

Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum

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NOTE

“UNIQUE IDENTITIES AND VULNERABILITIES”: THE CASE FOR TRANSGENDER IDENTITY AS A BASIS FOR ASYLUM

Adena L. Wayne†

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INTRODUCTION

On September 3, 2015, the U.S. Court of Appeals for the Ninth Circuit suspended the deportation of a transgender Mexican woman because the Board of Immigration Appeals (BIA or Board) had failed to consider the “unique identities and vulnerabilities” of transgender women in Mexico.¹ The BIA had instead looked to recent, increased legal protections in Mexico for gay, lesbian, and bisexual individuals.² Accordingly, the BIA had determined that the defendant, Edin Carey Avendano-Hernandez, would not face sufficient danger upon her return to Mexico to warrant relief under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³ The Ninth Circuit reversed in part and remanded the case for a grant of relief under CAT because conditions in Mexico for transgender people continue to be exceedingly dangerous.⁴

While the BIA’s determination may seem like mere ignorance regarding the nuances of sexual orientation and gender identity, there may be more behind this confusion. For over a decade, courts, particularly the Ninth Circuit, have conflated sexual orientation and gender identity for asylum seekers.⁵ This conflation may be partly due to ignorance regarding the nuances of sexual orientation and gender identity and partly because it is easier for a court to recognize an applicant as a member of a group that is already established than to create a new group.

Part I of this Note provides definitions for “transgender” and “particular social group.” Part II provides the history of asylum law relating to claims brought by gay and transgender

1 Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1082 (9th Cir. 2015).
 2 See *id.* at 1080.
 3 *Id.* at 1075; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
 4 Avendano-Hernandez, 800 F.3d at 1081–82.
 5 See *infra* Part II.

people. Part III analyzes why transgender people fit within the BIA’s definition of “particular social group” and considers barriers to and benefits of such a development. Part IV explores how cisgender women may be able to use the development of transgender people as a particular social group to procure asylum based on their gender identity.

I DEFINITIONS

A. Transgender

The word “transgender” has come to serve as an umbrella term for the gender identities of people who do not solely identify with the sex that society assigned to them at birth. These gender identities can include people who identify as transsexuals, cross-dressers, genderqueer, bigender, and many other formulations of gender identity.⁶ While transgender people often identify as men or women, sometimes trans-identified people identify as both or neither. “Transgender” can be contrasted with “cisgender,” meaning those who identify with the sex that society assigned to them at birth. In this Note, “transgender” refers to all people who do not exclusively identify with the sex that society assigned to them at birth.

B. Sexual Orientation

“Sexual orientation” refers to the innate sexual feelings a person experiences, and about whom a person experiences those feelings.⁷ The gender identity of an individual, in combination with the gender of the people an individual is attracted to, defines that person’s sexual orientation. For instance, the sexual orientation of a person who identifies as a woman and is attracted solely to men is heterosexual. Similarly, the sexual orientation of a person who identifies as a woman and is attracted solely to women is homosexual. Sexual orientation encompasses a number of identities, as many people are attracted to multiple genders or to no gender. Clearly, then, sexual orientation takes gender identity into account, but sexual orientation is a distinct identity that defines individuals’ sexual proclivities rather than how individuals view their innate genders.

⁶ See Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *AGGRESSION & VIOLENT BEHAVIOR* 170, 171 (2009).

⁷ See AMERICAN PSYCHOLOGICAL ASSOCIATION, *DEFINITION OF TERMS: SEX, GENDER, GENDER IDENTITY, SEXUAL ORIENTATION* 1 (2011), <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [<https://perma.cc/ZQ5R-8G9T>].

C. Particular Social Group⁸

To qualify for asylum under the Immigration and Nationality Act (INA), applicants must be refugees, meaning that they satisfy four requirements: (1) they must have a fear of persecution; (2) this fear must be “well-founded”; (3) the persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and (4) they must be unable or unwilling to return to their country because of this persecution.⁹

The BIA defined “particular social group” in a 1985 decision, *In re Acosta*.¹⁰ There, the applicant argued that he had a well-founded fear of persecution on the basis of his membership in a particular social group comprised of taxi drivers, who had formed a cooperative organization in El Salvador.¹¹ In determining whether such a class could constitute a “particular social group,” the BIA articulated that members of a group must share a “common, immutable characteristic.”¹² The Board also supplied some examples of what could be a qualifying characteristic, such as “sex, color, or kinship ties.”¹³ Additionally, the BIA specified that “it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities”¹⁴ The Board reasoned that when the shared characteristic was immutable or fundamental, it became comparable to the other four categories that are grounds for asylum: race, religion, nationality, or political opinion.¹⁵

Twenty-one years later, in *In re C-A-*, the BIA added another requirement that a class must satisfy to constitute a particular social group: “social visibility.”¹⁶ In that case, a fam-

⁸ Case law in the asylum context is somewhat atypical, as decisions at the immigration court level are not precedential, and only certain decisions of the BIA are precedential. This Note focuses only on precedential BIA and circuit court decisions.

⁹ 8 U.S.C. § 1101(a)(42)(A) (2012); INA § 101(a)(42)(A).

¹⁰ 19 I. & N. Dec. 211 (B.I.A. 1985). Importantly, while the BIA has certain definitions and interpretations of “particular social group,” federal circuit courts often have their own, sometimes conflicting, definitions of the same. *See generally* 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04 (rev. ed. 2015) (laying out the definitions that various circuits have attached to “particular social group”). This section focuses predominately on the BIA’s definitions.

¹¹ *Acosta*, 19 I. & N. Dec. at 216, 232.

¹² *Id.* at 233.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 233–34.

¹⁶ 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006), *aff’d sub nom.* Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006).

ily applied for asylum, claiming that they were members of a particular social group comprised of informants against a drug cartel in Colombia.¹⁷ The Board first applied the *Acosta* test and then noted that their previous decisions about what constituted a particular social group had involved characteristics that were “highly visible and recognizable by others in the country in question.”¹⁸ Relying on guidelines issued by the United Nations, the BIA held that the family could not be members of a particular social group because, as a class, informants would typically remain anonymous and were therefore not visible, even though in this case the cartel had previously threatened the family.¹⁹

The BIA has since renamed this “social visibility” requirement as “social distinction,” thereby clarifying that society must perceive the group as a distinct class rather than be able to visually identify that group of people.²⁰ Before this clarification, some circuits had rejected the social visibility requirement because they believed that it referred to “ocular” visibility.²¹ Ocular visibility means that someone passing members of the group on the street would recognize that they belonged to that particular social group simply by looking at them.²² In rejecting this definition in *In re W-G-R-*, the BIA explained that “[a]lthough the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.”²³ Therefore, “[t]o have the ‘social distinction’ necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”²⁴

¹⁷ *Id.* at 953.

¹⁸ *Id.* at 960.

¹⁹ *Id.* at 952, 960.

²⁰ *In re W-G-R-*, 26 I. & N. Dec. 208, 216 (B.I.A. 2014).

²¹ *Id.* at 211; *see, e.g.,* *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 605 (3d Cir. 2011) (“Women who have not yet undergone female genital mutilation in tribes that practice it do not look any different from anyone else.”); *Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

²² *See Ramos*, 589 F.3d at 430 (“[Y]ou can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic.”).

²³ *In re W-G-R-*, 26 I. & N. Dec. at 217.

