September 2007

Panel Three - Categories of Migration

Berkeley Journal of Gender Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/bglj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z383B5W73H

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Gender, Law & Justice by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Panel Three—Categories of Migration

FIRST SPEAKER: MARIA SUAREZ

Good afternoon. I would like to thank the Berkeley Journal of Gender, Law and Justice for inviting me to speak to you on behalf of thousands of victims and survivors of trafficking who are silenced by fear for their lives and those of their families.

I was raised on a farm in Mexico and thanks to my wonderful family I had a very happy childhood. As a child, I dreamt of becoming a teacher and working to support my family. I jumped at the chance to come to the United States to help support my family when I was 16.

I was so excited when I arrived, I began to looking for a job immediately. I quickly met a woman on the street who told me about a job helping an elderly man. As a wide-eyed teenager, I remember thinking how lucky I was to get my first job so fast. The next thing I knew I heard the door slamming and locking. An old man was telling me he bought me for $200, and I was going to do whatever he said. I was so confused and scared and didn’t know what to do.

Over the next five years he assaulted me, beat me, and forced me to cook and clean for him. As I was still a child, it was worse than anything I could ever imagine in my wildest dreams. Although I didn’t want to live like this and didn’t care what he told me, I was paralyzed by fear that he will hurt my family. To this day, I cannot mention the name of the man who always told me that if I ever told anyone what was happening or try to escape he will hurt my family or find me wherever I escaped to.

My first encounter with the law enforcement was when my family sent the police to check up on me at my trafficker’s house where I was enslaved. When they came, I was so scared of my trafficker that I told them there was nothing wrong. The police simply turned around and left the house without conducting any further investigation or even filing a report. It was a strange arrangement, but the police officers didn’t notice anything initially and left shortly after they arrived. If the police officers had asked me more questions about my situation, such as are you free to leave or do you fear your employer, maybe I would have said something. This was almost 30 years ago, so it is not surprising that the local police had no idea I was a victim of slavery, held against my will by a man who was decades older than me.

Training police officers to ask the right questions to victims when they suspect a case of trafficking could mean a difference between life and death. I

1. Former client of Coalition to Abolish Slavery and Trafficking
am lucky to be alive, but other victims might not be so lucky if the police are not able to identify them as victims of trafficking.

I would like to make this absolutely clear, that trafficking victims want to cooperate in the investigations and prosecutions of traffickers. In fact, after being repeatedly abused and enslaved by them, we want to see them go to jail more than anyone. Sometimes it might look like victims don't want to help law enforcement because they fear for their lives and most importantly the lives of their families. But all they need to cooperate is to be protected and informed about their rights as victims of violent crimes and they will be great witness. If I knew then what I know now about my rights and protections given to me as a survivor of trafficking, I would have escaped from my trafficker at the first chance I got. No one needs to force me or any survivor of trafficking to cooperate with law enforcement. And it's wrong to ask us to cooperate with law enforcement or be deported because reminds us of our trafficking and makes some of the trafficker's dreams come true because traffickers threaten to take away what is more important in our lives—our families, providing immigration.

Protection to our families is also critical to protecting us and helping us to cooperate in the prosecution of our traffickers. The greatest threats to our family are before and during the prosecution of our traffickers. So our families need this protection right away, not months or years later. Most of us are here and continue working, not for ourselves, but for our families. And without protection for them, many trafficking victims will never come forward. Providing services to victims immediately after they are identified is important to the victim and will help the prosecution by helping victims testify against their traffickers. After being enslaved, victims need to see a doctor immediately. Most survivors of trafficking have no family or friends when they escape from their situations.

Victims do not need to be treated like criminals in houses or in jails. They need appropriate shelter to stay safe from traffickers and their associates today. We need to see an attorney so that we can learn about our rights and make sure they are protected. We can not wait a month, a year, and certainly not two years. If you only take away a few things from this conference today, one should be that survivors need better access to immediate protection and services in order to hold traffickers accountable for their crimes and to begin rebuilding their lives.

Because I am fortunate, I am now taking college classes to work towards my bachelor's degree. I might be the oldest student in my class, but this has not dimmed the excitement I feel when I pack my backpack or finish writing my last sentence of my homework. I would like to become a social worker some day so I can help others in my situation. To get there I need an education first.

I would like to close by saying that it would be best to prevent trafficking of women in the first place because no one should have to go through what I did. One way to do this would be by providing safe ways for women to come and work in the United States. Once women are trafficked here the prosecution of the traffickers and protections and services for survivors of trafficking must go hand-in-hand. One cannot and should not exist without the other because we are
victims of violent crimes and have the right to be protected and provided services, like any other victim of crime. Just because you can’t see most of our wounds doesn’t mean that we aren’t seriously injured and don’t need immediate attention. Thank you very much.

