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Joseph Landau

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"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law

Cover Page Footnote

J.D., 2002, Yale University; B.A., 1995, Duke University. I am currently a law clerk to the Hon. David G. Trager, U.S. District Court for the Eastern District of New York. I would like to thank Lavi Soloway, who mentored me on several of the asylum cases discussed in this Article; Greg Klass, Frank Pasquale, David Menschel, and Simon Stern, for providing insightful comments on drafts of this piece; and Anil Kalhan and Jonathan Fine, former colleagues at Cleary, Gottlieb, Steen & Hamilton, who supervised my work on *Reyes-Reyes v. Ashcroft*, discussed below.

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“SOFT IMMUTABILITY” AND “IMPUTED GAY IDENTITY”: RECENT DEVELOPMENTS IN TRANSGENDER AND SEXUAL-ORIENTATION-BASED ASYLUM LAW

*Joseph Landau**

INTRODUCTION

Owing to a number of recent developments, U.S. asylum law is one of the most hospitable legal arenas for lesbian, gay, bisexual, and transgender (“LGBT”) litigants.¹ Gays and lesbians have been protected as a “particular social group” since 1990,² and it is now beyond cavil that the law of asylum protects immigrants who face persecution on account of sexual orientation no less than those whose persecution is based on race, religion, nationality, or political opinion.³

* J.D., 2002, Yale University; B.A., 1995, Duke University. I am currently a law clerk to the Hon. David G. Trager, U.S. District Court for the Eastern District of New York. I would like to thank Lavi Soloway, who mentored me on several of the asylum cases discussed in this Article; Greg Klass, Frank Pasquale, David Menschel, and Simon Stern, for providing insightful comments on drafts of this piece; and Anil Kalhan and Jonathan Fine, former colleagues at Cleary, Gottlieb, Steen & Hamilton, who supervised my work on *Reyes-Reyes v. Ashcroft*, discussed below.

1. Many of the concepts advanced in this Article were useful to me in successfully seeking asylum for clients whom I represented *pro bono* while an associate at Cleary, Gottlieb, Steen & Hamilton, from 2002 to 2004.

2. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990) (interpreting the term “particular social group” to include sexual orientation).

3. The asylum statute specifically protects race, religion, nationality, political opinion, as well as “particular social groups.” 8 U.S.C. § 1101(a)(42)(A) (2005). Homosexuality has been consistently recognized as a particular social group since the *Toboso-Alfonso* decision. After the ruling, former Attorney General Reno declared *Toboso-Alfonso* “precedent in all proceedings involving the same issue or issues.” 1895 Op. Att’y Gen. 94 (1994) (reported at 71 No. 25 Interpreter Releases 859 (July 1, 1994)). Federal courts of appeals have also noted that sexual-orientation-based persecution is fully protected under the asylum laws. *See, e.g., Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (recognizing homosexuality as social group); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (same); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998) (noting *Acosta* as established precedent that “gay men and lesbians in Cuba” constitute a particular social group).

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Two recent decisions by the Ninth Circuit⁴ extend these gains by protecting within that jurisdiction many, if not all, male-to-female (“MTF”) transgender asylum seekers.⁵ These cases demonstrate a developing jurisprudence of transgender asylum protection based on an asylum seeker’s expression of gendered traits, including a person’s hairstyle, clothing, demeanor, use of makeup, and choice of names. In these cases, the court honors such expression as a true and honest depiction of identity and self-determination, extending protection to litigants because the traits they exhibit are integral to their identities.

These cases evidence a “soft immutability” standard that, while requiring the asylum seeker to prove a “fundamental” transgender identity, allows a more relaxed set of criteria that adjust to the context of the particular asylum seeker’s case and circumstances. The conception of identity advanced in these cases eschews a standard biological approach of protecting only innate characteristics like chromosomal makeup, internal sex organs, or “birth sex” (the gender assigned to an individual at birth), extending protection based on characteristics adopted over time—including behaviors, character traits, and forms of dress.

In addition to taking advantage of this developing case law, transgender asylum seekers can marshal at least two additional arguments on their behalf. First, they can assert that they qualify under prevailing definitions of “particular social group”; second, they can assert a claim based on an “imputed gay identity.”⁶ Under the “imputed gay identity theory,” individuals who do not identify as gay or lesbian but who are labeled and persecuted as such can still litigate an asylum claim based on sexual orientation. Transgender applicants, for example, who do not identify as gay, but who are nevertheless perceived by those around them as gay, can take advantage of this theory. The imputed gay identity is not limited to LGBT asylum seekers; heterosexuals can bring (and have brought) such claims as well.⁷

This Article surveys the law of LGBT asylum as it has developed over the past fifteen years, first, with the landmark case of *Matter of Toboso-*

4. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004); *Hernandez-Montiel*, 225 F.3d at 1084.

5. The decisions do not currently protect female-to-male (“FTM”) transgender persons, though the theory of protection on which these decisions rely should be available to all transgender persons. See *infra* Part III.

6. I have found both strategies instrumental in my own representation of transgender asylum seekers; as discussed below, litigants in all jurisdictions can avail themselves of these strategies.

7. See *Amanfi*, 328 F.3d at 719, discussed *infra* note 112.

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Alfonso, which recognized homosexuality as a “particular social group”; second, with the Ninth Circuit’s recent cases adopting a soft immutability standard of identity and expanding asylum protection to transgender individuals; and third, with a discussion of the “particular social group” analysis as it applies to transgender asylum seekers and the emergence of the “imputed gay identity” category as an alternative basis for relief for those litigants who do not identify as gay or lesbian but who nonetheless face anti-gay or anti-lesbian persecution.

Given the staggering number of new asylum claims making their way through the various courts of appeals,⁸ one can expect more developments in the near future. These changes, while crucial to asylum litigators and commentators on immigration law, can also contribute to the development of LGBT law and scholarship in other statutory and constitutional contexts like employment discrimination and constitutional equal protection challenges.⁹

8. Since 2002, the number of immigration appeals lodged in federal courts has surged. During the twelve month period ending in March 2003, filings of immigration agency appeals rose 379% to 8446 appeals. *See Immigration Appeals Surge in Courts*, 35 THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS 9 (Administrative Office of the U.S. Courts, Washington, D.C.), Sept., 2003, available at <http://www.uscourts.gov/tb/sep03tb/immigration/index.html>. The unprecedented increase in immigration appeals is a result of procedural reforms initiated by former Attorney General John Ashcroft that were intended to clear a backlog of roughly 56,000 immigration-related cases. *Id.*; see *Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,878 (Aug. 26, 2002). The reforms expand the use of a streamlining procedure first implemented in 1999, whereby immigration appeals are decided not by a panel of arbiters but rather by a single individual who upon reviewing the decision can issue a one-sentence summary affirmation without any analysis of the underlying merits of the case. *See* 8 C.F.R. § 1003.1(e)(4) (2005); see generally Marcia Coyle, *Immigration Appeals Surge: A Backlog Shifts From One Level to the Circuit Courts*, 26 NAT’L L.J. 9 (2003). This procedure, dubbed “affirmance without opinion” has caused immigration cases to move from administrative courts to the federal courts of appeals, which have jurisdiction over appeals of final agency decisions. *See generally id.* The procedure has been upheld by all federal circuits where it has been challenged. *See, e.g.,* *Dominguez v. Ashcroft*, 336 F.3d 678, 680 (8th Cir. 2003); *Falcon-Carriche v. Ashcroft*, 335 F.3d 1009, 1013 (9th Cir. 2003), *reh’g denied en banc*, 350 F.3d 845, 856 (2003); *Khattak v. Ashcroft*, 332 F.3d 250, 253 (4th Cir. 2003); *El Moraghy v. Ashcroft*, 331 F.3d 195, 205-06 (1st Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003); *Mendoza v. United States Attorney Gen.*, 327 F.3d 1283, 1288-89 (11th Cir. 2003); *Soadjede v. Ashcroft*, 324 F.3d 830, 831-33 (5th Cir. 2003).

