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Humanitarian Capital: How Lawyers Help Immigrants Use Suffering to Claim Membership in the Nation-State

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Abstract:

This paper explores how humanitarianism operates within the nation-state, asking: what strategies do lawyers employ to help undocumented immigrants access membership rights in the United States through humanitarian policies? I identify three concurrent evaluations that lawyers undertake to determine legalization strategies. First, attorneys carry out an assessment of threat of deportation because not all undocumented immigrants are equally at risk. Second, they determine eligibility by matching migrants' complex lived experiences to narrow, formal eligibility criteria, which often exclude individuals arbitrarily. Third, attorneys determine whether each case is "strong" or "weak" (more/less likely to acquire status) by identifying instances of migrant suffering to transform them into what I call "humanitarian capital," a symbolic resource legible to adjudicators in the immigration bureaucracy who grant legal status on the basis of compassion to limited numbers of exceptional cases.

Keywords: humanitarianism, citizenship, asylum.

In the context of an increasingly punitive immigration system, obtaining legal status has

become a challenge for the estimated 11 million undocumented immigrants in the US (Massey et. al. 2014). However, certain humanitarian policies provide exceptions to this restrictive trend for particular categories of immigrants deemed too vulnerable to be morally excluded outright. Based on data collected during 28 months of ethnographic fieldwork at a legal aid organization, this paper examines how lawyers help immigrants apply for these policies, which provide legal status and a path to citizenship on humanitarian grounds:

- Asylum;
- U-Visa for victims of crime;
- Cancellation of Removal for immigrants with a family member who would suffer “exceptional and extremely unusual hardship” were the immigrant deported;
- Special Immigrant Juvenile Status for abandoned, abused, or neglected children.

When I started fieldwork in January 2015 at the Center for Legal Aid (CLA)¹ in Los Angeles, the clientele was primarily comprised of undocumented immigrants from Mexico, El Salvador, Honduras, and Guatemala. Some had recently arrived in the US, as escalating levels of violence and criminal victimization prompted outmigration from the Central American Northern Triangle (Hiskey et. al. 2018) and Mexico (Massey et. al. 2014). Among them were children migrating alone and seeking humanitarian relief in unprecedented numbers. Others were long-term US residents who remained undocumented. CLA’s client composition reflected broader patterns and histories of immigration and hindered access to citizenship for these groups. Guatemalans and Salvadorans have struggled to gain political recognition as refugees since the exodus from the civil wars of the 1980s (Coutin 2000), causing many to remain undocumented or in prolonged states of “liminal legality” (Menjívar 2011) (e.g. Temporary Protected Status for

¹ CLA and all personal names are pseudonyms

Salvadorans and Hondurans). Increased border enforcement produced a “caging effect” that transformed previously circular Mexican migration flows into permanent (undocumented) settlement (Massey et. al. 2014). Today, Mexicans, Salvadorans, Hondurans, and Guatemalans are disproportionately targeted by immigration enforcement, accounting for just 66% of the undocumented population but 94% of deportations (Menjívar et. al. 2016). Reflecting the broader restrictive context for these groups, CLA clients were almost never eligible for family or work-based statuses. They could only secure legal status through humanitarian policies if they had been victimized before, during or after migration. The composition of CLA’s clientele thus provided an ideal case to explore how humanitarianism operates within the nation-state, addressing the research question: what strategies do lawyers employ to help undocumented immigrants access membership rights through humanitarian policies?

Situating the analysis in what I conceptualize as the humanitarian field, I identify three concurrent evaluations that lawyers undertake to determine humanitarian legalization strategies for their immigrant clients. First, attorneys carry out an assessment of threat of deportation because not all undocumented immigrants are equally at risk. Second, attorneys determine each immigrant’s eligibility for relief by matching complex lived experiences to formal eligibility criteria; however, these narrow criteria often exclude individuals in arbitrary ways. Third, attorneys determine whether each case is “strong” (more likely to acquire legal status) or “weak” (less likely) by identifying, assessing, and consolidating specific instances of suffering in immigrants’ lived experiences to transform them into what I call “humanitarian capital,” a symbolic resource legible to adjudicators in the immigration bureaucracy who grant legal status on the basis of compassion to limited numbers of exceptional cases. My findings highlight the contradictory and dehumanizing process in which suffering becomes a means to claim

membership in the nation-state.

Theorizing Access to Membership and the Humanitarian Field

This paper examines how humanitarianism operates within the realm of the nation-state, where the particularistic rights and entitlements of citizens (Brubaker 1992), by definition based on population distinctions and exclusionary of foreigners, are directly at odds with the universalistic and ostensibly apolitical character of humanitarianism (Wilson and Brown 2011).

National membership boundaries produce a “stratified system of belonging” (Menjivar 2006), distinguishing between citizens, non-citizens, and a spectrum of in-between statuses, each granting different levels of protection for varying amounts of time. Immigrants who find themselves inside territorial borders but outside national membership boundaries are categorized by the state as “illegal.” While their “deportability” makes them vulnerable and serves as a disciplining force (De Genova 2002), physical presence may enable them to acquire legal status.

Yet not all undocumented immigrants have equally strong normative grounds to claim belonging and rights. State policies and discourses construct a “moral economy of illegality” (Chauvin & Garcés-Mascreñas 2012:248) that shapes the structure of opportunities for undocumented immigrants’ *potential* acquisition of membership rights, allowing some to become “less illegal” vis-à-vis the state. Chauvin and Garcés-Mascreñas (2014) distinguish between legalization policies that reward “civic performance deservingness frames,” granting status to immigrants who demonstrate economic or social integration, and those that are the subject of this analysis that reward “vulnerability deservingness frames,” granting status to migrants victimized before, during or after migration.

The latter policies reflect what Wilson and Brown (2011) call the humanitarian “ethos,” a

sentiment embedded in civil society and formalized in law and institutions that taps into the emotional nature of compassion based on the notion that suffering is a universal human experience. “Humanitarian admissions to the polity confirm and reify the identity of the nation as good, prosperous and generous” (Dauvergne 2005:4), validating the idea that liberal democracies espouse the rule of law and universal human rights as the cornerstone of their political ideologies (Joppke 1997). The humanitarian “ethos” to some extent constrains state interests (i.e. excluding foreigners), providing opportunities for immigrants to seek inclusion on the basis of compassion.

