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Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgendered Asylum Seekers

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COMMENT

TAKING THE SQUARE PEG OUT OF THE ROUND HOLE: ADDRESSING THE MISCLASSIFICATION OF TRANSGENDER ASYLUM SEEKERS

INTRODUCTION

It was a watershed victory for the gay and lesbian community when United States courts first recognized that sexual orientation was a legal ground for membership in a particular social group for asylum-seeking purposes.[1] This

[1] *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990). Prior to 1990, sexual orientation was not recognized as a protected social group for purposes of asylum applications. With the landmark *Toboso-Alfonso* decision, sexual orientation was recognized as immutable. The Board of Immigration Appeals (BIA) specifically noted that "the service has not challenged the immigration judge's finding that homosexuality is an 'immutable characteristic' nor further 'that that characterization is subject to change.'" *Id.* at 820-22. In 1994, Attorney General Janet Reno designated *Toboso-Alfonso* as administrative precedent, affirming 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." Memorandum from Attorney General Janet Reno to Mary Maguire Dunne, Acting Chair, Board of Immigration Appeals 1 (June 16, 1994), *available at* http://www.qrd.org/qrd/world/immigration/us.gay.asylum.policy-01.23.95); *see also* Eric D. Ramanathan, *Queer Cases: A Comparative Analysis of*

gave an unprecedented number of gay and lesbian asylum seekers the ability to escape persecution in their countries of origin and begin new lives in the United States. Although transgender individuals fall under the lesbian, gay, bisexual, and transgender (LGBT) umbrella, they present a distinct set of issues that serve to distinguish them from gay and lesbian asylum seekers. In the social schema, trans-identified individuals may be more visible, viewed as more transgressive of social norms, and thus subject to greater discrimination and persecution within a society.[2] From the judicial perspective, transgender individuals can present blurred social and biological paradigms, often resulting in an erroneous adjudication contrary to the applicant's identity. Although the judicial system has recently begun to affirm the rights of transgender and transsexual individuals in the civil and employment context, there is a dearth of case law recognizing the trans-community in the immigration context, and specifically, transgender asylum applicants.

For purposes of obtaining asylum, many transgender individuals are forced to embrace membership in the social group "homosexual" even though this accepted social group does not always match a transgender applicant's sexual orientation. The transgender identity as a man or a woman is distinct from the broad range of sexual orientations the transgender community encompasses.[3] Consequently, the homosexual particular social group subsumes a transgender asylum applicant into a sexual identity he or she may not possess. This erroneous application leaves the claimant without accurate legal recognition.

Global Sexual Orientation-Based Asylum Jurisprudence, 11 GEO. IMMIGR. L.J. 1, 20-21 (1996).

[2] *See generally* INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, SEXUAL MINORITIES AND THE WORK OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE (June 5, 2001) (describing how doctors and nurses routinely leave transvestites to wait for hours in emergency wards, even if there are no other patients; in Mexico, twenty transvestites were kept for five nights in a cell measuring three square meters. They were denied both food and blankets); *see also* Arwen Swink, Note, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 HASTINGS INT'L & COMP. L. REV. 251, 253 (2006).

[3] Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 260-61 (2005) ("Transgender people have all sexual orientations: some transgender people are straight, some are gay, some are bisexual, and some are queer."). *Id.* at 270.

The limited interpretation of the appropriate social group the federal circuits have applied to transgender asylum claims reflects prevalent misunderstandings that permeate this social and biological identity.[4] The social group currently applied to transgender individuals is socially inaccurate and unnecessarily narrow. Instead, the immigration system should adopt a separate and distinct social group for transgender applicants so they can legitimately claim lawful grounds for asylum. To allay criticisms that recognition of the transgender identity for asylum purposes may result in an amorphous particular social group, there are comparable legal victories for the transgender community in the civil and employment contexts warranting similar protection in the immigration court system.

Part I provides the basic definitions and understandings this Comment will adopt within the transgender paradigm and provides an overview of United States asylum procedures and the immigration court structure. Part II discusses asylum applications based on sexual orientation and will address how subsequent cases have erroneously applied this social group to transgender applicants. Part II further highlights examples of adjudicatory issues that transgender asylum seekers may face as a result of not identifying as homosexual. Part III showcases the recognition and protection afforded to transgender plaintiffs in pivotal civil discrimination cases and, as a result, how their rights have been correspondingly protected. This Comment concludes with a recommendation that the immigration judicial system modify its current definition of "particular social group" to explicitly recognize the "transgender identity" for asylum purposes.

I. BACKGROUND

A. TRANSGENDER IDENTITY

Throughout the course of Western history, society has constructed gender norms that often assume individuals are

[4] Throughout this paper, when referring to the claimants highlighted in the court decisions discussed, I will use the appropriate pronoun for the applicant's gender identity. Many of the decisions erroneously refer to the applicant using a pronoun that coincides with the sexual identity assigned to them at birth.

born male or female and should behave accordingly.[5] The transgender term encompasses an individual whose anatomic sex may conflict with their gender expression and whose birth sex does not match their internal perception of their gender identity.[6] Broadly speaking, "sex" is typically used to refer to an individual's identity as it relates to biology, including, but not limited to, chromosomal and/or reproductive composition.[7] In contrast, "gender" may be based on an individual's social identity as related or unrelated to sex but often involving culturally associated masculine or feminine norms.[8] A transgender individual presents a unique gender identity that the general public is often ignorant of or misunderstands.[9]

It is important to note that there is no direct causal connection between gender identity and sexual orientation.[10] Gender identity is who one is, whereas sexual orientation describes those to whom one is attracted.[11] Transgender individuals may identify as heterosexual, lesbian, bisexual, gay, queer, and any number of other categories of sexual orientations.[12] Accordingly, when discussing and practicing the law surrounding transgender issues, it is important not only to understand the appropriate terms but also to look to what terms the individual prefers to use when defining himself or

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[5] Amanda S. Eno, Note, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765, 766 (2008) (citing Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 24, 32 (2003) (discussing how society sets out standards for how people should act within their gender category)).

[6] *See generally* TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006).

[7] Francine Tilewick Bazluke & Jeffrey J. Nolan, *"Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity,* 32 J.C. & U.L. 361, 362 (2006).

[8] *Id.*

[9] *Cf.* Transgender Law Ctr., Top 5 Tips for Working with Transgender Clients and Co-Workers, http://transgenderlawcenter.org/pdf/Top%205%20tips%20on%20clients%20and%20co-workers.pdf (last visited Nov. 15, 2009) (stressing the importance of being aware of gender assumptions, using the correct name in all correspondence, and inquiring into medical history and surgery).

[10] Vade, *supra* note 3, at 270; *see also* Ben Lunine, Transitioning Your Services: Serving Transgender Victims of Domestic Violence, Sexual Assault and Stalking, ¶ 5, http://www.transgenderlawcenter.org/pdf/LunineSummer2008.pdf (last visited Dec. 1, 2009).

[11] Vade, *supra* note 3, at 270.