SECOND SPEAKER: CHARLES SONG

I want to thank the audience for dragging yourselves in after that great lunch. I know you all are probably really sleepy like I am, but hang in there its just a couple more hours.

I want to take this opportunity also, to actually thank Neha and Shelley. I wanted to publicly embarrass them while I was here; they did an amazing job with AB22. I don’t know if many of you heard, we have a new California law on human trafficking, and Neha and Shelley had such a huge part in that. I was extremely proud of them and, you know, it’s a great credit to them that they can say that during law school they actually wrote some trafficking legislation. And in my opinion and I think actually in a lot of people’s opinions, it’s the best in the country. In fact, Shelley even named the new act; it’s the California Trafficking Victim’s Protection Act. So, just goes to show you what you can do even as a student despite what your professors might tell you. You can do quite a bit actually.

I just want to echo what Maria was saying, as I’m going to be basically talking about how trafficking victims or survivors are classified or categorized. But the best thing that we can do to prevent trafficking is to prevent situations like in Mujeres de Juarez, and one of the ways that the law can do that is through empowering survivors. I liked some of the literature that the Journal put out in talking about empowering survivors. Our laws can either contribute to the trafficking—to make it easier for traffickers to enslave people—or they can empower women, survivors of trafficking to be able to migrate safely, to be able to work safely and then if they are to end up in a trafficking situation, like Maria was, to understand what their rights are and feel like, “I can get benefits. I can get shelter. I can be protected.”

CAST—I’m the legal director of the Coalition to Abolish Slavery and Trafficking—was founded in 1995 in the aftermath of the El Monte case. I’m not sure if any of you have heard of that case. It’s the El Monte Slave Shop case where 72 Thai workers were enslaved for up to 7 years at a time. One of the most difficult things about that case was knowing how long the government knew about that case. Some government agencies knew about that case for over a year, but had no idea what it was or what to do about it. In fact, they set up a surveillance office right next door in their neighbor’s house and were watching what was going on at El Monte. But they weren’t sure what it was and they weren’t sure what to do about it. So, what do you do—you do nothing, right, if

2. Legal Services Director, Coalition to Abolish Slavery and Trafficking
you’re not sure what it is. So they sat on it for about a year. Ultimately, the Department of Labor Standards Enforcement, finally decided: all right we need to go in, we don’t know what it is, but we need to figure out what it is and take care of it.

It got to such a point within the Immigration Service that actually there were even jokes about El Monte, like if somebody had a bad day, they would joke, “well at least you’re not at El Monte.” And once the California Department of Labor Standards Enforcement decided to go in, that’s when other agencies said, well, if you’re going to go in then I want to go in. And so they followed the Department of Labor Standards Enforcement in, and they found the 72 workers. They saw that there was razor wire all around the compound. You know, this was the type of razor wire that you would see in a concentration camp or in a federal prison, and it was faced inward. It certainly wasn’t faced outward. But it took them that long just to figure out what to do in that type of case.

And then what did they do once they “raided” and “rescued” the people? They put them all in jail, which is what you’re supposed to do with victims of crimes, I think. So that obviously didn’t help the situation, but during that time, CAST also realized there wasn’t anybody in Los Angeles, or even in the country for that matter at that time, that knew how to deal with these trafficking cases or knew what to do with them. We didn’t know where to put them, where to house them—they were mono-lingual, they didn’t have any friends, and they didn’t have any family. We didn’t know what to do with them, exactly. And fortunately, the Thai Community Development Center stepped up to the plate and ended up assisting them quite a bit. But that’s how CAST was founded in terms of realizing the need to assist survivors of trafficking in a fair way.

Before I talk about the classification and the categorization of trafficking victims, I just want to give you the background of the Trafficking Victim’s Protection Act. Part of the reason for the Trafficking Victim’s Protection Act in 2000 was the El Monte case. There was also a Thai welder case out in L.A. in 2000, there was also the Reddy case that you guys may be familiar with here in Berkeley—one of the most notorious trafficking cases in the country, where a young 17-year old girl actually died in captivity as a slave.

But anyway that gave rise to the Trafficking Victim’s Protection Act. Law enforcement and non-governmental organizations realized we didn’t have the proper prosecution tools. We didn’t have the proper tools to protect trafficking survivors. We didn’t have anything to really help with preventing the trafficking situation. So the TVPA was set up by Congress, and it was intended to prevent trafficking victims from being treated like criminals and again, it’s called the Trafficking Victim’s Protection Act, not the Trafficker’s Prosecution Act. I’ll just give you a little more background.

