



Content downloaded/printed from

[HeinOnline](#)

Mon Aug 12 08:47:08 2019

Citations:

Bluebook 20th ed.

Sarah Hinger, Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims, 19 COLUM. J. GENDER & L. 367, 408 (2010).

APA 6th ed.

Hinger, S. (2010). Finding the fundamental: Shaping identity in gender and sexual orientation based asylum claims. Columbia Journal of Gender and Law, 19(2), 367-408.

Chicago 7th ed.

Sarah Hinger, "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims," Columbia Journal of Gender and Law 19, no. 2 (2010): 367-408

McGill Guide 9th ed.

Sarah Hinger, "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims" (2010) 19:2 Colum J Gender & L 367.

MLA 8th ed.

Hinger, Sarah. "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims." Columbia Journal of Gender and Law, vol. 19, no. 2, 2010, pp. 367-408. HeinOnline.

OSCOLA 4th ed.

Sarah Hinger, 'Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims' (2010) 19 COLUM J GENDER & L 367

Provided by:

University of Sussex Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device



FINDING THE FUNDAMENTAL: SHAPING IDENTITY IN GENDER AND SEXUAL ORIENTATION BASED ASYLUM CLAIMS

SARAH HINGER*

Within the United States and globally, gender and sexual orientation form the basis of an increasing number of rights claims and protections. Both grounds, which reflect the expanding notions and challenges of identity-based rights, have been incorporated into United States asylum law with varying success. The extension of asylum to include some claims based on gender and sexual orientation has real and immediate significance for many individuals. However, securing protection in an individual case sometimes creates precedents that make it more difficult to prevail in future asylum claims, and that limit conceptions of gender and sexual orientation within the broader movement for human rights.

To obtain asylum in the United States, an applicant must be a member of a particular social group targeted for persecution on the basis of a characteristic so fundamental to identity that it cannot or should not be required to change.¹ Applying this standard, adjudicators seek to understand what about gender or sexual orientation unites a group of people to the extent that it places members collectively at risk of persecution. Thus, the surest way for applicants and advocates to demonstrate that the asylum standard is met is to put forward a familiar and universalized picture of the persecuted woman, lesbian, or gay man, minimizing variability or complicating factors in the individual case. These firm but under-theorized depictions of gender and sexual orientation create and reinforce limited conceptions of identity and culture that make it more difficult to raise new asylum claims within these established categories. Existing asylum law should incorporate a more careful analysis of the harms that occur in these

* Staff attorney and Columbia Law School Social Justice Fellow at the New Jersey Institute for Social Justice. I am infinitely grateful to Professor Elizabeth Emens for her guidance in researching and writing this Article. I am also grateful to Professors Katherine Franke and Suzanne Goldberg for many thought provoking courses and conversations and to the *Columbia Journal of Gender and Law* and my editors for their work over the past year in bringing this publication to fruition.

¹ *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

claims, particularly the successful ones, in order to find and permit a more robust view of identity and culture.

Part I of this Article examines the development of U.S. asylum law and its incorporation of new identity-based claims based on gender and sexual orientation. Part II uses gender-based asylum claims to illustrate that the implicit search for fixed and fundamental characteristics to identify a particular social group creates a limited narrative of how identity is shaped and operates within culture. Part III argues, using examples of sexual-orientation-based asylum claims, that the current asylum analysis used by U.S. administrators and courts, which focuses on defining a fundamental identity characteristic, erases expressions of variability. Thus, gay men and lesbians are molded, through their individual asylum claims, into a particular, western characterization of queer identity.

This possible narrowing of gender and sexual orientation based asylum claims is not a necessary outcome of the asylum process. In Part IV, this Article proposes a new method of analyzing asylum claims, which this Article terms an axis-oriented approach. This method posits that in assessing whether a social group possesses a fundamental characteristic that binds its members, as required by the asylum standard, adjudicators should explicitly identify the generalized axis of identity, such as gender or sexual orientation, before turning to the applicant's specific articulation of identity. This importantly shifts the focus away from an isolated inquiry into the scope and persecution of the subordinate identity. By recognizing a broader framework, the adjudicator can assess the existence of a particular social group within the context of a dominant identity norm, such as heterosexuality or gender hierarchy, to evaluate the persecution claim with more analytical rigor. Axis-oriented analysis serves as an alternative to analyses that attempt to enforce a dominant norm. This approach protects individuals without requiring asylum-seekers to show that the society they are seeking relief from has completely institutionalized certain norms. It also allows the asylum standard to remain open to iterations of an identity trait recognized as fundamentally important to humanity.

I. ASYLUM AS A REGULATORY PARADIGM

A. The Origins of U.S. Asylum in International Human Rights Law

Although asylum law developed after World War II with a focus on civil and political rights, it has now evolved to include expanded notions of human rights. Yet, asylum is also standards-based, meaning it creates a secure status and calls for a response to human rights abuses but bases the status and abuses on limited standards. Thus, the act of defining the

particular social group and the shared fundamental characteristic of that group in new identity claims both expands and reestablishes limits to asylum. Each asylum claim seeks to demonstrate the fixity of the protected group and the individual's inclusion therein.

U.S. law defines a refugee as:

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²

This can be parsed into two basic requirements. To obtain asylum, an applicant must (1) have a well-founded fear of persecution, (2) on account of a protected characteristic.

The particular developments of domestic asylum law incorporate common foundational principles from international human rights law. The United States asylum statute substantively resembles the United Nations law,³ which it enacts domestically.⁴ As mentioned previously, asylum law was designed with the atrocities of the Nazi State in mind.⁵ International asylum law invoked human rights to protect individuals from abuses of state power infringing on familiar categories of civil and political rights.⁶ In supplying a standard for when the protections of asylum should be afforded, international asylum law also limited the responsibilities of each individual state, legitimizing the use of inherently limited state resources to aid some, but not all, non-citizens in plight.⁷ While U.S. asylum law delineates specific and limited grounds for protection, it remains tied to conceptions of international human rights, which continue to evolve.

² The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

³ Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, Oct. 4, 1967, 606 UNTS 267, *entered into force* Oct. 4, 1967.

⁴ The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁵ James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 140, 156 (1990) [hereinafter Hathaway, *A Reconsideration*].

⁶ *Id.* at 140–41; *see also* PATRICIA TUITT, FALSE IMAGES: LAW'S CONSTRUCTION OF THE REFUGEE 17 (1996).

⁷ Hathaway, *A Reconsideration*, *supra* note 5, at 140, 156.

Global human rights law has broadened in outlook, particularly with problems related to gender⁸ and sexual orientation⁹—amongst others—and developing more complex understandings of what protecting human rights entails.¹⁰ Relying on the expansion of human rights discourse, advocates can press for asylum law to likewise extend its protections.¹¹ While the persecution requirement precludes arguments for extending asylum on certain human rights grounds, such as severe economic hardship, the open language of “particular social group” allows room to argue for the inclusion of a range of identity categories.

In theory, and according to precedent,¹² the particular social group need not be recognized explicitly elsewhere in human rights law. Eliminating physical suffering is not the end purpose of asylum law; for instance, it does not provide a remedy for those suffering due to natural disasters or extreme poverty.¹³ It is instead the characteristics included

⁸ See, e.g., Charlotte Brunch, *Women's Rights as Human Rights*, in *THE POLITICS OF HUMAN RIGHTS* 232 (The Belgrade Circle ed., 1999) (articulating several arguments for incorporating women's rights as human rights).

⁹ See, e.g., Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 *HUM. RTS. Q.* 67 (1996).

¹⁰ See generally, Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 *HUM. RTS. Q.* 703 (1997).

¹¹ See generally, MARK R. VON STERNBERG, *THE GROUNDS OF REFUGEE PROTECTION IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: CANADIAN AND UNITED STATES CASE LAW COMPARED* 3 (2002) (recounting the developments of refugee protections criteria in relation to human rights and arguing, “[t]he direct relationship between the political opinion category and international human rights shows clearly the dependence of the refugee standard on evolving human rights developments. The refugee definition's essential components, therefore, must be interpreted with a view to offering enhanced consideration, as a matter of public policy, to individuals who promote seminal human rights goals in the face of coercive governmental or third-party action.”).

¹² See, e.g., *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1092 (9th Cir. 2000); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (considering and rejecting the argument that members of a taxi cooperative constitute a particular social group); Kathleen Anderson, *Expanding & Redefining “Membership within a Particular Social Group”*: *Gender and Sexual Orientation Based Asylum*, 7 *NEW ENG. INT’L & COMP. L. ANN.* 243–47 (2001).

¹³ Some human rights activists argue that asylum law should be extended to protect people from physical suffering more generally. See generally, Matthew Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 *HARV. INT’L L.J.* 413 (2006).

under asylum that form the focus of its protections. Thus, these bases for granting the limited right to protection from physical harm cannot be arbitrary.¹⁴ The accepted categories have normative resonance, whether imbued by an understanding of universal human rights or by the political motivations of individual states.¹⁵ The push to expand the protections of asylum law is evidence of the potential of asylum law to extend affirmation and legitimacy to recognized identity characteristics.

While the expansion of human rights can be invoked to extend asylum protections, the increasing global scope of immigration strengthens the impetus to limit access to asylum.¹⁶ Anti-immigration feelings mean that applicants for asylum must emphasize that the shared identity characteristic they are being persecuted for is fundamental. Expansion of the particular social group category has been least successful where characteristics appear as matters of choice without deep personal and societal significance,¹⁷ and it becomes more successful if the social group descriptive can be framed as an inherent human trait such as sex or sexual orientation.¹⁸ As the example of sex or gender shows,¹⁹ the characteristic must be seen not only as inherent but also as having some greater significance to the individual through its innateness. Thus, the debate within asylum law becomes one of defining the

¹⁴ See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 136 (1991).

¹⁵ See generally Hathaway, *A Reconsideration*, *supra* note 5, at 168–71 (discussing the political malleability of the definitional framework of asylum law).

¹⁶ This can be seen most directly in the emphasis on credibility determinations in reviewing asylum applications. Apart from determining whether an applicant meets the legal criteria for asylum, asylum officers and immigration judges (“IJs”) assess applicants’ testimony in an effort to screen out fraudulent claims. IJs have broad discretion in this determination, and the potential for bias in this element of review has been criticized by many. See, e.g., Michael Kagan, *Is Truth in the Eye of the Beholder?: Objective Credibility Assessment in Refugee Status Determination*, 17 *GEO. IMMIG. L.J.* 367 (2003) (describing the importance of the credibility determination and the potential for biased determinations due to a lack of standards); Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 *BERKELEY J. OF GENDER L. & JUST.* 1 (2009) (arguing that the Real ID Act exacerbates the potential for bias in credibility determinations). At the same time, the increasing constraint on other forms of immigration and relief from deportation may increase reliance on asylum as a means of obtaining status.

¹⁷ See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (holding that a taxi cooperative did not constitute a particular social group).

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part II.

valid parameters of human identity and expression capable of protection through a human rights framework.