[12] *Id.*

herself as indicative of that person's gender identity.[13]

B. ASYLUM PROCEDURE IN THE UNITED STATES

Asylum law in the United States finds its foundational and substantive support in the United Nations Convention Relating to the Status of Refugees, commonly referred to as the Geneva Convention.[14] Enacted subsequent to the mass shifting of refugees worldwide following World War II, the Geneva Convention has been interpreted by various state actors broadly and in response to a variety of changing circumstances.[15] In 1968, the United States adopted the Protocol to the United Nations Convention Relating the Status of Refugees (U.N. Refugee Protocol), which encompassed the Geneva Convention's basic terms.[16] The United States has subsequently incorporated the U.N. Refugee Protocol's definition of asylum into its body of immigration law.[17] The text of the U.N. Refugee Protocol, therefore, remains the essence of asylum jurisprudence in the United States.[18]

The U.N. Refugee Protocol's definition of refugee, as articulated in section 101(a)(42)(A) of the Immigration and Nationality Act (INA), provides protection to any person who can establish a well-founded fear of being persecuted on

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[13] JOAN M. BURDA, GAY, LESBIAN, AND TRANSGENDER CLIENTS: A LAWYER'S GUIDE, 3 (2008).

[14] Convention Relating to the Status of Refugees, art. 1, *opened for signature* July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (entry into force Apr. 22, 1954); *see also* Monica Saxena, *More Than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims*, 12 MICH. J. GENDER & L. 331, 336 (2006).

[15] Saxena, *supra* note 14, at 336.

[16] United Nations Protocol Relating to the Status of Refugees, art. I § 2, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entry into force Oct. 4, 1967); *see also* DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 2 (3d ed. 1999); Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 187 (2007-2008).

[17] Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (Westlaw 2009); *see also* ANKER, *supra* note 16, at 4. In 1952, the McCarran-Walter bill — passed into law as the Immigration and Nationality Act — consolidated previous immigration laws into one statute. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). Congress later passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at various sections of 8 U.S.C. and 22 U.S.C.). *See generally* Thomas Alexander Aleinikoff et al., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 173-78 (6th ed. 2008).

[18] *See* O'Dwyer, *supra* note 16, at 187.

account of race, religion, nationality, *membership in a particular social group,* or political opinion, is outside the country of his or her nationality, and, due to such fear, is unwilling to avail himself or herself of the protection of that country.[19] "A well-founded fear" involves an assessment based on both subjective and objective elements of the prospective asylee's claim.[20] Therefore, under U.S. immigration law, an applicant may qualify for asylum either because the applicant has suffered past persecution or because he or she has a well-founded fear of future persecution, but only if the applicant can point to a nexus between the persecution and one of the five protected grounds.[21]

Transgender asylum applicants who have been subject to

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[19] Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (Westlaw 2009); *see also* Convention Relating to the Status of Refugees, art. 1, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entry into force Apr. 22, 1954).

[20] United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status, ¶ 1, 8 §§ 37-38, U.N. Doc. HCR/IP/4/ENG/REV (1992), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d58e13b4&query=handbook%20on%20procedures%20and%20criteria%20for%20determining%20refugee%20status. ("Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin. To the element of fear — a state of mind and a subjective condition — is added the qualification 'well-founded.' This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration."). The UNHCR Handbook goes on to explain that "[t]here is no universally accepted definition of 'persecution,' and various attempts to formulate such a definition have met with little success . . . [i]t may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights — for the same reasons — would also constitute persecution." *Id.* at 10 § 51. "Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context." *Id.* at § 53. The UNHCR Handbook has been recognized by the United States Supreme Court as persuasive authority when interpreting the U.N. Refugee Protocol. *See generally* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999); INS v. Cardoza-Fonseca, 480 U.S. 421, 437-39 (1987).

[21] 8 C.F.R. § 208.13(b) (Westlaw 2009): A showing of past persecution creates a presumption of a well-founded fear of persecution, which the government may rebut by a preponderance of the evidence that either country conditions have changed to such a degree that a well-founded fear of future persecution does not exist or that the person could safely relocate within the country of origin; *see also* O'Dwyer, *supra* note 16, at 191.

genuine and violent persecution on account of their sexual identity often do so under the "membership in a particular social group" umbrella. The U.N. Refugee Protocol does not provide a definition of "particular social group." As a result, the courts have had to fashion their own definitions of what constitutes membership in this category.[22] The Board of Immigration Appeals (BIA) stated that a "particular social group" comprises members who possess an immutable characteristic, one that members cannot change or should not be required to change because it is fundamental to their individual identities or consciences.[23] However, this definition is binding only on immigration judges and Department of Homeland Security employees.[24] In *Hernandez-Montiel v. INS,*[25] the United States Court of Appeals for the Ninth Circuit reconciled its "particular social group" definition set forth in an earlier decision with that of the BIA.[26] It is now settled that LGBT applicants who have been persecuted on account of their sexual orientation must satisfy definitions determined under the protected category of "particular social group" in order to satisfy asylum requirements.[27]

C. IMMIGRATION COURT STRUCTURE AND PRECEDENTIAL IMPACT

With the exception of asylum granted by asylum officers, an immigration judge is involved in proceedings for all defensive applications for asylum and withholding of removal

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[22] Christi Jo Benson, Note, *Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society*, 30 WHITTIER L. REV. 41, 54 (2008).

[23] *In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987), *abrogated by* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

[24] 8 C.F.R. § 1003.1(g) (Westlaw 2009).

[25] Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

[26] *Id.* at 1093. After *Acosta*, the Ninth Circuit, in *Sanchez-Trujillo v. INS.,* broadened the *Acosta* requirement of immutability, ruling that "particular social group implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group." Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

[27] Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J 265, 270 (2005).

and also serves as a second review of denials of asylum made by asylum officers.[28] The BIA is the administrative body that hears appeals from the immigration court. Each year the BIA publishes approximately 50 decisions out of the roughly 4,000 cases that it hears.[29] These serve as binding precedents for immigration judges.[30]

If the BIA rules against a claimant, he or she may appeal to the federal court of appeals with jurisdiction over the case.[31] The decisions of a court of appeals are binding on the immigration courts within that court's circuit, as well as on the BIA when it reviews cases that originate in that circuit.[32] If a "court of appeals adopts a different rule than the BIA, the new rule will be applied within that court's circuit in future cases."[33] Consequently, the law applied by the BIA or an immigration judge can differ by federal circuit when there is a split between the circuits or when a particular issue has been decided in one circuit but not another.[34] As a result of the small number of published cases, the even smaller number designated as precedent, and the precedential impact of the courts of appeals on various immigration courts around the country, different definitions and criteria have been established, leading to confusion and at times contradictory immigration adjudications.[35]

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[28] Immigration and Nationality Act § 241(b)(3), 8 U.S.C.A. § 1231 (Westlaw 2009) ([T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.).

[29] Neilson, *supra* note 27, at 267.

[30] STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY (4th ed., 2005) (citing 8 C.F.R. § 1003.1(g) (2004)).

[31] *See* Immigration and Nationality Act § 242(a)(2)(D), 8 U.S.C.A. § 1252(a)(2)(D) (Westlaw 2009).

