THE LGBTQ ASYLUM SEEKER: PARTICULAR SOCIAL GROUPS AND AUTHENTIC QUEER IDENTITIES

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INTRODUCTION

Since the early 1990s, the Board of Immigration Appeals ("BIA") and Immigration Courts have recognized that the United States' asylum law includes protections based on sexual orientation.[1] A decade later, in a case now infamous

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1. *See* Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822 (BIA 1990).

for its clumsy attempt at articulating the respondent's gender identity, the Ninth Circuit paved the way for transgender asylum claims.[2] As we near the thirtieth anniversary of the watershed case for LGBTQ asylum claims, *Matter of Toboso Alfonso*, the legal authority protecting LGBTQ asylum seekers remains in place. Today, advocates have secured asylum for countless numbers of LGBTQ people fleeing persecution around the world. The fact that sexual orientation and gender identity ("SOGI") related claims constitute a protected ground meriting asylum is practically taken for granted in many jurisdictions.[3]

While modern legal precedent leaves little doubt that persecution of LGBTQ persons on account of their identities can provide grounds for asylum, neither sexual orientation nor gender (identity) are specifically enumerated as protected grounds under asylum law.[4] Despite the absence of explicit protection under the statute, since the late 1990s practitioners have successfully used the amorphous category of "Particular Social Group" (PSG) to secure legal protections for their queer[5] clients.

In some instances, practitioners have used precedential cases as a springboard to advance more nuanced theories of queer asylum cases. However, an ostensibly safer strategy involves the construction of narratives that fall within a template with which adjudicators are comfortable. Theoretically, the familiarity of these narratives makes it more likely that the adjudicator will grant asylum on these grounds. By opting for this presumably safer route of relaying narratives, immigration practitioners are potentially engaging in two conflicting acts: zealously advocating for clients by fitting their facts to a legally cognizable claim to guarantee the best outcome possible, and, in doing so, inadvertently limiting the immigration system's understanding of what it means to be a queer survivor.

This article poses two questions: 1) to what extent does the PSG category create room for non-normative queer narratives; and 2) what is the practitioner's role and responsibility in framing these PSGs to a particular applicant? Part I provides a basic overview of asylum law, with emphasis given to the PSG ground of protection and the evolution of LGBTQ case law in that area.[6] The second part takes a closer look at the PSG category through the lens of queer theory in order

2. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000) (concluding that "gay men with female sexual identities" constituted a cognizable particular social group, reasoning that sexual orientation and sexual identity are immutable characteristics so fundamental to one's identity that a person should not be required to change them).

3. Outcomes of LGBTQ asylum claims can vary greatly by jurisdiction; while there is strong legal authority for LGBTQ claims, some judges have astonishingly low grant rates with LGBTQ cases or with Particular Social Group cases more generally.

4. *See* Immigration and Nationality Act § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

5. Throughout this article, I use the term "queer" to refer to individuals who deviate from policed gender and sexuality norms and the outcast status that often results from that deviation; it is also purposefully used because of its lack of definitive boundaries and its ability to accommodate a fuller range of LGBTQ experiences.

6. While LGBTQ asylum seekers may qualify for asylum under other grounds of protection (political opinion, for example), this article is focused only on the Particular Social Group protected ground.

to determine whether and how the legal underpinnings of the category may lend themselves to queer identities. Part III pulls back from the theory and law to take a hard look at the practitioner's role and responsibilities in eliciting, preparing, and conveying narratives of queer survival.

I. ASYLUM LAW – THE PROTECTED GROUNDS AND PARTICULAR SOCIAL GROUPS

U.S. asylum law is rooted in international agreements from the mid-1900s. In the aftermath of World War II, the international community spelled out protections for people fleeing their home countries in crisis and established norms of responsibility sharing during large-scale population movements. In the 1951 Refugee Convention, a still young United Nations created a universal definition of the term "refugee"[7] and contemplated the kind of legal protections a refugee is entitled to receive.[8] Additionally, the Convention presented the principle of non-refoulement[9] and established standards for responding to refugee crises. To ensure that the contents of the 1951 Convention applied to nations outside of Europe and crises occurring after 1951, the United Nations created the 1967 U.N. Protocol Relating to the Status of Refugees.[10] Signatories to the 1967 Protocol commit to this international refugee protection regime and "agree to apply the core content of the 1951 Convention. . .to all persons covered by the Protocol's Refugee definition, without limitations of time or place."[11] The United States acceded to the 1967 Protocol in 1968 and over a decade later enacted the Refugee Act of 1980, bringing U.S. domestic law into compliance with the international standard.[12]

Distilled down to its most basic elements, U.S. asylum law requires an applicant to show they have suffered past persecution or fear persecution in the future

7. The 1951 Refugee Convention defines a refugee as a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution. *See* U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967) (see Article 1A(2)).

8. U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967).

9. Non-refoulement asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom.

10. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 303 U.N.T.S. 268; *See also* UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, at 4, https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html ("The 1967 Protocol broadens the applicability of the 1951 Convention. The 1967 Protocol removes the geographical and time limits that were part of the 1951 Convention. These limits initially restricted the Convention to persons who became refugees due to events occurring in Europe before 1 January 1951.") .

11. UNHCR, *"A Guide to International Refugee Protection and Building State Asylum Systems"* at 16, https://www.unhcr.org/3d4aba564.pdf.

12. INA §101(a)(42)(A), 8 USC §1101(a)(42)(A).

on account of a protected ground.[13] The statute enumerates five protected grounds: race, religion, nationality, political opinion, and "particular social groups."[14] Sexual orientation and gender (identity)[15] are conspicuously absent from this list, and as a result, those categories of claims usually rely on the fifth protected ground, Particular Social Group.[16] Once an applicant has established that they suffered persecution, and/or that they possess a well-founded fear of persecution, and they belong to a protected group, they must also show that the persecution they suffered or fear is at least in part due to their protected characteristic. Known as the "nexus" requirement, this element in asylum law often requires evidence that the persecutor will be able to identify the applicant as their intended victim.[17] In other words, the applicant needs to answer the question, "what is it about you specifically that will single you out in the eyes of the persecutor?"

In addition to these eligibility requirements, an applicant must show that they are not barred from receiving asylum under the statute. For example, an applicant could be barred under the statute because they did not file their application within their first year of arrival.[18] For LGBTQ applicants, these bars can pose tremendous barriers to immigration relief.[19] Many queer applicants fail to meet the one year filing deadline because they are unable to "come out" or take other important steps during their first year in the United States.[20] Other queer applicants face bars to asylum due to their immigration histories or criminal records in the

13. An applicant or respondent must also show that the government itself is the feared persecutor or the government is unable or unwilling to control a private actor. The government can include actors such as police, military, and government-sponsored entities. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

14. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

15. The inclusion of "identity" in parentheticals is intended to distinguish the overlapping concepts of gender and gender identity. If "gender identity" was listed as a protected ground, the law would clearly provide protection for transgender applicants; on the other hand, if the statute listed "gender" as a protected ground it is not clear whether courts would interpret that to include gender identity and transgender applicants.

16. Note that many LGBTQ asylum applicants may have multiple protected grounds. For example, they may also have a claim based on political opinion if they were involved in LGBTQ advocacy in their home country. For the purposes of this Article, I do not explore those claims in depth.

17. The nuances of the "nexus" requirement, and the barriers it can create for LGBTQ asylum applicants, is beyond the scope of this Article.

18. INA §208(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii).

19. There are several bars to asylum beyond the one-year filing deadline. Examples of asylum bars include: firm resettlement; having committed a serious non-political crime outside the United States; conviction of a "particularly serious crime" such that the applicant is a danger to the community; and terrorism-related bars. Bars to Asylum are beyond the scope of this Article and will not be discussed in detail.

20. While the one year filing deadline is an extremely burdensome requirement for LGBTQ and other applicants, the law does provide for exceptions based on changed or extraordinary circumstances. Many queer applicants can successfully overcome the one year filing deadline based on changes that are material to their claim and increase their fear of return. These changes can include evens like marriage to a same sex partner, beginning certain steps in gender transition, a recent HIV diagnosis, or recently getting into mental health care. The applicant must still apply for asylum within a "reasonable time" after a change in circumstances, and many jurisdictions interpret that to mean approximately six months. *See* Wakkary v. Holder, 558 F.3d 1049, 1057-1058 (9th Cir. 2008).

