

# The Politics of Death and Asylum Discourse: Constituting Migration Biopolitics from the Periphery

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## Abstract

In 2006, Mexico's then-president Felipe Calderón declared war on drug trafficking. The human toll included the loss of over 95,000 lives, the forced disappearance of more than 27,000 people, and the displacement of 2 percent of the Mexican population. This article offers an explanation of how persecution and exile are specific effects of the governmentalization of the Mexican state. This governmentalization includes the shared use, by criminals and authorities, of techniques for dominating the population and controlling the conduct of citizens through the practices of death, that is, by necropolitics. The article goes on to discuss how the objectives, rationality, and governmentalization of the state serve to dislocate concepts of the legal discourse of asylum in such a way that its truth politics exclude Mexican asylum seekers, thereby constituting American migration biopolitics from the periphery.

## Keywords

asylum, biopolitics, necropolitics, Mexico

## Introduction

Thousands of people have fled Mexico's war on drug trafficking (2006–2012)<sup>1</sup> with over 700,000 displaced people, 230,000 of these from the Valle de Juarez in Chihuahua alone. Of these displaced persons from the Valle de Juarez, 150,000 are now in the United States and hundreds have applied for asylum, although they have generally been unsuccessful due to the systematic rejection of Mexican cases by American courts. This systematic rejection could be related to the tactical use of asylum law in the migration *dispositif* (apparatus) of the United States.

This article seeks to broaden the analysis by conceptually examining the politics of death that leads to persecution in Mexico and the lodging of asylum claims in the United States. It also focuses on how this necropolitics serves the migration apparatus through the legal discourse of asylum. The article will therefore first discuss how biopower and the governmentalization of the State work: how both constitute biopolitics, how the Third World expression of this is necropolitics, and how

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biopolitics and necropolitics work together in the regulation of migration through asylum law. Second, it will characterize the phenomenon of Mexican asylum seekers in the United States in general, and El Paso, Texas, in particular.<sup>2</sup> It will go on to discuss how the objectives, rationality, and governmentalization of the State serve to dislocate the concepts of the legal discourse of asylum in such a way that its truth politics exclude Mexican asylum seekers. Finally, the article will examine how the main legal concepts of asylum discourse—the state’s unwillingness or inability to provide protection, and motivation based on political opinion and membership of a particular group—are used as biopolitical tactics in the US Office of Immigration and Citizenship Services (USCIS) and the Executive Office for Immigration Review (EOIR) to exclude Mexicans fleeing violence and seeking protection in the United States.

### Necropolitics: Constituting Biopolitics from the Peripheries

While it was not the intention of Michel Foucault to write a theory of power, he did venture an analytical philosophy of power that establishes how it works and its powers of subjection.<sup>3</sup> This analytical work focuses on differentiation systems, instrumental modalities, and how power is institutionalized. For Foucault, power is the control of conduct since it is not exercised directly on people but by inducing, facilitating, hindering, limiting, and preventing their actions. Power relations become relations of domination when blocked using techniques that permit the complete domination of the actions of others. The ideal vehicles of power are discourses—elements or tactical blocks used in relations of force to construct subjectivities<sup>4</sup>—and they operate through apparatuses (*dispositifs* or the nondiscursive instruments linked to discourses) maintained through a variety of strategies. Foucault identified the use of three types of power in European history: sovereign power, disciplinary power, and biopower, with these three historical types of power overlapping rather than replacing each other.<sup>5</sup> Whereas sovereign power is exercised through legal apparatuses and disciplinary methods, biopower is enforced through a very different set of objectives, objects, rationality, apparatuses, strategies, and struggles or resistances.

Biopower modifies the sovereign’s right to let live and make die, essentially inverting the relationship: instead of *letting live* and *making die*, the state now exercises the right to *make live* and *let die*.<sup>6</sup> Through the use of these techniques, the state does not replace disciplinary power but incorporates it and takes it to another level or sphere of action where different devices are used. While disciplinary power is focused on individual bodies (anatomy-politics), biopower focuses on processes specific to life itself, such as birth, death, reproduction, migration, and disease, while the technologies used are also different: medicine, statistics, birth control, policy, or anything intended for use as a means of population control.<sup>7</sup> The rationality of biopower is governmentality, which is the set of institutions, analyses, calculus, and tactics that focus on population as the main objective while political economy gives it shape and security apparatuses are its main instruments.<sup>8</sup> Governmentality is not exclusive to the state since these techniques control the possible actions of other subjects or self-directed actions for the domination of pleasures and desires. In order to differentiate political governmentality from other types of governmentality, Foucault referred to the first as “Governmentalization of the state.” This process has turned the justice State—the sovereign state ruled by law—into the managerial state.<sup>9</sup>

Scholars from Africa and Latin American, however, point out that biopolitical analysis does not operate in the same way everywhere. In fact, they believe biopolitics is inadequate for assessing the politics of life in the Third World where criminal violence and the governmentalization of the State are not intended to regulate life but death. In other words, the Third World faces a *politics of death*, a form of *necropolitics*.<sup>10</sup> In the view of scholars from peripheral countries, while biopolitics is a fundamental starting point for the analysis of relations of domination, in the context of poor countries, it proves inadequate because the apparatuses, techniques, practices, and strategies used in the relations

of domination have very different and radical effects, such as the consequences of Calderon's war on drug trafficking. This is not to say biopolitics and necropolitics are in opposition, although it is important to make a distinction since this allows us to identify their specific objectives—the regulation of life and the regulation of death, respectively—while clearly establishing how their apparatuses and strategies become intertwined in situations such as that of Mexicans applying for asylum in the Juárez–El Paso border region.

