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Uncharted Territory: Choosing An Effective Approach in Transgender-Based Asylum Claims

Cover Page Footnote

The author is the legal director of Immigration Equality, formerly known as the Lesbian and Gay Immigration Rights Task Force. Immigration Equality advocates for equal rights for lesbian, gay, bisexual, transgender, and HIV-positive individuals under U.S. immigration law. The author would like to thank legal intern Aaron Morris (anticipated juris doctorate at American University, 2005) for his invaluable assistance with this Article. The author would also like to thank Dean Spade, founder of the Sylvia Rivera Law Project, for reading and commenting on portions of the Article.

UNCHARTED TERRITORY: CHOOSING AN EFFECTIVE APPROACH IN TRANSGENDER- BASED ASYLUM CLAIMS

Victoria Neilson*

PRELUDE

A client steps into your office to discuss an immigration matter. The client, Geovanni, appears to be an effeminate gay man, but Geovanni tells you that she is transgender and considers herself to be female.¹ As a result of her transgender identity, she has endured tremendous mistreatment in her country, beginning with physical and verbal abuse in school that escalated in frequency and violence as she got older. Geovanni was harassed and forced to pay bribes to the local police on many occasions. Eventually, a police officer took Geovanni into custody, brought her to a

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1. Some commentators define “transgender” much more broadly than I do in this Article. For example, Taylor Flynn uses the term “transgender” to include lesbians, gay men, bisexuals, “masculine-appearing women, effeminate men, cross-dressers, and intersexed (those born with ambiguous or dual anatomy) individuals.” Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 393 n.5 and accompanying text (2001). Likewise, Paisley Currah and Shannon Minter use the term “transgender” “in its most inclusive sense, as an umbrella term encompassing: pre-operative, post-operative and non-operative transsexual people; cross-dressers; feminine men and masculine women; intersexed persons; and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity.” Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37 n.1 (2000).

Other legal scholars, such as Chai R. Feldblum, have defined “transgender” more narrowly, as I do, to include only those “who desire to change their gender, are in the process of changing their gender, or have completed the process of changing their gender.” Chai R. Feldblum, *The Pursuit of Social and Political Equality: Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 238 n.1 (1996).

remote location, and raped her. Based on the years of abuse she has suffered on account of her transgender identity, Geovanni wants to apply for asylum.²

INTRODUCTION

This Article uses the term “transgender” identity to refer to individuals who feel a discord between their gender identity and their anatomical sex—that is, those who were born anatomically male but believe that their gender is female or those who were born anatomically female but believe that their gender is male. Some transgender individuals take affirmative steps to physically change their anatomical sex, undergoing such procedures as hormone therapy, electrolysis, and sex reassignment surgery.³ This Article uses the term “transsexual” to define such individuals. Many commentators have argued for a broader definition of “transgender,” which would include virtually any individual who does not conform in appearance or behavior to societal expectations for their gender.⁴ This Article will focus more narrowly, however, on individuals like Geovanni who believe that they were born with the wrong anatomical sex and who suffer persecution as a result of their transgender identity.⁵

This Article will discuss existing precedent in the context of transgender asylum seekers and suggest possible theories for framing successful transgender asylum claims.⁶

2. The facts in this hypothetical are taken from *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), discussed at length *infra* at Part II.B. In discussing Geovanni’s facts, I refer to Geovanni as “she.” In fact, in both the Ninth Circuit’s decision and in the amicus brief submitted on Geovanni’s behalf, Geovanni was described as “he.” *Id.*; Brief of Amici Curiae ACLU of Southern California, et al. *passim*, *Hernandez-Montiel v. INS*, 225 F.3d 1084 (No. 98-70582), available at <http://www.transgenderlaw.org/ndcaselaw/hernandez.pdf> (last visited Feb. 8, 2005). Thus, when I discuss the actual *Hernandez-Montiel* case, I use the masculine pronoun. As discussed *infra*, this choice of gender description for Geovanni was probably the result of the attorney’s strategic choice to frame the claim as that of a “gay man with a female sexual identity” rather than as a transgender woman. See *Hernandez-Montiel*, 225 F.3d at 1087.

3. See Flynn, *supra* note 1, at 393 n.4.

4. See *supra* note 1 (offering examples of scholars who advocate broader definitions of the term “transgender”).

5. As noted *supra* in note 2, Geovanni’s facts are taken from the *Hernandez-Montiel* case. 225 F.3d 1084. It is not possible, however, to determine definitively from the facts cited in the decision whether or not Hernandez-Montiel actually believed that he should have been born anatomically female. See *generally id.*

6. Although published cases are scarce in this area of asylum law, there have been numerous successful asylum cases for transgender individuals. See Fatima Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?*, 12 HASTINGS WOMEN’S L.J. 387, 405-10 (2001) (discussing four successful transgender asylum cases). Additionally, as legal director of Immigration

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Generally, there are very few published decisions for successful asylum cases.⁷ Of those few cases, the number addressing lesbian, gay, bisexual, and transgender (“LGBT”) issues is minuscule. In fact, there have been only five published cases involving LGBT asylum claims: four circuit court cases and one Board of Immigration Appeals (B.I.A.) decision.⁸ Moreover, only two of these five cases address a claim for asylum by a transgender applicant, and then only indirectly.⁹ This Article will discuss existing precedent in the context of transgender asylum seekers, suggesting ways that the case law could be used to frame a successful transgender asylum claim.

Equality, I have worked directly with several successful transgender applicants and provided technical assistance to other attorneys in such claims.

7. The Board of Immigration Appeals (“B.I.A.”) is the administrative appellate body that hears appeals from the Immigration Court. When the B.I.A. publishes cases, the decisions become binding precedent for subsequent Immigration Court decisions. 8 C.F.R. § 1003.1(g) (2005). The Federal Circuit Court then has power to review final orders of removal. Immigration and Nationality Act (“INA”) § 242(a)-(d), 8 U.S.C. § 1252(a)-(d) (2004). The B.I.A. did not assign precedential value to a decision granting asylum until 1987. See Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 696 (2004) (citing Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 447 n.46 (1992)). While there had been successful asylum claims before that, the B.I.A. had chosen not to designate them as precedent. Each year the B.I.A. publishes approximately fifty of its decisions (the majority of which do not concern asylum) out of the roughly 4000 cases that it hears. *Id.* at 696 and accompanying footnotes (citing T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 950 n.152 (1992)).

8. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990). The Attorney General designated *Toboso-Alfonso* as precedent for all proceedings involving the same issues. 1895 Op. Att’y Gen. 94 (1994) (on file with author).

9. See *Hernandez-Montiel*, 225 F.3d at 1084. As discussed *infra* at Part II.B., the *Hernandez-Montiel* asylum seeker probably actually identifies as transgender, but the court classifies him as a gay man “with [a] female sexual identit[y].” *Id.* at 1087. As in *Hernandez-Montiel*, *Reyes-Reyes* also involved an applicant who was probably transgender, but whom the Ninth Circuit described as a “homosexual male with a female sexual identity” rather than explicitly calling him transgender. 384 F.3d at 785. In *Reyes-Reyes*, the Ninth Circuit did not reach the merits of the claim, choosing to remand the decision because the immigration judge applied the wrong legal standards. *Id.* at 784. Thus, the court did not address whether or not transgender identity could comprise a particular social group. Because the *Reyes-Reyes* decision is the topic of another Article in this book, this Article does not discuss the *Reyes-Reyes* case. For a full discussion of *Reyes-Reyes*, see Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. -----,----- (2005).