9. *See* Taylor Flynn, *Transforming the Debate: Why We Need To Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 404-05 (2001) (noting application of the analysis of these cases—particularly *Hernandez-Montiel*—to claims involving “employment discrimination, domestic violence and rape, and violations of equal protection”).

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I. THE STRUCTURE OF ASYLUM LAW

“Asylum” is a legal remedy available to legal and illegal immigrants who seek protection from persecution they faced or would face in their home country on account of some protected ground.¹⁰ Not all immigrants are protected from persecution; rather, the persecution must have a connection to some protected characteristic. Currently, that includes race, religion, nationality, political opinion, and membership in a “particular social group.”¹¹ An asylum request is automatically considered an application for an alternative claim of withholding of removal.¹² Both

10. U.S. asylum law is based on the 1951 United Nations Convention Relating to the Status of Refugees, and the 1967 Protocol Relating to The Status of Refugees. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 303 U.N.T.S. 268. Although the U.S. Congress never ratified the Convention, it joined the Protocol in 1969. The Refugee Act of 1980, amending the Immigration and Nationality Act (8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. II 1996)), adopts the Convention’s definition of refugee and the Protocol. See Pub. L. No. 96-212, 201, 94 Stat. 102, 102 (1980).

11. Immigration & Nationalization Act of 1956 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2005).

12. 8 C.F.R. § 208.3(b); *Njuguna v. Aschroft*, 374 F.3d 765, 769 (9th Cir. 2004) (“Every asylum application is deemed to include a request for a withholding of removal.”). Almost all litigants also seek relief under the Convention Against Torture. The Convention Against Torture, which provides a remedy similar to that granted under withholding of removal, is vital for individuals who, for some reason, do not fall into one of the protected groups (including “particular social group”) under the asylum and withholding of removal statutes.

Article 3 of the Convention Against Torture prohibits signatory states from deporting individuals to states where there are “substantial grounds for believing” they would be subjected to torture. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 3, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. The Convention Against Torture defines “torture” as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. art. 1(1).

In 1998, the United States implemented the Convention Against Torture by enacting the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-761, § 2242, and in February 1999, the Attorney General published regulations governing claims under the Convention Against Torture. See 64 Fed. Reg. 8479 (codified at 8 C.F.R. § 208.16-208.18). An applicant seeking Convention Against Torture relief must demonstrate he will “more likely than not” be tortured upon return to his country of origin.

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forms of relief require the applicant to demonstrate a certain quantum of persecution that the individual suffered in his or her home country or would suffer if returned there, and both require a “nexus” between that persecution and one of the protected grounds mentioned above.¹³

A. Asylum Versus Withholding of Removal

Asylum and withholding of removal appear nearly identical but have important differences: asylum is subject to the Attorney General’s discretion,¹⁴ while withholding of removal, once proven, is a mandatory form of relief.¹⁵ A person granted asylum may be eligible for permanent residency;¹⁶ consequently, most litigants prefer asylum. Withholding of removal, by contrast, guarantees only that the person will not be forcibly returned to his or her country of origin and does not preclude the possibility of being removed to a third country.¹⁷

1. Asylum

Under the Immigration and Nationality Act of 1956,¹⁸ an alien may be granted asylum if, at the discretion of the Attorney General, the alien is a “refugee” within the meaning of the statute.¹⁹ A “refugee” is

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

8 C.F.R. § 208.16(c)(2). This standard tracks the higher burden of proof required in withholding of removal cases. *Cf.* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). At the same time, the applicant need not demonstrate that he would be tortured along any of the protected grounds specified in asylum and withholding of removal cases. *See, e.g., Kamalithas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001). Convention Against Torture relief is therefore available to *any* alien who meets the burden of proof. *See* 8 C.F.R. § 208.16(c). Because the Convention Against Torture lacks any nexus requirement, the identity of the individual bringing the claim is a less salient (though still relevant) issue.

13. *See generally* *INS v. Elias-Zacarias*, 502 U.S. 478, 481-83 (1992); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 349 (5th Cir. 2002) (““on account of” language . . . requires the alien to prove some nexus between the persecution and the five protected grounds”).

14. 8 U.S.C. § 1158(a) (2005).

15. *Id.* § 1231(b)(3); 8 C.F.R. § 208.16(c).

16. *See id.* § 1255 (2005).

17. *See id.* § 208.16(f).

18. *Id.* § 1101(a)(42)(A).

19. Immigration & Nationalization Act of 1956 § 208(a), 8 U.S.C. § 1158(a).

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An applicant may establish eligibility by proving past persecution, which creates a rebuttable presumption that a well-founded fear exists,²¹ or by demonstrating a “reasonable possibility” of future persecution.²² An applicant who belongs to a particular social group can meet this standard if she can establish that in her country of origin, there is a pattern or practice of persecuting a group of persons similarly situated to the applicant.²³

2. Withholding of Removal

An applicant qualifies for mandatory withholding of removal when he demonstrates that his life or freedom would be threatened upon return to his homeland on account of his membership in a particular social group.²⁴ To establish eligibility for withholding of removal²⁵ the applicant faces a somewhat higher burden—he must demonstrate that future persecution is “more likely than not” to occur.²⁶ Thus, an applicant can obtain withholding by proving that he belongs to a particular social group and that it is more likely than not that he would be persecuted on account of his membership in that group if returned to his country of origin.²⁷

Consequently, in order to bring a successful claim for asylum or withholding of removal, an applicant must first establish participation in one of the statutorily or judicially created categories; in the case of LGBT persons, the individual must prove membership in a “particular social group.” Upon doing so, the applicant must demonstrate the nexus between that particular social group and persecution.

20. Immigration & Nationalization Act of 1956 § 101(a) (42) (A), 8 U.S.C. § 1101(a)(42)(A).

21. Under the Attorney General’s implementing regulations, past persecution or torture creates a presumption that the applicant’s life or freedom is threatened in the country of removal. The government may refute this claim by establishing to a preponderance of the evidence that (a) there has been a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened, or (b) the applicant could avoid a future threat by relocating to another part of the proposed country. 8 C.F.R. § 208.16(b)(1) (2005).

22. *See, e.g.*, *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1244-45 (9th Cir. 1999) (citing 8 C.F.R. § 208.13(b)(1)(i)).

23. 8 C.F.R. § 208.16(b)(2)(i).

24. *Id.* § 208.16(b).

25. 8 U.S.C. § 1231(b)(3).

26. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

27. 8 C.F.R. § 208.16(b)(2).

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3. Proving “Social Group” Standards

The Immigration and Nationality Act does not define “particular social group,” leaving interpretation to the Board of Immigration Appeals (“BIA”)—the highest administrative body for interpreting and applying immigration laws²⁸—and the federal courts. In *Matter of Acosta*, the BIA defined “particular social group” as “a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared experience”²⁹ The characteristic must be something “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

Many federal circuits borrow the *Acosta* definition of “particular social group,” while other circuits have developed slightly alternative formulations. The First,³¹ Third,³² and Seventh³³ Circuits explicitly follow the *Acosta* analysis, which defines “particular social group” through the lens of innate and immutable characteristics. The Second and Ninth Circuits have developed variations on the standard BIA definition that are arguably broader than the *Acosta* formulation.³⁴

In *Gomez v. INS*, the Second Circuit defined “particular social group” as one “comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor . . . or in the eyes of the outside world in general.”³⁵ This standard expands upon the *Acosta* analysis in two ways. First, it protects characteristics that are not innate and immutable, but “fundamental”—a category that potentially incorporates a broader range of characteristics. Second, by focusing on the persecutor’s *perception*, the *Gomez* formulation recognizes the extent to which outsiders’ perceptions of an individual—real or imaginary—form the basis of that person’s persecution. *Gomez* captures an important reality underlying much persecution (not to mention

28. A description of the BIA and its functions is available at www.usdoj.gov/eoir/biainfo.htm.

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

30. *Id.*; see also *In re H*, 21 I. & N. Dec. 337, 342 (B.I.A. 1996) (citing *Acosta*, 19 I. & N. Dec. at 233-34).

