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SEXUAL MINORITIES AND ASYLUM LAW: SOME DOORS REMAIN UNOPENED

NICK CORSANO

INTRODUCTION

Sexual and gender minorities have consistently been left out, over-looked or simply forgotten when protections from discrimination are afforded to particular social groups. Whether it was because of disapproval or lack of visibility, gender and sexual minorities have not been socially accepted to constitute people who can be defined within the clear-cut confines of a particular group. Immigration law did not fail to follow suit in lacking the adequate definitions and enumerations to protect sexual and gender minorities seeking asylum.

The Immigration and Nationality Act enumerates quite a few social groups whose members can claim asylum if they are persecuted for their membership or association within that group.¹ Not completely unaware that there may be groups of people that do not fall under one of the enumerated categories, the Immigration and Nationality Act allows for members of “a particular social group” to claim asylum if he or she can prove their membership was or will be the source of their persecution.² This is the gateway group for sexual and gender minorities to claim asylum for persecution based on this characteristic.

Sexual and gender minority is not met with ease in defining what would constitute a particular social group. Through an order by the Attorney General defining gays and lesbians as a protected “particular social group” in 1990 and a few defining cases handed

¹ Immigration and Nationality Act, 8 U.S.C. §§ 1-1778 (2010).

² 8 U.S.C. § 1158 (a)(1), (b)(1) (2003).

down by the circuit courts, have caused “a particular social group” to slowly but sufficiently broadened itself to incorporate sexual and gender minorities.³

These cases demonstrate a developing jurisprudence for the protection of asylum seekers based on sexual and gender minorities persecuted for the immutable and/or innate characteristics expressed as integral parts of their identities. However, they also bring to light the difficulties surrounding the protection of an innate, yet non-physical characteristic. As cases involving sexual and gender minorities that display outward manifestations of their “particular social group” are easier in a sense to evaluate, the immigration courts stifle when dealing with individuals who possess the immutable characteristic but don’t exhibit outward manifestations.⁴ The courts attempted to remedy these situations by stating that evidence of past persecution will automatically instill a valid fear of future persecution and denial may only be granted on proof of evidence to change of circumstances offered proved the government.⁵ This does not provide a solution however for those individuals who fail to have a past experience of persecution, but are still in danger due to their membership in the particular social group of sexual or gender minority.

In order to remedy the problems of persecution facing sexual and gender minorities the courts have attempted to interpret the Immigration and Nationality Act in a favorable light to allow for those persecuted on the basis of a non-physical characteristic. This Note will examine the interactions of sexual and gender minorities with asylum law

³ Reyes-Reyes v. Ashcroft, 384 F.3d 782, 784 (9th Cir. 2004); Amanfi v. Ashcroft, 328 F.3d 719, 721 (3d Cir. 2003); Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 2000); Opinion of Attorney General Order no. 1895-94 (June 19, 1994).

⁴ In re Soto Vega, No. A-9880786, at 3 (Immigration Ct. Jan. 21, 2003).

⁵ Vega v. Gonzalez, 183 Fed. Appx. 627, 629 (9th Cir. 2006).

and the expansions and contractions taken in establishing standards for the granting or denial of asylum for persecution based on membership in a “particular social group.” Part I examines the foundations of asylum law and its applications. Part II looks over the considerations and reasoning behind the circuit split in defining what constitutes a particular social group. Part III discusses the circuit split over whether punitive intent is necessary for whether treatment of an individual constitutes persecution. Part IV discusses homosexuality defined as a particular social group. Part V discusses the difficulties in defining transsexual and transgender as a particular social group. Part V also looks at the ideas of soft immutability and the Imputed Identity Doctrine. Part VI examines the importance of physical manifestation when determining an individual’s membership in a particular social group. Part VI also discusses the ideas of covering and reverse covering. Throughout the Note there will be analysis of the procedural and policy precedents in place and their affect on sexual and gender minorities seeking asylum, concluding that courts should hold firm to practices that allow for the protection of those persecuted because of an actual or perceived immutable or innate characteristic core to their identity, regardless of how well their “particular social group” can be defined.

I. ASYLUM LAW: DEFINITION AND PRACTICE

Asylum claims in the United States are governed by the Immigration and Nationality Act (INA).⁶ The Department of Homeland Security and the Justice

⁶ 8 U.S.C. §§ 1-1778 (2010); Stephen Yale-Loehr, Sean Koehler, *Overview of the U.S. Immigration Law*, 139 PLI/NY 11, 16-17 (2004).

Department govern the INA regulations.⁷ When granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to § 209 of the Refugee Act of 1980, 8 U.S.C.S. § 1159, after residing in the United States one year, subject to numerical limitation and the applicable regulations.⁸ The regulations prescribe that when the alien applies for an adjustment to “permanent resident,” he or she has to have been physically present in the United States for at least one year after being granted asylum, continued to be a refugee within the meaning of Section 101(a)(42)(A), 8 USCS § 1101(a)(42)(A)⁹ or as a spouse or child of such a refugee, is not firmly resettled in any foreign country, and is admissible as an immigrant under this Act at the time of examination for adjustment of the alien.¹⁰

Cases of asylum are heard first in the Executive Office for Immigration Review (EOIR).¹¹ If the immigration judge finds that removal of the applicant is proper, the applicant may appeal to the Board of Immigration Appeals (BIA).¹² An individual member of the BIA is authorized to affirm the decision of an immigration judge without opinion if he or she determines that any errors that may exist in the decisions are

⁷ 8 U.S.C. §§ 1-1778; Koehler, *supra* note 6, at 16-17.

⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

⁹ The term "refugee" means:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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 opinion.

8 U.S.C. § 1101 (a)(42)(A) (2010).

¹⁰ 8 U.S.C § 1159(b)(1)-(5) (2005).

¹¹ THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 254, 256 (4th ed. 1998).

¹² 8 C.F.R. § 3.1(b) (2003).

“harmless or nonmaterial,” or the issue on appeal is “squarely controlled by existing Board or federal court precedent,” or that the “questions raised on appeal are so insubstantial” that a panel is unnecessary.¹³ Finally, if the BIA denies the application, the applicant may raise their case on appeal to the federal circuit court for review in the circuit in which they are located.¹⁴ When the BIA issues an opinion that does not adopt the decision of an immigration judge, the BIA’s opinion becomes the basis for judicial review of the decision of which the alien is complaining.¹⁵ Though the federal court has the ability to clarify the law, they cannot define factually what does or does not constitute asylum eligibility regarding an administrative judgment.¹⁶

A court of appeals reviewing an asylum claim is not generally empowered to conduct a *de novo* inquiry into the matter and reach its own conclusions based on that inquiry; proper conduct, except in rare circumstances, would be for the court to remand back to the agency for additional investigation or explanation.¹⁷ The agency (BIA) is entitled to deference in interpreting ambiguous provisions of the INA.¹⁸ If the appeal to the Court of Appeals is successful, the court’s decision is then binding on the BIA and

¹³ 8 C.F.R. § 3.1(a)(7) (2003).

¹⁴ 8 U.S.C. § 1252 (2003).