Perhaps the most important necropolitics thinker at present, Cameroon-born philosopher Achille Mbembe, argues that biopolitics is not enough in itself to establish an understanding of how life becomes subordinated to the power of death in Africa. He claims the proliferation of weapons and the existence of worlds of death—where people are so deprived they effectively become the living dead—indicates the operation of a politics of death (necropolitics) rather than a politics of life (biopolitics).<sup>11</sup> Mbembe claims military operations and the right to kill are no longer exclusive to the governmentalized state and the regular army is no longer the only means used to exercise the right to kill. New actors in this scenario include urban militias, private armies, and private security officers with access to the techniques and practices of death.<sup>12</sup>

Mbembe's African reading of Foucault's biopolitics has heavily influenced other scholars writing from the perspective of the periphery about the role of governmentality in the generation of violence. For example, Sayak Valencia agrees with Mbembe's reinterpretation and radicalization of Foucault's biopolitics, and also believes death, rather than life, now operates at the center of biopolitics and has transformed it into necropolitics. However, she claims necropolitics has to be geopolitically and context-specific, and offers a reflection on necropolitics in hyperconsumer societies, particularly Mexico, where extreme violence and hyperconsumerism serve as structuring elements in the construction of dissident—although illegal—subjectivities resisting state power.<sup>13</sup>

She argues that if biopolitics controls life processes, capitalist demands have transformed life and all associated processes—such as death—into commodities. In hyperconsumerist societies, bodies become a commodity and their care, conservation, freedom, and integrity are related products. As a commodity, life is more valuable when subject to threats, kidnappings, and torture. For Valencia, illegal drug corporations wield a parallel power of oppression and have effectively become a parallel state that reconfigures biopolitics and uses technologies called necropractices—radical actions designed to inflict pain, suffering, and death through murder, torture, and kidnapping—to seize, retain, and profit through exercising the power of making die.<sup>14</sup>

In Valencia's Mexican interpretation of the politics of death, necropolitics is only part of a larger cultural and socioeconomic interpretative framework designed to explain the internal dynamics of violence in Northern Mexico, specifically in border cities such as Tijuana and Baja California (or Ciudad Juárez, Chihuahua, in the case analyzed here) where forced displacements and asylum seeking are endemic. Valencia calls this framework *Gore Capitalism*.<sup>15</sup> Of all the approaches to necropolitics, Valencia's approach best describes the status of life and death in the governmentalization of the Mexican state, although I do not share her interpretation of the role of criminal gangs. Considering Foucault's definition of governmentality, I believe criminal gangs do not represent a parallel state since their use, at different times and at different levels, of the same techniques, practices, and apparatuses as the governmentalized state helps create a hybrid State as regards the use of security techniques for the regulation of death.<sup>16</sup> In effect, the governmentalized Mexican state involves the sharing—between the state and criminal gangs—of techniques and practices for dominating the population such as public displays of violence for intimidation purposes and the subjection of bodies to extreme violence (torture, executions, disappearances, and persecution) in order to regulate not the life of the population, but its death. This necropolitics uses the war against drug trafficking as its central apparatus and militarization as its core strategy.

The specific subjectivity of Mexican necropolitics could be defined in terms of what Valencia has called the Endriago subject, which is a product of the sociocultural dynamics of Gore Capitalism.

According to Valencia, Gore Capitalism's cultural patterns build on the subversion of the meaning of work derived from the Post-Fordist organization of labor. She argues that the Post-Fordist contempt for labor culture and the working class in general subverts the traditional processes of capitalist reproduction, replacing labor as a meaningful social activity with consumption, even in extremely deprived and marginalized areas and regions. Social pressure for consumption, together with widespread frustration among young people who cannot achieve socially demanded levels of consumption, makes the criminal economy and the use of violence as a market tool viable option. Given that work is not socially valued, young men who need to feel competent as providers in the dynamic of hyperconsumption seek "work" in the gore industry of killing, drugs, kidnapping, and the sex trade.<sup>17</sup>

Necropolitical relations serve to induce subjects to necropractices offered in the biomarket. The subjectivity that emerges from this induction is what Valencia has called the Endriago subject, a subjectivity that operates as the main agent of persecution in the asylum cases of Mexicans. The *Endriago* is a mythical character from the medieval romance *Amadis of Gaul*: a monstrous hybrid of man, hydra, and dragon. It is a tall, strong, and agile beast that inhabits infernal lands and strikes fear into its enemies. Valencia uses the term to conceptualize the subjectivity of men who use violence as a means of survival, a mechanism of self-affirmation, and a tool of work. Valencia claims Endriagos do not only kill and torture for money, but also for reasons of dignity and self-affirmation; given the prevailing social and cultural conditions in Mexico, it is no surprise that Endriagos use gore practices to meet the demands of consumerism since they are used to subvert the feelings of failure caused by material frustration.<sup>18</sup>

For Valencia, the Endriago is a dissident subjectivity that resists power. Resistance, however, doesn't mean legitimate resistance: Endriagos are businessmen who take neoliberalism to its ultimate consequences, resisting the neoliberal state but in a dystopian way. According to Valencia, Endriagos do not dispute the state as such, but biopolitical power, that is, control of the population, territory, and security through necropractices. However, as mentioned previously, I do not believe criminals constitute a parallel state because they often work together with authorities. As a consequence, Endriagos do not replace state agents but represent a new subjectivity emerging from the governmentalized State in Mexico which, as stated previously, is a mixture of criminal gangs and government institutions at different levels and to varying degrees.<sup>19</sup> Endriago subjects hired by criminal gangs are usually former sportsmen, soldiers, law enforcement officials, and private security guards, and in many cases, their links to the government are unclear.

Necropolitics and its core subjectivity—the Endriago—allow us to identify specific practices of the governmentalized Mexican State that are conducive to relations of domination that force people to flee and become asylum seekers in the United States, a country that in turn subjects them to the truth politics of asylum discourse which serves the migration apparatus in the United States.

## Characterizing the Mexican Asylum Phenomenon in the United States

Necropolitics in Ciudad Juárez and the Valle de Juárez has produced shootouts, deaths attributable to crossfire, decapitations, and the use of car bombs against authorities and rival gangs; while kidnappings, extortion, disappearances, and the execution of civilians have become daily occurrences. The human toll of the violence associated with Gore Capitalism has been devastating with the loss of 100,000 lives and the forced disappearance of 27,000 people. As for displacement, between 2010 and 2011, some 700,000 people were forced to flee their homes as a consequence of generalized violence and 2 percent of the Mexican population has been forcibly displaced.<sup>20</sup> In the Valle de Juárez alone, 230,000 people have been forced to abandon their homes and while a large proportion of these people have relocated internally the rest have fled to the United States, and in particular Texas.<sup>21</sup>