31. See, e.g., *Meguenine v. INS*, 139 F.3d 25, 28 n.2 (1st Cir. 1998); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

32. See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003).

33. See, e.g., *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998).

34. See *infra* notes 35-45 and accompanying text.

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

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discrimination): namely, that actual identity is often less relevant than presumed identity.³⁶ After *Gomez*, asylum seekers in the Second Circuit do not have to prove actual membership in one of the protected groups; rather, they need only demonstrate that they face persecution because outsiders presume that they are members of such a group. This definition of particular social group overlaps with a larger principle of asylum law discussed below—the theory of “imputed” identity.³⁷

The Ninth Circuit for many years applied a test for particular social group that was at once broader and narrower than the BIA’s *Acosta* analysis. In *Sanchez-Trujillo v. INS*, the court defined particular social group as “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”³⁸ *Sanchez-Trujillo*’s “central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”³⁹ The court also noted that the term particular social group was intended to apply to a “cohesive, homogeneous group.”⁴⁰

Sanchez-Trujillo’s “voluntary associational relationship” requirement seemed to add a second hurdle to the *Acosta* analysis, which focused merely on the individual’s identity.⁴¹ At the same time, however, *Sanchez-*

36. A number of state anti-discrimination measures and hate-crimes statutes recognize the importance of protecting individuals on the basis of presumed sexual identity. *See, e.g.*, CAL. CIV. CODE § 51.7 (2004) (hate crime statute designating “all persons . . . free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . . sexual orientation . . . or because another person perceives them to have one or more of those characteristics”). The drafters of the Employment Non-Discrimination Act, federal legislation that would outlaw sexual orientation discrimination in the workplace, incorporated this standard into the framework of the Act. The bill defines “sexual orientation” as “homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.” H.R. 3285(a)(9), 108th Cong. (2003).

A few states also protect various forms of transgender identity. *See, e.g.*, MINN. STAT. § 363.03(44) (2004) (defining sexual orientation as including, *inter alia*, “having a self-image or identity not traditionally associated with one’s biological maleness or femaleness”); R.I. GEN. LAWS §§ 11-24-2.1, 28-5-6, 34-37-3 (2002) (defining “gender identity,” for purposes of public accommodations, equal housing, and employment acts, respectively, as “gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth”).

37. *See infra* Part III.B.

38. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

39. *Id.*

40. *Id.* at 1577.

41. *Sanchez-Trujillo* confused commentators and litigants, who saw the formulation as

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Trujillo's willingness to protect "common characteristic[s] . . . *fundamental* to . . . identity,"⁴² like the Second Circuit's standard, presented a potential departure from *Acosta*'s strict immutability analysis and indicated a willingness to protect aspects of identity that are not necessarily immutable, but still integral, to identity.

The Ninth Circuit harmonized *Sanchez-Trujillo* with the *Acosta* analysis in *Hernandez-Montiel v. INS*,⁴³ expanding the definition of "particular social group" to include "one united by a voluntary association . . . *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members cannot or should not be required to change it."⁴⁴ This test incorporated an *Acosta*-like appreciation of "innate characteristics" and characteristics that a person "cannot or should not be required to change," while retaining *Sanchez-Trujillo*'s protection for various "fundamental" identities.

II. LGBT ASYLUM CLAIMS

The law of asylum clearly protects lesbians and gay men from persecution by extending the particular social group doctrine to sexual orientation claims. The state of the law is less certain with respect to transgender persons, but a number of doctrinal trends signal a growing willingness to protect asylum seekers from persecution based on their transgender identity.

A. Homosexuality

Gays and lesbians have constituted a particular social group since 1990.⁴⁵ In *Matter of Toboso-Alfonso*, the BIA upheld a ruling by an immigration judge ("IJ") granting particular social group status to gay men

unduly restrictive. See, e.g., T. David Parish, Note, *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, 941-42 (1992) (noting the "flawed" and "tenuous" nature of *Sanchez-Trujillo* due to its overly restrictive interpretation of the particular-social-group doctrine).

42. *Sanchez-Trujillo*, 801 F.2d at 1576 (emphasis added).

43. 225 F.3d 1084 (9th Cir. 2000).

44. *Id.* at 1093 (emphasis in original). In many ways, the court merely incorporated the idea in *Sanchez-Trujillo* that a social group can be comprised of a voluntary association of individuals; beyond that, the court essentially eliminated *Sanchez-Trujillo*'s requirements that members of the purported social group be "homogenous" or "cohes[ive]."

45. Before 1990, the INS issued *per se* exclusions of gay and lesbian immigrants, designating them excludable because of their presumed psychopathic personalities. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 155-56 (3d ed. 2003).

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in Cuba.⁴⁶ After this decision, doubt surfaced as to whether *Toboso-Alfonso* was limited to only those sexual orientation claims filed on behalf of Cubans.⁴⁷ In 1994, Attorney General Janet Reno resolved the question by extending *Toboso-Alfonso* to all sexual orientation claims, ordering it “precedent in all proceedings involving the same issue or issues.”⁴⁸ The Attorney General held that “an individual who has been identified as a homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a particular social group.”⁴⁹ Since the *Toboso-Alfonso* ruling, a number of judicial circuits have noted that gays and lesbians may bring asylum claims as members of a particular social group.⁵⁰

B. Transgender Identity

The BIA has not formally recognized transgender status as a particular social group. And no federal circuit has yet squarely considered the issue. But the Ninth Circuit has issued a pair of decisions that extend protection to many transgender asylum seekers. *Hernandez-Montiel* establishes the particular social group “gay men with female sexual identities,”⁵¹ a broadly defined group encompassing a variety of gender-based characteristics, including dress, comportment, and hairstyle. In *Reyes-Reyes v. Ashcroft*, the court reiterated this principle by again extending protection to a transgender asylum seeker and again incorporating a vast array of gender-

46. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

47. The government continued to try to limit the reach of *Toboso-Alfonso* by arguing that the case applied only to the particular social group of gay men living in Cuba. Some courts of appeals similarly describe *Toboso-Alfonso* as establishing a particular social group of “homosexuals in Cuba.” See *Castellano-Chacon v. INS*, 341 F.3d 533, 547 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998).

48. *Toboso-Alfonso*, 20 I. & N. Dec. at 819 n.1; see also 1895 Op. Att’y Gen. 94 (1994) (reported at 71 No. 25 Interpreter Releases 859, 859 (July 1, 1994)).

49. 1895 Op. Att’y Gen. 94 (1994) (reported at 71 No. 25 Interpreter Releases 859, 860 (July 1, 1994)). By protecting those individuals who have been “identified” as gay or lesbian, the Attorney General essentially incorporated the Second Circuit’s observation in *Gomez* on the role of the persecutor’s perception of the asylum seeker. See *supra* notes 35-36 and accompanying text.

50. See, e.g., *Castellano-Chacon*, 341 F.3d at 547 (noting *Acosta* as established precedent that “homosexuals in Cuba” constitute a particular social group); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (recognizing homosexuality as social group); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (same); *Lwin*, 144 F.3d at 511 n.3 (recognizing that “gay men and lesbians in Cuba” constitute a particular social group).

51. *Hernandez-Montiel*, 225 F.3d at 1087.

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based characteristics.⁵² These cases signal a consensus in the Ninth Circuit that those who deviate from established gender norms deserve no less protection than those who are gay or lesbian. The cases also highlight a greater respect for the manifold ways in which transgender identity is expressed.