[32] Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) ("A federal agency is obligated to follow circuit court precedent in cases originating within that circuit.") (citing NRLB v. Ashkenazy Prop. Management Corp., 817 F.2d 74, 75 (9th Cir. 1987) (overruled on other grounds by Parussimovo v. Mukasey, 533 F.3d 1128 (9th Cir. 2008))); *see also* O'Dwyer, *supra* note 16, at 193.

[33] Alan G. Bennett, *The "Cure" That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U.L. REV. 279, 285 (1999).

[34] O'Dwyer, *supra* note 16, at 193.

[35] Neilson, *supra* note 27, at 267. Because of the dearth of published opinions, it is difficult to determine or analyze whether important decisions, and corresponding trends, are occurring within the system. At the BIA level few decisions are released; of

II. ANALYSIS OF THE CURRENT TRANSGENDER PARTICULAR SOCIAL GROUP

While a claim of homosexuality is now an accepted means of establishing membership in a particular social group for asylum purposes, the BIA and the courts of appeals have yet to recognize a claim of transgender or transsexual identity in a similar way.[36] The Ninth Circuit has come the closest to affording protection to transgender applicants by utilizing a specific set of descriptors, without directly stating that those who possess a transgender or transsexual identity constitute a distinct social group for purposes of asylum.[37] Section A of this part discusses attempts by various circuit courts to apply a social group to transgender applicants and the resultant creation of an unnecessarily narrow and arbitrary social group. This is highlighted in Section B by two examples of legal hurdles a prospective transgender applicant might face under current asylum law.

A. THE CREATION OF A SOCIAL GROUP FOR TRANSGENDER APPLICANTS BY THE COURTS OF APPEALS

1. Hernandez-Montiel v. INS: *Beginning to Recognize the Transgender Asylum Applicant*

In 2000, the Ninth Circuit first addressed the case of a transgender asylum applicant, holding in *Hernandez-Montiel*

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these published decisions, the vast majority involve asylum denials. *Id.*; *see also* Leonard Birdsong, *"Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .": The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357, 373-74 (2008) (citing Stuart Grider, *Sexual Orientation as Grounds for Asylum in the United States—In re* Tenorio, *No. A72 093 558 (EOIR Immigration Court, July 26, 1993), 35 HARV. INT'L L.J. 213, 215 (1994).* Moreover, the number of published opinions, including circuit decisions, addressing LGBT issues is minuscule. This creates a system in which it is nearly impossible for the claimant or the immigration judge to discern clear standards necessary to establish a successful asylum claim, and particularly a claim based upon sexual orientation and identity persecution. *See generally* Robert C. Leitner, Comment, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 695-99 (2004).

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

[37] Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 246 (2005).

v. I.N.S. that "gay men with female sexual identities in Mexico" constituted a "particular social group" for the purposes of asylum.[38] Hernandez-Montiel, a Mexican national the court referred to as "Geovanni," realized at the age of eight "that [he] was attracted to people of [his] same sex."[39] Beginning at age twelve, Geovanni began dressing and behaving as a woman.[40] Geovanni faced repeated and consistent abuse and persecution at the hands of both private individuals and government officials.[41] After Geovanni was expelled from school for refusing to change sexual orientation, Geovanni's parents threw Geovanni out of their home.[42] When Geovanni was fourteen years old, police officers forced Geovanni into their car, drove to a deserted area, and forced Geovanni to perform oral sex.[43] Two weeks later, Geovanni was raped by the same officers.[44] Geovanni fled to the United States at age fifteen but was arrested and returned to Mexico several days later.[45] Upon return to Mexico, Geovanni lived with a sister who attempted to "cure" Geovanni's sexual orientation.[46] She enrolled Geovanni in a counseling program, which altered Geovanni's female appearance by cutting Geovanni's hair and nails in a masculine style, and forced Geovanni to discontinue taking female hormones.[47] Geovanni again entered the United States on or around October 12, 1994, and applied for asylum and withholding of deportation within the year.[48]

The Ninth Circuit in *Hernandez-Montiel* expressly held that a "particular social group" is "one united by a voluntary association . . . *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[49] Based on testimony from leading experts in Latin

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[38] Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 2000).
[39] *Hernandez-Montiel*, 225 F.3d at 1087 (brackets in original).
[40] *Id.*
[41] *Id.* at 1088.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Hernandez-Montiel*, 225 F.3d at 1088.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1089.
[49] *Hernandez-Montiel*, 225 F.3d at 1093 (emphasis in original).

American history and culture, Geovanni was able to convince the court of the longstanding persecution of "gay men with 'female' sexual identities in Mexico" by police and other groups within the society.[50] The court stated in a footnote that "Geovanni's brief states that he [sic] 'may be considered a transsexual.'"[51] Despite this, the court went on to state "[w]e need not consider in this case whether transsexuals constitute a particular social group."[52] Nevertheless, the court's ruling in favor of Geovanni signaled a greater inclusiveness for transgender asylum applicants, broadened the Ninth Circuit's definition of "particular social group" and brought it into greater alignment with the BIA's definition.[53] However, by recognizing the particular social group of "gay men with female sexual identities," rather than "transsexuals" it created a particular social group that was unnecessarily limiting and arguably sociologically incorrect as related to Geovanni's sexual orientation.[54]

2. *The Ninth Circuit Continues to Recognize the "Gay Men with Female Sexual Identities" Particular Social Group*

The broadened definition of "particular social group" under which an asylum seeker could apply was upheld in two later Ninth Circuit decisions, *Reyes-Reyes v. Ashcroft*[55] and *Ornelas-Chavez v. Gonzales*.[56] In *Reyes-Reyes*, the court affirmed its recognition of a "homosexual male" with a "deep female identity" by overturning the lower court's removal order for the

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[50] *Id.* at 1089.

[51] *Id.* at 1095 n.7. The court then defined a transsexual as "a person who is genetically and physically a member of one sex but has a deep-seated psychological conviction that he or she belongs, or ought to belong, to the opposite sex, a conviction which may in some cases result in the individual's decision to undergo surgery in order to physically modify his or her sex organs to resemble those of the opposite sex." *Id.* (citing Deborah Tussey, Annotation, *Transvestism or Transsexualism of Spouse as Justifying Divorce*, 82 A.L.R.3d 725 n. 2 (1978)).

[52] *Hernandez-Montiel*, 225 F.3d at 1095 n.7.

[53] *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985) (defining "particular social group" to "mean persecution that is directed toward an individual who is a member of a group of person all of whom share a common, immutable characteristic").

[54] The *Hernandez-Montiel* court did not directly discuss what Geovanni's sexual orientation was, rather, it automatically ascribed "homosexual" to him without any discussion.

[55] Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004).

[56] Ornelas-Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006).

