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Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims

Stefan Vogler

Using court decisions, interviews with legal actors, and ethnographic observations, this paper analyzes the development of sexual identity classifications for sexual minorities seeking asylum in the United States and argues that the adjudication of such claims works to consolidate and regulate sexual identities but also creates possibilities for recognizing marginalized queer identities. Asylum seekers must prove their sexual identities, and immigration officials must classify claimants as belonging to a protected group. At the inception of queer asylum law in 1990, protected categories were highly circumscribed, but the indeterminacy of the law allowed advocates and asylum seekers to challenge existing categories and stake out new claims based on their sexualities. Against the backdrop of extant criticisms of the asylum process for queers, this paper suggests that the way asylum law has been elaborated, adapted, and interpreted, particularly in approximately the past decade, offers possibilities for making unique identity claims that are not recognized in existing scholarship.

What constitutes sexual identity according to the state, and how does the law construct sexual identity categories? This paper addresses these questions through an analysis of asylum claims based on sexual orientation, or queer asylum, made in the United States.[1] Just as asylum seekers can apply for protection from persecution based on race or religion, so too can they apply based on sexual orientation. Though judges have been reluctant to define sexuality (Goldberg 2002), this is precisely what adjudicators must do when they decide whether an asylum claimant's sexual identity is credible. Thus, queer asylum provides a glimpse into how the state understands sexuality. Specifically, it allows us to see how the state legally classifies claimants with non-normative sexualities, how those classifications change over time, and how those categories variously reflect and contest existing schemas.

Please direct all correspondence to Stefan Vogler, Department of Sociology, Northwestern University, 1810 Chicago Avenue, Evanston, IL 60208; e-mail: svogler@u.northwestern.edu.

[1] For analytical ease I use the term "queer" throughout this paper as a capacious term encompassing all non-heterosexual identities.

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Though the United States has historically excluded and discriminated against sexual "deviants" (Canaday 2009; Luibheid 2002; Shah 2012), the "queer exception" to legal protections has recently begun to fade (Kornbluh 2011). One of the earliest "exceptions" to disappear was the bar on queers entering the country, which was repealed in 1990, just months after the Board of Immigration Appeals affirmed an immigration judge's decision to allow a Cuban man to remain in the United States because of persecution he had faced on account of his homosexual identity.[2] Since then, asylum has provided entry to the United States for increasing numbers of queers each year (Gesaman 2009), with the largest queer immigration organization, Immigration Equality, reporting that it has helped over 1,100 people seek asylum since 2004 (Millman 2014). Asylum, though not without problems, has become an important new route to citizenship for queers (Cantú 2009; Carrillo 2010; Epstein and Carrillo 2014; Randazzo 2005). Although asylum directly affects a relatively small number of people, it is important to examine developments in this arena because the law sends larger symbolic messages about what is and is not acceptable (Ewick and Silbey 1998), including which sexual identities are state-sanctioned (Bernstein et al. 2009). Moreover, because queers must prove their sexual identities to attain protection, asylum highlights processes of normalization and resistance (Cantú 2009; Murray 2014) and the incremental accretion of legal change within the bureaucratic state.

Despite queer asylum's rich cultural significance, no systematic studies examine how understandings of sexuality in this body of law develop over time in the United States.[3] Most existing U.S.-based research relies on a handful of appellate decisions or a small number of interviews.[4] My study offers a more nuanced understanding of legal development by systematically analyzing 153 appellate decisions, but more importantly, by also including interviews with legal actors and observing asylum hearings in immigration court where the majority of claims are adjudicated. Additionally, 18 months of participant-observation with a large immigration law practice yielded insight into the workings of administrative immigration law. This methodological approach allowed me to observe "law in action"—that is, to see how various legal actors interact with and interpret formal written law on a day-to-day basis and, in this instance, how legal categories of

[2] See *Matter of Toboso-Alfonso* (1990).

[3] Though see Berg and Millbank (2009) for a systematic review of cases in the UK, Australia, New Zealand, and Canada.

[4] Notable exceptions include Bohmer and Shuman (2007), Shuman and Bohmer (2014), which rely on extensive field work.

sexual identity are constructed through the interaction of "bottom up" and "top down" forces.

