage, more than one response is not noted and instead the majority of where the family comes from is what is accounted for. Considering many people who are Latino born in the United States may trace their family origin to different Latin American countries this could be seen as an oversight and issue when analyzing specific national origin subgroups or how different cultures are interacting with one another.

Another important thing to note is that there is no specific race question. While the survey is geared towards people who identify as Latino, there is no way of telling if these individuals identify as black, indigenous or any other race which is crucial to thinking about political behavior. The experience of white identifying/ passing Latinos in the United States will be vastly different from the experience of those who do not identify as white. Finally, the survey is meant to be on Latinos but those who identify as Hispanic are also questioned. This is not necessarily an issue based on national origin subgroup, but the inclusion of Spain and persons of Spanish descent on the survey is something to take note of and also curious to think about when calculating total values.

The LINES

The LINES 2012 uses one question to gage national origin. The sample is entirely made up of Latino immigrants and therefore only national origin is asked of the respondents. It is important to note that Spain is once again included in the list of countries. Another thing that is important to note is that there is no race question asked of the respondents. While it is true that the concept of race is perceived differently across different countries, the absence of a race question provides little information into how the respondents see themselves and perceive their experiences.

The CMPS

The CMPS 2016 asked when it came to the question about race:

"In order to make sure we have a representative sample of everyone across America, let's start with a few basic demographic questions to ensure this study is inclusive of all Americans: [ALLOW MULTIPLE]

White, not-Hispanic

Hispanic or Latino

Black or African American

Asian American

Middle Eastern or Arab

American Indian/Native American

Other"

One thing that is important to note here is that this survey is allowing both to identify oneself as Latino under a racial category rather than simply an ethnic one. It is also important to notice that this question also allows for people to select more than one racial category which

allows for people to express other identities that we may not have previously seen with the other surveys. In connection with this race question the survey also asked about skin color:

[C262] As you know, people display a wide variety of physical characteristics. One of these is skin color. Displayed below is a skin color scale that ranges from 1 to 10. The 10 shades of skin color are represented by a hand of identical form, but differing in color. Which hand shown below comes closest to your skin color?

This question is critical because many surveys do not ask this question and colorism affects both how one perceives themselves and also how an individual is treated in society as well as perceived by other people.

When it comes to asking Latinos about their particular national origin subgroup, this survey followed the same suit as the others previously mentioned with every country in Latin America mentioned along with Spain being mentioned as well.

Results: Distinctions Based on Experiences

An interesting question on the LNS from 2006 that the other surveys did not have is that it asked the reason for immigrating to the United States of the respondents who identified as being born outside the United States. This question is significant in the fact that it ties back into how different immigrant experiences may shape political experiences.

Value	*Label*	*Unweighted Frequency*	*%*
1	Education	391	4.5 %
2	Family reunification	642	7.4 %
3	Escape political turmoil	380	4.4 %
4	My parents brought me as a child	880	10.2 %
5	Improve economic situation	3399	39.4 %
6	Other (SPECFIY)	492	5.7 %
. (M)	-	2450	28.4 %

Based upon 6184 valid cases out of 8634 total cases.

In looking at the general breakdown of responses given, the majority of the respondents stated they came to the United States to improve their economic situation, many respondents also answered being brought here as a child and for family reunification purposes. However, in

Reason for Immigrating	Mexico	El Salvador	Guatemala	Colombia	Cuba	Dominican Republic
Education	5.83	4.66	3.42	15.5	1.17	6.71
Family Reunification	9.69	5.18	8.22	14.73	8.21	16.11
Escape Political Turmoil	0.72	17.88	7.53	7.75	62.76	1.68
My parents broiught me as a child	13.38	9.59	10.27	13.95	9.97	15.1
Improve Economic situation	63.57	54.15	64.38	34.11	11.44	54.7
other	6.81	8.55	6.16	13.95	6.45	5.7

looking at the data separated by national origin group another picture begins to emerge. In looking at the national origin breakdown of the data one can see that the majority of Cubans in the sample answered political turmoil as the reason for immigration. The majority in the other national origin subgroups answered improving economic situation as a reason for immigrating as well. However, education and family reunification was more important to some groups more than others. It is also important to note that I am only showing the top six groups in the sample, meaning there were at least 100 respondents for each of these subgroups.

Table 1: Central American Political Interest

	Dependent variable:
	Political Interest
Naturalized U.S. Citizen	0.084***
	(0.030)
Central American	−0.207***
	(0.037)
Income	0.026***
	(0.008)
Gender	0.031
	(0.025)
Republican	0.151***
	(0.048)
Political Turmoil	0.194***
	(0.053)
English Proficiency	0.169***
	(0.016)
Constant	1.444***
	(0.025)
Observations	3,539
R^2	0.075
Adjusted R^2	0.074
Residual Std. Error	0.730 (df = 3531)
F Statistic	41.144*** (df = 7; 3531)
Note:	*p<0.1; **p<0.05; ***p<0.01

Results: How National Origin and Experiences in the Home Country Affect Political Attitudes

Table 1 shows my first regression model. For this first regression I focus on Central American Political Interest. As mentioned previously in this paper, while I am discussing combatting essentialism in studying Latinos in Political Science, I also have to work with the data I have and therefore am using Central Americans as a test group for this hypothesis as this is a subgroup that is not studied as much in political science but important to look into. As more data becomes available though I think it is important to also look into dividing these groups as Central Americans are not one nation or one racial or ethnic group.

Table 1 shows the first regression which is a measure of the dependent variable of political interest controlling for whether or not the person is a naturalized U. S. citizen, all the people that identified as Central American, income, gender, which is whether or not the respondent is a republican, political turmoil which is whether or not the respondent noted that they came to the United States because of political turmoil in their home country, and how proficient the respondent is with the English language. The regression shows that there is a negative correlation when it comes to being Central American and indicating political interest. This effect is also significant demonstrating a P value of 0.01. What this appears to indicate is that Central Americans appear to have less political interest than other Latinos. This corresponds with previous research theorizing Central Americans invisibility within U.S. politics and how this could potentially contribute to lack of political interest.

To further mark a conscious distinction between groups, in Table 2 I took the question in the survey that asked about how much in common the respondents felt they had with other Latinos. I used the same controls, and the next table demonstrates the results from that regression. This shows that Central Americans compared to all other Latino groups as a whole, feel they have less

Table 2: How much in Common with other Latinos

	Dependent variable:
	Political Interest
Naturalized U.S. Citizen	0.003
	(0.044)
Central American	−0.138**
	(0.055)
Income	0.010
	(0.012)
Gender	−0.034
	(0.037)
Republican	0.220***
	(0.071)
Political Turmoil	−0.004
	(0.079)
English Proficiency	0.146***
	(0.024)
Constant	1.405***
	(0.037)
Observations	3,380
R^2	0.020
Adjusted R^2	0.018
Residual Std. Error	1.058 (df = 3372)
F Statistic	9.993*** (df = 7; 3372)
Note:	*p<0.1; **p<0.05; ***p<0.01

in common with other Latinos. This again can be in connection to the invisibility felt by many Central Americans and also contributes to the distinction felt among national origin subgroups.

With regards to political turmoil the next table, Table 3, has the same controls but focuses more on questions on public opinion in regards to same sex marriage. If one is to believe that political opinions can be affected by the home country experience, then experiencing political turmoil in the country of origin will definitely have an effect on how one views certain political issues. The table shows that political turmoil does have a significant effect on public opinion on same sex marriage among Latinos. In fact, it shows that this relationship is negative which suggests that people that have experienced political turmoil in the home country are less likely to support marriage of same sex couples. The table shows this is true even when controlling for whether or not the respondent is a Republican.

Table 3: Latino Opinion on Same Sex Marriage

	Dependent variable:
	Opinion On Same Sex Marriage
Political Turmoil	−0.230**
	(0.116)
Naturalized U.S. Citizen	−0.035
	(0.065)
Income	−0.021
	(0.018)
Gender	−0.067
	(0.054)
Republican	−0.201**
	(0.097)
Mexican	0.090
	(0.061)
English Proficiency	0.016
	(0.034)
Constant	0.0620***
	(0.072)
Observations	1,007
R^2	0.023
Adjusted R^2	0.016
Residual Std. Error	0.847 (df = 999)
F Statistic	3.342*** (df = 7; 999)
Note:	*p<0.1; **p<0.05; ***p<0.01

Moving on to another matter of public opinion, I run the same model with support for abortion as the dependent variable in Table 4. Once again political turmoil comes up as a significant variable in regard to abortion public opinion. However, this time the effect is going in

the opposite direction. Political turmoil appears to have a positive effect on support for abortion and, with the way the model is set up, this means that experiencing political turmoil in the home country leads to greater support for abortion legalization in all circumstances. The results from these public opinion questions demonstrate that in taking a closer look and breaking the Latino sample down by national origin and immigrant experience, we can see differences in public opinion that we cannot necessarily see when looking at the group as a whole.

Table 4: Latino Opinion on Abortion

	Dependent variable:
	Opinion On Abortion
Political Turmoil	0.254***
	(0.082)
Naturalized U.S. Citizen	0.094**
	(0.043)
Income	0.022*
	(0.012)
Gender	0.036
	(0.036)
Republican	−0.105
	(0.066)
Mexican	−0.016
	(0.042)
English Proficiency	0.091***
	(0.024)
Constant	0.715***
	(0.049)
Observations	1,578
R^2	0.037
Adjusted R^2	0.033
Residual Std. Error	0.709 (df = 1570)
F Statistic	8.649*** (df = 7; 1570)
Note:	*p<0.1; **p<0.05; ***p<0.01

The Multiracial Question

The 2016 CMPS is the only survey of the three I am analyzing within this paper that allowed respondents to mark more than one race apart from identifying as Latino. The survey had 3,002 respondents that identified as Latino. Of those 3,002 respondents, 254 identified another racial category aside from Latino. However, based on the questions given throughout the survey, it is impossible to know which of these individuals identified another race in addition to Latino because they identify as biracial in the sense of having family outside of Latino family ancestry and which individuals see being Latino as being multiracial in general.

Aside from this there is also the issue of the erasure of various groups in the Latino community. While some Latinos see themselves as a mixing of races other groups within the community identify as Indigenous and Afro Latino. Other individuals also associate more closely

with whiteness as well. To ignore these distinctions and simply assume that the racial identity of all Latinos is the same is a severe misstep when it comes to statistical analysis.

Conclusion

My first hypothesis was correct. Firstly, both the LNS and LINES did not have questions other than asking if the person participating in the survey was Latino with regards to racial identification. This leaves no opportunity to identify and study political behaviors of individuals who identify as more than one race, including Latinos who identify more as white or Afro Latino or indigenous or any other racial group. Further, all of the surveys do not allow for people to identify with more than one national origin subgroup. This also poses an issue because especially with Latinos born in the United States, many of them may have family members with different national origins. When it comes to the CMPS specifically, respondents were permitted to mark more than one racial category as part of their identity but as was stated before, it is impossible to tell who is identifying themselves as a person of mixed race in the context of Latino concepts of mestizaje and who is identifying themselves as Latino and another race. Future surveys should add questions on national origin subgroup that allow people to answer more than one category and there should also be more race questions to clarify how Latinos are interpreting the race question. One possible way of doing this could be to ask respondents the race of each of their parents in order to get a clearer picture of how these types of questions are being perceived.