Part I of this Article will explain the legal standard for asylum claims.¹⁰ This section will specifically focus on the definition of the “particular social group” category of protection within asylum law because this is the category under which Geovanni and other transgender applicants would put forward their asylum claims.¹¹ Part I also emphasizes the requirement under asylum law that a nexus exist between the applicant’s protected characteristic and the persecutor’s motivation to harm.¹² Establishing such a nexus may be a particularly difficult aspect of transgender asylum cases.¹³

Part II will focus directly on Geovanni’s claim.¹⁴ It will first argue that transgender identity meets the legal definition of “particular social group.”¹⁵ It will then explore the requirement of proving a nexus between the harm Geovanni suffered and her transgender identity.¹⁶ Finally, Part II will argue that regardless of whether or not a transgender applicant actually identifies as homosexual, she should also put forward a claim based on her perceived identity as a homosexual if she believes that her persecutors thought her to be gay.¹⁷

I. BACKGROUND ON ASYLUM LAW

A foreign national who fears returning to her country because she has suffered past persecution or has a well-founded fear of future persecution¹⁸ on account of her race, religion, nationality, membership in a particular social group, or political opinion may apply for asylum in the United States.¹⁹ If successful, she is granted asylum status, which allows her to

10. *See infra* Part I.

11. *See infra* Parts I.A-B.

12. *See infra* Part I.C.

13. *See infra* notes 53-59 and accompanying text.

14. *See infra* Part II.

15. *Infra* Part II.A.

16. *Infra* Part II.B.

17. *Infra* Part II.C.

18. Although the INA does not define “persecution,” case law has forged a definition for this term. Generally, physical harm including death, torture, and beatings are considered persecution, and, under some circumstances, non-physical harm such as severe discrimination, economic deprivation, or forced conscription may rise to the level of persecution. Karen Musalo, *Ruminations on In re Kasinga: The Decision’s Legacy*, 7 S. CAL. REV. L. & WOMEN’S STUD. 357, 362-63 (1998) [hereinafter Musalo I]. If the applicant has suffered past persecution, there is a presumption that he will also suffer future persecution. 8 C.F.R. § 208.13(b)(1) (2005). If the persecutor is a non-state actor, the applicant must also prove that his government was unable or unwilling to protect him and that it would not be possible for him to safely relocate within his country. *Id.* § 208.13(b)(3)(ii).

19. 8 U.S.C. § 1101(a)(42)(A) (2005).

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remain lawfully in the United States, to be accompanied or followed by a spouse or children,²⁰ and to petition for authorization to travel²¹ and work.²² A year after her grant of asylum, she can apply for legal permanent residence.²³

Historically, the term refugee “came of age during the Cold War,” when it was most commonly used to refer to political dissidents from Soviet bloc countries.²⁴ During the last decade, however, there has been a shift, and increasing numbers of foreign nationals are seeking asylum based on less traditional grounds—as members of “a particular social group.”²⁵ In 1994, Attorney General Janet Reno designated a 1990 B.I.A. decision, *Matter of Toboso-Alfonso*, as precedent.²⁶ This case recognized that homosexuality could form the basis for membership in a particular social group, allowing lesbians and gay men to qualify for asylum if they could demonstrate persecution based on their sexual orientation.²⁷ Likewise, the last ten years have seen landmark asylum cases recognizing gender-based violence, such as female genital mutilation and domestic violence, as potential grounds for asylum.²⁸ Since gender is not one of the five protected categories under

20. *Id.* § 1158(b)(3).

21. *Id.* § 1158(c)(1)(C); 8 C.F.R. § 223.2.

22. 8 U.S.C. § 1158(c)(1)(B); 8 C.F.R. § 208.7.

23. 8 U.S.C. § 1159(a)(1)(B); 8 C.F.R. § 208.14(g).

24. See Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781 n.28 (2003) [hereinafter Musalo II].

25. These less traditional grounds have included individuals fleeing persecution on gender-based grounds such as female genital mutilation and domestic violence, as well as sexual-orientation based claims. See *infra* notes 27-28.

26. 1895 Op. Att’y Gen. 94 (1994) (designating that *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990), would serve as binding precedent “in all proceedings involving the same issue or issues”) (memorandum on file with author).

27. *Toboso-Alfonso*, 20 I. & N. Dec. at 822 (upholding immigration judge’s finding that Toboso-Alfonso established membership in a social group on the basis of his status as a homosexual, and noting that the issue of whether homosexuality is an immutable characteristic was not raised on appeal); see generally James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997) (comparing the rights of women who are abused to the rights of sexual minorities who are abused).

28. See *Gonzales v. Gutierrez*, 311 F.3d 942, 947 n.9 (9th Cir. 2002) (noting that respondent was granted asylum on the basis of her status as a victim of domestic violence); *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (characterizing female genital mutilation, practiced by the applicant’s tribe, as “persecution”); see also B.J. Chisholm, *Credible Definitions: A Critique of U.S. Asylum Law’s Treatment of Gender-Related Claims*, 44 How. L.J. 427 (2001) (critiquing existing and proposed legal standards for determining the existence of a “social group” under asylum law in the United States); Irena Lieberman, *Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence*, 29 HUM. RTS. 9 (2002) (focusing on the unique challenges faced by women and girls

asylum law, the gender-based persecution cases also must rely on expansive definitions of the “particular social group” category.

A. Defining Particular Social Group

The phrase “membership in a particular social group” is not defined in the Immigration and Nationality Act.²⁹ Case law has offered guidance, however, in fashioning a definition. In *Matter of Acosta*, the B.I.A. determined that the characteristic that defines the group “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 or consciences.”³⁰ In *Acosta*, the B.I.A. held that the applicant, a Salvadoran taxi driver who was opposed to work stoppages, and thus targeted for harm by guerillas, did not fall within this definition.³¹ The Board found that since *Acosta* was free to change his occupation, and that taxi driving was not fundamental to his identity, the proposed social group to which he claimed membership did not warrant a grant of asylum.³²

Following the *Acosta* decision, the Ninth Circuit addressed the issue of membership in a particular social group in *Sanchez-Trujillo v. INS*.³³ In *Sanchez-Trujillo*, the applicants proposed a particular social group of “young, urban, working-class males of military age” in El Salvador who faced potential persecution because they did not actively support the government by serving in the military.³⁴ The Ninth Circuit rejected this formulation of a “particular social group,” and promulgated its own definition, adding a “voluntary associational relationship” requirement among group members, which the proposed group did not meet.³⁵ In a subsequent case, *Hernandez-Montiel v. INS*, the Ninth Circuit decided that membership in a particular social group could entail either voluntary relationships or an “innate characteristic that is so fundamental to the

seeking asylum protection from gender-based violence); Musalo I, *supra* note 18, at 357 *et seq.* (reflecting on the impact of Fauziya Kasinga’s highly politicized asylum case on relevant law and policy).

29. See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2004); see also Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L.J. 281, 281 (2002) (describing “membership in a particular social group” as the “most elastic and nebulous” category of asylum claims).

30. 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

31. *Id.* at 234 (noting that one’s profession is not an immutable characteristic).