¹⁵ *Fen Yong Chen v. Bureau of Citizenship & Immigration Servs.*, 470 F.3d 509, 513 (2d Cir. 2006); *Board of Immigration Appeals*, JUSTICE.GOV, <http://www.justice.gov/eoir/biainfo.htm>, (last updated April 2011).

¹⁶ *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006).

¹⁷ *Id.*

¹⁸ *Negusie v. Holder*, 555 U.S. 511, 522 (2009). This course of remand will play an integral role in the progression of asylum cases regarding homosexuals, as the BIA is the agency that ultimately should define what does, or does not constitute a “particular group of society.”

lower immigration judges for cases that arise within that circuit.¹⁹ Only a decision from the Supreme Court would affect all immigration courts, but they infrequently give *certiorari* to immigration cases.

The Attorney General has the authority to overrule decisions of the BIA and can establish clarity among the law, by determining what should be held as precedent.²⁰ Federal Regulations permit the Attorney General to intervene in the appeals process by certifying a BIA decision to himself, or by accepting referral from the Board or the Department of Homeland Security.²¹ Once the referral has been made to the Attorney General, the BIA decision is no longer final and cannot be used as precedent or reviewed by a federal court.²² The decisions issued by the Attorney General in these instances become the final agency decision and serve as precedent, binding future cases.²³

Asylum may be initiated in two manners. A “defensive application” for asylum occurs when removal proceedings²⁴ have begun and the alien raises an asylum claim as grounds for relief from deportation.²⁵ Conversely, as the name suggests, an “affirmative application” for asylum occurs when the applicant is legally present and makes his or her claim outright in order to obtain asylum status.²⁶ Regarding persecution based on sexual

¹⁹ Stuart Frider, *Sexual Orientation as Grounds for Asylum in the United States – In re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993), 35 HARV. INT’L L.J. 213, 215 (1994).

²⁰ 8 C.F.R. § 3.1(g) (2003).

²¹ 8 C.F.R. § 1003.1(h)(1) (2008).

²² 8 C.F.R. § 1003.1(h)(1); Attorney General Order No. 2380-2001 (Jan. 19, 2001) (attached to E-L-H-, 23 I. & N. Dec. 700, 701 (AG 2004)).

²³ 8 C.F.R. § 1003.1(g) (2008).

²⁴ Removal proceedings are governed and defined by I.N.A. 239, 240, 8 U.S.C. §§ 1229-1229(a) (2003).

²⁵ Vicente A. Tome, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 COLUM. J.L. & SOC. PROBS. 411, 423 (1994).

²⁶ *Id.* at 422-23.

orientation or gender, whether asylum is raised as a “defensive” or an “affirmative” measure should have no impact on deciding whether to grant asylum or not. Using the manner in which asylum is sought to rebut the validity of the claim based on sexual orientation or gender would be inappropriate given the lack of clarity in the application of this “particular social group” as it is.

Under Title 8, an alien has to prove that race, religion, nationality, membership of a particular social group, or political opinion, was or will be at least one central reason for which he or she was or will be persecuted.²⁷ The United States Supreme Court has established a two-step process for reviewing an agency’s interpretation of a statute. First, if the congressional purpose is clear, courts and administrative agencies must give effect to the unambiguously expressed intent of Congress.²⁸ The second level of review is triggered when the statute is silent or ambiguous with respect to the specific issue.²⁹ When the statute is silent the court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.³⁰

Evidentiary support is essential to establishing that one was or will be subjected to persecution. The BIA laid out in the *Matter of Acosta* that in order for the alien to show that it is likely he will become the victim of persecution, his evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to extinguish in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the

²⁷ 8 U.S.C. § 1158(a)(1), (b)(1) (2003).

²⁸ *Chevron, U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984).

²⁹ *Id.* at 843.

³⁰ *Id.* at 844.

inclination to punish the alien.³¹ In addition, the statutory standard for asylum requires the facts to show that an alien's primary motivation for requesting refuge in the United States is "fear," i.e., a genuine apprehension or awareness of danger in another country.³² The requirement of a "well-founded fear of persecution," set out by section 101(a)(42)(A) of the Act, has been interpreted by the BIA to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.³³ This requires that the alien show his fear has a solid basis in objective facts or events and that it is likely he will become the victim of persecution.³⁴

The "well-founded fear of persecution" standard involves both a subjectively genuine fear of persecution and an objectively reasonable possibility of persecution.³⁵ The subjective component requires that the applicant have a genuine concern that he or she will be persecuted, and may be satisfied by the applicant's testimony that he or she genuinely fears persecution.³⁶ The objective component requires that the alien establish a reasonable fear of persecution by credible, direct, and specific evidence.³⁷ The applicant is not however required to present proof that the persecution is more likely than not; one can have a well-founded fear of an event happening when there is less than a 50 percent chance of the occurrence taking place.³⁸

³¹ Matter of Acosta, 19 I. & N. Dec. 211, 226 (B.I.A. 1985).

³² *Id.* at 221.

³³ *Id.* at 225.

³⁴ *Id.*

³⁵ *Cardoza-Fonesca*, 480 U.S. at 430-31.

³⁶ *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

³⁷ *Id.*

³⁸ *Id.*

To satisfy the objective prong of having a well-founded fear of future persecution, an applicant must show that he would be individually singled out for persecution or demonstrate that there is a pattern or practice in his country of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁹ The immigration judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if he establishes his inclusion in and identification with similarly situated groups of persons against which there is a pattern or practice of persecution in his country on account of the five statutory grounds for asylum.⁴⁰ It is therefore inappropriate to delve into the subjective levels of the person's individual experience with a particular social group, if there is clear evidence that the applicant does in fact belong to the persecuted particular group.

In the *Matter of Acosta*, the BIA interpreted persecution of this kind to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic; one that might be innate such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.⁴¹ No matter what the common characteristic, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.⁴²

³⁹ *Vasquez-Ramirez v. Attorney General United States*, 315 Fed. Appx. 381, 382 (3rd Cir. 2009).

⁴⁰ *Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994).

⁴¹ *Matter of Acosta*, 19 I. & N. Dec. at 233-234.

⁴² *Id.*

In applying the *Acosta* formula, the BIA focuses on the two major considerations of immutability and social visibility.⁴³ The BIA has noted that a past experience is by its very nature, immutable.⁴⁴ The event has already occurred and cannot be undone; however, this fact does not mean that any past experience shared by people suffices to define a particular social group for asylum purposes.⁴⁵ The Agency is careful to police its interpretation of the “particular social group” so not to over broaden the requirements necessary to obtain asylum. “Particular social group” should not be a “catch all” for all persons alleging asylum that do not fit within another enumerated category.⁴⁶ This means that the risk of persecution alone does not create a particular social group within the meaning of the INA.⁴⁷

II. THE THREWAY SPLIT OVER A PARTICULAR SOCIAL GROUP

In 1994, Attorney General Janet Reno announced that *Toboso-Alfonso* would act as precedent for all cases concerning the same or similar issues.⁴⁸ The case stated an “individual who has been identified as a homosexual and persecuted by his 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 The Attorney General ordered that this opinion act as precedent in all proceedings involving issues relating to all sexual orientation claims.⁵⁰ The new standard lead to the three-ways circuit split that

⁴³ *Castillo-Arias v. United States Attorney General*, 446 F.3d 1190, 1194 (11th Cir. 2006).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1198.