²⁴ *Id.*

In re C-A- also alluded to a “particularity” requirement for a particular social group, but did not detail what it entails.²⁵ A 2008 BIA decision, *In re S-E-G-*, explained that a group is particular if it “can accurately be described in a manner sufficiently distinct that the group would be recognized . . . as a discrete class of persons.”²⁶ The Board clarified in 2014 that particularity “chiefly addresses the question of delineation” of who is a member.²⁷

The BIA has indicated that while the size of the group is one factor that courts should consider in determining particularity, the essential concern is whether the group is “too amorphous . . . to create a benchmark for determining group membership.”²⁸ Indeed, the BIA has ruled that the possibility that most nationals of a certain country would qualify as members does not preclude a class of people from being a particular social group.²⁹ On the other hand, some circuits have held that such a possibility probably disqualifies that group. For instance, the Ninth Circuit declared that “[m]ajor segments” of a country’s population could rarely, if ever, constitute a particular social group.³⁰ Similarly, the Third Circuit has indicated that the large size of a class of people may preclude them from being a particular social group.³¹

II

SEXUAL ORIENTATION AND “SEXUAL IDENTITY” AS BASES FOR PARTICULAR SOCIAL GROUPS

Until the 1990s, no court recognized gay people as a particular social group; someone experiencing persecution on the basis of their sexual orientation could not receive asylum.³² In 1990, the landmark BIA decision *In re Toboso-Alfonso* recog-

²⁵ *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), *aff’d sub nom.* Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006).

²⁶ 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

²⁷ *In re W-G-R-*, 26 I. & N. Dec. at 214.

²⁸ *In re S-E-G-*, 24 I. & N. Dec. at 584 (citing *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

²⁹ *In re H-*, 21 I. & N. Dec. 337, 343–44 (B.I.A. 1996).

³⁰ *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005).

³¹ *See Lukwago v. Ashcroft*, 329 F.3d 157, 171–72 (3d Cir. 2003) (“[C]hildren as a class represent an extremely large and diverse group . . .”).

³² In fact, gay and lesbian noncitizens were not even able to enter or immigrate to the United States before 1990. *See* INA § 212(a)(4); 8 U.S.C. 1182(a)(4) (1988) (repealed 1990). At the time, the United States was the only country in the world with an explicit policy of excluding noncitizens on the basis of their sexual orientation. Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT’L L.J. 771, 771 (1993).

nized, for the first time, that gay people could be a particular social group.³³ In that case, the BIA granted withholding of deportation to a gay man from Cuba.³⁴ The Immigration and Naturalization Service argued against such a grant because it “would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well,” referring to the sodomy laws that still existed at the time.³⁵ The BIA dismissed this argument, explaining that it was not Toboso-Alfonso’s homosexual conduct that subjected him to persecution in Cuba but his identity as a gay man.

Though the BIA did not initially designate *In re Toboso-Alfonso* as a precedential opinion, the Attorney General issued an order several years later, declaring it as precedent “in all proceedings involving the same issue or issues.”³⁶ Accordingly, various circuit courts have recognized that gay people constitute a particular social group in subsequent asylum cases.³⁷

A. “Gay Men with Female Sexual Identities”

A decade after *In re Toboso-Alfonso*, the Ninth Circuit overturned a BIA decision denying asylum to a transgender woman in *Hernandez-Montiel v. INS*.³⁸ Although the court noted that “at the age of 12, [Hernandez-Montiel] began dressing and be-

³³ 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

³⁴ *Id.* at 823. Withholding of deportation, now called “restriction on removal,” is an alternative form of relief to asylum. 8 U.S.C. § 1231(b)(3)(A) (2012); INA § 241(b)(3)(A). To qualify for restriction on removal, applicants must also be fleeing persecution on the basis of their race, religion, nationality, membership in a particular social group, or political opinion. While asylum is a discretionary form of relief, restriction on removal is mandatory if applicants meet all the requirements. *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999). Applicants who would probably not qualify for asylum because, for instance, they have committed crimes, may still qualify for restriction on removal. NAT’L IMMIGRANT JUST. CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 17 (2016), http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual_05%202016_final.pdf [<https://perma.cc/H2WK-MA69>]. However, the burden for restriction on removal is higher than that for asylum, and applicants must prove that, more likely than not, they will face persecution if they return to their country. See *INS v. Stevic*, 467 U.S. 407, 429–30 (1984). By contrast, asylum claims require only that the applicant have a well-founded fear of persecution, meaning that persecution need only be a reasonable possibility. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

³⁵ *Toboso-Alfonso*, 20 I. & N. Dec. at 822 (internal quotation marks omitted).

³⁶ Att’y Gen. Order No. 1895-94 (June 19, 1994).

³⁷ See, e.g., *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (“[H]omosexuals may be [members] of a ‘particular social group’”); *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005).

³⁸ 225 F.3d 1084, 1099 (9th Cir. 2000).

having as a woman,”³⁹ and that she had been taking female hormones,⁴⁰ the word transgender does not appear in the decision.⁴¹ Instead, the court characterized Hernandez-Montiel as a “gay man with a female sexual identity” and used male pronouns to describe her throughout.⁴² Thomas M. Davies, Jr., an expert witness on conditions for gay people in Mexico in the case, explained that a gay man has a “female sexual identity” if he assumes the “stereotypical ‘female,’ i.e., passive role in [gay] sexual relationships.”⁴³ He also indicated that men with female sexual identities often behave and dress as women. Davies further noted that, conversely, men in Latin America may engage in homosexual activity without persecution so long as they assume the “male” role.⁴⁴

Importantly, the Ninth Circuit recognized that the persecution Hernandez-Montiel would face as someone with a “female sexual identity” is distinct from the treatment that others who have homosexual sex might encounter.⁴⁵ Nevertheless, the court cited *In re Toboso-Alfonso* to show that sexual orientation could be the basis for a particular social group and defined Hernandez-Montiel’s particular social group as “gay men with female sexual identities in Mexico.”⁴⁶ Unlike the immigration judge (IJ) and the BIA, the Ninth Circuit focused on the immutability of Hernandez-Montiel’s “sexual identity” in determining that she was a member of a particular social group, rather than the mutability of her female dress.⁴⁷

Although a limited number of cases clearly deal with transgender asylum applicants, they largely follow the reasoning of *Hernandez-Montiel*, especially, unsurprisingly, within the Ninth Circuit. Several years later, the Ninth Circuit again used the term “female sexual identity” in a case about a transgender woman who fled El Salvador, *Reyes-Reyes v. Ashcroft*.⁴⁸ The

³⁹ *Id.* at 1087.

⁴⁰ *Id.* at 1088.

⁴¹ This Note uses the pronouns that correspond to applicants’ gender identities, rather than the pronouns employed by the courts in many decisions which largely correspond to the sex assigned to the applicants at birth. However, it is possible that the courts were not incorrect in using male pronouns for applicants who presented themselves as female. Since transgender identities vary widely, an individual may choose to present as female much of the time but continue to use male pronouns.

⁴² *Hernandez-Montiel*, 225 F.3d at 1099.

⁴³ *Id.* at 1089.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *Id.* at 1094.

⁴⁷ *Id.* at 1094–96.

⁴⁸ 384 F.3d 782, 785 (9th Cir. 2004).

court noted that she had gone by female names, had a “deep female identity,” and employed “characteristically female appearance, mannerisms, and gestures,” though she had not “undergone sex reassignment surgery.”⁴⁹ Further, the court even mentioned in a footnote that she exhibited “transsexual behavior.”⁵⁰ Nevertheless, the court consistently referred to Reyes using male pronouns, called her a “homosexual male,” and spoke of her “female sexual identity.”⁵¹ Interestingly, the Ninth Circuit’s decision did not explicitly discuss whether Reyes was a member of a particular social group, though the court did mention in a footnote that sexual identity is “inherent to one’s very identity as a person.”⁵² The court therefore implicitly recognized that Reyes’s female sexual identity meant that she was a member of a particular social group.⁵³

The Ninth Circuit employed the same reasoning in *Ornelas-Chavez v. Gonzales*, a case involving another transgender woman from Mexico.⁵⁴ As in *Hernandez-Montiel* and *Reyes-Reyes*, the court discussed both Ornelas-Chavez’s “homosexuality” and her “female sexual identity,” again using male pronouns throughout the decision.⁵⁵ By the time of this decision, the Ninth Circuit had firmly determined that gay men with female sexual identities constituted a particular social group. Indeed, the court noted in a footnote that “[w]hether Ornelas-Chavez belongs to a protected social group is not at issue in this appeal,” citing *Hernandez-Montiel*.⁵⁶

B. “Transsexual” Individuals

Though most Ninth Circuit asylum decisions involving transgender individuals have used the term “female sexual identity” and employed male pronouns,⁵⁷ one 2007 decision referred to a Mexican applicant as a “transsexual” woman and

⁴⁹ *Id.*

⁵⁰ *Id.* at 785 n.1.