In terms of my second hypothesis and national origin subgroups, the number of respondents in each survey did vary and in some cases, there was an oversampling of some groups at the cost of others in the Latino community. For example, in the 2016 CMPS there was an oversampling of Puerto Ricans with 491 respondents identifying themselves as Puerto Rican.

This number made up 16% of the sample. However, in 2016 Puerto Ricans only accounted for 9.5% of the Latino population in the U.S. at the time. Another example of this is 237 respondents identified as Spaniard which accounted for 7.89% of the total sample. The percentage of the sample of South Americans combined was 8.87% which is just approximately one percentage point higher. In all the surveys, the number of Mexican respondents was much higher than all the other subgroups. While this makes sense because Mexicans make up the majority of the United States Latino population it is important to note from a statistical standpoint, that having so much of one group does not allow for effects to be seen among other groups. Further, having so little of these other groups does not allow for sufficient analysis of political behaviors which leads for the need to combine groups as I did in the case of Central Americans. Therefore, my second hypothesis was correct. Further effort should be made to collect nationally representative samples of respondents and further effort should also be made in this direction because as more and more Latinos from different countries immigrate to the United States, more generations of Latinos from different national origin backgrounds will also interact with U.S. politics.

My third and fourth hypothesis were also correct. There was a clear distinction seen between Central American and Mexican American political interest with more political interest being seen in the Mexican American group. In the case of having a lot in common with other Latinos Central Americans also demonstrated a lower sense of this. Respondents who answered political turmoil as the reason for immigration also demonstrated more conservative views on a few key political issues. While these results are promising it is important to note that even these results are still too broad. Preferably, it would be better to be able to have larger samples of each national origin subgroup in order to see each national origin group's interaction with politics. It would also be better to have controls for different racial identification to control for those

Latinos who identify as Afro Latino, white, indigenous or mixed race in some other way. The same can be said of the question of political turmoil, where the majority of the respondents who answered this question were Cuban there were other groups that answered this question and larger sampling of different groups would aid in the analysis of different immigrant experiences and political opinions.

My fifth hypothesis was also correct. The first two surveys did not account for any other racial identification aside from asking respondents if they were Latino/ Hispanic. The CMPS did allow respondents to mark more than one racial category but as was discussed in the analysis of hypothesis one, no clear distinction can be made between those who identify as biracial or multi-racial in the U.S. sense and those who identify in the Latin American sense. This is an issue of course because not accounting for this data does not account for the other racial identities within the Latino community.

Overall, the study of the Latino community through statistical methodology in political science has come a long way. But the haziness and unclear nature of the concept of Latino remains even with improvements in data collecting and analysis. The discipline of Political Science needs to move further away from essentialism and more into looking at and understanding the nuances of the Latino community. Better collection methods need to arise when it comes to different national origin subgroups and better question development needs to occur to account for difference racial groups in the Latino community.

Chapter 2: Social Factors in Courts: Decision Making in Asylum Cases

Introduction:

Many times, papers include a race or sex/gender variable. Researchers use this as a measure of diversity when really it is a label that tells us some things but not others. A person's race and gender can have an effect on how the world sees and treats them. This can have an effect on how they view politics. People's background, socialization and experiences definitely shed a light on their perspective of the world and that is not always captured in political science research. We often conduct work only looking at the label of race, gender, and sexuality but not connecting it back to the lived experience of the individual within the larger social context. This paper looks at diversity in looking at immigration judges and how diversity in the court may or may not be making a difference in their decision-making with regards to asylum cases.

Asylum claims have skyrocketed in recent years and thousands of people are in a backlog spanning years awaiting to go before a judge to have their case decided. Their fate rests in the hands of immigration judges who have a large amount of discretion and a variety of options on what to do about their cases. Judges can grant claimants a stay in this country, send them back to the country that they are fleeing, or a variety of many different outcomes such as granting an extension of their case. Not much has been explored about the backgrounds of immigration judges and how they make their decisions, but with all the discretion these judges possess this leads to the question of whether their race, ethnicity, gender and/or background has an effect on their overall decision making. Many of these judges have a very high denial rate when it comes to these decisions but that varies from place to place. This paper intends to try to understand why and whether or not this is caused by bias based on a judge's background.

In terms of what leads to all the variation in denial rates among judges, the person seeking asylum having legal representation and geography are the main arguments given by analysis by the Transactional Records Access Clearing House (TRAC) which has a database dedicated to tracking asylum denial rates in the United States. Immigration judges also do not have the same typical path as many other judges in the United States. While many judges are elected or nominated and then appointed, immigration judges are not. They are hired. According to the United States Department of Justice website, an immigration judge must only have seven years of post-bar admission legal experience, an L.L.B., J.D., or L.L.M. degree, and active bar membership to apply. It is also important to note that immigration judges do not need immigration law experience in order to be hired for the job. All new hires are also trained for a few weeks through the Department of Justice and overseen by the attorney general. In looking at data from the Transactional Records Access Clearinghouse (TRAC), while many immigration judges have experience in immigration, many others have experience in other fields such as corporate law, military law, and so forth. Many of these judges also went to a wide variety of law schools. All this information makes immigration judges an interesting case study in terms of looking at diverse experiences and judicial decision making.

This paper measures diversity in three ways, the first measuring diversity by looking at exposure to diversity in the judge's youth. I do this by collecting data on where the judge went to undergrad and law school. The second measure of diversity is a proxy for whether or not the judge is a person of Latino or Asian descent. The third measure of diversity looks at the judge's gender and the gender of the other judges at the immigration court. The preliminary results for this paper appear to show that the higher the number of male judges working at the immigration court, the higher the denial rate. This could potentially be because of social dynamics between

the different judges but further work into the literature on gender and the legal profession and statistical modeling needs to be done.

Judges and Bias

Justice Harlan of the supreme court is quoted as saying in his famous dissent, "our Constitution is color-blind, and neither knows nor tolerates classes among citizens" (Plessy v. Ferguson). However, there is plenty of evidence in the realm of social science that points to a racial disparity in the way the law is applied upon individuals in various branches of the judiciary. Plessy v. Ferguson itself held the infamous "separate but equal" policy that did not get overturned until the famous Brown v. Board of Education decision occurred. While this paper focuses specifically on immigration judges, a large portion of the previous research on judges and bias in political science does not look at immigration judges. However, this research serves as a useful tool for building a theoretical framework for how immigration judges think and may potentially be acting with bias.

There is the question of prejudice and implicit bias when it comes to looking at judges. Prejudice is defined as a hostile attitude or feeling toward a person solely because he or she belongs to a group to which one has assigned objectionable qualities (Allport, 1954). Implicit bias is a social behavior that is largely influenced by unconscious behaviors and judgments, more specifically, it refers to attitudes and stereotypes that affect a person's understanding, decisions, and actions in an unconscious way which therefore makes them difficult to control (Greenwald and Banaji, 1995).

There has been some research done in the realm of implicit bias and judicial decision making. While implicit bias is by definition not always easily recognized, trial judges are trained to follow the letter of the law and therefore they are supposed to not let their implicit bias seep

through in their decisions. However, that is not always the case, or at least not always the perception people have.

Former President, Donald Trump repeatedly spoke out about his opinion on judges and their differing decisions. An example of this, were his attacks on Judge Gonzalo Curiel. Trump repeatedly spoke out about how Judge Curiel is a "Mexican Judge" and that because of his race and ethnicity Judge Curiel could not make a fair decision when it came to the Trump University case. Donald Trump had also spoken out about the ninth district court citing that it has "Obama judges" meaning their decisions are too liberal. We also have the case of the somewhat recent nominations and confirmations of Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. On all three occasions people were concerned with these confirmations because these individuals appear to be more conservative leaning judges. With the case of Justice Kavanaugh, individuals were not only concerned because of the fact he is considered a conservative judge and what that could mean for abortion rights in this country but also because of the allegations of sexual assault against him.

There is a lot of talk about conservative and liberal judges when repeatedly it is stated that judges are supposed to simply follow the letter and spirit of the law. This is the view that Justice Roberts, in a very strange and irregular move, pointed out when he took on Trump head on by issuing a public statement. Roberts was quoted as saying, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges… What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for" (Roberts, November 21, 2018). Even thought Chief Justice Roberts and other people like him make these claims the concern of bias in judicial decision making is something that researchers have indeed touched on.

A variety of research demonstrates that people have two different sets of decision making. These sets are intuitive decision making and deliberative decision making (Kahneman, 2011). Intuitive decision making consists of a person going with their first instinct, while deliberative decision making consists of a slower more logical thought process. Judges are no exception to this. Specifically, in the judicial setting issues have been found with judges relying too much on anchoring. Anchoring references an excessive reliance on numeric reference points when making numeric judgements (Amos et al., 1974). Numeric reference points are not necessarily a problematic thing, when one conducts an analysis with income and the price of an object, anchoring can prove to be very useful and reliable. However, studies have demonstrated that anchoring can make its way into judicial decision making (Guthrie et al., 2009 & Lappi-Seppälä, 2001).

While the connection to anchors may have some reason, some research has been conducted in connection to judicial decision making and emotions that provides us with some evidence that judges are influenced by their emotions (Wistrich et al., 2015). Many notable justices have spoken on the matter of emotions and judicial decision making. Former President Barack Obama was once quoted as saying with regards to his decision in nominating Justice Sonia Sotomayor, that he wanted someone with "empathy" for "people's hopes and struggles" (Hook et al, 2009). When Justice Sotomayor was appointed to the supreme court she distanced herself from these remarks by saying, "It's not the heart that compels conclusions in cases, it's the law" (Sotomayor, 2009). Another justice, Justice Kagan, was asked at her hearing if she was in agreement that, "the law is only twenty-five miles of the marathon and emotion is the last mile." However, when questioned with this Justice Kagan responded with, "it is law, all the way down" (Kagan, 2010). Both the literature and examples in our media demonstrate an attention to

emotion that judges are aware of to an extent. In connection to this some research has also demonstrated that defendants that are seen as sympathetic tend to have a connection to judges making more favorable rulings in cases (Wistrich et al., 2015).

There also comes the question of favoring ingroups. In social science, ethnocentrism is seen as, "the view of things in which one's own group is the center of everything and all others are scaled and rated with reference to it" (Sumner, 1906). In group favoritism has been seen time and time again throughout social science research. A variety of studies have noted that geographic favoritism is something that has been seen playing a role within the judiciary as well. Some of this evidence has demonstrated a bias against individuals petitioning courts from different states (Goldman et al., 1980).