⁴⁷ *Id.*

⁴⁸ Opinion of Attorney General Order No. 1895- 94 (June 19, 1994).

⁴⁹ *Matter of Toboso-Alfonso*, 20 I.&N. Dec. 819, 819 n.1 (B.I.A. 1990).

⁵⁰ Opinion of Attorney General Order No. 1895- 94.

has evolved in evaluating what constitutes a particular social group, especially when dealing with non-physical, immutable or innate characteristics.

The First Circuit,⁵¹ Third Circuit,⁵² and Seventh Circuit,⁵³ have all followed the standard set out by the BIA in *Acosta* in determining a member of a “particular social group” when reviewing applications for asylum. The guidelines set out above are what these Circuits adhere to, and they aim to determine if the persecution is because of membership in a particular social group, whose members share a common, immutable characteristic.⁵⁴ The First Circuit, while adhering to the standard laid out in *Acosta*, narrowed the standard a bit more in their analysis by emphasizing another section of the INA. Even if an alien asserts a fear of future persecution by local functionaries, they must show that those functionaries have more than a localized reach.⁵⁵ The reasoning is that if the potentially troublesome state of affairs is sufficiently localized, an alien can avoid persecution by simply relocating within his own country instead of fleeing to a foreign nation.⁵⁶ The Immigration and BIA courts within these three circuits are held to the standard those circuits and must review asylum cases in that light; here strict adherence to the guidelines of the BIA and *Acosta*.

The Ninth Circuit has evolved a more liberal take on the standard set out in *Acosta*. Initially, laying out its opinion in *Sanchez-Trujillo v. INS*, the court defined “particular social group” as a collection of people closely affiliated with each other, who

⁵¹ *Da Silva v. Ashcroft*, 394 F.3d 1 (1st Cir. 2005).

⁵² *Amanfi*, 328 F.3d at 719.

⁵³ *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998).

⁵⁴ *Da Silva*, 394 F.3d at 5.

⁵⁵ *Id.* at 7.

⁵⁶ 8 C.F.R. § 208.16(b)(2); *Da Silva*, 394 F.3d at 7.

are associated by some common impulse or interest.⁵⁷ The central vein of the court’s concern is the existence of a voluntary associational relationship among the purported members, which expresses some common characteristic that is fundamental to their identity as a member of that discrete social group.⁵⁸ The Ninth Circuit has turned its attention towards the associational relationship involving “common characteristics...fundamental...to identity.”⁵⁹ The court speaks to the ability of persecution to not only occur based on an immutable characteristic, but also to an association, one fundamental to the identity and core of the applicant’s person. In dealing with applications based on sexual orientation, the Ninth Circuit opens itself up to the allowance of those who share a common characteristic that may not be immutable but is core to their person none-the-less. Though the Attorney General stated, *Toboso- Alfonso* is precedent, there are subsets of gender identity that are not as clearly defined as the homosexuality reviewed in that case. Those subsets will now have a more reasonable chance of success under the altered standard of the Ninth Circuit.

The Ninth Circuit moved on from *Sanchez-Trujillo* to *Hernandez-Montiel v. INS*, where the court harmonized the previous case with the standard set forth in *Acosta*. The court expands the definition of “particular social group” in *Hernandez-Montiel* to include “one united by a voluntary association...or by an innate characteristic that is so fundamental to the identities or consciences of its member that members cannot or should not be required to change it.”⁶⁰ This standard encompasses the immutable characteristic standard laid out in *Acosta*, but broadens itself to encompass things not necessarily

⁵⁷ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Hernandez-Montiel*, 225 F.3d at 1093.

immutable, but crucial to a person's identity none-the-less. This broadened standard makes asylum more accessible to the LGBT community. There are subsets and intricacies involved in sexual orientation and gender identity that possess qualities not necessarily immutable, but unchangeable and innate to the individual, suggesting that they should not be required to be changed.

Lastly, the Second Circuit removes analysis from the individual claiming asylum and observes the actions and objectives of his or her persecutor. The Second Circuit focuses its opinion around perception in *Gomez v. INS*. The idea of perception opens the claim of asylum to a broader range of victims, who would otherwise rely solely on establishing that they are part of a particular social group based on an immutable characteristic or a characteristic so innate they should not be required to change it. In *Gomez*, 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 the persecutor...or in the eyes of the outside world in general."⁶¹ This standard removes the claim from a basis of actual identity, to one of perceived identity, which in many cases is the basis for persecution or victimization to begin with; which other statutes in the United States allow for, holding the attacker equally as culpable as if their persecution was based on actual, rather than perceived knowledge.⁶² The standard upheld by the Second Circuit opens up asylum claims to those that would otherwise be at a loss. People persecuted because of their perceived

⁶¹ *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

⁶² The Employment Non-Discrimination Act outlaws sexual orientation discrimination in the workplace; sexual orientation being defined as homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived. H.R. 2981 § 3(a)(9), 111th Cong. (2009).

identity may in fact not identify as a member of that group and do not have the immutable characteristics of those being persecuted. Should they be denied asylum and forced to endure persecution because of an inaccuracy? The Second Circuit says no. This standard facilitates a means for a great deal of subsets in the LGBT community, specifically among the transsexuals and transgender individuals. Something as difficult to explain as transexuality, can be even more difficult when forced to contextualize not only what you are but how you, among others, are persecuted for it. The standard of the Second Circuit allows a bit of leniency to the victim as they are not required to clarify what they are and how they are part of a “particular social group,” but only that their attacker perceives them as such, which usually will fall more smoothly into the binary sexual system laid out in the United States.

III. PUNITIVE INTENT OR NOT?

The idea of whether an asylum applicant’s persecutor must have acted with punitive intent has caused a split among the circuits. At least two circuits uphold the idea in *Matter of Acosta* that persecutors must exhibit intent to punish in order for asylum to be granted.⁶³ *Sivaainkaran v. INS*, from the Seventh Circuit, involved the denial of asylum for a Sri Lankan Applicant because the court felt his situation didn’t merit asylum simply because he feared harassment from the conflict between the Buddhist Sinhalese and the Hindu/Muslim Tamils.⁶⁴ The court said that persecution has been described as “punishment” or “the infliction of harm” for political, religious, or other offensive reasons.⁶⁵

⁶³ *Matter of Acosta*, 19 I. & N. Dec. at 233.

⁶⁴ *Sivaainkaran v. INS*, 972 F. 2d 161, 165 (7th Cir. 1992).