United States. Criminal bars to asylum can disproportionately impact LGBTQ applicants and other populations that are over-criminalized and denied access to the formal economy through widespread employment discrimination and inability to provide work authorization.[21]

Furthermore, even if an applicant establishes that they meet the statutory elements and are not barred from asylum, they can still be denied on discretionary grounds.[22] Despite attempts to create uniformity in the law and its application, the U.S. asylum system ultimately functions as "an exercise of compassion; but this compassion is subject to abuse."[23] As explored later on, the parameters and limits of that compassion may be heavily influenced by whether the applicant's narrative fits within the adjudicator's imagination of the "deserving gay." An Asylum Officer or Immigration Judge[24] may use their own discretion to make an adverse credibility finding, which can hinge, explicitly or implicitly, on factors such as how the applicant or respondent presents in terms of their gender expression. For example, an Immigration Judge may not believe that a Respondent is in fact gay because he does not manifest his sexual orientation in such a way that coincides with the Judge's expectations of what it means to be a gay man.[25] This assessment is inextricably tied to race, class, and national origin bias and imposes an implicit performative requirement on queer asylum seekers.[26] The expectation of culturally-specific queer performance is not only demeaning to the asylum seeker, but it also narrows the likelihood of eliciting factually rich and accurate asylum claims.

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21. According to the 2015 U.S. Transgender Survey, one in five (20%) transgender people have participated in the underground economy, with higher rates among women of color. Over one-third (36%) of undocumented transgender individuals reported that they had engaged income-based sex work. Respondents in that survey, particularly transgender women of color, also reported that police frequently assumed they were sex workers simply because they were transgender. Available at: https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

22. The applicant has the burden of establishing that a favorable exercise of discretion is warranted; however, the danger of persecution should outweigh all but the most egregious adverse discretionary factors. *See* Dankam v. Gonzales, 495 F.3d 113, 119 n.2 (4th Cir. 2007); *Matter of Pula*, 19 I&N Dec. 467 (B.I.A 1987).

23. Keith Southam, *Who Am I and Who Do You Want Me to Be? Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 CHI.-KENT L. REV. 1363, 1364 (2011).

24. Depending on the procedural posture of the case, an asylum application will be adjudicated either by an Asylum Officer within U.S. Citizenship and Immigration Services ("USCIS"), or by an Immigration Judge, who operates within the Executive Office for Immigration Review ("EOIR") under the Department of Justice. These two different postures are referred to as "affirmative" versus "defensive" cases.

25. *See* Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (remanding an Immigration Judge's finding that a gay applicant from Albania was not credible because his mannerisms and speech did not indicate that he was homosexual).

26. *See* Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 150 (2006) (arguing that LGBTQ asylum seekers "must be 'gay enough' for the government to find that they have met their burden of proof. This often means that applicants must mold aspects of their life and identity to fit U.S. norms and expectations of what it means to be [gay or lesbian]").

Enacted in 2005, the REAL ID Act amended the Immigration and Nationality Act (INA), adding to the already existing problem of unchecked discretion.[27] The Act allows asylum adjudicators to make adverse credibility determinations "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of an applicant's claims."[28] Thus, an Asylum Officer or Immigration Judge may conclude that an applicant lacks credibility due to a minor discrepancy between a written statement and testimony, even if the discrepancy is not material to the asylum claim. Furthermore, the Act authorizes adjudicators to "base a credibility determination on the demeanor, candor, or responsiveness of the applicant."[29] Therefore, if an asylum seeker does not speak the "right way," dress properly, or articulate their identity in a palatable way, they are exposed to the risk of an adverse credibility determination.

Moreover, adjudicators may consider virtually unlimited factors in making discretionary decisions, ranging from germane to trivial to destructive. They may assess the applicant's eye contact and ability to present certain details, how the individual entered the United States,[30] if they have ever worked without authorization, whether they have any arrests or convictions, how long they have lived in the United States and what positive contributions have they made. They may also assess the applicant's demeanor, which condones an assessment of queer performativity – a determination of whether the applicant is adequately and appropriately gay. As discussed later, many of these factors go to the ultimate question of whether the LGBTQ asylum seeker is a "deserving gay."

As a consequence of the vast discretion conferred to adjudicators, the most important determinant in any given case may have little to do with the substance of the applicant's claim and more to do with the particularities of the Asylum Officer or Immigration Judge charged with adjudicating the case.[31] Discretion can become an even bigger problem when statutory terms are left undefined and, therefore, open to interpretation.[32] While undefined statutory terms are the perfect breeding grounds for a prejudiced decision-maker to deny asylum claims, they are also a crucial tool for immigration practitioners to push the boundaries of the law and to secure protection for people on the margins.

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27. H.R. 1268, 109th Cong. § 101 (2005).

28. 8 U.S.C. § 1158(b)(1)(B)(iii).

29. *Id.*

30. For example, if the applicant or respondent entered the United States "without inspection" this can be a negative discretionary factor, even if the applicant or respondent credibly testifies about their despair in fleeing persecution.

31. *See, e.g.*, JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, AND PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009); *see also* Immigration Reports created by the Transactional Records Access Clearinghouse (TRAC), available at http://trac.syr.edu/immigration/reports.

32. Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the 'Cultural Hook' for Claims Involving Gender-Related Persecution*, 76 N.Y.L. SCH. L. REV. 1569-70 (2011) ("This [discretionary] power is especially significant given that the statutory provisions do not define the elements of an asylum claim.").

A. PARTICULAR SOCIAL GROUP – GENERALLY

Over time, case law has evolved to clarify what is meant by the undefined statutory term, Particular Social Group (PSG). In a 1985 decision involving a taxi driver from El Salvador, *In Re Acosta*, the Board of Immigration Appeals (BIA) expounded on the PSG category and provided some basic elements.[33] The BIA explained that a PSG refers to a group that "share[s] a common immutable characteristic,"[34] which 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."[35]

Acosta was a founding member of COTAXI, a taxi cooperative in El Salvador, and had received escalating threats from anonymous "anti-government guerillas" for refusing to participate in national work stoppages.[36] The BIA, reiterating that the PSG analysis is a case-by-case inquiry, held that Acosta did not belong to a cognizable PSG.[37] The BIA concluded that being a taxi driver was not immutable or fundamental because "the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages,"[38] and that Acosta's membership in the group of taxi drivers was something he could change. As such, he could take action to avoid persecution and was therefore not eligible for asylum.

Since *In re Acosta*, the BIA has elaborated in other cases to explain that a PSG must be defined with "particularity," meaning that the group has "concrete, identifiable boundaries that allow an observer to distinguish members of a group from non-members."[39] In *Matter of S-E-G*, the BIA rejected the respondent's PSG, which was comprised of Salvadoran youth who resisted gang recruitment, finding that the group was made up of "a potentially large and diffuse segment of society" and therefore failed the particularity test.[40]

Finally, the BIA has held that a PSG must be "socially distinct," which requires showing that the society in question perceives those with the relevant characteristic as a social group.[41] The social distinction prong, initially dubbed as "social

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

34. *Id.* ("The shared characteristic might be an innate one 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").

35. *Id.*; *see also* In re Kasinga, 21 I. & N. Dec. 357, 366-67 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

36. In re Acosta, 19 I. & N. Dec. 211, 216 (B.I.A. 1985).

37. *Id.* at 233-34.

38. *Id.* at 234.

39. Temu v. Holder, 740 F.3d 887, 892 (4th Cir. 2014); In re S-E-G, 24 I. & N. Dec. 579, 584 (B.I.A 2008).

40. Matter of S-E-G-, 24 I. & N. Dec. 579, 585 (B.I.A 2008).

41. In re M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A 2014) (This element previously required "social visibility." The BIA interpreted the social visibility prong as not requiring literal visibility, and thus changed the element's name to "social distinction," explaining that an asylum applicant has to show that the society in question recognizes the stated group as "distinct."); *see also* In re W-G-R-, 26 I. & N. Dec. 208 (B.I.A 2014).

visibility," was met with confusion and frustration by advocates and several Federal Circuit Courts. Judge Posner, writing for the Seventh Circuit, concluded that the "social visibility requirement makes no sense" and rejected it as an element for PSGs.[42] In reaching this conclusion, Judge Posner reasoned that "a homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible."[43] The BIA subsequently issued two decisions clarifying that social visibility does not require literal visibility, and changed the name of this prong to "social distinction" to signal that the group should be recognized within the specific society as a distinct entity, or that individuals who share the particular trait can be distinguished from those who do not.[44]

The requirements for making out a cognizable PSG are convoluted, subject to interpretation, and, under the Trump Administration, the category appears to be under attack. In 2018, then-Attorney General Jefferson Sessions issued a decision in *Matter of A-B-* attempting to constrict the viability of asylum claims for survivors of gender-based violence.[45] Sessions' decision overruled *Matter of A-R-C-G-*, the BIA decision establishing the cognizable PSG of "married women in Guatemala who are unable to leave their relationship."[46] While *Matter of A-B-* overruled an important precedential decision for survivors of gender-based violence, it "did not conclude that particular social groups based on status as a victim of private violence could never be cognizable, or that applicants could never qualify for asylum or statutory withholding of removal based on domestic violence."[47] Moreover, the PSG category – while perplexing and subject to attacks from adversarial administrations – remains alive and well.