These competing facets of asylum law, to limit the scope of response measures required of asylum-granting states and to provide broader protection of basic human rights, do not manifest within the case law as two discrete and concretely opposed approaches. Adjudicators and attorneys may have a particular bent towards a more or less inclusive asylum policy, yet the two tensions must be reconciled when arguing individual cases. To do so requires delineating what characteristics may properly form the basis of a particular social group and, under the current articulation of the standard, also entails defining the scope and content of the specific identity characteristic in question. "Homosexuality," for instance, has been accepted as a basis for asylum;²⁰ however, debate continues as to what particular actions and mannerisms constitute homosexuality for the purposes of asylum law. The standards for finding persecution and defining those persecuted social groups aim to parse such distinctions.

B. The Development of the Persecution and Particular Social Group Standards in Contemporary Case Law

Persecution is characterized as "an extreme concept."²¹ Discrimination, including economic discrimination²² and harassment,²³ does not rise to the level of persecution. So, too, individually-motivated violence will not constitute persecution. As voiced in the international context, "'being persecuted' may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection."²⁴ Violence committed by individual actors only constitutes persecution if the

²⁰ See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 819 (B.I.A. 1990) (establishing the presumption that homosexuality constitutes the basis of a particular social group).

²¹ E.g., *Burog-Perez v. I.N.S.*, 95 F. App'x 886, 888 (9th Cir. 2004); *Tavera Lara v. Att'y. Gen.*, 188 F. App'x 848, 855 (11th Cir. 2006); *Kimumwe v. Gonzales*, 431 F.3d 319, 323 (8th Cir. 2005).

²² See, e.g., *Burog-Perez*, 95 F. App'x at 888; *Tavera Lara*, 188 F. App'x at 855.

²³ See, e.g., *Tavera Lara*, 188 F. App'x at 858; *Santoso v. Gonzales*, 231 Fed. App'x 611, 611 (9th Cir. 2007).

²⁴ *Ward v. Attorney Gen. of Can.* [1993] 2 S.C.R. 689, 709, 733–34.

state was unable or unwilling to control the individual actors.²⁵ Thus, asylum protects against only the most serious encroachments on individual freedom. Though it cannot ensure positive articulations of equality, asylum will guard a protected characteristic against the threat of extermination through brute physical violence.

To be eligible for asylum, there must also be a causal link between persecution and the characteristic protected as a basic human right. As articulated in U.S. law, the identity characteristic must be a “central reason” for the persecution.²⁶ Thus, defining persecution overlaps with the formulation of the particular social group.

“Membership in a particular social group,” the most amorphous of the asylum grounds, has been the focus of many attempts to fit new claims within the scope of the asylum statute. There is no statutory definition of “particular social group,” and interpretations at various times have pointed to discreteness,²⁷ social visibility,²⁸ and chosen membership²⁹ as requirements. *Matter of Acosta* provides the current prevailing standard and defines a particular social group as “a group of persons who share a common, immutable characteristic that the members of the group cannot or should not be required to change.”³⁰ The particular social group definition is objective and not based on self-characterization. In one case, the Second Circuit defined a particular social group as sharing a “fundamental characteristic . . . which serves to distinguish them in the eyes of the persecutor—or in the eyes of the outside world in general.”³¹ As this

²⁵ *E.g.*, *Mohammed v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005); *Santos*, 231 Fed. App’x at 611.

²⁶ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) (hereinafter the Real ID Act).

²⁷ *See, e.g., In re S-E-G-*, 24 I. & N. Dec. 579, 582–85 (B.I.A. 2008).

²⁸ *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (defining a fundamental characteristic as one “which serves to distinguish [the group] in the eyes of the persecutor—or in the eyes of the outside world in general”). The Second Circuit later clarified that *Gomez* was to be read as consistent with *Acosta*. *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007).

²⁹ *See Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986).

³⁰ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

³¹ *Gomez v. INS*, 947 F. 2d 660, 664 (2d Cir. 1991) (citations omitted).

description suggests, judgment of the objective definition also occurs at different levels. Adjudicators may look to whether a characteristic is recognized internationally and within the asylum-granting nation, or they may delve more specifically into how the home country defines the group.³² Recent Board of Immigration Appeals (“B.I.A.”) decisions give increased importance to the societal basis of the group definition, explicitly requiring additional showings of social visibility³³ and particularity.³⁴

While courts use the terms “fundamental” and “immutable” to describe the characteristic linking a particular social group, they have also made clear that biological innateness is not a requirement and that a characteristic may be a wholly social construct.³⁵ The recognition that significant characteristics need not be biologically determined stems from the exercise of analogizing the particular social group to the other categorical bases for asylum, which include religion and political opinion.³⁶

³² See *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094–95 (9th Cir. 2000).

³³ See generally *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006), *aff’d* *Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006); *In re A-M-E*, 24 I. & N. Dec. 69 (B.I.A. 2007), *aff’d*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007).

As Fatma Marouf argues, the developing social visibility requirement will make it more difficult to succeed in bringing asylum claims based on gender and sexual orientation due to the lack of social visibility of those groups. See Fatma E. Marouf, *The Emerging Importance of Social Visibility in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47 (2008).

³⁴ See e.g., *In re S-E-G-*, 24 I. & N. Dec. 579, 582–85 (B.I.A. 2008) (discussing criteria).

³⁵ See *Hernandez-Montiel*, 225 F.3d at 1093. As the B.I.A. explained,

[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.

Acosta, 19 I. & N. Dec. at 233. Asylum claims based on membership in a particular profession are commonly raised but also frequently rejected. See, e.g., *Alvarez-Flores v. I.N.S.*, 909 F.2d 1 (1st Cir. 1990) (cheesemakers); *Jelkovski v. I.N.S.*, 103 Fed. App’x 578 (6th Cir. 2004) (Russian businessmen); *Eshun v. Ashcroft*, 99 Fed. App’x 369 (3d Cir. 2004) (association of important members of the diamond mining industry in Ghana).

³⁶ This analogy is an application of the doctrine *ejusdem generis*, which “holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” *Acosta*, 19 I. & N. Dec. 211 at 233.

At times the Attorney General or the courts may create a presumption that a certain characteristic forms a valid basis for a particular social group.³⁷ However, the particular social group requirement remains a standard to be established within each case, dependent upon the specific social context. This more open definition allows applicants to bring a wider range of claims, often with a greater degree of specificity.

In securing the protections of asylum, however, successful claims tend to hew closely to a concept of innateness. Ultimately, adjudicators must make the value determination that a characteristic “cannot or should not be required to be changed,” and this determination is bound up in the adjudicators’ contextual identification of a particular social group. While the flexibility of particular social group standard affords the possibility of including new groups, this flexibility may also be invoked to push particular claims or groups outside the asylum protections. Creating a picture of the characteristic as universally recognizable, with a fixity that assures its legitimacy and falls within predictable parameters of asylum law, provides the best guarantee for an asylum claim.

II. GENDER-BASED ASYLUM CLAIMS: AN OVER-DETERMINED VIEW OF IDENTITY AND CULTURE

Asylum applicants must show extreme harm as a result of membership in an identity group with strong social cohesion. If roughly half of any population identifies as women and we recognize that women have different experiences of violence,³⁸ defining any individual claim as persecution becomes difficult. To prove persecution on account of a shared fundamental characteristic, women must effectively show that persecution defines their existence as women within the society they are fleeing.

Asylum law clearly recognizes gender as a fundamental characteristic. As the Ninth Circuit acknowledges, “[f]ew would argue that sex or gender . . . is not an ‘innate characteristic,’ ‘fundamental to individual identity.’”³⁹ Equating gender with biological sex provides a clear

³⁷ Attorney General Reno, for instance, adopted as B.I.A. policy the presumption that homosexuals constitute a particular social group. Att’y Gen. Order No. 1895–94 (June 19, 1994).

³⁸ Some women may not experience violence at all and, as is particularly relevant in the case of female genital cutting, women may interpret the same acts differently.

³⁹ *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005).

distinction between women and men.⁴⁰ Yet the ease of recognition and universality of gender have stood as obstacles for women claiming both membership in a particular social group targeted for persecution and, in turn, eligibility for asylum.

Because there must be a causal nexus between asylum's requirements of a shared characteristic and persecution, the harm must be likely to affect all persons who can be identified as members of the group. For example, defining an act of domestic violence as persecution, which not all women experience and which is not overtly aimed at women as a group, is problematic because the fundamental characteristic—gender—is not necessarily implicated. A flat idea of biological sex must be replaced by a more dynamic notion of gender created through culture such that acts have some resonance beyond their stated aims and immediate effects. With this understanding, an act of domestic violence both reflects and shapes ideas of gender within society.⁴¹

A. The Problematic Pervasiveness of Gender

In earlier asylum cases, courts found gender too widely-shared a characteristic to form the basis of a particular social group.⁴² In response, claims attempted to narrowly articulate the particular social group by relying on a description of the injury. A particular social group might be described as “women who have been previously battered and raped by Salvadoran guerrillas”⁴³ or “Guatemalan women who have been involved

⁴⁰ Of course, this assumes that biological sex is itself fixed and deterministic. This notion has been criticized as overlooking the variability and multiplicity of elements that make up biological sex, *see generally* Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005); Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917 (2002), as well as the culturally inflected nature of our conceptions of sex. *See generally* EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* (1999); THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

⁴¹ *See, e.g.*, Susan Schechter, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982) (describing domestic violence as a means of reinforcing women's subordination to men).

⁴² *See, e.g.*, *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999; A.G. 2001); *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994); *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (holding “[p]ossession of a broadly-based characteristic such as youth and gender will not by itself endow individuals with membership in a particular social group”).

⁴³ *Gomez*, 947 F.2d at 663.

intimately with Guatemalan male companions, who believe that women are to live under male domination.”⁴⁴ Yet these definitions also failed to circumscribe the particular social group sufficiently.

In *Gomez v. I.N.S.*, Gomez had been repeatedly raped and beaten by guerrilla forces as a young woman.⁴⁵ While the Second Circuit readily acknowledged that Gomez had a well-founded fear of persecution based on this systemic brutalization, it ultimately found her ineligible for asylum because she could not demonstrate she was more likely to be persecuted than any other young woman.⁴⁶

In *In re R-A-*, Rodi Alvarado was severely abused by her husband and received no assistance from the police or courts, although she sought their help.⁴⁷ The B.I.A. found Alvarado was not a member of a particular social group, and, thus, the harm she suffered was not “on account of” a protected characteristic.⁴⁸ The Board noted that Alvarado’s husband had not shown any inclination to target other women opposed to male domination and thus concluded that Alvarado was targeted solely because her husband was a violent person.⁴⁹

⁴⁴ *In re R-A-*, 22 I. & N. Dec. at 908.

⁴⁵ *Gomez*, 947 F.2d at 662.

⁴⁶ *Id.* at 664.

⁴⁷ *In re R-A-*, 22 I. & N. Dec. at 928.

⁴⁸ *Id.* (as recounted in Victoria Nielson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL’Y REV. 417, 424 (2005)).