In 2007, a year after the war on drugs commenced, there were 9,545 asylum applications from Mexico, an increase of 41 percent over the previous year. Between 2006 and 2010, 44,019 Mexicans applied for asylum in other countries, 13,700 of them in the United States and 30,142 in Canada. Up to 2007, the majority of Mexican asylum seekers sought refuge in Canada (74 percent) and to a lesser extent the United States (24 percent).<sup>22</sup> However, by 2010, there was a change in this trend with asylum claims by Mexicans in the United States increasing to 4,225. In contrast, the number of asylum claims lodged by Mexicans in Canada reached 9,413 in 2008 but dropped to 1,198 in 2010,<sup>23</sup> mainly because of the need for Mexican citizens to obtain a visa to visit the country.<sup>24</sup>

By 2010, Mexico was responsible for one of the highest numbers of asylum requests in the United States, exceeded only by China, and followed by Haiti, Guatemala, and El Salvador. According to the Transactional Records Access Clearinghouse (TRAC), 60 percent of cases were recorded in just four states: California, Texas, Illinois, and Arizona. In contrast, acceptance rates are very low: in 2010, affirmative asylum was granted in only 143 of 2,320 cases (6.2 percent). The number of successful affirmative cases<sup>25</sup> first rose and then dropped between 2008 and 2010 with 176 in 2008; 191 in 2009; and 143 in 2010. In 2010, asylum was granted in just 49 of 3,231 cases (1.5 percent). As for defensive asylum, the number of successful cases decreased from 2008 to 2010: there were 72 in 2008, 62 in 2009, and 49 in 2010.<sup>26</sup> A total of 85 percent of all asylum claims lodged between 2008 and 2010 were denied. In El Paso, Texas, where hundreds of the cases related to the war on drug trafficking are found, judges William L. Abbott and Thomas C. Roepke have some of the highest denial rates in the country<sup>27</sup> and have become even tougher since Mexicans rose to the top of the asylum applications lists.<sup>28</sup>

The systematic denial of asylum to Mexicans is related to what Anna Jessica Cabot, Managing Attorney for Las Americas Immigrant Advocacy Center, claims to be “this feeling that when you start letting in Mexican citizens that (have) experienced drug violence, then you’re opening the doors to hundreds of thousands of Mexican citizens because drug violence is so pervasive in Mexico.” Migration is regulated since this fear is shared by officials in Washington who support the use of biopolitical tactics. According to Carlos Spector, attorney-at-law and legal representative of dozens of Mexicans seeking asylum in El Paso, cartels act as state agents and victims, as well as asylum authorities, are aware of this. However, granting asylum to Mexicans would be tantamount to opening Pandora’s Box and that is why “when we go to court with a case involving a Mexican they use two or three of their best lawyers. If the defendant is from any other country in the world they use a novice. No decisions have been made concerning any of the cases of political asylum here. When we request political asylum from the asylum office, which represents the good guys, every case must be sent to Washington before a decision is reached. There are six regional political asylum offices and the office we have to go through is Houston. On several occasions, not trying to hide anything, I have been told after an interview: “since this case is for a Mexican we have to send it to Washington.”

Typical biopolitical tactics used against Mexicans—such as successive migration reforms and securitization of the border—are now complemented through the enforcement of asylum law as a tactic to legitimize, through expert discourse (law) and its apparatus (courts, laws, and administrative bodies), these political decisions.

## **Necropolitical Dislocation of Asylum Law and its Biopolitical Use**

In the writings of Foucault, a *dispositif* or apparatus is a set of social relationships built around a discourse: institutions, laws, policies, disciplines, scientific, and philosophical statements, concepts, moral propositions, and so on. As a tactic in the migration apparatus, asylum discourse has truth effects; it establishes subjectivities, objects, and concepts that separate the false from the true. In order to create these truth effects, it relies on other truth discourses such as the law and criminology, and it is produced and distributed under the control of large political and economic apparatuses such

as courts, immigration offices, and law firms.<sup>29</sup> This migration apparatus serves American biopolitics; it is a “defense” against the “threat” of Mexican migration. Asylum law should not, however, form part of this biopower since it pertains to complementary sovereign and disciplinary powers: while the first results in legal codes, the second implements these codes institutionally.<sup>30</sup>

However, asylum law in the United States is used to regulate migration, in this case, the migration of Mexicans, and not to discipline them. This is because, as Foucault argued, there is a strategic use of law in biopolitics due to the development of biopower, and norms become more important than the judicial system. This does not mean that law or its institutions tend to disappear but that the law increasingly serves as a norm—intended to impose conformism and homogenize—and that judicial institutions are more integrated into a continuum of apparatuses with regulatory functions.<sup>31</sup> It is a regulatory mechanism in the politics of life and death. Asylum discourse in the United States—through its legal texts—serves as a tactic for the regulation of migration, which in turn has economic and political objectives: to defend American territory from the threat of Mexican migration and maintain the credibility of security cooperation between Mexico and the United States.

Asylum is codified in various legal texts: the United Nations Convention Relating to the Status of Refugees (1951), its Protocol (1967), and the Immigration and Nationality Act (INA). Asylum discourse in the migration apparatus of the United States excludes a subject a priori if they have participated in the persecution of others in connection with one or more of the five protected grounds, stayed in the United States for over a year at the time of the application, or resettled successfully in another country. Once a person is eligible for asylum, their claim will be successful if they manage to prove, in terms of the politics of truth in asylum discourse established in INA 101(a; 42) that they have a well-founded fear of persecution due to the government’s unwillingness or inability to protect victims from their persecutors and that this persecution is motivated by the victim’s race, nationality, religion, political opinion, or membership of a particular social group. These two concepts—the government’s unwillingness or inability to protect and motivation—establish the terms of inclusion and exclusion in the politics of truth of asylum law.

As indicated previously, asylum law forms part of the US migration apparatus. As such, it is enforced managerially, although its reproduction, signification, and power techniques resemble those of sovereign power, such as courts. There are two institutional techniques that overtly bring asylum law into the migration apparatus.

First, the division of asylum into affirmative and defensive procedures permits the differential treatment of claimants according to their socioeconomic status and gender, which supposedly determines their criminal proclivity. Affirmative applicants either enter the country with a valid visa or overstay their visas and therefore hold no documents authorizing them to remain in the country. Their claims are reviewed by an asylum officer from the USCIS and if not approved they are referred to an immigration judge of the EOIR, which is a branch of the US Department of Justice but fails to operate as a proper court. Only at this time is the applicant transferred to removal proceedings, although their application has not yet been rejected.