Other factors that may influence judicial decision making are racial and gender bias. One particular study looking at gender found that judges who presided over gender discrimination cases decisions shifted into showing more concern for female claims of discrimination after they had a daughter. This distinction was also more evident among Republican appointed nominees which connects back to our questions on ideology and the role that may play in judicial decision making (Glynn et al., 2015).

There has been some research done on judges in federal courts and criminal courts. In a study by Welch, it was found that white judges were more likely to send black defendants to prison in comparison to white defendants. The same study also found that black judges also tend to treat white and black defendants more alike (Welch et al., 1988). This study was done at the city level with only one large metropolitan area under the study. However, in order to get the data for the study, the authors of this article could not reveal exactly which city it took place in. In another study done in Detroit it was found that both black and white judges sentence black

offenders more severely than white offenders (Spohn, 1990). Again, this study was done in one city. Quintanilla 2013 finds that white judges are more likely to dismiss the claims of "stereotyped-group members" and that implicit bias is operating more frequently against black plaintiffs in employment discrimination cases.

Another study done in Pennsylvania that included Hispanics or Latinos, found that among all types of criminal cases this group is the most likely to receive the harshest penalty by any judge (Steffensmeir et al., 2001). A study done on federal courts involving discrimination cases found that there is some differentiation in how Black, White, and Latino judges make decisions. It showed that Latino judges make the harshest decisions across the board and that women judges in general, especially minority women, were much less harsh across the board This study is one of very few that exists on a national scale (Morin, 2014). Finally, a review of studies looking at bias in judging noted that given that the application of the law rarely provides a "correct" answer, it is no surprise that judges' decisions vary according to their personal backgrounds and, more importantly, according to their ideology (Harris and Sen 2018). Therefore, there is some evidence to show that a judge's identity may have a correlation with the outcomes of their cases.

Looking more specifically at asylum judges, Gupta (2016) has posited that certain types of asylum cases, such as those of people fleeing dictatorships are routinely granted while others, cases brought forth by victims of domestic violence, are not. The conclusion here is that judges tend to reason that a personal or criminal reason motivated the issue and not an issue on protected grounds. Some evidence has also been found suggesting that even controlling for the merits and quality of a case, the sequence of past decisions appear to have an effect on asylum judges' current decisions (Chen et al., 2016). Another study done in Dallas looking at

immigration courts found that judges in this setting appear to have two methods when it comes to their decisions on removal proceedings. The first being, the "scripted approach" which is when judges following a pattern in their decision making, and the second being the extemporaneous approach, which is when judges reflect deeply on the specific cases they have at hand (Asad, 2019). Returning to the implicit bias literature, some evidence has been found that factors such as judges having a lack of independence, low motivation, low risk of review and not much of an opportunity for deliberative thinking may allow implicit bias to creep into decision making in immigration courts (Marouf, 2011). Another study that was conducted looking at immigration judges found that female immigration judges had a higher grant rate in their cases than their male counterparts (Schoenholtz et al., 2007).

Some scholars have suggested some potential remedies for implicit bias in the legal system. One potential remedy mentioned in reducing bias is having a more diverse court. Diversity in the court has been seen as important for combatting implicit bias. This is not necessarily because of the identity the person has but the experiences the judge has in connection to their identity (Chew et al., 2012). Another suggestion researchers have brought up to combat potential bias has been to set up a committee that would audit and look over and review cases to search for patterns of implicit bias (Irwin, 2010). Another solution proposed is the idea that judges could foster more diversity within their private lives. One author suggested that to combat bias, judges could purposefully choose to live in diverse areas and send their children to diverse schools (Robert et al., 2012). Other suggestions have been made as well recommending that judges could take coursework in ethnic studies and/or also teach at diverse and historically black universities and colleges (Andrew et al., 2017).

The Asylum Context

Immigration judges apply for their positions and are ultimately appointed by the attorney general, and as is the tendency in other types of judicial appointments judges tend to be appointed based on their prior history and whether or not the person in power thinks they will side with what they want. Like most judges they are chosen based on their prior experience; however, the process is different than other judges. People who want to be immigration judges need a minimum of 7 years of administrative law experience. This means that they do not necessarily have to have specialized in immigration prior to becoming an immigration judge. (USCIS) While their selection is ultimately based on the attorney general at the time's decision, I am more interested in how their prior background leads to their decision making mainly because immigration judges opt into applying for these positions instead of being selected or running for and winning an election like other judges.

In asylum courts, the current backlog according to the National Immigration Forum is that there are over 700,000 pending immigration cases. The National Immigration Forum also lists the national average wait time for a case to be heard is approximately two years. However, in some courts the average wait time can be as high as almost four years. With so many cases and only about 350 judges, the backlog per judge has grown to an enormous size of approximately over 2,000 cases per judge. A variety of methods have been proposed to address this growing problem. These include but are not limited to, hiring more immigration judges, increasing the use of prosecutorial discretion, dismissing cases that are considered low priority, limiting asylum claims based on certain factors, and setting quotas to encourage the speediness among judges (National Immigration Forum). With mounting pressure from the executive branch, it is now more important than ever that a closer look be taken at immigration courts and how judges are making these pressure filled decisions. Recently, we have seen a variety of large

migrant caravans at the border hoping to have their asylum claims processed and be allowed to stay in the United States. However, with the remain in Mexico Policy many of these individuals will not be allowed to enter the U.S. and will have to wait for their case to be heard in Mexico. Because of the current backlog, this could take years and individuals are left in a state of limbo because of this. These individuals, along with many others trapped in the backlog, will eventually go before an immigration judge and have their cases decided. Thus, immigration judges have their work cut out for them and caseloads may be another factor to consider within this project.

With the ongoing debate concerning judges, one is left wondering where this leaves plaintiffs. Specifically, in the scope of this paper: asylum seekers in the United States. Every year, the U.S. takes in tens of thousands of refugees and asylum seekers. These asylum seekers come from all over the world, but the top five countries from where asylum seekers come from in the United States are: China, Guatemala, Honduras, El Salvador, and Mexico. In recent years, we have seen several migrant caravans at the border primarily from the three Central American countries previously mentioned. These individuals are fleeing persecution due to a variety of issues. Asylum seekers in general can claim a variety of reasons for seeking asylum in the United States such as having suffered fear or persecution due to: race, religion, nationality, membership in a particular social group, or political opinion of some kind (USCIS). Many asylum seekers have been granted asylum status more specifically because of fleeing gang violence, domestic abuse, as well as being a member of the LGBTQI+ community and being persecuted for that, since these are major problems afflicting foreign countries and the groups being persecuted because of these problems need to seek help from the United States.

Historically speaking there have been issues with perceived bias and immigration courts in the past. During the time period of the Central American exodus, there were a variety of federal court cases that further fueled the controversy and had a long lasting historical impact on the future laws that are affecting immigrants today. The first of these cases was the case of Orantes-Hernandez v. Meese. This case was a class action civil lawsuit that eventually ended up on the desk of a judge in the United States District Court for the Central District of California. The facts of the case followed a group of Salvadoran immigrants who challenged the practices of the Immigration and Naturalization Services (INS). This group contested that the INS had used specific tactics to coerce immigrants to go back to El Salvador, failed to advise them of their right to have an attorney or even apply for asylum in general, denied them enough communication with their counsel and also locked them up in solitary confinement without a hearing (Orantes-Hernandez v. Meese). While the plaintiffs in this case did not win entirely there was an investigation done into the violations committed by the INS.

Another case that has had a lasting impact on immigration policies in regard to Central Americans is the case of Orantes-Hernandez et al. v. Thornburgh. This case found that the INS had to inform all Salvadoran detainees, as well as other detainees from different places, of their right to apply for political asylum as well as their right to communicate with their counsel and all the other subsequent rights that entail from that (Orantes-Hernandez et al. v. Thornburgh).

Finally, a groundbreaking case was that of American Baptist Churches et al., v. Richard Thornburgh, et al. This case was also a class action lawsuit and it involved several Central American immigrants as well as a variety of human rights organizations. The plaintiffs claimed, among many other things, that there was a biased viewing and decisions were biased when it came to the asylum claims of Central American asylum seekers. The case was eventually settled,

and it was ordered that approximately 250,000 asylum applications by Central American immigrants be reconsidered for asylum claims. This of course while right, added to the enormous backlog that judges are still facing today in immigration courts.

The rights granted to the asylum seekers are also very different in comparison to other types of court cases. In the case of C.J.L.G. v. Sessions, the Ninth Circuit Court of appeals declared that immigrants in immigration court do not have a guaranteed right to representation in their cases. While immigrants can hire a lawyer and have the right to have the lawyer represent them this is not a guaranteed right the United States government has to facilitate. Therefore, if an immigrant in immigration court wants a lawyer but cannot afford one, then they will not be appointed one by the state. The plaintiff in this specific case is also a minor. Therefore, the court's decision also solidifies the fact that even minors in immigration court do not have the guaranteed right to an attorney to assist them with their cases.

This leaves many immigrants in court struggling with little knowledge of the language and documentation required for court. In looking at the data for this project, it is important to note that there are a huge number of asylum seekers who are not getting represented in immigration courts and it is definitely a topic that should be researched more in depth.

The Role of Education in Politics

Previous literature has demonstrated that educational attainment has been shown to have a role in increasing political participation. Some of this research has theorized that this is because of how cognitive skills develop and the connection this has to relevant politics (Campbell et al., 1960; Rosenberg, 1988). Finally, other research has shown that it is the development of civic skills in the educational experience that leads to more political participation (Rosenstone et al., 1993). While more current research has shown some evidence that the causal relationship between

education and political participation is a little unclear (Kam and Palmer, 2008) there is also current research that demonstrates some causal assumptions on this relationship (Mayer, 2011).

In terms of diversity in higher education there is a lot of research when it comes to arguments for affirmative action which can be used to build on the theory for this paper. One study has shown that interaction among individuals of different racial and ethnic groups in college has shown some positive educational and civic importance (Gurin et al., 2009).

There is also a case for this in regard to the contact hypothesis theory. Contact hypothesis is the theory that under appropriate conditions, interpersonal contact could be an effective way to reduce the prejudice between groups (Allport, 1958). This hypothesis fuels my theory in the sense that diversity in undergrad and in law schools may affect the way a judge views the world later on in their practice. In terms of diversity in education, some literature exists in the legal academic field of Critical Race Theory and affirmative action. One article particularly coming from Duncan Kennedy suggests that cultural diversity in law schools is important because law schools are inherently political institutions and therefore Kennedy makes the argument for affirmative action in law schools (Kennedy, 1990). Kennedy suggests that there are two cases for affirmative action in law schools:

"The political case is based on the idea that the intelligentsias of subordinated cultural communities should have access to the resources that are necessary for groups to exercise effective political power. The cultural case is based on the idea that a large increase in the number of minority legal scholars would improve the quality and increase the social value of legal scholarship, without being unfair to those displaced" (Kennedy, 1990).