⁴⁹ *Id.* For an account of the vigorous dissent in *In re R-A-*, emphasizing the state’s treatment of domestic violence, see Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 183–84 (2001).

After protracted compilations, Rodi Alvarado was granted asylum in December 2009. In 2001 Attorney General Reno ordered the B.I.A. to issue a new opinion after the Department of Justice’s proposed regulations were enacted. *In re R-A-*, 22 I. & N. Dec. 906 (A.G. 2001). The proposed regulations were never enacted. In 2005, Attorney General Ashcroft remanded the case back to the B.I.A.. Letter of Attorney General Ashcroft (Jan. 19, 2005) (on file with author). Most recently, Attorney General Mukasey certified the case to himself and ordered the B.I.A. to reconsider the case without waiting for the proposed regulations to be issued. In December 2008, the B.I.A. remanded the case back to Immigration Court. In December 2009, the Immigration Judge granted asylum in an opinion stating simply, “[i]nasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the

In both cases, the idea of gender as a fundamental, unifying characteristic did not align with a harm that occurred inconsistently across the group. Paradoxically, either because the applicant could not prove she was more likely to be targeted than any other woman⁵⁰ or because she could not prove her attacker would also target other women, these claims failed.⁵¹ Not only have courts in these cases failed to find a sufficient risk of future persecution, in cases where persecution is not certain for all women or for the applicant in the future, courts go on to provide a further reason for denying asylum in that the prior persecution could not have been based “solely on their gender.”⁵²

Conversely, where persecution of women can be depicted as universal across a country or subpopulation, defining women as a particular social group becomes less problematic. Asylum claims involving female genital cutting⁵³ have been more successful in using female gender as the basis of a particular social group precisely because adjudicators see the practice as culturally pervasive. In *Hassan v. Gonzales*, the Eighth Circuit explained this distinction by noting that unlike previous overbroad categorizations, “all Somali females have a well-founded fear of persecution based on gender given the prevalence of FGM.”⁵⁴

The distinction reveals an implicit requirement that the shared characteristic be uniform across the social group and connected directly to the harm. It is not enough to recognize a class of women, differentiated from men, who are more likely to be subjected to rape or domestic violence. The asylum standard requires persecution on account of, or directed at, the shared, fundamental characteristic. In cases where some women are

parties [to grant asylum].” See *In Re Rodi Alvarado-Pena*, No. A073-753-922, at *1 (US. Immig. Ct. Dec. 9, 2009).

⁵⁰ *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

⁵¹ *In re R-A-*, 22 I. & N. Dec. at 917–18.

⁵² *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); see also *In re R-A-*, 22 I. & N. Dec. at 917 (holding that abuse was not targeted at R-A- because she was a woman, but because the abuser was a violent person); *Gomez*, 947 F.2d at 660 (holding “[p]ossession of a broadly-based characteristic such as youth and gender will not by itself endow individuals with membership in a particular social group”).

⁵³ Female genital cutting is frequently abbreviated as “FGC” and is also commonly referred to as female genital mutilation or “FGM,” the term favored by the courts, and has also been termed female circumcision. This Article uses the term female genital cutting in an attempt to avoid normative inflections of one form or the other.

⁵⁴ *Hassan v. Gonzales*, 484 F.3d. 513, 518 (8th Cir. 2007).

targeted but others are not and there is no effective technique to predict which women will be targeted, it is difficult for courts to see gender as a unifying characteristic within the rubric of asylum law.

For a persecuted woman to succeed in an asylum application, her persecution must be synonymous with the condition of being female. Female genital cutting claims often succeed because the practice can be seen as systematic and openly targeted at women. Where all women can be said to face subjection to female genital cutting, the boundaries of the harm and the boundaries of the gender category are one and the same. Gender becomes a legitimate characteristic under asylum law only where it can be defined through or in unison with the persecution.

B. Understanding Gender as Culture

Where persecution fails to map neatly to the fundamental characteristic or fully cover a group, it becomes much more difficult for applicants to establish the existence of a targeted particular social group. In order for more complex asylum claims to succeed, applicants must rearticulate the harm so that it can be seen to affect all women.

Even grants for asylum based on female genital cutting are sometimes challenged in cases where the persecution is accused of not being truly universal. These arguments do not claim that all women are not directly at risk. Rather, the argument is temporal, suggesting that once a woman has been subjected to the procedure, she is no longer at risk of persecution, as female genital cutting can typically be performed only once. The B.I.A. adopted this position recently in *In re A-T*,⁵⁵ although the Attorney General soon vacated the ruling.⁵⁶ The Board concluded, “[a]ny presumption of future FGM persecution is [] rebutted by the fundamental change in the respondent’s situation arising from the reprehensible, but one-time, infliction of FGM upon her.”⁵⁷ In short, the B.I.A. understood female genital cutting as an isolated instance of physical violence with limited effects.

This argument could be countenanced in gender-neutral terms. Courts have noted that female genital cutting is “extremely painful, physically invasive, [and] psychologically damaging”⁵⁸ and that its effects

⁵⁵ *In re A-T*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007).

⁵⁶ *In re A-T*, 24 I. & N. Dec. 617 (B.I.A. 2008).

⁵⁷ *Id.*

⁵⁸ *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005).

are ongoing, causing “long term health problems, and depriv[ation] . . . of a normal and fulfilling sexual life.”⁵⁹ However, asylum will not be granted on the basis of physical suffering alone; the harm in question must be directed at a shared, fundamental characteristic. Also, the ongoing effects from the harm must remain tied to gender.

Female genital cutting, by its definition, is directed at women. Thus, biological sex seems an obvious causal nexus for this form of persecution. Yet, as demonstrated by cases like *In re A-T-*, biological sex as a category cannot fully capture the problem and, therefore, does not offer much protection. Where women’s persecution cannot be reduced to biological sex, defining a particular social group is rife with all of the difficulties of defining gender and its cultural operation. Advocates and courts that reject a limited understanding of gender persecution must put forth a more complex definition of the harm. In developing the relationship between the harm and the shared characteristic, they must formulate a more robust notion of gender as something fundamental to individual identity.

The trajectory of *In re A-T-* demonstrates the effect this requirement can have on individual applicants. The Attorney General vacated the B.I.A.’s first ruling in *In re A-T-*, observing that female genital cutting is capable of repetition so there was no basis for the conclusion that past infliction of female genital cutting alone prevents the possibility of future persecution.⁶⁰ More generally, the Attorney General clarified that future persecution need not take a form identical to prior persecution.⁶¹ Thus, the B.I.A. was called upon to recognize female genital cutting as an embedded part of a broader culture of female subordination. The B.I.A. remanded *In re A-T-* to the Immigration Judge for further proceedings to develop the connection between past and future persecution. In doing so, the B.I.A. cautioned that “it is essential” that A-T- “clearly indicate . . . what enumerated ground(s) she is relying upon in making her claim, including the exact delineation of any particular social group” and cited the importance of “establishing the ‘on account of element,’” a burden that rests with the applicant.⁶² To succeed in her asylum claim, A-T- must

⁵⁹ *Id.* at 799.

⁶⁰ *In re A-T-*, 24 I. & N. Dec. at 621.

⁶¹ *Id.* at 622.

⁶² 25 I. & N. Dec. 4 (B.I.A. 2009), citing *In re A-T-*, 24 I. & N. Dec. at 623 n.7.

In an argument rejected by the B.I.A., the Department of Homeland Security went further, demanding that A-T- submit “evidence . . . as to why her past FGM rises to the level of persecution, because she does not remember the event.” *Id.* at 10. DHS argued that A-T-

demonstrate, with exacting detail, the relationship between the immutable characteristic of female gender, past persecution, and ongoing risk. Since gender defines a group broader than any group that can be identified as at immediate risk of persecution, A-T-'s asylum claim grows weaker. Similarly, any evidence that A-T- and other women may overcome the persecutory effects of female genital cutting works against her asylum claim.⁶³

Courts that grant asylum in cases of female genital cutting take such pains to describe the causal link between female gender and persecution that they often conflate the two. In *Mohammed v. Gonzales*, for example, the Ninth Circuit found of female genital cutting, "possession of the immutable trait of being female is a motivating factor—if not a but for cause—of the persecution."⁶⁴ Confronting the one-time argument, the court analogized female genital cutting to coerced sterilization, which it called "a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life."⁶⁵ It suggested female genital cutting is "practiced in significant part . . . 'to control women's sexuality,'"⁶⁶ which the court then characterized as an ongoing form of gender persecution.⁶⁷ These statements were informed by ideas of gender as something equivalent to "natural" and as externally "controlled."

Arguments from both sides invoke the powerful idea of cultural pervasiveness.⁶⁸ The B.I.A. argues that female genital cutting does not

should have to demonstrate and perform for the legal system the way in which female genital cutting had traumatized her and in turn, formed a fundamental part of her personal identity.

⁶³ WENDY BROWN, *STATES OF INJURY* 74 (1995). Wendy Brown's theory of "wounded attachments" in identity politics could be borrowed as an important caution in the asylum context. Brown writes, "[p]oliticized identity [] enunciates itself, makes claims for itself, only by entrenching, restating, dramatizing, and inscribing its pain in politics; it can hold out no future—for itself or others—that triumphs over this pain." *Id.*

⁶⁴ *Mohammed*, 400 F.3d at 798.

⁶⁵ *Id.* at 799. The B.I.A. rejected this analogy in *In re A-T-*, noting that forced sterilization is given explicit, special recognition for asylum purposes, while female genital mutilation is not. *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007).

⁶⁶ *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

⁶⁷ *Id.* at 800.

⁶⁸ See Gregor Noll, *Asylum Claims and the Translation of Culture into Politics*, 41 TEX. INT'L L.J. 491, 493–94 (2006) (observing that cultural arguments can be used to support both granting and rejecting asylum).

constitute persecution because it is widely practiced and culturally accepted. To counter this, the court in *Mohammed* puts forth the notion of culture as controlling and subordinating.⁶⁹ The idea of control reinforces the court's holding that opposition is not required for the practice to constitute persecution.⁷⁰ Instead, the court is concerned with the direction of the harm—toward the female gender—and not with whether the woman had agency in the situation. Thus, the court suggests that a cultural practice, including female genital cutting, acts to shape, and in this case control, individual identity.

The Eighth Circuit extended this narrative of culture. Dismissing arguments that female genital cutting is an isolated event and noting the prevalence of rape in the country, the court found, "the government erroneously assumes that FGM is the only form of persecution . . . and that having undergone the procedure, [the asylum applicant] is no longer at risk of other prevalent forms of persecution."⁷¹ Since the connection between female genital cutting, rape, and "other prevalent forms of persecution" is otherwise implicit, the particular social group characteristic, female gender, does the work of connecting these harms.