In defensive claims, a migration officer places the applicant in removal proceedings and the case goes directly to the EOIR. Typically, claimants who go directly to defensive asylum do not hold a visa and state their intention to seek asylum at a port of entry before an immigration officer. In these situations, asylum seekers are sent to detention centers where they are held until an immigration court makes a decision, which could take up to five years. While awaiting a decision, the judge either grants or denies asylum and proceeds to removal.<sup>32</sup>

Crystal Massey, then a human rights advocate and researcher at the Law Firm of Carlos Spector and today Associate Attorney at the Southwest Asylum & Migration Institute, claims the purpose of the affirmative/defensive distinction is to act as a filter for the type of Mexicans allowed access to the asylum system—which does not mean they are granted asylum, just access to the system. Massey argues that people holding a visa are usually middle-class, well-informed Mexicans who have the



means or knowledge to obtain a border crossing document or know that stating an interest in asylum at the border will lead to their detention. Massey also claims young men spend more time in detention since they are associated with the drug business or gangs in the biased minds of American civil servants or judges. In detention, people are forced to live in degrading and uncomfortable conditions for long periods and harassed (separated from young children and told they could be separated for a very long time) to pressure them to drop their asylum claim.

Applicants in detention can request a “credible fear” interview in which they must provide evidence that their fear of persecution is well founded.<sup>33</sup> The success of a claimant’s credible fear interview depends entirely on the judge’s perception. This prerogative is granted by the 1996 Real ID Act which, says Cabot, gives judges the “negative credibility decision with which they can decide that asylum seekers are not credible based on any inconsistencies in the story, even inconsistencies that have no bearing on the actual claim of asylum (the color of a house, the time of day that something happened, etc). This kind of subjective assumption is sufficient for a judge to justify dismissing asylum seekers’ testimony.” According to Massey, together, the division between negative and positive procedures is intended to exclude the poor and young men suspected of being *carriers* of violence.

Second, American migration courts are administrative, managerial bodies that administrate migration rather than disciplinary bodies responsible for controlling sovereign power. The quasi-legal or quasi-administrative character of migration courts makes decision making subjective and arbitrary. Immigration courts in the United States are not constitutional like civil or criminal courts where people can claim rights. Their decisions are appealed with the Board of Immigration Appeals, whose published decisions are law only for the circuit where the claim was based. Only when the asylum seeker appeals a judge’s decision in the Supreme Court does their case enter a constitutional field. Although these administrative bodies look like courts, law enforcement is relaxed and discretionary.

Although extralegal techniques are key to defining the managerial status of asylum law, legal texts play a fundamental role in the regulation of Mexican migration because the Endriago subject dislocates concepts used to establish the politics of truth in such discourse. This subversion further narrows the terms of inclusion of the two core concepts in the legal construction of the refugee: unwillingness or inability to protect citizens from persecution and motivation based on one of the five protected categories. Asylum law has truth effects concerning what constitutes an act and a victim of persecution, and the context in which persecution occurs. It has created a politics of truth—subjectivities, objects, and concepts that separate true from false—in which the definition of state attribution, responsibility, context, and victim excludes many subjectivities, objects, and concepts resulting from necropolitics and the necropactices of the Endriago subject. The hybrid character of the governmentalization of the Mexican state and its necropolitics therefore subvert the politics of truth in asylum discourse.

Ernesto Laclau’s concept of *dislocation* is helpful in understanding this subversion. Dislocation refers to social processes or events that cannot be represented or symbolized within a particular system of identities and consequently lead to a disruption of the structure itself.<sup>34</sup> Or as Francisco Panizza explains, “*Dislocation* is caused by events beyond the control of the hegemonic forces that cannot be symbolized by the existing discursive order and therefore cannot be integrated within its political, cultural and institutional boundaries.”<sup>35</sup> Through the actions of the Endriago subject necropolitics dislocates classic understandings of the subject and object of persecution in the judicial discourse of asylum.

## **Necropolitical Dislocation of the Legal Construction of the Political Refugee: Political Opinion and Particular Social Group**

Two key concepts in the politics of truth of asylum discourse are dislocated through the actions of the Endriago subject and the emergence of different objects of political persecution, such as

persecution for speaking out against state corruption, for demanding justice in the murder of a relative, for refusing to pay *cuotas* (extortion), and for “knowing” too much about the political nature of the Endriago subject (its criminal-state hybridity). These concepts are (1) a well-founded fear of present or future persecution due to the state’s unwillingness or inability to protect them and (2) that they are or could be the victims of persecution due to their nationality, race, religion, political opinion, or membership of a particular social group.

### *The State’s Unwillingness or Inability to Protect the Victims of Persecution*

Fear of persecution is defined as a fear of serious harm and the failure of the state to provide protection vis-à-vis this possibility. Persecution could be understood as “the sustained or systematic violation of human rights demonstrative of a failure of state protection.”<sup>36</sup> The level of harm must be severe. In order to demonstrate persecution, a person’s experience must be more than simple unpleasantness, harassment, or even basic suffering. According to the UN Asylum Handbook, persecution could be an action of the state or the result of the inability of the state to stop the criminality of nonstate actors.<sup>37</sup> There are two interpretations of persecution by nonstate agents in the face of which the state is willing but unable to provide protection. One, the view of protection where the definition is extended to cover situations where the state of origin is incapable of providing necessary protection; and two, the view of accountability, which establishes that only when persecution is by the state can the person be considered a refugee.<sup>38</sup> The involvement of nonstate actors is not the main problem facing Mexican asylum seekers because judges may apply the protection view.

Given the appearance of the Endriago subject, according to Cabot and Nancy Oretskin (the then Associate Attorney at the Legal Offices of Carlos Spector, today Associate Attorney at the Nuevo México-based Southwest Asylum & Migration Institute) the main legal challenge facing Mexican asylum seekers is to prove the state’s unwillingness or inability to protect them from persecution or torture from state authorities, criminals, or both. As Oretskin puts it, “the key is always, no matter whether political opinion or social group, whether the government or representative of the government is unable or unwilling to protect you. You have to have a tie to the government.”