However, humanitarian immigration policies remain fundamentally conservative because they favor the plight of select subgroups while ignoring the fact that all undocumented immigrants are vulnerable precisely due to their lack of legal status (Ticktin 2011). Further, when migratory inflows rise, exacerbating the asymmetry between the receiving state’s willingness to grant entry (and legal status) and migrant demand, political actors play an active role in *constructing* immigration as a “crisis” that poses a threat to basic societal values and interests (Lindley 2014) and narrowly redefine the “liberal humanitarian consensus” (Dauvergne 2005:4) to justify reducing humanitarian admissions and legalization without compromising the positive national identities that humanitarianism conveys. In western liberal democracies, temporary “B-statuses” are more frequently being granted than paths to citizenship (Zolberg et. al. 1989), and asylum is no longer considered a fundamental human right, enshrined in international law, but a measure of exception, compassionately bestowed on few through adjudication bureaucracies that implement “discretionary humanitarianism” (Fassin 2011).

These scholarly critiques of the restrictiveness of the humanitarian immigration system based on the rationale of compassion are an accurate characterization of the US asylum process, where grant rates remain low (see table 1), particularly for Central Americans and Mexicans who apply

for asylum based on persecution from private actors (gangs and domestic violence). These experiences fail to satisfy the “state-centric” refugee definition formalized in international law after World War II when refugees were understood to be produced by “regimes [...] that preyed on certain sections of their citizenry” (Gibney 2004). US policies protecting migrant children have also been criticized for straying from the universal children’s rights approach enshrined in the Convention of the Rights of the Child, which the US never ratified, to instead adopt a victimizing, needs-based approach catering only to sub-groups of minors deemed exceptionally vulnerable (Byrne 2018).

Because legal status is granted as a matter of *exception* in all petitions for humanitarian relief analyzed in this paper, immigrants must demonstrate that they meet the threshold of suffering necessary to merit membership rights and exemption from exclusionary immigration control. To illustrate how something as intangible as human suffering can be used to obtain tangible rights in these petitions, I draw on the concept of “symbolic capital,” defined as those resources that exist because they are “perceived by social agents endowed with categories of perception, which cause them to know [them], recognize [them], and give [them] value” (Bourdieu 1998, 47). I conceptualize “humanitarian capital” as a form of symbolic capital that is activated relationally as legal intermediaries (immigration lawyers, paralegals) recognize specific instances of immigrant suffering and give them value by drawing on their professional knowledge to mine formal legal definitions and anticipating the subjective element characteristic of humanitarian adjudication, to prepare claims in ways that make suffering legible to adjudicators in the immigration bureaucracy. I argue that the level of “humanitarian capital” an undocumented immigrant is determined to have alters her position in the “moral economy of illegality” (Chauvin & Garcés-Mascreñas 2012), appealing to the humanitarian “ethos” and affecting her

odds of transitioning to a more favorable position in the membership hierarchy of the receiving state (e.g. humanitarian visa holder, permanent resident), when adjudicators evaluate whether these symbolic resources are sufficient to merit access to concrete rights and legal status.

Humanitarian policies exist based on the assumption that suffering is measurable and that deserving vulnerable immigrants will be adequately identified through a bureaucratic selection process. Yet the humanitarian field is characterized by subjectivity, suspicion, and risk. Research has shown that lack of regulation and excessive reliance on discretion “widen the margins of subjectivity and irrationality” in humanitarian adjudication (Noll 2005:3) so that ideological inclinations, personal preferences for particular cases (Ramji-Nogales et. al. 2007), and emotions (Ticktin 2011) influence case outcomes. At the same time, institutionalized suspicion of claimants “privileges biomedical objectivity and standardized bureaucratic criteria, over narrative, self-reported evidence” (Lakhani & Timmermans 2014:373). The indeterminacy inherent in the humanitarian field makes immigrants more dependent on legal intermediaries to access relief, while also somewhat limiting lawyers’ capacity to anticipate case outcomes. As the state prioritizes punitive immigration enforcement over the humanitarian “ethos,” risk becomes a more salient feature of the humanitarian field, and I will show how lawyers manage risk by strategically positioning themselves as *either* “agents of the law” (reinforcing legal categories) *or* “critics of the law” (challenging legal categories) (Coutin 2000).

Policy overview

Humanitarianism is encoded in concrete policies of US immigration law; I next review the eligibility criteria, bureaucracies involved in adjudication, and associated rights for each policy.

Asylum. Incorporated into domestic law with the 1980 Refugee Act, asylum protects

individuals unable or unwilling to return to or avail themselves of the protection of their home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. There are two routes to apply for asylum in the US. Immigrants who have never been apprehended file *affirmative* applications at the asylum office, an independent branch of US Citizenship and Immigration Services (USCIS) that evaluates petitions during non-adversarial interviews. Immigrants denied at the asylum office and those apprehended and placed in removal proceedings file *defensive* applications, adjudicated during adversarial hearings in immigration court, with a government attorney arguing for the immigrant's deportation. Asylum-seekers with pending cases may be granted a work permit after six months. Migrants granted asylum are eligible to apply for Legal Permanent Residency (LPR) after one year and citizenship after four.²

Asylum under TVPRA. Minors must satisfy the same substantive requirements as adults to be awarded asylum. However, the 2008 Trafficking Victims Protection Act (TVPRA) established additional procedural protections for individuals classified as “Unaccompanied Alien Children” (i.e. those under age 18, for whom no parents/legal guardians are available to provide care and physical custody (6 U.S.C. 279(g)(2))), who are allowed to apply through the non-adversarial process at the asylum office even if they have been apprehended. They have higher odds of winning their cases through this process (Galli 2018). The 28 May 2013 USCIS memorandum established that, once a minor has been classified as a UAC, which usually occurs upon apprehension, she must be guaranteed access to the asylum office even if she is later reunified with parents, which happens in 60% of cases (ORR 2014), or reaches majority of age.

