

How does a migrant's gender affect his or her likelihood of receiving humanitarian-based legal relief?

Gendered Recourse in Humanitarian Paths to Citizenship

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How does a migrant's gender affect his or her likelihood of receiving humanitarian-based legal relief? My dissertation, an examination of the legal status acquisition process for female and male unauthorized immigrant crime victims in the United States, attempts to provide answers to this critical question.

BLOOD, SWEAT, AND TEARS ON A MIGRANT'S LEGALIZATION JOURNEY

There are three general avenues through which immigrants abroad may legally move to the U.S.; the same three avenues may also be utilized by undocumented migrants who wish to regularize their legal status from within the country, after having resided in the United States without permission from the government.

When potential migrants have *blood* ties to U.S. citizen or Legal Permanent Resident family members, the citizens or residents assert a right for their kin to join them on American soil.

When potential migrants possess unique and valuable skills demonstrable through the literal or proverbial *sweat* of their brows, U.S. employers assert a right to bring the individuals into the country in order to hire them.

Immigrant crime victims, whether having suffered persecution and shed *tears* inside or outside American borders, lack an equivalent U.S. ally to assert a comparable right for them to enter the polity. Such migrants must apply for a form of what the U.S. government calls "humanitarian" legal status without the backing of and credibility associated with having a U.S. family member or employer vouching for them.

Although the United States has enacted federal immigration law and promulgated policies





that aim to protect migrants who are victimized within U.S. territory and abroad, immigrants' "right" to this safety and residence in the United States is not asserted in the same way as that of family-based or employment-based migrant petitioners, nor are their petitions subject to the same adjudicatory vetting process¹. Rather, the claims of victim-based petitioners must be produced and validated by lawyers working in close collaboration with the migrants, and in concert with legal and political institutions of the U.S. state. While migrants may petition for humanitarian-based statuses without the aid of attorneys, having legal representation significantly increases the odds of receiving approvals, particularly in the asylum context (Ramji-Nogales, Schoenholtz, & Schrag, 2007). Not surprisingly, migrant victims often hire lawyers in order to translate their concerns into the language of U.S. humanitarian-based immigration law. This entails demonstrating that they survived a particular type of persecution—one that the U.S. government considers worthy of humanitarian intervention—and that they are deserving of protection by the U.S. government through a grant of legitimate legal status.

1. The United States is also a signatory to the 1967 United Nations Protocol to the 1951 Convention Relating to the Status of Refugees. The international Convention defines who is a refugee, and delineates the rights of individuals who are granted asylum and the responsibilities of nations that grant asylum. Individual state signatories to the Convention are responsible for designing and implementing their own federal laws and policies on refugees, which are supposed to maintain the spirit and intentions of the U.N. initiative.

My dissertation will explore how gendered assumptions regarding who constitutes a “victim,” which are embedded in the structure and content of U.S. immigration laws and carried out in U.S. immigration bureaucracies, influence which migrants apply for humanitarian-based relief and receive approvals. These gendered notions of legal victimhood also influence the work of immigration lawyers on behalf of humanitarian-based petitioners. Attorneys’ perceptions of which migrants are “good” candidates for humanitarian legal relief are shaped by their assumptions and beliefs about who is likely to be granted status by adjudicators at the United States Citizenship and Immigration Services (USCIS) or immigration judges in Immigration Court.²

All immigrants petitioning for U.S. legal status face an immigration legal system that, with respect to other forms of U.S. law, has been characterized as particularly chaotic legislatively as well as inconsistent when it comes

2. Since 2003, the primary immigration adjudicatory agency in the United States has been the United States Citizenship and Immigration Services (USCIS), the adjudicative branch of the Department of Homeland Security (DHS). Immigration Customs and Enforcement (ICE) is the enforcement branch of DHS. Prior to 2003, Immigration and Naturalization Services (INS) was responsible for immigration adjudication and enforcement, under the Department of Justice. The Executive Office for Immigration Review (EOIR), which includes the U.S. Immigration Courts where immigration judges oversee removal proceedings and the Board of Immigration Appeals (BIA), has been part of the Department of Justice since 1983 (Justice, 2010).

to adjudication of petitions (Einhorn, 2009; Legomsky, 2010; Wadhia, 2010). The rules of U.S. immigration law and associated provisions are often unclear, creating confusion for all players in the system: migrant applicants considering appealing to them, lawyers trying to utilize them on behalf of migrant clients, and the decision-makers tasked with approving or denying petitioners’ legal requests. Even when the rules and provisions of immigration law are fairly straightforward, rules frequently force judges and adjudicators to exercise discretion in applying broadly worded statutory or regulatory language to individualized facts, making outcomes unpredictable.

