

# US gender- and sexuality-related asylum law: The politics of transgender asylum

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## Abstract

This essay addresses the politics undergirding the incorporation of transgender refugee provisions in the US system of political asylum. I first outline how asylum provisions for trans persons have developed through legal decisions in relation to two related categories of asylum law—gender-based asylum and sexuality-related asylum. I then question the future of transgender asylum in the context of US transnational aspirations and anxieties. What does the incorporation of particular trans asylum seekers enable? What does it conceal? What US geopolitical and economic motivations help us make sense of trans asylum? This essay serves as both a meditation on the history of trans incorporation in this institution as well as a forecasting of the future for gender-related, sexuality-related, and transgender asylum in the United States.

## Keywords

Asylum, gender, refugees, sexuality, transgender

## Introduction

The United Nations defines a refugee as someone outside of his or her own country with a well-founded fear of persecution relating to their “race, religion, nationality, membership of a particular social group or political opinion” (United Nations (UN), 1951, p. 36). Based on this definition, in 1994, the United States passed a provision, stating that “an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group” (Reno, 1994). Although the 1994 precedent is directly about sexuality (or, more specifically, being identified as homosexual), transgender applicants

have also gained asylum through this framework (Hernandez-Montiel v. INS, 2000). After years of pressure from lesbian, gay, bisexual, and transgender (LGBT) activists, in 2011, the United States released a framework that offered even more possibility in the ways trans applicants might gain refugee status, by adopting the language of gender identity and expression as constituting eligible “social groups.” Building on emergent work on

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transgender asylum in cultural and legal studies, this essay considers the politics behind this expansion in legal discourse (Aizura, 2012; Berg & Millbank, 2013; Neilson, 2004). It is concerned with the following questions: if we understand gendered refugee protections to be about protecting someone's rights to transgress the gendered social and cultural norms in their country of birth, what kinds of gendered transgressions are deemed safe and worthy of inclusion in US asylum law, and conversely, what transgressions pose threats or risks?

I read developments around transgender asylum through transnational feminist theorizing, recognizing the trans in both concepts as a site ripe with potential for theoretical illumination. As Finn Enke (2012) highlights, trans works "as a prefix meaning 'to cross'" (p. 5), addressing what Susan Stryker (2008) describes in pulling out the transgressive nature of trans as "the movement across a socially imposed boundary a way from an unchosen starting place—rather than any particular destination or mode of transition" (p. 1). Emphasizing the boundary transgression inherent in gender identities and expressions allows us to see that "Genders beyond the binary of male and female are neither fictive nor futural but are embodied and lived" (Salamon, 2008, p. 115). Such boundary transgressive understandings of gender work well with transnational feminist theorizing that deploys the trans to address "the *transversal*, the *transactional*, the *translational*, and the *transgressive* aspects of contemporary behavior" (Ong, 1999, p. 4), or what Raka Shome (2006) calls attendance to the "cracks and crevices, the silences and sutures of the global" (p. 3). While some see trans and feminist perspectives as in tension, Gayle Salamon (2008) rightly notes that there is transformative potential in combining trans and feminist theorizing. Specifically, drawing together of trans and transnational feminist analyses means attention to movement and the boundary transgressions that happen in that movement, while also maintaining focus on dynamics of power that play out in those movements and transgressions. These analytics together necessitate asking how boundary crossings and transgressions also produce limits, exclusions, and prohibitions, a focus

that gets at the ripple effect and flexibility of structures of power. I want to suggest here that while greater recognition for trans asylum seekers has meant an acknowledgment of the precariousness that comes with trans-ing gender boundaries, and necessarily also affords possibilities for certain trans applicants to gain refuge, it does so at the expense of walling off the concepts of gender and gender-based violence from the concepts of gender identity and expression.

Building off of a fear of reproductivity that is associated with the female-assigned body, this latest iteration in US asylum law reproduces a dynamic where gendered protections seem to be expanding, all the while presumably heterosexual, cisgender women of color continue to have limited ground in gaining gendered protections. The incorporation of trans applicants enables the United States' global moral project of positioning itself as the authority on human rights issues, while containing the threat of expanding protections for women whose reproductive bodies are seen as threatening. This analysis demonstrates how the protection of some gender transgressions can also participate in or produce limits and foreclosures—transgressing others' possibilities for livability in the context of US transnational political aspirations and anxieties.