Special Immigrant Juvenile Status (SIJS). The 1990 Immigration Act established SIJS to grant status to immigrant children under age 21 who have been abandoned, abused or neglected

² Other LPRs can become citizens after 5 years.

by both parents. TVPRA expanded SIJS eligibility to include individuals who were abandoned etc. by only one parent. The application involves different bureaucracies. First, children appeal to State-level courts to obtain the “SIJS order,” which determines that it is not in their best interest to be returned to the home country. In California, this must be obtained before age 18 or age 21 for individuals abandoned etc. by one or both parents respectively. Other States delimit SIJS eligibility differently, depending on State laws. Second, youths apply to adjust their status to LPR at USCIS but, due to statutory limitations, applicants from high demand countries (El Salvador, Guatemala, Honduras, Mexico) wait in limbo for over 2 years.

U-Visa. Created in 2000 with the Victims of Trafficking and Violence Protection Act, it grants temporary status and a work permit for 4-years to immigrants victimized by crime in the US who suffered mental or physical abuse as a result and who help law enforcement in the investigation of the crime. USCIS bureaucrats review U-Visa applications on paper without interviewing applicants. Grantees can later adjust to LPR but may wait for long periods of time.

Cancellation of removal. Unlike the above measures, this is a form of prosecutorial discretion that immigration judges may grant to non-LPR immigrants who find themselves in removal proceedings in immigration court and who can demonstrate: 1) that deportation would cause “exceptional and extremely unusual hardship” to the applicant’s US citizen or LPR spouse, parents, and/or children; 2) 10 years of continuous residence; 3) no criminal record; 4) good moral character. If awarded Cancellation, immigrants transition directly to LPR.

[Table 1 here]

Data and Methods³

³ This study obtained IRB approval.

This paper is based on 28 months of ethnographic fieldwork at CLA, an organization in Los Angeles that provides legal services to immigrants from El Salvador, Honduras, Guatemala, and Mexico, relying on donations and small fees charged to clients. Los Angeles is well-served by legal service-providers compared to places with less dense immigrant populations, which is important because legal representation drastically improves the odds of securing humanitarian relief (Miller et. al. 2015), and characterized by generally positive local attitudes toward immigration, which likely attenuated immigrants' fear of interacting with the state. Taking into account the relatively favorable environment where fieldwork was conducted, the difficulties involved in humanitarian legalization I will discuss are notable, leading to the hypothesis that these trends would be further exacerbated in less immigrant-friendly places.

I gained access to the organization access by offering to volunteer, in addition to doing research, which allowed me to build rapport with staff based on reciprocity. Most attorneys and paralegals were co-ethnics of their clients and first or second-generation immigrants themselves. Some had legalized through asylum. These shared experiences and their linguistic and socio-cultural competencies facilitated their work, giving them a better understanding of their clients' needs. I helped them prepare applications for humanitarian relief by translating testimonies, compiling documentary evidence, and interviewing applicants. I shadowed attorneys and paralegals when they met with clients (immigrants who had either been released from detention or had never been detained) to determine eligibility, prepare applications, and discuss case outcomes. I observed these naturally occurring interviews, in Spanish, between legal intermediaries and their immigrant clients. I took hand-written notes of these interactions in the field, which I later transcribed and expanded on.

Determining legalization strategies in the humanitarian field

As CLA lawyers met with each immigrant client to determine a strategy for legalization, they carried out three concurrent moves that I distinguish for analytical purposes and will address in turn: (1) managing risk by determining the immigrant's degree of "deportability" (De Genova 2002); (2) determining eligibility by matching complex lived experiences to formal eligibility criteria; (3) anticipating the chances of success through an assessment of "humanitarian capital".

Managing Risk by Determining Degrees of "deportability"

The legalization strategies lawyers advised were shaped by their assessments of immigrants' degree of "deportability" (De Genova 2002), in other words, the likelihood they would effectively be deported or receive a formal deportation order. This was shaped by how visible immigrants were to the state's punitive immigration system and how they came into contact with the legal process. Undocumented immigrants who had never been apprehended were "less illegal" (Chauvin & Garcés-Mascreñas 2012) because invisible to the state, while those who had been apprehended were "more illegal" because they were in removal proceedings in immigration court.

While immigrants who have never been apprehended are also clearly at risk of deportation, applying for certain types of humanitarian relief involved the additional risk of declaring their presence to the state. The immigrants who fell into this category had usually lived in the US for numerous years, and CLA attorneys helped them decide whether to continue living in the shadows or to attempt to proactively adjust their status. Due to the different administrative procedures in place at the separate adjudication bureaucracies, not all applications for relief were equally risky. The greater the risk involved in the application, the more careful CLA lawyers were to counsel only those with the "strongest" cases to apply, telling others, "*you've waited so*

long, perhaps it's better you wait a little longer." For SIJS and the U-Visa, if USCIS denies a case, it should not heighten risk of deportation because immigrants are not placed in removal proceedings. Conversely, immigrants who apply for affirmative asylum risk deportation because they are placed in removal proceedings if their cases are denied. Finally, Cancellation of Removal can only be requested if the immigrant is in removal proceedings, making this the riskiest legalization strategy for undocumented immigrants living in the shadows, who had to file asylum applications with the goal of being denied and referred to court, where the judge *could* consider granting this relief.

On the other hand, immigrants who had been apprehended and placed in removal proceedings did not proactively seek to adjust status; rather, they were "pushed" into the legal process. They had no option but to attempt applying for relief to avoid imminent deportation. In these cases, attorneys worked as critics of the law, attempting to stretch legal categories to match lived experiences to help clients who feared for their lives in their home countries remain in the United States. Most CLA clients fell in this category; they were adults, unaccompanied, and accompanied children who had recently arrived from Mexico and Central America, had been apprehended at the border, and then released from detention to await the outcomes of their cases in immigration court. Attorneys notified clients of the possibilities of success but also pragmatically encouraged them to apply for any and all forms of relief they might be eligible for, whether or not their cases were "weak" (i.e. less likely to secure relief):

The attorney and I meet with Pablo, a young Salvadoran man who was apprehended at the border, then released on bail. He fled after receiving death threats from the gang members who murdered his cousin, who had been recently deported from the US. Since he couldn't afford an attorney, he never showed up to court and received a deportation order in absentia. The attorney advises he file a motion to reopen his case

and apply for asylum but cautions, “only about 10% of cases like this get approved, you need witnesses, proof, and a very good deposition to improve your chances. You should get your cousin’s autopsy report. Make sure you don’t have problems with the law and, in the future, if there is a change in laws, then maybe you could fix your papers.”