Difficulties arise since necropolitics dislocates common understandings of persecution and motivation in asylum law because the state no longer holds a monopoly of domination technologies such as the military and the police. In terms of asylum law, this does not necessarily represent a problem due to the protection view of private persecution.<sup>39</sup> However, it is a problem when trying to establish inability or unwillingness to protect. For example, while the federal government enforces anticrime policies, at the local and mid-levels of government, law enforcement officials are often on the payroll of drug cartels. The Mexican government spends billions of dollars on security and the militarization of the war on drug trafficking, as evidenced by the Merida Initiative (2008) through which the United States transferred resources for law enforcement and the antidrugs, antiterrorism, and border security program. As a consequence of this policy, evidence of the state’s unwillingness or inability to protect citizens is problematic since it appears to judges and migration officials that the state does make an effort to fight criminal gangs. However, while the state fights crime with this type of policy, there are cartels set up by former Army members or active policemen that operate as Endriago subjects.<sup>40</sup>

In order to prove the inability or unwillingness of the state, claimants submit reports from international human rights nongovernmental organizations or the American State Department to the USCIS or EOIR. However, human rights reports do not always present the facts as evidence of a human rights crisis but as generalized violence. In response, authorities empowered to grant asylum provide evidence of Mexican or bilateral policies for fighting drug trafficking such as the Mérida Initiative. Unwillingness or inability is therefore consigned to the strictly subjective realm since victims must prove this occurs in their specific case. Lawyers present personal recommendations from



Mexican human rights commissions together with news clippings reporting that law enforcement officials or soldiers linked to cartels have directly participated in, or ignored, murders related to their cases. Nevertheless, sometimes recommendations simply do not exist since victims are afraid and do not trust state institutions. In such cases, testimonies would be the only possible evidence but many are unwilling to testify against Endriagos or state agents. Asylum authorities reply again with evidence of national antidrug policy or US–Mexico security cooperation.

A case illustrating this blurring of the politics of truth in asylum law through the concepts of “unwillingness” and “inability” is that of the *Cheese Maker Family*.<sup>41</sup> In June 2012, a member of the Cheese Maker family was murdered. Local police provided no details, simply stating he had been killed by “somebody” near the Valle de Juárez town where the family had their creamery businesses. When the family buried him the next day, the dead man’s brother (X) received a call from his nephew to say his own brother had been killed while visiting his father’s grave. X then received further death threats by phone demanding he tell the others to leave town or be killed. The family rushed to the cemetery to find the young man lying dead on his father’s grave.

X then received another death threat saying his mother would be next. Since no help had been received from local police, and it was clear the entire family was a target, they went to the federal police headquarters in their town to request assistance. These requests were ignored. *Sicarios* then started looting all of the family’s businesses. In a convenience store, X ran into federal police officers assigned to a neighboring town who were willing to help. When the gunmen discovered three police vehicles parked at the family’s ranch, they told one of the officers to pass on the message that if they failed to leave things would only get worse. By this time, the gunmen had also seized the Cheese Makers’ seven homes. Police agreed to escort them to Ciudad Juárez where they were left at the Office of the Attorney General. Here they were told nothing much could be done to help them since the office had never before dealt with a case like it. Federal authorities said all they could do was to take them to Mexico City for temporary protection since the federal government was unable to take on this type of case. The entire family fled to El Paso where it is currently in asylum procedures.

### *The Persecutor’s Motivation: Political Opinion and Particular Social Group*

Given the characteristics of the Mexican situation, arguing motivation is never straight forward either. As Cabot claims, “when you’re dealing with people who are fleeing from drug violence there’s no obvious group, no obvious ground . . . you know, it’s not their race, religion, nationality, so those go out the window.” Asylum claimants therefore have only two category options: political opinion and membership of a particular social group. However, given the characteristics of the war on drugs, connections to political opinions or social groups are clear only in the most traditional cases.

*Political opinion.* Political opinion refers to “any opinion on any matter in which the machinery of the State, government, and policy may be engaged.” Even if the applicant has not yet expressed any opinions, the strength of their convictions leads to the assumption the applicant will eventually express them and clash with authorities.<sup>42</sup> To date, people who have managed to demonstrate a well-founded fear of persecution due to their political opinions do so in terms of the INA and the UN Convention, that is, typical asylum seekers. In the words of Cabot, “For some people fleeing Mexico there is political opinion that actually works for them, but that’s usually politicians, journalists or human rights activists, it’s specifically for people who speak out and doesn’t apply to the normal person fleeing violence.” For instance, in September 2010, the US government granted political asylum to journalist Jorge Luis Aguirre, director of *La Polaka.com*, when he fled Ciudad Juárez just a few hours after the execution of journalist Armando “Choco” Rodríguez and after having received an anonymous call warning him: “you’re next.”

Nevertheless, people who speak out against drug cartels and are consequently persecuted by *Endriagos* face the greatest difficulties, such as the *Morín Brothers*. Since 1989, the Morín brothers have owned a public transport company in Ciudad Juárez, Chihuahua, and shortly after its founding they joined a union confederation. In addition to the three brothers, another five family members work in the business. In June 2008, a drug cartel began making death threats and warned their homes would be set on fire and buses incinerated if they failed to pay the cartel 5,000 pesos a week. The brothers tried to organize union members to avoid making these payments and to stage a public protest. However, they were warned that if they continued to organize others their buses would be incinerated.

One of the brothers suggested the group organize a general strike and refuse to provide bus services, thereby exerting pressure on the police. The union members present agreed to take action but ultimately were afraid so no group action was taken. A phone call was later received saying a bus had been set on fire and that if they continued to advocate strikes and resist extortion the cartel would kill a family member. Shortly, the son of one of the brothers was executed in a Juárez bar and in March 2011, the Morín family fled to El Paso. Calling publicly on others to organize a united front against extortion qualifies as political opinion, according to lawyer Carlos Spector, who also believes the Morín family was not persecuted on an individual basis but as a family with strong political opinions. However, the Morín family has been denied affirmative asylum and finds itself in defensive proceedings.

*Particular social group.* Since persecution is related to the characteristics of necropolitics, in most cases motivations are not explicitly those of the INA and the UN Convention, that is, *Endriagos* and corrupt law enforcement officials persecute entire families who refuse to pay extortion or speak out about extortion or try to kill the relatives of murdered victims seeking justice. In the fifth circuit, a particular social group needs to have three key characteristics: social visibility, immutability, and particularity.