I was fortunate enough to be in D.C. working on the TVPA when I was in law school and there was a huge debate at that time. There was a totally law enforcement bill that was all about sex trafficking versus a human rights-based bill that was more about protection. They couldn’t agree and what ended up
happening was you had two very separate bills kind of smashed together at the last minute. If you look closely through the TVPA, you’ll see instances of that, and I’m actually going to talk about some of that today.

You guys might be familiar with some of the benefits that are available for the TVPA. Actually some of the speakers mentioned some of them. One is the T-Visa, which is what Maria has. One is the U-Visa and somebody asked earlier, well how come nobody is applying for U-Visa? And one answer, my answer would be because there aren’t any. The U-Visas have been out since 2000—Congress mandated them in 2000 and the federal government has refused to issue regulations. Why? Maybe because most of the people who applied for interim relief—there is interim relief under the U-Visas—are women who have been abused in domestic violence situations or raped or have had other crimes committed against them. But there aren’t any U-Visas right now, so that is one of the things that we can’t even provide. We can get interim relief, but that keeps them in a state of legal limbo that’s really not acceptable.

The other is the T-Visa. I don’t know if you guys are familiar with immigration law at all, but there is, literally, a whole alphabet soup of different visas and immigration statuses that you can receive. There is one visa called the S-Visa and that’s what a lot of us like to call basically the Snitch Visa for informants of organized crime. The T-Visa, I used to believe right after the S-Visa because it was the letter T and I thought it stood for Trafficking Visa or that’s what a lot of people call it. Oh, five minutes all ready. Okay. I now like to call it the Tattle Tale Visa, because this is how they are being categorized. I thought this was all about protecting victims and about providing them services. But witness cooperation is what it comes down to, both the T and U. You cannot get either visa without reporting to law enforcement and without cooperating with them. Essentially, our laws are saying, “we don’t care if you’ve been enslaved. We don’t care if you’ve been raped. We don’t care what’s happened to you. Unless you cooperate, you’re not getting a thing from us.” And actually, you are subject to arrest and detention and deportation regardless of whether you’re a victim of a severe form of trafficking or not.

The requirements are for the T-Visa one, you have to be a victim of a severe form of trafficking. And I know a lot of you are probably saying, “What the hell is a victim of a severe form of trafficking?” and I’ll get into that in a second. The second requirement is that you have to cooperate with law enforcement, which I was just mentioning. The third requirement is that you have to be here on account of the severe form of trafficking. And the final requirement, as if there aren’t enough hoops for some of these survivors, you have to face extreme hardship involving severe, unusual harm. Well, what the hell does that mean? These are the questions that we face and these are people that Congress has recognized have been enslaved in the United States and we’ve failed to protect them. And after surviving all of these situations, then they still have to jump through all of these hoops and they have to risk their lives in order to be eligible for these T-Visas.
One of the biggest problems with categorizing traffic victims more as witnesses than people who deserve benefits simply for humanitarian reasons or for the hardships that they faced in the law enforcement cooperation. For example, VAWA doesn’t require the law enforcement cooperation, and neither does asylum status. But in the trafficking context, it does require it. And one of the things that bothers me most about this law enforcement cooperation requirement is the fact that 18 U.S.C. § 1584 is involuntary servitude in the United States. And that means that somebody has physically or legally coerced somebody to work against their will. Legal coercion requires or includes threats to call the police and threats to call immigration, and that fits for the definition of a victim of a severe form of trafficking.

So lets say you’ve got a victim of severe form of trafficking whose been placed in involuntary servitude. They get out, they’re “rescued,” put in jail and in INS detention, and are told if “you don’t cooperate with law enforcement, you’re going to be arrested and detained and deported.” It sounds an awful lot like what the traffickers told them when they were in their situation. I’m not saying that that’s tantamount to involuntary servitude, but that’s really frighteningly close to involuntary servitude and to the type of legal coercion that’s going on. Is this a meaningful choice, or are we over bearing their will in that type of situation. I wish I had time to go over what I would do if Charles was in charge of all of this stuff, but I don’t. And maybe I’ll have to wait for that, but that’s one of the main problems and I think there are a number of other problems with the way we’ve classified trafficking victims. And hopefully we can change that.

One last thing, the U.S. recently—this is my big hope right now—ratified the trafficking protocol of the U.N. Crime Convention and that definition for trafficking is broader than the U.S. definition. And I’m hoping to use that to expand our definition of trafficking in the United States. Thank you very much.