⁶⁵ *Id.*

However, in certain circumstances, denial of a privilege in a home country for legitimate reasons does not escalate to persecution. The Fifth Circuit handed down *Faddoul v INS*, where they refused to grant asylum to a Palestinian applicant alleging persecution in Saudi Arabia.⁶⁶ The applicant alleged that he and his family were denied basic living, citizenship, and exit/ re-entry ability in Saudi Arabia.⁶⁷ The court noted that all non-Saudi residents were subject to the same lack of privileges and that this particular applicant failed to show that he and his family were being isolated for persecution.⁶⁸ Additionally, *Faddoul* failed to show he feared harm as a result of the Saudis' desire to punish him for a particular belief or characteristic; resulting in denial of asylum.⁶⁹

The Ninth Circuit deviates from the "intent to punish" standard. In *Pitcherskaia v. INS*, Pitcherskaia was a registered⁷⁰, suspected lesbian and was ordered to undergo treatment at a clinic. She was diagnosed with "slow-going schizophrenia" and prescribed sedatives.⁷¹ Applicant was arrested twice in the home of a gay friend in 1990 and 1991 and imprisoned overnight.⁷² On appeal, the Ninth Circuit disagreed with the BIA, the Fifth Circuit and the Seventh Circuits view on what constitutes persecution.⁷³ The Ninth Circuit held that "persecution" is defined objectively as "the infliction of suffering or harm upon those who differ... in a way regarded as offensive."⁷⁴ Therefore, the subjective motives of the persecutor are irrelevant, for "persecution by any other name

⁶⁶ *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994).

⁶⁷ *Id.*

⁶⁸ *Id.* at 189.

⁶⁹ *Id.*

⁷⁰ In Russia, the government kept records of suspected homosexuals during the 1990's.

⁷¹ *Pitcherskaia*, 118 F.3d at 644.

⁷² *Id.*

⁷³ *Id.* at 648.

⁷⁴ *Id.* at 647, (citing *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)).

remains persecution.”⁷⁵ The Ninth Circuit remanded the applicant’s case to the BIA, stating; “human rights law cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as ‘curing’ or ‘treating’ the victims.”⁷⁶ As observed previously, this is now precedent in immigration courts that lie within the Ninth Circuit. Their applicants will have the objective, reasonable person standard, removing the protection of misleading terms that may hide the true subjective nature of the persecutor’s intent.

IV. HOMOSEXUALITY AS A PARTICULAR SOCIAL GROUP UNDER ASYLUM LAW

Until 1990, homosexuals were formally excluded on the grounds that they were “aliens afflicted with a psychopathic personality, epilepsy, or mental defect.”⁷⁷ The Immigration Act of 1990 removed the bar on admission for homosexuals into the United States.⁷⁸ In 1990, in *Toboso-Alfonso*, a homosexual was deemed a member of a particular social group, specifically Cuban gays, and the applicant was permitted to successfully allege persecution on that basis to qualify under the statutory definition of refugee in Section 101 of the INA.⁷⁹ Subsequent to *Toboso-Alfonso*, was the case of *In re Tenorio*, decided in 1993, the court granted asylum to a Brazilian gay man who feared persecution by paramilitary groups after having been bashed in Rio de Janeiro.⁸⁰ In both cases homosexuality served as the basis for claiming membership to a particular social

⁷⁵ *Id.* at 647.

⁷⁶ *Id.* at 648.

⁷⁷ Immigration and Nationality Act of 1952, Pub. L. No. 89-236, 15(b), 79 Stat. 911, 919 (1965) (superceded 1990).

⁷⁸ Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990).

⁷⁹ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 823.

⁸⁰ *In re Tenorio*, No. A72-093-558 (Immigration Ct. July 26, 1993).

group subject to persecution.⁸¹ However, neither case was assigned precedence at the time it was decided.⁸²

In 1994, Attorney General Janet Reno issued a directive, mandating that the immigration system adopt *Toboso-Alfonso* as precedent “in all proceedings involving the same issue or issues.”⁸³ 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.”⁸⁴ Since the adoption of *Toboso-Alfonso*, the hurdle for gays and lesbians to establish themselves as part of a particular social group has been removed by the determination that homosexuality is in fact, a particular social group. However, though gays and lesbians may associate themselves as part of a particular social group (sexual and gender minorities) they must still demonstrate the subjective and objective fears of persecution required by *Matter of Acosta*.⁸⁵ They must show a nexus between the persecutions they have suffered, or their fear they will suffer persecution and their membership to their particular social group (sexual minorities).⁸⁶ The *Mogharrabi* test holds that an alien’s fear is reasonable if a reasonable person in a similar circumstance would fear future persecution.⁸⁷ Though still faced with the task of proving fear of persecution or that of future persecution, gays and lesbians no longer have

⁸¹ *In re Tenorio*, No. A72-093-558; *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 823; Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 GEO. IMMIGR. L.J. 1, 22 (1996).

⁸² *In re Tenorio*, No. A72-093-558; *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 823; Ramanathan, *supra* note 81, at 20-21.

⁸³ Attorney General Order No. 1895-94, 859, 860 (June 19, 1994).

⁸⁴ *Id.*

⁸⁵ *Matter of Acosta*, 19 I. & N. Dec. at 226.

⁸⁶ 8 U.S.C. § 1101(a)(42)(A) (2010).

⁸⁷ *In re Mogharrabi*, 19 I. & N. 439, 445 (B.I.A. 1987).

to worry about proving where they fit in regards to a “particular social group.”⁸⁸ This is still not the case however for those among other sexual and gender minority groups.

V. DIFFICULTY IN DEFING TRANSEXUALS AND BISEXUALS UNDER “PARTICULAR SOCIAL GROUP”

In the case of transsexual and transgender individuals, the argument for asylum becomes more difficult. Though Attorney General Janet Reno affirmed that homosexuality does constitute a particular social group upon which asylum claims may be based and that *Toboso-Alfonso* should be adopted as precedent for all cases regarding the same issue or issues;⁸⁹ the courts have not extended this to mean those individuals who identify under the headings of transsexual or transgender. The BIA has never formally recognized transgender or transsexuals as a “particular social group,” and no federal circuit has defined the standard regarding these individuals directly. However, the Ninth Circuit has issued two decisions that contribute to the protection for transgender/sexual asylum seekers. In *Hernandez-Montiel* and *Reyes-Reyes v. Ashcroft*, the Ninth Circuit established that “gay men with female sexual identities” comport a particular social group,⁹⁰ and then broadly defined this group to encompass a variety of gender-based characteristics, consecutively.⁹¹ These cases are important because they do not just gauge these individuals against the particular social group of homosexuality, but that of what they really are- sexual minorities. They establish precedent for the equal protection and opportunity to gain asylum for those that don’t conform to stereotypical gender norms.

⁸⁸ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 823.

⁸⁹ Attorney General Order No. 1895-94, at 860.

⁹⁰ *Hernandez-Montiel*, 225 F.3d at 1087.

⁹¹ *Reyes-Reyes*, 384 F.3d at 784-85.

Hernandez-Montiel v. INS is a case from the Ninth Circuit issued in 2000.⁹² The decision in this case extended protection to Hernandez-Montiel, a transgender asylum seeker.⁹³ Hernandez-Montiel wore his hair long, had long fingernails, dressed in women's clothing, took female hormones and had same-sex attraction.⁹⁴ Hernandez-Montiel claimed that he should be considered as a member of a particular social group – gay men with female sexual identities.⁹⁵

Initially, the Immigration Judge, though finding Hernandez-Montiel credible and sincere, denied relief because “homosexual males who wish to dress as a woman” did not constitute a particular social group.⁹⁶ The Immigration Judge noted that he could not characterize Hernandez-Montiel's assumed female persona as immutable or fundamental to his identity because he alternated between it and his male identity.⁹⁷ The BIA affirmed the Immigration Judge's decision, and found that Hernandez-Montiel faced persecution not because of his 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.⁹⁸

The Ninth Circuit reversed the decision of the BIA.⁹⁹ The court laid its foundation in establishing the existing precedent, that gays and lesbians are members of a

⁹² *Hernandez-Montiel*, 225 F.3d at 1084.