The fifth Circuit defines visibility as society's perception of a group as socially visible. Oretskin describes this in the following way: "In the Fifth Circuit of Texas, where we are, membership of a social group is hard (to demonstrate) because you have to prove it is immutable and you have to show visibility. Visibility is participating in protests and pictures. Immutability is a member of the family who has been in the media; the media covered this around the world because of the injustice. How's that immutable? How can you change being part of that family. So the social group is hard. Really hard." Immutability refers to people who share innate or unalterable characteristics such as a past, defined by something as basic as their identity that they should not be required to abandon.<sup>43</sup> As Spector says, "homosexuals, women, people with fixed characteristics: I am who I am, I can't change that."

In particular, this has to do with the specific characteristics of motivation not linked to persecution. According to Cabot, this is related to characteristics unrelated to persecution itself: "The other thing about a social group is, in order to prevent circular logic the court (says) your social group cannot be defined by the persecution that it suffers, for example, women who suffer domestic violence cannot be a social group because domestic violence is the persecution itself. So Mexican citizens targeted by cartels cannot be a social group because this is defined by the persecution. That prevents us from using what might be the most obvious social group, a fairly visible thing. That's one problem." Therefore, people who refuse to pay quotas to drug cartels, criminal informants, Mexicans returning from the United States, and businesspersons (wealthy merchants or families) are groups which are too broad to qualify as a "particular group." In addition, there is no voluntary relationship or innate characteristic to bind its members.<sup>44</sup>

A possibility for establishing a particular social group for Mexicans is the family since family meets the criteria of a particular social group: "Family membership is a characteristic that a person either cannot change (if he or she is related by blood) or should not be required to change (if he or she is

related by marriage).”<sup>45</sup> Nevertheless, in the fifth circuit, it is not enough to belong to the family of a persecuted person. Although persecution on account of family as a social group seeks “to terminate a line of dynastic succession,”<sup>46</sup> this is much harder to prove in the fifth Circuit. Many people have lost their cases in affirmative proceedings when trying to prove family as a specific social group.

One such case is that of *Miss Bala*.<sup>47</sup> Miss Bala’s husband was murdered in April 2010 after being kidnapped and his body was dumped in a Ciudad Juárez street. Miss Bala believes this was because he refused to pay quotas (extortion). In order to provide for her children, she began working as a waitress in Ciudad Juárez bars. While working in one of these bars in 2011, federal police officers visited the premises to conduct a routine inspection. Five minutes after they had left, with their police vehicles still parked outside, heavily armed men entered and opened fire. Miss Bala found herself on the floor with the bodies of dead customers and workers piled on top of her. She didn’t get up to leave until she smelled burning. Local police tried to enter the building but were prevented by federal police, so she took advantage of the confusion and left. Although she managed to escape, police officers identified her car and a week later, a colleague rang to say five Federal police officers were looking for the surviving waitresses. Two weeks after the massacre, a car tried to bump her off the road while she was transporting her children. The following day she decided to drive straight to the international bridge with her children and seek asylum.

A few months later, she learned a group of armed men had broken into her house, where her uncle had been living. He was beaten until he revealed the whereabouts of Miss Bala’s father. The men then went to his house and asked for Miss Bala and when her father refused to tell them of her whereabouts they took him with them. He is still missing. The kidnappers told Miss Bala’s mother that if she failed to tell her daughter to give herself over to them they would come for her children and would eliminate the whole family. Now the entire family is seeking asylum.

## Conclusion

To sum up briefly, while a biopolitical framework proves useful for the analysis of migration, related phenomena such as forced displacement and asylum require a complementary and context-specific reading of the regulation of death in a society producing forced displacement, and how this regulation becomes a part of the migration apparatus in the United States. Necropolitics is an ideal analytical tool for understanding why people leave their towns—beyond the obvious crude images of violence—and how its dynamics complement the biopolitics of asylum policy in the United States. Thousands of people have fled their homes and relocated within Mexico, but those who are not protected by the Mexican state, either by inability or unwillingness, are seeking asylum in the United States.

The well-founded fear of persecution due to the unwillingness or inability of the government to protect victim from their persecutors, along with persecution on the grounds of political opinion or membership of a particular social group, are concepts used as exclusionary categories in asylum discourse due to the necropolitical dislocation of the action of Endriagos. This suggests that biopolitics is also informed by necropolitics.

## Interviews

Anna Jessica Cabot. Legal Coordinator of the Las Americas Immigrant Advocacy Center, El Paso, Texas. Interview held on June 25, 2012.

Alejandro Hernández Pacheco. Journalist granted political asylum, resident in El Paso, Texas. Interview held on June 26, 2012.

Iliana Holguín. Attorney and Executive Director of Diocesan Migrant & Refugee Services, Inc., El Paso, Texas. Interview held on June 24, 2012.

- Crystal Massey. Researcher and Human Rights Defender at the Legal Offices of Carlos Spector. Interview held on June 23, 2012.
- Nancy Oretskin. Associate Attorney at the Legal Offices of Carlos Spector, El Paso, Texas. Interview held on June 24, 2012.
- Carlos Spector. Defense Attorney for Mexicans requesting asylum in El Paso, Texas, and co-founder of the group Mexicanos en el Exilio (Mexicans in Exile). Interview held on June 22–23, 2012.