⁵¹ *Id.* at 785.

⁵² *Id.* at 785 n.1 (citing *Hernandez-Montiel*, 225 F.3d at 1093).

⁵³ *See id.* The court did not need to explicitly decide whether Reyes was a member of a particular social group, as it remanded the case so the BIA could reconsider her withholding-of-removal claim using the correct legal standard. However, by remanding the case, the court indicated that the BIA could make such a finding.

⁵⁴ 458 F.3d 1052, 1054 (9th Cir. 2006).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1056 n.3 (citing *Hernandez-Montiel*, 225 F.3d at 1094).

⁵⁷ *See, e.g., id.* at 1054 (“Ornelas-Chavez’s dealings with government officials . . . [were] marked by either animus toward his female sexual identity or tacit acceptance of the abuse he received because of it.”).

used female pronouns.⁵⁸ The procedural posture in this case was such that the court never had to decide whether the applicant, Morales, belonged to a particular social group.⁵⁹ Instead, the court remanded the case for reconsideration on the asylum issue because the IJ had based his denial of Morales's asylum claim on improper evidence relating to her criminal convictions.

However, the Ninth Circuit decision noted that the IJ had stated that "but for Morales's conviction . . . he would have found her eligible for asylum under *Hernandez-Montiel v. INS*."⁶⁰ This seems to indicate that the IJ intended to group Morales with *Hernandez-Montiel's* gay men with female sexual identities, conflating sexual orientation and gender identity. The IJ also denied Morales CAT relief because he did not believe that it was more likely than not that she would experience persecution, based in part on evidence of a gay pride parade in Mexico City, further demonstrating that the IJ blended sexual orientation and gender identity.⁶¹ While using Morales's correct pronouns and acknowledging that she identified as a woman indicate progress in the Ninth Circuit's conception of transgender people, failing to critique the IJ's conflation of these distinct categories shows that the court continued to mischaracterize gender identity.

Eight years later, the Ninth Circuit again received a case of a transgender applicant from Mexico in *Avendano-Hernandez v. Lynch*.⁶² This time, however, the court highlighted the distinct, albeit overlapping, nature of sexual orientation and gender identity.⁶³ While the Ninth Circuit finally understood and acknowledged this important difference, it was not able to carve out an official particular social group in this opinion because Avendano-Hernandez did not qualify for restriction on removal.⁶⁴ Avendano-Hernandez had a felony conviction for

⁵⁸ *Morales v. Gonzales*, 478 F.3d 972, 975 (9th Cir. 2007).

⁵⁹ *See id.* at 984–85.

⁶⁰ *Id.* at 977.

⁶¹ To qualify for relief under CAT, applicants must show that, if they were to return to their country, the government would more likely than not torture them or acquiesce to their torture. *Id.* at 983. Despite this higher burden, convictions of particularly serious crimes will not bar applicants from relief under CAT, though it would for asylum or restriction on removal. *See* NAT'L IMMIGRANT JUST. CTR., *supra* note 34, at 18, 20.

⁶² 800 F.3d 1072, 1075 (9th Cir. 2015).

⁶³ *Id.* at 1081 ("While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct.")

⁶⁴ *Id.* at 1078. Avendano-Hernandez did not apply for asylum, for which she also would not have been eligible due to her conviction. Though the court used

drunk driving, a “particularly serious crime,” and therefore was ineligible for that form of relief.⁶⁵ Accordingly, her only option was relief under CAT, which does not require membership in a particular social group, unlike asylum and restriction on removal.⁶⁶ The court found that Avendano-Hernandez was eligible for relief under CAT due to the unique persecution faced by transgender women in Mexico and remanded the case for a grant of CAT.⁶⁷ So, while the court seemed prepared to declare transgender women in Mexico a particular social group,⁶⁸ the facts of this case did not present such an opportunity. No court has yet expressly articulated a particular social group made up of transgender people.

III

TRANSGENDER IDENTITY SHOULD QUALIFY AS A BASIS FOR A PARTICULAR SOCIAL GROUP

The Ninth Circuit’s decision in *Avendano-Hernandez* illuminated the importance of separating sexual orientation from gender identity in asylum law. Since the two identities are distinct, transgender people may experience disparate treatment in the countries of their nationality if they are transgender rather than gay. While gay, lesbian, and bisexual people may be making major strides in certain countries, transgender people often face distinct, increased levels of persecution.⁶⁹ Accordingly, the BIA and federal circuit courts should recognize that transgender people are a particular social group that faces unique challenges in many countries. This Note focuses on the BIA’s definition of particular social group and argues why transgender people are a particular social group for asylum purposes.

the term “withholding of removal,” it was referring to the relief of restriction on removal, a common practice of the BIA and federal courts. *Id.* at 1077; *see* 3 GORDON ET AL., *supra* note 10, § 33.04[3].

⁶⁵ *Avendano-Hernandez*, 800 F.3d at 1078.

⁶⁶ *See* 3 GORDON ET AL., *supra* note 10, § 33.06[1] n.1.

⁶⁷ *Avendano-Hernandez*, 800 F.3d at 1082.

⁶⁸ *See id.* (“The unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal, or CAT claim.”).

⁶⁹ *See* Katie McDonough, *The Last Acceptable Bigotry?: How Cultural Ignorance Is Killing Trans Americans*, SALON (Aug. 29, 2013, 7:45 AM), http://www.salon.com/2013/08/29/the_last_acceptable_bigotry_how_cultural_ignorance_is_killing_trans_americans/ [https://perma.cc/L74L-U8UR].

A. Possible Reasons for *Hernandez-Montiel's* Conflation

To understand the benefits and challenges of recognizing that transgender people constitute a particular social group, it is important to first examine why the conflation of sexual orientation and gender identity occurred in *Hernandez-Montiel* and its progeny.

There are several possible reasons why the Ninth Circuit referred to *Hernandez-Montiel* as a “gay man with a female sexual identity” rather than as a transgender woman. First, the court, and potentially even Professor Davies, an expert witness on Mexico, may simply not have been familiar with the concept of transgender identity in 2000.⁷⁰ Second, Mexican society at the time may not have conceived of transgender identity as entirely separate from gay identity. Indeed, Professor Davies’s testimony in *Hernandez-Montiel* may have been accurate in its description of how Mexican society perceived transgender women: as gay men who assumed the passive role in sex.⁷¹ Since the crucial inquiry in asylum cases is how society will view and treat applicants in the countries of their nationality, rather than in the United States, the appropriate question is how Mexicans would view *Hernandez-Montiel*.

Lastly, *Hernandez-Montiel's* attorneys likely made a strategic decision to cast her identity within the scope of sexual orientation, as sexual orientation was already an established basis for membership in a particular social group.⁷² It would be easier for her attorneys to link her identity with a group that had already gained protected status than to create a new protected group. Furthermore, asylum law, where people’s lives are necessarily at risk if they have a viable claim, is not an ideal venue for impact litigation. It makes sense that applicants and their attorneys would rather take the path of least resistance than change the law to make future claims easier for similarly situated individuals. Indeed, Joseph Landau, the attorney for *Reyes* in *Reyes-Reyes v. Ashcroft*, has explained that his client

⁷⁰ Transgender visibility has increased dramatically since 2000. Many transgender advocacy organizations, such as the National Center for Transgender Equality, only came into existence in the early 2000s. Megan Townsend, *Timeline: A Look Back at the History of Transgender Visibility*, GLAAD (Nov. 19, 2012), <http://www.glaad.org/blog/timeline-look-back-history-transgender-visibility> [https://perma.cc/4Q88-B5E3].