These legal challenges are necessarily heightened when these players are confronted with substantively and procedurally new forms of legal relief. In these cases, petitioners, their attorneys, and immigration decision-makers, including immigration judges in Immigration Court and adjudicators at USCIS, have minimal legal precedents upon which to rely when determining how to proceed. For applicants and their legal advocates, the petitioning process is made more difficult when they are appealing to new laws and procedures for which the adjudication process is still in flux. Similarly, adjudicators and judges are in the position of implementing the law with little clear guidance from statutory text and no



**U.S. Citizenship
and Immigration
Services**

prior written decisions upon which to rely.

While no migrant—whether petitioning through *blood, sweat, or tears* means—is automatically granted a right to enter the formal bounds of the U.S. state and become a politically enfranchised member, it is arguable that *tears*, or humanitarian-based petitioners, face a steeper battle than their *blood* and *sweat* migrant counterparts.

PROVING PERSECUTION

Tear migrants’ legal requests are subject to an exceptionally high burden of proof in comparison to those of family-based and employment-based migrant petitioners. Migrants who are applying for legal status through *blood* ties and *sweat* ties must justify their requests by including such documents as birth certificates, diplomas, and occasionally, DNA tests, to prove the existence of their relationships and abilities. These documents are, for the most part, readily available to applicants, or at least accessible.

Humanitarian-based migrant applicants also must submit secondary evidence to corroborate their contentions of persecution. However,

A photograph of a filing cabinet filled with numerous folders and documents. The folders are mostly brown and are organized into rows on the shelves. Some folders are open, showing stacks of papers inside. The cabinet is light-colored, and the shelves are densely packed with files. The text is overlaid on the image, providing information about humanitarian-based migrant applicants.

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the equivalent documentation required by *tear* applicants—including police reports of crimes, for example—might not be available to or even obtainable by applicants. Many humanitarian-based petitioners suffered atrocities that they did not report to police or government authorities due to fear or other reasons. Sometimes representatives of petitioners’ sending-state governments covertly carried out or endorsed the atrocities, and thus, public records of the persecution are not available. In such situations, concrete, tangible, bona fide evidence demonstrating what petitioners experienced literally may not exist—that is, aside from mental, physical, psychological, or emotional scars of their

trauma. It is also important to consider that the circumstances in which humanitarian-based petitioners left their countries of origin may have prevented them from gathering proof of their experiences. Asylees and refugees, for example, often must flee their home countries with little or no planning, whenever an opportunity arises, and do not have time to collect relevant documents verifying their experiences and identities.

SOCIALLY “DESERVING” VICTIMS

While there is certainly discretion involved in the adjudication decisions on family- and employment-based immigration applications, petitions for humanitarian-based forms of relief

are approved *primarily* as a matter of discretion, on a case-by-case basis. There are baseline eligibility requirements that victim-based applicants must first meet. But once they get over those hurdles, they face a highly discretionary adjudicative process that requires them to persuasively demonstrate that their particular applications should be looked upon favorably and granted. Humanitarian-based migrant petitioners must prove that they not only *qualify* for the relief from a rules standpoint, but that they also *deserve* the legal status from a social standpoint. Admission requires immigrant applicants to appeal not just to the laws of the American nation but also its liberal democratic ideals of freedom, justice, and equality (Walzer, 1983).