Having received a deportation order in absentia, Pablo could perhaps be characterized as the “most illegal”. Although his case is “weak” due to case law on gang-based claims (the attorney calculates a 10% likelihood of winning), he is advised to try reopening it to apply for asylum. The alternative would be living in the US with a removal order, risking immediate deportation to El Salvador if newly apprehended, a fate that resulted in his cousin’s death. To help a client fearful for his life and in the least favorable position vis-à-vis the state’s enforcement branch, the attorney counsels applying for asylum despite slim odds of winning the case, so that Pablo might live safely in the US, at least while his application is pending, hoping for a positive resolution, either through asylum or in case of legislative changes.

Matching complex lived experiences to formal legal categories

When it came to determining eligibility for relief, immigrants’ lived experiences frequently failed to satisfy formal legal categories. To begin, due to existing case law, establishing asylum eligibility is complex for Mexican and Central American immigrants who commonly escape the persecution of non-state actors, applying for asylum due to gang or domestic violence.⁴ Their asylum applications pose many challenges, as one paralegal noted:

⁴ In summer 2018, Attorney General Sessions further complicated matters by barring gang and domestic violence as valid grounds for asylum. This decision (Matter of A-B-) is being challenged by the American Civil Liberties Union and the Center for Gender and Refugee Studies.

The paralegal is worried about how to anticipate a question asylum-seekers get from adjudicators: *why didn't you hide in your home country?* She asks an attorney for advice, *"I'm not sure how to deal with fear of return in the applications, because you know, with Salvadorans, it's not as clear as, like, for Syrians who are escaping a war. When I ask them if they tried to relocate in their countries, some people are unclear about it or they simply didn't try."*

The attorney counseled the paralegal to argue that no place in the home country is safe because gangs rely on intricate networks to locate people, noting, *"the most important thing is to create the link with government corruption."* The attorney thus argues that asylum-seekers fleeing persecution of non-state actors nonetheless satisfy the "state-centric" refugee definition (Gibney 2004) since they are forced to flee because sending state institutions (e.g. the corrupt police) that either do not have the capacity to protect its citizens or may even be colluding with the private persecutors that victimize them (for more on how lawyers construct asylum narratives for Central Americans, see Galli 2018). In preparing these types of asylum cases, legal intermediaries continue a decades-long legal struggle for the recognition of migrants from this region as refugees, serving the role of critics of the law as they attempt to broaden interpretations of the refugee definition by filing cases in immigration court, hoping to create expansive precedents in evolving case law.

When matching lived experiences to legal categories to determine asylum eligibility for unaccompanied children, the age variable adds another layer of complexity. When a CLA attorney asked an undocumented mother why her children, Julio (17-years-old) and Alba (14), migrated unaccompanied from Guatemala, she replied, *"because they were alone and Julio had problems in school with the gangs."* Gang members had targeted Julio, trying to forcibly recruit him. Alba, on the other hand, had not yet experienced forcible gang recruitment, likely due to her

younger age. Nonetheless, Alba left with Julio because, as her mother explained, “*they are siblings; he didn’t want to leave her alone,*” particularly since their grandmother, who cared for them since their mother migrated to the US several years before, had recently died. Family reunification considerations often affect decisions to bring children to the US to subtract them from immediate (and often grave) danger. However, family reunification is not a valid basis for asylum, despite the fact that the lack of adult caretakers exacerbates children’s vulnerability to gang victimization.

Eligibility for humanitarian relief for immigrant children is also based on age cut-offs. This oftentimes results in arbitrary legal outcomes, as age differences involving months or even days lead young people living through almost identical situations to fall in or out of eligibility. For example, Carlos fled forcible gang recruitment in El Salvador, taking 4 months to reach the US because he was apprehended and deported twice in Mexico, where immigration enforcement has been increased at the expense of the US government (Rosenblum & Ball 2016). By the time Carlos arrived at the US-Mexico border, where he was apprehended, he had just turned 18. This made him ineligible for the procedural protections that allow unaccompanied minors to apply at the asylum office. He was instead considered an adult and had to apply through the defensive process in immigration court, where grant rates are lower, and CLA attorneys determined his case would likely be denied. While Carlos risked deportation back to the country he fled because his life was in danger, his two brothers (also CLA clients) won their cases after fleeing similar experiences of forcible gang recruitment. The main difference was that they were apprehended as minors, which allowed them to apply at the asylum office. Fundamentally, the understanding of the age when someone is vulnerable in US asylum law (i.e. under 18) does not adequately protect youths fleeing Central America. While gangs recruit minors because they are subject to lesser

law enforcement penalties, persecution does not end abruptly when youths turn 18. Moreover, Carlos was indeed persecuted as a minor, yet he reached the US just after his 18th birthday, which is of no relevance to his legal claim, yet left him unprotected.

Further reflecting the arbitrary nature of age-based eligibility criteria, US policies protecting immigrant children define childhood in different ways: under 18 for asylum under TVPRA and under 21 or 18 for SIJS, if neglected, abandoned or abused by *both parents* or by *one parent* respectively. These divergent definitions and complex bureaucratic procedures make the legalization process exceptionally difficult to navigate without an attorney. Further, with SIJS, immigrants can “age-out” of eligibility due to bureaucratic backlogs if they fail to obtain the “SIJS order” in State court before deadlines. Thus, arbitrary factors like court scheduling supersede youths’ vulnerability when determining access to relief, as one attorney described:

“with SIJS, it’s very difficult because the clock is ticking, for one of my cases, the minor was turning 18 on September 20th and we were asking the judge to make an issue on September 15th.”