⁹³ *Id.* at 1087.

⁹⁴ *Id.* at 1088.

⁹⁵ *Id.* at 1089.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1089-90.

⁹⁹ *Id.* at 1084.

particular social group.¹⁰⁰ The court then continued on to note that “sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance.”¹⁰¹ The court observed that men who are homosexual in many cases, “outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails.”¹⁰² The court noted that these men may suffer the most serious persecution in certain cultures because they are not only homosexual, but additionally they adopt the passive role in the gay relationship, the one perceived to be the stereotypical female role.¹⁰³ The court recognized Hernandez-Montiel as a “homosexual who has taken on a primarily ‘female’ sexual role.”¹⁰⁴ The court described Hernandez-Montiel as part of the particular social group- “gay men with female sexual identities.”¹⁰⁵ The court said that *Hernandez-Montiel* was not a case about a man who on occasion puts on a dress to engage in “cross-dressing;” but a case about “sexual identity,” manifested in the adoption of gendered traits characteristically associated with women.¹⁰⁶ The sexual identity discussed here that manifests in traits characteristically associated with women, also manifests itself in traits characteristically associated with transsexuals. Though the female is the binary category within which these traits fall stereotypically, it must also be remembered that these traits are the innate traits of the transgender/transsexual. They are just as much core characteristics of the

¹⁰⁰ *Id.* at 1094, (citing *Toboso-Alfonso*, 20 I. & N. Dec. at 823, and *Matter of Tenorio*, No. A 72-093-558 (B.I.A 1999)).

¹⁰¹ *Id.* at 1093.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1095.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1096.

transsexual as they are of the female and this is the recognition and equation the court has not yet reached.

Though the court never uses the term transsexual or transgender, the Ninth Circuit provides opportunity in asylum cases to this group of sexual minorities. The court described these individuals as “gay men with female sexual identities.”¹⁰⁷ The court makes a statement in saying that sexual identities cannot be as binary as they have been perceived in the past. Sexual identifications cannot be as clear-cut as to fit nicely in the package that has been established- homosexuality. *Hernandez-Montiel* states “sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance.”¹⁰⁸ Sexual identification is more than just intercourse as the court describes, that is only a piece to the puzzle, which as a whole is identity. Identity is expressed in a multitude of ways. One example expressed here is dress.¹⁰⁹ The dress is not merely to be taken as protection from the elements or as the court describes, “a fashion statement.”¹¹⁰ It is a statement or expression generally of who that person is, the identity they hold, and an outward manifestation of the internal immutable characteristics that classify them a person, a person whose identity deserves protection from persecution. Many groups in society can be classified by their clothing; Goths, Hipsters, Grunge. Each of these “particular social groups,” dress in a certain way that make them identifiable to the public and to each other. Their clothing is an extension and representation of the beliefs that are core to their identity. If ever persecuted for these beliefs, they hold the necessary requirements for an asylum claim, and it seems that the

¹⁰⁷ *Id.* at 1095.

¹⁰⁸ *Id.* at 1093.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1097.

Ninth Circuit held correctly that the outer manifestation or representation of one's internal identity should not be taken so lightly simply because it is removable.

In *Reyes-Reyes v. Ashcroft*, the Ninth Circuit expanded the borders of “gay men with female sexual identities.”¹¹¹ The court noted that the application of this social group extends to a man who “dresses and looks like a woman, wears makeup and a women’s hairstyle.”¹¹² The counsel in *Reyes-Reyes* referred to Reyes-Reyes as “transgender,” which provided the court the opportunity to redefine, or fuse the concept of transgender with the broader definition of “gay men with female sexual identities.”¹¹³ The court did not avoid referring to Reyes-Reyes as a transgender individual, they noted that Reyes-Reyes’s “sexual orientation, for which he was targeted and his transsexual behavior are intimately connected.”¹¹⁴ Combined with the decision of *Hernandez-Montiel*, *Reyes-Reyes* extends protections under asylum law to those individuals persecuted for their sexual identities manifested “beyond conduct, and outwardly expressed through dress and appearance.”¹¹⁵

A. *The Soft Immutability Standard*

Hernandez-Montiel and *Reyes-Reyes* impose a “soft immutability” standard that alters the way in which courts protect the transgender or sexual minority asylum seeker.¹¹⁶ The soft immutability standard that is established in these cases from the Ninth Circuit reduce the need for “scientific or biological” proof of sexual identity through

¹¹¹ *Reyes-Reyes*, 384 F.3d at 787-89.

¹¹² *Id.* at 785.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Hernandez-Montiel*, 225 F.3d at 1093.

¹¹⁶ Joseph Landau, *Special Series: 2003 Lavender Law Conference: “Soft Immutability” and “Imputed Gay Identity”*: *Recent Developments In Transgender And Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 250 (2005).

static characteristics by way of chromosomal makeup, sex organs, or the sexual identity assigned at birth.¹¹⁷ This standard allows for transgender asylum seekers to seek protection based on traits adopted over time though still integral to their identity.¹¹⁸ They expand the definition of what might constitute “immutable.”¹¹⁹ The court’s lenient interpretation of immutability allows for individuals to establish identity through traits that accurately and fairly represent their identities without biological or scientific support.¹²⁰ The Ninth Circuit interprets broadly the original definition of a particular social group with this standard, which protects the 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.”¹²¹

The Ninth Circuit interpreted the latter part of this standard in the proper light. The dress, actions and outward traits and expressions of these individuals are fundamental to their individual identities or consciences and therefore should not be required to be changed. Political association and religious views are protected, non-physical traits that can constitute a membership to a particular social group, yet their outward physical expressions of association are removable. If an individual goes to bed without his yarmulke or prayer shawl on, does he no longer hold Judaism core to his identity? If a political activist puts down his flag, has he abandoned his association? Though missing the opportunity for analogy in these cases, the Ninth Circuit establishes the precedent when dealing with the particular social group of transgender individuals or

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 251.

¹²¹ *Matter of Acosta*, 19 I. & N. Dec. at 233.

“gay men with female sexual identities.” Just because they are able to remove their outer garments, makeup, etc, does not mean that they abandon their fundamental identification with the particular social group. Nor does it mean they become any less at risk for persecution based upon their association. Therefore these individuals should be afforded the same protection as those who conform within the binary categories of gay and lesbian.

B. *The Imputed Identity Doctrine*

Though loosening the stronghold on the definition of immutability, the Ninth Circuit still reviews the identity and characteristic of the persecuted and attempts to find out if it is core to their person and for which they are persecuted.¹²² There is a third standard of review in cases regarding asylum claims based on sexual identity. That third standard concerns the imputed identity doctrine, which concerns not the asylum seeker’s identity, but the perceptions and motivations of the persecutor.¹²³ If the persecutor perceives the individual to be a member of a particular social group and persecutes him on that basis, the alien’s actual identity is no longer relevant and he or she should be granted asylum on the beliefs and acts of persecution of the persecutor.¹²⁴ The Second Circuit includes imputed identity into its definition of a particular social group.¹²⁵ In *Gomez v INS* the court said, “A particular social group is 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

¹²² *Reyes-Reyes*, 384 F.3d at 787-89; *Hernandez-Montiel*, 225 F.3d at 1093.