1. *Hernandez-Montiel v. INS*

In 2000, the Ninth Circuit issued a sweeping decision that extended protection to Geovanni Hernandez-Montiel, a transgender asylum seeker.⁵³ Hernandez-Montiel was a Mexican immigrant who realized same-sex attraction from a young age and began dressing and behaving as a woman at the age of twelve.⁵⁴ He wore his hair long and had long fingernails, dressed in feminine clothing, and took female hormones.⁵⁵ Based on these characteristics, he argued that he should be considered a member of the particular social group “gay men with female sexual identities.”⁵⁶

At his asylum hearing before an IJ, Hernandez-Montiel provided expert testimony describing the ostracism and persecution of gay men who are perceived to take on a feminine role during sexual intercourse. This testimony noted that gay men who appear feminine are more easily identified and uniquely subjected to especially harsh forms of persecution by police.⁵⁷ The IJ, finding Hernandez-Montiel entirely credible and sincere, nevertheless denied relief because “homosexual males who wish to dress as a woman” did not constitute a particular social group.⁵⁸ The IJ noted that Hernandez-Montiel alternated between dressing in male and female attire and because of that found that “he cannot characterize his assumed female persona as immutable or fundamental to his identity.”⁵⁹

52. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 784-85 (9th Cir. 2004).

53. *Hernandez-Montiel*, 225 F.3d at 1087.

54. *Id.*

55. *Id.* at 1088.

56. *Id.* at 1089. The decision to argue to the court that Hernandez-Montiel was a gay man with a female sexual identity made strategic sense. After all, if gay men already constituted a particular social group, then a subset of that group, “gay men with female sexual identities,” would, *a fortiori*, qualify for protection as well. Hernandez-Montiel also argued that he was a member of the particular social group of transsexuals, but the Ninth Circuit chose not to rule on the issue of whether transsexuals constitute a particular social group. *See id.* at 1095 n.7 (“In addition to being a gay man with a female sexual identity, Geovanni’s brief states that he ‘may be considered a transsexual.’ . . . We need not consider in this case whether transsexuals constitute a particular social group.”).

57. *Id.* at 1088-90.

58. *Id.* at 1089.

59. *Id.*

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The BIA affirmed the IJ's decision, ruling that Hernandez-Montiel faced persecution not because of homosexuality but "because of the way he dressed (as a male prostitute)" and that "his decision to dress as a female" was not an immutable characteristic.⁶⁰

The Ninth Circuit reversed. The court began by noting that gays and lesbians are members of a particular social group.⁶¹ The court built upon this foundation by noting that "[s]exual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance."⁶² The court observed that certain men who are homosexual by definition "outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails."⁶³ In certain cultures, these men face the most serious persecution because they "are perceived to assume the stereotypical 'female,' *i.e.*, passive role in gay relationships."⁶⁴ The court coined the phrase "gay men with female sexual identities" to describe Hernandez-Montiel and other similarly situated asylum seekers.⁶⁵ And, to the great benefit of future asylum seekers, the court eschewed any clear-cut definition, standard, or litmus test for membership in this social group, essentially trusting an individual's self-definition as a true and accurate reflection of gender identity.

The court recognized that Hernandez-Montiel was "a homosexual who has taken on a primarily 'female' sexual role," that his homosexuality was manifest from a very young age, that he began dressing as a woman at the age of twelve, socialized with other gay youngsters at school, and dressed in female attire on a regular basis.⁶⁶ Noting these factors, the court rejected the IJ's and BIA's descriptions of Hernandez-Montiel as a man who occasionally engaged in cross-dressing: "This case is about sexual identity, not fashion Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women."⁶⁷

60. *Id.* at 1089-90.

61. *Id.* at 1094 (citing, *inter alia*, *Toboso-Alfonso* and *Matter of Tenorio*, No. A72-093-558 (B.I.A. 1999) (per curiam) (adopting IJ decision granting asylum to Brazilian gay man whose asylum claim qualified "on account of one of the five grounds enumerated" in the INA)).

62. *Id.* at 1093.

63. *Id.*

64. *Id.*

65. *Id.* at 1095.

66. *Id.*

67. *Id.* at 1096.

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In 2004, the Ninth Circuit expanded the contours of “gay men with female sexual identities” in the case of another transgender asylum seeker, Luis Reyes-Reyes.⁶⁸ The court again reiterated its commitment to the group “gay men with female sexual identities” and noted its application to a person who “dresses and looks like a woman, wear[s] makeup and a woman’s hairstyle.”⁶⁹ The court also noted Reyes-Reyes’s “characteristically female appearance, mannerisms, and gestures,” “deep female identity,” and use of monikers “such as Josephine, Linda, and Cukita.”⁷⁰ Throughout the briefing, counsel referred to Reyes-Reyes as “transgender,” providing the court with an opportunity to incorporate that concept into its broader definition of “gay men with female sexual identities.”⁷¹ The court abstained from referring to Reyes-Reyes as transgender. It did, however, note that Reyes-Reyes’s “sexual orientation, for which he was targeted, and his transsexual behavior are intimately connected.”⁷² While this statement does not ensure protection for all forms of transgender identity, it does suggest a greater willingness to protect various forms of “transsexual behavior”—either by biological males or females—that are linked to sexual orientation. It accords with the important recognition in *Hernandez-Montiel* that “[s]exual identity goes

68. I represented Reyes-Reyes in his petition for review before the Ninth Circuit and argued the case before the panel. I relied heavily on *Hernandez-Montiel* in briefing the social group issue and the nexus between social group and persecution. The dispositive issue at the heart of the *Reyes-Reyes* case was not social group, but rather the IJ’s incorrect application of legal standards under the withholding of removal statute and the Convention Against Torture. The Ninth Circuit remanded the case to the agency in light of both issues. See *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787-89 (9th Cir. 2004).

69. *Id.* at 785.

70. *Id.* (internal quotation marks omitted).

71. Before briefing the issues, I discussed the matter of transgender identity at great length with my client. Reyes-Reyes does identify as transgender, and it seemed appropriate to refer to the client as such throughout the briefing (and during oral argument). And given that neither the Government nor the IJ ever challenged Reyes-Reyes’s fit within the particular social group “gay men with female sexual identities,” I was able to rely on Reyes-Reyes’s uncontested membership in a previously established particular social group all the while suggesting to the panel that it could address the issue of transgender identity more broadly. Rather than briefing the issue of transgender identity as such, I simply referred to Reyes-Reyes throughout the brief as both “transgender” and as a “gay man with a female sexual identity” in an attempt to guide the panel toward incorporating a broader form of transgender identity protection in its ruling. In its published opinion, the court eschewed the word “transgender” but did note “that Reyes’s [sic] sexual orientation, for which he was targeted, and his transsexual behavior are intimately connected.” *Id.* at 785 n.1; see *infra* note 79 and accompanying text.

72. *Reyes-Reyes*, 384 F.3d at 785 n.1.

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beyond sexual conduct and manifests itself outwardly, often through dress and appearance.”⁷³ *Hernandez-Montiel* and *Reyes-Reyes*, taken together, establish strong precedent for future transgender asylum seekers appearing before administrative and federal courts.⁷⁴ By extending protection to various forms of gender expression as an outgrowth of sexual orientation, the Ninth Circuit has opened up the possibility for additional transgender asylum seekers—FTM or MTF—to pursue their claims.⁷⁵ Indeed, not a single judge on either panel dissented.⁷⁶

3. Implications

Hernandez-Montiel and *Reyes-Reyes* embrace a “soft immutability” standard that signals a positive shift in the way courts protect transgender asylum seekers. This soft immutability standard reduces the need for scientific or biological proof through static characteristics by way of chromosomal makeup, sex organs, or the sexual identity assigned at birth; rather, transgender asylum seekers can seek protection based on traits adopted over time and later deemed integral to identity. Although the cases do not dispense with the immutability requirement entirely, as evidenced by the use of terms like “innate,” “fundamental,” and of course, “immutable,” they show remarkable flexibility in terms of what can constitute an immutable trait. The courts eschew a biological definition of immutability and embrace non-biological forms of identity, providing litigants with a wider range of choices. Relevant considerations may include the duration of the person’s identification with a particular gender, the frequency of the asylum seeker’s performance of that identity, and the individuals with whom the asylum seeker socializes on a regular basis.