TEARS AND MORE TEARS: THE HUMANITARIAN PATH TO CITIZENSHIP

Through an ethnographic case study based primarily out of one non-profit organization in Los Angeles, California that aids immigrant victims, my dissertation investigates the legal status acquisition process for humanitarian-based migrants in a chronological fashion. I will be charting the process from the time undocumented victims decide they want to regularize their status and contact immigration attorneys, through the case development phase, when the migrants collaborate with lawyers to produce victim-based petitions for legal status, to the stage of application approval and beyond, documenting the approval's consequences for migrants. I will also explore how immigration lawyers representing migrant victims are drawn to this type of work and how that may affect the outcomes of clients' cases.

My dissertation is based on what will amount to three years of ethnographic participant observation research within the immigration law practice of Equal Justice of Los Angeles³ ("Equal Justice" or "EJLA"). Attorneys at Equal Justice provide free legal and social services to undocumented battered immigrant women escaping domestic violence by seeking legal residency

3. Equal Justice of Los Angeles is a pseudonym, used to protect the confidentiality of the organization, its lawyers and staff, and its clients.

under the 1994 Violence Against Women Act (VAWA)⁴ (by submitting what are called VAWA self-petitions) and the U Visa. EJLA lawyers also aid unauthorized migrant victims of labor and sex trafficking who were brought to the United States as modern day slaves and forced to work in the sex trade, sweatshops, agricultural fields, and private homes for meager or nonexistent pay, by helping them apply for relief under the T Visa.⁵ Another large part of EJLA's immigration practice includes assisting asylees and refugees who are survivors of torture, having fled from their home countries and arrived in the United States. Equal Justice immigration attorneys also provide U.S. citizens, permanent residents, refugees, and asylees with assistance in family reunification matters.

EJLA immigrant clients hail from all corners of the world, including Mexico, Central and South American countries, parts of Africa, the Middle East, and many countries in Asia. They are female and male, adults and children, and with varying language facility in English. All are

4. The Violence Against Women Act ("VAWA") was developed for undocumented victims of domestic violence whose abusers are Legal Permanent Residents or U.S. citizens. See Abriel & Kinoshita (2005), Orloff & Kaguyutan (2002), and Berger (2009) for more information on the Violence Against Women Act and VAWA self-petitioning by migrants.

5. The 2000 Victims of Trafficking and Violence Protection Act (VTV-PA) created the U and T Visas for undocumented survivors of violent crimes who collaborate with U.S. law enforcement in the investigation and/or prosecution of the crimes they experienced; the T Visa was specifically designed for survivors of trafficking. See Kinoshita, Bowyer, & Ward (2010) and Orloff, Isom, & Saballos (2010) for more information on the Victims of Trafficking and Violence Protection Act, and the U and T Visas.

indigent. In 2009, approximately 80 percent of the individuals who received legal assistance at Equal Justice earned less than 125 percent of the federal poverty level⁶. Equal Justice attorneys are nearly all female, and all speak more than one language (and many three or more). A considerable number of the lawyers are immigrants themselves, having moved to the United States as children, teens, or adults; others are U.S.-born children of immigrants.

FROM UNDOCUMENTED VICTIM TO HUMANITARIAN-BASED VISA HOLDER

One chapter of my dissertation begins by pointing out that, as distinct from unauthorized immigrants who are apprehended and *forced to confront* their illicit status, the vast majority of undocumented migrants who apply for humanitarian legal relief proactively *decided to deal with* their irregular status. The migrant victims who become official U.S. asylees or recipients of U Visas, T Visas, or VAWA self-petitions were previously part of the large, heterogeneous group of immigrants living in the United States without bona fide legal status. In this chapter, I explore the joint processes of how undocumented

6. This figure includes individuals who received legal assistance at EJLA in any service area, not just immigration law. The organization offers legal aid in a number of other areas, including but not exclusively housing and eviction defense, family law, and consumer law. I purposely give an approximation of the proportion of EJLA clients that earned below 125 percent the federal poverty level in 2009 to maintain the confidentiality of the organization.

immigrant victims in Los Angeles decide they want to become documented through humanitarian-based means, and how they secure legal aid to obtain the relief. The role of migrants' gender in these processes is something I am examining.

While several forms of humanitarian-based immigration relief exist in the United States, only a narrow group of immigrant victims legally qualify for this relief. Even among eligible immigrant victims, those who seek and are successful in obtaining legal assistance to apply for these forms of legal status are distinct from those who do not. What are the opportunity junctures that filter out immigrant victims who are eligible for the forms of status but do not pursue them? What factors lead immigrant victims to pursue legal help and enable them to ultimately apply for humanitarian-based relief?