To see these harms as gendered, meaning to connect the harm directly to the social group and fundamental characteristic, requires a reference to something beyond the physical pain produced by the act. Some courts' opinions resemble the arguments of dominance feminism.⁷² Since dominance feminism understands gender as ordering society in a way that controls and subordinates women,⁷³ courts use this framework to portray the effects of female genital cutting as extensive and enduring. In this reading, an overt act of force in imposing female genital cutting against a woman's will is not a single event. Because the pervasiveness of gender hierarchy makes consent irrelevant,⁷⁴ it is not only the isolated instance of female genital cutting that controls or persecutes women, but the more pervasive structure of gender subordination that it manifests.

⁶⁹ *Mohammed*, 400 F.3d at 796 n.15.

⁷⁰ *Id.* at 797.

⁷¹ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

⁷² See generally CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); ANDREA DWORKIN, OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS (1976).

⁷³ MACKINNON, *supra* note 72, at 172–83.

⁷⁴ *Id.* at 175.

Because they form part of the more overarching gendered culture, female genital cutting, rape, and other forms of violence against women are acts through which, it might be said, “*all men keep all women in a state of fear.*”⁷⁵ Accordingly, female gender can be seen as a unifying trait because the act of rape, along with other acts of gender discrimination, go on to affect all women by creating a fear and vulnerability that generally reproduces men’s dominance over women. Thus, reflexively, the act of persecution creates gender as a particular social group.

C. The Limitations of Asylum’s Gender Protections

The theoretical framework of dominance feminism allows us to recognize identity as a concept bound up with culture. It allows us to understand the nature of the particular harm as reaching beyond the immediate physical pain, even while this element remains central to the individual claim. Yet in other ways, reliance on the uniformity of women’s condition weakens the ability to employ asylum law to address gender-based claims as part of a broader rights movement. The need to create a strong, cohesive narrative of women and their treatment within society means that affording protection to individuals comes at the cost of discounting positive cultural elements or improving social conditions. Invoking asylum protections may demand the absence of other successful efforts to secure women’s rights, including the use of domestic law or improvement of women’s social position. In order to show that the government is unable or unwilling to control violence, the definition of persecution, which relies on deterministic narratives, leaves little room for even minimal or uneven government interventions.

Dominance theory has been critiqued for obscuring and deemphasizing other social factors such as race, class, and culture, which may present problems of equal weight in themselves and may work to shape gender in different ways.⁷⁶ This critique is particularly apt in the context of asylum law, which purports to be inclusive of claims from across the world. Asylum requires identifying a central “if not but for”⁷⁷ cause for

⁷⁵ SUSAN BROWNMILLER, *AGAINST OUR WILL* 15 (1975).

⁷⁶ See e.g., CAROLE SMART, *FEMINISM AND THE POWER OF LAW* 77 (1989); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. F. 139–67 (1989). *reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195–217 (David Kairys ed., 2nd ed. 1990).

⁷⁷ *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

persecution. It encourages applicants to narrowly define the basis for their claim and deemphasize complicating elements.⁷⁸ When other social factors are recognized, they are usually depicted in flat and uncomplicated ways to fit into a coherent cultural structure of gender discrimination and persecution. Adjudicators more easily recognize female genital cutting as persecution because it is seen as part of a unitary culture. Where female genital cutting is practiced in a country, adjudicators in the United States feel confident asserting that such a society oppresses women generally. Thus, “the successful asylum seeker must cast herself as a cultural Other, that is, as someone fleeing from a more primitive culture.”⁷⁹

Granting asylum in these cases appears justified because the United States, a country and a culture that does not practice female genital cutting, can be seen as a society capable of protecting and supporting women.⁸⁰ The more complete a theory of persecution, the more successful the asylum claim will likely be. Put differently, arguing a winning asylum claim requires creating a pervasive narrative of persecution. As a result, effective narratives of culture have been entirely one-dimensional and regressive.⁸¹ The same follows for notions of women’s identity and agency within such a culture.⁸² This analytical framework ultimately leaves gaps in asylum’s protections, making it difficult for tribunals to recognize cultures as containing persecutorial as well as potentially affirmative elements of

⁷⁸ *In re A-T-*, 24 I. & N. Dec. 617 (B.I.A. 2008).

⁷⁹ SHERENE H. RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS 92 (1998) (as quoted in Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the “Cultural Hook” for Claims Involving Gender-Related Persecution*, 76 N.Y.U L. REV. 1562, 1578 (2001)).

⁸⁰ See Noll, *supra* note 68, at 495. In fact, much of the criticism regarding female genital cutting in African societies could also be turned inward. As Sondra Hale posits, “feminists would be kept very busy just looking into the clitoridectomies performed in the United States into the 1950’s to control female hysteria, masturbation, and the like. We could probably look into other unnecessary surgeries performed on women as well; for example, too-radical mastectomies and hysterectomies.” Sondra Hale, *Colonial Discourse and Ethnographic Residuals: The “Female Circumcision” Debate and the Politics of Knowledge*, in FEMALE CIRCUMCISION AND THE POLITICS OF KNOWLEDGE: AFRICAN WOMEN IN IMPERIALIST DISCOURSES 209, 213 (Obioma Nnaemeka ed., 2005).

⁸¹ See, e.g., Jennifer E. Coffman, *Producing FGM in US Courts: Political Asylum in the Post-Kasinga Era*, 53 AFRICA TODAY 59 (2007).

⁸² See, e.g., Connie G. Oxford, *Protectors and Victims in the Gendered Regime of Asylum*, 17 NWSA J. 18 (2005) (arguing that gender-based persecution laws and policies reproduce the victimization of women and deny women’s agency).

female identity. It makes it difficult to acknowledge individual claims as valid if social conditions no longer conform to a depiction of the primitive Other.

If gender does not map exactly to biological sex or form a strict social structure but instead emanates from multiple points of power⁸³ and intersects with other socio-cultural factors,⁸⁴ gender cannot be isolated as a unifying or targetable characteristic in the manner that asylum analysis requires. However, understanding gender as an incomplete social construct does not mean it has no salience as a socio-cultural category or that women are not harmed and discriminated against on account of their gender. Adjudicators can recognize the validity and importance of gender as a category and the potential for persecution on this basis without also equating gendered culture and identity with such harms. In gender-based asylum claims, the fact that the applicant suffered a serious physical harm is rarely contested. Courts can interpret these acts to re-enforce a detrimental understanding of gender. When the state condones acts of violence against women, either expressly or implicitly, it strengthens and gives legitimacy to a narrative of gender hierarchy. Thus, the combination of the physical act and state response rises to the level of persecution. This conceptualization allows a narrative of domination that is harmful but not totalizing. The asylum applicant is thus not required to define her entire identity—both gendered and cultured—in relation to the act of persecution in order to be protected.

⁸³ Wendy Brown asks in response to the dominance approach espoused by MacKinnon,

What if gender generally and women's subordination in particular do not devolve on a single social relation, but have manifold sites and sources of production and reproduction. . . . might MacKinnon's anxiety about supplying feminism with a systematicity, with a single logic, mechanism, and explanatory principle betoken . . . [an] anxiety about what constitutes the real and the potent?

BROWN, *supra* note 63, at 83.

⁸⁴ See Kimberlé Crenshaw, *Gender, Race, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992).

III. SEXUAL ORIENTATION-BASED ASYLUM CLAIMS: PROTECTING THE HOMOSEXUAL IDEAL

For many decades, gay men and lesbians were excluded from immigration entirely.⁸⁵ However, in the early nineties, Attorney General Reno adopted as B.I.A. policy the presumption that homosexuals constitute a particular social group.⁸⁶ This presumption has allowed many gay men and lesbians to secure asylum protections. Asylum law also shapes and defines these claims in ways that have importance for future claims. Within the current framework of asylum law, the presumption that homosexuals constitute a particular social group often equates to an understanding of sexual orientation as fixed, consistently taking the same form and following the same narrative of persecution across society and across cultures.

Asylum analysis contains a tension between the social importance of the particular social group categorization and the individual importance of the characteristic. As previously stated, asylum requires persecution on the basis of membership in a particular social group,⁸⁷ within which each member possesses a fundamental characteristic that cannot or should not be required to change.⁸⁸ Describing a characteristic as fundamental to individual identity suggests that its importance is not limited by cultural context. At the same time, the characteristic must connect a group, requiring attention to societal context.⁸⁹ Adjudicators could engage these issues as two distinct points of analysis. However, as the presumption suggests, courts commonly conflate these aspects such that the ideas of a fundamental

⁸⁵ Earlier incarnations of the Immigration and Nationality Act excluded "homosexuals and sex perverts," Immigration and Nationality Act § 212(a)(4), 8 U.S.C. §1182 (2006), and later those "afflicted with . . . sexual deviation." Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965). Exclusion of immigrants based solely on their sexual orientation was not completely put to rest until the 1990 reforms. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). For a more detailed account of the history of exclusion see Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C. R. & C. L. 345 (2007).

⁸⁶ Att'y Gen. Order No. 1895-94 (June 19, 1994).

⁸⁷ The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁸⁸ *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

⁸⁹ The definition of the particular social group should be based on perceptions and definitions within the country of origin. See *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1092 (9th Cir. 2000); see also *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006), *aff'd* *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006).

characteristic universally recognized and of a particular social group within a specific country become the same idea.

Affirmatively recognizing those identity categories protected by asylum law will always require subjective value judgments. Before evaluating individual sexual orientation-based claims, for instance, courts and political actors had to determine that sexual orientation could form grounds for asylum⁹⁰ and acknowledge that sexual orientation is a fundamental aspect of individual identity akin to religion or ethnicity. Although the signaling function of asylum law can play an important role in the development of a broader scheme of rights protections, the current adjudicatory framework over-determines those identity characteristics in its effort to protect them. The tension between a universal human rights perspective and more limited, context-specific protections plays out through individual claims such that the bounds of the particular social group become the bounds of valid individual identity. In turn, appearing to focus solely on the specifics of an individual claim obscures the use of subjective judgments in shaping the content of the fundamental characteristic protected.

A. Articulating a Valid Individual Identity

While the way in which female gender forms a fundamental characteristic has been questioned and reformulated, adjudicators have struggled to recognize sexual orientation as a fundamental characteristic in any form. In acknowledging “homosexuality” as a valid particular social group characteristic, yet without a strong understanding of its innateness, adjudicators may test the credibility of an applicant’s claim to the characteristic in a way that seems unfathomable in the case of gender. Adjudicators do not ponder a woman’s dress or mannerisms as markers of her gender, or to confirm she is a woman. However, such an inquiry commonly occurs in adjudicating sexual orientation-based asylum claims⁹¹ because immigration officials and the courts more overtly fill out the definition of “homosexuality.”

In undertaking this inquiry, courts establish not whether a particular social group exists, but whether the particular asylum applicant is truly a member of the social group. Adjudicators police the boundaries of the

⁹⁰ *In re Toboso-Alfonso*, 20 I. & N. Dec. 819.