Salvadoran transgender petitioner.[57] Reyes-Reyes was ineligible for asylum because the application was filed after the one-year deadline.[58] However, Reyes-Reyes was eligible for relief under two "withholding of removal" statutes, both of which have requirements similar to those of an asylum application.[59] Although the court used the male pronoun "he" when referring to the applicant, it included the term "transsexual" in a footnote, which affirmed the term Reyes's counsel used throughout the proceeding.[60] The court stated, "[w]e note, however, that Reyes's sexual orientation, for which he [sic] was targeted, and his [sic] transsexual behavior are intimately connected."[61]

While the decision affirmed the expansive definition of "particular social group" the Ninth Circuit continues to apply to prospective transgender asylum seekers,[62] it does not go far enough. The *Reyes-Reyes* court unnecessarily interrelated Reyes's sexual orientation and transsexual identity and refused to accurately recognize Reyes's female identity,[63] despite the fact that, according to the court, she had transitioned prior to the proceeding. Instead, the court described Reyes-Reyes throughout the opinion as a "homosexual male," without any discussion of whether Reyes-Reyes actually identified as homosexual while simultaneously acknowledging that Reyes-

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[57] *Reyes-Reyes*, 384 F.3d at 785, 789.

[58] *Id.* at 786-87.

[59] *Id.* at 787-89. First, Reyes-Reyes was eligible for withholding of removal under the Convention Against Torture, which creates a mandatory prohibition against returning someone to a country if "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (Westlaw 2009). Reyes-Reyes was also eligible for withholding of removal under Immigration and Nationality Act § 241 (b)(3), 8 U.S.C.A. § 1231(b)(3) (Westlaw 2009), under which he could not be removed if his "life or freedom would be threatened." IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 383 (10th ed. 2006) (citing Article 33 of the Protocol).

[60] *Reyes-Reyes*, 384 F.3d at 785 n.1.

[61] *Id.*

[62] Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 LAW & SEXUALITY 59, 70 (2006) (citing *Reyes-Reyes,* 384 F.3d at 787).

[63] *Reyes-Reyes*, 384 F.3d at 785 n.1. The court interconnected Reyes-Reyes's sexual identity and sexual orientation despite noting that "[a]s we have recognized, it is well-accepted among social scientists that '[s]exual identity is inherent to one's very identity as a person. . . . Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance.'" *Id.* (quoting Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000)).

Reyes did *not* identify as a "male."

In *Ornelas-Chavez*, the Ninth Circuit upheld its earlier recognition of gay men with female sexual identities, again providing protection to a transgender woman under this narrow and misleading descriptor.[64] Ornelas-Chavez, a Mexican national, was beaten and raped on several occasions by male family members, and then shunned by family throughout childhood and early adolescence.[65] Ornelas-Chavez reported the sexual abuse to a teacher who, rather than notify the authorities, responded that she "shouldn't do that because only homosexuals did that."[66] After arrest and detention by the local police chief, who was trying to "teach" Ornelas-Chavez "to behave," Ornelas-Chavez was told that the detention would be extended if the police chief "found out again he [sic] was sexually involved with men."[67] At a later date, two of Ornelas-Chavez's homosexual acquaintances were killed by the police.[68] The men were found stabbed to death with sticks inserted in their rectums.[69] Ornelas-Chavez later moved to another part of Mexico and resided there for five years without significant harm.[70] However, then Ornelas-Chavez's father arrived unexpectedly, attacked her, and broke her nose with a bottle.[71] Ornelas-Chavez then fled Mexico for the United States.[72]

The immigration judge and BIA denied asylum, on the basis that a six-hour detention did not constitute persecution.[73] The remaining claims of persecution failed because Ornelas-Chavez failed to report them to government authorities.[74] The Ninth Circuit ultimately reversed and remanded the case, holding that Ornelas-Chavez was not required to report the persecution if caused by a private party the government was unwilling or unable to control.[75] Although the decision did not

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[64] Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1056 (9th Cir. 2006).

[65] *Id.* at 1054.

[66] *Id.*

[67] *Id.* (first "[sic]" in original).

[68] *Id.*

[69] *Id.*

[70] *Ornelas-Chavez,* 458 F.3d at 154-55.

[71] *Id.* at 1055.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Ornelas-Chavez*, 458 F.3d at 1058 (stating that an applicant who seeks to establish withholding of removal "on the basis of past persecution at the hands of

discuss the claimant's sexual orientation directly, the court stated that "[w]hether Ornelas-Chavez belongs to a protected social group [was] not at issue in this appeal," referring to the "gay men with female sexual identities in Mexico" social group that was affirmed in *Hernandez-Montiel*.[76] Both the *Reyes-Reyes* and *Ornelas-Chavez* decisions indicate recognition by the Ninth Circuit of a particular social group as applied to transgender applicants. However the Ninth Circuit has consistently limited this group to "gay men with female sexual identities" from Latin America.

3. Morales v. Gonzales: *Recognition of a Transsexual Asylum Applicant*

The 2007 decision of *Morales v. Gonzales*[77] marked the Ninth Circuit's first use of the term "transsexual" in the body of an immigration decision, referring to the asylum applicant as a "male-to-female transsexual."[78] Morales, a Mexican national, was identified at birth as male and began using a female identity at age fourteen because "she always felt that she was more of a female than a male."[79] During her hearing, Morales claimed she was raped by her brother at a young age and on several other instances occasions by other individuals.[80] Morales also stated that she was arrested several times for dressing as a woman.[81] The facts indicate that Morales returned to Mexico once to receive breast implants and that she has since feared returning to Mexico because "she is 'more' of a woman now," and as a result, was more likely to be assaulted in Mexico.[82]

Morales invoked her asylum claim as a defensive strategy against charges by Immigration and Customs Enforcement that she was an alien present in the United States who has not

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private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse").

[76] *Id.* at 1056.

[77] Morales v. Gonzales, 478 F.3d 972, 975 (9th Cir. 2007).

[78] *Morales*, 478 F.3d at 975.

[79] *Id.* at 976.

[80] *Id.*

[81] *Id.*

[82] *Id.*

been admitted or paroled[83] and she was removable because she was convicted of communication with a minor for immoral purposes, a crime of moral turpitude.[84] Consequently, the court did not have to determine Morales's particular social group, as her crime ultimately made her ineligible for asylum.[85] Interestingly, the court mentioned the immigration judge's inquiry into the Mexican government's position on transgender people and made a determination that, "but for Morales's conviction for communication with a minor for immoral purposes, [the immigration judge] would have found her eligible for asylum under *Hernandez-Montiel v. INS*."[86] However, in marked distinction from *Hernandez-Montiel*, there was no identification of Morales as a gay man with a female identity, either by the court or by Morales herself. Rather, the court expressly referred to her as a male-to-female transsexual, noted that she had had breast-implant surgery, and referred to her using the feminine pronoun.[87]

Based on the finding that Morales was ineligible for asylum and withholding of removal, the Ninth Circuit was able to sidestep the implications of Morales's transsexual identity and her asylum application based on a well-founded fear of persecution.[88] However, if the case had rested solely on Morales's membership in a particular social group, the court would have been forced to determine whether Morales's identity was legally and sociologically appropriate under the established *Hernandez-Montiel* particular social group.

The aforementioned cases highlight the unnecessarily limited definition of "particular social group" as the

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[83] *Morales*, 478 F.3d at 977; *see also* Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C.A. § 1182(a)(6)(A)(i) (Westlaw 2009).