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### Notes

1. Felipe Calderón finished his term of office in December 2012. While violence remained constant during 2013, this article focuses exclusively on the Calderon administration.
2. El Paso is used as a case study because it is presumed most asylum applications there are related to the problems addressed in this analysis. Although the details and nature of cases in the United States are confidential, some activists and academics have revealed that while many cases in California concern indigenous people fleeing traditional political harassment in Oaxaca and Chihuahua, or gender and sexual orientation-based persecution in conservative parts of Mexico, most cases registered in Texas, particularly in El Paso, concern violence linked to the war on drugs in Ciudad Juárez.
3. Edgardo Castro, *El vocabulario de Michel Foucault. Un recorrido alfabético por sus temas, conceptos y autores* (Bernal, Argentina: Universidad Nacional de Quilmes, 2004), 398, 204.
4. Ibid.
5. Michel Foucault, *Power* (New York: The New Press, 2000), 484, 3; Michel Foucault, *The Birth of Biopolitics* (New York: Picador-Palgrave Macmillan, 2004); Michel Foucault, *Defender la sociedad* (México: Fondo de Cultura Económica, 2006); Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978* (Basingstoke, UK: Palgrave Macmillan, 2007).
6. Evidently, a discussion of biopolitics and its complex relationship with the historical development of capitalism and liberalism could be more extensive and sophisticated, but such a discussion would move beyond the scope of this article. The interested reader should refer to more extensive and specific sources such as Castro, *El vocabulario de Michel Foucault*, 398; Foucault, *Power*, 484; Foucault, *The Birth of Biopolitics*, 2004; Foucault, *Defender la sociedad*, 2006; Foucault, *Security, Territory, Population*, 2007; Thomas Lemke, "The Birth of Bio-politics: Michel Foucault's Lecture at the Collège de France on Neo-liberal Governmentality," *Economy and Society* 30, no. 2 (2001): 190–207.
7. Castro, *El vocabulario de Michel Foucault*, 398; Foucault, *Power*, 2000; Foucault, *The Birth of Biopolitics*, 2004; Foucault, *Defender la sociedad*, 2006; Foucault, *Security, Territory, Population*, 2007.
8. Castro, *El vocabulario de Michel Foucault*, 130–31.
9. Ibid.
10. Achille Mbembe, *Necropolítica* (Santa Cruz de Tenerife, España: Melusina [sic], 2011); Sayak Valencia, *Capitalismo Gore* (España: Melusina, 2010).
11. Mbembe, *Necropolítica*, 2011.
12. Ibid.

13. Valencia, *Capitalismo Gore*, 2010.
14. Ibid.
15. Valencia borrows the term Gore from a movie genre focused on extreme and graphic violence to describe the Third World's current stage of capitalism in which blood, corpses, mutilated bodies, and captive lives are used as the tools of capital reproduction. According to Valencia, this economy simultaneously destroys bodies and produces capital, the reproduction of which is based on speculation that uses bodies as merchandise and violence as investment. Valencia characterizes Gore Capitalism's political, cultural, economic, and power dynamics in terms of the Narco-state, hyperconsumption, drug trafficking, and necropolitics.
16. It is not the purpose of this article to demonstrate the relationship between organized crime and the Mexican state. This issue has been addressed primarily in journalistic work that shows the uneven existence of such links at the different levels of government (local, state, and federal). See C. Bowden, *Murder City: Ciudad Juárez and the Global Economy's New Killing Fields* (New York: Nation Books, 2011); Charles Bowden and Molly Molloy, *El Sicario: The Autobiography of a Mexican Assassin* (New York: Nation Books, 2011); Ioan Grillo, *El Narco: Inside Mexico's Criminal Insurgency* (London, UK: Bloomsbury Press, 2012). This link has also been studied in academic literature such as Carlos Antonio Flores Pérez, "La lógica del botín: de la cooptación del estado y el estado 'fallido'," *Arenas. Revista Sinaloense de Ciencias Sociales* 13, no. 1 (2012): 11–44. Here, the author maintains that the Mexican state fails to function as a proper state because of the dominance of circuits and institutional areas by criminal interests that are often sponsored by public servants responsible for ensuring collective interests. He argues that the implementation of these interests in institutions has obstructed their functions and generated serious deviations from what was initially expected of them. This process of state cooptation is considered from the perspective of "co-opted State Reconfiguration" in which a group of public and nonpublic actors with shared interests of an illicit nature employ different strategies to use state resources to their benefit, thereby determining or hindering institutional design and operation. The implementation of this interest in institutions has obstructed their functions and led to serious deviations from what was initially expected of them.

In addition, in asylum cases, many witnesses and applicants claim that law enforcement officials have been present before or after murders and disappearances. The argument developed in this article assumes that these testimonies, as well as journalistic and academic reports, are credible.

17. Valencia, *Capitalismo Gore*, 2010.
18. Ibid.
19. Ibid.
20. Luis Benavides and Sandra Patargo, "México ante la crisis humanitaria de los desplazados internos," *Foreign Affairs: Latinoamérica* 12, no. 4 (2012): 77–88.
21. Displacement Monitoring Centre and Norwegian Refugee Council, *México* (Oslo, Norway: Displacement Monitoring Centre, Norwegian Refugee Council, 2011), accessed November 6, 2014, <http://www.internal-displacement.org/americas/mexico/2011/mexico-displacement-due-to-criminal-and-communal-violence>; Artículo 19 and CENCOS, *Violencia en México y el derecho a la información. Análisis de las cifras* (México: <http://www.ifex.org>, 2011), accessed November 5, 2014, [http://www.ifex.org/mexico/2011/05/10/article19\\_cencos\\_informe\\_2010.pdf](http://www.ifex.org/mexico/2011/05/10/article19_cencos_informe_2010.pdf); Sanjuana Martínez, "Hay 4 mil desaparecidos en este sexenio; 'podrían ser más,' dice la Afadem," *La Jornada* (México: La Jornada Online, 2011), accessed November 2014, <http://www.jornada.unam.mx/2011/2007/2031/politica/2002n2011pol>.
22. UNHCR (United Nations High Commissioner for Refugees), *Asylum Levels and Trends in Industrialized Countries, 2007. Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries* (Geneva, Switzerland: United Nations, 2007), 38.
23. UNHCR, ed., *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva, Switzerland: United Nations, 2008), 21; UNHCR, ed., *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva, Switzerland: United Nations, 2009), 30; UNHCR, ed., *Asylum Levels and Trends in Industrialized Countries, 2010. Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*