The idea brought up by Kennedy (1990) is what fuels this paper and the other literature mentioned provides us with a framework for this particular study on asylum judges. These theories and this literature review informs the following hypotheses:

Hypotheses

Hypothesis 1: If the judge is someone who is Latino or Asian, then they will likely be more lenient, and their denial rate will be lower than white judges.

Hypothesis 2: If the judge is a woman, then they will likely be more lenient, and their denial rate will be lower than white judges.

Hypothesis 3: If the judge went to a more diverse undergrad and law school then their denial rate will be lower than judges who did not go to as diverse of a school.

Hypothesis 4: If the judge moved around a lot for school then they will have a lower denial rate than judges who did not move as much for school.

Data and Methodology

For the analysis, I use data from the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. This website contains written profiles of immigration judges organized by each judge's city and name. For the scope of this project, I am looking at judge's decisions in asylum cases from 2013 to 2018. This database of immigration judges has their denial rate for asylum cases, the caseload they saw during this time period, their gender, where they went to college and law school, their professional experience, the year they were appointed, the year they graduated law school, which attorney general appointed them which stands in as a measure for ideology, what court they are assigned to, the percentage of national origin subgroups they saw cases for during this time, and the year they graduated college. All this information is not in a

data format that can be imported into R. Therefore, to collect the information needed for this project I web scraped the data directly from the website and formatted it into a data set.

The ideal approach in looking at diversity in the institutions these judges attended would be to have a measure of diversity of their schools during the time period they attended that college or university. However, this data is not available through the TRAC website. Therefore, I will be using diversity scores from US News and World Report website for 2020 to measure diversity in these institutions. The scores from the US. News and World Report scores measure the percentage of different racial and ethnic group at each institution and gives them a score based on the percentage and how many different groups attend this institution. The US News and World Report website has a comprehensive list of diversity scores for both undergraduate institutions as well as law schools.

Of course, 2020 is not an accurate measure, but I am using these diversity scores because one can safely assume that diversity in these places has had a positive growth over time rather than a negative one. Despite limitations, this is the best way to measure diversity apart from a racial and gender category which is what this paper is exploring.

In terms of controlling for race of the judge, that information is not available to me. However, the surnames of all these judges are available through the TRAC website. In order to have an estimate of the race of each judge, I will be using the WRU package in R to help minimize this issue. This package in R utilizes surname analysis to help determine the probability that a person is of a certain race using 2010 census data. While surname analysis is potentially not the best method in determining race, it has been used in a variety of papers (Abrahamse et al., 1994. Fiscella et al., 2006) and therefore it is the one I am using for this project for now. Also, since I will be using surname analysis I will only be focusing on judges

who come up as having a probability of being Asian American or Latino because those surnames are more easily identifiable than White and Black surnames.

I have also included a male percentage variable to include in the model to control for amount of men that are on the court at each different immigration court location. The reason I am controlling for this as well is because I suspect the number of male or female judges could have an effect on cases since judges interact with one another and consult with one another on different cases.

I also created a geographic mobility variable based on whether or not the judge moved around in their higher education years. By higher education years I mean the years from college through law school. If the judge attended their undergraduate institution and their law school in the same state then they were coded as 0, if they attended two different institutions in two different states then they were coded as 1. The reason I control for this is because regionally we see differences in people's political preferences. Since judges are, of course, people, then I suspect mobility could have an effect on their perspectives. I also include a variable to control for the population of the area that the judge resides in to see if population may have an effect on decision making. The full list of variables are as follows:

Variable List
denial – the denial rate the judge has
years- years on the court
diversityundergrad2020 – diversity score from US News and World Report
gradschool – whether or not judge attended gradschool, 0,1
diversitylaw – diversity score from the law school from US News
p_his – probability the judge is hispanic/latino from WRU package
numberjudges – number of judges on the court

p_asi – probability the judge is Asian from the WRU package in R
Male – whether or not the judge is a male coded as 0, 1
citysize – the population size of the city of the immigration court
malepercentage – the percentage of male judges on the court
ideo – ideology measurement based on the party id of the attorney general, 0,1
caseload – individual caseload of the judges

In terms of my model, I am using multilinear regression. For my models, I have the judge's denial rate as my dependent variable and the diversity score for their undergrad as my independent variable. My first model uses these two variables and controls for: whether or not the judge has a high probability of being Latino, the population of the geographic region the judge presides in, the years they have served on the court, the diversity score of their law school, whether or not the judge attended graduate school, the caseload of the judge, the number of judges on the court and whether or not the judge is a male (Table 1). My second model are these exact same variables but instead of having the probability of being Latino I have the probability of being Asian (Table 2).

For my third model I have these same variables however I separated the male and female judge samples to take a closer look at the differences among the genders and keep the probability of being Latino variable in. Table 3 are the female judges and Table 4 are the male judges.

Results

Table 1:

	Dependent variable:
	Denial Rate
Years on the court	−0.407***
	(0.151)
Undergrad 2020 Diversity Score	−6.180
	(8.266)
Male	9.454***
	(2.871)
Attended Grad School	2.976
	(3.284)
Law School 2020 Diversity Score	−5.622
	(12.736)
Hispanic	11.419**
	(5.159)
Number of Judges	−0.489***
	(0.183)
Caseload	−0.009**
	(0.004)
Ideology	−1.125
	(2.932)
Male Percentage	0.201**
	(0.082)
City Size	−0.00000
	(0.00000)
Geographic Mobility	−1.523
	(2.593)
Constant	69.051***
	(9.068)
Observations	299
R^2	0.415
Adjusted R^2	0.391
Residual Std. Error	21.538 (df = 286)
F Statistic	16.927*** (df = 12; 286)
Note:	*p<0.1; **p<0.05; ***p<0.01

Table 2:

	Dependent variable:
	Denial Rate
Years on the Court	−0.437***
	(0.151)
Undergrad 2020 Diversity Score	−6.435
	(8.336)
Male	8.182***
	(2.819)
Attended Grad School	2.601
	(3.308)
Law School 2020 Diversity Score	−2.409
	(12.726)
Asian	10.280
	(9.219)
Number of Judges	−0.523***
	(0.186)
Caseload	−0.010**
	(0.004)
Ideology	−1.533
	(2.955)
Male Percentage	0.207**
	(0.083)
City Size	−0.00000
	(0.00000)
Geographic Mobility	−1.326
	(2.629)
Constant	70.464***
	(9.109)
Observations	299
R^2	0.408
Adjusted R^2	0.383
Residual Std. Error	21.674 (df = 286)
F Statistic	16.415*** (df = 12; 286)
Note:	*p<0.1; **p<0.05; ***p<0.01

Table 1 and Table 2 show no significance for diversity in the undergraduate education and no significance for diversity in the law school education either. However other variables do appear to have some significance. Years on the court appears to show a correlation. The more years you have on the court the lower your denial rate will be. Whether or not the judge is a male appears to also hold some significance. There seems to be a correlation between gender and denial, with male judges denying asylum at higher rates than female judges. That is consistent with the second hypothesis of this paper. Whether or not the judge is Latino or Hispanic also

appears to show some significance. There seems to be a correlation that if the judge is Hispanic or Latino their denial rate is higher. However, the same does not appear to hold true for Asian American judges since that variable in Table 2 shows no significance. However, this corresponds with some of the previous research cited in this paper. Some previous research in looking at judges has shown that sometimes Latino and Black judges may be harsher because they feel the need to prove they will not be lighter on co ethnics. Since many asylum applicants come from countries in Latin America there is a possibility that the Latino judges are harsher because they feel the need to prove they will not be lenient.

It also appears that there is a correlation that the higher the number of judges at an immigration court location, the lower the denial rate. This could lead us to believe that while the judges do not necessarily work together in cases they may interact with one another outside of the courtroom and more input in cases could lead to lower denial rates. It also appears that there is a correlation that the higher the caseload the lower the denial rate. This could potentially be correlated with more experience. The more cases a judge hears the more knowledge they gain on different policies and perhaps that means less denial. This also makes sense considering that there is also a correlation with the more years on the court the lower the denial rate.

Results from these first two tables also show that the more men on the court, the higher the denial rate. This makes sense in connection to previous literature cited with regards to women judges being more lenient.

Table 3:

	Dependent variable:
	Denial Rate
Years on the Court	−0.421
	(0.272)
Undergrad 2020 Diversity Score	−20.294
	(13.558)
Attended Grad School	−1.716
	(6.008)
Law School 2020 Diversity Score	−8.778
	(22.827)
Hispanic	5.213
	(7.025)
Number of Judges	−0.400
	(0.327)
Caseload	−0.010
	(0.007)
Ideology	−6.396
	(5.074)
Male Percentage	0.274
	(0.248)
City Size	−0.00000
	(0.00000)
Constant	81.186***
	(19.724)
Observations	117
R^2	0.436
Adjusted R^2	0.382
Residual Std. Error	23.064 (df = 106)
F Statistic	8.184*** (df = 10; 106)
Note:	*p<0.1; **p<0.05; ***p<0.01

Table 4:

	Dependent variable:
	Denial Rate
Years on the Court	−0.417**
	(0.182)
Undergrad 2020 Diversity Score	2.086
	(10.759)
Attended Grad School	3.728
	(3.939)
Law School 2020 Diversity Score	−6.202
	(15.536)
Hispanic	21.576**
	(9.102)
Number of Judges	−0.614***
	(0.231)
Caseload	−0.011*
	(0.006)
Ideology	1.611
	(3.663)
Male Percentage	0.219**
	(0.089)
City Size	−0.00000
	(0.00000)
Geographic Mobility	3.063
	(3.276)
Constant	68.230***
	(10.378)
Observations	182
R^2	0.319
Adjusted R^2	0.275
Residual Std. Error	20.560 (df = 170)
F Statistic	7.241*** (df = 11; 170)
Note:	*p<0.1; **p<0.05; ***p<0.01

In looking at the results based on gender breakdown (Table 3 shows women judges and Table 4 shows men judges), when it comes to female judges nothing shows significance. However, when it comes to male judges it appears that the years a judge has spent on the court and the number of judges on the court have a negative correlation with the denial rate. This means that the longer a male has spent as an immigration judge, the more likely he is to approve asylum cases. This also means that for the male judges, the more judges working at the same immigration court the more likely they are to approve asylum cases. Caseload seems to demonstrate some significance in that the higher the caseload, the lower the denial rate. Further, there seems to be a correlation with more men on the court and higher denial rates. It also

appears that for the male judges, having a high probability of being Hispanic/Latino seems to have a correlation with a higher denial rate.

Conclusion

Overall, based on this analysis, my hypothesis about diversity in education appears to be incorrect. However, as was stated before, my measurements for diversity in a judge's educational background were not ideal and could have played a role in the lack of significance it showed in the model. However, based on these results, gender does seem to play a big role in the judge's denial rate one way or another. It appears that male judges have higher denial rates than female judges. It also appears that the more men working at an immigration court the higher the denial rate of the other men at that court.

