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Redefining refugees: Interpretive control and the bordering work of legal categorization in U.S. asylum law

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ABSTRACT

States engage in a variety of border enforcement practices to reassert control over migration and territory in spite of international human rights obligations. State responses to asylum seeking are illustrative of the subsequent movement and proliferation of borders far from the territorial borderline. While the refugee category delineates to whom states have obligations to protect, less research has examined the bordering work achieved through legal interpretations of the refugee category. Based on an analysis of asylum case law, specifically two foundational cases involving Salvadoran asylum seekers to the U.S. in the 1980s, *Matter of Acosta* (1985) and *Sanchez-Trujillo* vs. INS (1986), this paper argues that legal interpretations of the refugee definition are acts of interpretive control, or discursive tactics designed to contain human mobility and circumscribe the human rights of those with access to U.S. territory. The case studies illustrate how defining and redefining the refugee category was critical to constructing Central American "feet people" as illegally present in the U.S. and thus legitimate targets of spatialized tactics of exclusion including deportation and detention. Through analysis of these cases, the paper illustrates that legal definitions are not a static backdrop against which other forms of bordering work occurs, but dynamic sites in which legal discourse both responds to and produces socio-spatial relations, delineating the threshold of humanitarian categories and thus the meaning and consequences of cross border movement for specific groups of people.

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The 1980 Refugee Act fundamentally altered the relationship between geopolitical-territorial and juridical borders in the United States. Prior to 1980, Cold War criteria dominated the refugee-asylum regime. Notably, a refugee was defined as anyone fleeing a communist state, communist dominated region or the Middle East. Humanitarian immigration and foreign policy goals were thus closely aligned. However, the 1980 Act changed domestic refugee law to comply with international human rights standards (Anker & Posner, 1981; Helton, 1984; Swanwick, 2006). This was a momentous piece of legislation because it sought to create a new system that was objective and neutral rather than based on geographic, ideological or foreign policy concerns (Anker & Posner, 1981; Helton, 1984). The shift was exemplified by the adoption of the United Nations' definition of a refugee as someone persecuted due to race, religion, nationality, political opinion, and membership in a particular social group.

While this new legislation was hailed by human rights activists and others seeking to regularize refugee admissions (Tichenor, 2002), to the executive branch agencies charged with border enforcement, the integration of international human rights triggered concerns about diminished state sovereignty (Rogers & Copeland, 2006), specifically weakened control over US territorial borders (Tichenor, 2002, 242). By removing the explicit ideological and geographic basis for refugee status, the codification of the UN legal standard circumscribed state officials' power to exercise selectivity over migration into U.S. territory and subsequent access to legalization. As one prominent immigration official described during the mid-1980s, the refugee definition provided migrant populations with a "key" they could now use to "unlock" previously closed doors (see Martin, 1988, p. 5). Since meeting the refugee definition supposedly enabled entry into a country of choice, it was linked to a "new" migration pattern: spontaneous and uninvited asylum seeking (Martin, 1988, p. 5).

Unplanned and unsolicited migration was of particular concern when originating from countries in close proximity to the United States. For instance, in 1983 President Ronald Reagan warned of an impending "tidal wave of refugees" from Central America who

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would "swarm into our country" (Reagan, 1983). Reagan referred to these refugees as "feet people" to highlight their geographic proximity and ability to cross the country's borders. The term feet people drew a parallel to the controversial arrival of Haitian and Cuban asylum seekers via boat (who became known as boat people). However, unlike boat people who had to traverse the sea, Reagan stressed that feet people simply had to cross the Rio Grande and could thus come in large numbers (Roberts, 1983; Clines, 1983).

Reagan's comments highlighted how the recently passed 1980 Refugee Act changed the U.S.' responsibility to those who entered into U.S. territory on humanitarian grounds. This is because the legal refugee definition determines eligibility for political asylum, which allows people to apply for refugee status *after* they have arrived in the country. Asylum is thus distinct from refugee resettlement, in which refugees are prescreened and selected abroad before being permitted to immigrate. In fact, eligibility for political asylum is contingent on being present within sovereign space, regardless of the mode of entry (with or without authorization). Since the UN refugee definition codified the rights of an expanded group of people to pursue asylum, it heightened concerns about the accessibility of territorial borders. As Reagan's comments illustrate, geographical routes and methods of travel vis-à-vis territorial borders figured more prominently in U.S. responses to migrant events after 1980, and as I shall explore, also shaped the role and nature of asylum's juridical borders.