32. *Id.* (finding that *Acosta* could have changed jobs or cooperated with guerillas to free himself from the fear of prosecution).

33. 801 F.2d 1571 (9th Cir. 1986).

34. *Id.* at 1577.

35. *Id.* at 1576.

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identities or consciences of its members that members either cannot or should not be required to change it,” bringing it in line with the B.I.A. definition.³⁶

In 2001, the Immigration and Naturalization Service proposed regulations that would, in part, provide guidance on determining membership in a particular group.³⁷ The proposed regulations would harmonize existing case law and provide definition to one of the least defined areas of asylum law.³⁸ While it remains to be seen when or if the

36. 225 F.3d 1084, 1093-94 (9th Cir. 2000) (holding that gay men with female sexual identities in Mexico comprised a particular social group for purposes of asylum). The significance of the *Hernandez-Montiel* ruling to transgender applicants is discussed *infra* at Part II.B. For a further discussion of the evolution of the particular social group category see Musalo II, *supra* note 24, at 783-85.

37. See Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (Dec. 7, 2001) (to be codified at 8 C.F.R. pt. 208). The regulations were proposed in response to *In re R-A-*, 22 I. & N. Dec. 906, Interim Decision 3403 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att’y Gen. 2001), in which a Guatemalan woman sought asylum after enduring years of domestic violence and being unable to obtain protection from her government. The Immigration Judge had granted asylum to R-A-, but the B.I.A. overturned the decision. *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999). Former Attorney General Janet Reno vacated the decision and remanded it for reconsideration upon the final publication of the proposed rule, 65 Fed. Reg. 76588 (Dec. 7, 2000). *Matter of R-A-*, 22 I. & N. Dec. at 906 (Att’y Gen. 2001). The regulations have still not been finalized and *Matter of R-A-* is still pending. See Musalo II, *supra* note 24, at 802-03 (discussing *Matter of R-A-*); *Asylum Protection News 14*, **Human Rights First** (Human Rights First, New York, N.Y.), May 7, 2003, available at http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_14.htm (last visited Feb. 23, 2005).

38. See 65 Fed. Reg. 76588. The proposed regulations set forth the following definition for membership in a particular social group:

Proposed § 208.15 Definitions. . . .

(c) Membership in a particular social group.

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant’s individual circumstances and country conditions information about the applicant’s society.

(2) When past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.

(3) Factors that may be considered in addition to the required factors set forth in paragraph (b)(2)(i) of this section, but are not necessarily determinative, in deciding whether a particular social group exists include whether:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;

regulations will be finalized,³⁹ because former Attorney General Ashcroft's commentary to the proposed regulations states that they do not change the law but rather codify "existing administrative interpretation,"⁴⁰ the proposed regulations have guided decisions by federal courts in subsequent asylum cases.⁴¹

B. Sexual Orientation as Membership in a Particular Social Group

In the *Matter of Toboso-Alfonso*, the B.I.A. held that sexual orientation could be a basis for membership in a particular social group.⁴² Toboso-Alfonso was a gay Cuban man who had suffered repeated abuse by his government because of his homosexuality.⁴³ He was detained by police on several occasions, disproportionately sentenced to sixty days of hard labor for missing work, and forced to appear for a "hearing" with the government every two to three months, all because of his sexual orientation.⁴⁴ The immigration court granted Toboso-Alfonso withholding of deportation, which is a form of relief similar to asylum.⁴⁵ The Immigration and

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- (iii) A voluntary associational relationship exists among the members;
 - (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
 - (v) Members view themselves as members of the group; and
 - (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

Id.

39. See Rachel Swarns, *Ashcroft Weighs Granting Political Asylum to Abused Women*, N.Y. TIMES, Mar. 11, 2004, at A1; see also *supra* note 37.

40. See *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3d Cir. 2003).

41. See *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) (following INS proposed regulation in Torture Convention case); *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) (noting that the B.I.A. was beginning to consider external perceptions relevant in determining whether a social group existed); *Amanfi*, 328 F.3d at 729 (noting that, when interpreting the INA, the opinions of the Attorney General are controlling on questions of law) (quoting INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2004)).

42. 20 I. & N. Dec. 819, 822 (B.I.A. 1990); 1895 Op. Att'y Gen. 94 (1994) (designating *Toboso-Alfonso* as precedent) (memorandum on file with author).

43. *Toboso-Alfonso*, 20 I. & N. Dec. at 820.

44. *Id.* at 820-21.

45. *Id.* at 823. As with asylum, to win "withholding" the applicant must prove persecution on account of one of the five protected grounds, but unlike asylum the applicant is not required to merit a favorable exercise of discretion. Withholding is a mandatory form of relief, with a higher standard of proof than that for asylum. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). Where an asylum applicant must demonstrate that he has a well-founded fear of future persecution, a withholding applicant must demonstrate that it is more likely than not that he would face future persecution if returned to his home country. *Id.* *Toboso-Alfonso* had a criminal conviction, which led the judge to deny asylum. The immigration judge recognized, however, that *Toboso-Alfonso* was likely to face persecution if returned to

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Naturalization Service (“INS”) appealed the decision to the B.I.A., arguing that granting Toboso-Alfonso immigration status in the United States based on his homosexuality “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.”⁴⁶ The B.I.A. found, however, that Toboso-Alfonso was targeted by the Cuban government for his “status”⁴⁷ as a homosexual and not for any homosexual conduct.⁴⁸ The B.I.A. accepted the immigration judge’s finding that homosexuality is “immutable” because the INS did not challenge it on appeal.⁴⁹ As a result of this decision, homosexuality was unequivocally recognized as a “social group” for asylum purposes and thousands of gay men and lesbians have been able to seek asylum in the United States based on persecution they suffered on account of their sexual orientation.⁵⁰

Unlike sexual orientation claims, there has yet to be a precedential decision establishing transgender individuals as members of a particular social group. The inclusion of sexual orientation as a viable particular social group has opened the door to the possibility for other sexual minorities to fit within this category.⁵¹ In fact, there have been successful asylum claims based on transgender, but none have been published as precedent.⁵²

Cuba, so he granted withholding despite Toboso-Alfonso’s criminal record, a decision which was affirmed by the B.I.A. *Toboso-Alfonso*, 20 I. & N. Dec. at 822.

46. *Toboso-Alfonso*, 20 I. & N. Dec. at 822.

47. The difference between “status” and “conduct” is significant in transgender asylum claims as well. As discussed in Part II.B *infra*, the B.I.A. had denied the asylum application of Hernandez-Montiel in large part because it felt that his “conduct” of dressing like a woman was not immutable. *See Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

48. *Toboso-Alfonso*, 20 I. & N. Dec. at 822. Prior to the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which found a Texas law criminalizing consensual sodomy to be unconstitutional, it was difficult to argue that homosexuals should be granted asylum in the United States if they faced criminal prosecution for homosexual acts in their home countries because such laws had been upheld as constitutional in the United States. The *Lawrence* decision removes this argument against sexual orientation-based asylum grants. *See id.* at 583 (“Texas’ sodomy law is targeted at . . . gay persons as a class.”).

49. *Toboso-Alfonso*, 20 I. & N. Dec. at 822.