In looking at caseload, years of experience and number of judges all being negatively correlated with denial rates, I suspect this may be because judges with more years on the court gain more experience and more practice with asylum cases. This could signal more experience because with more experience judges may take more time and consider more things when looking at a case and may not be so quick to deny asylum. Another possible reason for these things being correlated negatively with denial rate could be that over time judges may develop more empathy for people seeking asylum and it may become more difficult to deny asylum.

In terms of the number of judges being negatively correlated I suspect this might be because since judges probably check in with one another this could mean the more opinions and perspectives a judge hears the more likely they are to rule differently. In terms of caseload, this could be because the higher the case load the more a judge will consult with others since they cannot oversee and give each individual case the same amount of attention than they would with a lighter case load.

The gender variables demonstrated the most interesting results. It appears overall, no matter what controls were added, male judges have a higher denial rate and having more male judges on the court also appears to correlate with a higher denial rate. These results are only true for the male judges on the court. In fact, none of the other controls or covariates in the model appear to have an effect on the women judges. The results for caseload, years on the court, and number of male judges all disappear when the analysis is run on the women judges separately. This is interesting and would appear to show an environment in immigration courts forming based on gender. One potential thing this could indicate is perhaps women judges do not interact as much with the male judges. The other possibility this could be signaling is that women judges come in with different experiences and time on the court may not be as big of a factor.

In terms of future research, I intend to pursue, based on this analysis I intend to look further into different measurements of diversity. Diversity is showing to be a measurement challenge with the current information I have right now but going forward I intend to add a few more measures of diversity into the model. One measure will be based on the employment background of the judge since this is something that could potentially have an effect on how they view their job. Another measure I intend to look into is the percent of women that went to the law school the judge attended. The numbers for this do not go as far back as some of the judge's graduation years however I can use the numbers I can obtain from school records as close as possible to the date the judge attended school. Another measure for diversity I intend to add is the percentage of people of color in the city the judge attended school. Further, the data set I used for this paper was collected between 2013-2018. Data from TRAC goes as far back as 1994 and as recent as 2021. With this much information, I intend to conduct the same analysis among all

the five year periods to be able to conduct this study among a larger sample of immigration judges.

I also intend to look into the literature more on male and female legal professionals to see what could be causing such a distinction between the two groups. I hypothesize that part of the distinction could be different areas of employment that men and women lawyers go into. Another distinction could be the different time periods that the men and women judges attended college and graduate school.

Chapter 3: An Analysis of LGBTQ Asylum Claims

Introduction:

With the victory brought about with marriage equality, it is sometimes easy to believe that LGBTQIA+ people have achieved equal rights within the United States and everywhere else as well. However, that is not entirely the case. Currently, 69 countries still criminalize homosexuality with as many as 11 having a death penalty for same sex acts. (Williams Institute, 2021) While some countries do not criminalize homosexuality in a de jure way, that is, via formal legislation, many do so in a de facto way. Many people are harassed and persecuted by people in their communities for their gender and sexuality identities, forcing them to seek asylum in the United States. These individuals come to the U.S. seeking a fair shot in their asylum claims.

According to a 2021 report by the Williams Institute at UCLA, approximately 11,400 asylum applications were filed in the United States between FY 2012 to FY 2017 by LGBT people. Of these claims, 3,899 claims were on the basis of LGBT status. Further, over three-fourths of LGBT asylum seekers were male. Asylum claims based on LGBT status originated from 84 countries however, more than half were from three countries in Central America, El Salvador, Guatemala, and Honduras.

We have seen a lot of LGBTQIA+ individuals at the border seeking asylum because their home country does not allow for them to live safely. They seek asylum under the status of membership in a particular social group and having a reasonable fear of persecution. Many of these immigrants seeking asylum come with high hopes for the future but are met with difficulties upon seeking asylum. One of these difficulties is passing both these standards.

Within this paper, I argue that the well-founded fear of persecution, or reasonable fear logic is equal to the logic found in the reasonable person doctrine and because of this, the well-founded fear of persecution is inherently subjective and not always fair which is demonstrated through the opinions in asylum cases given by immigration courts. This paper argues that the policing of gender and sexuality in asylum cases is also a component of this subjective analysis of cases.

To prove my hypothesis, within this paper I use both a qualitative and quantitative text-based analysis to collect data from 70 precedential immigration asylum court decisions in connection with LGBTQIA+ issues. This paper uses sentiment analysis to sort through different perspectives of gender and reasonable fear found in the immigration court decisions.

Within this paper, I first establish my theory on the reasonable person doctrine and how it is being used in immigration courts through the reasonable fear of persecution logic as well as conceptions of gender and sexuality. Then, I will provide a brief history of LGBTQI+ migration and asylum to the United States and then discuss my main findings with regards to the cases I examined for this paper.

A Brief History of LGBTQIA+ Immigration

The history of LGBTQIA+ immigration is a complicated one. The Immigration Act of 1917 excluded lesbian and gay immigrants from entry into the United States because they were considered individuals that fall under "constitutional psychopathic inferiority." (Matter of LaRochelle, 1965) Not much is known about this time period when it comes to LGBTQIA+ immigration but there are a lot of recorded cases of discrimination against lesbians and gay men from the time period of the 1950s and onward. In 1952 the McCarren-Walter Act was passed which did not allow for "psychopathic personalities" entry into the United States. At this time,

lesbians and gay men fell under the provision of psychopathic personalities. In 1965, the wording was edited to include people who fell under the category of "sexual deviates" and this was explicitly meant to exclude people in the lesbian and gay community. (Lubhéid, 2017) All of this legislation allowed for gender and sexuality policing at the border.

One example of how people were policed based on beliefs and ideas on gender and sexuality at the border was the case of Sara Harb Quiroz. Quiroz lived and worked in El Paso but had some ties in Juarez, Mexico. One day as she was crossing the border, she was stopped by an immigration officer. She was already a permanent legal resident of the United States and there is not a lot of information as to why she was stopped that day (Luibhéid, 2017). However, her lawyer would later say that she was stopped based on her physical appearance. The immigration officer believed she was a lesbian based on the way she looked and that is why she was stopped (Luibhéid, 2017). One strategy Quiroz's lawyer attempted to implement was to bring up her past relationship. At 16 Quiroz was in a relationship with a man who left her once she became pregnant. Her lawyers felt this would help prove that she was not a lesbian. However, the Board of Immigration Appeals felt that, "an affair of ten years ago does not now establish that she is not now a homosexual" (Luibhéid, 2017). As a last ditch effort to win her case, Quiroz married a man and with this, attempted to show that she was not a homosexual or if she had been that she was "rehabilitated" (Luibhéid, 2017). The case of Quiroz is just one in a long string of examples of gender and sexuality policing in U.S. immigration court. It demonstrates just how we associate appearance and clothing with gender and sexuality norms.

In 1967, the U.S. Supreme Court was faced with the question of whether or not the U.S. had the power or right to exclude gay immigrants from entering the country. This case was Boutilier v. Immigration and Naturalization Service. The case was brought to the court by Clive

Boutilier. He was a man that was born in Canada but immigrated to the United States with his family. When he petitioned for citizenship, he revealed to the Immigration and Naturalization Service that he had been arrested in New York because of a sodomy charge. Later on, when he was interviewed by an Immigration and Naturalization Service officer he revealed his sexual history with details about past consensual same sex relationships both before and after he had come to the United States. The Immigration and Naturalization Service then recommended that Boutilier be deported. (Oyez) His case eventually made its way to the Supreme Court where the majority of the court decided to uphold his deportation citing the McCarren- Walter Act of 1952. (Boutilier v. Immigration Naturalization Service)

The Boutilier ruling being overturned and the shift in LGBTQIA+ immigration law did not happen until the 1990s. This happened when the Immigration Act of 1990 was signed into law. The act amended the "medical exclusion" provisions of the Immigration and Nationality Act of 1965 to eliminate text that let agents exclude "suspected homosexuals" and removed the psychopathic personality and mental defect language that had been used for decades to exclude "suspected homosexuals." (Lee, 2015)

The 1990s also ushered in a new wave of LGBTQIA+ immigrants: asylum seekers. The Matter of Toboso Alfonso ushered in a whole new meaning of the terminology "members of a particular social group." The case occurred in 1990, Toboso Alfonso was an asylum seeker from Cuba. He petitioned for asylum based on a fear of persecution if he returned to Cuba. At the time gay men were heavily persecuted in Cuba and Toboso Alfonso described his being put into a labor camp several times as punishment for being considered a gay man by the Cuban government. (Matter of Toboso Alfonso) Toboso Alfonso claimed that he had been given a choice to either flee to the United States or spend four years in a penitentiary for being a

homosexual. He chose to come to the United States and petitioned for asylum. (Matter of Toboso Alfonso)

The Board of Immigration Appeals set a huge precedent with this case. They sided with Toboso Alfonso and approved his petition for asylum. In their decision, the court stated with regards to the Cuban government's actions to penalize people for the sexuality in this case that, "The record indicates that rather than a penalty for misconduct, this action resulted from the government's desire that all homosexuals be forced to leave their homeland. This is not simply a case involving the enforcement of laws against particular homosexual acts, nor is this simply a case of assertion of 'gay rights.'" (Matter of Toboso-Alfonso) The court established that the laws and the prospect of incarcerating Toboso Alfonso based solely on his identity was enough for granting asylum. The Board of Immigration appeal judge determined that Toboso-Alfonso's homosexual identity qualified him as a member of a particular social group. (Bennett, 1999) This victory opened the door for LGBTQIA+ individuals to be able to apply for asylum.

Reasonableness

In law, the reasonable person test has a number of definitions based on the context and branch of the law. In criminal law broadly, it is the notion of someone involved, whether it is an attorney or a judge using the hypothetical reasonable person example to justify whether or not an individual acted as the average person would given the circumstances. (Webster Law) With regards to cases with sexual harassment claims, the reasonable woman standard is applied. In the reasonable woman standard, the focus is on what "the reasonable woman would find objectionable" in a case of sexual harassment. (Oxford) These types of tests have been met with criticism with some claiming that the reasonable person test is based on opinion and a dangerous tool to use in the

law. Others have even looked at the reasonable person test through a racial lens and have found significant racial bias in its use. (Astrada et. al., 2020)

Byrd 2005 states with regards to the reasonable person:

"The common law is obsessed with reasonable people. These people are pinnacles of virtue—courteous, placid, gentle, timely, careful, perceptive—in short, complete figments of our imagination… Although no one is really like them, they set the standard for judging our frailties. If we do not match their glorious perfection, we are cast into the shadow of ignominy and damnation." (Byrd, 2005)

Byrd's thoughts on the reasonable person are related to criminal law but the statement holds firm among other scholars studying different branches of the law. In discussing the reasonable woman standard, Burke 2020 argues that the reasonable woman test will become ineffective if there is not some sort of social framework evidence or background evidence associated with how it is used in sexual harassment claims. More broadly, Moran 2003 explores the concept of the reasonable person and discusses the issue in that having an idea of a reasonable person presupposes a concept of normal behavior and is a concept that ultimately needs major reform. (Moran, 2003)

Reasonable Fear of Persecution

As was stated before, the reasonable person test is commonly used in a lot of case law to provide an ideal example for what the average person might do if certain situations unfold. Within this paper I argue that the reasonable person comes into immigration asylum law through the reasonable fear of persecution concept and the gender and sexuality concepts placed on applicants by immigration judges. Under immigration law, asylum seekers have to establish a well-founded fear of persecution. The well-founded fear of persecution doctrine reads as follows:

"The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such

person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion…" (INA § 101(a)(42))

The term "well-founded fear of persecution" is very broad and leaves a lot of room for interpretation. In fact, there exists a disagreement in terms of the meaning of the word persecution between the immigration courts and the federal courts of the United States. Asylum courts and federal courts both agree that a person does not need to demonstrate punitive damages to prove persecution. However, some federal courts such as the fifth circuit have disagreed with others in terms of the definition of persecution suggesting that persecution "requires the intent to punish the victim." (Bennett, 1999) The reason LGBTQIA+ individuals qualify for asylum under this statute is because they fall under the category of belonging to a particular social group that is oftentimes persecuted.