B. PARTICULAR SOCIAL GROUP – LGBTQ CASE LAW AND LEGAL AUTHORITY

Matter of Toboso Alfonso, decided in 1990 and designated as precedent by then-Attorney General Janet Reno in 1994, involved a gay man who fled to the United States to seek protection from the Cuban government.[48] The applicant, Fidel Armando Toboso-Alfonso, was subjected to a range of violent and humiliating treatment after the Cuban government identified him as a "homosexual"

42. Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) ("More important, it makes no sense; nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else.").

43. *Id.* at 616.

44. *Id.*

45. 27 I&N Dec. 316, 321 (A.G. 2018).

46. Matter of A-R-C-G-, 26 I&N Dec. 388 (B.I.A 2014).

47. U.S. Immigration and Customs Enforcement, *Memorandum: Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-* (July 11, 2018).

48. 20 I&N Dec. 819 (B.I.A. 1990).

(a criminal offense).[49] The Cuban government gave Toboso-Alfonso an ultimatum: spend four years locked up for the crime of being a homosexual or leave Cuba on the Mariel boat lift.[50] He chose the latter and once in the United States he applied for asylum and, in the alternative, withholding of removal.[51] The Immigration Judge concluded that Toboso-Alfonso met the definition of a refugee, determined that his sexual orientation was immutable, and granted his application for withholding of removal.[52] Dismissing the Department of Homeland Security's appeal, the BIA affirmed the Judge's decision, recognizing "homosexuals" from Cuba as a valid particular social group and paving the way for other sexual orientation-based claims.[53]

Since *Matter of Toboso Alfonso*, courts continued to elaborate on how different sexual orientations and gender identities can constitute valid PSGs. In 1997 and 2000, the United States Court of Appeals for the Ninth Circuit came out with two important decisions involving LGBTQ asylum seekers. The first recognized that a lesbian from Russia belonged to a cognizable particular social group.[54] In awkward language, the second case held that "gay men with female sexual identities" from Mexico constitute a cognizable particular social group.[55] In coming to these

49. *Id.* at 821 ("He testified that it was a criminal offense in Cuba simply to be a homosexual. . ..He further testified that on one occasion when he had missed work, he was sent to a forced labor camp for 60 days as punishment because he was a homosexual (i.e., had he not been a homosexual he would not have been so punished)."); *see also* Sharita Gruberg & Rachel West, *Humanitarian Diplomacy, The U.S. Asylum System's Role in Protecting Global LGBT Rights*, CENTER FOR AMERICAN PROGRESS, (June 18, 2015, 9:38 AM), https://www.americanprogress.org/issues/lgbt/reports/2015/06/18/115370/humanitarian-diplomacy/ (Every two or three months for thirteen years, he received a notice—which referred to him as "Fidel Armando Toboso, a homosexual"—to appear for a hearing. Each hearing involved an invasive physical examination and questions from Cuban officials about his sex life and partners. Frequently, he was detained for days after these hearings without being charged, subjected to verbal and physical abuse, and once sent to a forced labor camp for sixty days).

50. *See Toboso-Alfonso*, 20 I&N at 821.

51. Withholding of removal is a special type of relief available to a person who demonstrates more than a 50% chance that they will be persecuted in their home country on account of their race, religion, nationality, membership in a particular social group, or political opinion. Like asylum, withholding of removal protects a person from being deported to a country where they fear persecution. However, withholding of removal is a very limited benefit in many ways and is therefore a less generous form of relief than asylum. Most individuals apply for asylum and request a grant of Withholding of Removal in the alternative. Notably, withholding of removal may be available to people with criminal convictions that bar them from asylum.

52. *Supra* note 49 at 819-20 ("In a decision dated February 3, 1986, the immigration judge found the applicant excludable under sections 212(a)(9), (20), and (23) of the Immigration and Nationality, 8 U.S.C. §§ 1182(a)(9), (20), and (23), denied his request for asylum, pursuant to section 208(a) of the Act, 8 U.S.C. § 1158(a), but granted his application for withholding of deportation to Cuba under section 243(h) of the Act, 8 U.S.C. § 1253(h).").

53. *Id.* at 822-23 ("We do not find that the Service has presented persuasive arguments on which to reverse the immigration judge's finding that the applicant established his membership in a particular social group.").

54. *See* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997). This case also stands for the important notion that even if the motive of the persecutor was to "cure" rather than to "harm," it could still constitute persecution.

55. The asylum applicant in *Hernandez-Montiel* was referred to with male pronouns in the court documents. It is not entirely clear what Hernandez Montiel's gender identity was, as this case appears to

conclusions, the Court reasoned that sexual orientation and gender identity are immutable characteristics so fundamental to one's identity that a person should not be required to change them.[56] In 2004, the Ninth Circuit reaffirmed its decision in *Hernandez-Montiel* in another case involving a transgender asylum-seeker. The court relied on the established PSG of "gay men with female sexual identities" instead of establishing a "transgender" PSG, but did note that the asylum-seeker's "sexual orientation, for which he was targeted, and his transsexual behavior are intimately connected."[57] While this 2004 case relies on a problematic formulation of gender identity and refers to "transsexual behavior," it, along with its predecessor, is widely accepted as the landmark transgender asylum cases, and they are often relied upon as highly persuasive authority outside of the Ninth Circuit.

In addition to claims involving one's authentic identity, an applicant may claim asylum under a theory of imputed identity. These claims "may qualify under the particular social group category and may involve applicants who identify as gay or lesbian; are viewed as a sexual minority, regardless of whether the persecutor or society involved distinguishes between sexual orientation, gender and sex; [. . .] or are 'closeted' gays and lesbians[.]"[58] This theory permits the applicant to shift the focus to societal norms and the perception of individuals who deviate from those norms. Many applicants may benefit from articulating PSGs based on their actual identity as well as PSGs based on how society is likely to perceive them, regardless of their how they actually identify.

II. PARTICULAR SOCIAL GROUP – A QUEER TERM INDEED

Ask an immigration lawyer what they think of the PSG category and you are likely to hear terms such as "unclear," "malleable," "constantly evolving," or "lacks clear boundaries."[59] Now, ask a queer theorist to define the term "queer" and you may hear an echo of the same responses. The question becomes whether the Particular Social Group category, by virtue of its lack of definitive boundaries, carries with it the potential to accommodate the multitude of queer identities and expressions that exist – especially those lying outside the most palatable identity categories.[60]

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have conflated gender identity and sexual orientation. Hernandez Montiel did articulate an alternative PSG of "transsexuals" but the Ninth Circuit determined it "need not consider in this case whether transsexuals constitute a particular social group". *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1095 n.7 (9th Cir. 2000).

56. *See Hernandez-Montiel*, 225 F.3d at 1095; *see also* Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (holding that "all alien homosexuals are members of a 'particular social group").

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

58. *Id*. at 14.

59. *See*, *e.g*., *Fatin v. INS*, 12 F.3d 1233, 1238 (3rd Cir. 1993) ("Read in its broadest literal sense, the phrase [particular social group] is almost completely open-ended.").

60. Less "palatable" identities may include, for example, people with fluid notions of gender or sexuality, where identity has changed over time and may continue to evolve and change, or where the gender identity does not fit within the male/female binary.

This section begins with a brief overview of Queer Theory to expose the role institutions play in constraining certain lives and values while advantaging others. From there, the Article suggests that one of these institutions, the U.S. asylum system, operates within the coercive and deeply flawed binary of American exceptionalism and explores the limitations this creates specifically for queer asylum seekers. Finally, the section identifies how the Particular Social Group Category may provide relief to non-normative queer asylum-seekers.

A. QUEER THEORY, BRIEFLY

The term "queer" has many potential connotations, ranging from denigrating and shaming to liberating, destabilizing or transformational. Others simply use it as a convenient umbrella term for the expansive LGBTQ community, preferring the monosyllabic alternative to a tongue twister of letters. In the early 1990s – around the same time that *Matter of Toboso Alfonso*, the watershed LGBTQ asylum case, was decided – the term "queer" came into more popular usage in academic and political realms as scholars began publishing works on queer theory.[61]

Queer theory is a diverse and rich field of thought which seeks to break apart the assumptions included in gender categories and sexual identities, recognizing them as constructed and often artificially binaried.[62] Queer theory generally views gender and sexuality as constrained and policed through institutions of power, including the criminal justice system and the immigration system. In response, queer theory "pursues a political agenda that seeks to change values, definitions, and laws which make these institutions and relationships oppressive."[63] While a full overhaul of the heteronormative and xenophobic immigration system is beyond the scope of this Article, queer theory offers hope and guidance for the individual immigration practitioner through an analysis of the deserving gay and the cis-heteronormative binaries within narratives of American exceptionalism.