50. During a panel presentation in 2000, presenter Lavi Soloway, previous chair of the Board of Directors of the Lesbian and Gay Immigration Rights Task Force (now known as Immigration Equality), estimated that, since 1994, 2000 sexual orientation-based asylum claims had been filed. Symposium, *Recent Developments in International Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 187-88 (2000-2001).

51. *See, e.g., Mohyuddin, supra* note 6, at 405-10 (detailing the accounts of several successful asylum claims based on transgender identity which have not been published as precedent).

52. *See id.*

C. Proving a “Nexus” to Harm

Once an asylum applicant has succeeded in establishing that she fits within one of the five protected categories, and that she has suffered persecution or may suffer persecution in the future, she must also demonstrate that the persecution is “on account of” the protected category.⁵³ In a 1992 decision, *INS v. Elias-Zacarias*, the United States Supreme Court addressed the necessity of proving a nexus between the harm suffered and the protected characteristic.⁵⁴ The Court held that Elias-Zacarias, a Guatemalan man who resisted recruitment by guerilla rebels and feared that they would kill him as a result, had not demonstrated that his fear was “on account of” his political opinion.⁵⁵ Instead, the Court found that, although the rebel violence might ultimately be politically motivated, the guerillas were recruiting Elias-Zacarias because they needed to increase their troops.⁵⁶ Elias-Zacarias thus failed to establish that he was targeted for potential violence on account of any political opinion (or lack thereof) that he held.⁵⁷

As a result of the *Elias-Zacarias* decision, adjudicators have added another level of scrutiny to asylum cases by requiring a level of causation based on the *persecutor’s* intent. Now, the courts analyze the intent of the persecutor to ensure that the protected characteristic motivates the persecutor to harm the applicant.⁵⁸ In other words, it is not sufficient to demonstrate that the applicant falls within one of the protected categories and that she has suffered past persecution or will suffer future persecution,

53. INA § 101(a)(42)(A) (2000); 8 U.S.C. § 1101(a)(42)(A) (2000).

54. 502 U.S. 478 (1992).

55. *Id.* at 482-83.

56. *Id.* at 482 (interpreting the Ninth Circuit’s conclusion that the guerillas’ “motive in carrying out the kidnapping [was] political” to mean that the guerillas sought to create an army to wage war against the government) (quoting *Elias-Zacarias v. INS*, 921 F.2d 844, 850 (9th Cir. 1990)).

57. *See id.* (stating that the mere existence of a generalized political motive underlying the guerillas’ forced recruitment did not establish that Elias-Zacarias feared persecution on account of *his own* political opinions). As Justice Scalia explains in the majority opinion of *Elias-Zacarias*,

[i]f a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized “political” motive underlying the guerillas’ forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as § 101(a)(42) requires.

Id. (emphasis in original).

58. *See* Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT’L L. 223, 224 (2002).

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she must also affirmatively demonstrate that a primary reason for the persecution is her protected characteristic.⁵⁹

As discussed below, proving the nexus between the persecutor's motivation and the protected characteristic may be particularly difficult in transgender cases.⁶⁰ Consider an asylum applicant who is anatomically male, dresses like a woman, and has romantic relationships with men. It may not be possible for the applicant (or the adjudicator) to determine whether she has been harmed because the persecutor perceives her to be a homosexual man or because she appears to be a man wearing women's clothes. Regardless of whether she is harmed as a transgender individual or as an actual or perceived homosexual, she should qualify for asylum.⁶¹ The applicant should be prepared, however, to grapple with unresolved issues within the universe of asylum law and to put forth alternative theories of her case.⁶²

II. TRANSGENDER CLAIMS UNDER ASYLUM LAW

Having considered the relevant issues pertaining to asylum cases generally, this Article now turns specifically to the possibility of Geovanni making a successful claim for asylum. There is no precedent directly addressing asylum based solely on transgender identity.⁶³ The primary issues Geovanni will have to address are whether, based on her transgender identity, she can successfully claim membership in a particular social group, and, if so, whether she will be able to establish that the harm she suffered was "on account of" her transgender identity.⁶⁴ This may be very difficult to demonstrate, so Geovanni's claim may be strongest if she also

59. *See id.* (describing the requirement that an asylum applicant provide some evidence that the persecutor's motivation for the persecution was the applicant's race, religion, nationality, political opinion, or membership in a particular social group). It is worth noting that in *Pitcherskaia v. INS*, the only precedent addressing a lesbian asylum claim, the Ninth Circuit reversed the B.I.A.'s holding that because the persecutors' intent was "benign"—the alleged persecutors claimed they subjected the applicant to enforced psychiatric treatment out of a desire to "cure" her of her homosexuality—their actions did not constitute persecution. 118 F.3d 641, 645 (9th Cir. 1997). The Ninth Circuit noted that the motive of the persecutor is relevant "only insofar as the alien must establish that the persecution is inflicted . . . 'on account of' a characteristic or perceived characteristic of the alien." *Id.* at 647. Thus, *Pitcherskaia* clarified that an asylum applicant is not required to show that the persecutor's intent was malicious so long as the persecutor's actions were, in fact, motivated by the victim's protected characteristic. *See id.* at 647.

60. *See infra* Part II.

61. *See infra* Conclusion.

62. *See infra* Conclusion.

63. *See supra* notes 8-9, 52.

64. *See supra* notes 18-19 and accompanying text.

puts forth a claim of “imputed” membership in the firmly established “particular social group” of homosexuals.⁶⁵

A. Particular Social Group and Transgender Applicants

The first step in preparing a successful claim for Geovanni is demonstrating that transgender individuals comprise a particular social group. As discussed above, persecution based on sexual orientation has unequivocally been found to be a ground for asylum.⁶⁶ While being transgender is often confused with sexual orientation, the two are distinct.⁶⁷ Sexual orientation is generally defined as the emotional and sexual attraction an individual feels towards others.⁶⁸ The first question, then, is whether Geovanni could successfully put forward a successful application based on transgender identity alone, without including sexual orientation in the claim.

First, Geovanni may have difficulties proving to an adjudicator that her transgender identity is “immutable” since a primary component of that identity is her desire to change the anatomical sex with which she was born.⁶⁹ While most non-transgender individuals (including, one imagines, the vast majority of asylum adjudicators) consider their sex and gender to be immutable, most transgender individuals do not.⁷⁰ Nevertheless, the debate surrounding the rigidity of gender and sex should not preclude a

65. See *infra* Part II.A-C.

66. See *supra* notes 25-28, 50 and accompanying text.

67. While medical researchers once assumed that transsexuals are generally heterosexual, there is growing evidence to show that there are greater incidences of homosexuality and bisexuality among transsexual individuals. Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 591 n.13 and accompanying text, 609 *et seq.* (2000) (citation omitted).

68. See Suzanne Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 605 n.1 (1993) (positing the following definitions: “a) sexual orientation: an enduring erotic, emotional, or romantic attraction to individuals of a particular gender; b) homosexual: a primary or exclusive attraction to individuals of one’s own gender; c) heterosexual: a primary or exclusive attraction to individuals of the other gender”).

69. See, e.g., Feldblum, *supra* note 1, at 238 n.1 (defining transgender individuals as those “who desire to change their gender, are in the process of changing their gender, or have completed the process of changing their gender”).

70. Although transgender individuals may believe that their anatomical sex can and should be changed, this does not necessarily mean that they feel that their gender is not immutable. Thus, one could argue that a transgender applicant’s gender is immutable, just as a woman seeking asylum on the basis of mistreatment as a female would argue that her gender is immutable. See *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (granting the request of a young woman seeking asylum from her home country to avoid female genital mutilation because being female is an immutable characteristic).