⁷¹ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000).

⁷² It is a common strategy for LGBT rights attorneys to group an unprotected class of people with a protected one rather than fighting for new, formal protections. For instance, many courts have extended laws that protect against sex discrimination to protect transgender people from discrimination. See *infra* section IV.B.1.

did actually identify as transgender. Nevertheless, he and his colleagues chose to base Reyes’s claim on her uncontested membership in a previously established particular social group, gay men with female sexual identities,⁷³ rather than focus on her transgender identity.⁷⁴

B. Transgender Identity Is a Common, Immutable, and Fundamental Characteristic

Transgender individuals share a common characteristic in that they all possess gender identities that differ from the sex they were assigned at birth. Though transgender identity can take many forms because it is an umbrella term, this group of people has a common characteristic in that they all do not identify solely with the sex society assigned to them at birth.

Further, experts today consider one’s transgender identity innate and therefore immutable,⁷⁵ placing transgender identity squarely within *Acosta*’s requirement that members of a particular social group share a “common, immutable characteristic.”⁷⁶ Indeed, in *Acosta* the BIA even enumerated “sex” as one such characteristic that a court could find to be common and immutable.⁷⁷

One possible critique of the stance that being transgender is immutable is the viewpoint that transgender people can change their appearance and choose at times to dress and behave in a manner consistent with the sex assigned to them at birth. However, the Ninth Circuit in *Hernandez-Montiel* addressed and rejected this line of reasoning, which the IJ and BIA had employed in denying asylum to Hernandez-Montiel.⁷⁸ While the court conceded that gay men with female sexual identities can alter the physical manifestations of their identity, it held that a person’s identity, not the expression of that iden-

⁷³ See *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 (9th Cir. 2004).

⁷⁴ Laurie Berg & Jenni Millbank, *Developing a Jurisprudence of Transgender Particular Social Group*, in *FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM* 121, 133 (Thomas Spijkerboer ed., 2013). However, Landau did include Reyes’s transgender identity as an alternate argument for membership in a particular social group. Further, Reyes’s attorneys referred to her as transgender in briefing, though the court declined to incorporate such language into the opinion. Joseph Landau, “*Soft Immutability*” and “*Imputed Gay Identity*”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 *FORDHAM URB. L.J.* 237, 249 (2005).

⁷⁵ See, e.g., VANESSA SHERIDAN, *THE COMPLETE GUIDE TO TRANSGENDER IN THE WORKPLACE* 18 (2009); DAVID SUE, DERALD WING SUE, DIANE SUE, & STANLEY SUE, *UNDERSTANDING ABNORMAL BEHAVIOR* 449 (2015).

⁷⁶ *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

⁷⁷ *Id.*

⁷⁸ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2000).

tity, must be immutable under the *Acosta* analysis for a particular social group.⁷⁹

The same reasoning applies to people who identify as transgender. While their expression may change, especially for those who identify as gender fluid and may dress as women one day and as men the next, their identities as transgender people are immutable. Though in the past courts have required scientific or biological proof that a trait is immutable, in *Hernandez-Montiel*, the Ninth Circuit “embrace[d] non-biological forms of identity” by acknowledging that one’s sexual identity is innate and immutable.⁸⁰ Other jurisdictions’ adoption of gay people as a particular social group shows that this relaxed immutability standard is now widespread.⁸¹ Therefore, while an applicant may not be able to provide scientific proof of their transgender identity, they can still establish that this identity-related characteristic is immutable.

Even if a court were to rule that transgender identity is not immutable, people’s transgender identity should still qualify them for membership in a particular social group because it is so “fundamental to their individual identities” that they should not be required to change it.⁸² Given the innate nature of a person’s gender identity and the importance that society places on one’s gender identity and expression,⁸³ being transgender is fundamental to a person’s identity. Indeed, medical professionals often diagnose transgender people who are not able to express themselves in ways consistent with their gender identity as having gender dysphoria, a serious medical condition that can lead to such high levels of distress that the condition becomes life threatening.⁸⁴

C. Transgender People Are a Socially Distinct Group

In *Avendano-Hernandez*, the Ninth Circuit explicitly noted that sexual orientation and gender identity are distinct, even

⁷⁹ See *id.* at 1096.

⁸⁰ Landau, *supra* note 74, at 250. Joseph Landau has described the court’s reasoning in *Hernandez-Montiel*, which asserts that one’s sexual identity is innate and immutable, as a “soft immutability standard.” *Id.*

⁸¹ See *supra* note 38 and accompanying text.

⁸² *Acosta*, 19 I. & N. Dec. at 233.

⁸³ See generally Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 SOC’Y & GENDER 510, 513–21 (2004) (examining the significant role gender plays in “social relational contexts”).

⁸⁴ See LAMBDA LEGAL, *FAQ on Access to Transition-Related Care*, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq#q1> [<https://perma.cc/5ACT-PD8M>].

while noting that the identities may overlap.⁸⁵ The court also noted that transgender people tend to be especially visible and vulnerable. To bolster the assertion that transgender people are uniquely vulnerable to persecution, the court pointed to a document recently released by Immigration and Customs Enforcement detailing steps detention officers should take to properly care for detained transgender people.⁸⁶ The court also referenced the particularly dire conditions for transgender people in Mexico,⁸⁷ which shows that, while transgender people are often distinct and uniquely vulnerable, in determining social distinction, it is crucial to examine to what extent people in an applicant’s country of nationality would single out transgender individuals.

The degree to which transgender people are socially distinct varies from country to country. While in a country such as the United States transgender people are increasingly gaining recognition, the societies of some countries may not know much about transgender people or what it means to be transgender. Indeed, even in the United States, many people do not understand the difference between sexual orientation and gender identity, as evidenced by the court’s decision in *Hernandez-Montiel*.⁸⁸ Nevertheless, understanding of a distinct identity is not equivalent to perception, meaning social distinction can exist even where society is ignorant to the intricacies of transgender identity.

Accordingly, a transgender individual’s claim for asylum is likely to take one of two forms regarding social distinction, each of which will place the applicant within a particular social group. One possibility is that the people in an applicant’s country of nationality recognize a distinction between a person’s sexual orientation and gender identity, and they persecute individuals uniquely on the basis of their gender identity, such as the situation described in *Avendano-Hernandez*.⁸⁹ Even though some people used gay slurs against Avendano-Hernandez in Mexico, clearly confusing her gender identity and sexual orientation, the court still found that transgender women in Mexico faced unique persecution, noting that “police

⁸⁵ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015).

⁸⁶ *Id.* at 1081 n.4; THOMAS HOMAN, U.S. IMMIGR. & CUSTOMS ENF’T, FURTHER GUIDANCE REGARDING THE CARE OF TRANSGENDER DETAINEES (2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf> [<https://perma.cc/9MQ7-W5P8>].

⁸⁷ *Avendano-Hernandez*, 800 F.3d at 1081.

⁸⁸ See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1088 (9th Cir. 2000).

⁸⁹ *Avendano-Hernandez*, 800 F.3d at 1081.

specifically target the transgender community for extortion and sexual favors.”⁹⁰ While, as the court noted, rights for gay, lesbian, and bisexual people in Mexico have improved,⁹¹ transgender individuals in Mexico have fewer rights and face more violence.⁹²

Similarly, transgender women in Honduras tend to experience worse persecution than gay, lesbian, or bisexual individuals, though those groups also face significant violence.⁹³ According to a Honduran activist, a disproportionate number of murders of lesbian, gay, bisexual, or transgender (LGBT) people in Honduras are of transgender women.⁹⁴ Further, the murders of transgender women tend to be more violent than those of other LGBT people, exhibiting signs of torture and castration.