B. AMERICAN EXCEPTIONALISM AND THE CONSTRUCTION OF THE DESERVING GAYS

The asylum system operates within a binary wherein the U.S. positions itself as the good guy playing opposite the antagonistic bad-guy-country rife with "foreign" values, earning them descriptors like "backwards," "oppressive," and "corrupt."[64] Historically, U.S. immigration policies have "reflected a heteronationalism" in which LGBTQ identities were "deviant and threats to

61. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE (Linda J. Nicholson 1990). Thinkers such as Judith Butler, Eve Sedgwick, Teresa de Lauretis, and Michael Warner are among the first producers of works of "queer theory."

62. *See id.*

63. Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?* 3 GLQ: A J. OF LESBIAN AND GAY STUD. 437, 444-45 (1997).

64. In her work on homonationalism and American exceptionalism, Jasbir Puar describes how the categories of "homosexuality" and "Muslim" are frantically manufactured as mutually exclusive identities, and how "queerness colludes with the delineation of exceptional U.S. sexual norms, produced against the intolerable forms of the sexualities of 'terrorist' bodies." Jasbir Puar, *Queer Times, QueerAssemblages*, SOCIAL TEXT 23, no. 3–4 84–85 (Fall-Winter 2005) at 126.

the national project."[65] Yet, as domestic policies on gay rights have shifted over the years, the U.S. has cast itself as the protagonist in the international gay rights scene, ready to draw its pistol in a duel against any homophobic country with distinctly un-American values.[66] This is an odd state of affairs given that the shift in the LGBTQ legal landscape in the United States has not only been extremely recent, but also remains highly contingent.[67] The decriminalization of sodomy between consenting adults occurred only in 2003[68] and gains in the recognition of same-sex relationships in 2015.[69] While marriage equality and decriminalization of private sexual relationships are positive advances for American LGBTQ people, the legal bases for these decisions reveal that these rights have been doled out for a specific kind of gay person.[70] These domestic rights have been handed down to deserving gays, often imagined as white, affluent, long-term monogamous couples.[71] In other words, the analytical underpinning holding up the advances in gay and lesbian rights has less to do with notions of self-determination and fundamental human rights, and more to do with convincing arguments about how gays and lesbians are not a threat to decent society. For example, many of the marriage equality cases leading up to *Obergefell v. Hodges* explicitly depicted gay couples as saviors to young children of color who had been abandoned by single mothers.[72] In using the imagination of the "deserving gay" as a basis for equal rights, courts (and legal advocates) have

65. *See* Cheryl Llewellyn, *Homonationalism and Sexual Orientation-Based Asylum Cases in the United States*, 20 SEXUALITIES 682 (2017).

66. *See generally* JASBIR PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES, (2007); *see also* Jasbir Puar, *Rethinking Homonationalism*, 45 INT. J. OF MIDDLE EAST STUD. 336 (2013) ("While the discourse of American exceptionalism has always served a vital role in U.S. nation-state formation, [Terrorist Assemblages] examines how sexuality has become a crucial formation in the articulation of proper U.S. citizens across other registers like gender, class, and race, both nationally and transnationally. In this sense, homonationalism is an analytic category deployed to understand and historicize how and why a nation's status as 'gay-friendly' has become desirable in the first place").

67. *See, e.g.*, Toboso-Alfonso, 20 I&N at 822 (In its appeal to the BIA, the Department of Justice argued that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion would be "tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well.").

68. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

69. *See* U.S. v. Windsor, 570 U.S. 744 (2013) (striking down the Defense of Marriage Act in 2013); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (permitting full marriage equality in 2015).

70. Nancy D. Polikoff, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. OF PA. L. REV. ONLINE 99 (2016).

71. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 49 (1999) ("Through such a hierarchy of respectability, from the days of the Mattachine Society to the present, gay and lesbian politics has been built on embarrassment. It has neglected the most searching ethical challenges of the very queer culture it should be protecting.").

72. *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014) ("...many of those abandoned children are adopted by homosexual couples, and those children would be better off emotionally and economically if their adoptive parents were married.").

employed race and class as a tool to distinguish (white) gays as good and therefore deserving of certain rights, such as marriage.[73]

Throughout the gay rights movement, advocates caught on to the fact that institutions, such as the federal courts, were more likely to side with "deserving gays" than queer outcasts.[74] As such, gay and lesbian advocates threw resources into depicting and conveying this image of the deserving gay in the courts and in the halls of Congress.[75] Throughout history, this coercive force has provided queers with an offer that they can't resist: these rights are yours (marriage equality and the ability to have sex in your home) so long as you don't deviate too far from what we are comfortable with in decent heterosexual society. In response, some LGBTQ advocates have made strategic decisions to center certain gay and lesbian narratives and issues (marriage equality and adoption, for example) over unsavory topics such as LGBTQ homelessness, sex work, and police violence.[76] As a result, the full spectrum of Queer American existence has been overshadowed by elaborate wedding cakes. By participating in the binary of good vs. bad gays, LGBTQ advocates, and the institutions they engage with, have deepened the chasm between deserving gays and non-deserving queers – those behind bars, denied access to the formal economy, living on the streets, and without support from biological families.

In the asylum context, a similar coercive force is thrust onto the applicant to prove what factors about them are "good" that make them deserving of asylum. As in domestic LGBTQ law, "good" in the asylum context can be "deeply rooted

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73. *See, e.g.*, Compl., Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (M.D.N.C. 2014) The case was filed by gay marriage advocates and depicting the Plaintiffs (same sex couples) as model parents to abandoned and neglected children as an argument for gay marriage. The drafters of the complaint include details about the physical abuse and neglect that the adopted children previously endured in foster care and by their birth parents, explaining how gay couples have sacrificed in order to provide a family structure for children "who previously had none." *See also* Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906, 943-44 (S.D. Miss. 2014) ("Like many states, Mississippi suffers when heterosexual couples have unprotected sex, bear children, and cannot take care of them. A number of those children end up in the foster care system, the juvenile justice system, and the children's mental health system. These children need homes and caretakers to love them. Same-sex couples can help.").

74. *See, e.g.*, Andrew Sullivan, *The Gay Rights Movement is Undoing Its Best Work*, THE INTELLIGENCER (Jan. 2, 2018), http://nymag.com/intelligencer/2018/01/sullivan-the-gay-rights-movement-is-undoing-its-best-work.html ("We emphasized those things that united gays and straights, and we celebrated institutions of integration — such as marriage rights and open military service. We portrayed ourselves as average citizens seeking merely the same rights and responsibilities as everyone else — Republicans and Democrats, conservatives and liberals. We were largely gender-conforming, which is not in any way better than non-gender-conforming, but this helped get the conversation started and sustained. We adopted a much less leftist stance — and few can really dispute that it was one of the most swiftly successful civil-rights movements in history.").

75. *See, e.g.*, Rebecca Juro, *Even After All These Years, HRC Still Doesn't Get It*, HUFFINGTON POST (Apr. 1, 2013, 7:55 PM), https://www.huffingtonpost.com/rebecca-juro/even-after-all-these-years-hrc-still-doesnt-get-it_b_2989826.html (discussing decisions by the Human Rights Campaign and then-Representative Barney Frank, an openly gay member of Congress, to push forward the Employment Non-Discrimination Act (ENDA) without transgender protections because it would be easier to pass).

76. Sullivan, *supra* note 74.

in racial and gender stereotypes."[77] Applicants and practitioners alike are pushed to create a narrative that least disrupts the predominately white, Western, cis-heterosexual norms of good behavior that prevail in the U.S.[78] Practitioners reasonably conclude that applicants who "can adopt the narrative of 'the homosexual' have greater success than applicants' [whose] identities . . . are not easily encapsulated by this single narrative."[79]

Furthermore, asylum practitioners often are limited in their description of persecution to avoid the fragility of white Western masculinity. As Anita Sinha describes in the context of gender-related claims, "decision makers are reluctant to grant asylum in cases where the alleged gender-related violence appears similar to forms of gender-related violence that are pervasive in the United States."[80] This reluctance stems from the binary structure at the heart of the asylum system. If an adjudicator grants asylum to someone who has suffered the type of violence that is still rampant in the United States, this challenges the U.S. identity as the "good guy" and destabilizes the systemic binary.[81] Thus, asylum seekers are often forced into an uncomfortable position of reinforcing American exceptionalism by overlooking queer injustices in the United States.[82]

For the LGBTQ asylum seeker, and principally for marginalized LGBTQ members, the process of narrating identity is full of strategic decisions. The applicant often feels they must fit their narrative into that of the imagined "deserving gay" while declaring, at least implicitly, a sense of indebtedness to the United States. For transgender individuals, this can translate to forced expressions of

77. Sinha, *supra* note 32, at 1565; *see also* Puar, *supra* note 64, at 126 ("Furthermore, queer exceptionalism works to suture U.S. nationalism through the perpetual fissuring of race from sexuality—the race of the (presumptively sexually repressed, perverse, or both) terrorist and the sexuality of the national (presumptively white, gender normative) queer: the two dare not converge.").