## Historicizing trans asylum

The US asylum system as we know it today began with the implementation of the 1980 Refugee Act, which harmonized US law with international law and created a system for evaluating asylum seekers' claims. By the mid 1990s, the courts had heard enough sexuality- and gender-related cases to realize that there were not only gaps in the protections offered through the application of the UN refugee definition, but that it was necessary to address those gaps, especially as it began organizing interventionist foreign policy projects in the name of protecting women and lesbian, gay, bisexual, trans, and queer (LGBTQ) individuals (Riley, Mohanty, & Pratt, 2008). The 1994 Attorney General order did significant work to address the gaps for sexuality-related claimants (and because of the conflation of gender and sexuality, certain trans claimants as well), though

there would be no equivalent recognition of gender and gender-based violence protections for cis women. Rather, acknowledgment of cis women's gendered claims was incorporated through segregated case precedent. Through these cases, gender came to be recognized, almost exclusively, as something that cis women have, and gender-based asylum meant refuge for presumably heterosexual cis women who were fleeing violence easily intelligible as cultural, relational, or private (McKinnon, 2016). The isolated and contingent nature of gender's incorporation meant that the social and cultural transgressions that most cis women experienced persecution for went largely unrecognized as forms of political violence making them eligible for refugee relief.

It would be another 5 years before Hernandez-Montiel's case made it through the courts, setting precedent for those who transgressed social and cultural norms through their gender identity and expression to gain relief. Specifically, the courts recognized these claimants as "gay men with female sexuality identities," a social group that made them eligible for asylum (Hernandez-Montiel v. INS, 2000). This precedent certainly created space for some trans applicants to be recognized as refugees, but it left many other trans applicants, such as trans men, gender variant, and gender queer applicants, without good standing to be seen as refugees in accordance with the law, and the precedent did nothing for cis women making gender-based claims (Neilson, 2004).

The Hernandez-Montiel precedent would continue to guide the way trans applicants navigated the immigration system for 10 years. Yet, in line with the mounting US global "LGBT rights as human rights" platform, pressure to harmonize US legal language with international doctrine around trans issues became of utmost importance (UN, 2007). One of President Obama's first steps toward doing this was signing on to the UN Statement on "Human Rights, Sexual Orientation, and Gender Identity," along with 66 other countries. In its press release, the Obama administration explained,

The United States is an outspoken defender of human rights and critic of human rights abuses around the world. As such, we join with the other supporters of

this Statement and we will continue to remind countries of the importance of respecting the human rights of all people in all appropriate international fora. (US Department of State, 2009)

This globally oriented project is in line with earlier iterations of the "women's rights as human rights" platform that deployed protecting women and girls rhetoric to justify US international defense, diplomacy, and development projects (Grewal, 2005; Hesford & Kozol, 2005). The current iteration consolidates US aspirations for political power and control through trans rights rhetoric. In order to be prepared for the internationally oriented project of what US Ambassador to the United Nations Susan Rice recently called in a speech "Advancing US interests and values abroad," the United States must provide a symbol to the outside world that the country itself is recognizing trans rights.

A symbolically powerful, yet contained, way to do this is through the adoption of legal language and protections for trans asylum seekers. As a national manifestation of international law, asylum law holds the symbolic power of duly representing a state's domestic and foreign orientation toward particular issues. In attempting to demonstrate the United States' defense of a person's right to transgress binarized gendered norms, the 2011 protocol and training began by offering a set of definitions to guide asylum officers' understanding of gender as it relates to other relevant concepts such as sex and sexual orientation:

Gender is what society values as the roles and identities of being male or female. Sex is the assignment of one's maleness or femaleness on the basis of anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity is an individual's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others. Gender expression is how a person expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics. Transgender is a term used for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some transgender people dress in the clothes of the opposite gender; others undergo medical treatment,

which may include taking hormones and/or having surgery to alter their gender characteristics ... Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual or homosexual sexual orientation. (US Citizenship and Immigration Services, 2011, pp. 12–13)

The definition of gender offered allows for cis women and men to be seen as having a gender, yet by linking gender identity and expression directly to trans, the document forecloses the possibility that cis individuals might make legitimate claims on the basis of their gender identity and expression. There is one discussion in the manual of “gender-based mistreatment,” but by only focusing on the struggles of cis gay women in this section, the document continues to reify the idea that cis women are those who have gender-based experiences.