THIRD SPEAKER: KATE JASTRAM

Thank you, Shelley and thanks to all the organizers. I’m really proud of you for putting together such a great program. And I want to assure all of my global migration seminar students that I do see you here.

I want to take my time and talk about one hidden category, several invisible categories, and then offer some thoughts about how categories are applied. The hidden category that I want to talk about is detention. It has been mentioned a little bit: Charles mentioned a little bit, and I think Karen did this morning. But I think it’s really important that we think about the situation of migrant women who are in prison. I say prison because detention seems like a really bland and bureaucratic word to me.

All right, so which migrant women are we imprisoning? There are basically three categories. There are women who have committed crimes:

---

3. Lecturer in Residence, University of California, Boalt Hall School of Law
they’ve served their criminal sentence and now they are on an immigration hold pending resolution of their immigration status. There are also women in detention or in prison who have violated immigration law, which is not a crime. And there are also women in prison who are seeking asylum, which is neither a violation of immigration law nor a crime; in fact it’s a fundamental human right. But they are in prison.

Now why are we detaining migrant women? In some cases it’s mandatory: Congress has told DHS that certain categories of women have to be detained—aliens have to be detained. And in some cases DHS does have the discretion to release people on parole before their hearing. So, in cases like that, the reasons that we might be detaining people would be to determine their identity, to ascertain whether or not they are a danger to the community, to assess whether or not they are a flight risk (in other words, are they going to show up for their hearing?), and also to insure removal. And I should say that very recently DHS Secretary Chertoff announced the Secure Border Initiative. And this included a dramatic expansion in the application of expedited removal. So now aliens encountered within 100 miles of the entire southwest border are subject to expedited removal, which is, of course, a much more summary procedure where you don’t get to an immigration judge. And this is basically to insure removal of so called OTM’s (Other than Mexicans). Mexicans are easy to remove because the U.S. has a bilateral agreement with Mexico to do so.

And finally another reason that migrant women might be detained is for the purpose for deterrence—to deter asylum seekers. This is not a permissible purpose; governments are not supposed to detain asylum seekers to discourage others from coming. But with that exception, these other reasons that I have mentioned are, in most people’s way of thinking, acceptable purposes. And so we need to think about other ways to insure appearance and to insure removal—ways that may be less expensive and may be more humane.

Now, are we detaining the right women within these categories? And the quick answer is we don’t know. The parole process is at best whimsical. It’s in most cases not governed by regulations. There is a lack of clear policy. It’s a highly decentralized system: the local offices are making these decisions [with] very poor record keeping [and under] very poor supervision by higher ups. There is an institutional culture of “no.” Everyone at DHS is terrified of making the wrong decision and releasing somebody who will do something bad. And that all adds up to an inability or unwillingness on the part of ICE, Immigration and Customs Enforcement people within DHS, to make and document consistent detention and release decisions.

So in the study that Shelley mentioned—study of asylum seekers and expedited removal, which is of course only a small part of the universe of persons in detention—our study showed that the files really don’t reveal why people are being detained or why they are being released. It’s possible we are releasing the wrong ones and keep detaining the wrong ones that should be released.
We did find that there is a higher release rate for women. For example, 84 percent of women in our study were paroled as opposed to only 73 percent of men. So there is a noticeable differential there. Well, why is this discrepancy? I don't think it's chivalry. I think it's probably bed space. They typically don't have the room to put women in. But DHS is getting $90 million for 2,000 new detention beds, so the advantage we might have had perhaps in not having bed space is going to be addressed.

Under what conditions are migrant women detained? I should say there are varying facilities. There are some facilities that are directly run by DHS, detention facilities, not called prisons. There are also facilities that are run by private for-profit corporations that are under contract to DHS. And then there are actual jails and prisons where DHS contracts with the locality or the municipality and pays for the bed space. And in fact, because the smaller numbers of women, DHS tends not to save space for them in their own facilities. So it tends to be women that are disproportionately placed in these state and federal facilities. So typically, they are mixed with women who are serving criminal time, and this commingling can even include shared sleeping quarters. So it's very much a commingling. The conditions are uniformly grim. I don't know how many people have been in an immigration detention center. Those that are not actually prisons are like prisons in every significant respect. And this has been documented in our study and basically everybody else's study about detention. And this has implications for women's physical and mental health including the threat and reality of gender-based violence. That has been documented in Krome Detention Center and elsewhere. Sexual violence against women, implications for their contact with their family and community, their ability to locate, pay for, and meet with their attorneys and their ability to document their case. And I just want to mention for a very wonderful and compelling first person account of what it's like to be a refugee inside a U.S. detention center. You should read Fauziya Kasinga's autobiography. That was the story that Karen Musalo was telling this morning. And the book is, *Do They Hear You When You Cry?*

So just to sum up these few thoughts on detention, I would just query whether this is appropriate and necessary that we keep this many women in this dire kind of situation. I think that it's really important that we reflect on how to devise and implement a secure, humane, and cost effective detention policy. And then I also think that it's important that we have a conversation about what a detention center for migrant women should look like, because it is inevitable that they will be detained and I don’t think that it’s inevitable that it's under the kind of conditions that it is.