In this paper, I examine how legal interpretations of the refugee category became more prominent sites of border control following the 1980 Refugee Act. Specifically, I examine how legal interpretations of the refugee category were used to control migration and the meaning of territorial presence by shrinking the populations eligible to exercise their spatially defined rights as asylum seekers (or asylees). To refer back to the lock and key metaphor, if the refugee definition was imagined as a key that enabled territorial access, I examine how a specific kind of law-making called 'case law' can be used to "change the locks" and thus make it difficult for migrants to use their keys. I examine this dynamic through the experience of Central Americans who fled governments allied with the U.S. during the Cold War, or so called "feet people," and their quest for political asylum in the U.S. I draw upon two asylum cases of Salvadoran men, *Matter of Acosta* (1985) and *Sanchez-Trujillo vs. INS* (1986) to illustrate how legal interpretations of the refugee category are bordering practices that enable states greater control over whom they were obliged to protect under the UN Convention despite their position vis-à-vis state territory.

The dynamic between state sovereignty and the international human rights of refugees has generated debate across the disciplines (for example, see Merry, 2006; Bhabha, 1996; Fitzpatrick, 1994; Hathaway, 1993), and geographers have focused on the spatial problem that asylum introduces for sovereign control over migration and territory (Hyndman & Giles, 2011; Hyndman & Mountz, 2008; Mountz, 2010; Loyd, Mitchell-Eaton, & Mountz, 2016). A range of scholarship has highlighted the decidedly spatialized tactics states use to maintain control in spite of international obligations. Since asylum hinges on presence within sovereign space, states have pushed borders outward through extraterritorial enforcement practices to prevent people from arriving on sovereign soil (Hyndman & Mountz, 2008) as well as employed interiorized tactics to inhibit meaningful engagement in domestic legal systems. These exterritorial and interiorized practices illustrate what border studies scholars have described as the movement and proliferation of borders, often operating far from the territorial border line and materializing through a diverse set of practices that function to mark bodies as legitimate/illegitimate (Johnson et al., 2011).

These bordering practices often have some legal component, but as Coleman (2008) argues, most political geography scholarship on borders has approached immigration law in terms of statecraft rather than examining the law *per se* (6). While there is recognition that borders are not fixed lines, there is a tendency to view borders as spaces of legal consequence rather than dynamically constituted through legal reasoning and practices (Braverman, Blomley, Delaney, & Kedar, 2015, p. 17). This paper contributes to emerging literature on law within border studies (Coleman and Stuesse, 2016; Martin, 2011; Mountz, 2010) by examining the socio-spatial reasoning constituting the refugee definition. While legal categorization is integral to the state management of migration and territory (Loyd et al., 2016; Yea, 2015; Hyndman, 2010; Mountz, 2003, 2010), not enough attention has been given to legal interpretations of the refugee category. I thus attend to what legal geographers Wendy Jepson (2012) and David Delaney (2003, 2014) describe as the micro-geographies or micro-mechanics of legal reasoning by focusing on asylum case law and the shifting discourses of who qualifies as a refugee. I question how the evolution in legal reasoning relates to the exercise of state control over bodies and spaces (Delaney, 2003; Jepson, 2012), and thus the bordering work achieved through re/defining the refugee legal category.

To support the argument that legal interpretations of the refugee definition are bordering processes, in the following section I examine the relationship between law, space and political asylum through a discussion of the recent work in legal geography and border studies. I argue that after the 1980 Refugee Act, juridical borders of asylum became more significant to border control efforts due to the integration of international human rights standards. I examine this dynamic through the evolution of one provision of the UN refugee definition, the particular social group (PSG) category. The PSG category opened previously non-existent pathways to asylum, which adjudicators subsequently sought to bound and close by restrictively interpreting the category. I examine the legal reasoning within two foundational decisions that define the PSG category, *Matter of Acosta* (1985) and *Sanchez-Trujillo vs. INS* (1986). I embed the cases within a Cold War geopolitical landscape, in addition to racialized, classed and gendered fears about the migration of undesirable others. I discuss how legally narrowing access to asylum produced legal disenfranchisement that worked in concert with an array of violent border enforcement practices designed to detain and deport Salvadorans and Guatemalans despite obligations outlined in international refugee law.

Law, space and political asylum

This paper draws upon legal geography and brings it into conversation with recent scholarship in border studies. Since the 1990s, a growing body of literature has examined the nexus between law, society and space, despite what Braverman et al. (2015) describe as years of inattention to law by geographers and a disinterest in space among legal scholars (for an exception, see Volpp, 2012). Indeed, Delaney (2014) has argued that until recently, human geography was "lawless" (97) even though the things and processes that concern geographers are "not a-, pre-, or extra-legal" but rather "legally constituted and reconstituted" (98). Legal geographers draw inspiration from the critical legal studies movement, which challenged positivist accounts of the law as a detached and objective system of thought and action. Legal geographers have contributed to debunking this "myth of legal closure" (Blomley, 1994) by focusing on the law-space nexus (Blomley, 2003, p. 12). According to Delaney, legal geographers study how spatiality is integral to the social production of the law. Challenging the notion that laws are objective, a-spatial or that they simply respond to existing territorial constructs, legal geographers demonstrate that

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