⁹¹ See, e.g., *Tavera Lara v. Att’y. Gen.*, 188 F. App’x 848 (11th Cir. 2006); *Salkeld v. Gonzales*, 420 F.3d 804, 806 (8th Cir. 2005); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005).

particular social group, most often through appeal to certain traits stereotypically associated with gay identity in American culture. *Mockeviciene v. Att'y. Gen.*,⁹² a claim for asylum based on lesbian sexual orientation, stands out as an example for the specificity with which immigration judges ("IJ") set out the grounds of the adverse credibility determination.⁹³ As evidence refuting her claim to be a lesbian, the IJ included observations that,

(1) Mockeviciene defined being a lesbian as a woman who wants to be around other women and it does not necessarily involve sexual relationships; (2) although she had been in the United States for four years, she had not had a lesbian partner, so that she was at best a non practicing lesbian, (3) she had no documents to establish that she is a lesbian, and the letters or notes she did submit were not originals and did not mention with any degree of specificity the lesbian relationships of Mockevicene, only addressing the conclusion that Mockevicene is indeed a lesbian, [and] (4) she had not joined any groups while [in the United States] that involved lesbian activities.⁹⁴

In this analysis, the IJ presents a set of criteria to judge Mockevicene's claim to lesbian identity. Regardless of whether Mockevicene was truthful in her claim, or whether she should be considered a lesbian, the example is notable in that the IJ draws the criteria for making this determination not from a contextual analysis of identification of the group within the home country, as the asylum standard suggests, but through an external benchmark imported into the case. The presumption that homosexuality may form a valid basis for an asylum claim leads the IJ to assume a concrete body of traits identifiable as "homosexuality," similar in universality to biological sex. Thus, it is not so much that the IJ omits a contextual analysis, but rather that they assume that the analysis does not differ across specific cultural contexts.

Brushing aside the particular contextual element of asylum analysis, adjudicators rely on subjective ideas of sexual orientation in formulating the category into which an applicant must fit. If the claimant does not provide other information, this substitution is effectively required. When understanding the fundamental characteristic and the contextual

⁹² *Mockeviciene v. Att'y Gen.*, 237 F. App'x 569 (11th Cir. 2007).

⁹³ *Id.* at 572.

⁹⁴ *Id.* at 572-3.

setting of a particular social group from the same analysis, the adjudicator can use the specifics of the individual claim to renegotiate the bounds of the fundamental characteristic itself.

Reliance on an unspecified subjective understanding of gay identity presents many problems. First, it requires an asylum applicant to “reverse cover,” or perform the expected role of a gay person to prove the authenticity of the claim.⁹⁵ Thus, for example, a lesbian must demonstrate that she has joined lesbian groups, has a “partner,” and is otherwise documented.⁹⁶ Adjudicators rely on unsubstantiated stereotypes to assess the credibility of a claim to the fundamental characteristic. Moreover, an applicant must anticipate and perform certain stereotypes in her own application as the surest means of gaining asylum. In this way, stereotypical descriptions become the legal truth of what it is to be “homosexual” and form the standard to be applied beyond the individual case.

Relying on an unstated presumption of what it means to be gay effectively denies cultural differences. As with gender, culture affects the ways in which gay and lesbian communities form and interact as well as the ways in which sexual orientation is individually expressed.⁹⁷ Beyond this,

⁹⁵ Fadi Hana, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 915 (2005). The concept of covering derives from Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

⁹⁶ Requiring asylum applicants to have outwardly displayed their sexual orientation is not uncommon. Recounting the case of “Mohammad,” Deborah Morgan observes, “because Mohammad had to provide proof comporting with judicial stereotypes of what it means to be gay, his membership in gay organizations, subscriptions to gay publications, and participation in gay pride parades may have increased his chances of gaining asylum . . . more than his personal testimony concerning who he is and what he had endured.” Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 147 (2006). See also *Bromfield v. Mukasey*, 543 F.3d 1071, 1074 (9th Cir. 2008) (recounting the IJ’s reliance on the fact that Bromfield “was not politically active” in denying withholding of removal and protections under the Convention Against Torture); *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008) (critiquing the IJ’s assertion that no one in Guyana would recognize Ali as gay because there was no way that Ali would be able to form a close relationship with a partner).

⁹⁷ See generally, GILBERT HERDT, *SAME SEX, DIFFERENT CULTURES: EXPLORING GAY AND LESBIAN LIVES* (1997). This is true not only on an international scale, but also nationally, across subcultures. Hyeouk Chris Hahm argues that Asian American youth develop gay identity through a different process than their Caucasian peers, negotiating conflicts between cultural, gender, and sexual identities. Hyeouk Chris Hahm & Chris Adkins, *A Model of Asian and Pacific Islander Sexual Minority Acculturation*, 6 J. OF LGBT YOUTH, 155 (2009).

culture may affect the very definition of the social group.⁹⁸ Different cultures ascribe different meanings to same-sex sexual activity such that the identity categories of gay and lesbian do not exist homogeneously across cultures.⁹⁹ Sexual orientation, like gender identity, is created by and through culture, as opposed to having an essential core.¹⁰⁰

A standardized image of “all homosexuals” developed in the context of a gay man is especially problematic when used to address lesbians’ claims. Documentation, group membership, and identifiable relationships all require a certain degree of visibility within the public sphere. However, a social dichotomy between the concepts of public and private is deeply gendered.¹⁰¹ Where there is less acceptance of women’s public lives, “documentation” should not be presumed possible in the same ways that it might be for men because some acceptance and public space for a male homosexual community exists.¹⁰² In addition, much of the harm directed towards women takes place within the home and at the hands of family members.¹⁰³ Lesbians also experience private violence,¹⁰⁴ which may be directed at both their gender and sexual orientation.¹⁰⁵ These forms of

⁹⁸ RICHARD PARKER, *BENEATH THE EQUATOR: CULTURES OF DESIRE, MALE HOMOSEXUALITY, AND EMERGING GAY COMMUNITIES IN BRAZIL* (1999) For example, Parker argues that in the Brazilian context, while modern Brazilian gay identity has been influenced by the west, it also has a unique cultural dimension and several differentiable subcultures.

⁹⁹ See Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 100, 133–34 (2002).

¹⁰⁰ *Id.* at 117–18 (citing JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990)).

¹⁰¹ In a traditional patriarchal system, men and maleness occupy the public realms such as work and politics, while female activity and identity are relegated to the private sphere of home and family. See, e.g., CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1998); JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* 39 (2002); ANNE PHILLIPS, *ENGENDERING DEMOCRACY* 96 (1991).

¹⁰² See Nielson, *supra* note 48, at 437; Jenni Millbank, *Gender, Sex, and Visibility in Refugee Claims on the Basis of Sexual Orientation*, 18 GEO. IMMIGR. L.J. 71, 83–85 (2003).

¹⁰³ See Nielson, *supra* note 48, at 419–20; Millbank, *supra* note 102, at 86.

¹⁰⁴ See Nielson, *supra* note 48, at 426.

¹⁰⁵ This is not necessarily to suggest that lesbians are subjected to a greater degree of domestic violence in an additive fashion, but rather that the motivation for such violence in an individual instance may be attributable to either gender or sexual orientation, and, particularly because the two identity elements work to shape one another, it would prove

harm are more difficult to document and may even be dismissed as “family mistreatment.”¹⁰⁶

Additional complications may make the social category more difficult to prove in the individual sexual orientation asylum claim. For example, the Eleventh Circuit in *Tavera Lara v. Attorney General* questioned the validity of a lesbian sexual orientation claim for asylum where Tavera Lara failed to flee promptly and made return visits to see her children.¹⁰⁷ In assessing her claim, the court placed the identities of lesbian and mother in opposition. Either Tavera Lara was a mother, who felt the need to be near and care for her children, or a lesbian who could not help but live as such, forcing her to leave the country.¹⁰⁸ The characteristic of lesbian defines the social group to the exclusion of other identity traits, such as mother. As seen in relation to gender-based claims,¹⁰⁹ recognizing the competing tensions Tavera Lara faced in being both a mother and a lesbian would require the adjudicator to recognize persecution that was not directly related to the fundamental characteristic, but the court declined to do so.¹¹⁰ In this case, the credibility of her subjective fear is challenged by Tavera Lara’s deviation from a presumed universalized notion of the fundamental characteristic.¹¹¹

difficult to separate out one as the ‘true’ or primary impetus. See Neilson, *supra* note 48, at 426.

¹⁰⁶ *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (quoting the decision of the Immigration Judge). This case is an instructive example. Upon learning she was a lesbian, Olivia Nabulwala’s family orchestrated her rape by a stranger. The Immigration Judge, affirmed by the B.I.A., characterized this as “private family mistreatment,” finding Nabulwala was not subjected to persecution. *Id.* The Eleventh Circuit reversed and remanded, requiring the B.I.A. to consider whether police and authorities were unable or unwilling to control abuse within the family. *Id.* at 1119.

¹⁰⁷ *Tavera Lara v. Att’y. Gen.*, 188 F. App’x 848, 855 (11th Cir. 2006).

¹⁰⁸ *Id.* (In finding Tavera Lara’s testimony that she both feared for her life and wanted to be with her children inconsistent, the court reasons, “if the attack had been related to her sexual preference, ‘logic would dictate’ that Tavera Lara would have left immediately after the attack.”).

¹⁰⁹ See *supra* Part II.

¹¹⁰ *Tavera Lara*, 188 F. App’x at 858.

¹¹¹ Another example of the inability of adjudicators to fully address the complexity of individual claims can be drawn from *Mockeviciene v. Att’y Gen.*, 237 F. App’x 569 (11th Cir. 2007). While the Appeals Court criticized the IJ’s standards for judging Mockeviciene’s credibility, it ultimately found another fact, her recent marriage to a man, gave sufficient grounds for an adverse credibility finding. *Id.* at 574. Extrapolating from the actual case, it is

The B.I.A. bases its presumption that “homosexuals” constitute a particular social group on Western cultural stereotypes, which incentivizes applicants to explain away individual complexities so as not to detract from their sexual orientation. Ironically, by taking direction from culture, courts may conflate social perceptions of the fundamental characteristic with the individual identification. While some constructions may be more prejudicial than others, at some point, adjudicators draw a distinction between what constitutes the identity and what is ultimately incompatible with the identity. These assumptions of the fundamental nature of homosexuality can work to exclude applicants whose narratives do not reflect Western presumptions about sexual orientation. Exclusion of an individual applicant because her personal narrative would not place her within a socially perceived and persecuted group may be a legitimate limitation. However, decisions often define the fundamental characteristic through the exclusion, so while the standard purports to broadly protect “homosexuals,” in practice this protection is fairly narrow. Without a more careful articulation of the harm asylum is concerned with in sexual orientation cases, the standard “all homosexuals” provides insufficient guidance and masks the subjective element of the asylum determination.

B. *Hernandez-Montiel*: Recognizing Complexity and Securing Protection

Because understandings of sexual orientation are less deeply entrenched than those of gender, the boundaries of the identity itself are

possible to imagine Mockeviciene self-identified as bisexual, or characterized her sexual orientation entirely differently. It is also possible that she truthfully considered herself a lesbian, but found herself in this instance attracted to a man, perhaps changing her self-conception of sexual orientation, or recognizing this as a choice that did not alter her identity with regards to sexual orientation. As Dana Takagi notes, “there are those who identify as straight, but regularly engage in homoeroticism, and, of course, there are those who claim the identity gay/lesbian, but engage in heterosexual sex. . . .” Dana Takagi, *Maiden Voyage*, in *QUEER THEORY/SOCIOLOGY* 245 (Steven Seidman ed., 1996).