The urgency relative to the first stage of the application is particularly striking considering that, after the “SIJS order” is granted, it takes over 2 years for USCIS to process the second part and grant LPR.⁵ During this time, applicants remain in legal limbo and can be excluded from protection if they commit any “adult crimes,” as one attorney explained:

“Don’t do anything illegal, don’t break state or immigration laws. Be on your best behavior. If you don’t have a work permit, don’t work. [...] I provide a list of things they shouldn’t do and make sure they tape it somewhere they can see it and remind themselves they can’t make that one mistake we all

⁵ This has been the case since 2016, when El Salvador, Guatemala, Honduras, and Mexico hit statutory limits due to high demand.

could make at some point [...] Depending on the conviction, that could have substantial impact, for example possession of a narcotic, I know marijuana was legalized but it's not for federal purposes."

The list of forbidden behaviors is a material expression of the “probationary logic” of legalization (Chauvin & Garcés-Mascreñas 2012). With their lives under heightened scrutiny, immigrants cannot afford to make mistakes. Certain behaviors, while inconsequential for US citizens (e.g. marijuana consumption is now legal in California), invalidate the possibility of converting children’s suffering into “humanitarian capital.” Having defied western assumptions of childhood as a time of innocence, immigrant children who commit “adult crimes” cease to be considered worthy of humanitarian protection and are instead positioned as deviant adults to be targeted by immigration enforcement.

Assessing “humanitarian capital” to determine if cases “strong” or “weak”

In advising different legalization strategies to their clients, CLA lawyers applied two mechanisms, which I call *ranking* and *quantifying* suffering, to determine whether cases were “strong” (more likely to be awarded status) or “weak” (less likely), assessing how much immigrants had suffered and to what extent this suffering could be demonstrated, performed, and translated into “humanitarian capital,” a symbolic resource legible to adjudicators who grant legal status.

Ranking suffering consists in comparing clients’ stories to past successful cases to anticipate whether the adjudicator is likely to determine the case had sufficient “humanitarian capital” to merit relief. In this way, attorneys relied on their experience to mitigate the indeterminacy that characterizes the humanitarian legalization process and manage the risk associated with certain legalization strategies, such as Cancellation of Removal. The “strong” case of Ana and Diego

from Guatemala and the “weak” case of Beatriz and Guillermo from El Salvador aptly illustrate this mechanism. Both couples were invisible to the state, having lived in the US while avoiding apprehension for over 10 years. Potentially eligible because they had US-citizen sons with severe medical conditions, both couples had learned about Cancellation of Removal through their personal networks and wanted to proactively adjust status. To evaluate the strength of each case, the lawyers *ranked* the suffering of their US citizen sons:

Ana and Diego’s son has Down syndrome and a life-threatening heart condition, for which he recently had surgery; he is also receiving cognitive and physical treatment for his special needs. Ana has all his medical records. “Good,” the attorney says, “this evidence makes for a strong case,” but cautions that they will also have to convince the judge that their son is dependent on them. Ana explains, “my baby needs me;” she has no family in the US, except her husband, who works while she stays at home with their 7 children. Having warned them of the dangers involved, the attorney shows cautious optimism, noting the case is potentially strong enough to apply.

Beatriz and Guillermo’s son is autistic, he doesn’t communicate with other people, and relies on them for all his basic needs (e.g. getting dressed, using the bathroom). Beatriz says he is enrolled in special education in school but is receiving no additional therapy. The attorney says, “this is not good for the case.” Hearing this, Guillermo takes some documents out of a folder and hands them to the lawyer; they are reports from his special education teacher. The lawyer still doesn’t think that their case is strong enough, and, to provide an example of a case that is, explains, “we applied for a woman whose child had terminal cancer.”

Both boys depend entirely on their parents and, would suffer immensely if they were deported. However, the attorney found only Ana and Diego’s case “strong” enough to satisfy the “exceptional and extremely unusual hardship” criteria, having shown the appropriate amount of

suffering: their son has a genetic condition and had surgery for a life-threatening heart condition. Anticipating the judge will be favorable to their case, the attorney determines this justifies the risk of coming of the shadows necessary for this legalization strategy.

On the other hand, Beatriz and Guillermo have a “weak” case due to one crucial difference: their son does not have a life-threatening condition. The attorney determines this through the *ranking* mechanism, comparing their situation to the woman whose child had terminal cancer. Thus, a deadly disease (terminal cancer) and a potentially deadly disease (heart condition) combined with Down syndrome, are determined to yield the necessary amount of “humanitarian capital,” likely to result in a positive case outcome. On the other hand, the suffering constituted by autism ranks lower and fails to satisfy the necessary threshold. Having assessed low chances of success, the lawyer determines Beatriz and Guillermo’s case is not worth putting through the process because it is likely to fail, potentially exposing them to state scrutiny and a higher risk of deportation. In these cases, attorneys work as agents of the law, applying legal definitions conservatively to protect undocumented immigrants from immigration enforcement. In doing so, however, they inadvertently reinforce a dehumanizing legal process that deems only the most extreme suffering as deserving of protection.

Eligibility for Cancellation of Removal also depends on applicants’ “good moral character,” reflecting civic performance deservingness frames. Not having satisfied the vulnerability deservingness frames of primary importance in humanitarian reliefs, the lawyer does not invest time in verifying Beatriz and Guillermo’s civic performance based merits, as these would not significantly sway the evaluation of the strength of their case. Conversely, this evaluation was relevant in determining the strength of Ana and Diego’s case:

The lawyer explains they must prove they are people of “good moral character,” advising, “it helps to

have evidence, like letters from family, church officials, any kind of proof you are involved in the community.” Ana and Diego Both tell us they are both church leaders. Because Ana volunteers at school and community events, she knows the Mayor of her town, and he has agreed to vouch for her.

Ana and Diego provide the lawyer with numerous details about their involvement in the community, demonstrating high levels of “civic capital” (Chauvin & Garcés-Mascareñas 2012). While “humanitarian capital” yields greater rewards than “civic capital” in the humanitarian field, this “strong” case demonstrates how immigrants and attorneys can concurrently mobilize different forms of capital and deservingness frames to access relief.

The second mechanism through which legal intermediaries assess “humanitarian capital” is *quantifying suffering*, which entails identifying and attributing value to certain instances of suffering in immigrants’ lives. They thus turn the incommensurable into the measurable to cater to the demands of the state. Below is an excerpt from an interview between a paralegal and Mexican youth called Francisco who was applying for asylum after having escaped, alongside his mother and younger siblings, because a gang was trying to forcibly recruit him. Having been apprehended at the border, the family was later released from detention to apply for asylum.