[84] Immigration and Nationality Act § 212(a)(2)(A)(i)(I), 8 U.S.C.A. § 1182(a)(2)(A)(i)(I) (Westlaw 2009).

[85] *Morales*, 478 F.3d at 984. The Ninth Circuit remanded the asylum and withholding of removal claims because the immigration judge erroneously relied on facts pertaining to a crime of which Morales was not convicted. *Id.* at 984-85.

[86] *Id.* at 977, 984.

[87] *Id.* at 975-76.

[88] *Id.* at 985. The Ninth Circuit determined the immigration judge applied an incorrect legal standard in determining that Morales was ineligible for Convention Against Torture (CAT) relief and remanded for further proceedings. The CAT does not require that the persecution be on account of one of the five protected grounds. 8 C.F.R. § 208.16(c) (Westlaw 2009). The CAT was ratified by the United States Senate under the Foreign Affairs Reform and Restructuring Act of 1998, as implemented by section 2242. See Pub. L. No. 105-277, 112 Stat. 2681, 2681-821 (1998).

"homosexual male with female identity" that has been applied to transgender applicants with varying gender and sexual orientation identifications. It is notable that there was no indication the Ninth Circuit made any attempt to determine the applicants' sexual orientation. Instead, the court defaulted to the descriptor "homosexual male," despite the fact that the applicants may have identified as heterosexual females.

B. NEGATIVE CONSEQUENCES OF THE *HERNANDEZ-MONTIEL* APPROACH FOR TRANSGENDER APPLICANTS

1. The "Conduct vs. Identity" Distinction

While great strides have been made for homosexual asylum applicants, significant gaps remain that may have a troubling effect upon transgender applicants. The test for "particular social group" rightly remains contextual and fluid. However, *In re Toboso-Alfonso* established that the requirement of membership in a particular social group focuses on identity to the exclusion of conduct.[89] Consequently, as asylum law currently stands, only persecution on the basis of identity (not conduct that reflects identity) merits protection.[90] This "conduct versus identity" distinction has particular consequences for the transgender applicant who may not identify as homosexual and thus has not engaged in "homosexual" acts. Two recent cases that highlight this distinction are *Kimumwe v. Gonzales*[91] and *Maldonado v. Attorney General of the United States.*[92] Although neither of these cases involves a transgender or transsexual applicant, they present analogous issues and difficulties that a transgender applicant would face under a court's scrutiny and analysis.

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[89] Pfitsch, *supra* note 61, at 70; *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 994 (4th ed. 2005) (stating that *Alfonso-Toboso* established that a claimant could be persecuted solely for being homosexual, as distinguished from engaging in homosexual acts).

[90] Pfitsch, *supra* note 61, at 70 ("As the law currently stands, an LGBT immigrant persecuted on the basis of her homosexual conduct may not be granted asylum if she does not sufficiently identity as LGBT or if her persecution is rooted in laws regulating sexual activity rather that focusing on sexual identity.").

[91] Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005).

[92] Maldonado v. Attorney Gen. of U.S., 188 F. App'x 101 (3d Cir. 2006).

In *Kimumwe*, the Eighth Circuit upheld the immigration judge and BIA's finding that the applicant was punished for his improper sexual conduct, rather than his sexual orientation.[93] Kimumwe was expelled from secondary school in Zimbabwe at the age of twelve for having sexual relations with another male student.[94] Later, Kimumwe and another male student, a sixteen-year-old whom Kimumwe claimed to be in love with, got drunk together and had sex.[95] After the other boy complained to authorities about the incident, Kimumwe was arrested and detained by the police, ostensibly under a sexual-assault charge, although the jailer indicated it was because of Kimumwe's homosexuality.[96] Kimumwe was detained for two months, charged with sodomy and sexual assault, and released only after prison officials were bribed.[97] The immigration judge found that Kimumwe's problems in Zimbabwe "were not based simply on his sexual orientation, but instead resulted [from] his engaging in prohibited sexual conduct."[98]

The Eighth Circuit held the immigration judge and BIA's distinction between identity and conduct was justified.[99] The court stated that since any sexual conduct between students was illegal, Kimumwe would have been expelled whether Kimumwe had sex with a boy or a girl.[100] The court affirmed the immigration judge's finding that "the actions of Zimbabwean authorities in these instances were not based on Kimumwe's sexual orientation, but rather on Kimumwe's involvement in prohibited sexual conduct."[101] The Eighth Circuit also cited to the immigration judge's finding that Kimumwe presented no objective evidence to confirm his homosexuality.[102] Although the majority focused on the police statement, which stated that the alleged sexual misconduct was the basis for Kimumwe's arrest, there was no evidence in the record that indicated whether the other boy, who was not

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[93] *Kimumwe*, 431 F.3d at 323.
[94] *Id.* at 322.
[95] *Id.* at 321.
[96] *Id.*
[97] *Id.*
[98] *Id.* (brackets in original).
[99] *Kimumwe*, 431 F.3d at 322.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 321.

gay, was arrested or charged with any sexual misconduct.[103] Further, the majority ignored the fact that the political and social climate in Zimbabwe at the time was blatantly hostile toward homosexuals.[104] In a well-reasoned dissent, Justice Heaney disputed the immigration judge's finding that Kimumwe was not a homosexual and that he "was not punished because of his status as a homosexual, but rather because of the apparently coercive circumstances in which he engaged in sexual activity."[105]

The reasoning behind the Eighth Circuit's holding is disconcerting, particularly because individuals persecuted for one of the other established categories are not held to the same exacting standard of proving their identity. For instance, a claim of religious persecution would not be opposed or denied on the ground that the persecution is solely for praying or attending services; instead, the persecution would be treated as being on account of the individual's belonging to a particular religion.[106] Yet this "conduct versus identity" distinction is applied to the detriment of homosexual applicants.[107]

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[103] *Id.* at 322.

[104] As Judge Heaney wrote in his dissent:

> In 1995, [President] Mugabe publicly referred to gays as 'sodomites and perverts' and declared that homosexual people had 'no rights at all.' Mugabe's anti-gay rhetoric became stronger soon thereafter, attacking Britain's tolerance of homosexuals, [who] Mugabe believed were 'worse than dogs and pigs.' In speeches, Mugabe has promised that Zimbabwe will do 'everything in its power' to combat homosexuality and has described homosexual relations as 'an abomination and decadence.' Mugabe remains in power today.

Id., 431 F.3d at 324 (Heaney, J., dissenting) (citations omitted).

[105] The immigration judge stated that Kimumwe presented no objective evidence to confirm his homosexuality, despite the fact that Kimumwe testified he was openly gay and realized he was gay at seven years old. *Kimumwe*, 431 F.3d at 323-24.

[106] O'Dwyer, *supra* note 16, at 196.