78. *See* Llewellyn, *supra* note 65, at 68 ("In the asylum system 'the homosexual' is a unitary and fixed identity characterized by visibility, coherence and linearity. These features, notably, are consistent with a homonormative identity construction, which privileges white, Western, gay male sexual politics.").

79. *Id*.

80. Sinha, *supra* note 32, at 1565.

81. *See, e.g*., Jeune v. U.S. Attorney Gen., 810 F.3d 792 (11th Cir. 2016) (affirming the BIA's denial of a transgender woman's Withholding of Removal claim, explaining that "instances of discrimination, harassment, and ostracism of homosexuals and transgender persons" did not amount to persecution); *see also* Malu v. U.S. Attorney Gen., 764 F.3d 1282 (11th Cir. 2014) (affirming the denial of asylum to a lesbian from the Democratic Republic of Congo, stating that the mere absence of anti-discrimination laws was not evidence that she would be subject to persecution as lesbian, and highlighting one instance when the DRC police prevented a mob from lynching a lesbian). *But see* Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015) (concluding that the BIA erred when it held that a transgender woman from Mexico would be protected from future persecution because Mexico had passed pro-gay laws; the court found that, despite good laws on the books, transgender people in Mexico are still often subject to harassment and violence).

82. There is no element in asylum law requiring the applicant or respondent to demonstrate that she will be safe in the United States. However, reverence for gay rights in America is implicit in narratives of escape from home country persecution and survival in the United States.

gratitude for high levels of police mistreatment and harassment,[83] soaring rates of homelessness and sexual or physical assault in housing shelters,[84] and widespread psychological distress, including an attempted suicide rate that nears nine times the rate in the general U.S. population, resulting from these societal factors.[85]

The asylum framework's limitations around queer identities result in part from the binary embedded in the system. The process necessitates a narrative-construction that reinforces a view of America as superior and exceptional in the realm of gay and transgender rights. As a necessary consequence, asylum-seekers and practitioners end up partaking in a system that emboldens American Exceptionalism on the backs of queer survivors. Similarly, the theory of the case in many queer cases involves a depiction of the "good" or "deserving" gay, a narrative that is bolstered by the unspoken counter-example of a less-deserving queer. This results in the perception that, in order to be deemed deserving of immigration relief, a queer asylum seeker must perform their gender and sexuality in a manner satisfactory to the American adjudicator.

C. (NOT NECESSARILY) BORN THIS WAY

The Particular Social Group protected ground may provide an avenue for queer asylum seekers to portray a more nuanced narrative of their existence and survival. For example, it is notable that the PSG category does not strictly require a showing of fixedness. Instead, applicants can show that — while they theoretically could "change" — the law should not require such a change when the trait in question is "so fundamental" to a person's identity or conscience. This legal framing likely did not originate from a queer theory lens. Yet, at its core, it mirrors queer theory's repudiation of an exclusively "born this way" rhetoric for the gay rights movement, challenging the idea that there must be a biological basis at the root of LGBTQ identities in order to deserve rights and respectability.[86] Queer and feminist thinkers have questioned the notion that gender or sexuality exists in a natural or essential way, and instead have posited that all genders and

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83. *See* James, S. E., Herman et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CENTER FOR TRANSGENDER EQUALITY (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf ("In the past year of respondents who interacted with police or law enforcement officers who thought or knew they were transgender, more than half (58%) experienced some form of mistreatment.").

84. *Id*. Nearly one-third (30%) of respondents have experienced homelessness at some point in their lives. Those who did stay in a shelter reported high levels of mistreatment: seven out of ten (70%) respondents who stayed in a shelter in the past year reported some form of mistreatment, including being harassed, sexually or physically assaulted, or kicked out because of being transgender.

85. Forty percent (40%) have attempted suicide in their lifetime, nearly nine times the rate in the U.S. population (4.6%). *Id*.

86. Feminist and queer thinkers and advocates have long debated "whether bodies were born a certain way or made into 'men' and 'women'" – in other words, asking whether one is born with a particular gender or sexual orientation or whether those identities are constructed over time or can be a product of intentional choice. *See* Jack Halberstam, *Unbuilding Gender: Trans* Architectures In and Beyond the Work of Gordon Matta-Clark*, (Oct. 3, 2018), *available at* https://placesjournal.org/article/unbuilding-gender/?cn-reloaded=1.

sexualities are constructed and performed through daily as well as historical acts.[87] Understood as constructs, rather than natural to the human condition, identities such as gender and sexuality may fluctuate and look different based on time and place. However, under the PSG analysis, identity fluctuation and impermanence should not affect a Queer applicant's eligibility for asylum if they can demonstrate why their identity – mutable as it may be – is fundamental to who they are.

In determining whether an applicant cannot change, or should not be expected to change the shared characteristics of a PSG, an adjudicator should consider all relevant evidence, including the applicant's self-described identity or belief about how they would be perceived, and how their identity informs other aspects of their life such as community involvement or societal alienation.[88] Therefore, the analysis must be highly individualized to a particular applicant to determine what their identity is, what its significance is to them, and how it is plays out in the context of their country of origin.

A queer-identified applicant has options when it comes to narrating the status and origin of their identity. First, they can argue that they are gay and that their sexual orientation is unchangeable (the "born this way" approach). This argument can be bolstered by scientific research, medical evidence, their own testimony and written statements, and other forms of documentation generally considered as objective or reliable. Arguing that sexual orientation or gender identity is innate, genetic, or involuntary may be a more prudent strategy in certain jurisdictions. For example, this approach may be successful even if an adjudicator's personal belief system dictates that homosexuality is wrong, they still may be compelled by a narrative that depicts the applicant as never having had a choice in the matter. As an alternative to the "born this way" approach, an asylum applicant can argue that their sexual orientation or gender identity – regardless of whether they could or could not change it – is such a critical aspect of who they are that the government has no business insisting that they change it or suggesting that they should express it in a less obvious way.[89]

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87. *See, e.g.*, Paisley Currah, *Transgender Rights without a Theory of Gender?*, 52 TULSA L. REV. 441 (2017) ("Is gender identity fixed, or might it change more than once throughout the life course? Are transsexual people born in the wrong body, or is the wrong body narrative imposed by a medical establishment and legal architecture intent on maintaining the rigid border between male and female, even as they develop diagnoses and criteria that would allow one to move morphologically and/or legally from one gender to another?").

88. *See, e.g.*, U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 37 (2015) (providing a list of appropriate lines of inquiry for asylum officers to assess LGBTQ claims).

89. UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/01 (Oct. 23, 2012), https://www.unhcr.org/509136ca9.pdf ("A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that.").

The latter strategy is an especially important tool for queer cases that do not precisely follow a gay or trans coming-of-age narrative involving language like "always knowing," "from a young age," or "trapped in the wrong body." These coming-of-age cases exist and are certainly valid, and often they are more easily digestible for adjudicators. However, cases involving certain marginalized queer identities may be better served by showing how and why the particular characteristic is "so fundamental" to an applicant's identity or conscience. This alternative provides the applicant some breathing room to focus their narrative on their membership in a group and its significance to their identity. Additionally, it may allow queer applicants to explain the trajectory of their identity development with greater nuance, and it may be helpful in cases where applicants are perceived as "not queer enough."

This may be true for a vast range of queer people. This could include: a bisexual cisgender woman married to a man; a gender queer person who alternates between gender pronouns and expressions; a cisgender man married to a transgender woman and identifies as heterosexual; or a transgender man who previously identified as a lesbian but now identifies as a gay man. While a "born this way" theory may function in some of these cases, it may fail to persuade an adjudicator in others. Equally as important, a theory of immutability may not ring true for the applicant whose credibility is crucial and whose life is ultimately at stake. A queer applicant may sincerely feel that their sexual orientation or gender identity is and will always be evolving, and the legal landscape in the immigration world needs to become nimble enough to acknowledge their complete existence without insisting on a contrived narrative for the sake of cis-hetero comfort.

D. IMPUTED/PERCEIVED AND THE CONSTRUCTS OF GENDER AND SEXUALITY

The PSG category additionally allows an applicant to make a case for why they would be perceived as gay in their home country, even if they are heterosexual, and that they would be persecuted on that basis.[90] For example, if an applicant is a cisgender male who identifies as heterosexual, and he is a makeup artist who takes great care when it comes to his personal aesthetics, there may be a non-frivolous argument that a homophobic persecutor would target him due to an imputed sexual orientation. The inquiry in these cases starts by analyzing cultural assumptions and norms with respect to sexuality and gender constructs in the country in question.[91]

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90. *See, e.g.*, Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003) (recognizing that persecution on account of sexual orientation may be sufficient for an asylum claim even if the victim is actually not gay but is thought to be by the persecutor).