The paralegal types what Francisco said, reading aloud, “*I locked myself in the house, and I stopped going to school. I didn’t go outside for anything.’ What else did you feel?*”

Francisco: “*Dread.*”

Paralegal: “*Did you eat?*”

Francisco: “*Hardly at all.*”

Paralegal: “*Did you sleep?*”

Francisco: “*Not well.*”

Paralegal: “*What other fears did this cause you? What else did you stop doing?*”

Francisco: “*Well, I stayed home, I didn’t eat hardly...*”

To redact the written testimony that accompanies the asylum application, the paralegal asks questions to acquire details that can be used to convert Francisco's abstract suffering into something that can be demonstrated "visibly" to the immigration judge. The paralegal investigates the consequences of traumatic events on Francisco's health, documenting symptoms of mental or physical illnesses, such as lack of appetite, depression or insomnia. Like in Cancellation of Removal, identifying pathologies and attributing value to the suffering body serves to build the immigrant's "humanitarian capital". The paralegal also imparts concreteness to the abstract feeling of fear as he investigates how it impacted Francisco's behavior, causing him to hide. By acquiring these tangible details, the legal intermediary *quantifies* suffering, transforming it into "humanitarian capital" to convince the judge that Francisco merits relief.

Yet, for the purposes of *quantification*, not all forms of suffering yield equal amounts of "humanitarian capital":

John (paralegal) just prepared a young Salvadoran woman for her upcoming asylum interview. I ask whether he thinks she has a "strong" case. John says no, explaining, "she left her child with her abusive sister, who she lived with. So, you were so afraid that you left but you left your kid with an abusive family? She suffered abuse from them, but it was only verbal. Her sister left some bruises, but that's not substantial [...] then she was suicidal for two years." The intern interrupts asking, "can she prove that?" John confirms, "yes, she has scars to show that," then adds, "the only good thing is that she started crying."

Durable, visible or documented physical consequences are generally preferable to temporary or mental ones because they are easier to identify, demonstrate, and thus convert into "humanitarian capital." The abuse the woman suffered at the hands of her sister constitutes a

lesser amount of “humanitarian capital” because it relies primarily on her credibility. Indeed, her claim that her sister left bruises (indicating physical abuse) is glossed over. Since these marks are not enduring, the abuse she suffered is reduced to “only verbal” by the paralegal. On the other hand, in this particular case, mental illness (i.e. suicidal behavior) constitutes a greater amount of “humanitarian capital,” but only because it left permanent, visible scars on her body.

Further, according to the paralegal, her case is made “weaker” since her credibility is undermined because she fled while leaving her child behind. He notes that the only thing that helped her credibility was that she cried when telling her story; he perceives crying as a clear indicator of suffering, and he knows that such behavior will serve, from a performative standpoint, to make her vulnerability legible to the adjudicator. That day, I was taken aback by the paralegal’s harsh assessment of this young woman’s case. Of course, he was anticipating the assumptions he believed the adjudicator would make: in other words, considering the woman a “bad” mother for leaving her child behind, the danger she was in made lesser since she believed her child could stay. Yet, in doing so, he acted as agent of the law as he inadvertently reproduced a dehumanizing process that considers all humanitarian claimants untrustworthy.

Indeed, because all humanitarian claimants are viewed with suspicion, the mere testimony of suffering is seldom enough to build “humanitarian capital”. Thus, another crucial way in which legal brokers *quantify suffering* is by demonstrating it through documents produced by institutions or experts. The example of a Mexican woman named Maria illustrates the centrality of formal proof in the legalization process. Maria witnessed a murder in the US and applied for the U-Visa with a private attorney but her request was denied by USCIS. She came to CLA because she did not understand the decision letter and her previous attorney was not responding to her calls. During this meeting, the CLA lawyer was trying to determine whether Maria could

appeal the decision:

Lawyer: *“Who was killed? Did you know the person?”*

Maria: *“No, I was only a witness, it was the gangs.”*

The lawyer reads the USCIS letter, translating from English, *“it says here, the problem is that since you were not yourself a victim, you have to provide evidence that you have been traumatized because you witnessed this crime. You have to show them how much time and what quantity you suffered.”*

The lawyer asks Maria, *“Maybe you have suffered trauma and you still think about it?”*

Maria nods in agreement.

Lawyer: *“You need a certificate from a psychologist. Did you go see a psychologist when this happened? This paper, it counts a lot.”*

Maria: *“No.”*

Lawyer: *“How about a social worker?”*

Maria: *“No.”*

Lawyer: *“Did you speak of this with someone?”*

Maria: *“Yes, the pastor.”*

Lawyer: *“Good, get a letter from him. Can a family member write you a letter?”*

Maria: *“Can my daughter write me a letter?”*

Lawyer: *“Yes, but I prefer that she comes here so we can write a formal letter.”*

The attorney presents the psychologist’s certificate as the key component of an otherwise “weak” U-Visa application. Certifying the existence of Maria’s suffering would help her demonstrate her “humanitarian capital” and lend legitimacy to her application. The order in which the lawyer proposes professionals competent to provide this proof (first, the psychologist; second, the social worker) reflects the hierarchy of actors the state considers capable and trustworthy to certify suffering, ranked from those assumed to be most expert and neutral (i.e.

distant from the applicant) to those considered the least expert and neutral. Because psychologists (and doctors) are the highest ranked experts in the humanitarian field, the documentation they produce yields the most “humanitarian capital.” However, Maria did not interact with these professionals. She instead mobilizes her own personal, and therefore less neutral resources: the pastor and her daughter. In the case of the least “neutral” source, Maria’s daughter, the lawyer provides letter-writing services to meet demands for formality and partly overcome state suspicion. Yet Maria’s application remained “weak” without the superior “humanitarian capital” yielded by the psychologist’s certificate.

Indeed, because humanitarian claimants rely on experts and institutions to *quantify* their suffering, barriers in access to professional help and documentary proof significantly curtail access to legal status. However, accessing proof is no easy matter for forced migrants who quickly fled their countries to save their lives. For example, Nicolas was an unaccompanied minor from El Salvador applying for asylum who could not prove that gang members had killed his brother. Although he went to the morgue to identify the corpse, it was too badly disfigured and he had to get a DNA test to verify the identity. However, after receiving death threats from the gang himself, he was forced to flee before he could get the results, and his suffering was not mobilized as “humanitarian capital” as effectively as it could have been because his account was based wholly on his credibility.