Many times however, they are denied because the burden of proof is so high when it comes to these cases. LGBTQIA+ applicants do not only need to prove that they are members of the LGBTQIA+ community but they also have to prove that they are being persecuted because of their identity. Applicants must prove that they either "have a well-founded fear of future persecution, or actual past persecution." (Bennett, 1999) Being able to prove this can be incredibly difficult for people seeking asylum under these laws.

What further complicates things with regards to reasonable fear of persecution is the Supreme Court's ruling in the 1987 case of *INS v. Cardoza- Fonseca.* This case considered the situation of Luz Marina Cardoza Fonseca. She was an asylum seeker from Nicaragua. She based her reasonable fear claim because if she returned to Nicaragua she believed her life would be in danger. (INS v. Cardoza- Fonseca) Cardoza- Fonseca's brother had been put in prison and

tortured because he opposed and participated in activities against the Sandinistas government. Her case made it on appeal to the Supreme Court where they attempted to clarify the meaning of a "well-founded fear of persecution." (INS v. Cardoza- Fonseca) However, little clarification was given. The court found that the "well-founded fear of persecution" standard is definitely distinct from other standards of evidence in asylum cases such as the "clear standard of proof" and the "more likely than not" standard both of which need an applicant to demonstrate a probability of above a 50% chance that their claim occurred. While the court clarified that the "well-founded fear of persecution" standard does not have to be above the 50% chance mark it did not clarify what mark it should be at. This means that the standard falls somewhere between above 0 and under 50%. (Kim, 2021) However, courts have not agreed on what the standard should be and thus, the issue arises where there is not a clear numerical or fixed line of how to establish this "well-founded fear of persecution. In some cases, such as that of *Guevara Flores v. INS* the Board of Immigration Appeals has stated someone has an objective fear if, "a reasonable person in their circumstances would fear the same persecution."

In thinking about the reasonable fear of persecution standard some scholars have discussed getting rid of the standard as a whole. Kim 2021states that, "the subjective and objective aspects of a well-founded fear of persecution unnecessarily complicate the analysis" in reference to immigration asylum cases. While I agree with Kim's analysis and critique of the issues with the well-founded fear of persecution I respectfully disagree with some components of their proposed solution. Kim states that:

"A well-founded fear should simply be interpreted as "a reasonable possibility of persecution." The Supreme Court should clarify that a well-founded fear is not a separate element that asylum seekers need to prove when establishing future persecution but an evidentiary burden that refers to the *likelihood* of the persecution based on established facts. A reasonable possibility should be

determined to be a more generous standard of at least a 10% chance of persecution, as the Supreme Court suggested in *Cardoza-Fonseca…"* (Kim, 2021)

While I agree with the sentiment Kim has in regards to requiring more of a possibility framework I disagree with the idea of a 10% chance of persecution. That is not an equation that can be implemented neatly and accurately across the board. In the case of Cardoza-Fonseca the example the court used was:

"Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp... In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have a "well- founded fear of persecution" upon his eventual return." (INS v. Cardoza-Fonseca)

While this example is pretty clear cut and makes a lot of sense cases in asylum court are rarely this clear and clean with numbers. What I propose in this paper is that reasonability should be cast out entirely. The invitation of the reasonable person in these cases often leads to complications in the cases. The reasonable person is a standard that is based on the person giving judgment's opinion and not on the person who is being judge d's opinion. This leads to an unfair bias against the individual and this is extremely evident in asylum cases with LGBTQIA+ applicants where many of the immigration judges do not have experience with the harsh realities faced by LGBTQIA+ applicants and the different perceptions of queerness from around the world. The reasonable person adds a third person in cases that prevents courts from having empathy for the applicants in understanding their fear and also provides a fear of queerness that is not entirely accurate.

Previous Research on LGBTQIA+ Immigration and Asylum

The previous work on looking at LGBTQIA+ asylum law has been done mostly outside of the realm of political science. This work has been found mostly in sociology, ethnic studies and law.

Much of this work has also extended at looking beyond lesbian and gay individuals seeking asylum but is now also looking at other members of the LGBTQIA+ community and their asylum experience.

Collier and Daniel 2019 discuss the idea of cisnormativity in the U.S. immigration system. They define cisnormativity as "a hierarchical system of power that structures legal, administrative, and policing systems and simultaneously produces both the 'hypervisibility' of gender variance and the erasure of trans identities." Their paper explores the experience of trans immigrants and how more attention needs to be paid to the effect cisnormativity has on the transgender immigrant experience. "Trans immigrants are not widely discussed in the illegality literature, but, importantly, can experience qualitatively different forms of domination, and, therefore, potentially heightened vulnerability to deportation regimes or shifts in legal status." (Collier & Daniel, 2019)

Cisnormativity and subsequently heternormativity work in conjunction to demonstrate another major concern when it comes to LGBTQIA+ asylum applicants. "The surest way for applicants and advocates to demonstrate that the asylum standard is met is to put forward a familiar and universalized picture of the persecuted women, lesbian, or gay man, minimizing variability or complicated factors in the individual cases." (Hinger, 2010) Applicants are often forced to fit into a mold of what immigration courts believe the person seeking asylum should be like. However, gender and sexuality are often fluid with different variations based on different cultures.

Massad (2002) discusses this phenomenon and its effect on LGBTQIA+ politics through exploring what he terms "the gay international." He states, "it is the discourse of the Gay

International that both produces homosexuals, as well as gays and lesbians, where they do not exist, and represses same sex desires and practices that refuse to be assimilated into its sexual epistemology" (Massad, 2002). The U.S. conceptualization of gender and sexuality is not the same as the conception of gender and sexuality in other parts of the world. Therefore, individuals coming into this country seeking asylum are expected to fit into U.S. centric molds of gender and sexuality that may not suit them.

Cory (2019) has looked at LGBTQIA+ asylum cases specifically and explores two questions in their work. The first being LGBTQIA+ people fitting into the particular social group category and to what extent this category allows for queerness and the second being how practitioners of the law are responsible in framing this group to the particular social group category. Cory discusses in their analysis that, "the Particular Social Group Category, by virtue of its lack of definitive boundaries, carries with it the potential to accommodate the multitude of queer identities and expressions that exist." (Cory, 2019) Cory also explores the concept of the "deserving queer" in their analysis meaning that many applicants for asylum have to conform to a U.S. centric view of gender and sexuality.

Hypotheses

The ultimate goal of this paper is to explore how two ideas central to asylum law play out with respect to LGBTQ people seeking to enter the United States: a reasonable fear of persecution based on the judge's perception of what constitutes a reasonable fear and constraints related to gender and sex roles in U.S. society. The following are my two hypotheses with regards to this question:

Hypothesis 1: We will see a significant number of opinions from the original immigration judge, the Board of Immigration Appeals and the federal appeals decision based solely on the judge's perception of gender and sexuality rather than on any outside source assisting in this perception. This will in turn, lead to judgment calls on whether or not the applicant can claim membership in a particular social group in the LGBTQIA+ community.

Hypothesis 2: We will also see a significant number of opinions where the judge's perception of reasonable fear of persecution will be based on their own perception of the applicant's situation rather than looking at outside sourcing in any way. This will be true of the original immigration judge, the Board of Immigration Appeals and the federal appeals court.

Methodology: A Text as Data Analysis

For this project I will be using both a qualitative text as data analysis and a quantitative text as data analysis. More specifically in the case of my qualitative analysis, I take 70 cases located on the Immigration Equality website and read through them closely looking for key words that may connect to gender views some examples being, words like "mannerisms." In this analysis, I also looked at language and analysis used to describe the reasonable fear of persecution as well. In this particular case I looked not only at the actual use of the term "reasonable" or the like, but also examined points where judges were making inferences on the applicant's situation with little to no background information.

For the quantitative text as data analysis, I use three different emotion lexicons. The first is the NRC Word-Emotion association lexicon, this emotion lexicon takes a list of English words and their associations with eight emotions. The emotions are anger, fear, anticipation, trust, surprise, sadness, joy and disgust. It also categorizes the text into negative and positive. The second emotion lexicon is the bing lexicon. This categorizes words into a binary, positive and

negative categories. Finally, the third emotion lexicon I am using is the Loughran-Mcdonald sentiment lexicon. This lexicon categorizes words into six different categories. They are negative, positive, litigious, uncertainty, constraining, and superfluous. In my following analysis I use all three lexicons separately.

With regards to the source of the cases for this project, Immigration Equality is an organization that was founded in 1994 by a group of attorneys who wanted to assist LGBTQ asylum seekers. The organization's mission is "to promote justice and equality for LGBTQ and HIV positive immigrants and families through direct legal services, policy advocacy, and impact litigation." (Immigration Equality) As of 2020, Immigration Equality has 18 staff members and 1,150 pro bono lawyers in their network. They provide free legal services in 28 states. The organization has a number of resources on their website including the cases I will be using for this study.

These cases are listed as important precedent under LGBTQIA+ immigration asylum law. I then proceed by reading through the cases and coding them based on the sentiment coming from the judge that is made apparent through the language they use in discussing the petitioners in the cases.

Important Cases in the Sample:

This paper focuses on the question of defining a reasonable fear of persecution and gender in immigration asylum cases. By defining gender, I mean to say gender and the norms that come with it this includes but is not limited to sexuality, gender expression such as how one dresses and acts, and other roles and norms that are included and enveloped within the gender umbrella.