So that's my hidden category: kind of literally, we don't see them. And then I wanted to talk about a few invisible categories, which basically are what I would call unrecognized categories that reveal the gap between the social reality of migration and then our legal structure.

It's obvious that women migrate within or increasingly outside of the channels that are established by governments. And this disjunction between the
needs and desires of women who migrate and the legal structures that we have leads to greater vulnerability for women. And that has come up many times in comments that people have been making during the day.

Generally speaking and just to save time, I'm going to throw out some sweeping generalizations here. The U.S. immigration system is constructed on a really circumscribed vision of family relationships, on a limited notion of protection, and on a really narrow set of employment relationships. And I want to touch on each of those categories briefly.

First of all, women in non-recognized family relationships. Now family, although it is recognized as a fundamental unit of society under international human rights law, is not defined. And that's because of cultural differences and what constitutes a family. Now of course, under U.S. immigration law we have a definition of family.

So let's look at who is left out. I can think of at least five categories that we might want to be concerned about. The first one is the undocumented mothers of U.S. citizen children. People probably know that [for] a person here without status who gives birth, that child is a U.S. citizen but is not able to confer immigration benefits on his or her parents until the age of 21. Okay, so these [are] so-called mixed-status families where you have U.S. citizen kids living with undocumented people who are typically their parents. There are more than 3 million: 3.2 million U.S. citizen-kids are living in mixed-status families. And it's seen as one of the biggest obstacles to dealing with the unauthorized population—how to deal with that particular gap or category that is not recognized.

Second category: mothers of children who are recognized as refugees. In our statute, a parent or a spouse who is recognized as a refugee can confer derivative asylum benefits on their spouse or their children. But a child recognized as a refugee cannot confer the derivative benefit back up to a parent. In a couple of cases, the judge basically used membership in a particular social group to include the parents. But, in my opinion, this is not a great use of the social group category, and it's on a very case-by-case basis as to whether the parent gets recognized.

Third, non-recognized, family relationship is women seeking to join their lawful permanent resident husbands. Now this is a category in U.S. immigration law, but the category is so over-subscribed that there can be, particularly in the case of Mexico, a 10-year wait to get in. So this is obviously not a realistic timeframe in a marriage or anybody's life to be apart from their spouse.

Fourth category, women in lesbian bi-national relationships. Often the U.S. likes to think that we are a leader in immigration, in protection. And actually we're often not, which is okay, but my point here is that there are at least 10 other countries that recognize lesbian relationships as being able to confer immigration benefits. And not that the U.S. cares what other countries do with their legal arrangements, but it's always good for the floodgates argument. You know, Canada plays a great role in this regard, because Canada will do things
first and then we can say look, they haven’t been overrun.

Finally, another category is grandmothers caring for their grandchildren. Now a U.S. citizen adult obviously can bring in their kids and can also petition for their parents. But, for example, a lawful permanent resident can not. So you miss that family relationship and that sort of help of getting into the labor market, et cetera, et cetera. Okay, so these are the non-recognized family relationships.

Women fleeing human rights violations that are not covered by the 1951 convention or the torture convention: there are a lot of people left out of our definition of refugee, even on a fair reading of the refugee definition. Charles has talked about some of the trafficking, categorical shortfalls. I’ll just mention a few others: women who have a nexus problem, they have a well-founded fear of persecution, but they can’t link it to one of the five grounds; women who are fleeing from armed conflict, generalized violence, or widespread violations of human rights; women who need temporary protection and are seeking to enter the United States; women who are fleeing from poverty or other violations of economic social and cultural rights; women who are fleeing repressive male-dominated societies and situations that may not rise to the level of persecution. And I should say that most of these categories could include girls as well, but that’s a different analysis. Women internally displaced persons. Obviously, with Hurricane Katrina, that’s an issue that we’ve become a bit more aware of. Now there are one or more countries that protect some or all of those categories that I just mentioned.