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finding that transgender identity can form the basis of membership in a particular social group.⁷¹ Social group membership can also be based on past experience among individuals who share a characteristic that is fundamental to identity.⁷² Thus, the relevant social group could be framed as “individuals born with one anatomical sex who believe their anatomical sex does not match their gender.” Since there is scarcely any characteristic more fundamental to identity than a person’s gender, this would be a strong argument.

Secondly, transgender individuals meet at least some of the additional guidelines set forth in the proposed regulations.⁷³ For example, they may affiliate closely with one another and voluntarily associate with one another.⁷⁴ In addition, transgender men and women are driven by their common interest in assuming the gender identity of the opposite sex;⁷⁵ they view themselves as members of the group of transgender individuals;⁷⁶ and they are recognized as a segment of the population and are singled out for different treatment.⁷⁷ Since gender identity itself, if not its anatomical manifestation, is immutable and fundamental to a person’s identity,⁷⁸ transgender individuals should be able to establish that they are members of a particular social group for asylum purposes.

B. The Nexus Between Transgender Identity and Persecution

Once a transgender claimant has established that her transgender identity qualifies as membership in a particular social group, she will have another hurdle to clear. As discussed above, *INS v. Elias-Zacarias* requires an asylum seeker to prove a nexus between the attacker’s actions and the

71. There is some risk that courts might find that the desire to change one’s gender identity is not protected. For example, Currah and Minter describe how courts have inferred a distinction between discrimination based on sex and discrimination based on a change of sex. Currah & Minter, *supra* note 1, at 40. In arguing the irrationality of this distinction, Currah and Minter analogize that a court is not likely to find that an employer who fired an employee for changing his religious affiliation or nationality would be excused because he objected to the change rather than to the new religion or nationality. *Id.* at 41.

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

73. See *supra* note 37 and accompanying text (explaining that, in the wake of *In re R-A-*, then Attorney General Janet Reno proposed amendments to the I.N.S. regulations that govern establishing asylum and withholding eligibility).

74. Asylum and Withholding Definitions, 65 Fed. Reg. 76588, § 208.15(c)(3)(i), (iii) (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

75. *Id.* at § 208.15(c)(3)(ii).

76. *Id.* at § 208.15(c)(3)(v).

77. *Id.* at § 208.15(c)(3)(iv), (vi).

78. See, e.g., *Musalo I*, *supra* note 18, at 366 (noting that the board in *Matter of Acosta* defined gender as an immutable characteristic).

protected characteristic.⁷⁹ It is certainly possible that an applicant who successfully establishes that she is transgender, and thus meets the definition for membership in a particular social group, could still lose her asylum case because she cannot establish that her attacker knew that she was transgender.

Perhaps this very issue was at the heart of the framing of the social group in *Hernandez-Montiel v. INS*.⁸⁰ In *Hernandez-Montiel*, the Ninth Circuit took up the question of whether or not “gay men with female sexual identities in Mexico” constitute a protected “particular social group.”⁸¹ At first glance, it is hard to imagine why Hernandez-Montiel’s counsel would have chosen to frame the particular social group in the way that they did. At the time, sexual orientation had already been recognized by the B.I.A. as a particular social group,⁸² so why narrow the category to gay men with female sexual identities?

The answer probably lies in the “nexus” requirement between the protected category and the harm. It is likely that Hernandez-Montiel could not prove to what extent the harm he suffered was because he was gay and to what extent the harm was derived from his female appearance.⁸³ Thus, although the framing of the social group category appears to be merely narrowing the established sexual orientation social group,⁸⁴ it is actually expanding the categories of harm that will qualify as persecution against Hernandez-Montiel by linking his female appearance to his identity as a gay man.

Indeed, while the immigration judge and the B.I.A. probably understood that they were required by the precedent set in *Matter of Toboso-Alfonso* to recognize sexual orientation as a particular social group, neither was prepared to do so for men who dress like women.⁸⁵ The immigration judge found it significant that Hernandez-Montiel did not always dress like a

79. See 502 U.S. 478 (1992); see also *supra* Part I.C (discussing the Supreme Court’s decision in *Elias-Zacarias*).

80. 225 F.3d 1084 (9th Cir. 2000).

81. *Id.* at 1087.

82. See *supra* Part I.B.

83. I am using the male pronoun “he” to describe Geovanni Hernandez-Montiel when discussing the Ninth Circuit’s decision because that is the pronoun the court and Hernandez-Montiel’s amicus brief use. See *supra* note 2.

84. Although gay men had already been established as a particular social group, the B.I.A. and courts have always been reluctant to recognize social groups that are overbroad. See Chisholm, *supra* note 28, at 441 (discussing the “floodgates” argument against expanding asylum categories too broadly).

85. See *Hernandez-Montiel*, 225 F.3d at 1089-90 (summarizing the holdings of the immigration judge and the B.I.A.).

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woman.⁸⁶ Since Hernandez-Montiel chose to sometimes dress like a man, the immigration judge determined that his appearance was volitional and not immutable.⁸⁷

Likewise, the B.I.A. dismissed Hernandez-Montiel's appeal finding that "the tenor of [the applicant's] claim is that he was "mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual."⁸⁸ The B.I.A. also found that Hernandez-Montiel failed to show that his "decision to dress as a female was an immutable characteristic."⁸⁹ That is, rather than seeing Hernandez-Montiel's attire as a manifestation of his immutable identity, the B.I.A. saw his manner of dress as a voluntary act and something that he could be required to change to avoid further abuse.⁹⁰

The Ninth Circuit analyzed the case differently. The court reasoned that, "Geovanni's female sexual identity must be fundamental, or he would not have suffered this persecution and would have changed years ago."⁹¹ The court conflated his "female sexual identity" with his sexual orientation in concluding that "[t]his case is about sexual identity, not fashion. . . . Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women."⁹² In classifying Hernandez-Montiel's female appearance as a manifestation of his sexual orientation, it no longer mattered whether he was persecuted because he was gay or because he dressed as a woman.⁹³ By placing both characteristics under the established sexual orientation ground for asylum, the court was able to offer Hernandez-Montiel relief based on his suffering for either or both

86. *Id.* at 1089.

87. *Id.* Of course, the immigration judge did not address the possibility that after years of being ridiculed, beaten, and raped, at least in part because of his appearance, Hernandez-Montiel might feel too unsafe to always dress in his preferred manner. It would be difficult to imagine an immigration judge applying the same line of reasoning to an asylum claim based on religion. It seems inconceivable that a Jewish applicant would lose his claim because he felt too afraid to wear a yarmulke in public or that a Sikh's religious identity would be questioned for fearing to wear his turban at all times.

88. *Id.* Interestingly, the Ninth Circuit found no support on the record for the finding that Hernandez-Montiel dressed like a male prostitute. *Id.* at 1095. Apparently, this was an independent conclusion of the B.I.A. See *id.* ("We do not venture to guess the non-record basis of the B.I.A.'s assumption of how a male prostitute dresses.")

89. *Id.* at 1090.

90. *Id.* at 1089-90.

91. *Id.* at 1095 (citing *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993)).