The court’s reliance on some type of immutability standard should not be surprising; after all, every jurisdiction, to some degree, retains immutability as the basis of determining a particular social group. But

73. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

74. According to Taylor Flynn, because the *Hernandez-Montiel* court based its decision “in large part on Geovanni’s persecution due to gender nonconformity, it seems likely that under the Ninth Circuit’s reasoning, transsexuals would constitute a particular social group for asylum purposes.” See Flynn, *supra* note 9, at 405 n.76.

75. This is, indeed, all the more remarkable given the resistance by many federal courts to extend statutory provisions barring sex discrimination to aspects of gender performance. See, e.g., *id.* at 396 (noting refusal by many courts to extend Title VII protection beyond anatomical sex to include gender); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 917 (2002) (same).

76. In *Reyes-Reyes*, Judge Jay Bybee issued a separate opinion concurring and concurring in the judgment. 384 F.3d at 789.

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Hernandez-Montiel and *Reyes-Reyes* advance beyond a strict interpretation of what immutability means. The *Hernandez-Montiel* court notes, for instance, that “[s]exual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance,”⁷⁷ and that the petitioner “manifests his sexual orientation by adopting gendered traits characteristically associated with women.”⁷⁸ The *Reyes-Reyes* court equally notes that “Reyes’s [sic] sexual orientation, for which he was targeted, and his transsexual behavior are intimately connected.”⁷⁹ Both cases protect these identities through the ways they are expressed, and neither case relies on a scientific account to buttress its holding. In short, individuals can establish identity through traits that accurately and fairly represent their identities. This developing law lives up to the promise of the original definition of particular social group, which protects aspects of identity that a person “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”⁸⁰

With respect to their views of identity, the *Hernandez-Montiel* and *Reyes-Reyes* cases encompass what Professor Kenji Yoshino calls “performative” identity.⁸¹ As Professor Yoshino notes, courts generally protect only those traits believed to be immutable (like chromosomes or sex organs) and generally refuse to extend protection to aspects of identity that can apparently be altered to conform to normative standards,⁸² even when the courts grasp their own power to extend protection to various

77. *Hernandez-Montiel*, 225 F.3d at 1093.

78. *Id.* at 1095.

79. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 n.1 (9th Cir. 2004).

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

81. Professor Kenji Yoshino details the “performative” theory of identity and its relationship to equal protection jurisprudence in comprehensive and illuminating detail in *Covering*. See generally Yoshino, *supra* note 75, at 779, 865. Professor Yoshino observes the myriad ways that courts refuse to extend protection to characteristics or expression they do not consider essential to identity. *Id.* at 771. Instead, courts expect litigants to assimilate to one normative standard, or “cover” those aspects of identity not linked to innate characteristics like chromosomes. *Id.* at 849-64.

The asylum law cases discussed above dovetail with a performative conception of identity: that is, rather than seek to isolate a status like race or sex—or, here, sexual orientation and gender identity—and define it according to immutable characteristics like chromosomes or sex organs, the courts actually look at the person’s acts to determine their fit within a particular identity. This accords with Yoshino’s discussion of a “weak performative model,” which “suggests that identity has a performative aspect, such that one’s identity will be formed in part through one’s acts and social situation, rather than being entirely guaranteed by some prediscursive substrate.” *Id.* at 871.

82. *Id.* at 890 (discussing *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (limiting its conception of race to characteristics that one could not change like skin color and bloodlines)).

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performative identities.⁸³ Under such a model, an individual's identity is constituted, at least in part, by his or her actions, not immutable characteristics beyond that person's control.⁸⁴ These Ninth Circuit cases follow precisely this logic by extending protection to various statuses not according to a fixed, innate quality but rather by virtue of the way those statuses are acted out, or performed, protecting gender practices that not only "describe, but actually create, our sex."⁸⁵ By protecting the transgender asylum seeker's comportment, dress, grooming, and assumption of transgender names, the courts have begun to embrace this performative conception, signaling a dramatic and more accommodating shift in its jurisprudence.

These cases not only extend protection to performative dimensions of identity, but also eschew the "reductive and normalizing account of illness, disability, or genetics" observed by Anna Kirkland as underlying most cases involving transgender litigants.⁸⁶ Kirkland notes *Hernandez-Montiel*'s "rhetorical distancing from any essentialist understanding of what it would mean to be a member of Hernandez-Montiel's persecuted social group."⁸⁷ *Hernandez-Montiel* therefore presents an "entirely new set of possibilities . . . including protection for many meaningful practices of the self that are not 'immutable.'"⁸⁸ The Ninth Circuit provided broad guidelines wherein transgender individuals' gender expression is something "worth protecting, not because it cannot be changed, but because it is a meaningful and worthy part of being that particular person."⁸⁹ At the same

83. *Id.* at 897 (discussing *Hernandez v. New York*, 500 U.S. 352, 355-72 (1991) (plurality opinion of Kennedy, J.) (refusing to consider one's spoken language as a performative characteristic of race but noting in dicta that language could constitute a proxy for race because, "for certain ethnic groups and in some communities . . . proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis").

84. *See id.* at 871.

85. *Id.* at 870.

86. Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 31 (2003).

87. *Id.*

88. *Id.* at 32. While I agree that the courts *begin* to distance themselves from an essentialist understanding, I think it may be an overstatement to suggest that the courts dispense with the immutability requirement altogether. As mentioned above, *see supra* note 81, the courts do not so much eliminate the immutability standard as broaden—in a performative direction—what can be considered as an immutable trait. And, as I explain below, *see infra* note 100 and accompanying text, litigants should continue to assume the prevalence of a more rigid immutability standard in order to ensure that their clients have the best chance of success.

89. *See* Kirkland, *supra* note 86, at 32.

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time, the cases refuse “to characterize such identities as nonessential and behavior-based.”⁹⁰

These asylum law developments dovetail with LGBT victories in other contexts, particularly the U.S. Supreme Court’s decision in *Lawrence v. Texas*,⁹¹ which outlawed all remaining laws prohibiting adult sodomy and explicitly overruled *Bowers v. Hardwick*.⁹² The *Lawrence* Court extended protection to lesbians and gay men not on account of their homosexual status but rather by recognizing—and protecting—same-sex behavior as an aspect of identity:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.⁹³

As far as the law of asylum is concerned, *Lawrence* ends a period of uncertainty that dogged LGBT asylum litigation for more than a decade. Before the Court invalidated *Bowers*, courts could return asylum seekers to countries with anti-sodomy laws on their books, no matter how severe.⁹⁴ Courts engaged in this slight of hand by essentially eliding the distinction

90. Flynn, *supra* note 9, at 408.

91. 539 U.S. 558 (2003).

92. 478 U.S. 186 (1986).

93. *Lawrence*, 539 U.S. at 578. Justice O’Connor, concurring separately in *Lawrence*, noted that the statute’s proscription of various forms of conduct was tantamount to status-based discrimination because “the conduct targeted by this law is conduct that is closely correlated with being homosexual.” *Id.* at 583. O’Connor’s logic—that protecting homosexual conduct is necessary to ward off invidious discrimination “toward gay people as a class,”—is essentially performative in nature because it protects identity not only in its static dimensions but through its manifestations, namely, same-sex sodomy. *Id.*; see Yoshino, *supra* note 75, at 778, 842, 865, 872, 873 (noting the covering demand of abstaining from same-sex sodomy and reasoning that under a performative model, “[g]ay status can at times . . . be experienced as constituted by homosexual sodomy . . .”).