As well, these are my three kind of interesting things I’ve found. In some countries a women cannot be deported if she would face the death penalty, if she has a serious medical condition that’s recognized as worthy of stopping deportation, or those whose deportation would breech the right to family life. So these are all things that exist in other countries that don’t exist in our country.

And finally, I just want to mention women in non-credentialed or undervalued employment. We had this really wonderful panel on that earlier this morning. But, for example, in the case of domestic workers, it is interesting; it’s actually available to foreigners, as Nahar Alam spoke about this morning. Diplomats and foreign business executives can bring in their nannies. But it’s much more difficult for a U.S. citizen to try to bring in a nanny or to obtain permanent residence for the woman who is taking care of their children. So, in effect, there are such long waits and such restrictions that it’s basically an unavailable category.

Finally, I would just like to say a little [about] our application of the existing categories. Now some categories, such as whether someone has a spouse, are primarily a factual determination. But other categories, including trafficking and asylum, rely on a much more contextual understanding of women’s lives. And this is where we run into trouble. Categories that extensively exist can really be narrowed by agency or judicial interpretation.

And I want to say just a couple of words about the Real ID Act, which
passed earlier this year, which has been very problematic, I think. It will be very problematic for asylum claims. There has been a lot of attention rightly placed on what it’s done to habeas in judicial review, but just three things I’ll flag for you. The Real ID Act with respect to asylum introduced a new standard for burden of proof—the protective ground has to be at least one central reason for persecution. So this ratchets up the nexus problem that asylum seekers have anyway, even more. The Real ID Act also introduced a new standard for collaborative evidence, such that the immigration judge can require it even for credible testimony. And I have to think that any government attorney worth their salt is going to insist on this in every single case—that the asylum-seeker bring in collaborative evidence. And finally, it also introduces a new standard for credibility which is basically a laundry list that invites judges to find applicants not credible. And one of the factors a judge is supposed to think about in terms of the credibility of the case is the inherent plausibility of the account. And this is despite the really well-known dangers of judges substituting their own version of common sense for a better actual understanding of the claim.

So it’s just a concern to me about how these new standards are going to read for women asylum-seekers. I think they are certainly contrary to the spirit, at least, of the gender guidelines issued by IMS and UNHCR. So, I’ll leave it at that. Thanks.

**FOURTH SPEAKER: DEBORAH ANKER**

Thank you all for organizing this conference so wonderfully. I’ve learned so much from it, and I’m so really delighted to be here.

So, I was going to speak today about one of the criteria in the refugee definition (the basis for asylum protection in the United States). The criterion I will focus on is the ‘membership in a particular social group’ category. I’ll take you through the refugee definition a little bit in a few minutes.

I probably won’t have time to talk about this, but maybe during the question and answer period we can: I think that the membership in a particular social group category is extremely important. I think it’s increasingly important for women and other vulnerable people applying for asylum protection, and I think there’s a major avenue for relief for trafficking survivors in the particular social group category.

I want to talk a little bit about some of the problems with the current membership in a particular social group doctrine and how those problems relate to the Board of Immigration Appeals (the highest administrative appellate body)—its failure to reason and rule consistently with its own doctrine in the area, and also how advocates have failed to embrace the logic of their own positions. In many instances, advocates have taken the opportunistic stance of defining the particular social group in terms of all elements of the refugee

---

4. Director, Harvard Immigration and Refugee Clinical Program
definition—constructing the group narrowly to appease unfounded floodgates concerns. Rather, I would say advocates should maintain a principled stance in defining the particular social group ground in terms of fundamental immutable characteristics and appropriately argue the other elements of their case in this framework. In particular, the ‘persecution’ or ‘well-founded fear of being persecuted’ elements should be emphasized as key filters on asylum eligibility.

By embracing the full scope and logic of particular social group doctrine, with reference to international law, the domestic refugee law of other states parties to the Refugee Convention (and even materials from the Department of Homeland Security’s Asylum Office), advocates can advance the development of the particular social group ground and asylum law more generally.

Let me just take you briefly through the refugee definition. As I mentioned, ‘membership in a particular social group’ is one of the five protective grounds in the refugee definition. To qualify as a refugee, an applicant must show that he or she was persecuted or faces being persecuted for reasons of or on account of one of five grounds set forth in the refugee definition: race, religion, nationality, political opinion, or membership in a particular social group. While membership in a particular social group seems the least transparent of these statutory grounds, it is in fact the clearest and in a sense the most fundamental. Particular social groups frequently encompass large groups, but their size does not by any means require that all members of the group receive asylum status. Rather, applicants must meet the other requirements for asylum status as well, namely: 1) that they were or face a well founded fear of being, 2) persecuted and 3) on account of their membership in a particular social group. These requirements serve as significant additional filters on eligibility for classification as a refugee and for asylum status.