92. *Id.* at 1096. For an interesting discussion suggesting how the court's analysis in *Hernandez-Montiel* could be used to advance transgender litigants' discrimination claims under U.S. law, see Flynn, *supra* note 1, at 405-08.

93. See *supra* notes 46-50 and accompanying text.

aspects of his identity.⁹⁴

Reading (not very hard) between the lines of the *Hernandez-Montiel* decision, it is apparent that the applicant was a transgender individual. The court writes that Hernandez-Montiel began to dress as a female at age twelve,⁹⁵ and that he had long hair, long nails, and took female hormones.⁹⁶ The court tucked its discussion of transsexualism into a footnote.⁹⁷ In footnote 7, the court wrote, “[i]n addition to being a gay man with a female sexual identity, Geovanni’s brief states that he ‘may be considered a transsexual.’”⁹⁸ The court then defined transsexualism in the footnote, but concluded, “[w]e need not consider in this case whether transsexuals constitute a particular social group.”⁹⁹ Since the court had already found that Hernandez-Montiel fit within the social group of “gay men with female sexual identities,” it did not need to reach the issue of whether transsexuality would constitute a social group, but neither did it discount the possibility.¹⁰⁰

Hernandez-Montiel is an important bridge to other cases involving claims by individuals who push the boundaries of sexual identity. Hernandez-Montiel’s case was made somewhat easier by the fact that he identified as a gay man. Many transgender individuals do not self-identify

94. See *Hernandez-Montiel*, 225 F.3d at 1095-96.

95. *Id.* at 1095.

96. *Id.* at 1088 (noting that, when Hernandez-Montiel was placed in a counseling program at the age of fifteen, the program staff forced him to cut his hair and nails and to stop taking female hormones).

97. *Id.* at 1095 n.7.

98. *Id.*

99. *Id.* In the footnote, the Ninth Circuit defines 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. (quoting Deborah Tussey, *Transvestism or Transsexualism of Spouse as Justifying Divorce*, 82 A.L.R.3d n.2 (2000)).

100. *Id.* at 1087 (finding that Hernandez-Montiel’s female sexual identity is immutable because it is inherent to his identity). An argument could also be made for asylum for applicants who are, in a more general sense, gender non-conformists. For example, in *In re S-A-*, 22 I. & N. Dec. 1328, 1329 (B.I.A. 2000), asylum was granted to a Moroccan woman who refused to follow the narrow religious edicts set down by her father and suffered severe beatings as a result. Further, because she fled to the United States without the “approval or supervision of a male family member,” she would have been killed by her father had she returned to Morocco. *Id.* at 1331. Such gender-nonconformity based arguments are beyond the scope of this article. For more on the issue of granting asylum for gender persecution, see generally Lieberman, *supra* note 28; and Musalo I, *supra* note 18.

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as homosexual,¹⁰¹ however, and therefore would not feel comfortable defining their social group as “same sex sexual orientation with opposite sex sexual identities” as Hernandez-Montiel did.¹⁰² The question remains open then as to how an adjudicator would decide a case in which the applicant’s claim is based solely upon transgender identity.

There is only one immigration decision with precedential value that deals directly with an application for relief by a transgender individual.¹⁰³ *Miranda v. INS*¹⁰⁴ was decided prior to *Hernandez-Montiel*,¹⁰⁵ and involved an appeal to the Eighth Circuit of the B.I.A.’s denial of the applicant’s motion to re-open her¹⁰⁶ deportation proceedings to allow her to file for suspension of deportation.¹⁰⁷

Suspension of deportation was a form of relief, available prior to April 1, 1997, which was eliminated by changes to the Immigration and Nationality Act.¹⁰⁸ Under the former suspension law, certain foreign nationals could obtain legal permanent residence in the United States if they could demonstrate: seven years of continuous physical presence in the United States; good moral character; and that the applicant or a close family member who was a United States citizen or legal permanent resident would

101. See Minter, *supra* note 67, 592-93 n.13 (discussing the distinction between transgender individuals and homosexuals).

102. In fact, putting forward a claim based on homosexual sexual orientation for a person who does not actually consider himself or herself to be homosexual could be considered a “frivolous” asylum claim. A “frivolous” asylum claim is defined as an application in which “any of its material elements is deliberately fabricated.” 8 C.F.R. § 208.20 (2005). There is no penalty in the INA greater than that for filing a “frivolous” asylum claim—an applicant found to have knowingly filed a “frivolous” asylum claim after being given notice of the consequences of doing so is barred from ever receiving any form of immigration relief in the future. INA § 208(d)(6), 8 U.S.C. § 1158(d)(6) (2004); 8 C.F.R. §§ 208.3(c)(5), 208.20.

103. See generally *Miranda v. INS*, 51 F.3d 767 (8th Cir. 1995) (affirming the district court’s decision that the potential medical and social hardships the plaintiff might encounter if deported did not rise to the level of extreme hardship).

104. *Id.*

105. See generally 225 F.3d at 1084. It is interesting to note that, despite the factual similarities, the *Miranda* decision was not cited in the *Hernandez-Montiel* decision.

106. *Miranda v. INS*, 51 F.3d at 768-69. In this case, the court accepts that *Miranda* is a male to female transsexual and refers to her using the female pronoun throughout the decision.

107. *Miranda* had already lost her claim for asylum, but it is not possible to tell from the decision whether she had applied for asylum based on her sexual identity or for another reason. Since this case was decided in 1993 (after *Matter of Toboso-Alfonso* was decided, but before it was designated as precedent), there was not yet any established precedent that sexual orientation could be a ground for asylum. See *id.* at 768 (denying applicant’s motion because she failed to make a prima facie case for extreme hardship, which was a prerequisite to reopen the case).

108. IRA KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 688 (8th ed. 2002) (stating that suspension of deportation was eliminated as of April 1, 1997).

suffer extreme hardship if the applicant was deported.¹⁰⁹ Since there was neither a requirement to show government involvement or failure to protect, nor a requirement to show that the hardship would be “on account of” any protected characteristic, suspension was generally easier to win than asylum.¹¹⁰ Because of the procedural posture of the appeal in *Miranda*, the circuit court was considering only whether to uphold the B.I.A.’s decision not to reopen the case.¹¹¹ To prevail, *Miranda* would have had to make a *prima facie* showing of eligibility for suspension.¹¹²

Gina *Miranda* was a male to female, post-operative transsexual from Honduras.¹¹³ *Miranda* made two hardship-based arguments. First she stated that she would face medical hardship if forced to return to Honduras because there was no “integrated” treatment available for transgender people there.¹¹⁴ She submitted letters from two American and two Honduran doctors attesting to this assertion.¹¹⁵ Both the B.I.A. and the Eighth Circuit rejected this argument, however, finding that the Honduran letters were written before *Miranda* had completed sex reassignment surgery, and that there was no evidence that *Miranda* could not continue to receive hormone treatment or counseling if returned to Honduras.¹¹⁶

Miranda next asserted “social hardship.”¹¹⁷ This is the part of *Miranda*’s claim that most closely parallels asylum. Here, *Miranda* stated that she would “face discrimination and governmental persecution in Honduras and [could] not legally change her name and gender” there, which would result in extreme hardship to her.¹¹⁸ The B.I.A. rejected this claim, however, finding that although *Miranda* would “face some social difficulties in Honduras as a result of her sexual reassignment surgery,” she had not

109. *Id.* at 710-11 (citing former INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (repealed Sept. 30, 1996)).