[107] *Id.*; *see also* Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (overturning the immigration judge's finding and BIA's affirmance that denied asylum to a Lebanese homosexual with AIDS on the basis of the conduct versus identity distinction). The Ninth Circuit found significant problems with the Attorney General's argument that "the future persecution Karouni fears would not be on account of his *status* as a homosexual, but rather on account of him committing future homosexual *acts*." *Karouni,* 399 F.3d at 1172 (emphasis in original). Similarly, the Court quoted part of the immigration judge's oral decision, which stated that "[t]here has been evidence to show that individuals are prosecuted for homosexual conduct. [But t]here has been no evidence that mere homosexuality is against the law in Lebanon." *Id.* In overturning the immigration judge and BIA, the Ninth Circuit held there can be "no appreciable difference between an individual, such as Karouni, being persecuted for being a homosexual and being persecuted for engaging in homosexual acts." *Id.* at

In contrast to *Kimumwe*, the Third Circuit, in *Maldonado v. Attorney General of the United States*,[108] took a different approach to the BIA and immigration judge's arbitrary "conduct versus identity" distinction. Maldonado, an Argentinean applicant, was repeatedly harassed and detained by police over twenty times during the course of several years, often while leaving gay clubs.[109] In one incident, the police detained Maldonado for over six hours, during which he was told by the police that "you faggots deserve to die" and "you need a hot iron bar stuck up your ass."[110] Both the immigration judge and the BIA adopted the government's contention that, while the allegations may be true, they were not inflicted "on account of" his membership in a particular social group, but instead on account of his leaving gay clubs late at night, acts that the applicant was free to modify.[111] The Third Circuit overturned the IJ and BIA's ruling, finding it was "a distinction without a difference. The fact that Maldonado was targeted by the police only while engaged in an elective activity does not foreclose the possibility that he was persecuted on account of his membership in a particular social group."[112] The Third Circuit remanded the case to the BIA for further review.[113]

Kimumwe and *Maldonado* illustrate the illusory distinction that courts continue to make when adjudicating asylum applications for persecution on account of homosexual conduct, rather than identity, in order to justify denials of relief to lesbian, gay, bisexual, and transgender applicants. This arbitrary differentiation is not applied to protection sought by claimants who are not sexual minorities.[114] In the cases discussed above, at least petitioners Kimumwe and Maldonado could claim membership in a protected social group, homosexuals, to bolster their claim. This holds potentially serious consequences for transgender applicants, as they may not identify as either lesbian or gay. Consequently, while they may engage in what others would identify as homosexual acts,

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1173.

[108] Maldonado v. Attorney Gen. of U.S. 188 F. App'x 101 (3d Cir. 2006).

[109] *Id.* at 103.

[110] *Id.*

[111] *Id.* at 104; *see also* O'Dwyer, *supra* note 16, at 203.

[112] *Maldonado*, 188 F. App'x at 104.

[113] *Id.* at 105.

[114] O'Dwyer, *supra* note 16, at 196.

their identity may be heterosexual, thus calling into question their protection under the accepted particular social group, homosexual.

2. Imputed Gay Identity

To address the conduct and identity distinction discussed above, critics have encouraged transgender applicants to take advantage of the "imputed gay identity" theory, in which the homosexual label has been applied by the persecutors instead of the applicant individual.[115] This would allow transgender applicants to prove their cases without necessarily having to establish that their persecutors targeted them because of their transgender identity.[116] As Joseph Landau points out, "[a]dvancing the imputed gay identity theory has the advantage of placing transgender asylum seekers into a category of persons already deemed eligible for 'particular social group' status as opposed to having to persuade a fact-finder that transgender persons organically constitute a particular social group."[117]

The conceptual underpinnings of the "imputed gay identity" theory are found in *Amanfi v. Ashcroft*,[118] a Third Circuit decision from 2003. Amanfi, a Ghanaian man, claimed persecution by members of a cult and by the Ghanaian police, both of which viewed him as a homosexual, although Amanfi did not identify as a homosexual.[119] Amanfi claimed he was approached by several men, claiming to be police, who drove him to an isolated area and locked him in a room.[120] However, the men were not police but "macho men," essentially private security guards hired by individuals to settle disputes.[121] The men told Amanfi that his father was murdered and that a similar fate would befall him.[122]

Amanfi believed the men planned to offer him as part of a

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[115] Landau, *supra* note 36, at 258.
[116] Neilson, *supra* note 27, at 288.
[117] Landau, *supra* note 36, at 258.
[118] Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).
[119] *Id.* at 721.
[120] *Id.* at 723.
[121] *Id.*
[122] *Amanfi*, 328 F.3d at 723.

human sacrifice.[123] Based on this belief, and on an understanding that the cult believed homosexuals were not suitable for human sacrifice, Amanfi engaged in a homosexual act with another man kept captive by the "macho men."[124] When they were discovered, Amanfi and the other man were severely beaten before being brought to the police, who informed the public that Amanfi was a homosexual.[125] Amanfi claimed the police beat him daily for nearly two months until he was able to escape from captivity.[126] Amanfi did not identify himself as a homosexual.[127] Nevertheless, his captors imputed his homosexual conduct into a homosexual identity and persecuted him based on this belief.[128] Amanfi argued that his claims should be analyzed from the perspective of him *imputed* status as a homosexual rather than *actual* membership in this social group.[129]

The BIA reasoned that Amanfi could not qualify as a member of the homosexual social group because he testified that he was not in fact a homosexual.[130] The BIA opined that extending the imputed political opinion rationale to imputed sexual orientation status was "without any legal precedent."[131] The Third Circuit reversed the BIA, holding imputed identity on account of perceived sexual orientation was legally sufficient.[132] The Third Circuit found that Amanfi's claim of imputed membership in a particular social group, homosexuals,[133] was consistent with other circuit opinions discussing imputed political opinion, [134] as well as precedential

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[123] *Id.*

[124] *Id.*

[125] *Amanfi*, 328 F.3d at 723.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 724.

[130] *Amanfi*, 328 F.3d at 724.

[131] *Id.*

[132] *Id.* at 719.

[133] *Id.* at 729.

[134] *Amanfi*, 328 F.3d at 729 n.4 (citing Al Najjar v. Ashcroft, 257 F.3d 1262, 1289 (11th Cir. 2001) (acknowledging that proof of an imputed political opinion would have qualified as persecution "on account" of political opinion under Immigration and Nationality Act); Morales v. INS, 208 F.3d 323, 331 (1st Cir. 2000) ("There is no doubt that asylum can be granted if the applicant has been persecuted or has a well-founded fear of persecution because he is erroneously thought to hold a particular political opinion."); and Lwin v. INS, 144 F.3d 505, 509 (7th Cir. 1998) ("One way that an

BIA cases and administrative regulations and letters.[135] Consequently, for the first time, a claim of imputed homosexual status based on the persecutor's beliefs was recognized by a court without regard to the applicant's actual sexual orientation.

Many countries have no concept of "transgender," resulting in the perception that all gender non-conforming behavior is synonymous with homosexuality.[136] When the persecutory act relates to the victim's sexual orientation, the imputed gay identity may afford transgender individuals a pathway to asylum. Under current U.S. asylum law, the claimant must not only show a well-founded fear of persecution but must also produce corroborating evidence that the persecutor's intent was premised upon a belief about his or her sexual orientation.[137] While the doctrine of imputed gay identity may provide a viable avenue of relief for transgender applicants, it is not clear whether claims based on imputed membership in other particular social groups would be successful.[138] In the case of adjudicators who do not understand the distinction between gender identity and sexual orientation, this may lead to unpredictable results. For instance, if persecutors attacked a heterosexual transgender woman solely for exhibiting traits that fall outside the gender norms in that country (and not for being perceived as a homosexual woman), then she has not been persecuted for homosexuality, imputed or not. Under the *Hernandez-Montiel* particular social group, as well as the imputed gay identity, she would be left without an established

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applicant can establish 'political opinion' under the INA is to show an imputed political opinion.")).