I am also exploring the ways in which gender affects how *female versus male* unauthorized immigrants learn about humanitarian relief and access legal aid. Scholars have found that the social networks through which undocumented migrants acquire information about legalization can be highly gendered. Hagan's (1998) analysis of Guatemalan migrants in Houston illustrated how migrants' gendered social relations through neighborhood, work, and voluntary associations differentially affected their access to information about the legalization opportu-

nities available through the 1986 Immigration Reform and Control Act. Female migrants were much less informed than the men about the legalization process because their live-in domestic worker jobs restricted their interaction with others in the community, and therefore their knowledge about the legalization process. Women's economic, social, and geographic isolation as compared to their male counterparts – who worked in larger, more public settings among many employees and were less restricted in their mobility during after-work hours – led to unequal access to the resources provided by social network ties. The greater access enjoyed by the males enabled most of them to gather the information and documentation necessary to legalize, whereas the lesser access restricted females' participation in the programs (see also Granovetter, 1973).

Singer and Gilbertson (2003) also examined gender dynamics present in the legalization process by investigating how male and female Dominican immigrants in New York City perceived the prospect of naturalization and acted on their capability of becoming U.S. citizens. Men imagined that acquiring U.S. citizenship would encourage the reestablishment of traditional gender hierarchies that had attenuated after migration by facilitating greater transnationalism between the Dominican Republic and the United States. For women, however, these

same processes contributed to an inversion of such hierarchies by facilitating their independence and legitimating their individual relationship with the U.S. state (see also Hagan, 1994).

Given that nearly all Equal Justice immigration lawyers are female, I am also investigating how attorneys' gender may affect their lawyering approaches and the legal strategies they employ on behalf of migrant victims. Jack and Jack (1989) discerned that female lawyers tend to be more care-oriented, empathetic, and conciliatory than male lawyers when interfacing with clients, which may translate into their securing more information on more subjects than their male counterparts, thereby giving female lawyers a better grasp of a wider range of client needs and objectives (Menkel-Meadow, 1985).

In considering these questions, I examine various stages of the filtering process through which undocumented victims become humanitarian-based petitioners for legal status. By doing ethnographic fieldwork at the client intake stage of the case evaluation process at several non-profit legal aid organizations in Los Angeles (including Equal Justice), I will determine how potential applicants' qualification for victim-based relief is assessed, from their basic eligibility according to the letter of the law to the more subjective eligibility determination made by attorneys within organizations (which influences the attorneys' ability and willingness

to represent them). I will also utilize data from in-depth interviews with Equal Justice clients and attorneys from EJLA and other Los Angeles non-profit and community-based organizations, to clarify and expand upon what I am able to observe ethnographically. Although fieldwork is still ongoing, what follows is some data and preliminary analysis.

SEEKING AND SECURING LEGAL AID

Not all immigrant survivors of crime (or their non-immigrant counterparts, for that matter) report their victimization experiences to law enforcement or subsequently seek out legal and/or social services. Immigrant crime victims may be unaware of the legal protections they have or the social service agencies that can assist them regardless of legal status (Blum, Heinenon, Migliardi, & White, 2006; Sullivan, Senturia, Negash, Shiu-Thornton, & Giday, 2005). As such, fear of deportation may prevent non-citizen victims of violence from escaping their perpetrators or pursuing help (Hamilton & Chinchilla, 2001; Mahler, 1995). Moreover, some female immigrant victims of domestic violence resist fleeing or reporting their batterers because of cultural and gender norms in ethnic communities that regard domestic abuse as “normal” (Bhuyan & Senturia, 2005; Raj & Silverman, 2002). These limitations, coupled with language

and economic barriers, may dissuade immigrant victims from pursuing aid. The very names of certain humanitarian-based forms of immigration relief may also deter individuals from applying for them. For example, while males are eligible to apply for immigration relief under the Violence Against Women Act, they may believe the relief only applies to females based on its gendered name. Even if male migrants know they may apply for relief under VAWA, they may resist petitioning for a status that was developed with *female* domestic violence victims in mind. Similarly, stigma tied up with claiming legal victimhood may prevent eligible migrants from applying for U or T Visas through the 2000 Victims of Trafficking and Violence Protection Act. Adopting (at least to a certain extent) the victim identity that goes along with applying for a U or T Visa may be unappealing to male or female migrants because of negative associations they or others have of victimhood with weakness or vulnerability (Bumiller, 1988). The impact of legal language on individuals’ willingness to mobilize law on their behalf should not be underestimated (Merry, 1995).