110. *See* 8 U.S.C. § 1254(a)(1) (repealed Sept. 30, 1996).

111. *See* 51 F.3d at 768 (finding that the petitioner did not make a *prima facie* showing of extreme hardship).

112. *Id.*

113. *Id.*

114. *Id.* at 769.

115. *Id.*

116. *Id.* It is interesting to contrast this reasoning with that of the B.I.A. in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000). In *Hernandez-Montiel*, the B.I.A. denied the applicant’s claim, in part, because his female appearance was not permanent: he could choose whether or not to wear feminine attire. Thus, in *Hernandez-Montiel*, the B.I.A. denied the claim, in part, because the applicant could change at will from a male to a female appearance and vice versa. In *Miranda*, the court found that since her transition to female was complete, she no longer faced any medical hardship in returning to Honduras. Thus, in *Miranda*, the court held the fact that *Miranda*’s transition was completed against her.

117. *Miranda*, 51 F.3d at 769.

118. *See id.*

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demonstrated that the problems would rise to the level of extreme hardship.¹¹⁹ The B.I.A. found it significant that Miranda had lived part of her life in Honduras as a woman before coming to the United States.¹²⁰ It also dismissed Miranda's claimed discrimination at work because she had been able to maintain employment in Honduras and one of her co-workers defended her in the face of discrimination.¹²¹ The Eighth Circuit upheld the B.I.A.'s reasoning, agreeing that Miranda had not made a showing of extreme hardship, which the B.I.A. was free to construe narrowly.¹²²

In her case, Miranda had filed a motion to reopen to file the suspension claim, which meant that she did not have the opportunity to have a full hearing.¹²³ This probably made the record before the court minimal at best.¹²⁴ Nevertheless, when compared with subsequent cases, it is difficult to understand why the court refused to reopen Miranda's case, thereby preventing her from submitting her suspension of deportation claim for a full hearing. Following Miranda's case, there have been successful sexual orientation-based asylum cases involving applicants from Honduras,¹²⁵ and Amnesty International reports that transgender individuals in Honduras continue to suffer persecution and even death.¹²⁶ Fortunately, the potential precedential damage of the *Miranda* case was mitigated by the fact that the decision is based upon a form of relief that is no longer available under the INA.¹²⁷ In fact, *Miranda* has only been cited in two subsequent cases, both of which were suspension of deportation cases and neither of which dealt with a transgender applicant.¹²⁸ Thus, its effects on subsequent cases have

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 769.

123. *See id.* at 768.

124. *See, e.g.,* *Chungong v. INS*, 217 F.3d 836 (4th Cir. 2000) (dispensing with oral argument in affirming denial of motion to reopen). In cases reviewing denials of motions to reopen deportation hearings, review is minimal, usually consisting of a review of the file and perhaps an allowance for reargument.

125. *See New Filing Deadline is Tested in Immigration Court: Judge Grants Asylum to HIV+ Gay Honduran Man*, LGIRTF STATUS REP. (The Lesbian and Gay Immigr. Rts. Task Force, New York, N.Y.), Fall 1998 (on file with author).

126. *See* Amnesty Int'l, *Human Rights and Sexual Orientation and Gender Identity*, (Mar. 31, 2004), at <http://web.amnesty.org/library/Index/ENGACT790012004?open&of=ENG-347> (last visited Feb. 10, 2005).

127. *See* 8 U.S.C.A. § 1254 (repealed 1996).

128. *See* *Vallejos-Miranda v. INS.*, 133 F.3d 923, 923 (8th Cir. 1997) (citing *Miranda* as support for the B.I.A.'s denial of a relief to petitioner); *Oyelowo v. INS*, 74 F.3d 1243, 1243 (8th Cir. 1996) (citing *Miranda* as enumerating a rule allowing B.I.A. to narrowly define "extreme hardship").

been minimal.

C. Framing Transgender Claims as “Imputed Sexual Orientation” Claims

If it is not possible to convince an adjudicator that transgender individuals constitute a particular social group, or that the applicant was persecuted because she was transgender, it might be logical to use the *Hernandez-Montiel* approach of framing transgender identity as a component of the applicant’s sexual orientation. For many transgender individuals, however, this approach will not work because the applicant may not consider herself to be gay.¹²⁹ Let us consider how to frame Geovanni’s claim if the facts of the *Hernandez-Montiel* case were slightly different.

In the new fact pattern, Geovanni refuses to identify as a “gay man with a female sexual identity,” because she does not consider herself homosexual or a man. Although she had relationships with men in Mexico while she was still anatomically male, she considered herself to be a woman in heterosexual relationships. In these altered facts, Geovanni’s longest term partner never considered himself to be gay either, and Geovanni was the only “man” with whom he had ever been involved.¹³⁰

One way to approach this factual scenario would be to argue that, regardless of whether or not Geovanni self-identifies as homosexual, much of the abuse she suffered in her country was a result of others perceiving her to be homosexual. After all, while living in her country, Geovanni was anatomically male and had romantic relationships with men. The men who attacked Geovanni almost always made homophobic comments while they abused her. If the reason for the harm she suffered was the persecutors’ belief that Geovanni was a gay male, it seems logical to frame the asylum application from the perspective of the persecutors.¹³¹

Since Geovanni does not actually consider herself to be homosexual, the claim that she would be putting forward under this category is one of imputed membership in a particular social group. While it is clear that homosexuals can constitute members of a particular social group,¹³² it is

129. See *supra* note 101.

130. This fact pattern is based loosely on the facts of a transgender asylum case on which the author is currently working.

131. This is especially true in light of *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), discussed *supra* at Part I.C., which requires the asylum applicant to “provide some evidence” that the motivation of the persecutor was the applicant’s protected characteristic. *Id.* at 483.

132. See *supra* Part I.B (discussing *Matter of Toboso-Alfonso*).

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not clear whether or not adjudicators will recognize imputed sexual orientation or imputed membership in any particular social group.

Although there is substantial precedent establishing that an asylum applicant can win a claim based on his imputed political opinion,¹³³ the availability of asylum based on imputed membership in a social group is less clear. The only precedential case to address whether or not sexual orientation can be imputed is *Amanfi v. Ashcroft*.¹³⁴ In *Amanfi*, the applicant, a man from Ghana, was told by men claiming to be police officers that his father had been murdered as a result of his religious preaching.¹³⁵ Amanfi was abducted by private security forces hired to settle disputes,¹³⁶ placed in a room with an idol covered with blood, and served food and wine.¹³⁷ Based on the teachings of his grandfather, Amanfi concluded that the “macho men” who abducted him were preparing him for a ritual sacrifice.¹³⁸ When another man was placed in the room with him, Amanfi convinced the man to engage in a homosexual act with him so that the two would be considered unacceptable for sacrifice.¹³⁹ When the “macho men” found Amanfi and the other man engaged in the homosexual act, they beat them and brought them to the police station.¹⁴⁰ At the police station they were both beaten again and the other man was eventually beaten to death.¹⁴¹ After Amanfi escaped from the police station, he was forced to stay in a hotel because he could no longer stay with family members who now believed him to be gay,¹⁴² and he was told that the police were looking for him.¹⁴³ Amanfi was able to escape and fled Ghana.¹⁴⁴ Amanfi does not identify as gay, but rather testified that he engaged in the homosexual act to be spared from human sacrifice.¹⁴⁵

Amanfi first argued that he was targeted because of his religious beliefs, but the B.I.A. found that the harm he suffered at the hands of the “macho men” was based on a private dispute between them and his father, and

133. See, e.g., *Amanfi v. Ashcroft*, 328 F.3d 719, 729 and n.4 (3d Cir. 2003) (listing Circuit Court cases affirming imputed political opinion as a ground for asylum).