Self-conceptions might not have altered the perception of Mockeviciene’s sexual orientation within her home country. Whether or not she would be perceived as a lesbian and persecuted as such would have depended not on her individual understanding but on societal perceptions. See *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006); *In re A-M-E*, 24 I. & N. Dec. 69 (B.I.A. 2007). However, because the court draws on a universalized notion of homosexuality as both the fundamental characteristic and the particular social group, not only has Mockeviciene failed to show she would be treated as a member of the particular social group, but the credibility of her individual subjective identification is also called into question.

susceptible to debate in applications based on sexual orientation. Also, the less fixed notion of sexual orientation allows the opportunity to move decidedly away from an essentializing standard of identity.

Geovanni Hernandez-Montiel, a citizen of Mexico, testified that at a young age, “he ‘realized that [he] was attracted to people of [his] same sex’” and “began dressing and behaving as a woman.”¹¹² He was repeatedly abused, including by police officers, expelled from school, and kicked out of his home. Geovanni sought asylum under the particular social group of “gay men with female sexual identities in Mexico,” acknowledging that he might be referred to as a transsexual in the United States.¹¹³ The court recognized the particular social group, noting that sexual identity and sexual orientation are fundamental to human identity and that dressing femininely was an expression of Geovanni’s deeper identity.¹¹⁴

Hernandez-Montiel has been widely cited as a progressive standard for LGBT rights.¹¹⁵ In contrast to many of the claims based on gender and sexual orientation, the Ninth Circuit does not assume the content of Geovanni’s specific social group likely because “gay men with female sexual identity” does not readily fit into any categories in the American lexicon. While the court also acknowledges the possibility of using “transsexual” to define the particular social group,¹¹⁶ it opts to use “gay men with female sexual identity” and thus must take the extra step in explaining the existence of the group. This characterization allows the possibility of recognizing sexual orientation and sexual identity outside a binary of homosexual/heterosexual to include other identities—in this case, “gay men with female sexual identity.”

The court also describes the particular social group within a specific cultural context. Beyond an account of Geovanni’s own sense of sexual orientation, the court notes how the group is seen and treated both within

¹¹² *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000).

¹¹³ *Id.* at 1095 n.7.

¹¹⁴ *Id.* at 1094, 1096.

¹¹⁵ See, e.g., Katyal, *supra* note 99; Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 31–32 (2003); Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 404–08 (2001); Sami Zeidan, *The Limits of Queer Theory in LGBT Litigation and the International Human Rights Discourse*, WILLAMETTE J. INT’L L. & DISP. RESOL. 73, 90–91 (2006).

¹¹⁶ *Hernandez-Montiel*, 225 F.3d at 1095 n.7.

Mexican society and in contrast with other potential social groups.¹¹⁷ The court does not assess whether the identity is credible or whether an individual meets a predetermined, presumed ideal, but rather reads the individual's story with a background of accounts of sexuality and its treatment within the home country.¹¹⁸ This careful analysis provides some recognition of the variability of sexual orientations and sexual identities across cultures and how they may be embedded within a broader cultural framework. The court also recognizes and affirms Geovanni's choice to express his sexual orientation through dress and other outward characteristics as aspects of his identity.¹¹⁹ The court in *Hernandez-Montiel* thus takes notice of some of the complexities shaping the individual identity, in this case highlighting the relationship between gender and sexual orientation, which cannot be entirely separated.¹²⁰

C. Negotiating the Margins of "Homosexuals"

Even in *Hernandez-Montiel*, the court cannot avoid some line-drawing in defining the contours of sexual orientation and identity. In asserting Geovanni's sexual orientation as fundamental, as opposed to a series of independent choices about dress and actions, the court claims, "Geovanni is not simply a transvestite 'who dresses in clothing of the

¹¹⁷ *Id.* at 1095–96.

¹¹⁸ The Court relies on academic experts for its account but cautions that expert testimony only serves to support Geovanni's story, which might be sufficient in its own right. *Id.* at 1094. Thus, the expert opinion only lends support and a fuller picture. The use of such testimony may also be seen as a vast improvement over deference to State Department Country Reports, a practice that has been the focus of much criticism. See Gramatkov v. INS, 128 F.3d 619, 619–20 (7th Cir. 1997) ("[T]here is perennial concern that the Department soft pedals human rights violations by countries that the United States wants to have good relations with."); Eliot Walker, *Asylees in Wonderland: New Procedural Perspectives on America's Asylum System*, 2 N.W. J. L. & SOC. POL'Y 1, 10–13 (2007).

¹¹⁹ Kaytal, *supra* note 99, at 171.

¹²⁰ The court notes that "gay men with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical 'female,' i.e., passive, role . . . [they] outwardly manifest their identities through characteristics traditionally associated with women." *Hernandez-Montiel*, 225 F.3d at 1094. See Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 404–08 (2001) (noting that "the fact that Geovanni's persecution stemmed in large part from his gender nonconformity required the Ninth Circuit to analyze gender oppression in a way that demonstrates the interconnections among acts of discrimination based on sex, gender nonconformity, and sexual orientation").

opposite sex for psychological reasons.”¹²¹ Thus, the court suggests a limit to what activities may be considered as part of a fundamental and immutable sexual identity. Whereas, at the outset, the court refers to evidence of treatment of the particular social group within Mexican society, the court now turns to characterize Geovanni’s subjective sexual identity as constructed in a specific way which makes it fundamental. Here, it is not sexual identity or sexual orientation generally that is fundamental for people universally. Rather, to explain why harm directed towards a manner of dress and expression is persecution, the court must place these actions within the realm of the individual’s fundamental identity and expressly distinguish those actions from the non-fundamental. Thus as in Mockeviciene’s case, certain patterns of action and choice are precluded. In locating and defining a discrete group, the court necessarily begins to draw lines.

Subsequent sexual orientation cases cite *Hernandez-Montiel* as establishing that “all homosexuals constitute a particular social group.”¹²² Again, the complexities of individual cases are collapsed into an assumption, “homosexuality.” The emphasis on “all homosexuals” reinforces the fundamental nature of the characteristic and also erases the more complex picture of Hernandez-Montiel as a gay man with female sexual identity.

If an applicant falls far enough from the image sought, it is not difficult to find the claim incredible.¹²³ However, in some cases adjudicators encounter claims that do seem credible in many aspects despite the failure to align completely with the ideal of the identity category. In these cases, the argument against asylum amounts to finding applicants “not gay enough.”¹²⁴

¹²¹ *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1096 (9th Cir. 2000) (citing *American Heritage Dictionary* 1289 (2d Coll. Ed.) (1985)).

¹²² *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“*Hernandez-Montiel* clearly suggests that *all* alien homosexuals are members of a ‘particular social group.’”); *Vega v. Gonzales*, 183 Fed. App’x 627, 628 (9th Cir. 2006).

¹²³ The Eleventh Circuit ultimately rejected Mockeviciene’s claim because she had recently married a man. *Mockeviciene v. Att’y Gen.*, 237 F. App’x 569, 574 (11th Cir. 2007). While the court criticized the use of indicators such as the absence of a lesbian relationship or membership in a related political organization, for the court, marriage to a man clearly fell outside the bounds of lesbian identity.

¹²⁴ See Morgan, *supra* note 96.

Jose Salkeld sought asylum fearing “harm, abuse, and torture if returned to Peru because of his homosexuality.”¹²⁵ As a child in Peru, Salkeld suffered abuse because of his perceived homosexuality.¹²⁶ He did not reveal himself to be gay while living in Peru but eventually did so while living in the United States.¹²⁷ The immigration judge, whose decision was later upheld by the B.I.A., denied Salkeld’s application, finding that “there are no criminal penalties for homosexuals in Peru” and that while “living an openly homosexual lifestyle in Peru may provoke a reaction from private citizens or the police, . . . Salkeld did not reveal his status while living in Peru and there are no laws requiring homosexuals to register with the government.”¹²⁸ While the Eighth Circuit noted “evidence of some alarming instances of violence towards homosexuals” in its review, it found these were “relatively sporadic,” and that “homosexuality [was] not penalized by the Peruvian government.”¹²⁹ Moreover, the court found, “like in the United States, . . . Peru has some locations in which homosexuals may live more safely.”¹³⁰ Notably absent from the court’s consideration is a discussion of the frequency or thoroughness of police or government intervention after acts of violence against gay men.¹³¹ The onus in avoiding violence targeted at their sexual orientation is placed upon gay men, who can deny or hide their sexual orientation and move to “more tolerant” areas to reduce their

¹²⁵ Salkeld v. Gonzales, 420 F.3d 804, 806 (8th Cir. 2005).

¹²⁶ *Id.* at 808.

¹²⁷ *Id.*

¹²⁸ *Id.* at 809; see also, *In re Soto Vega*, No. A-95880786 (Immigration Ct. Jan. 21, 2003), *rev’d*, *Vega v. Gonzales*, 183 F. ’App’x 627 (9th Cir. 2006) (recounted in Fadi Hana, Case Comment, *Punishing Masculinity in Gay Asylum Cases*, 114 YALE L.J. 913, 914–15 (2005)).

¹²⁹ *Salkeld*, 420 F.3d at 809. The evidence of violence that the court deemed sporadic included the findings that “[p]olice and other security forces often do nothing to protect homosexuals and periodically may even join in the harassment” and “incidents in Peru, occurring as late as 2001, where paramilitary groups hunted down and killed homosexuals.” *Id.* at 807.

¹³⁰ *Id.* at 809.

¹³¹ As Shane Phelan asserts, “[f]ailure to arrest and prosecute those who prey upon gays and lesbians is [] a prima facie denial of citizenship” because it denies the most basic element of legal citizenship, physical protection. SHANE PHELAN, *SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP* 23 (2001).

risk of attacks, which the police only sometimes participate in. Salkeld's claim was denied.¹³²

In cases such as *Salkeld v. Gonzales*, gay men who do not act or dress effeminately or who have avoided physical abuse by hiding more effeminate activities and mannerisms from public view are denied asylum on two bases, which are often intertwined. First, adjudicators read the applicant's ability to avoid overt maltreatment as suggesting that homosexuals are not sufficiently persecuted as a group. Second, adjudicators may find that non-effeminate applicants fall outside the bounds of the particular social group of homosexuals.¹³³ For example, in *Salkeld*, the court distinguished the petitioner from a presumed group of other, more visible homosexuals and, in part because of this, concluded that violence against homosexuals as a group in Peru was sporadic.¹³⁴ Thus, in these cases, an applicant's credibility as to his sexual orientation is not at question. Instead, his supposed ability to avoid persecution either forces him outside of the social group category or results in a finding that violence is insufficiently pervasive to constitute persecution of the group.