Further, in some countries, both gay and transgender people experience discrimination, but the form of harassment and violence may vary between groups, showing the distinctness of each one. For instance, though both gay and transgender Ugandans face persecution, civilians and authorities alike in Uganda often harass and assault transgender people in ways that indicate that it is because of their gender identity.⁹⁵ Authorities in Uganda sometimes arrest transgender women for “impersonating a woman,” showing that Ugandans see trans-

⁹⁰ *Id.*

⁹¹ As of June 2015, it is unconstitutional to deny marriage licenses to same-sex couples in all Mexican states. Randal C. Archibold & Paulina Villegas, *With Little Fanfare, Mexican Supreme Court Legalizes Same-Sex Marriage*, N.Y. TIMES, June 14, 2015, <http://www.nytimes.com/2015/06/15/world/americas/with-little-fanfare-mexican-supreme-court-effectively-legalizes-same-sex-marriage.html> [https://perma.cc/CX43-ELKS]. While this does not guarantee safety to gay Mexicans, it does seem to indicate progress in the legal sphere.

⁹² See TVT RESEARCH PROJECT, TRANS MURDER MONITORING RESULTS: TMM TDOR 2015 UPDATE (2015), http://transrespect.org/wp-content/uploads/2015/11/TVT-TMM-Tables_2008-2015_EN.pdf [https://perma.cc/43G3-22N9] (showing that Mexico had the second highest transgender murder rate worldwide between 2008 and 2015).

⁹³ Allison Lopez, *Nelson Arambú, of Honduras: “We Do Not Want to Come Back Here Next Year to Report More Murders of the LGBT Community,”* LATIN AMERICA WORKING GROUP (Aug. 5, 2014), <http://www.lawg.org/action-center/lawg-blog/69-general/1363-nelson-arambu-of-honduras-we-do-not-want-to-come-back-here-next-year-to-report-more-murders-of-the-lgbt-community> [https://perma.cc/R2FD-L6EA].

⁹⁴ *See id.*

⁹⁵ *See Uganda: Anti-Homosexuality Act’s Heavy Toll*, HUMAN RIGHTS WATCH (May 14, 2014), <https://www.hrw.org/news/2014/05/14/uganda-anti-homosexuality-acts-heavy-toll> [https://perma.cc/2P8W-VSNM].

gender women not as gay men, but as men dressing as women.⁹⁶

Therefore, in a situation in which people uniquely persecute transgender people, transgender people are unequivocally socially distinct and qualify as a particular social group. While persecution alone does not make a group of people socially distinct, it is not their persecution that would make transgender people in a country a particular social group. Rather, when people in a certain society persecute transgender people in ways that are unique to how they persecute other people, it indicates that the society perceives transgender people as distinct. That people are able to recognize transgender people as a discrete group, not that a society persecutes them, makes transgender people socially distinct in such a scenario.

However, applicants from these societies would need more evidence than the fact that people in their countries persecute transgender people to establish that they are distinct. Though obtaining such evidence could prove difficult for some applicants, if a society views transgender people as distinct enough to persecute them uniquely, it is likely that there are other indicators of this distinction. According to the BIA, “country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’”⁹⁷ In societies where people uniquely persecute transgender people, it is likely that there are other records of discrimination and animosity that will corroborate the applicant’s assertion that transgender people are distinct.

Another theoretical possibility is that people in certain countries do not recognize any distinction between gay and transgender people but persecute both groups identically as gay people. In such a scenario, one could argue that transgender people are not socially distinct and therefore are not a particular social group. However, even if that were the case, transgender people may be able to establish membership in a particular social group on the basis of their imputed gay identity, meaning that people in their society perceive them to be

⁹⁶ *Id.* Transgender Ugandans have also reported that civilians and the police have asked them if they are men or women and have tried to “check” by touching their genitalia. *Id.*

⁹⁷ *In re M-E-V-G-*, 26 I. & N. Dec. 227, 244 (B.I.A. 2014).

gay, regardless of how they actually identify.⁹⁸ A Third Circuit decision, *Amanfi v. Ashcroft*, held that imputed gay identity qualifies an asylum applicant for membership in a particular social group.⁹⁹ Other courts have adopted *Amanfi's* recognition of imputed gay identity.¹⁰⁰

The notion of an imputed gay identity has its roots in the concept of imputed political opinion, which nearly every circuit and the BIA have recognized can qualify an applicant for asylum on the basis of their political opinion.¹⁰¹ Applicants seeking asylum on the basis of political opinion can establish that they are refugees by showing that their persecutors have attributed to them certain political opinions.¹⁰² Whether the applicants actually hold these opinions is irrelevant to an asylum claim in these circumstances.¹⁰³ Some courts have recognized that applicants may bring claims of imputed race,¹⁰⁴ nationality,¹⁰⁵ or religion.¹⁰⁶ Though compared to the extensive case law on imputed political opinion there has been little discussion on whether imputed membership in a particular social group can qualify an applicant as a refugee, *Amanfi v. Ashcroft* clearly established that imputed membership in a particular social group can serve as a basis for asylum.¹⁰⁷

In addition, the Attorney General implicitly recognized imputed gay identity in establishing *In re Toboso-Alfonso* as prece-

⁹⁸ See generally Landau, *supra* note 74, at 258–62 (advocating for imputed gay identity as a legal argument for transgender asylum applicants).

⁹⁹ 328 F.3d 719, 730 (3d Cir. 2003).

¹⁰⁰ See, e.g., *Pozos v. Gonzales*, 141 F. App'x 629, 631 (9th Cir. 2005).

¹⁰¹ See, e.g., *Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006); *Chun Gao v. Gonzales*, 424 F.3d 122, 129 (2d Cir. 2005); *De Brenner v. Ashcroft*, 388 F.3d 629, 636 (8th Cir. 2004); *Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1289 (11th Cir. 2001); *Vasquez v. INS*, 177 F.3d 62, 65 (1st Cir. 1999); *Mya Lwin v. INS*, 144 F.3d 505, 509 (7th Cir. 1998); *Cruz-Diaz v. INS*, 86 F.3d 330, 332 (4th Cir. 1996); *In re C-Y-Z-*, 21 I. & N. Dec. 915, 922 (BIA 1997); see generally 3 GORDON ET AL., *supra* note 10, § 33.04[4][d][i][A][2] (providing an overview of the doctrine of imputed political opinion).

¹⁰² See *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988).

¹⁰³ See *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997).

¹⁰⁴ See *Eduard v. Ashcroft*, 379 F.3d 182, 188 (5th Cir. 2004) (assuming without deciding that imputed Chinese identity could serve as a basis for refugee status).

¹⁰⁵ See *Castaneda v. INS*, 23 F.3d 1576, 1577–78 (10th Cir. 1994) (assuming without deciding that imputed Nicaraguan nationality could serve as a basis for refugee status).

¹⁰⁶ See *Rizal v. Gonzales*, 442 F.3d 84, 90 n.7 (2d Cir. 2006).

¹⁰⁷ See 328 F.3d 719, 730 (3d Cir. 2003) (“We therefore hold that persecution ‘on account of’ membership in a social group, as defined in INA §§ 101(a)(42)(A) and 241(b)(3), includes what the persecutor perceives to be the applicant’s membership in a social group . . .”).

dent. In her order, Attorney General Janet Reno stated that the case applies to “an individual who has been identified as a homosexual and persecuted by his or her government for that reason alone.”¹⁰⁸ This order protects applicants with imputed gay identities because it requires only that their societies have identified them as homosexuals, not that they actually identify as gay or engage in homosexual conduct. Accordingly, even if one could establish that people in a particular country did not distinguish between transgender and gay people and persecuted both groups in an identical fashion, a transgender applicant would likely qualify as a member of a particular social group by virtue of their imputed gay identity.