94. See, e.g., Matter of Abdul-Karim, No. A72-661-821 (I.J., San Diego, Cal., June 11, 1998) (returning to Lebanon an asylum seeker who “testified credibly that he is a homosexual male” and ruling, in light of *Bowers*, that Lebanon’s “anti-sodomy laws are not persecution”). The Ninth Circuit denied a petition to review the agency’s decision in *Abdul-Karim*, citing substantial evidence for the agency’s ruling. *Abdul-Karim v. Ashcroft*, 102 Fed. Appx. 613, 613 (9th Cir. 2004); see also Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 824 (B.I.A. 1990) (Vacca, Board Member, dissenting) (“The United States Supreme Court has in fact found that state criminal sodomy laws do not violate the fundamental rights of homosexuals.”). Government attorneys opposing asylum applications would even argue that the very possibility of U.S.-based asylum for gays and lesbians was contradicted by the presence within the territory of state anti-sodomy laws.

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between illegitimate persecution and legitimate prosecution.⁹⁵ The overruling of *Bowers* eliminates this possibility.⁹⁶

III. LITIGATION STRATEGIES

Unless and until the BIA or the federal circuits extend protection to all asylum seekers, litigators and academics must continue to operate on

95. See *id.* *Lawrence* obviates the need to collapse all sexual-orientation-based persecution (and, outside the asylum law context, discrimination) as status-based. For example, I represented a transgender asylum seeker from Lebanon, a country where sodomy is a criminal offense, in New York immigration court in 2003, before *Bowers* was overruled. Article 534 of the Lebanese Penal Code criminalizes “all physical contact and union[s] against nature.” Under the circumstances, I argued in moving papers that my then-client’s persecution stemmed not from her conduct but her status, and that she would face persecution in Lebanon regardless of whatever sexual activity she chose (or chose not) to engage in. This was essentially illegitimate persecution, not legitimate prosecution under Lebanon’s anti-sodomy law. The presence of *Bowers* made arguments like this necessary. See *infra* note 94 (discussing *Abdul-Karim*).

96. The court’s oblique stance on the precise contours of this “full right” to engage in private sexual behavior has enabled some lower courts to dilute much, if not all, of the otherwise robust and protective rhetoric in Justice Kennedy’s majority opinion.

Immediately after deciding *Lawrence*, the U.S. Supreme Court ordered a Kansas Appellate Court to reconsider a 2002 decision in which it upheld a seventeen year prison sentence for an eighteen-year-old boy who committed one act of consensual oral sex with another boy four years his junior. *Limon v. Kansas*, 539 U.S. 955, 955 (2003). The Kansas Appellate Court initially relied heavily on *Bowers*, and the U.S. Supreme Court issued an order granting certiorari, vacating judgment, and remanding the case to the lower court in light of its *Lawrence* opinion. *Id.* On January 30, 2004, the Kansas Appellate Court reaffirmed its 2002 decision, ruling that “Limon is not asserting a *Lawrence*-like due process challenge. Instead, Limon makes an equal protection challenge . . . [and] the law and facts are distinguishable from *Lawrence*.” *State v. Limon*, 83 P.3d 229, 235 (Kan. App. 2004). Moreover, “the *Lawrence* court refused to hold that homosexuality was constitutionally irrelevant and deserving of strict scrutiny review.” *Id.* at 239. The case is currently on appeal to the Kansas Supreme Court. *State v. Limon*, 2004 Kan. LEXIS 284 (2004).

The same week that the Kansas Appellate Court reaffirmed its *Limon* decision, the Eleventh Circuit upheld Florida’s law barring gay men and lesbians from adopting children. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004), *rehearing denied by* *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1275 (11th Cir. 2004) (*en banc*). The Eleventh Circuit denied that *Lawrence* required overturning the Florida law. While *Lawrence* “establish[ed] a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct,” *id.* at 815-19, the Supreme Court never “characterize[d] this right as ‘fundamental.’” *Id.* at 816. In short, the lower court refused “to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis.” *Id.* at 817. The lower court even chastised the Supreme Court for issuing a ruling that invoked principles “not with ‘careful description,’ but with sweeping generality.” *Id.* The U.S. Supreme Court denied a petition for certiorari. 125 S. Ct. 869 (2005). See also Joseph Landau, *Misjudged*, NEW REPUBLIC, Feb. 9, 2004, at 16 (discussing the *Limon* and *Lofton* cases in light of *Lawrence*).

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several fronts. First, litigators in the Ninth Circuit—which hears roughly half of all immigration appeals⁹⁷—should obviously marshal *Hernandez-Montiel* and *Reyes-Reyes* for their doctrinal and rhetorical import. As mentioned above, these cases protect MTF transgender persons and recognize the ways that identity is shaped by one’s gender performance. The soft immutability standard espoused in these cases embraces a performative logic that promotes broader interpretations of the “particular social group” doctrine. Litigators bringing cases outside the Ninth Circuit should still cite *Hernandez-Montiel* and *Reyes-Reyes*, even though these cases may have less weight outside that jurisdiction.

Asylum seekers (in all circuits) have additional options as well. First, litigators should focus on the definition of “particular social group” within their particular jurisdiction and note the ways in which transgender identity satisfies that standard. After applying the language of “particular social group,” litigators should consider inquiring into the nature of the persecution against their clients in order to determine whether that persecution is on account of the transgender individual’s perceived homosexuality. If that is the case, a claim based on imputed gay identity should be advanced as well.

A. Particular Social Group

As an initial matter, the process of bringing a successful asylum claim requires arguing that transgender persons constitute a particular social group. Then, of course, the applicant must prove that she or he is persecuted because of membership in that group.⁹⁸ Transgender identity should qualify under any of the above-mentioned definitions of “particular social group” because it is in many, if not most, cases a fundamental aspect of one’s identity and usually something that the individual does not want to and/or does not feel he or she can change, even in the face of persecution back home. Such an argument satisfies the definitional requirements of “particular social group” established by the BIA and the federal circuits. At the same time, it accords with the idea that “the social group concept . . . is a flexible one, designed to anticipate varied forms of invidious

97. In 2003, 47.6% of all immigration appeals were filed in the Ninth Circuit, representing one in every three new appeals docketed in that court. See Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1. According to Ninth Circuit Chief Judge Mary Schroeder, 872 immigration appeals were filed in her court in all of 2000; during the first six months of 2004, that number had already grown to 2900 cases. *Id.*

98. See *supra* notes 19-25 and accompanying text.

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persecution against aggregations of humanity.”⁹⁹

As a starting point, it might be helpful to note that sexual orientation constitutes a particular social group and to advance this precedent to help establish that transgender identity is a protected group as well. Although many jurisdictions are beginning to apply the soft immutability standard discussed above to the definition of “particular social group,” litigators, in an abundance of caution, might nevertheless see reason to champion rhetoric sounding in strict immutability in defining their clients.¹⁰⁰ Litigants might even want to revert back to a biological or quasi-biological conception of immutability by arguing that a person’s transgender status is “fixed,” noting, perhaps, that the individual has consistently (perhaps from an early age) identified with a gender other than the one assigned at birth and that the person has not altered his or her transgender status in the face of persecution and intense pressure to change (perhaps by family and friends).¹⁰¹ The litigator should introduce any additional evidence that will help demonstrate the “fundamental” nature of the client’s transgender identity.¹⁰² This might include a discussion, where applicable, of a client’s use of hormones to enhance male or female appearance, and/or the decision to undergo various surgical procedures.¹⁰³ One might then argue that the client’s identity is in any event something that she should not be required to change. *Hernandez-Montiel* is helpful here with its formulation that “sexual identity is immutable because it is inherent in . . . identity; in any event, [one] should not be required to change it,”¹⁰⁴ as is language from *Matter of Acosta* defining those traits worthy of protection as those a person “either cannot change, or should not be required to change”¹⁰⁵ *Lawrence* is additionally helpful given its discussion of intimate sexual activity as a protected constitutional right; indeed, its language respecting

99. Arthur C. Helton, *Persecution on Account of Membership in a Social Group As a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 67 (1983).