91. *See* U.S. CITIZENSHIP AND IMMIG. SERV., RAIO DIRECTORATE – OFFICER TRAINING: GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 16-17 (2015) ("Claims involving actual or imputed sexual minority status may qualify under the particular social group category and may involve applicants who:[. . .]are viewed as 'effeminate' or 'masculine' but identifiy as heterosexual [or] who are not actually gay but are thought to be gay by others. . .").

Therefore, imputed queerness cases involve a critical assessment of gender constructs within a particular society, and how a specific applicant matches up – or fails to match up – with those constructs. Imputed sexual orientation cases can ultimately resemble a rebuke of compulsive heterosexuality[92] and gender binaries, not too dissimilar from the works of queer theorists like Judith Butler. While concepts like sex, gender, and sexual orientation are often understood as binaried truths (male/female; man/woman; gay/straight), queer theory exposes the layers and nuances that exist within each of these categories, and the ways in which societies assign a gendered meaning to behaviors and expressions. Butler's work highlights the performativity of gender, arguing that "gender is always a doing,"[93] and that it requires a "repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance."[94] The imputed or perceived sexual orientation cases often require a practitioner to educate the adjudicator on the ways in which gender is produced in a particular society and how a specific aspect of an individual can place them with the realm of "deviant" gender performance, and thus vulnerable to persecution.

An imputed sexual orientation claim can arise in many different contexts, including factors like one's HIV status, gender expression, or the identity of their partner. In many countries around the world, HIV/AIDS is still deeply associated with gay men and other members of the LGBTQ community.[95] As a result, a straight, cis-gender man may be able to show that his HIV positive status would cause societal actors to view him as gay and persecute him on that basis. Another scenario where sexual orientation may be imputed is in the example of queer allies who make known their support of LGBTQ communities.[96] As a result of their visible support of a gay son, transgender friend, or genderqueer sibling, a potential persecutor may categorize an ally as yet another one of the deviant "other."

Imputed sexual orientation claims are also important for certain partners of transgender people. For example, a woman-identified partner of a transgender man, regardless of her actual identity, could be perceived as a lesbian in her home country as a result of her relationship. This is particularly likely in a case where the transgender partner's gender identity would not be recognized in the country of origin, consequently forcing him to be "out" at every turn. With identity

92. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*,5 SIGNS 631 (1980).

93. Butler, *supra* note 61, at 25.

94. Butler, *supra* note 58, at 33.

95. *See, e.g.*, GEO. WASH. U. L. SCH. HUM. RTS. CLINIC, et al., *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Guatemala: A Shadow Report*, at 11-12, http://www.iglhrc.org./binary-data/ATTACHMENT/file/000/000/566-1.pdf (March 2012) ("The association of homosexuality with HIV/AIDS in Guatemala is so widespread that people living with HIV/AIDS, including those who are LGBT, frequently conceal their status in order to avoid homophobic and transphobic discrimination.").

96. Individuals in this situation may also have a political opinion claim for asylum in addition to a PSG claim.

documents listing him as female and with a name that may be unavoidably gendered, he and his partner could be treated as a lesbian couple by government officials or private actors. Moreover, the imputed theory not only provides alternative PSG formulations for queer individuals, but it also permits the asylum-seeker and practitioners to engage in a critical analysis of gender constructs and the consequences of deviating from them.

III. THE PRACTITIONER'S ROLE

Asylum practice can feel like taking the typical lawyer-client relationship and injecting it with steroids. The degree and depth of intimate information shared, combined with the incredibly high stakes of these cases, can make for an unusually close-knit relationship. With LGBTQ cases, the substance of the claim will inevitably require a deep dive into the most personal aspects of a client's life. As a result, a lawyer taking an LGBTQ asylum case should take additional steps to foster a strong relationship, which ultimately may be necessary to a successful outcome.

A. SETTING THE STAGE FOR A PRODUCTIVE PRACTITIONER-CLIENT RELATIONSHIP IN ASYLUM CASES

The immigration practitioner has three basic stages to representation: 1) gathering facts; 2) organizing facts and law and; 3) telling the story. Once the practitioner has a grasp on the facts of the case, she organizes them into good, bad, or neutral facts, with reference to the law and discretionary guideposts. And then comes the task of relaying those facts to the adjudicator. This is the "storytelling" portion of a lawyer's job and it is a central part of the practitioner's role in asylum cases.

This all-important responsibility is rife with potential missteps as well as opportunities for successful advocacy. In asylum cases, where credibility is king and adjudicators are given a great deal of discretion, the adjudicator will base much of their decision on the consistency between the client's testimony and the documents the client's lawyer has prepared in advance to tell their story. However, to successfully narrate another's story, the practitioner needs to be strategic about each step of the process. The work begins and ends with the recognition of positionality – which is to say, knowing who the boss is and therefore who ultimately calls the shots.

1. Positionality, Identity, and Queer Excellence

A critical step in representing queer survivors involves recognizing positionality and the various forms of identity that impact the lawyer-client relationship dynamics. The person sitting in the client's chair is trusting the practitioner on two intensely intimate levels. First, they trust the practitioner as they recount their life story – the good, the bad, and sometimes the unfathomably horrific. Second, they are impliedly placing their trust in the practitioner to convey their story to the

decision-maker in their case. That means they must trust that that the practitioner is listening like a sponge, not taking a word for granted, and that the practitioner is humble enough to state outright when he did not understand something and needs it repeated or explained.

The practitioner has access to multiple forms of institutional power and legitimacy usually inaccessible to the asylum-seeker. Most obviously, a lawyer is an "insider entitled to civility of treatment, sometimes even respect, by virtue of [their] occupation and its role, regardless of [their] political beliefs or sexual orientation."[97] In contrast, asylum-seekers are often cast as lawbreakers or leeches on the American economy, and their experience with civility and respect is often contingent on any number of personal qualities, such as their sexual orientation, HIV status, or country of origin. The challenge for the practitioner is to situate themselves in that role such that they can be effective advocates without being co-opted by a system that has granted them exclusive access. The civil rights lawyer J.L. Chestnut said a great risk facing movement lawyers is "losing the edge" required to "go out and confront resistance every day."[98] Access to institutionalized respect is intoxicating, and it can impact a practitioner's ability to act as a comrade with their client. As J.L. Chestnut described in the context of his experience as a Black lawyer during the civil rights movement, a practitioner should be cognizant of their access to power and "remain on guard – always," aware of the "strain of being part of and apart of the system at the same time."[99] This type of awareness becomes a tool for a lawyer's own endurance in the work as well as their ability to effectively utilize access to a system rather than allowing it to erect a barrier between them and their client.

Power dynamics in lawyer-client relationships take other forms that can become barriers or bridges to an effective dynamic. Race, personal or family experience with the immigration system, and language capabilities, among other factors, can each have a very significant impact on the relationship building between lawyer and client. In LGBTQ cases, the lawyer's own gender identity, sexual orientation, or HIV status can also impact the tenor of the relationship between client and practitioner. As inevitably must happen in asylum cases, the client divulges an extraordinary amount of personal data in the confines of this relationship. A practitioner has an obligation to create a space that is affirming and safe for their queer and/or HIV positive clients. There are a number of ways to go about creating that type of space.

First, the client should have no doubt in her mind that she is the expert in her case, and to the extent possible and appropriate, the practitioner can acknowledge that expertise and power through subtle techniques. Asylum cases are intensely

97. *See* Nancy Polikoff, *Am I My Client?:The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C. L. L. REV. 443, 448 (1996).

98. J.L. CHESTNUT, JR & JULIA CASS, BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR 183 (1990).

99. *Id*. at 246-47.

fact-driven, and the client is the only person with a full grasp on those facts. Humility in representation can go a long way in terms of conveying respect and placing authority where it belongs. Practitioners should avoid regurgitating all they know about a client's country during preliminary meetings; instead, they should recognize the client's expertise and let her do the educating. Ask questions, elicit more detail, but recognize the client as the properly situated expert. For queer clients, this also means deferring to a client's self-expressed identity terms rather than correcting them or imposing a different label on them.

Next, it is especially important for practitioners to strive for something beyond queer competence. On the most rudimentary level, queer competence means respecting queer identities and possessing a basic knowledge of terms and other culturally significant references to enable meaningful interaction with Queer people.[100] Something beyond queer competence – queer excellence – means acknowledging where queer competency falls short and making a long-term commitment to do more and do better.[101] The "more and better" can only happen with committed work and intentionality. It involves tangible things such as understanding queer terminology in the language a client uses, avoiding assumptions about a client's sexual orientation or gender identity, and appreciating that being queer means something different to everyone. It also means less tangible things such as recognizing one's own positionality in relation to queer communities and individuals, understanding the role of shame and rejection in queer communities, and appreciating individual skepticism of authority.