- (Geneva, Switzerland: United Nations, 2010), 38; UNHCR, ed., *A Year of Crises. UNHCR Global Trends 2011* (Geneva, Switzerland: United Nations, 2011), 25; UNHCR, ed., *Displacement. The New 21st Century Challenge* (Geneva, Switzerland: United Nations, 2012), 48.
24. On July 14, 2009, the Canadian government announced that Mexicans wishing to visit Canada would be required to obtain a visa, thereby contravening reciprocity with Mexico which does not request Canadians obtain visas when visiting the country. The Canadian government argued that most applications were bogus and that Mexicans were using the asylum system to enter the country for economic reasons. In 2010, Canada stated that the Mexican case had “broken” the asylum system and that urgent measures were needed in order to prevent allegedly false applications like those of Mexicans “clogging” the system. Citizenship and Immigration Canada, *Balanced Refugee Reform* (Ottawa: Government of Canada, 2010).
  25. The differences between affirmative and defensive asylum, and how they constitute a managerial aspect of asylum law and policy, are discussed subsequently.
  26. UNHCR, ed., *Asylum Levels and Trends in Industrialized Countries* (Geneva, Switzerland: United Nations, 2007); UNHCR, ed., *Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries* (Geneva, Switzerland: United Nations, 2007), 38; UNHCR, ed., *2008 Global Trends*, 21; UNHCR, ed., *2009 Global Trends*, 30; UNHCR, ed., *Asylum Levels and Trends in Industrialized Countries*, 2010; UNHCR, ed., *Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries* (Geneva, Switzerland: United Nations, 2010), 38; UNHCR, ed., *A Year of Crises*, 25; UNHCR, ed., *Displacement. The New 21st Century Challenge*, 48.
  27. Transactional Records Access Clearinghouse, “Immigration Court Backlog Tool. Pending Cases and Length of Wait in Immigration Courts,” TRAC Immigration (Syracuse, NY: Transactional Records Access Clearinghouse, 2012), accessed November 5, 2014, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/); Transactional Records Access Clearinghouse, “Judge William L. Abbott. FY 2005–2011, El Paso Immigration Court,” TRAC Immigration (Syracuse, NY: Transactional Records Access Clearinghouse, 2012), accessed November 5, 2014, <http://trac.syr.edu/immigration/reports/judge2010/00051ELP/index.html>; Transactional Records Access Clearinghouse, “Judge Thomas C. Roepke. FY 2006–2011, El Paso Immigration Court,” TRAC Immigration, (Syracuse, NY: Transactional Records Access Clearinghouse, 2012), accessed November 5, 2014, <http://trac.syr.edu/immigration/reports/judgereports/00054ELP/index.html>.
  28. While refusal figures are not worse than those registered in other countries such as Germany, where there is a very restrictive asylum system, these figures are important in their own context, that is, acceptance figures nationwide. For instance, the figures for granting asylum are lower for Mexicans than for Chinese and Colombian nationals—China being an enemy country and Colombia a friend country, like Mexico. As Massey discovered, the United States granted asylum to 547 Colombians in 2008, 368 in 2009, 234 in 2010, and 213 in 2011. As for Chinese nationals, the United States granted asylum to 3,456 in 2008; 3,449 in 2009; 3,796 in 2010; and 4,700 in 2011; Crystal Massey, “Violaciones a los derechos humanos de los mexicanos solicitantes de asilo en El Paso, Texas y el sur de Nuevo México entre enero de 2008 y junio de 2012,” *Maestría en Derechos Humanos y Democracia* (México: Facultad Latinoamericana de Ciencias Sociales, 2013), 94.
  29. Castro, *El vocabulario de Michel Foucault*, 398.
  30. Foucault, *Defender la sociedad*, 2006; Foucault, *Security, Territory, Population*, 2007.
  31. Castro, *El vocabulario de Michel Foucault*, 219.
  32. Andy Rottman, Christopher J. Fariss, and Steven C. Poe, “The Path to Asylum in the US and the Determinants for Who Gets in and Why,” *International Migration Review* 43, no. 1 (2009): 3–34.
  33. In December 2009, President Barack Obama established that asylum seekers able to prove “credible fear” of persecution by the government of their country, or by a group the government does not wish to control or is unable to control, could remain in US territory until such time as the process for the asylum application was completed. The problem, however, comes when people are required to demonstrate “credible fear.”



34. Ernesto Laclau, *New Reflections on the Revolution of Our Time* (London, UK: Verso, 1990), 263; Ernesto Laclau, *Emancipation (s)* (London, UK: Verso, 1996), 124.
35. Francisco Panizza, "Discurso e instituciones en la reforma de la administración pública uruguaya," *Revista Uruguaya de Ciencia Política* 35, no. 13 (2002): 66.
36. Matthew E. Price, "Persecution Complex: Justifying Asylum Law's Preference for Persecuted People," *Harvard International Law Journal* 47, no. 2 (2006): 413–66, 454.
37. Sergio García, "Asylum for Former Mexican Police Officers Persecuted by the Narcos," *Boston College Third World Law Journal* 31, no. 2 (2011): 245–67; Sharon Pickering, "Crimes of the State: The Persecution and Protection of Refugees," *Critical Criminology* 13, no. 2 (2005): 141–63.
38. Roland H. Bruin, *Working Party on Non-state Agents of Persecution: 2002 Report* (Wellington, New Zealand: International Association of Refugee Law Judges, 2002).
39. *Ibid.*
40. See Bowden and Molloy, *El Sicario*, 2011; Diego Enrique Osorno, *La guerra de Los Zetas. Viaje por la frontera de la necropolítica* (Mexico: Grijalbo, 2012).
41. The researcher had access to the legal files for these cases. The details provided here are accurate with respect to the testimonies provided in sworn affidavits and applications (forms I-589). However, the names have been changed in order to protect their identities.
42. Holly Buchanan, "Fleeing the Drug War Next Door: Drug-related Violence as a Basis for Refugee Protection for Mexican Asylum-seekers," *Merkourios. Utrecht Journal of International and European Law* 27, no. 72 (2010): 28–60.
43. Pickering, "Crimes of the State," 141–63; Buchanan, "Fleeing the Drug War Next Door," 28–60.
44. García, "Asylum for Former Mexican Police Officers persecuted by the Narcos," 245–67.
45. The United States Court of Appeals for the Fifth Circuit, *Demiraj vs Holder* (New Orleans, LA: The United States Court of Appeals for the Fifth Circuit, 2011), 16, 15.
46. *Ibid.*, 7.
47. *Miss Bala* is a Mexican film about a woman kidnapped by police linked to a criminal gang after she witnesses a massacre in the bar where she works. I call the woman in this case *Miss Bala* because of the way her story resembles that of the film. See *Miss Bala* trailer, accessed November 5, 2014, <http://www.youtube.com/watch?v=pwBCK78Mies>.

### Author Biography

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