An additional obstacle may present itself once undocumented victims decide they want to regularize their status via humanitarian-based means: finding a lawyer who can verify their eligibility for the relief, is both willing and able to represent them, and for some migrants,

who they can afford. Perhaps not surprisingly, there is high demand among undocumented victims for the services of legal non-profits or community-based organizations that charge low or no legal fees to clients. Attorneys at such organizations are often inundated with requests for help and carry humongous caseloads, so at any given time, they may not possess the resources to represent eligible humanitarian relief applicants. Moreover, lawyers at non-profit and community-based organizations have distinct modes of legal practice that tend to align with their organizational missions and goals; these goals may affect the likelihood of a non-profit attorney accepting an individual’s case, as well as the extent of aid an individual is given. That is, immigrant victims who are deemed eligible for humanitarian-based relief by organizations with the resource capacity to represent them may face an additional hurdle concerning attorneys’ willingness to serve as their legal advocates.

Legal organizations that are flooded with demand can be—and indeed must be—choosy in selecting their clientele. Individuals who are technically eligible for humanitarian-based relief based on the letter of the law may encounter resistance from lawyers who feel their cases are not “compelling” enough or in line with their organizations’ missions. Lawyers may take other factors into account as well. For example, at-



torneys may decline to represent an individual who is technically eligible for a humanitarian-based form of relief because they believe that immigration decision-makers will not find the person's circumstances especially compelling.

Leah, a non-profit attorney in Los Angeles, explained in a January, 2001 interview that

people start lining up on the street outside her organization's office at 2 or 3 A.M. on Sunday night each week, waiting for intake hours to begin on Monday morning. During intake, lawyers evaluate the merits of potential clients' legal situations for free and determine if they can represent them – also without charge. Since many of the potential clients who come to her door for victim-based assistance are technically eligible for the relief, Leah must make judgment calls regarding whose cases she will accept. She articulated how she makes that determination:

Unless my heartstrings are super pulled, I don't accept cases with criminal convictions because they take so many resources, and then I just think about how I'm using all of these resources on this person when there are single moms that have no criminal history that aren't getting seen [and helped]... Generally we have a policy that we don't take the young single dudes with criminal convictions, but then everybody makes exceptions from time to time.

Organizations that are formally committed to protecting victims of crime confront ethical dilemmas when evaluating cases of immigrant victims that have criminal convictions themselves. Individuals with prior criminal convictions are not necessarily ineligible for humanitarian relief.⁷ But in light of their time

7. Certain criminal convictions totally bar individuals from receiving humanitarian-based forms of relief, depending on the type of relief. However, some crimes may be formally "waived" by USCIS adjudicators or immigration judges upon request, allowing individuals to receive the relief on the basis of the case's merits.

constraints and the overarching goals of the organizations in which they work, non-profit lawyers are limited in the extent to which they can assist all eligible migrants, and must decide to help some and not others. Leah expressed reluctance to help a male "criminal" victim at the expense of a female, single mother victim with a clean criminal record. Immigration lawyers considering which cases to accept may take other factors into account when deciding who is the most "deserving" of their help. Their reasoning may also be affected by their anticipation of how immigration judges or USCIS adjudicators will evaluate victims' deservedness for humanitarian-based legal statuses. USCIS explains that the humanitarian-based immigration programs it offers are designed to "assist individuals in need of shelter or aid from disasters, oppression, emergency medical issues and other urgent circumstances."⁸

Attorneys may decline to take cases for individuals who present as technically eligible for humanitarian-based forms of relief because their prior lawyering experience has shown them that certain types of cases are not likely to be approved by immigration decision-makers. Although both types of cases Leah identifies above are for individuals who have survived violent crimes, her remarks convey an understanding that single mothers with no criminal convictions

8. See United States Citizenship and Immigration Services (2009).



tions are likely to promote more sympathy from judges and adjudicators than “single dudes with criminal convictions.”