These arguments are similar to the challenges posed by the recognition of gender as a unifying characteristic. If the category of homosexuality incorporates more than individuals whose sexual orientation is readily visible (and thus readily targeted for persecution), a clear social group boundary becomes difficult to draw, and identifying the core of the fundamental identity likewise becomes more difficult. Notably, for asylum purposes, requiring a strong boundary to the category of homosexuality also works to establish a strong sense of who or what is not homosexual, or at least not *so* homosexual as to be synonymous with persecution. As Janet Halley has noted, such treatment of homosexuality is the result of anxiety towards a characteristic that is simultaneously mutable and immutable.¹³⁵ Halley makes an analogy to race under segregation laws, noting that blacks

¹³² *Salkeld v. Gonzales*, 420 F.3d 804, 809 (8th Cir. 2005).

¹³³ See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005) ("[T]he JJ attempted to limit these findings [of persecution of homosexuals] . . . by stating that the majority of anti-gay violence reported in Mexico was against transvestites and that Boer-Sedano is 'a low-profile, non-transvestite gay man. . . .'"). The Ninth Circuit held the B.I.A. had not rebutted a presumption of well-founded fear based on prior persecution and remanded to the Attorney General. *Id.* at 1089, 1092.

¹³⁴ *Salkeld*, 420 F.3d at 807.

¹³⁵ Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 932 (1989).

could be “culturally and geographically isolated ‘as blacks’ or, wherever that proved impossible, . . . appropriated and co-opted ‘as whites,’” but in either case serving the motives of the majority.¹³⁶ In asylum, those who can be seen as wholly “other,” “a discrete group [who] cannot disguise their group membership,”¹³⁷ and cannot avoid being persecuted are rewarded with the protections of asylum law.

In contrast, when individuals cannot be completely otherized and are instead co-opted as a type of homosexual that would receive tolerance in America (i.e. those who live a life as close as possible to being heterosexual despite their inability to achieve this norm), they are often denied the protections of the law.¹³⁸ The distinction serves two purposes. First, it allows preservation of the categorical separation of homosexual and heterosexual.¹³⁹ By ensuring that the category of homosexual remains distinct and far removed from heterosexual, heterosexuality remains shielded from the anxiety of variability and the defining stigma of persecution.

Second, it allows the preservation of cultural superiority.¹⁴⁰ Courts recognize persecution in a culture where violence towards the distinct group is pervasive and severe. Where the treatment of homosexuals appears too similar to that found in the United States, adjudicators do not find persecution.¹⁴¹ As Victoria Nielson, a leading advocate in LGBT immigration law, stated as a general rule, “you’d ask, could this happen in the United States? If the answer is yes, there’s no asylum claim.”¹⁴² This

¹³⁶ *Id.* at 932.

¹³⁷ *Id.* at 931 (citing Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985)).

¹³⁸ See Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408, 1414–15 (2004).

¹³⁹ See Halley, *supra* note 135, at 931; WILLIAM E. CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 64 (2002) (“Identity requires differences in order to be, and it converts difference into otherness in order to secure its own self-certainty.”).

¹⁴⁰ Noll, *supra* note 68, at 493.

¹⁴¹ See, e.g., *Salked v. Gonzales*, 420 F.3d 804, 806 (8th Cir. 2005).

¹⁴² Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 LAW & SEXUALITY 59, 75 (2006). Victoria Nielson is the Legal Director of Immigration Equality. See also Noll, *supra* note 68, at 498 (“Where it can be established that the culture in the state of origin is different from that in the state of asylum, we can be reasonably sure that the human rights argument will not turn into a boomerang.”).

allows the United States to maintain a conception of fulfilling its human rights obligations in not contributing to pervasive violence by separating other harms, harassment, and non-ubiquitous violence from the sphere of its affirmative duty.¹⁴³ For applicants, the outcome seems in opposition to the portrait of the group. Those homosexuals who can be most completely otherized are granted asylum, while those who appear closer to the heterosexual standard are deported.

These challenges obviate the need for a deeper explanation of how persecution affects these men and, through this, why the unity of the particular social group is maintained. Commentators have recognized these denials as problematic in that they fail to recognize the use of covering or passing behaviors as a means of avoiding persecution.¹⁴⁴ Some have suggested that covering itself, where motivated by fear, constitutes a form of persecution.¹⁴⁵ Yet, in arguing these men should be granted asylum as homosexuals, this analysis suggests “[i]t is their core sexual identity, separate from action, that immigration courts have long recognized the inability of gay men to change.”¹⁴⁶ The importance of the identity, and of the need for asylum, is expressed through discounting the importance of actions and individual expression.

Some courts have also recognized the denial of asylum in cases of less visible gay men as problematic, again calling on an understanding of sexual orientation that exists more deeply than these independent actions. In refuting such challenges, the Ninth Circuit relies on the assertion, drawn from *Hernandez-Montiel*, that “all homosexuals” are members of a

Describing the process of applying for asylum as troublingly imperialist, Saeed Rahman observes, “my queerness had to be made accessible to the I.N.S.” See Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 517 (1998) (remarks of Saeed Rahman).

¹⁴³ Noll, *supra* note 68, at 496.

¹⁴⁴ See Morgan, *supra* note 96; Hana, *supra* note 95. As defined by Kenji Yoshino, passing occurs when an individual hides his or her underlying identity, asserting and acting out heterosexuality although self-identifying as homosexual. Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 772 (2002). Covering occurs when, for instance, “a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.” *Id.* Thus where an asylum seeker acknowledges homosexual orientation but fails to establish the types of public documentation that may be sought by immigration officials, this may be due to “passing” or “covering.”

¹⁴⁵ Hana, *supra* note 95, at 918.

¹⁴⁶ *Id.* at 920.

particular social group¹⁴⁷ and cites *Lawrence v. Texas*¹⁴⁸ for the fundamental nature of homosexual identity.¹⁴⁹ The Ninth Circuit thus conceptualizes homosexual acts as “intimate contact and enduring personal bond.”¹⁵⁰ These assertions move the complexity and cultural variance of individual claims to the background. The presumption of universal homosexuality supersedes individual choice and deliberative sexual orientation. In a sense, the applicant gains protection as a homosexual despite his variations from the idealized identity.

At the same time, those individuals described as more “effeminate,” with more visibly “gay” mannerisms and dress, are also drawn into the single homogenizing norm. It is not ultimately their “effeminate” version of homosexuality that is being protected. Rather, asylum law protects homosexuality as fundamental in the form of “enduring personal bonds.”¹⁵¹ As Katherine Franke points out, *Lawrence* protects homosexual sex by putting forth a concept of homosexuality as consisting of loving, marital-like relationships. It “leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship.”¹⁵² Thus, these assertions draw on a particular notion of homosexuality that is closely related to American heterosexual norms. “There remains a tendency to view same-sex sexual activity that does not fit [the western] mold as ‘underdeveloped,’” Katyal observes, “and to recommend that lesbians and gay men in developing nations ‘catch up’ with the rest of the Western world.”¹⁵³ Through adjudicating the individual’s asylum claim, U.S. courts isolate a particular version of homosexuality, similar to dominant Western understandings of heterosexual relationships, as the focus of asylum. It is this more familiar individual who is awarded asylum at the end of the process.

¹⁴⁷ *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“*Hernandez-Montiel* clearly suggests that *all* alien homosexuals are members of a ‘particular social group.’”); *Vega v. Gonzales*, 183 Fed. ‘App’x 627, 628 (9th Cir. 2006).

¹⁴⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁴⁹ *Karouni*, 399 F.3d at 1173.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Teemu Ruskola, *Gay Rights vs. Queer Theory: What is Left After Lawrence v. Texas*, 23 SOC. TEXT 913 (2005) (as quoted in Franke, *supra* note 138, at 1409).

¹⁵³ Katyal, *supra* note 99, at 175.

As actions and individual identities are folded into a consistent notion, future cases presenting new scripts may be even more difficult to fit within the bounds of homosexuality. If they can be fit within the category, it will likely be at the cost of ignoring and even denying the importance of individual choice and identity variance. Moreover, as gender claims suggest, this entrenchment of a single narrative of fundamental homosexuality works to equate the identity with persecution. However, if asylum can exist as a meaningful part of a human rights movement that can protect a broader understanding of sexual orientation and identity for individuals, it must be able to afford these protections without limiting the legal conceptions of sexual orientation.

IV. TOWARD A MORE INCLUSIVE STANDARD: AN AXIS ORIENTED APPROACH

In its current scope, asylum law does not protect physical security broadly. Although physical security is the main result afforded to individuals, that security cannot be seen as asylum's systematic goal. If asylum law can be said to have a primary, universal function, it is to signal those facets of human identity deemed of primary importance, such that they should be the focus of attention in protecting against discrimination and mistreatment. This message is bound up with the broader discourse of universal human rights law and the United States' perspective within the field. These implications demand a more careful, articulate analysis to incorporate asylum law's aspirational underpinnings within its structural limits.

Determining which characteristics asylum law will protect requires a value judgment. At present, such designations develop primarily through case law.¹⁵⁴ Since law is an "ongoing dialogue" with culture that is both reflective and constitutive,¹⁵⁵ development through case law need not be a cause for alarm in and of itself. The standard can allow the law to address and recognize contemporary understandings of culture and identity as they have real meaning and effect in the lives of individuals. However, the

¹⁵⁴ In some instances, as in the case of forced sterilization and homosexuality, the Attorney General can issue a directive construing the asylum statute to include certain categories.

¹⁵⁵ Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL RTS. J. 1429, 1435 (2006) (citing Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003)).

current framework of asylum law analysis obscures the value judgment being made and, in doing so, allows subjective views and prejudices to shape and limit asylum protections beyond that necessitated by the basic statutory framework. Asylum suggests that at a basic level, people should be free from physical harm in expressing, whether or not they have a choice in the expression, the recognized identity characteristic. Addressing discrimination or individual private acts of violence and providing more positive treatment are matters left to the individual states. With such a significant yet basic protection, asylum law would do best to draw its primary categories as inclusively as possible.

The particular social group standard, which requires finding an immutable characteristic fundamental to a person's identity, allows for several positive recognitions within asylum law. By including characteristics that both cannot and should not be required to change, the standard can encompass a broader range of claims without requiring hard proof (i.e. a characteristic's biological innateness). Beyond loosening the evidentiary burden, the standard is capable of recognizing the role of culture in shaping social classifications, as well as the subjective element in the legal standard. Thus, the standard itself suggests a need for some exposition of the parameters of the category and of the reasons why we treat the characteristic as fundamental. As *Hernandez-Montiel* suggests,¹⁵⁶ the particular social group standard allows the flexibility to adapt these understandings based on specific facts.

However, the competing pressures within asylum law are more commonly reconciled by equating the immutable characteristic with something deeply innate or universalized to avoid lengthier inquiries into the demarcations of the category. The courts can avoid admitting their role in establishing these standards by assuming a notion of the characteristic, which is then applied to the context-specific analysis of the particular social group. This process leaves asylum law continually needing to work novel claims into a rigid structure, which in turn requires further essentializing the characteristic and dismissing the significance of any variations from the character ideal being protected. If asylum law is not isolated but has meaning within the context of human rights law and domestic law more generally, these essentialized notions of identity may have limiting effects on individual liberty in other areas.