[135] 65 Fed. Reg. 76588, 76597-98 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208.15(b)) (An asylum applicant must demonstrate membership in one of the five protected categories (race, religion, nationality, membership in a particular social group or political opinion) or "on account of what the persecutor perceives to be the applicant's race, religion, nationality, membership in a particular social group, or political opinion."). At present, these regulations have not yet been promulgated. *See also* INS General Counsel Opinion Letter, Genco Op. No. 93-1, 1993 WL 1503948 (INS) ("Persecution inflicted because the persecutor erroneously imputes to the victim one of the protected characteristics set forth in Section 101(a)(42) can constitute persecution 'on account of' that characteristic for the purposes of asylum or refugee analysis.").

[136] Landau, *supra* note 37, at 261.

[137] INS v. Elias-Zacarias, 502 U.S. 478, 482-84 (1992) (holding that an asylum applicant must provide some direct or circumstantial proof of persecutor's motive).

[138] Neilson, *supra* note 27, at 285-86.

means of redress under current asylum law.[139]

III. THE TRANSGENDER IDENTITY AS A DISTINCT PARTICULAR SOCIAL GROUP FOR PURPOSES OF ASYLUM

The creation of a "transgender" particular social group as distinct from the previously identified "gay men with female sexual identities" serves the purposes of being more inclusive to the broad array of transgender identities. Currently, this particular social group accounts for a narrow subset of people persecuted on account of their sexual identity and orientation. In comparison, if a heterosexual female with a deep male identity is subject to persecution, the court would have to create a new particular social group to accurately reflect this identity. The same would be true for an asexual male with a female identity. These claims can be made simpler by adopting a single social group to which they all belong: the transgender particular social group.

Instead of requiring an applicant to prove the intent of the persecutor and to then produce corroborating evidence of the imputed identity, courts should recognize that persecution "on account of" a transgender or transsexual identity satisfies the requirements for establishing asylum. If the BIA established by precedent that transgender identity was part of an established particular social group, it would not be necessary for applicants to circuitously prove the erroneous sexual orientation their persecutor attributed to them, thus making the burden of proof in an asylum case more accessible for transgender applicants.

A potential criticism of the creation of a transgender particular social group is that it would lead to a flood of fraudulent claims.[140] It is impossible to refute or affirm this

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[139] *Id.* at 281 n.102 (stating that a person who put forward a claim based on homosexual orientation who did not consider himself or herself to be a homosexual could be considered a "frivolous" claim. A "frivolous" claim is defined as an application in which "any of its material elements is deliberately fabricated."). *Id.* (citing 8 C.F.R. § 208.20 (West 2008)). Following the same logic, the court could make a frivolous finding against an individual who filed a claim for persecution on account of "imputed homosexuality" if the claimant could not show that the persecutor was motivated to persecute because of his or her erroneous perception.

[140] Lauren Smiley, *Border Crossers*, SF WEEKLY, Nov. 26, 2008, at 13, *available at* http://www.sfweekly.com/2008-11-26/news/border-crossers/1 (citing Dan Stein, president of the Federation for American Immigration Reform, a national organization

criticism, as the United States Citizenship and Immigration Service does not break down its general asylum statistics according to the basis of the claim.[141] Accordingly, there are no official statistics to indicate the number of sexual orientation or gender identity asylum claims filed or approved.[142] Another criticism is that a "transgender social group" might be "mired in obfuscation and ambiguity."[143] Perhaps in response to these criticisms, the courts have rejected claims for asylum on the rationale that the persecution claimed is too prevalent or the proposed social group is too broad.[144] For example, the Ninth Circuit has avoided "sweeping categories"[145] and has suggested that social groups should be "readily identifiable."[146]

In turn, asylum applicants have proposed a broad range of group definitions, using descriptors to fit within the contours of a social group that is narrow and "readily identifiable."[147] However, once a narrow and descriptive particular social group is developed, it has the problematic outcome of creating a checklist for judges seeking a particular type of trait on the part of the applicant before recognition of his or her membership.[148] As society in the United States often conflates

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aimed at curbing illegal immigration).

[141] Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Claims*, 15 LAW & SEXUALITY 135, 141 (2006).

[142] *Id.* at 142, n.38 ("One estimate indicates that over the five year period from 1994 to 1999, which spans the inclusion of homosexuals as a 'particular social group,' the Attorney General 'granted asylum to about 300 gays and lesbians.'") (citing Denise C. Hammond, *Immigration and Sexual Orientation: Developing Standards, Options, and Obstacles*, 77 NO. 4 INTERPRETER RELEASES 113, 118 (Jan. 24, 2000)).

[143] Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 505 (2002) (describing decisions following *Toboso-Alfonso* and questioning whether persons with a disfavored sexual orientation can constitute a "particular social group").

[144] B.J. Chisholm, Comment, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 HOW. L.J. 427, 441 (2001).

[145] *Id.* (citing Sanchez-Trujillo v. INS, 801 F.2d 1571, 1573 (9th Cir. 1986)).

[146] *Id.* (citing Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (9th Cir. 2000)).

[147] *Id.* at 432-33 (citing Matter of R-A-, 24 I. & N. Dec. 629, 630, Interim Decision 3624 (B.I.A. September 25, 2008) ("Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."); Matter of Kasinga, 21 I. & N. Dec. 357, 358 (BIA 1996) ("young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice.")).

[148] *Cf.* Morgan, *supra* note 140, at 154 (arguing that immigration judges make decisions based on racialized sexual stereotypes and culturally specific notions of homosexuality, thus discriminating against those who do not conform).

gender and sexual identity, transgender individuals face a heightened struggle with stereotypes in asylum proceedings.[149] Accordingly, this could lead to arbitrary and erroneous decisions made on the basis of stereotypes and misconceptions.[150] For example, an immigration judge could encounter a transgender male claimant who has not yet begun taking testosterone or other hormone injections and has not had surgery to remove his breasts for fear of persecution, yet has always felt he was more male than female. As the asylum adjudicators mirror the misconceptions of society, the result is that a transgender person might be stigmatized both for being transgender and then as a homosexual, even though the transgender applicant may identify as heterosexual.[151] Accordingly, education and training of adjudicators on the fluidity of the gender identity is critical.[152]

Judicial precedent forces a transgender applicant who is not homosexual to adjust the contours of his or her claim so as to fall within the established *Hernandez-Montiel* social group.[153] This places an unfair burden on the applicant. The solution is for the BIA and the courts of appeals to hold that transgender people form a particular social group, thus creating a more inclusive social group that recognizes the fluid gender/sex dichotomy.[154] In fact, one commentator has suggested that "the relevant social group could be framed as 'individuals born with one anatomical sex who believe their

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[149] Benson, *supra* note 22, at 57 (citing Natl. Ctr. for Transgender Equal. & Transgender L. Ctr., The Real ID Act: Bad Law for Our Community [¶. 7], http://www.realnightmare.org/images/File/NCTE%20realid.pdf).