The more asylum-seekers interacted with institutions in their home countries, the more likely they could provide documentary evidence to support their claims, for example police reports. However, several CLA clients recounted that the police refused to give them a report after they denounced a crime or that they feared approaching the police because they would do nothing to help or would reveal their identities to criminals, putting their lives at risk. Indeed, they fled their

home countries because of their inability to count on the state to ensure their safety, a fact that attorneys stress in their legal arguments, as we previously saw. It is therefore not surprising that asylum-seekers should have trouble producing evidence to support claims. Ironically, the documents produced by the very governments that fail to protect their citizens yield more “humanitarian capital” than the testimonies of asylum-seekers. In this way, asylum-seekers are made more dependent on sending states, contradicting the purported aim of asylum law.

Similarly, to apply for the U-Visa, immigrant victims of crime must obtain a certificate from the US police stating that they are cooperating to ensure the prosecution of the criminal. However, undocumented immigrants frequently fear approaching the police and, even when they do, it is not uncommon for officers to deny issuing these certificates as they have discretion over decisions (Lakhani 2013). In these cases, CLA attorneys wrote letters and accompanied clients to the police but complained that even this did not always work. Without the police certification, the immigrant’s actual suffering cannot be mobilized as “humanitarian capital.” For example, Rosa had been in an abusive relationship with her ex-husband and had placed a restraining order against him several years earlier. However, she had never gone to the police to denounce him. Without the police report, she was ineligible for the U-Visa, despite having been victimized and having sought the help of a state court to distance her abuser. Unlike Nicolas, whose traumatic experience at the morgue yielded some “humanitarian capital” without documentary proof, despite riding solely on his testimony, Rosa’s abusive relationship could not be converted into “humanitarian capital” at all, due to this bureaucratic obstacle.

Lawyers categorized immigrants who failed to demonstrate sufficient “humanitarian capital” and whose lived experiences failed to match codified eligibility criteria as “weak” cases. These immigrants usually remained undocumented and at risk of deportation. In certain cases, however,

they could acquire temporary protection from deportation. From January 2015 until shortly after Trump took office, immigration judges granted temporary protection from deportation to immigrants in removal proceedings who did not have “strong (enough) cases” to be awarded the long-term legal status (and potential path to citizenship) associated with all the forms of relief discussed above, yet were considered deserving of *temporary* status, through a type of prosecutorial discretion attorneys referred to as PD.

Employing another risk management strategy, lawyers advised clients with “weak cases” to accept PD instead of relying on winning their humanitarian petitions for legal status. For example, Lourdes left Guatemala because she was being “*harassed by narcotraficantes*” who repeatedly followed her to ask about the whereabouts of her father and uncle but were never violent. Her attorney told her:

“[Adjudicators] need to see the worst, like that you were beat up. With asylum you could get welfare and permanent residency, but you don’t have a strong asylum case, it’s best that you take PD, at least you will have a work permit.”

The attorney determined that Lourdes’ suffering was “*not violent enough*” and thus did not yield sufficient “humanitarian capital” to enable her to acquire the more favorable membership rights (welfare and permanent residency) associated with asylee status. Therefore, the attorney advised that she accept the lesser benefits (temporary work/residence permit) she could obtain through her more limited symbolic resources instead. In the cases I observed, immigrants always agreed to accept PD when attorneys suggested it. However, as one attorney related, “*some clients don’t want to accept PD because they think, ‘this thing happened to me, I’m eligible [for asylum],’ but it is not that simple.*” This reflects how immigrants who self-identify as refugees

based on their experiences of forced migration and fear of returning home fail to understand why the receiving country's humanitarian system fails to protect them.

Conclusion

This study demonstrates how humanitarianism operates in the nation-state, highlighting the contradictions that arise when the universalistic humanitarian "ethos" (Wilson & Brown 2011) is at odds with the inherently particularistic and exclusionary dimension of citizenship (Brubaker 1992). To be compatible with restrictive immigration control, humanitarian immigration policies produce categorical distinctions within the undocumented population, creating opportunities for the legalization of select, and narrowly defined, subgroups.

Using ethnographic data collected at a legal aid organization, I identify the key actors and mechanisms that operate in the humanitarian field, where suffering is the sole means for otherwise ineligible immigrants to seek membership in the nation-state. Legal intermediaries (attorneys, paralegals) are central actors in the field; their role involves: (1) assessing undocumented immigrants' risk of deportation based on their visibility to the receiving state's immigration enforcement branch; (2) determining eligibility by matching lived experience to the narrowly defined eligibility criteria of humanitarian policies; and (3) turning the incommensurable into measurable indicators by transforming immigrants' lived experiences of suffering into a symbolic resource that I call "humanitarian capital."

By *ranking* and *quantifying suffering* legal intermediaries determine whether the immigrant's case yields sufficient "humanitarian capital" to merit a certain degree of membership rights as determined by immigration bureaucrats in different state agencies (asylum office, immigration court, USCIS, state courts), which grant status on a discretionary basis and according to the logic

of compassion, while maintaining limited approval rates. Attorneys rely on their past experience to *rank suffering*, comparing each immigrant's circumstances to those of successful cases. In this way, they anticipate likely case outcomes and mitigate the risks associated with humanitarian legalization, especially pathways that make undocumented immigrants more visible to the state.

Legal intermediaries *quantify suffering* by identifying and attributing value to distinct instances of suffering in immigrants' lives, which yield different amounts of "humanitarian capital." In a context characterized by institutionalized suspicion of claimants, enduring physical marks more effectively demonstrate "humanitarian capital" than personal narratives of suffering, which depend on the immigrant's credibility. To lend validity to personal testimonies, lawyers rely on professional figures. Doctors and psychologists have the greatest symbolic power in the humanitarian field because they have the highest expert status and are the most neutral (i.e. distant from the applicant) and thus "objective"; they convert pathologies or trauma into "humanitarian capital" through medical certificates. Others may be called upon to back claims, but the power they wield to consolidate "humanitarian capital" decrease with diminishing expert status and the closer they are to the migrant. To add further complexity, institutional figures in both home and host countries serve as gatekeepers, preventing immigrants from transforming their suffering into "humanitarian capital". Ironically, sometimes it is their very vulnerability that prevents immigrants from accessing humanitarian relief; for example, asylum-seekers fail to satisfy evidentiary requirements precisely because they are exiled from home country institutions that produce documentary proof.