Importantly, it is irrelevant to the social distinction analysis whether people in a certain society are able to visually identify transgender people. Due to the BIA’s recent clarification that social distinction does not refer to ocular visibility, the important inquiry is not whether transgender people present as transgender, but whether their society recognizes that a group of transgender individuals exists in their society.¹⁰⁹ Therefore, even if some transgender people are able to pass as cisgender, either consistent with their gender identity or with the sex assigned to them at birth, it has no effect on the social distinction inquiry. The irrelevance of ocular visibility is particularly important in the context of transgender individuals, as it is the identity that asylum law protects and, therefore, that the society in question must perceive, rather than the behavior.¹¹⁰

Of course, transgender identity is often manifested through transgender people’s conduct and appearance, which allows for a society to perceive them as a distinct group of people. Nevertheless, the shift away from ocular visibility ensures that transgender people need not all present as transgender for them to be a socially distinct group.

D. Transgender People Are a Particular Group

Transgender people are clearly particular, as they comply with the BIA’s main concern that one be able to delineate who is and is not a member. As the BIA requires, one could describe transgender people in a manner sufficiently distinct to recognize them as a discrete group. Admittedly, there is varia-

¹⁰⁸ Att’y Gen. Order, *supra* note 36; see Landau, *supra* note 74, at 259.

¹⁰⁹ See *supra* notes 21–24 and accompanying text.

¹¹⁰ Cf. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (noting that the identities of gay men with female sexual identities must be immutable, not their behavior).

tion within the overarching category of transgender. People who identify as agender, meaning that they have no gender, have unique gender identities from those who identify as female-to-male.¹¹¹ However, these two types of people, along with the many other identities that fall within the term “transgender,” are all within one group in that society assigned to them at birth a sex that differs from their gender identity. This definition is sufficiently precise to delineate membership in the group. While several jurisdictions have found that characteristics such as wealth¹¹² and poverty¹¹³ are too amorphous and relative to allow one to determine who possesses such a characteristic, the quality of being transgender is not similarly subjective. Though there is room for variation within the category of transgender people, it is still a discrete group that is not too amorphous to define.

Further, there is no issue with the size of the category of transgender people. While it is difficult to obtain an accurate estimate of what percentage of the population identifies as transgender, some studies have estimated that transgender people make up somewhere between 0.1–0.5% of the population in the United States.¹¹⁴ Though these statistics come from surveys and may underestimate the total number of transgender people, it is unlikely that the number is so inaccurate as to constitute too large a group in any country to satisfy the particularity requirement. This is especially true since only certain courts require that a particular social group be small in number.

E. Potential Credibility Issues in Application

To qualify for asylum, applicants must establish that they are credible, since under the REAL ID Act of 2005, there is no presumption of credibility before an IJ.¹¹⁵ The credibility determination has long been a major barrier to people bringing

¹¹¹ *Agender*, LGBTQIA+ INFO, <http://lgbtqiainfo.weebly.com/agender.html> [https://perma.cc/EZ8Y-SEW6].

¹¹² *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

¹¹³ *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005).

¹¹⁴ See Mona Chalabi, *Why We Don't Know the Size of the Transgender Population*, FIVETHIRTYEIGHT (July 29, 2014, 4:31 PM), <http://fivethirtyeight.com/features/why-we-dont-know-the-size-of-the-transgender-population/> [https://perma.cc/3H2Q-AXBD]; GARY J. GATES, THE WILLIAMS INSTITUTE, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 5–6 (2011).

¹¹⁵ 8 U.S.C. § 1158(b)(1)(B)(iii) (2012); Pub. L. No. 109-13, div. B, 119 Stat. 231 (2005); 3 GORDON ET AL., *supra* note 10, § 33.04[5][f].

sexual orientation asylum claims,¹¹⁶ as many judges have a rigid view of sexuality in which people are either gay or straight. Any previous heterosexual experiences may disqualify them as gay.¹¹⁷ For instance, in *Safadi v. Gonzales*, an unreported Sixth Circuit case, the court determined that an asylum applicant claiming membership in a particular social group on the basis of his sexual orientation was not credible, in part due to a past, fraudulent marriage to a woman.¹¹⁸ Indeed, the court noted that inconsistencies in his testimony “raise questions as to whether Safadi is in fact gay.”¹¹⁹ While Safadi claimed that the marriage was fraudulent and that he was attracted exclusively to men, the court seemed to be partially motivated by a suspicion raised by his past relationship with a woman. This presumption—that if a man has potentially been attracted to a woman he could not truthfully be attracted to men—exhibits a rigidity in the conception of sexual orientation held by the IJ, the BIA, and the Sixth Circuit.

A similar credibility issue could easily arise for transgender applicants. Indeed, it could be a more pervasive issue, since awareness of transgender identity in the United States tends to be less common than awareness surrounding sexual orientation.¹²⁰ While an IJ might understand the gender identity of a male-to-female transgender person, for instance, it is less likely that an IJ will grasp the gender identity of someone who does not fall neatly within the gender binary, such as a bigender person.¹²¹ If an applicant did not present exclusively as male or exclusively as female, an IJ would likely question their credibility and whether they were actually transgender, just as IJs

¹¹⁶ See 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, 206–08 (2008).

¹¹⁷ See generally Melanie A. Conroy, *Real Bias: How REAL ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 18–20 (2009) (detailing the credibility barriers that gay asylum applicants face when they have had heterosexual relationships, even if they were “sham” relationships).

¹¹⁸ 148 F. App’x. 372, 376 (6th Cir. 2005) (“We conclude that the various discrepancies, coupled with the pall cast on Safadi’s credibility by his fraudulent marriage, are sufficient to support the adverse credibility finding by both the IJ and the BIA.”).

¹¹⁹ *Id.* at 377.

¹²⁰ See McDonough, *supra* note 69.

¹²¹ Bigender people are those who identify as both male and female, either simultaneously or at different times. Accordingly, they may present as male at times and as female at other times. See *Bigender*, LGBTQIA+ INFO, <http://lgbtqiainfo.weebly.com/bigender.html> [<https://perma.cc/PE3M-FKER>].

question the credibility of gay people who may have had heterosexual experiences.

Further, the REAL ID Act preferences corroboration through evidence, which could be another hurdle for transgender people.¹²² Transgender people who have been able to access medical care such as counseling, hormones, or surgery would be able to present their medical records to corroborate their transgender identities.¹²³ However, for transgender individuals who have no transgender-related medical records because they have not been to counseling and either have not yet or do not wish to transition, meeting the burden of establishing credibility will be significantly more difficult. The REAL ID Act excuses an applicant from supplying corroborating evidence if “the applicant does not have the evidence and cannot reasonably obtain the evidence.”¹²⁴ However, in practice it is quite possible that an IJ would not be satisfied that an individual is transgender if they sometimes present consistent with the sex they were assigned at birth and they do not have supporting medical documentation.

How, then, can transgender people who do not identify or present strictly as male or female overcome a possible credibility barrier? One possible solution might be increased education of IJs regarding transgender issues. In 2011, the U.S. Citizenship and Immigration Services released guidance as a training module for asylum officers to assist them in adjudicating claims brought by lesbian, gay, bisexual, transgender, or intersex individuals.¹²⁵ The guidance includes definitions related to sexual orientation as well as gender identity. It stresses that not all transgender people receive transgender-related medical treatment.¹²⁶ Similar training for IJs could help reduce this potential barrier for transgender people, as they are often the ones who ultimately determine whether an asylum applicant is truly transgender.

¹²² See 8 U.S.C. § 1158(b)(1)(B)(ii) (2012).