A particular social group is defined by an immutable or unchangeable characteristic, or a past or present voluntary association entered into for reasons protected by basic human rights principles that are considered fundamental to human dignity. This analysis, what we call the immutability analysis, is also grounded in fundamental anti-discrimination norms of domestic and international law.

The Board of Immigration Appeals 20 years ago, in the case of Matter of Acosta, first enunciated the immutability paradigm for analyzing the membership in a particular social group ground. The Board held that a particular social group is a “group of persons all of whom share a common immutable characteristic that the members of the group either cannot change or should not be required to change, because it is fundamental to their identities or conscience.” Subsequently, refugee law scholar James Hathaway in a book called The Law of Refugee Status and most importantly the Canadian Supreme Court in a case called i, further elaborated on the Board’s immutability analysis. The Department of Homeland Security, the United Nations High Commissioner for Refugees, the British House of Lords and the New Zealand authorities, among prominent others, also have adopted this immutability analysis.
In *Acosta*, the Board offered sex, color, and kinship ties as examples of immutable characteristics that a person cannot or should not be required to change. A person who has been persecuted or who faces a well-founded fear of being persecuted because of these characteristics may be protected. The immutability principle relates to the underlying purposes of refugee law, which seeks to protect those persons who are fundamentally marginalized within their societies because of characteristics over which they have no control, or that are protected as basic rights.

This ground of protection—membership in a particular social group—is on a certain level the most basic and foundational of all the grounds. All of the protected grounds—race, religion, nationality, political opinion, religion—represent basic civil and political rights and statuses defined by immutable characteristics or protected beliefs and associations, which mark an individual as somehow outside the national community. In key respects the grounds of persecution that precede the membership in a particular social group are merely specific applications of the criteria for designating a particular social group. Thus, race and nationality, depending on the nationality laws, could be described as unchangeable characteristics. Religion and nationality may be considered a voluntary association for reasons so fundamental to human dignity that the individual should not be required to renounce them. Even where a person’s nationality has changed persecutors may still target people because of their former nationality. Finally, political opinion may often overlap with membership in a particular social group inasmuch as many politically active people associate with other like-minded people in political parties or organizations.

The membership in a particular social group ground is an independent ground of eligibility for status. Like other grounds, it is determined by immutable characteristics. Again, these characteristics cause the authorities or other persecutor to target group members whom they view, based on this characteristic, as opponents, disloyal, or unworthy of protection.

It is not appropriate to require applicants to connect their particular social group claim to another protected ground. This is precisely what many advocates attempt to do when they offer what they view as a narrow and therefore more likely successful formulation of the particular social group. For example, the formulation “female members of the X tribe who have not had female genital mutilation and who oppose the practice,” suggests a requirement that putative members of this particular social group express a political opinion against female genital mutilation. Such requirements effectively read the membership in a particular social group out of the refugee definition. Rather, particular social group is an additional and independent ground that can stand on its own.

I’m going to try to skip to some of the recent case law on particular social groups. The particular social group ground partly got off on a wrong track because of a 1986 9th Circuit case, but the 9th Circuit has more than vindicated itself since then. In that case, *Sanchez-Trujillo v. INS*, the court denied a
particular social group claim and in the process included considerable dicta reflecting floodgates concerns that—aside from being unjustified—really play no legitimate role in the interpretation of the statute. In a way, the court itself did not apply the administrative agency’s own fundamental immutability analysis.

Advocates for the protection and fair treatment of women claimants have relied upon ‘gender’ as defining the particular social group ground; gender-based claims also have been an important vehicle for the clarification and jurisprudential evolution of the particular social group ground. The recognition of gender itself as defining a particular social group has encountered opposition based on a misunderstanding that gender is overly broad and in effect would recognize every woman in certain countries as a refugee. As I mentioned, gender has been recognized as a real or perceived immutable characteristic defining a particular social group, most notably in the landmark Acosta (U.S. Board of Immigration Appeals) and Ward (Canadian Supreme Court) decisions. In Acosta, the Board specifically mentioned that, “the shared characteristic uniting a particular social group might be an innate one, such as sex.” In Ward, the keystone Canadian Supreme Court case, the Court stated that the category of groups defined by an immutable characteristic, “would embrace individuals fearing persecution on such basis as gender.” Later, in Fatin v. INS, the Court of Appeals for the 3rd Circuit again recognized that gender itself could define the particular social group where there is evidence of systemic discrimination against women, and evidence of a particularized fear of being persecuted. Again, despite the logic of the well-established Acosta ruling, U.S. courts, adjudicators and advocates have for many years shirked naming sex, gender or women as a particular social group in itself. The shadow of Sanchez-Trujillo and the fear of opening the floodgates inhibited them and, as a result, much of the case law became incoherent and confusion reigned.