The American Psychological Association (APA) has identified critical factors in building towards "cultural humility."[102] The factors include a "lifelong commitment to self-evaluation and self-critique" and "a desire to fix power imbalances where none ought to exist."[103] This means that cultural humility, or queer excellence, necessitates introspection, and not merely acceptance or respect for people and cultures external to us. While the practitioner is not the focus of an asylum case, they are part of a client-lawyer team that can be made immensely stronger and safer through self-awareness. The client is forced into an extreme state of self-awareness by virtue of the nature of asylum cases. In turn, the

100. This definition is adapted from the idea of cultural competence. The Substance Abuse and Mental Health Services Administration (SAMHSA) defines cultural competence as "the ability to interact effectively with people of different cultures" and means "to be respectful and responsive" to the beliefs and practices of different groups. *Cultural Competence*, DEP'T OF HEALTH & HUM. SERV., https://www.samhsa.gov/capt/applying-strategic-prevention/cultural-competence (last updated Nov. 10, 2016).

101. Many advocates and organizations now use the term "cultural humility" in place of "cultural competence" as a way of acknowledging cultural awareness as a process rather than an end product. *See, e.g.*, M. Tervalon, & J. Murray-Garcia, *Cultural humility versus cultural competence: A critical distinction in defining physician training outcomes in multicultural education*, J. OF HEALTH CARE FOR THE POOR AND UNDESERVED 9, 117-125 (1998).

102. See Amanda Waters & Lisa Asbill, *Reflections on Cultural Humility*, AM. PSYCHOL. ASS'N (2013), https://www.apa.org/pi/families/resources/newsletter/2013/08/cultural-humility.

103. *Id.*

practitioner should consider how it would feel to sit across the table from them, taking into account race, class, gender identity, sexual orientation, and other identities that contribute to power dynamics or solidarity.

Using humility and flexibility as guideposts, practitioners can assess how their own identities are communicated, if at all, to the client. Some identities may be communicated by virtue of their existence, whereas others may require intentional decisions. For example, it may be immediately apparent to a client that a practitioner is not a native Spanish speaker; race may also be ostensibly apparent and meaningful. Introspection is a helpful tool for a practitioner communicating in a non-native language. They may choose to let the obvious fact speak for itself, trusting that the client will immediately realize that they speak proficiently but are not a native speaker. Alternatively, a practitioner may choose to name the "identity" difference as a way of bridging a gap and becoming more human in the interaction with a client. Naming an identity or difference is not necessarily the "right" approach, but it merits consideration as part of the effort of introspection. A practitioner can build comradery with a client by stating, "Hey, I'm not a native speaker in your language. I feel comfortable doing this work together in Spanish, but it's important to me that you let me know if you don't understand me at some point, and I'll do the same." Naming this identity or experience gap allows room for more collaboration and it creates space for the client to insert herself as the expert in the language. It also makes explicit something that too often is left implicit: the client deserves to be heard and fully understood.

Moreover, just as a practitioner is gauging their client – assessing credibility and strengths of the case – the client is also assessing the practitioner, determining to what degree this person is to be trusted. Being aware of positionality and striving for queer excellence, through introspection as well as external output, can help set the stage for a trusting and affirming relationship.

B. TELLING THE STORY: FACING TEMPTATION & EMBRACING NUANCE

In his article *The Ethics of Narrative*, Muneer I. Ahmad writes that "[n]arrative, or storytelling, is the primary means by which we as lawyers advance our clients' causes."[104] Eliciting a client's story of survival and constructing an accurate and persuasive narrative is the most important component of building an asylum case. This task requires contending with racially and culturally bound stereotypes and wrestling with structure, chronology, syntax, grammar, and identity terms — all having a significant impact on how the client's story is relayed to an adjudicator. The task of narrative building begins with listening.

1. Active Listening and Client-Driven Practice

Law schools teach aspiring lawyers how to digest and analyze information, how to apply facts to the law, and how to talk (and talk, and talk). However, most

104. Muneer Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER & SOC. POL'Y & L. 117, 122 (2002).

students do not graduate with a newly minted and highly refined ability to actively listen. The responsibility of telling a client's story in a compelling and credible fashion begins with intense focus on the client's own telling of the facts. This often-overlooked aspect of lawyering is one of the most critical steps in asylum representation. It is not enough to regurgitate the basic themes of the client's life or to take their story and fancy it up with lawyer-speak and formalize it with their signature. It is critical that the client's "voice" comes through clearly in her affidavit or declaration.[105] In order to do that, a practitioner needs to view her role in this early stage as a sponge, soaking up not only the substance and facts, but also the particular types of words used and the structure and style of the client's communication.

In LGBTQ cases, listening like a sponge is especially important to safeguard the integrity of the client-lawyer relationship and to ensure proper framing of the PSG. In order to pick up on the nuance in an applicant's identity, the practitioner has to temporarily disable the "conclusory" portion of their brain and avoid slapping a label on a client prematurely. For example, a client who presents as a gay man initially may eventually disclose that they are questioning their gender or that they identify as neither male nor female. This fact may only come out if the client feels comfortable enough with the practitioner, and it can prove to be an integral part of their case. If the client is not able to share their full identity with an attorney, it can result not only in diminished trust but also in a credibility problem come time for the interview or hearing.

The practitioner must also be aware of the "coercive force" at play in LGBTQ asylum cases and openly discuss it with their client in order to come to a conclusion together on how the client would like to present their identity to the adjudicator. In carefully piecing together a narrative, the practitioner plays mental gymnastics to consider how the intended audience will best be able to absorb the information and come to a positive conclusion, knowing that "in order for a story to be persuasive, it must resonate with the values, beliefs and assumptions of our audience."[106] A discussion of the coercive force may involve talking with a client about various strategies to portray their identity and experiences, and how the adjudicator is likely to digest that information. The practitioner should be

105. There are many different techniques to draft a client's affidavit. Some lawyers and clients find it most effective, and sometimes therapeutic, for the client to take a first go at drafting their own statement. The practitioner can then review it, making edits as well as stylistic and organizational changes before reviewing it multiple times with the client to check for accuracy and fill in holes. The act of reviewing the declaration serves a number of purposes: it ensures that the declaration is accurate; serves as a memory-reinforcing tool for the client; and allows the practitioner opportunities to get more intimate with the facts of the case. Another technique is for the practitioner and client to draft the declaration from scratch together. This looks more like a conversation, where the client narrates portions of their life as the practitioner listens, asks questions, and transcribes. The advantage of this method is that, with careful attention, the practitioner can transcribe the client's words so that it reads very much like an echo of how the client speaks. This bodes well for credibility purposes come time for the client's interview or testimony.

106. Ahmad, *supra* note 104, at 122.

intentional about not coercing the client into a specific narrative, but can provide insights based on knowledge of the system and its players – including their biases. In the context of her work as a public defender, Abbe Smith argues that "prejudice exists in the community and in the courthouse, and criminal defense lawyers would be foolhardy not to recognize this as a fact of life."[107] In a similar vein, immigration practitioners faced with prejudiced judges or other uneducated decision-makers may have to "draw upon prevailing norms and beliefs, no matter how problematic they may be" in order to successfully advocate for a queer client.[108] However, awareness of the intended audience's predispositions does not necessarily equate to throwing in the towel on a client's ability to present a more accurate narrative of their identity and survival. By being aware of the coercive force and engaging in meaningful strategy conversations with their clients about narrative, a practitioner avoids unquestioningly contributing to the construction of the "deserving gay" asylum seeker.

Some practitioners understandably take the view that the lawyer's primary duty is to zealously advocate for her client in order to guarantee the best outcome, regardless of the means used or the accumulated consequences of narrative.[109] Ahmad explores the dilemma facing criminal defense lawyers, asking, "is there anything wrong with advancing arguments that, while advantageous to our clients, may reinforce subordinating racist, sexist or homophobic stereotypes?"[110] Similarly, in queer asylum cases, a gay narrative that least deviates from white heteronormativity may appear more likely to win, but at what cost? Reproducing homo-normative stereotypes not only ossifies the immigration system's limited understanding of queer survivors, but it may also lead to negative outcomes in a specific case if that narrative does not coincide with the client's authentic identity.[111] The centrality of credibility means that the client's authentic identity and narrative are best presented in their most authentic form.[112] Therefore, practitioners should avoid the temptation to use generalized, widely-accepted LGBTQ terms out of concern that an immigration judge "just won't get it." Shoving a client's multi-layered identity into a nicely packaged gay box, while tempting, is

107. Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 954 (2000).