Within these cases one thing that has been quite notable is the fact that judges cannot seem to come to a consensus on what defines gender and sexuality norms or even if there is a definition. For example, in the 2000 case of *Hernandez-Montiel v. INS* a gay man from Mexico who expressed himself in a way that was perceived as expressing himself as a woman sought asylum on the basis of his persecution. Giovanni, the individual in this case, recounted several instances in which he was sexually assaulted by police officers in Mexico because of his gender expression. The Immigration judge noted that he, "has altered certain outward physical attributes and his manner of dress to resemble a woman." However, the judge found that Giovanni appearing to present as a woman was not an immutable characteristic, meaning this was something he had power over and could change. The judge stated:

> "If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity. The record reflects that respondent's decision to dress as a women [sic] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that respondent himself may not view his dress as being so fundamental to his identity that he should not have to change it." (Hernandez-Montiel v. INS)

Here the immigration judge is pointing out that how Giovanni dresses is a choice and since sometimes he dresses in what can be perceived as being a feminine way and other times he can be perceived as being dressed in masculine way, the way he dresses is not central to his identity and it is something he can change. This statement from the original immigration judge on the case points out two critical issues in thinking of gender. One, the judge is thinking in a binary way and many LGBTQ individuals do not express themselves within a binary. Two, regardless of how Giovanni dresses, this has nothing to do with him proving his persecution. How he was perceived by the people persecuting still ultimately led to him being harassed and assaulted. The

fact that the officers persecuted him for dressing as a woman is something the judge fails to consider and thus leaves the entirety of the responsibility on Giovanni to change.

This same line of reasoning was followed through with the Board of Immigration Appeals in this case. The court noted that the, “tenor of the respondent’s claim is that he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual…” (Hernandez-Montiel v. INS) What both the immigration judge and the board of immigration appeals fail to note in this case is while fashion can change, gender expression is a central part of one’s idea and the harassment is not about the outfit but about the heterosexism that causes someone to be uncomfortable with the outfit. Instead of focusing on the perpetrators, in this case the police officers, the judge is very focused on the actions of Giovanni, the victim in this case. Much in the same way that victims of sexual assault are questioned about their attire (citation here) Giovanni is being told to watch what he dresses in a way. In this way, the perpetrator is not being required to act in a reasonable manner, but Giovanni is being required to act in what the judge considers a reasonable manner.

The ninth circuit court of appeals noted that there is no specific definition for membership in a particular social group in the Immigration and Nationality Act. This both provides a lot of opportunity for interpretation on the definition. However, in this case, the court noted that both the Board of Immigration Appeals and the immigration judge on the case mislabeled the particular social group. They stated:

“We thus conclude that the BIA erred in defining the "particular social group" as "homosexual males who dress as females." Professor Davies did not testify that homosexual males are persecuted simply because they may dress as females or because they engage in homosexual acts. Rather, gay men with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical "female," i.e., passive, role in gay relationships.”

The ninth circuit points out the key point here. The way Giovanni dresses is not about simply his dress, it's about the implications that come with his way of dressing and how that is perceived by individuals in a heteronormative society. This is what has led to his persecution.

In another case in 2007, *Shahinaj v. Gonzales,* there is a similar pattern, but this time not only did the immigration judge in the case discuss the way the applicant was dressed, they also discussed the mannerisms and behavior of the applicant. Shahinaj was an asylum seeker from Albania. He sought asylum because he stated that if he were to return to his home country he would be persecuted because he reported election fraud and identified as a homosexual person. (Shahinaj v. Gonzales) Shahinaj stated that after he reported the election fraud he was beaten and sodomized by police officers who also made references on his homosexuality. The officers threatened to cause further harm to Shahinaj and his family. He stated he was not part of any homosexual organization and said his family did not know about his sexual orientation. As part of his case, Shahinaj presented the court with witness affidavits, as well as historical and political information on the situation in Albania. However, the original immigration judge in this case deemed that Shahinaj was not credible. The judge further added, "neither Shahinaj's dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual, nor is there any indication that he engaged in a pattern or practice of behavior in homosexuals in Albania." Here, the immigration judge is clearly discussing a perception of how Shahinaj ought to act versus the facts. The judge mentions both dress and behavior in this case even though there is no clear-cut way a gay person speaks or acts.

Apart from this, with regards to the assault Shahinaj suffered at the hands of the police, the judge goes further on to say, "While one can understand that he would not report it to the

police, since they were the alleged perpetrators, it is simply implausible that he would not report it to an organization whose job it is to represent the interest of homosexuals in Albania." Here the judge is making another assumption. In this instance, they are making the assumption that Shahinaj would feel comfortable going to one of these organizations. The applicant's entire credibility hinges on whether or not the judge finds it reasonable that he should have sought out help from one of these organizations. There could be a multitude of reasons why someone would not seek help from an organization but that does not seem to be explored at all in the judge's opinion.

The Board of Immigration appeals in this case agreed with the immigration judge in denying Shahinaj's claim on the basis of his credibility but disagreed with the idea that this was because he did not seek help from an LGBTQ organization after his attack. However, the Board of Immigration Appeals did agree that the reason they were denying Shahinaj's claim and siding with the immigration judge in this case was because of "Shahinaj's failure to present any evidence corroborating that he is a homosexual." This once again connects to the difficulty with the idea of proving a sexuality and a case being rejected on this basis.

The eighth circuit court in this case disagreed with the outcome both from the perspective of the original immigration judge on the case and the Board of Immigration Appeals. The court concluded that the immigration judge discredited Shahinaj's claim based on his own opinion of Shahinaj's dress and mannerisms in connection with his claim of homosexuality. The court felt this analysis was erroneous and determined that the case should be sent back and that Shahinaj's claim should be handled by an immigration judge.

While these cases demonstrate that in an instant of appeals judges can recognize that this type of analysis and discourse with regards to LGBTQ asylum decisions can be problematic and detrimental, there is also the conversation of how not all cases of this nature can have the resources to go towards an appeal. While you can appeal your case to federal court without a lawyer, it is a difficult process and many people seeking asylum do not have the resources to obtain a lawyer for an appeal. The other issue is that not all cases that do go to an appeal have the guaranteed recognition that these trains of thought can be problematic. I am not saying that because the cases do not end in a positive outcome for the applicant that means the train of thought is inherently problematic. What I am saying is that many similar trains of thought could potentially go unchecked at the appellate level and this could point to a need for more education on LGBTQ topics and a reconceptualization of how judgment of queerness can lead to issues in judicial decision making.

Courts have also had some complication and issue with defining persecution in asylum cases. These cases have also played a role in LGBTQ asylum cases. One example being the 1997 case of *Pitcherskaia v. INS*. In this case, Pitcherskaia was a lesbian woman from Russia. She sought asylum on the basis of her being lesbian and being persecuted by the Russian government for being a part of different organizations including LGBTQ organizations. She claimed she was persecuted because the Russian government forcibly checked her into a mental institution due to her status as a lesbian. While she spent time in this institution, Pitcherskaia was subjected to involuntary treatment. Some of these “treatments” included electro shock therapy to “cure” her of her being a lesbian.

Pitcherskaia brought this up to the court as proof of persecution based on her LGBTQ status. However, the immigration judge assigned to her case determined that since the intention of the government was to cure her, this did not constitute persecution. The immigration judge determined that there had to be an intention to punish in order for Pitcherskaia's experience to be considered persecution. The Board of Immigration Appeals also agreed with the immigration judge in that there needed to be an intention to punish in order for Pitcherskaia's experience to be considered persecution.

When the case made it to the Ninth Circuit Court of Appeals the court disagreed with this conclusion. The court declared that:

"The fact that a persecutor believes the harm he is inflicting is "good for" his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. The BIA majority's requirement that an alien prove that her persecutor's subjective intent was punitive is unwarranted. Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as "curing" or "treating" the victims." No. 95-70887.

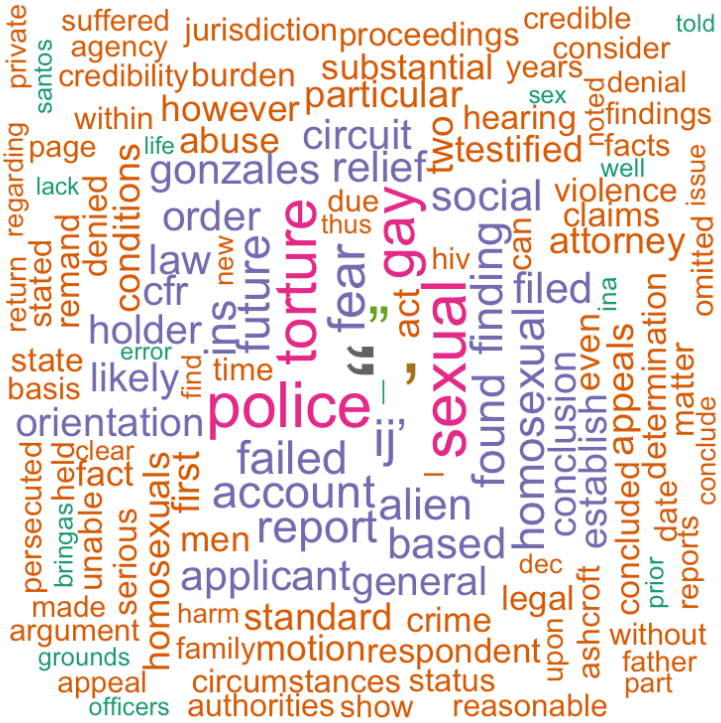
The lower court ruling in this case makes an interesting point in terms of what constitutes reasonable persecution. In this case the immigration judge and the Board of Immigration Appeals both believed that since the intention was to "cure" Pitcherskaia this did not rise to the level of persecution. It is interesting to note here that while the term "reasonable" is not used in this case, the logic seems to show that the courts viewed the actions of the government as not constituting persecution because of their intentions. However, the circuit court noted that placing actions in this category does not necessarily mean it is not still harmful. One could see this as the lower court ruling believing that the treatment of Pitcherskaia was seen as reasonable by the perpetrator under the circumstances while the district court viewed it as being unreasonable and against already established human rights law.

Another example of applicants having an issue in establishing past fear of persecution is the case of *Doe v. Attorney General of the U.S.* from 2020. In this case the petitioner fled his home in Ghana after his family and neighbors persecuted and assaulted him after finding out he was in a same sex relationship. The immigration judge in this case determined that the petitioner had not established past persecution or a well-founded fear of persecution based on his account. While the immigration judge did not state they did not believe the petitioner's account of the trauma he suffered at the hands of his neighbor and family, the judge noted that, "there was no reason to believe that [petitioner] would not be able to live a full life, especially if he were to continue to keep his homosexuality a secret." (Doe v. Attorney General of the U.S.) The Board of Immigration Appeals agreed with the decision of the immigration judge in that the petitioner had not established a past persecution or well-founded fear of persecution. The appeals court in this case ended up siding with the petitioner. The court found that the petitioner did in fact demonstrate past persecution and a fear of persecution with his account.

While the Third Circuit court of appeals sided with the petitioner, the Board of Immigration appeals, and the immigration judge did not. The petitioner recounted a horrific tale noting that he almost died at the hands of his own father who tried to light him on fire simply because he caught him having sex with his same sex partner. The petitioner then noted that he did not feel safe because his entire neighborhood discussed stoning and killing him and his partner. The petitioner also stated that he had been separated from his partner, who he had been in a relationship with for ten years and had not been able to communicate with him since he fled. With such a harrowing and horrific account, one would assume that the immigration judge and the board of immigration appeals would see this as constituting past fear and persecution. Further, the insinuation by the immigration judge that the petitioner would be able to not face

future persecution if he hid his sexuality further proves that the petitioner is in danger because of his sexuality to begin with.