A case such as *Hernandez-Montiel* presents the possibility that asylum law could avoid this narrowness. In *Hernandez-Montiel*, the court

¹⁵⁶ *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000).

paused to set out sexual orientation as the fundamental characteristic.¹⁵⁷ While the sources it drew on to support this assertion might have shortcomings, they are identifiable and debatable.¹⁵⁸ Beyond stating the fundamental characteristic that is involved, the court also analyzed the particular social group from the perspective of the specific country in its opinion. This distinct and thorough analysis allows the claimant to overcome some of the potential shortcomings that might result from unique details. This approach also remains open to new potential categories because it leaves room to include understandings of the fundamental characteristic from other countries and cultural contexts.

Most cases do not involve even these elements. Simply recognizing the complexities and multiple factors involved in individual asylum cases can play an important role in combating essentialism. Insofar as a court's opinion stands as the authoritative narrative of a person's claim and, in turn, a person's identity, recording the complexities and details of a case may do important work in allowing the law to record a fuller story.¹⁵⁹ Presently, the State Department's country reports play a pivotal role in determining the existence and treatment of a particular social group within a given country.¹⁶⁰ Adjudicators willing to receive and rely on additional sources of information can depict a fuller picture of the society both through the addition of data and the reflection of alternative perspectives. This receptiveness can diminish the notion of asylum categories as western-centric and dependent on the United States' government's political motivations. Highlighting multiple grounds for which asylum could be granted can also illuminate the complexity and interrelation of many of the categories. Even in *Hernandez-Montiel*, the court goes on to defend and characterize Geovanni's subjective identity, which avoids the pressure to define the fundamental characteristic as something akin to the innate and

¹⁵⁷ *Id.*

¹⁵⁸ Where the court holds that sexual orientation and sexual identity are "fundamental to one's identity," it cites social and behavioral scientists, the American Psychological Association, and the American Psychiatric Association for the authority behind this proposition. *Hernandez-Montiel*, 225 F. 3d at 1093–94. This reliance could be seen to fall in line with the historical tendency to medicalize sexual orientation and transgender identity. See generally Greenberg, *supra* note 40.

¹⁵⁹ Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1216 (1997); Derrick Bell, *The Power of Narrative*, 23 LEGAL STUD. F. 315, 316 (1999). Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

¹⁶⁰ See Walker, *supra* note 118, at 10–13.

thus universal. Such a step should not be necessary under the asylum statute.

An axis-oriented approach would significantly aid in removing some of the limitations within asylum. An axis-oriented analysis would involve explicit articulation of the steps in assessing existence of a fundamental characteristic and a particular social group. First, in making the definition of the fundamental characteristic a distinguishable element, courts should attempt to use broad definitions, setting out the categorization as an axis of identity. Where the idea behind requiring an immutable or fundamental characteristic analogizes the particular social group to other categorical bases for asylum, drawing the fundamental characteristic broadly is fitting. Thus, a fundamental characteristic might be gender or sexual orientation, analogous to religion, while the particular social group specific to the claim might be female or homosexual, akin to Protestant, a subclass of the fundamental category.

It is not just that adjudicators chose the wrong label in creating a presumption based on homosexuality. This label merely reflects the general approach to the particular social group category. While gender-based claims refer to “gender,” in actuality, cases address only female gender. Identifying the fundamental characteristic in more general terms should change the analysis of the particular social group. In the contemporary development of gender and sexual orientation cases, “particular” takes the meaning of different, or other, as opposed to merely a discrete subset of the larger axis. This former definition is consistent with the implicit assumption of asylum law: that persecution is not only defined by the physical severity of the injury but also, simultaneously, through the relationship between the harm and the identity characteristic. Thus, defining the particular social group around a fundamental characteristic always involves an implicit and primary identification of the dominant social group or norm from which the particular group differs.

As the axis-oriented approach recognizes, a fundamental characteristic of gender or sexual orientation includes a broad set of more particular identities. At the very least, it includes both ends of a binary—male and female, heterosexual and homosexual—but it may also include other iterations of gender and sexual orientation, such as “gay men with female sexual identity.”¹⁶¹ Requiring the specific identity of homosexual or female to do the work of demarcating a group and explaining its persecution leads to the conflation of the identity with persecution. Identification of a fundamental characteristic more broadly allows recognition of the relevance

¹⁶¹ *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1099 (9th Cir. 2000).

of other identity groups to which the particular social group is implicitly compared. In identifying a particular social group subject to persecution, courts should first attempt to note how multiple gender or sexual orientation categories are perceived within the specific society. This makes apparent that the particular social group could also be framed through recognition that its behaviors or mannerisms are not those of a dominant identity; persecution occurs where individuals do not fall within the construction of the dominant category.

Acknowledging the relation between the two, it is less important to define the content of the particular persecuted social group than to critique the use of coercive power to support a dominant identity norm. In this frame, an applicant would have to prove that living the life they want to live with regards to an aspect deemed fundamental to identity would likely result in his or her persecution in the home country. The requirement to show persecution would continue to limit the range of potential claims. An individual would also still need to prove that he or she behaves in certain ways or engages in certain activities, to show that he or she would fall within a particular social group, but this analysis would not result in a critique of the validity of the individual identity itself.

Beginning to recognize a dominant norm and understanding how a particular social group relates to this norm would allow for deviation in individual cases and could allow recognition of a link between those individual transgressions, not because identity in its expression or self-conception is strongly salient across the group, but because we recognize this characteristic as an important signifier throughout society. Thus, there is less dependence on the individual to represent a characteristic group. This also allows the recognition of persecution and harm without the need to equate the norm with the entirety of the culture and with concrete categories of oppressors and oppressed dividing the population.

Identifying a dominant norm may seem too abstract and unpredictable a step for the courts to undertake. However, in female genital cutting cases, courts have already recognized the use of FGM as a way of oppressing women in an ongoing way. In fact, all claims based on gender or sexual orientation rely on a dominant norm without stating as much. Recognizing a dominant norm and seeing persecution as an attempt to enforce that norm, rather than as the necessary result of being female or gay, would allow the court to avoid portraying the norm as essential to the culture. In this framework, the physical abuse need not encompass the identity entirely to be understood as persecution. Thus, asylum protections could be attainable where persecution occurred more sporadically. This emphasis in this modified standard shifts from identifying and categorizing

the victim/asylum seeker towards recognition of how government persecution, or inability or unwillingness to protect from persecution, contributes to limiting individual liberty more broadly.

Assume, for instance, that Geovanni was “simply” a transvestite, an identity class the court distinguishes as non-fundamental.¹⁶² Following the facts of the case, he was beaten and harassed for appearing “effeminate.” Adopting the proposed standard, a court might still find that one’s style of dress does not fall within the category of sexual orientation and thus is not protected by asylum. In doing so, however, the court would need to articulate the category more generally, making it more difficult to circumscribe and define one class, homosexuals, while leaving heterosexuality entirely outside of analysis. This standard also makes more obvious the possibility of another ground for asylum: gender. Because the case involves a man, gender does not immediately seem an appropriate category for asylum; however, if we see gender to include males and masculinity, this category becomes applicable in the case. Under either framework, the court will have to engage in a more complex analysis than asking what society perceives as normative and non-normative. The claim does not depend on how the applicant viewed his cross-dressing as part of a subjective identity. Rather, the court could recognize manner of dress broadly as a form of expressing gender and/or sexual orientation, and then find that the applicant was attacked because of deviance from a norm of heterosexual and/or masculine dress. Where asylum serves to protect an ambit of freedom within the category, it is less important to note something fundamental about the particular action or activity on the part of the individual. More important is a critique of the coercive actions in support of a dominant norm.

Of course, there will always be pressure to adhere to certain identity norms. Part of the axis-oriented approach’s movement is to recognize these as incomplete rather than totalizing. Asylum’s requirement of state involvement supports this. Where the state refuses to provide protections to a man beaten for dressing effeminately, or to a woman abused by her husband, this failure of government response makes it possible for the dominant norm to gain influence and become further entrenched. In fact, the impetus for the individual event is not even the most important factor. Rather, the court can note that, regardless of the ability to isolate a motive for the individual action, the state’s refusal to assist in this and in similar cases creates a certain effect at the societal level. Thus, in the case of domestic violence, for example, the dominant norm supported by

¹⁶² *Id.* at 1096.

persecution might be one of submissive females and dominant males. A revised standard would avoid an inquiry into whether the perpetrator would target other women, as well as whether all women are placed at risk.

A standard that acknowledges broad categories of identity and explicitly addresses dominant as well as persecuted subcategories would allow asylum protections to apply where persecution occurs frequently, but without encompassing all individuals who identify as female or gay. It could do so without creating a picture of the society and the characteristic as entirely encompassed by repressiveness and persecution. Such a standard would allow recognition of greater individual diversity in the expression of these identity characteristics. In doing so, it would allow a broader base from which to draw in developing other domestic and human rights protections.

Adopting an axis-oriented approach to the analysis of asylum claims would likely result in the grant of asylum for many of the claims discussed in this article and for other gender and sexual orientation claims. It would remove certain barriers and restrictions in articulating asylum claims. In the long-term, it would make it less difficult to incorporate new asylum claims. However, it is not an argument for a presumption of asylum on the grounds of gender or sexual orientation, and thus it would not automatically expand asylum.¹⁶³ Perhaps most importantly, an axis-oriented approach cannot speak to the primary determination that certain facets of identity deserve asylum and other human rights protections. Adopting an axis-oriented approach would not change the need to prove the individual credibility of a claim or the need to show government involvement. However, an axis-oriented approach would change the ways in which asylum law tells the stories of gender and sexual orientation, and of the persecution and protection of these identities.

V. CONCLUSION

Under the current framework, cultural and individual variability have arisen as challenges to the guarantee of asylum. Courts have reacted by asserting the fundamental, universal nature of the identity and an essentialized narrative of persecution. These protections reinforce American or Western culture as superior in its protection of individuals, as well as American or Western conceptions of those individual identities protected.

¹⁶³ It is worth recalling that most of the claims discussed in this Article were ultimately granted, whether at the outset or on appeal.

The framework through which asylum claims are analyzed works to limit the understanding of what may be important to individual identities and worth protecting and supporting through human rights. It also prevents a more complex understanding of how persecution and human rights violations occur within societies, limiting recognition to cases in which a persecutory culture may be seen as totalizing.

Despite these impulses, there is some indication of a possibility within asylum law for a more open framework. Recognizing the complexities of cases and focusing on the social norms enforced through persecution, rather than relying on assumed categories of identity, can allow for broader protections under asylum law. Such protections would in turn fit within a scope of human rights that seeks not only to limit violation of individual physical integrity, but also to protect and promote individual flourishing in a more robust way.