¹²³ Landau, *supra* note 116, at 257.

¹²⁴ *Id.*

¹²⁵ *Gomez*, 947 F.2d at 664.

general.”¹²⁶ This interpretation of the enumerated category, “particular social group,” holds important the belief of the persecutor rather than the self-identification of the alien. The imputed identity doctrine, allows the alien to claim asylum on what he or she is perceived to be by their persecutor, regardless of whether they can identify themselves as an actual member of that particular social group.

The Third Circuit extended imputed identity to sexual-orientation based claims in *Amanfi v. Ashcroft*.¹²⁷ The court reversed a BIA decision that held imputed identity was limited to political opinion.¹²⁸ The court held that imputed gay identity falls squarely under the BIA’s decision in *In re S-P*, a case that extended asylum to an applicant who faced persecution on account of his imputed political views.¹²⁹ *In re S-P* held that “persecution for ‘imputed’ grounds (where someone is erroneously thought to hold a particular political opinion or mistakenly believed to be a member of a religious sect) can satisfy the ‘refugee’ definition.”¹³⁰ The court in *Amanfi* recognized the doctrine of imputed gay identity relying on the holding of *In re S-P*-, and the proposed Attorney General regulation in 2000 that

¹²⁶ *Id.*

¹²⁷ *Amanfi*, 328 F.3d at 727.

¹²⁸ *Amanfi* involved a claim for asylum by a supposed heterosexual man who, in believing he had been selected by the “macho men” in his native Ghana to be sacrificed, engaged in homosexual activity to allude his imperfection for sacrifice. His claim of asylum asserted that he would be persecuted in Ghana not because he would be sacrificed but rather his perceived homosexuality. The BIA rejected his case on grounds that there was insubstantial precedent to support an individual who was not himself a homosexual to qualify for relief under protections extended to gays and lesbians. *Id.* at 721-24.

¹²⁹ *Id.* at 721 (citing *In re S-P*-, 21 I. & N. Dec. 486 (BIA 1996) and *In re T-M-B*-, 21 I. & N. Dec. 775 (B.I.A 1997)).

¹³⁰ *In re S-P*-, 21 I. & N. Dec. 486, 489 (B.I.A 1996).

would extend the imputed identity doctrine to all protected groups across the board.¹³¹

The imputed gay identity doctrine opens the door for asylum claims to a number of individuals that previously would have been denied. Until this point, there has been an unrecognized difference between persecution based on knowledge, and persecution based on perception. Most persecution stems from the perception of a persecutor and usually continues on this basis because of what they perceive the person to be. 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 sexual-orientation-based one, may now be able to bring a claim under the imputed identity doctrine.¹³²

The idea in itself is not as far fetched as one might think. Our domestic laws already allow for the perceptions of the bigoted public. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act was enacted in 2009. The act protects against hate crimes performed domestically on account of an individual's association with a certain group based on an immutable

¹³¹ The relevant text from 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 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 CFR 208.15(b)).

¹³² Landau, *supra* note 116, at 260, (citing *Hernandez-Montiel*, 225 F.3d at 1087), which speaks to gay men who are singled out for persecution because they are "perceived to assume the stereotypical 'female,' passive, role in gay relationships."

characteristic.¹³³ In addition to protecting against bigotry regarding race and color, the act also enumerates for crimes performed because of sexual orientation and gender identity.

In general.--Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person-¹³⁴

The most important language to take note of is “because of actual or perceived.”¹³⁵ Our domestic law regarding persecution on account of an immutable or innate characteristic takes action for those who may not “be” but are merely “perceived to be.” Whether the crime is performed based on knowledge that the individual is a homosexual or merely perceived to be; any violent action taken against them is considered a hate crime and subject to a harsher punishment if found guilty under the law.¹³⁶ The fact that our domestic laws enumerate for crimes based on perception suggests that the imputed identity doctrine of the Third Circuit is not as far fetched as some may think.

VI. WHAT IS GAY ENOUGH?

¹³³ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 111 P.L. 84, 4707, Stat. 2190 (2009).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Amanfi* involved a claim for asylum by a supposed heterosexual man who, in believing he had been selected by the “macho men” in his native Ghana to be sacrificed, engaged in homosexual activity to display his imperfection for sacrifice. His claim of asylum asserted that he would be persecuted in Ghana not because he would be sacrificed but rather his perceived homosexuality. The BIA rejected his case on grounds that there was insubstantial precedent to support an individual who was not himself a homosexual to qualify for relief under protections extended to gays and lesbians. *Amanfi*, 328 F. 3d at 721-24.

In claims brought for transgender or ambiguously gendered individuals, advocates should demonstrate how these individuals are marked by their male and female characteristics and the different ways that their client's culture places emphasis on the nexus between a person's outward appearance and his or her given sex.¹³⁷ However, there are dangers regarding outward expression of sexual orientation. Cases in which individuals are persecuted for their sexual identity or perceived sexual identity have involved individuals whose sexual identity has been outwardly represented. Certain defenses have been raised against individuals whose outward appearance does not represent the stereotypical homosexual identity. In the *Matter of Soto Vega*, an immigration judge refused to grant asylum because the individual's homosexuality was not manifested through gendered traits of a homosexual.¹³⁸ This decision is representative of a trend in immigration cases to equate visibility with the potential for anti-homosexual persecution.¹³⁹ The judge noted the credibility of the gay man who feared being returned to Mexico, but denied him relief because of his apparent non-"obvious" gay demeanor.¹⁴⁰ The judge remarked that he saw nothing in the individual's "appearance, dress, manner, demeanor, gestures, voice, or anything of nature that

¹³⁷ *Hernandez-Montiel*, 225 F.3d at 1087.

¹³⁸ *Vega*, 183 Fed. Appx. at 627; *Soto Vega v. Ashcroft* (9th Cir. 2004) (No. 04-70868), In *Matter of Soto Vega*, No. A 95 880 786 (IJ, L.A., Cal., Jan. 21, 2003).

¹³⁹ Fadi Hanna, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 913 (January, 2005).

¹⁴⁰ Brief for Appellant, *Soto Vega v. Ashcroft* (9th Cir. 2004) (No. 04-70868), at 4.

approached some of the stereotypical things that society assesses to gays.”¹⁴¹ The judge noted that the individual “would not be apparently gay to most people.”¹⁴² Also, if the individual returned to Mexico in some other community other than the one he was raised, the judge said that it would not be obvious that he was homosexual unless he made that obvious himself.¹⁴³ It was because of this lack of visibility, the immigration judge concluded that Soto Vega had failed to “demonstrate a reasonable fear of future persecution.”¹⁴⁴ The *Matter of Soto Vega* was affirmed by the BIA without opinion.¹⁴⁵

The Ninth Circuit reviewed the case and determined that the individual established a past persecution on account of his sexual identity and therefore a well-founded fear of future persecution should have been presumed established.¹⁴⁶ When the applicant establishes this past persecution, it is then the job of the government to rebut by showing circumstances in the country have changed or that the individual could reasonably relocate to another part of their native country.¹⁴⁷ The court notes in using the phrase “must show,” the immigration judge did not afford the individual the presumption of a well-founded fear of future persecution.¹⁴⁸ The court notes that the “clear probability” standard applies to withholding, rather than asylum, which requires only a showing of a reasonable

¹⁴¹ *In re Soto Vega*, No. A-95880786, at 3.