Cases for “single dudes” in the situation Leah describes may be approvable. However, such cases require attorneys to spend time preparing requests for immigration decision-makers

to “waive” clients’ convictions that make them “inadmissible” for the victim-based statuses. Given the overwhelming demand for attorneys’ services by individuals without any issues needing waivers, it is not particularly surprising that some lawyers – especially non-profit lawyers who have no financial incentive to accept one case over another because they are not being paid by clients and are not working toward the goal of higher billable hours - would likely opt to help individuals whose cases they perceive as more straightforward and simpler to prepare, additionally allowing them to help more people.

Lawyers also perceive cases as straightforward if they believe they are likely to be swiftly approved, based on how USCIS or immigration judges responded to previous migrant clients with similar stories. However, immigration lawyers representing migrants applying for humanitarian relief do not have much to go on in determining who is likely to be considered a “deserving” victim by immigration decision-makers, warranting the U.S. government’s humanitarian intervention and protection. The VAWA self-petition, the U Visa, and the T Visa are fairly new forms of immigration status, so certain kinks associated with the adjudication process surrounding these forms of relief are still being worked out and clarified. Moreover, numerically speaking, relatively few individuals

have received these forms of immigration relief as compared to individuals who have received family- or employment-based relief. Who U.S. immigration agencies consider a “deserving” victim, then, is still unfolding, as attorneys receive approvals and denials for their clients. Accordingly, prudent immigration lawyers continue to be cautious about whom they advise to apply for victim-based forms of relief and whose cases they take.

Lawyers also must consider their reputations with USCIS and Immigration Court when agreeing to represent migrant petitioners before these agencies. If they represent individuals whose situations deviate somewhat from the underlying legislative intent of humanitarian-based immigration relief, lawyers may fear that they will suffer reputational harm that could have negative repercussions impacting the outcome of future clients’ cases. Representing a migrant whose case USCIS or a judge in Immigration Court deems “frivolous”— that is, a waste of time and resources—could tarnish the lawyer’s individual reputation as an ethical attorney who brings credible, worthwhile cases and/or the larger reputation of the organization in which s/he works. Further, USCIS adjudicators and immigration judges may be more suspicious of subsequent cases brought by lawyers or legal organizations that submitted “bogus” petitions in the past. Since humanitarian-based

forms of legal relief are granted almost entirely based on the discretion of adjudicators and judges, one “frivolous” case brought by an immigration lawyer could have serious ramifications for his/her later, more “credible” cases, no matter how sympathetic the client’s circumstances are.

It is inherently risky for undocumented migrants to apply for legal status because it involves exposing their illegality to U.S. government agencies. The consequences of a rejected immigration petition can be especially stark for undocumented migrants. Migrants whose asylum applications are rejected are automatically placed in removal proceedings in Immigration Court, which could result in detention and/or deportation. While the files and identifying information of rejected VAWA self-petitioners and U and T Visa applicants are, by law, not supposed to be forwarded to ICE (which would be likely to result in their deportation), any exposure to U.S. immigration authorities always entails considerable risk and uncertainty. The consequences of a denied immigration petition may also be detrimental to immigration lawyers and the organizations that employ them insofar as rejections could reflect poorly on the lawyering acumen of the organizations or their reputations in the minds of USCIS adjudicators or immigration judges, which could negatively impact the petitions of future clients.



Migrants’ gender and gendered understandings of victimhood in immigration law and enacted within U.S. immigration bureaucracies may affect which migrant victims seek out legal aid, and apply for and ultimately receive humanitarian-based relief. In turn, the notions of gendered victimhood embedded in laws and regulations and effected in U.S. immigration bureaucracies shape the work of immigration lawyers who select clients on the basis of who they believe is likely to receive humanitarian forms of legal status. I hope my research contributes to

our understanding of these complex social processes that have serious, concrete implications for the lives of male and female migrants in the United States.

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