108. Ahmad, *supra* note 104, at 122.

109. *See, e.g.*, Monroe H. Freedman, UNDERSTANDING LAWYERS' ETHICS 65-66 (1990) (quoting Lord Brougham who said that "to save [a] client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is [the lawyer's] first and only duty").

110. *Supra* note 103, at 120-21.

111. For example, a practitioner may worry that an adjudicator will not grant asylum to a man who has primarily had female romantic partners, but who has had some relationships with men. The temptation may be to advise the client to frame his identity as bisexual, or possibly gay, even if the client has never used those words for himself. If the lawyer drafts documents and arguments using these terms, but the client's testimony elucidates that his identity has never really been bisexual or gay, the adjudicator may find reason to doubt the applicant's credibility.

112. This is not to discard the importance of tailoring narrative to the intended-audience and making strategic decisions about narrative construction more generally. Rather, it is intended to highlight the unique nature of asylum law as highly fixated on the authentic, raw credibility of an asylum seeker.

likely to cause more problems than it solves. It is the practitioner's job to educate the immigration judge or asylum officer on the significance and perception of her client's identity in the society in question. Too often, practitioners either shy away from cases involving less stereotypical or homo-normative lived queer experiences or package these claims in a homo-normative narrative. With the help of the Particular Social Group category and its bountiful options for creativity, practitioners can embrace the full spectrum of queer cases, and, with careful attention to framing the PSG, can expand the types of queer cases likely to succeed.

2. Framing, Framing, Framing

The PSG category allows the client and lawyer to be nimble enough to wiggle out of perceived binary decisions and can therefore be used to secure legal relief for a broader, more diverse range of queer individuals. Binary constructs often cause a practitioner or applicant to feel they need to be either gay or straight; man or woman; lesbian or bisexual in order to present a successful asylum claim. For applicants who do not identify within a widely understood or accepted category, a well-crafted PSG can create space for a more complete and accurate elaboration of their identity. Through careful attention to the framing of these PSGs, the category can also serve as a practitioner's tool against the coercive force at play in LGBTQ asylum claims.

Returning to the discussion of PSG elements in Section IA, the practitioner should craft a group that is sufficiently "particular" (paying attention to the boundaries of the group) and "socially distinct" (demonstrating how the group is understood or recognized by the society). The social distinction element can often be established by reference to country conditions evidence that shows how a country "distinguishes sexual minorities from other individuals in a meaningful way."[113] For example, in the watershed case *Toboso-Alfonso*, evidence revealed that the Cuban government maintained lists of homosexuals.[114] Clearly, if the government surveilled and punished gay Cubans, it viewed and treated homosexuals as a distinct group. To test out the particularity element, a practitioner can ask herself the immigration lawyer's Goldilocks question: is this group too broad, too narrow, or just right?[115]

The process of framing a PSG involves considering identity from two distinct perspectives: (1) that of the client and (2) that of the society in question. First, the practitioner and client work together to articulate the asylum-seeker's identity. The second task involves conveying how the asylum-seeker is likely to be viewed

113. Supra note 91 at 18.

114. *Toboso-Alfonso*, 20 I&N; *see also Matter of M-E-V-G—*, 26 I&N at 234.

115. *Supra* note 91 at 19. ("Because LGBTI claims involve individuals with a variety of characteristics, and because the persecutors in given cases may perceive the applicants' traits in a variety of ways, the appropriate formulation will depend on the facts of the case, including evidence about how the persecutor and the society in question view the applicant and people like the applicant").

in their country of origin, whether that view coincides with their authentic identity or not.[116] This dual approach gives the asylum-seeker room to define their identity in their own terms, while demonstrating to an adjudicator how aspects of their gender expression, for example, may expose them to violence by virtue of proximity to another reviled social group. For example, a transgender woman may choose to propose two PSGs in her case: Transgender women in Cameroon; and perceived gay men in Cameroon.[117] The first PSG corresponds to her actual identity whereas the latter illuminates a potential perception of her identity if forced to return. By framing the second PSG from the perspective of a potential persecutor, it exposes the existence of transphobia, as well as the conflation of sexual orientation and gender identity and generalized "other-ing" of sexual and gender minorities. Moreover, it allows the practitioner to argue that, regardless of the particular "type" of queer identity, the applicant will be persecuted by virtue of her non-compliance with gender and sexual norms.

Framing a PSG as "perceived" or "imputed" also opens the door to non-traditional LGBTQ cases, including claims by individuals who do not self-identify as queer. For example, an asylum officer granted asylum to a cisgender heterosexual minor from Honduras based on his perceived sexual orientation.[118] In that case, the asylum-seeker was rumored to be gay after he was raped by an older man.[119] While the asylum-seeker's actual identity, a cisgender heterosexual male, did not place him at risk of homophobic violence, his experience with sexual violence and societal perceptions associated with male victims resulted in others ascribing a gay identity to him. The attorney and client in that case framed multiple PSGs to capture the asylum-seeker's identity and experience with persecution. Among other PSGs, they proposed "young Honduran men perceived to be gay," "young Honduran men with imputed gay sexual orientation," "young Honduran men who challenge the binary gender norms," and "young Honduran men perceived to be girls."[120] Each of these PSGs is framed from the perspective of the potential persecutor. As a result, a principal focus of the claim was on socially constructed gender norms and the consequences of traversing them.[121]

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116. *Supra* note 91, at 16-17 and 34 ("It is important to remember that in the nexus analysis, the relevant inquiry is not whether the applicant actually possesses the protected trait. Rather, it is whether the persecutor believes the applicant possesses the trait (either because the applicant does possess it or because the persecutor imputes it to the applicant). Thus, the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is. . .").

117. *Supra* note 91, at 17 ("Note that even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian").

118. *See Case Number 23433*, CTR. FOR GENDER AND REFUGEE STUD. (Feb. 15, 2018), https://cgrs.uchastings.edu/case/case-23433.

119. *See id.*

120. *Id.*

121. *See Case Number 25079*, CTR. FOR GENDER AND REFUGEE STUD. (May 3, 2018), https://cgrs.uchastings.edu/case/case-25079 (describing a case where a heterosexual Salvadoran man was persecuted by gang members because they perceived him to be gay).

Furthermore, PSGs can serve as a jumping off point for queer narratives in asylum claims. For example, a gender fluid asylum-seeker may ultimately decide to articulate one of their formal PSGs as "gay men in Russia" but in their declaration and briefing, they may wish to clearly flesh out what it means to be gender fluid and how gender manifests for them on a daily basis. It may also be that the asylum seeker firmly opposes being identified as a "gay man" but acknowledges and fears that a potential persecutor would view them as just that, and harm them on that basis. In that case, the practitioner creates space for these dual realities by crafting alternative PSGs. Here, that might include "gender fluid individuals in Russia," "perceived gay men in Russia," and "sexual minorities in Russia." The use of a broader term, such as "sexual minorities," gives the practitioner and asylum-seeker latitude to flesh out the nuances of their identity while at the same time showing how a sexual minority of any variety is likely to face persecution by the mere fact of transgressing highly policed gender norms.[122]

CONCLUSION

Ultimately, "what queers want is acknowledgement of their lives, struggles, and complete existence."[123] Within the context of asylum law, access to that acknowledgment can feel reserved for a certain kind of gay or transgender narrative – the kind that is palatable and familiar to a Western, white, most often cis-heterosexual, decision maker.

An immigration practitioner is situated between an intensely powerful and coercive criminal-immigration[124] system and an individual client whose ability to articulate their identity will play a crucial role in the outcome of their case. Many practitioners are laser focused on the end goal of securing relief for their client with less critical analysis spent on the means of getting there. The practitioner who ascribes to a queer worldview will be better equipped to offer their LGBTQ clients greater control over the construction of their identity and narrative. In doing so, the practitioner resists the immigration system's myopic view of what it means to be LGBTQ, advocates for the best interests of their client, and pushes for recognition of the full array of queer existence.

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122. *Supra* note 91, at 19 ("[Sexual Minorities in Country X] may be an appropriate particular social group in cases where the persecutor in question perceives any sexual minority as 'outside the norm' but does not necessarily distinguish between orientation, gender, and sex. It might also be appropriate where there are a variety of traits involved in the claim, but the persecutor's animus toward those different traits stems from a more general animus toward all sexual minorities.").

123. Cohen, *supra* note 63, at 444 (paraphrasing Michael Warren's commentary in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993)).

124. I use this term to highlight the highly intertwined nature of the criminal justice system and the immigration system. These two systems, composed of many different agencies and branches, often work in tandem to apprehend and remove undocumented individuals with allegations of unlawful activity. The alleged unlawful activity can include the act of entering the United States without inspection. Various aspects of immigration law use criminal allegations as a barometer for worthiness of immigration relief.