¹⁴² Brief for Appellant, *Soto Vega v. Ashcroft* (9th Cir. 2004) (No. 04-70868), at 48.

¹⁴³ *Id.* at 39.

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *Id.*

¹⁴⁶ *Vega*, 183 Fed. Appx. at 629.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

possibility.¹⁴⁹ For that reason the court remanded back to the BIA to determine whether the government had properly rebutted the individual's plea.¹⁵⁰ If the government rebuts the individual's well-founded fear of future persecution by establishing an alteration in the dynamics of the country or establishing that the persecution is localized, then there is a legitimate foundation for denying the individual's claim for asylum.¹⁵¹ However, it is inappropriate to refuse asylum to the victim of persecution based on his or her sexual identity because the traits of that sexual identity are not apparent, or "obvious."

A. *Covering*

The idea of a homosexual acting "normal" rather than "queer," is known as homosexual covering- it is the process by which gay individuals alter their conduct to display only gender-typical traits, allowing others to ignore their sexual orientation.¹⁵² What occurred in the case of *Matter of Soto Vega* is known as reverse covering- this occurs when "straights...ask gays to perform according to stereotype," which is exactly what the judge in this case did.¹⁵³ The idea of reverse covering is rewarded in cases such as *Hernandez-Montiel* and *Reyes-Reyes*.¹⁵⁴ *Hernandez-Montiel* granted asylum to a male applicant who began

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 772 (2002).

¹⁵³ *Id.* at 909.

¹⁵⁴ Fadi Hanna, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 915 (2005).

dressing and acting like a woman at the age of twelve.¹⁵⁵ The court distinguished this “particular social group” as a subset group of homosexuals that was made up of “gay men with female sexual identities;” and based its decision on female-acting homosexual men being subjected to higher levels of abuse than male-acting homosexual men.¹⁵⁶ In recognizing that there is a heightened level of abuse among more feminine male homosexuals, the court is distinguishing persecution of sexual minorities by how “gay” or “not gay” they are. Persecution is persecution and should be treated as such. The subjectivity of the courts analysis, relying on sights and comparison to stereotype is inappropriate in analyzing the immutable characteristic of sexual identity. Compared with each other, *Hernandez-Montiel* and *Soto Vega* suggest that courts perceive gay asylum applicants on a covering spectrum, stretching from those who “act straight,” or cover, to those who “act gay,” or reverse cover.¹⁵⁷

Similarly, for religious asylum applicants, courts have considered whether the petitioner’s religion can be “readily identified.”¹⁵⁸ Courts have observed that, like the other enumerated categories, the attributes of a particular social group must be recognizable.¹⁵⁹ There is no visibility requirement for asylum, but it is a way of ascertaining whether persecution occurs “on account of” the protected

¹⁵⁵ *Hernandez-Montiel*, 225 F.3d at 1095 & n.7.

¹⁵⁶ *Id.* at 1089.

¹⁵⁷ Hanna, *supra* note 154, at 916.

¹⁵⁸ *Singh v. Ilchert*, 801 F. Supp. 313, 321 (N.D. Cal. 1992).

¹⁵⁹ *Gomez*, 947 F.2d at 664.

characteristic.¹⁶⁰ In general, there must be a nexus between the applicant's persecution and his or her protected characteristic.¹⁶¹ In order to fill this requirement, courts have suggested that as a base, it is necessary that "the persecutor could become aware" of the protected characteristic.¹⁶²

In the case of homosexuals, this requirement of visibility becomes somewhat of a predicament. For many homosexuals, the visibility of their sexuality is inversely related to the fear that they feel as an individual; when fear increases, visibility of their homosexuality decreases.¹⁶³ A study of homosexual persecution in Egypt revealed how an increasing public awareness that "colored underwear, long hair, and tattoos were all telltale signs" of homosexuality, and that led gay individuals to avoid these attributes.¹⁶⁴ Additionally, a case involving a gay couple from Bangladesh, required the pair to "conduct themselves in a discreet manner,"¹⁶⁵ because being visible would lead to "the possibility of being bashed by the police."¹⁶⁶ In these situations, it is the invisibility of sexuality rather than the visibility that acts as the nexus between the individual's fear of

¹⁶⁰ 8 U.S.C. § 1101(a)(42)(A); (see also *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) "The victim needs to show the persecutor had a protected basis (such as the victim's political opinion) in mind in undertaking the persecution.").

¹⁶¹ *Hanna*, *supra* note 154, at 917.

¹⁶² *In re Mogharrabi*, 19 I. & N. Dec. at 446.

¹⁶³ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 731 (1985).

¹⁶⁴ HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT'S CRACKDOWN ON HOMOSEXUAL CONDUCT 18 (2004).

¹⁶⁵ *Appellant S395/2002 v. Minister for Immigration & Multicultural Affairs* (2003) 203 A.L.R. 112, 117 (Austl.) (internal quotation marks omitted).

¹⁶⁶ *Id.*

persecution and their homosexuality.¹⁶⁷ If covering is considered a burden on the individual because they are required to hide their true identity for fear of persecution, then any voluntary covering is then arguably evidence that well-founded fear exists.¹⁶⁸ When fear of persecution forces a sexual minority to conform to the life of a straight person, “covering” infringes on conversion, which has been seen by American courts as persecution that meets the fear-based standard.¹⁶⁹

In the concepts of asylum law, one is either homosexual, or not- (a member of a particular social group).¹⁷⁰ Under asylum law, homosexuality is not treated as a behavior that lies on a gradual scale; but it is an immutable trait, unchangeable in nature.¹⁷¹ “An immutability- based legal standard for those persecuted on the basis of their sexual orientation must recognize that while some gay people are capable of resisting any expression of that orientation, they are still gay and not necessarily free from fear of persecution.”¹⁷²

¹⁶⁷ “Asylum requires a showing of both subjective and objective fear. Cover to avoid persecution clearly demonstrates that “an applicant has a genuine concern that he will be persecuted.” *Pitcherskaia*, 118 F.3d at 645; meeting the subjective test, the objective test asks if a reasonable person would experience similar fear, *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993), and requires further examination of what motivated the applicant’s invisibility.

¹⁶⁸ Yoshino, *supra* note 152, at 778.

¹⁶⁹ *Id.* (citing *Pitcherskaia v. INS*, 118 F. 3d 641, 644 (9th Cir. 1997); (*Pitcherskaia* stated that demands on a female asylum applicant to cover rose to the level of persecution when the Russian government “registered her as a “suspected lesbian’ and told her she must undergo treatment” and when her “ex-girlfriend was ... subjected to electric shock treatment and other so-called “therapies’ in an effort to change her sexual orientation.”))

¹⁷⁰ Hanna, *supra* note 154, at 919.