Unintentionally or not, the development of trans protections in US asylum participates in the severing of gender as a concept that might refer to a whole spectrum of identities, expressions, and experiences that variously fit or transgress social and cultural norms. Gender, instead is figured ontologically, rather than something that is done and felt in a multitude of manners (Butler, 2004; Salamon, 2010). Instead, the protocol further entrenches a division between gendered subjects as it perpetuates distinct categories for gender and gender-based persecution (concepts associated with cis women) and gender identity and gender-identity persecution (concepts given to trans and gender variant applicants). This framework solidifies the courts’ earlier equation that gender is something reserved for cis women, while gender identity and expression become new segregated legal categories reserved for trans applicants. In my broader research, I have found that the segregation of gender-based persecution from sexuality-related persecution normalized a one-sex, one-gender system whereby male-assigned subjects are figured as the neutral subjects for which all refugee categories (except gender) are available (McKinnon, 2016). By segregating gender from gender identity and expression, these new trans inclusive protections also work within the logic of this one-sex system, naturalizing male-assigned applicants as more readily legible, and hence eligible, for all asylum

categories. This normalization arguably allows for greater political protections for trans applicants (though time will tell). Yet, in separating gender and gendered forms of persecution into categories, this process of naturalization and normalization maintains the already uphill battle that cis women have in successfully proving that the gendered transgressions they experience violence for should enable their protection in accordance with international and US law. For cis women whose grounds for claiming asylum are connected to their gender, their options for claiming asylum remain, at best, contingent and segregated.

In addition to shoring up the United States’ ability to demonstrate that it defends the rights of trans people, we can see this division of gender from gender identity and expression as a method of creating boundaries around threats associated with gendered transgressions. Namely, this division guards the state from the threat of the non-White reproductive cis woman’s body. As I’ve demonstrated in my earlier work, one of the primary logics that shapes who is an incorporable immigrant subject is national anxiety around the reproductive threat of non-White women’s bodies and the perceived need to protect the White US nation from these bodies (McKinnon, 2010). When imagined as subjects with potential for belonging to the nation-state, some migrant subjects are valued for their entrepreneurial possibilities, while others are racialized through “schemes that serve to blacken and stigmatize” their desirability (Ong, 2003, p. 13). Eithne Luibhéid (2013) demonstrates that a particularly fear-producing subject in contemporary Western national contexts is the non-White immigrant woman who is “pregnant on arrival.” As she illuminates, the actual or possible reproductivity of an immigrant woman is, across many Western national contexts, central to the discursive boundaries created between who is a wanted immigrant subject and who is not, who is deemed “legal” and “illegal,” who might be acceptable enough for incorporation, and who must be excluded. This happens in the United States because as Carrie Crenshaw (1996) demonstrates, the definitional difference between men and women in US law is based on cis women’s assumed reproductivity and the differences associated with that reproductivity. In the

immigration context of US asylum where we are speaking mostly about non-White women's possible reproductivity, this difference is deployed as a means of exclusion to protect the primacy of the White US nation from the risk of non-White reproductivity. Furthermore, in an age of neoliberalism, all immigrant subjects are also weighed as variously desirable or undesirable alongside their ability to demonstrate that they will not be a burden to the state (e.g. having access to capital, a degree in a sought after occupation, family connections, or sponsorship through an employer). Since there is almost no way to reduce the way cis women's body are read as reproductive, cis women making gender-based claims are figured as overwhelmingly undesirable and threatening. In accepting such gendered subjects as widely as might happen for trans applicants through the new legal language, the US state would be transgressing boundaries around state investments in power that have been present and continue to be present in various forms, since the beginning of the White settler colonial nation-state.

In conclusion, in walling off gender from gender identity and expression, the United States can receive trans applicants as gendered claimants because their gendered claims do not also come with the threat of the reproductive body that challenges the White capitalist structure of the state. As a side benefit, this incorporation then allows the United States to deploy rhetoric about itself as a leader in human rights for groups like women and LGBT individuals in order to promote its global project of "advancing democracy" abroad. Meanwhile, the threat to the primacy of the White US nation remains walled-off. Segregated and contained in a contingent and conditional category, cis women and their presumed-to-be reproductive bodies are buffered from impacting the transnational aspirations that mobilize the US nation-state.

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