[150] Morgan, *supra* note 140, at 154 (positing that adjudicators' own narrow understanding of sexual identity encourages fraudulent sexual orientation claims because typical questions posed to determine if an applicant is "really gay" reveal unconscious adherence to sexual stereotypes).

[151] *Id.* (citing PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 8 (2000), *available at* http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf).

[152] *Id.* at 159-60. (Training would provide "concrete, factual reference information on the various ways in which sexuality is expressed around the world, as well as developing methods by which judges could assess whether they were employing stereotypes in their decision making.").

[153] Neilson, *supra* note 27, at 276 ("There is no precedent directly addressing asylum based solely on transgender identity.").

[154] *Id.* at 277 (stating that although most transgender individuals do not find their sex or gender to be immutable, the debate surrounding the rigidity of gender and sex should not preclude a finding that transgender identity can form the basis of membership in a particular social group).

anatomical sex does not match their gender.'"[155]

An illustrative example of this type of recognition is the limited advances the federal courts have made in extending protection to transgender victims of employment discrimination on account of gender. While rare, they are indicative of the advances courts are making toward full recognition of the transgender identity. However, one distinction from asylum decisions is that the courts are accurately describing claimants as transgender or transsexual and, in some cases, affording them relief based on this recognition, rather than applying a multitude of qualifiers. Several courts have given an expansive interpretation of what constitutes gender discrimination, based, in part, on the reasoning behind the United States Supreme Court's 1989 decision *Price Waterhouse v. Hopkins*.[156] In that decision the Court addressed harassment directed at a woman who did not conform to traditional gender stereotypes, holding that Title VII's[157] reference to "sex" encompassed both the biological differences between men and women and gender discrimination based on a failure to conform to stereotypical gender norms.[158]

The Ninth Circuit was the first to adopt a broad interpretation of "sex" in deciding *Schwenk v. Hartford*.[159] Although the case did not involve Title VII, the court nevertheless concluded that a transgender plaintiff could prove sex-harassment was discrimination by showing that the harasser's conduct was motivated by a belief that the plaintiff failed to conform to gender stereotypes.[160] The First Circuit has

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[155] *Id.*

[156] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine).

[157] 42 U.S.C.A. § 2000e-2(a) (Westlaw 2009) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

[158] *Price Waterhouse,* 490 U.S. at 250-51.

[159] Schwenk v. Hartford, 204 F.3d 1187, 1200 (9th Cir. 2000) (protection under the Gender Motivated Violence Act extends to transsexuals).

[160] *Id.* at 1202; *see also* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (extending *Schwenk* and holding that claimant had claim under Title VII based on comments made by male co-workers and supervisor, repeatedly reminding claimant that he did not conform to their gender-based stereotypes, by referring to him

also afforded transgender claimants protection outside the employment context, by reinstating an Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in masculine attire.[161]

The Sixth Circuit has gone the furthest in affording protection to transgender claimants by explicitly stating that Title VII protected transgender employees. In *Smith v. City of Salem, Ohio*,[162] the court held that discrimination against a transgender person who failed to act in accordance with his anatomical sex was no different than the discrimination faced by the plaintiff in *Price Waterhouse*.[163] The court held that the use of labels such as "transsexual" or "homosexual" would not affect claims by plaintiffs alleging discrimination because of their gender nonconformity.[164] In addition, several district courts have impliedly or explicitly held that Title VII extends protection to transsexuals.[165]

It should be noted that most circuits continue to deny protection to transgender applicants alleging discrimination on the basis of "sex." However, some courts are beginning to acknowledge that transgender individuals constitute a legitimate demographic and are entitled to protection under

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as "she" and "her.").

[161] Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).

[162] Smith v. City of Salem, 369 F.3d 912 (6th Cir. 2004) (*amended & superseded* by Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

[163] Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); *see also* Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (affirming the *Smith* decision by holding that discrimination against a transgender woman based on a person's gender non-conforming behavior is impermissible discrimination under Title VII); Myers v. Cuyahoga County, 182 F. App'x 510, 519 (6th Cir. 2006) (holding that "Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender").

[164] Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); *see also* Shannon H. Tan, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need To Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 591 (2008).

[165] *See* Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding that "[t]ranssexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extend that they are discriminated against on the basis of sex."); Schroer v. Billington, 424 F. Supp. 2d 203, 205 (D.D.C. 2006) (holding that a male-to-female transsexual plaintiff was "not seeking acceptance as a man with feminine traits," but rather wanted acceptance to express her identity as a female, not as a feminine male).

this identity.[166] Courts adjudicating asylum petitions should do the same. While claimants in the asylum context are arguably afforded relief more consistently than those seeking protection within the federal employment-discrimination context, the immigration courts do so by automatically ascribing a "homosexual" identifier to those claimants.

IV. CONCLUSION

As case law currently stands, transgender asylum applicants have only a narrowly defined particular social group, generally that of homosexual men with female identities from Latin America, that they may use as a basis of protection from persecution. However, these finite descriptors have the potential to preclude a successful claim if the applicant does not satisfy one of the criteria. Although one has to hope that the BIA or a court of appeals would liberally extend the same protection afforded the petitioner in *Hernandez-Montiel* to, say, a transsexual female-to-male from Eastern Europe,[167] existing decisions would not force this outcome, and courts could far too easily distinguish those circumstances from those found in previous decisions.

While gender-nonconforming individuals have won some legal battles in the past few years, namely by courts beginning to acknowledge a broadened concept of sex and gender, the courtroom continues to be a daunting forum for gender-nonconforming people to seek asylum. Recent Ninth Circuit opinions recognize that transgender individuals constitute a legitimate minority who are being persecuted because of gender variances. However, without express affirmation by the BIA or the federal courts of appeals that the transgender identity constitutes a distinct and particular social group for purposes of asylum,[168] transgender and transsexual individuals are forced to subsume themselves into discrete and established social groups that have been accorded recognition by the courts. Requiring applicants to do so commits further violence

[166] Eno, *supra* note 5, at 790.

[167] At present there is a dearth of case law concerning female-to-male transgender applicants, whether straight or gay-identified. *See generally* Landau, *supra* note 36, at 263 ("One drawback is the one-sidedness of the Ninth Circuit's rulings, which fail (at least for now) to protect female-to-male transgender persons.").

[168] Neilson, *supra* note 27, at 274.

on an already-persecuted identity. The ethical principles of the asylum system were designed to afford protection to those most marginalized. This inclusive system is fluid and contextual, and thus courts are able to adjust the concept of a "particular social group" to legally and sociologically align the applicant with an appropriate group. Transgender applicants are not seeking special protection, but rather equal protection under the law. Consequently, the courts should broaden their existing transgender social group and create one that accounts for varying transgender and transsexual identities.

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