Results: Common Words and Context



The image above shows a word cloud with the most often used words among the 70 cases. It is important to note that I have removed some words for the sake of clarity because they were repeated a lot but do not contribute to the analysis. The words that are most typical in these types of cases such as removal, BIA, immigration, asylum, review, government, petitioner, country, and case have all been removed. I have also removed smaller words such as may, will and one. With those words removed we are left with this word cloud which demonstrates some interesting results.

Police is used the most often among the cases. This is actually significant to note because the majority of the cases mention police. Out of the 70 cases, 46 mention interactions with the police. These discussions of police in these cases come from the applicant's testimony which the judges quote. All the interactions are not positive to varying degrees. Some applicants for asylum explain how police were no help when they were being harassed in their home country. These applicants describe inaction. However, another portion of applicants describe horrific circumstances where police physically and sexually assaulted them or assisted their persecutors in harming them.

Family is another word that comes up a lot within these cases. Family is used in two ways, the first way it is used is in an empathetic way. On some occasions, judges use the word family to describe how the applicant has a family or has started a family in some way to list the stakes of the case. However, in another context, family is also used to describe the persecution applicants are facing. Many individuals seeking asylum from the court describe abuse from their families as part of the reason they are seeking asylum because they have nowhere else to go. Father comes up in 33 out of the 70 cases. Unfortunately, most of these are in a negative context as well. Many applicants describe abuse by their fathers ranging from physical and sexual abuse to some people describing attempted murder at the hands of their father.

Mentions of credibility also come up a lot among these cases. Out of the 70 cases, 59 had discussions of credibility about the applicant, their testimony or a testimony from someone in support of the applicant. Nearly all of these discussions included doubts as to the applicant's credibility. Lastly, all these cases had mention of violence, abuse, torture and other words that are negative. This is of course, expected with petitioners having to describe so much violence.

Results: Emotion Lexicon

In using the emotion lexicons, I attempted to see if any emotion correlates with a positive outcome for the petitioner or if any use of research could correlate with more emotion for the

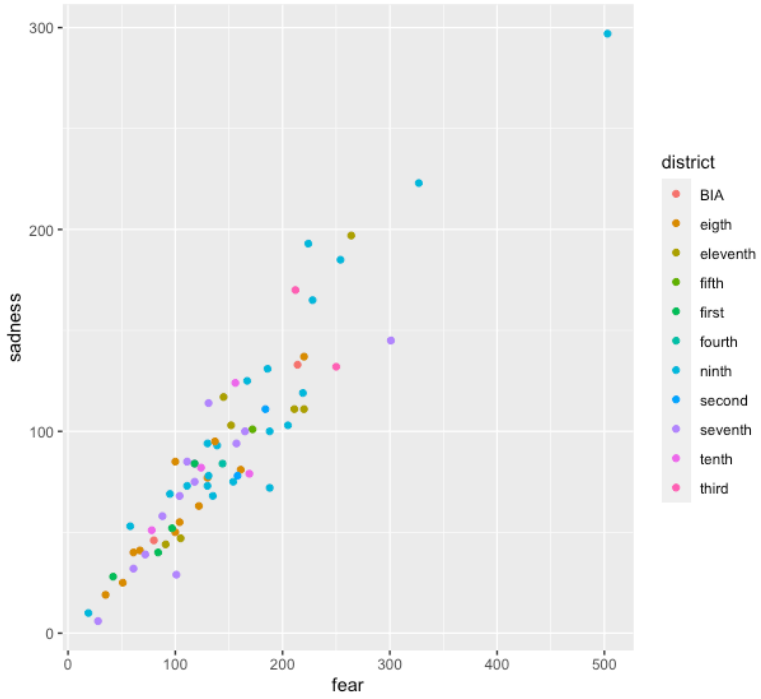
Table 1:

	Dependent variable:
	fear
outcome	−5.960
	(5.672)
trust	0.402***
	(0.125)
sadness	1.104***
	(0.077)
positive	−0.045
	(0.119)
research	4.604
	(5.861)
Constant	0.750
	(7.329)
Observations	69
R^2	0.920
Adjusted R^2	0.914
Residual Std. Error	22.885 (df = 63)
F Statistic	145.811*** (df = 5; 63)
Note:	*p<0.1; **p<0.05; ***p<0.01

petitioner in some way. However, I did not find anything significant when analyzing this data. There is a correlation with fear, trust and sadness in the tone of the opinions though. Table 1 shows this correlation. The more fear found in the opinion, the more sadness and trust is also found in the opinion. However, as I mentioned before, I did not find anything in connection to case outcomes or into whether or not this plays a role in the judge using outside research in the case. However, I think this could also be because my sample is far too small, and I would need more cases to be able to conduct an analysis of that matter. This finding is still interesting though, because it shows that judges who are addressing fear a lot in their opinions might also be addressing this feeling in connection to trust and sadness for the applicant.

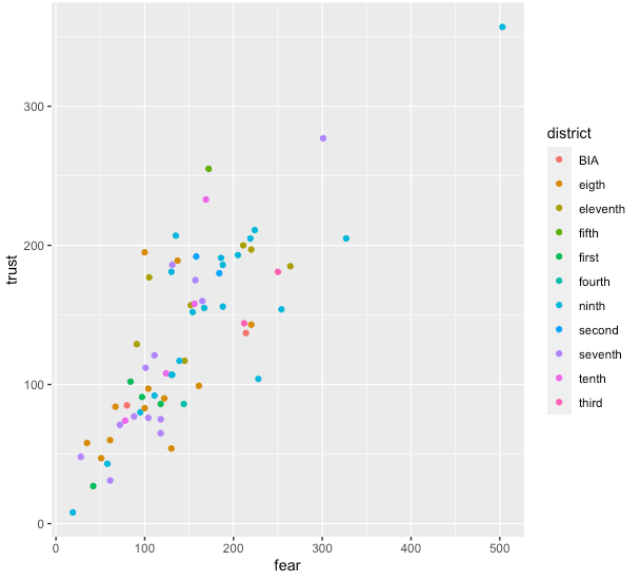
Results: Different Courts and Emotions

The graph to the right shows the correlation between fear and sadness but distinguishes it based on different courts. For the most part it seems that correlation is consistent among the courts, with a few outliers. The next graph below though however demonstrates a different story when we look at the relationship between fear and trust. Based on the court this relationship appears more scattered and the correlation is not quite as clean once you distinguish for different courts. This is something else that could be expanded on in further research. Once again, this is where only having 70 cases to look at limits the amount I can explore with this data.



Results: Outside Research

All the cases I have presented here are precedent in LGBTQIA+ immigration asylum law. Many lawyers and asylum applicants use these cases to help support their own cases. While the majority of the cases I have highlighted here made it to the federal court and were overturned in favor of the applicant it is important to note that they still demonstrate a history of difficulty with conceptions of gender and the reasonable fear standard. All 70 cases have to prove membership in a particular social



group and a reasonable fear of persecution but 24 of them rely on the judge's opinion and precedent alone and relies on the judge's conception on both whether or not the applicant is LGBTQIA+ and whether or not the reasonable fear standard has been met. This opens the door to bias in decision making.

My analysis of these cases also included counting out whether or not outside sources and/or expert testimony was used by the applicant and let in by the original or subsequent judges on the case. My analysis found that out of the 70 cases I analyzed for this paper, 24 out of 37 decisions coming out in favor of the applicant had outside research. Of the cases denied, 22 out of the 33 cases had no outside research. This means that 64% of the decisions in favor of the applicant for asylum had some sort of outside source or expert testimony and 66% of the decisions that did not benefit the applicant did not have an outside source or expert testimony. As was stated before, among all the outcomes of cases 24 out of 70 did not have any outside research and relied on the judge's opinion alone. This equates to roughly a third of these cases being decided on the judge's view of the case alone. I also attempted a logit model to see if there was any relationship between the outcome of the case and whether or not there was any outside research. However, nothing came up significant in that model, but I think once again this may be because the sample size is too small.

In terms of my hypotheses, there was a significant portion of cases that did not have any outside research and relied solely on the judge's opinion on gender and sexuality as well as reasonable fear of persecution. However, this ultimately did not seem to make much of a difference in terms of the outcome of the cases at the federal appeals level. However, when it

came to looking at these same cases at all three levels, the immigration judge, Board of Immigration Appeals and Circuit Court more interesting patterns came up.

Out of the 37 cases where the Circuit Court disagreed with the Board of Immigration Appeals and the Immigration judge in the case, 33 of them dealt with the reasonable fear of persecution standard. In most of these cases the appeals court felt that the applicant had established a reasonable fear of persecution and disagreed with the lower court's ruling. However, in the case of the 33 cases that did not turn out in favor of the applicant, there was more variety in why those cases were denied. Some of the cases dealt with technicalities such as missed deadlines for filing a case or overstaying a visa etc. Other cases dealt with lack of credibility because the applicant may have lied before in other testimony and some cases dealt with the applicant having a criminal record and that being the reason for denial.

Conclusion and Next Steps

While the sample is small and definitive statistical conclusions cannot be made from this portion of the analysis it is important to note that the majority of the decisions in the affirmative and denial cases had or did not have some sort of outside source and this could potentially be establishing a pattern that could and should be explored more in future work on this topic.

Overall, many of the cases showed a significant pattern. Firstly, judges' own perception of gender appears to have some influence on decision making in some earlier cases but at least in the cases that make it to appeal the perception of gender factor seems to be subsiding.

Further, with regards to a reasonable fear of persecution, it is also evident to see that judges have different standards of requirements and take distinct things into consideration when

considering the establishment of reasonable fear. These cases demonstrate an issue with this as well. Though reasonable fear is not a completely objective measure it is important to note that not all judges take in evidence from outside sources and taking in more evidence from a variety of outside sources could potentially aid in combatting bias coming through with the conceptualization of the reasonability issue in LGBTQIA+ and immigration law as a whole. It is also important to note that at least from these cases, there seems to be a pattern where the immigration judge and the Board of Immigration Appeals do not believe the applicant's claim rises to the standard of reasonable fear of persecution but the Circuit court does and therefore reverses the decision.

What I conclude in this paper is that judges, particularly those working as immigration judges and on the Board of Immigration Appeals, should be trained more in understanding and having empathy for applicants in this case. This would include making it a requirement that expert testimony be heard and admitted into the court room. Testimony could potentially assist the judge in making a more informed decision as well as admitting other evidence such as information from human rights organizations or new from the home country. Another way to help combat the issue with reasonable fear of persecution is to move away from it entirely and train judges in gender norms of different countries as well as mental health and how trauma can affect someone's testimony and behavior in court proceedings and life in general. Courts often require a reasonable person to come out of an unreasonable situation, but the fact of the matter is unreasonable situations bring about unreasonable behaviors.

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