¹⁷¹ *Id.*

¹⁷² *Id.*

In *Matter of Acosta*, the BIA defined an immutable characteristic as one that individuals “either cannot change, or should not be required to change.”¹⁷³ It is the inability of gay men to change their core sexual identity, separate from action, that immigration courts have consistently recognized, hence the inherent immutability in the trait.¹⁷⁴ The problem is, when courts use a performance model and incorrectly assume that homosexual identity is constituted by action, they remove the immutable nature of the trait. Additionally, it is ironic that homosexuals have been denied because their sexual orientation is not apparent and in the case of *Amanfi v. Ashcroft*, a heterosexual individual was perceived to be gay and thus was granted asylum based on persecution from this perception.¹⁷⁵ In essence, a heterosexual was homosexual enough at this point to qualify for asylum, yet in these cases that involve reverse covering, a homosexual may be denied asylum based on lack of perception he is the person he claims to be.¹⁷⁶ This is just a roundabout way of saying to those who are victimized, “if you can hide it, then do it - problem solved.” This idea would be unheard of if said straight forwardly; but essentially that is all these decisions amount to. Homosexuality was not originally enumerated, nor has homosexuality been as implemented in our society as it is today; but placed under the context of religion, roundabout or

¹⁷³ *Matter of Acosta*, 19 I. & N. Dec. at 233.

¹⁷⁴ *In re S-*, 8 I. & N. Dec. 409, 413-14 (B.I.A. 1959), (rejecting the idea that if a homosexual is “seeking treatment” then he or she is somehow now changed and no longer a homosexual).

¹⁷⁵ *Amanfi*, 328 F.3d at 723.

¹⁷⁶ *Hanna*, *supra* note 154, at 920.

straightforward, the notion of covering or reverse covering would be unthinkable if suggested. With a firm defense under the First Amendment, and an enumerated group in asylum law, telling someone to hide their religion if they can to avoid persecution is unthinkable and the same thought process should be used by the court in their review of asylum cases based on sexual identity.

CONCLUSION

So what does all of this interpretation and expansion mean? Sexual and gender minorities seeking asylum for persecution place the courts between a rock and a hard place. The alien applicants must possess a genuine fear of persecution and there has to be a reasonable possibility that the persecution will occur.¹⁷⁷ They have to establish that they are being individually targeted for persecution or that they are being persecuted because of their association with “a particular social group,” one that has not yet been defined in most cases for these minorities.¹⁷⁸

The Attorney General has stipulated after much debate, that though not enumerated as one of the original categories, homosexuality does constitute a “particular social group,” under which individuals suffering persecution because of their association with the group, may seek asylum.¹⁷⁹ Though this is progress, it isn’t enough. “Homosexual” as understood by the courts, does not automatically connote “sexual or gender minority.” These individuals who don’t fit the binary

¹⁷⁷ *Matter of Acosta*, 19 I. & N. Dec. at 225.

¹⁷⁸ 8 U.S.C. § 1158(a)(1), (b)(1) (2008).

¹⁷⁹ Opinion of Attorney General Order No. 1895-94 (1994); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 819.

system of gay male/female, or straight male/female, are going to have a much more difficult time establishing their connection with a particular social group under which they asylum may be claimed. So where do we look? Well the circuit spilt of interpretation of course.

The First,¹⁸⁰ Third,¹⁸¹ and Seventh Circuits¹⁸² require the particular group the alien claims they're a part of, share a common immutable characteristic. Immutable to these courts means unchangeable and ingrained, this presents a problem for individuals whose “particular social group,” is made up of people who can remove their outward expressions. The Ninth Circuit however, in saying that if the individuals are united by voluntary association or an innate characteristic that is fundamental to their identity and it cannot or should not be changed, well then they qualify as a “particular social group.”¹⁸³ This standard allows for the individual, if represented by an outward expression of their inner core identity, to be protected from persecution because it is a fundamental piece of who they are as a person. These traits should be accepted even if they have been acquired overtime as the individual accepted and associated with their true identity.¹⁸⁴ This brightens the possibilities for sexual minorities, because hypothetically, even if the individual is a straight sounding, masculine mannered male, but they wear woman’s clothing because they are transgender, and their identity is a straight

¹⁸⁰ *Da Silva*, 394 F.3d at 1.

¹⁸¹ *Amanfi*, 328 F.3d at 719.

¹⁸² *Lwin*, 144 F.3d at 505.

¹⁸³ *Hernandez-Montiel*, 225 F.3d at 1093.

¹⁸⁴ Landau, *supra* note 116, at 250.

female trapped in a man's body; this outward expression of their core gender identity should allow them to claim asylum under a particular social group if persecuted, and be granted asylum because of who they are at their core.

The Second Circuit analyzes the perception of the persecutor.¹⁸⁵ If someone is persecuted because of who they are perceived to be and that perception is incorrect, they should still be able to claim asylum under that particular social group. This standard is important. We incorporate it into our domestic protections so why not integrate it into our international protections?¹⁸⁶ If identity is imputed based on the perceptions of another, those perceptions should be protected against regardless of their truth when it comes to the individual's actual identity.¹⁸⁷ This will allow for those who may not have come to terms with how to identify themselves, and those who simply don't understand the concept of sexual deviation, but know that this sexual or gender difference is core to their person, or has been recognized and imputed upon them because of the perceptions of someone else; they should be afforded the ability to seek asylum protection, because the alternative is victimization for something that they cannot control.

That is the overlying idea that the courts must remember in moving forward when looking at asylum based on sexual and gender minority; the theme among these individuals, regardless of what "particular social group" of sexual or gender differentiation they associate themselves with, just like members of the

¹⁸⁵ *Gomez*, 947 F.2d at 664.

¹⁸⁶ 111 P.L. 84, 4707, Stat. 2190.

¹⁸⁷ Landau, *supra* note 116, at 250.

enumerated categories, the alternative to acceptance is victimization with the possibility of death. A fusion between the standard of the Second Circuit and the Ninth Circuit would provide the most alternatives for sexual and gender based asylum seekers, enumerating for non-immutable but still innate characteristics and the perceptions of the persecutor not just the identity of the victim. These decisions should never be made on the basis of what outward exhibition is being made versus what characteristics seem to suggest that they can hide their true identity.¹⁸⁸ The risk with this and one that surely has caused the courts to be so tentative in expanding the definitions of what constitutes “a particular social group” in relation to the non-physical characteristics of sexual and gender minorities; is lying. It is hard to lie in regards to race, religion, nationality, and even political association; however, the greatest risk to a broad interpretation of the standard is lying. There is no answer to solving this problem and it revolves around trust. When looking at evidence of persecution, the applicant’s testimony is sufficient. The courts trust the applicant to tell a truthful story that establishes fear upon which they seek asylum. That same trust is what must move the courts forward to broaden the interpretation of how someone can associate with a particular social group and what would constitute the creation of that group. There will be individuals who will try to take advantage of this system, but in order for sexual and gender minorities to receive adequate protection from persecution based on these immutable or innate characteristics; the courts need to trust that

¹⁸⁸ Hanna, *supra* note 154, at 918.

those seeking asylum are doing so because they have a well-founded fear of persecution and possible death for being who they are.

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