Motivated by solidarity grounded in shared experience, CLA's legal intermediaries worked in good faith to help their immigrant clients secure invaluable protections (legal status and a path to citizenship). However, their legal strategies were highly constrained by the specificities of the

humanitarian field, which is characterized by uncertainty and suspicion, paired with the risk associated with punitive immigration enforcement. Attorneys chose to work as critics of the law when they interpreted legal definitions broadly to apply for relief for clients who were more visible to the state. Attempting to prevent the deportation of those whose very lives were at risk, they expanded legal definitions to fit lived experiences of forced migration and victimization that not always closely corresponded to existing case law. Yet, when mediating access to legal status for undocumented immigrants living in the shadows, lawyers applied legal definitions conservatively to mitigate risk and protect their clients from state scrutiny and immigration enforcement, acting as gatekeepers and selecting only the most extreme cases of suffering most likely to successfully acquire relief. In doing so, they inadvertently worked as “agents of the law,” consolidating the victimizing process of humanitarian legalization.

My findings underscore the restrictiveness of the US humanitarian system, as it is interpreted and implemented through the work of immigration attorneys. This system formally includes several categories that should protect immigrants with different vulnerabilities yet, in practice, sets thresholds of suffering so high that only the most extreme cases are deemed deserving of relief. As the Trump administration increasingly prioritizes enforcement over compassion, uncertainty and risk are becoming more salient features of the humanitarian field, further exacerbating the dilemma immigrants face when applying for legalization: on the one hand, this might enable them to acquire rights, yet at the same time it also entails becoming more visible to the state and, thus, at greater risk of deportation. Risk management is likely to become an even more important characteristic of legal strategies as attorneys advocate for immigrants increasingly vulnerable to punitive enforcement, and, in this new context, immigrants might be dissuaded from seeking relief and claiming rights. Future work can apply this theoretical

framework to understand how humanitarianism operates in different national contexts and assess how restrictive policy changes affect immigrants and legal advocacy as we witness a narrowing of the “humanitarian consensus” (Dauvergne 2005) worldwide.

References:

- Bourdieu, P. 1998. *Practical Reason: On the Theory of Action*. Stanford: Stanford University Press.
- Brubaker, R. 1992. *Citizenship and Nationhood in France and Germany*. Cambridge: Cambridge University Press.
- Byrne, O. 2018. “Promoting a Child Rights-Based Approach to Immigration in the United States.” *Georgetown Immigration Law Review* 32: 59-98.
- Chauvin, S. and B. Garcés-Mascareñas. 2012. “Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality.” *International Political Sociology* 6 (3): 241–59.
- Chauvin, S., and B. Garcés-Mascareñas (2014) “Becoming Less Illegal: Deservingness Frames and Undocumented Migrant Incorporation.” *Sociology Compass* 8 (4): 422–32.
- Coutin, S. 2000. *Legalizing Moves: Salvadoran Immigrants’ Struggle for U.S. Residency*. Ann Arbor: University of Michigan Press.
- Dauvergne, C. 2005. *Humanitarianism, Identity, and Nation*. Vancouver: UBC Press.
- De Genova, N. 2002. “Migrant ‘Illegality’ and Deportability in Everyday Life.” *Annual Review of Anthropology* 31 (1): 419–47.
- Fassin, Didier (2011) “Policing Borders, Producing Boundaries. The Governmentality of Immigration in Dark Times.” *Annual Review of Anthropology* 40: 213–26.

- Galli, Chiara. 2018. "A Rite of Reverse Passage: The Construction of Youth in the US Asylum Process." *Ethnic and Racial Studies* 41 (90):1651–1671.
- Hiskey, J., A. Cordova, M.F. Malone, and D.M. Orces. 2018. "Leaving the Devil You Know: Crime Victimization, U.S. Deterrence Policy, and the Emigration Decision in Central America." *Latin American Research Review* 58 (3): 429–447.
- Joppke, C. 1997. "Asylum and State Sovereignty: A Comparison of the United States, Germany and Britain." *Comparative Political Studies* 30(3): 259–98.
- Lakhani, S.M. 2013. "Producing Immigrant Victims' 'Right' to Legal Status and the Management of Legal Uncertainty." *Law & Social Inquiry* 38 (2): 442–73.
- Lakhani, S.M and S. Timmermans. 2014. "Biopolitical Citizenship in the Immigration Adjudication Process." *Social Problems* 61(3): 360–79.
- Massey, D.S., J. Durand, and K.A. Pren. 2014. "Explaining Undocumented Migration to the U.S." 48 *International Migration Review* 48 (4): 1028–61.
- Menjívar, C. 2006. "Liminal legality: Salvadoran and Guatemalan immigrants' lives in the US" *American Journal of Sociology* 111(4): 999-1037
- Menjívar, C., L. Abrego, and L.C. Schmalzbauer.. 2016. *Immigrant Families*. Cambridge: Polity Press.
- Noll, G. 2005. *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*. Leiden: Martinus Nijhoff.
- Ramji-Nogales, J., I. Schoenholtz, and G. Philip. 2007. "Refugee Roulette: Disparities in Asylum Adjudication." *Stanford Law Review* 60: 295–411.
- Rosenblum, M. and I. Ball. 2016. *Trends in Unaccompanied Child and Family Migration from Central America*. Washington, DC: Migration Policy Institute.

Ticktin, M.I. 2011. *Casualties of Care: Immigration and the Politics of Humanitarianism in France*. Los Angeles: University of California Press.

Wilson, R., and R. Brown, eds. 2011. *Humanitarianism and Suffering: The Mobilization of Empathy*. Cambridge: Cambridge University Press.

Zolberg, A.R., A. Suhrke, and S. Aguayo. 1989 *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*. Oxford: Oxford University Press.