134. 328 F.3d 719.

135. *Id.* at 722.

136. These private security forces are referred to as “macho men.” *Id.* at 723.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See *id.* (“Amanfi’s cousin refused to let him stay with her because his reputation as a homosexual had drawn ‘a lot of attention.’”).

143. *Id.*

144. *Id.*

145. *Id.*

therefore was not “on account of” his religious beliefs.¹⁴⁶ Amanfi also argued that he would be subjected to future persecution because he was believed to be homosexual by members of the community and the government.¹⁴⁷ While the B.I.A. acknowledged that sexual orientation could form the basis of “a particular social group,” it found that since Amanfi admitted that he was not a homosexual, he could not fall within the “particular social group” of homosexuals.¹⁴⁸ The B.I.A. also noted that while imputed political opinion has been recognized for asylum purposes, no precedent exists for a finding of imputed membership in a particular social group in this case.¹⁴⁹

Subsequent to Amanfi filing his petition for review, the Department of Homeland Security (“DHS”)¹⁵⁰ proposed regulations dealing in large part with “particular social group” issues.¹⁵¹ In relevant part, the proposed regulations would amend existing regulations to state:

An asylum applicant must establish that the persecutor acted, or that there is a reasonable possibility that the persecutor would act, against the applicant on account of the applicant’s 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.¹⁵²

The INS moved the Third Circuit to remand *Amanfi* to the B.I.A. to reconsider the case in light of the proposed regulations.¹⁵³

Since the proposed regulations have not been finalized,¹⁵⁴ they are not binding on the DHS or courts, but the Third Circuit found that it could

146. *Id.* at 724.

147. *Id.*

148. *Id.*

149. *See id.* (citing *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (holding that an applicant established his membership in the particular social group of homosexuals in Cuba because he testified that he was registered as a homosexual with the Cuban government and persecuted on account of his sexual orientation)).

150. In 2003, the Department of Homeland Security replaced the Immigration and Naturalization Service as the agency which adjudicates asylum applications. *See The INS No Longer: Immigration and Asylum under the Department of Homeland Security*, LGIRTF STATUS REP. (The Lesbian and Gay Immigr. Rts. Task Force, New York, N.Y.), No. 1, 2003 at 4 (on file with author).

151. *See supra* notes 37-38.

152. *See supra* note 38 (quoting proposed regulations 8 C.F.R. § 208.15(b)).

153. *Amanfi*, 328 F.3d at 727-28. Note that the Third Circuit uses the old agency name, I.N.S., in its discussion. *Id.*

154. *See supra* note 39.

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decide this issue of law without remanding the case.¹⁵⁵ The court held 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.”¹⁵⁶ The court then remanded the case to the B.I.A. for a full consideration of the evidence in light of *Amanfi*’s claims to persecution as an imputed member in the particular social group of homosexuals.¹⁵⁷

The *Amanfi* decision has enormous significance for transgender individuals who have suffered persecution because they are perceived to be homosexual. This decision and, if they are ever promulgated, the proposed regulations which the decision interprets, will allow transgender asylum applicants to prove their cases without necessarily having to establish that the persecutor targeted them because of their transgender identity. In many instances, a transgender applicant will suffer harm because she is believed to be homosexual. In many attacks to which transgender individuals are subjected, they hear such epithets for “homosexual” as “faggot” or “dyke.” Indeed, many cultures may not even have a word for transgender identity, and equivalent epithets may not exist. Thus, in spite of the inherent differences between transgender and homosexual identities, it is important under asylum law to recognize the connections between the two.

CONCLUSION

While navigating the uncharted territory of transgender asylum claims, Geovanni should put forth alternative theories for her claim. First, Geovanni should make a claim that her identity as a transgender individual qualifies her as a member of a particular social group.¹⁵⁸ Gender identity is fundamental to human identity, and whether or not Geovanni chooses to change the outward manifestations of the appearance of her gender, the identity itself is immutable.¹⁵⁹ Since there is no precedential decision recognizing transgender identity as a particular social group, there would be some risk in advancing this as the only ground for asylum.¹⁶⁰ Moreover, because the asylum applicant must prove that the persecutor’s

155. *Amanfi*, 328 F.3d at 729. The court found it significant that the proposed regulations did not purport to change the law, but rather to codify existing precedent. Thus, the court did not find any need to remand the case to the B.I.A. for it to interpret the proposed regulations. *Id.*

156. *Id.* at 730.

157. *Id.*

158. *See supra* notes 25-27, 29-36, 42-50 and accompanying text.

159. *See supra* notes 36, 49 and accompanying text.

160. *See supra* note 51-52 and accompanying text.

motivation to harm her is the protected characteristic, Geovanni may have difficulty establishing that the persecutor actually knew that she had a transgender identity, particularly if the persecutor makes homophobic statements during the attack.¹⁶¹

Therefore, at the same time that Geovanni puts forth her claim based on transgender identity, she should also lean on the jurisprudence that has developed in sexual orientation-based asylum claims. If she happens to identify as homosexual, she should apply for asylum based on both sexual orientation and gender identity.¹⁶² If she does not consider herself homosexual, she should still make a claim based on imputed homosexual orientation if she believes that this is the reason that her persecutors targeted her.¹⁶³

There is often a perception that the issue of transgender rights is a footnote to the civil rights advances of lesbians and gay men.¹⁶⁴ In asylum law, transgender individuals have an opportunity to advance their cases based on jurisprudence that has developed in the area of sexual orientation-based claims, regardless of whether or not the applicant identifies as lesbian or gay.¹⁶⁵ There is no question that transgender individuals continue to suffer severe discrimination and violence around the world.¹⁶⁶ Although there is no binding precedent in this area, with a properly framed case, transgender people who have suffered persecution or who fear future persecution in their countries should be able to obtain asylum in the United States.

161. See *supra* notes 60-62 and accompanying text.

162. See *supra* Part I.B.

163. See *supra* Part II.C (discussing the *Amanfi v. Ashcroft* decision and its implications for transgender asylum applicants).

164. See Flynn, *supra* note 1, at 395. Flynn argues that rather than seeing transgender rights cases at the periphery of homosexual and women's rights cases, transgender cases should be central in the struggle for rights based on gender identity, within which she includes both sexual orientation and sex.

165. See *supra* Part I.B and notes 26-27 and accompanying text.

166. See, e.g., Amnesty Int'l, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity*, at 50 (2001), available at [http://web.amnesty.org/aidoc/ai.nsf/afec99eadc40eff880256e8f0060197c/dc31f264b72fabf280256a48003c810c/\\$FILE/lgbt.pdf](http://web.amnesty.org/aidoc/ai.nsf/afec99eadc40eff880256e8f0060197c/dc31f264b72fabf280256a48003c810c/$FILE/lgbt.pdf) (last visited Feb. 10, 2005).