Fortunately, at least at this moment, this era has ended. We are now back where we should be—where we started with Acosta. One of the most recent decisions on the membership in a particular social group ground, Mohammed v. Gonzales, was a 9th Circuit decision decided last winter. The court stated:

...although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality or even in some circumstances females in general, may constitute a social group is simply a logical application of our law. Few would argue that sex or gender combined with clan membership or nationality is not an innate characteristic fundamental to individual identity.

Mohammed v. Gonzales signals recognition of the long-standing principle that gender itself is one of the most fundamental immutable characteristics that typify the members of a social group, within the meaning of the refugee definition. The 9th Circuit’s recognition of gender is not so much new law as a correction and realignment with the Board’s 20-year old particular social group principles. Despite its recognition of a broadly based particular social group, Mohammed cannot be interpreted to mean that all (in that case, Somali) women
are eligible for asylum. Only those meeting the other statutory requirements as well are eligible.

I'll just mention domestic violence claims for a minute, which I believe Karen Musalo and others spoke about this morning. This has been another critical area of gender asylum law that's undergoing a profound change. Women who face domestic violence fear a form of harm that is gender-based. For many years advocates won cases on this basis, but one critical case where the Board held the other way was the case of Rodi Alvarado, which was mentioned earlier today. I think the panel this morning mentioned that the Rodi Alvarado case went back and forth, up and down between two Attorney Generals. The Department of Homeland Security finally submitted a brief in the last round of submissions and decision-making before Attorney General Ashcroft. The DHS submitted a brief to Mr. Ashcroft which, in addition to recommending that Rodi Alvarado be granted asylum, adopted a well-reasoned immutability modeled analysis of particular social group and essentially recognized that gender could define a particular social group. This remains the position of the Department of Homeland Security.

Female genital mutilation (FGM) is another area I want to mention: the Mohammed case itself, involved this issue. FGM cases are another area where gender has been recognized itself as defining the particular social group.

Just to mention in wrapping up, the other really critical area that has gone through development, and is maybe the area that will now make or break particular social group jurisprudence, is family. Again, ever since the Board’s decision in Acosta, which offered kinship ties as an archetypical example of an immutable characteristic giving rise to a particular social group, the Board and circuit courts have reiterated that family constitutes a particular social group. Family membership-based claims may be of particular importance for vulnerable individuals especially women and children. Not infrequently—this is the case, I think, in a lot of trafficking cases and I think a lot of trafficking cases can be modeled on this basis—the persecuting state or non-state actors target family members when they cannot or dare not target their intended victims. In some instances, gangs or smugglers may target family members of persons who do not pay off illegal debts or otherwise comply with their demands. Sometimes victims of family targeting can base a claim on imputed political opinion, but in many cases the nexus can and should be linked to the family as a particular social group.

The 9th Circuit issued a very important decision on this question in June, Thomas v. Gonzales. It was originally decided by a panel. The government litigants, the Department of Justice—and there are obviously divisions within the different agencies that have jurisdiction over immigration matters as well as differences between them, and who knows what those differences mean at this point—petitioned the 9th Circuit for an en banc rehearing. The Thomas case was decided en banc by the 9th Circuit and actually, I thought the 9th Circuit published a very well-reasoned decision. The en banc decision is a grounded
analysis of family as a particular social group, and the court specifically noted that this recognition reflects the long-standing position of the Board of Immigration Appeals and of virtually every other circuit court. If there was any inter-circuit conflict, it was coming from the 9th Circuit which had just gotten off on the wrong track for a while, as I mentioned earlier.

So, *Thomas* is a very positive note to end on, I would say the only sad note or qualification on it is that I guess it was two weeks ago, the Department of Justice filed a petition for certiorari to the Supreme Court on *Thomas*. We certainly hope that the Court will not grant certiorari on it. But I think a great deal is riding on it and it’s of extraordinary concern. I think that the Department of Justice is taking a position that tries to rewrite its own law, a 20-year old precedent. It has taken a position that families are not protected, even implied in the *Thomas* case that because Michelle Thomas was only related to the targeted person because of her marriage to that person’s son, there was no cognizable social group, that somehow marriage was not immutable. The Department of Justice has taken positions in this case that seem fundamentally incongruous with policies relating to family values that are professed within the administration.

So, I’ll stop there, I’m sorry for going over. Thank you. [Applause]