100. As the court in *Hernandez-Montiel* noted, “Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

101. *See id.* at 1095 (“[Petitioner’s] female sexual identity must be fundamental, or [s]he would not have suffered this persecution and would have changed years ago.”).

102. *Cf. Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (noting that the characteristic must be “fundamental to [particular-social-group members’] individual identities or consciences”).

103. Examples include a thyroid chondroplasty (“Adam’s apple” removal surgery, in the case of a male-to-female individual), cosmetic surgery to render appearance more masculine or feminine, or the decision (or plans) to undergo sex reassignment surgery.

104. *Hernandez-Montiel*, 225 F.3d at 1087.

105. *Acosta*, 19 I. & N. Dec. at 233.

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the privacy of individuals, combined with the connections drawn by *Hernandez-Montiel* and *Reyes-Reyes* between sexual orientation and gender identity, can be extended to transgender persons as well.

In addition to focusing on the individual's identity, litigators should also note the ways that transgender persons are treated differently than, or singled out from, other sexual minorities. Effeminate men and masculine women are often persecuted with extreme harshness, even in countries that are apparently tolerant of homosexuality. With respect to Latin American countries, the Ninth Circuit observed in *Hernandez-Montiel* that “[a] male . . . who is perceived to assume the stereotypical ‘female,’ *i.e.*, passive, role in . . . sexual relationships is ‘ostracized from the very beginning and is subject to persecution, gay bashing as we would call it, and certainly police abuse.’”¹⁰⁶ Where applicable, litigators might want to note the prevalent persecution of transgender persons, which remains even in the absence of persecution against gay men and lesbians. This further demarcates the distinctive harms facing transgender persons and the “shared experience” among members of this particular social group.¹⁰⁷

The argument that transgender persons constitute a particular social group has persuasive appeal. But, not all judges will agree. Many will flatly rule that transgender identity is simply not protected under the asylum and withholding of removal statutes, or that transgender persons cannot satisfy the immutability requirement within the various parameters set by that jurisdiction's definition of “particular social group.” At that point, litigators should consider an additional argument available for many transgender asylum seekers: the doctrine of “imputed gay identity.”

B. Imputed Gay Identity

Under imputed identity, courts look not to the asylum seeker's identity but the persecutor's perceptions and motivations behind the persecution. If the persecutor perceives an individual to be a member of a particular social group and persecutes her on that basis, the applicant's actual identity is irrelevant—all that matters is the *persecutors' beliefs*.

Advancing the imputed gay identity theory has the advantage of placing transgender asylum seekers into a category of persons already deemed eligible for “particular social group” status as opposed to having to

106. *Hernandez-Montiel*, 225 F.3d at 1089.

107. *Cf. Acosta*, 19 I. & N. Dec. at 232-33 (noting persecution of “people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests”).

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persuade a factfinder that transgender persons organically constitute a particular social group. Imputed identity is most commonly found in cases of political opinion,¹⁰⁸ but it is not limited to those cases.¹⁰⁹ Courts have repeatedly interpreted the term “particular social group” to include sexual orientation and imputed sexual orientation, and the Second Circuit incorporates imputed identity into its very definition of particular social group.¹¹⁰ The Third Circuit has explicitly noted the breadth of the imputed identity doctrine, extending it to sexual-orientation-based claims. In *Amanfi v. Ashcroft*,¹¹¹ the court reversed a BIA decision holding that the imputed identity doctrine was limited to political opinion.¹¹² The court held that imputed gay identity falls squarely under the BIA’s decision in *In re S-P*,¹¹³ a case in which the BIA extended asylum to an applicant who faced persecution on account of his imputed political views. In *S-P*, the BIA ruled that “[p]ersecution for ‘imputed’ grounds (*e.g.*, where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the ‘refugee’ definition.”¹¹⁴ In relying on that holding, as well as a proposed Attorney General regulation in 2000 that would extend the imputed identity doctrine to all protected groups across the board,¹¹⁵ the *Amanfi* court recognized the

108. See generally DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 325-30 (1999).

109. The BIA has tried on at least one occasion—unsuccessfully—to confine the doctrine exclusively to cases of political opinion. The Third Circuit rejected that attempt in *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003), and explicitly recognized the imputed gay identity standard. See *infra* notes 111-15 and accompanying text.

110. See *supra* notes 33-35 and accompanying text.

111. 328 F.3d 719 (3d Cir. 2003).

112. *Amanfi* involved a claim by a purportedly heterosexual man who, in believing he had been selected to be sacrificed by “macho men” in his native Ghana, engaged in homosexual activity so as to render himself impure for sacrifice. He then sought asylum on the basis that he would be persecuted in Ghana not because he would be sacrificed but rather on account of his perceived homosexuality. The BIA flatly denied this claim, finding no legal precedent supporting an individual who was not himself homosexual to qualify for relief under extending precedents protecting gays and lesbians. See *id.* at 721-24.

113. *Id.* at 721 (citing *In re S-P*, 21 I. & N. Dec. 486 (B.I.A. 1996) and *In re T-M-B*, 21 I. & N. Dec. 775 (B.I.A. 1997)).

114. *In re S-P*, 21 I. & N. Dec. at 489.

115. The text of the proposed regulation is as follows:

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.

65 Fed. Reg. 76588, 76597-98 (Dec. 7, 2000) (proposed rule 8 C.F.R. § 208.15(b))

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doctrine of imputed gay identity.

The imputed identity doctrine has been noted by additional federal circuits and the BIA,¹¹⁶ and is also implicitly covered by the Second Circuit's definition of "social group," which protects individuals who are persecuted because of characteristics "which serve[] to distinguish them in the eyes of a persecutor . . . or in the eyes of the outside world in general."¹¹⁷ The imputed gay identity theory is also explicitly part of the law of sexual-orientation-based asylum as established by former Attorney General Reno's 1993 order making *Toboso-Alfonso* precedent in all cases in which "an individual who has been *identified as a homosexual* and persecuted by his or her government for that reason alone."¹¹⁸ Reno's order establishes and the Third Circuit's *Amanfi* decision extends the availability of the imputed gay identity theory as an alternate basis for establishing social group status for transgender asylum claims.

The imputed gay identity doctrine relies on a few rather simple, basic observations. First, many cultures, including our own, place great emphasis on the accord between a person's outward appearance and his or her biological sex. Individuals who deviate from these expectations are more readily identifiable and at greater risk of stigmatization. Effeminate men and masculine women are frequently branded (accurately or inaccurately) gay or lesbian and are targeted on the basis of their presumed homosexuality. Indeed, because "[e]ffeminate men and masculine women are often assumed to be homosexual" and because of the widely held view that "to be gender atypical is to be orientation atypical and vice-versa,"¹¹⁹ transgender persons who are persecuted because of their perceived deviation from gender expectations, and for whom persecution can be as much a gender-based phenomenon as a sexual-orientation-based one, may be able to bring a claim under the imputed identity doctrine.¹²⁰ Litigants

(emphasis added). The court also noted the Attorney General's intention to "codif[y] the existing doctrine of imputed political opinion, as well as the existing administrative interpretation that this doctrine also extends to the protected grounds other than political opinion." 65 Fed. Reg. 76588, 76592 (Dec. 7, 2000).

116. Many courts have recognized *S-P-* as standing for the proposition that imputed political identity is a recognized basis for seeking asylum. *See, e.g.,* *Singh v. Ashcroft*, 367 F.3d 1182, 1189 (9th Cir. 2004); *Ravindran v. INS*, 976 F.2d 754, 760 (1st Cir. 1992); *In re T-M-B-*, 21 I. & N. Dec. at 777 .

117. *See supra* notes 33-34 and accompanying text.

118. *See supra* note 3 and accompanying text.

119. Yoshino, *supra* note 75, at 844.

120. As noted in *Hernandez-Montiel*, effeminate gay men in particular are singled out for persecution because they are "*perceived* to assume the stereotypical 'female,' i.e., passive, role in gay relationships." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000).