¹²³ See U.S. CITIZENSHIP & IMMIGR. SERVS., GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 45–46 (2011), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> [https://perma.cc/6UBN-5AT7].

¹²⁴ 8 U.S.C. § 1158(b)(1)(B)(ii).

¹²⁵ U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 123, at 3.

¹²⁶ *Id.* at 45–46, 53–55.

F. Why U.S. Law Should Recognize Transgender People as a Particular Social Group

One could argue that, practically speaking, not much will change for transgender applicants even if asylum law recognizes transgender people as a particular social group. Under the doctrine established by *Hernandez-Montiel*, transgender people, or at least transgender women, have been able to establish themselves as refugees by presenting themselves as “gay men with female sexual identities.”¹²⁷ However, there are several reasons why the BIA and the circuit courts should recognize transgender people as a particular social group.

First, as the Ninth Circuit’s decision in *Avendano-Hernandez* demonstrated, transgender people face unique persecution in many countries.¹²⁸ In some countries, they face more violent persecution than gay people do, or the kind of discrimination and mistreatment they experience indicates that their persecutors perceive their identities as distinct from lesbian, gay, or bisexual identities.¹²⁹ Classifying transgender people as gay creates a risk that IJs will fail to see that transgender people may still be vulnerable in their countries of nationality even if conditions are improving there for gay people.

Furthermore, it is crucial that the United States acknowledges transgender people as members of a particular social group as part of a crucial, larger effort to improve conditions for transgender people throughout the country. Currently, transgender people, especially transgender women of color, are among the most vulnerable members of U.S. society.¹³⁰ Members of these communities are disproportionately likely to be homeless, making them extremely susceptible to violence and sexual violence. According to a 2011 report, 41% of African-American and 27% of Latino/a transgender respondents experienced homelessness, and homeless shelters denied access to many of those respondents.¹³¹ A report on hate violence homi-

¹²⁷ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000).

¹²⁸ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015).

¹²⁹ See *supra* notes 91–97 and accompanying text.

¹³⁰ See HUMAN RIGHTS CAMPAIGN & TRANS PEOPLE OF COLOR COALITION, A NATIONAL CRISIS: ANTI-TRANSGENDER VIOLENCE 1–2 (2015); NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2013 8–11 (2014); JAIME M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN, & MARA KEISLING, NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–8 (2011).

¹³¹ GRANT ET AL., *supra* note 130, at 116.

cides in 2013 reported that 72% of the victims of these homicides were transgender women.¹³²

Despite these staggering statistics of violence against transgender people, state anti-discrimination laws still leave transgender people largely unprotected. Currently, only eighteen states have nondiscrimination laws protecting people on the basis of their transgender identity.¹³³ While the issue of protections for transgender people living in the United States is a separate issue from recognizing transgender people as a particular social group in asylum law, this is one of a number of steps that the U.S. government can and should take to increase awareness regarding transgender issues. While the lack of recognition of transgender people in asylum law is more a symptom of the problem than the cause, continuing to ignore the existence of transgender people in asylum cases hurts efforts to achieve equality for transgender people generally.

IV

EXTENDING GENDER IDENTITY CLAIMS TO CISGENDER WOMEN

Once the BIA and the circuit courts have recognized that a person's transgender identity can be the basis for membership in a particular social group, they may be more likely to extend this precedent to help protect all people who face persecution on the basis of their gender identity. Such developments may make it easier for cisgender women, or theoretically cisgender men, to claim that they are members of a particular social group comprised of people who share their gender identity.

A. Current Law on "Women" as a Particular Social Group

Despite the BIA's enunciation in *Acosta* that "sex" could be a characteristic that qualifies a class as a particular social group,¹³⁴ few courts have held that simply "women" are a par-

¹³² NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 130, at 8.

¹³³ NAT'L CTR. FOR TRANSGENDER EQUALITY, *State Nondiscrimination Laws*, <http://www.transequality.org/sites/default/files/docs/resources/State-Nondiscrimination-Map%20.pdf> [<https://perma.cc/M5BM-25ZY>].

¹³⁴ 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

ticular social group. Though the Third,¹³⁵ Eighth,¹³⁶ Ninth,¹³⁷ and Tenth¹³⁸ Circuits have recognized that women in a specific country *may* constitute a particular social group, the other circuits and the BIA have not espoused that view.¹³⁹

Instead, many courts and the BIA require that women who face persecution because they are women define their particular social group as a narrower subset of women with additional shared characteristics. For instance, in *In re Kasinga*, the BIA defined the Togolese applicant’s particular social group as “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation (FGM)], as practiced by that tribe, and who oppose the practice.”¹⁴⁰ As the name suggests, only women in the applicant’s society are at risk of FGM, and they face this persecution because they are women.¹⁴¹ Nevertheless, the Board chose to frame the particular social group as a small subsection of women, using several qualifiers in its definition.¹⁴²

¹³⁵ *Fatin v. INS*, 12 F.3d 1233, 1340 (3d Cir. 1993) (recognizing that “women” may be a particular social group while denying that the applicant had a well-founded fear of persecution based solely on her gender).

¹³⁶ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (“[W]e hold that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM.”). *But see* *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (citing *Fatin*, 12 F.3d at 1240) (“We believe this category [of Iranian women] is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”). In both of these cases, the Seventh Circuit seems to conflate whether a class constitutes a particular social group with whether all members of the group have a well-founded fear of persecution, which should be separate inquiries. *See Hassan*, 484 F.3d at 518; *Safaie*, 25 F.3d at 640.

¹³⁷ *Mohammed v. Gonzales*, 400 F.3d 785, 797–98 (9th Cir. 2005) (deciding that either “Somalian females” or “young girls in the Benadiri clan” could constitute a particular social group).

¹³⁸ *Niang v. Gonzales*, 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (“[T]he focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of their membership.’ (quoting 8 U.S.C. § 1101(a)(42)(A)).

¹³⁹ *See, e.g., Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (declining to decide whether gender alone can constitute a particular social group); *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005) (citing *Mohammed*, 400 F.3d at 796–97) (characterizing the Ninth Circuit’s decision in *Mohammed* as a determination that all women in Somalia are entitled to asylum); *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996).

¹⁴⁰ 21 I. & N. Dec. at 365. FGM is “a practice in which portions of the female genitalia are cut away” and “is characterized as a form of ‘sexual oppression.’” *Id.* at 361, 366.

¹⁴¹ *See id.* at 368.

¹⁴² *See id.* at 366.

Similarly, even though the Ninth Circuit articulated in *Mohammed v. Gonzales* that “Somalian females” could be a particular social group, it also stated that alternatively the social group could be comprised of “young girls in the Benadiri clan.”¹⁴³ Further, the Ninth Circuit later clarified in *Perdomo v. Holder* that it “[has] not held expressly that females, without other defining characteristics, constitute a particular social group.”¹⁴⁴ Accordingly, though some courts have recognized that simply “women” may constitute a particular social group, jurisdictions have not widely accepted this delineation.

At first glance, the current method that many courts and the BIA use when dealing with cisgender women in danger of gender-based persecution—delineating a narrow subset of women—may seem like a workable solution because these women are able to establish that they are members of a particular social group. However, this framework can pose serious problems for some applicants. The definitions of these potential particular social groups often refer to specific kinds of gender-based persecution, such as FGM¹⁴⁵ and domestic violence.¹⁴⁶ Such narrow definitions can be problematic as they protect women only if the deciding authority finds that the applicants will be in danger of these particular forms of gender-based violence throughout their home countries.¹⁴⁷ Courts and the BIA thereby endanger women who may not have a well-founded fear of that form of persecution throughout the country but do have a well-founded fear of other forms of gender-motivated persecution, such as forced marriage.¹⁴⁸ Therefore, it is important that these jurisdictions recognize that “women” can constitute a particular social group in order to protect these applicants from all types of gender violence.