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bringing claims for such clients should highlight the way their clients are marked by their male or female characteristics and the unique ways that their client's culture places such emphasis on the accord between a person's outward appearance and his or her given sex.¹²¹

Litigators bringing these claims on behalf of transgender asylum seekers may want to emphasize, where applicable, the types of epithets that are hurled against their clients. Many persecutors use slang terminology for transgender persons synonymous with derogatory terms like "fag" or "dyke," demonstrating that, from the persecutor's perspective, transgender identity and homosexual identity are synonymous. The nexus between persecution and the protected ground can be established when these epithets accompany the injurious acts themselves. Litigants are generally in the best position to explain this situation to their attorneys, and counsel may also want to interview experts, who can provide a broader understanding of general country conditions and the way those conditions impact LGBT persons. In many instances, an expert might also note that a particular country has no concept of "transgender," resulting in the perception that all gender-non-conforming behavior is synonymous with homosexuality. Experts can also provide important insight into collateral country conditions to bolster the particular kinds of persecution at stake.¹²²

121. *Hernandez-Montiel and Reyes-Reyes* pay important attention to the ways that sexual orientation and gender interrelate in culture, but there are cases in which IJs have used this same observation as a way to deny asylum to worthwhile candidates. In particular, one IJ recently refused to grant asylum to an individual whose homosexuality was apparently not manifested through gendered traits (at least not in the eyes of this particular IJ). In *Matter of Soto Vega*, No. A 95 880 786 (IJ, L.A., Cal., Jan. 21, 2003), the IJ noted the credibility of a gay man who feared being returned to Mexico, but denied him relief because of the asylum seeker's apparent non-"obvious" gay demeanor. See Brief for Appellant at 4, *Soto Vega v. Ashcroft* (9th Cir. 2004) (No. 04-70868), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/319.pdf. The judge noted that most people would not be able to see that the respondent is gay, *id.* at 48, and that "if he returned to Mexico in some other community [than the one in which he was raised] it would not be obvious that he would be homosexual unless he made that obvious himself." *Id.* at 39. This ruling, in addition to patently denying certain gay individuals the protection of the law guaranteed by the cases discussed in this Article, assumes that a person's homosexuality is manifested only through outward traits and behavior and that gay men who can "cover" their sexual orientation should be denied protection under the asylum laws. See *id.* at 39-42. On January 27, 2004, the BIA affirmed without opinion the IJ's decision. *Id.* at 3. The case is now on appeal in the Ninth Circuit. See Bob Egelko, *Gay Group Appeals Asylum Ruling: Guadalajara Police Beat Mexican Man*, S.F. CHRON., Oct. 27, 2004, at B-3. Immigration authorities in other countries have reached similar decisions. See, e.g., *Refugee Told He's Too Masculine*, CHI. SUN-TIMES, May 5, 2004, at 45 (discussing case of Fernando Enrique Rivera, a Mexican man denied asylum by Canadian Immigration and Refugee Board because he was not "visibly effeminate").

122. Because, for instance, many LGBT asylum seekers face persecution by members of

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Under the theory of imputed gay identity, transgender asylum seekers need not self-identify as gay or lesbian to gain protection; rather, they need only demonstrate that they are perceived to be so by their persecutors. And many transgender litigants, who understandably prefer *not* to identify as gay or lesbian, might possess a stronger legal claim under the imputed gay

their own families, it is often vital to document the extent (or lack thereof) to which police or other government agents respond to intra-family disputes. In many countries, acts of intra-family violence—no matter how brutal—go completely uninvestigated and unredressed. Although generalized persecution by private (i.e., non-government) actors is not necessarily actionable under the asylum laws, government sanctioning of private persecution can give rise to a cognizable asylum claim. See *Hernandez-Montiel*, 225 F.3d at 1097 (granting relief to applicant suffering persecution “‘inflicted either by the government or by persons or organizations which the government is unable or unwilling to control’”) (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)); *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994) (reversing BIA and granting asylum because the “statute protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control”); *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (granting asylum to an applicant facing a likelihood of intra-family abuse that the government would refuse to prevent and noting that “even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father’s conduct”).

I found the use of experts especially helpful in preparing a claim for a young gay man from Albania whose father had threatened to kill him when his homosexuality was discovered. Aside from that threat of death, there was no government-sponsored persecution of any kind. Upon interviewing experts, I submitted expert affidavits explaining the historical and cultural circumstances surrounding domestic violence in Albania and the complete abnegation of government or police involvement in intra-family (as well as inter-family) disputes, no matter how violent. These affidavits helped establish the severity of my client’s death threat and the certainty with which the threat would be carried out if the young man was returned home. The asylum petition was granted.

Because particular social group status has been extended to gays and lesbians (and, as discussed above, many, if not all, transgender persons), LGBT persons often fare better in bringing domestic violence asylum claims than victims of spousal abuse. This stems from the fact that women (the vast majority of such victims) are not *per se* considered a particular social group. U.S. immigration authorities have considered correcting this problem, but the issue remains unresolved. The BIA has issued contrary decisions on the issue of domestic-violence persecution. Compare *In re S-A-*, 22 I. & N. Dec. at 1329 (granting asylum to Moroccan applicant who faced “physical and emotional abuse” by her father on account of religious differences and whom government authorities would have refused to protect), with *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att’y Gen. 2001) (denying asylum to Guatemalan woman who was repeatedly physically, mentally, and sexually abused by her husband). Upon vacating the decision in *R-A-*, former Attorney General Reno proposed regulations that would have allowed victims of spousal abuse to seek asylum purely on that basis, see Press Release, U.S. Department of Justice, Proposed Rule Issued for Gender-Based Asylum Claims (Dec. 7, 2000), available at <http://uscis.gov/graphics/publicaffairs/newsrels/Gender.htm>, but no action was taken on those proposals. Former Attorney General Ashcroft was considering similar proposals. See Rachel L. Swarns, *Ashcroft Weighs the Granting of Political Asylum to Abused Women*, N.Y. TIMES, Mar. 11, 2004, at A20.

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identity theory as opposed to a standard sexual-orientation-based claim. Of course, attorneys should not try to persuade such clients to identify as gay or lesbian simply to take advantage of more auspicious case law.¹²³ Fortunately, the imputed gay identity theory utilizes favorable precedent all the while depicting the client accurately and in accordance with his or her wishes. The doctrine of imputed gay identity is therefore a viable avenue of relief for transgender asylum applicants who are persecuted because they are perceived to be gay or lesbian. It accords with the reality that, in many cultures from which asylum seekers flee, persecutors might erroneously perceive their victims to be homosexual, regardless of their actual gender or sexual orientation. The doctrine also pays tribute to the numerous ways in which gender and sexual orientation interrelate in culture.

CONCLUSION

Given recent developments in asylum law, transgender litigants can advance three separate theories for bringing a successful claim. They can focus on the ways that their transgender identity falls under the various applicable standards for particular social group; they can bring a claim under the doctrine of imputed gay identity; and they can take advantage of recent Ninth Circuit case law that has extended protection to transgender litigants.

The emerging case law in this arena is not perfect. One drawback is the one-sidedness of the Ninth Circuit's rulings, which fail (at least for now) to protect female-to-male transgender persons. Some scholars might object that a soft immutability standard fails to adequately protect performative characteristics and that the only way to truly protect all transgender individuals is to jettison immutability altogether. But these shortcomings should not overshadow the theoretical, doctrinal, and practical developments that have redounded to the benefit of many LGBT asylum seekers. Indeed, the receptivity of asylum law to the claims of LGBT asylum seekers, coupled with the soft immutability standard, suggests great promise, and serves as a lodestar for LGBT litigants in other statutory and constitutional contexts.

123. And, in any event, problems can arise during IJ hearings if the asylum seeker disclaims the very identity asserted in briefs during direct or cross-examination.