¹⁴³ 400 F.3d at 797.

¹⁴⁴ 611 F.3d 662, 667 (9th Cir. 2010).

¹⁴⁵ See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (“[T]he applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”).

¹⁴⁶ See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 917 (B.I.A. 1999) (rejecting a particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”), *vacated by* Att’y Gen. Jan. 19, 2001, *remanded* 23 I. & N. Dec. 694 (B.I.A. 2005), *stay lifted* 24 I. & N. Dec. 629 (B.I.A. 2008).

¹⁴⁷ See Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361, 378–79 (2012).

¹⁴⁸ *Id.* at 379.

B. Transgender Identity as a Framework for Gender Identity in Asylum Claims

1. *Transgender Discrimination as Sex Discrimination*

Though it is uncommon for attorneys to argue that courts should extend protections for transgender people to encompass cisgender women, the reverse argument is a well-trodden one. That is, a line of cases has established that discrimination against transgender people falls under the category of sex discrimination.

This framework has its origins in the landmark case *Price Waterhouse v. Hopkins*, in which the Supreme Court held that an accounting firm engaged in “sex stereotyping” in violation of Title VII when it passed over a female employee for a promotion because she did not conform to expectations of how women should appear and act.¹⁴⁹ Though Hopkins herself did not identify as transgender, this case has set the stage for transgender people to claim that an entity has discriminated against them on the basis of sex because they do not conform with societal gender expectations.

Indeed, several circuits have held that sex discrimination encompasses discrimination against transgender people under the Equal Protection Clause, Title VII, and other protections.¹⁵⁰ For instance, in 2011, the Eleventh Circuit enunciated in *Glenn v. Brumby* that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.”¹⁵¹

Further, some federal agencies have followed this trend of protecting transgender people using preexisting sex-discrimination laws. The U.S. Department of Education has clarified in guidance that the sex-related protections of Title IX extend to transgender students who experience discrimination because of their gender identities.¹⁵² Similarly, the U.S. Equal Employment Opportunity Commission has held in adjudication that discrimination against transgender people, as well as against gay, lesbian, and bisexual individuals, constitutes sex discrim-

¹⁴⁹ 490 U.S. 228, 255 (1989).

¹⁵⁰ See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[A] label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (deciding that a “transsexual” prisoner stated a claim under the Gender-Motivated Violence Act when she alleged attempted sexual assault by a prison guard).

¹⁵¹ 663 F.3d 1312, 1317 (11th Cir. 2011).

¹⁵² See U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, *QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE* 5 (2014).

ination.¹⁵³ Clearly, then, it is well established that transgender people can invoke sex-discrimination laws in various contexts.

2. *Implications and Potential Complications of Extending Transgender Identity to Gender Identity*

Since many jurisdictions have accepted that sex-discrimination laws also protect transgender people, cisgender women who hope to gain asylum because they will face gender-based persecution may be able to use the formal recognition of transgender identity to formulate a particular social group comprised of their gender. Once courts and the BIA have unequivocally recognized transgender identity, cisgender women living in countries where they face pervasive violence simply because they are women may have an easier time asserting that they are members in a particular social group composed of people who share their gender identity. In this way, cisgender women who experience gender-based violence that does not fall into a recognized category of persecution, such as FGM, may be able to qualify as members of a particular social group and overcome one hurdle in obtaining asylum.

Though using the establishment of sexual orientation as a particular social group in claims brought by transgender people has resulted in the problematic conflation of sexual orientation and transgender identity, this framework does not pose the same issue.¹⁵⁴ In the *Hernandez-Montiel* line of cases, the transgender applicants presented themselves as gay men in order to qualify for asylum.¹⁵⁵ Here, contrastingly, cisgender women would not be claiming that they fit under the category of “transgender” in order to qualify as members of a particular social group. Instead, they would be pointing to the recognition of one gender identity as a particular social group and arguing that their gender identity should also qualify as a particular social group, while keeping their gender identity of “cisgender women” distinct.

However, the biggest obstacle that cisgender women will face in advancing this argument is the particularity requirement. In some jurisdictions, the fact that women make up approximately half of the population will not be fatal to an applicant’s claim. For instance, since the BIA has stated that

¹⁵³ See *Macy v. Holder*, EEOC Appeal No. 0120120821 (2012), <https://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf> [<https://perma.cc/63VR-JJMM>].

¹⁵⁴ See *supra* Part II.

¹⁵⁵ See *supra* text accompanying notes 72–74.

the size of the group is only one consideration and the central concern is whether there is a benchmark for defining who is a member,¹⁵⁶ a cisgender woman may be successful in arguing that women qualify as a particular social group. On the other hand, in circuits where a large membership base can prevent a group from being particular, such as the Third or Ninth Circuit,¹⁵⁷ applicants may have a difficult time arguing that cisgender women constitute a particular social group.¹⁵⁸

However, from a policy perspective, the size constraint on the particularity requirement in some jurisdictions is an unnecessary point at which to limit who *may* qualify for asylum. Rather than focusing on how many people might have similar, legitimate claims, courts should focus on the nexus requirement—that the persecution the applicant faces is “on account of” the protected characteristic.¹⁵⁹ Several circuits have already adopted this approach by focusing on the strength of the applicant’s claim, rather than “deny[ing] refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”¹⁶⁰

Further, while the particularity requirement for membership in a particular social group category for asylum sometimes imposes size limits on who qualifies, the other four characteristics asylum seekers may possess—race, religion, nationality, and political opinion—do not have such a limitation.¹⁶¹ Since the BIA’s goal in defining “membership in a particular social group” was to shape a fifth category that was consistent with the other four protected grounds,¹⁶² it follows that the BIA and circuit courts should be consistent in their requirements about the potential size of the applicant pool.

¹⁵⁶ See *supra* note 28 and accompanying text.

¹⁵⁷ See *supra* notes 30–31 and accompanying text.

¹⁵⁸ However, as the Ninth Circuit has already indicated that it would qualify “Somalian females” as a particular social group, it is less likely that an applicant in that circuit would face this particularity barrier. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

¹⁵⁹ 8 U.S.C. § 1101(a)(42)(A) (2015); INA § 101(a)(42)(A).

¹⁶⁰ *Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2013); see also *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (deciding that even though the applicant was a member of the particular social group of Iranian women, she had not shown that she would face persecution in Iran solely because she is a woman).

¹⁶¹ See Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States*, 23 J. GENDER, SOC. POL’Y & L. 529, 564 (2015).

¹⁶² See *In re Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

CONCLUSION

The judiciary has set the stage for recognizing transgender people as a particular social group. The Ninth Circuit's decision in *Avendano-Hernandez* has called attention to the unfortunate way that asylum law regarding transgender applicants has developed. For transgender applicants to be secure in their eligibility for asylum, the BIA and circuit courts should recognize that transgender people constitute a particular social group.

Transgender people meet all the requirements for membership in a particular social group. Transgender identity is a common, immutable trait among people who do not solely identify with the sex that society assigned to them at birth. Further, even if people could change their gender identity, it is so fundamental to people's identities that they should not be required to change it. As transgender people are also socially distinct and particular, they meet the legal criteria for membership in a particular social group. In addition, policy aligns with the introduction of transgender people as a particular social group, as this will ensure safety for transgender people whom their society uniquely persecutes. This is one of many important steps on the path to safety and equality for transgender people.

Moreover, once the BIA and circuit courts formally recognize that transgender people constitute a particular social group, cisgender women facing gender-based violence may also benefit from the development. In a legal argument similar to those advanced by attorneys looking to use sex-discrimination laws to protect transgender individuals, cisgender women experiencing gender persecution may be able to claim that their particular social group is comprised of all women, as they have a common gender identity. In this way, a victory for transgender people may also benefit cisgender women facing gender-based violence in their countries.