My findings demonstrate considerable flexibility in bureaucratic state categorization. Scholars such as James Scott (1998) argue that states create broad and abstract classifications to simplify and manage their populations. Yet legal scholars have shown that such abstract categories allow for many interpretations, and therefore, that law-on-the-books often looks very different in practice. Queer asylum claims, where adjudicators often carve idiosyncratic classifications out of broad categories, illustrate this interpretive process as it relates to sexuality. While adjudicators' categories still often do not perfectly capture the lived reality of claimants, neither do they force claimants into bureaucratically over-determined boxes. As administrative law bureaucrats with substantial autonomy, immigration judges can craft classificatory schemas that more accurately portray the rapidly changing reality of sexual identities as they are lived in our society. Consequently, I show that queer asylum law works as a mechanism for the legal consolidation of sexual identities but also creates possibilities for wider recognition of marginalized queer identities. Specifically, the law requires that petitioners prove their sexual orientations and subsequently that immigration officials classify claimants as belonging to a "particular social group." This requirement results in the codification of specific sexual identities in asylum law, which allows state actors to regulate aspects of the asylum process and render sexual subjectivities visible to the state (Shuman and Bohmer 2014). At the same time, the flexibility of the "particular social group" category allows petitioners to stake out new claims based on their unique sexualities. Thus, asylum serves as a site for the proliferation of state-recognized sexual identities and may legitimate broader understandings of sexuality in society writ large. It also speaks to on-going debates about the etiology of sexuality: is it essential and unchanging or constructed and fluid? These questions of identity have become central in appeals to the state for lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights. Though scholars have shown how lawyers frame rights claims in legal parlance to gain protections for sexual minorities, much less attention has been devoted to examining how legal categories of sexual identity are created, maintained, and changed. This paper begins filling that gap.

In what follows, I first discuss the relationship between sexuality, identity, and law, before providing an overview of the asylum process and critiques regarding sexual identity in asylum claims—namely that the law views sexuality as immutable, uses Western identity categories, and prioritizes identity over conduct. Following a description of my methodology, I reevaluate these

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critiques. My findings suggest that the legal terrain is shifting, and that while many critiques correctly characterized particular moments and situations (and some still do), the current context requires a reevaluation of the applicability of extant criticism.

Sexuality, Identity, and the Law

Questions over identity categories and the etiology of homosexuality have occupied a central place in debates over sexual rights, both within the LGBTQ movement and in society at-large. Queers have deployed identity differently in various contexts depending on several factors, including goals, institutional access, and available resources (Bernstein 1997). The mainstream LGBT movement has emphasized the immutability and inherency of sexual identities, eschewing more nuanced discussions of the constructedness of sexuality (Weber 2012), an approach that has been roundly criticized by queer theorists who advocate a less reductionist view of identity (for a summary see Jagose 1996). This paper approaches sexual identity from a Foucauldian perspective, viewing sexual identities as products of multivalent discourses generated by "institutional incitements" to speak about sex. For Foucault (1990), a prime incitement was the confession. People were compelled to talk about sex, similarly, in fact, to what we see in queer asylum hearings today. Through these discourses, sexual acts ceased to be solely acts and became instead defining identities that institutions could use to classify people. One no longer simply engaged in sodomy but became a "homosexual" (Foucault 1990: 43). But identity formation is not entirely top-down; individuals may take up, and in the process change, categories through "reverse discourses" that challenge institutionalized norms.

Such insights are consistent with legal realist scholarship showing that law is remarkably elastic and indeterminate (cf., Erlanger et al. 2005; Tamanaha 2010). Scholars attribute this flexibility to the contradictory nature of law, the ambiguity of legal categories, and to the fact that law-on-the-books must be applied to situations that lawmakers cannot fully anticipate (Edelman 1992; Hagan et al. 2008). Legal indeterminacy is, therefore, crucial in political struggles over law's meaning. Indeed, entrepreneurial social movement actors have often viewed law's broad categories as opportunities to gain institutional recognition of new identities (Cohen 1985; Melucci 1996; Touraine 1981). Yet indeterminacy is not unlimited. Though judges make choices and can manipulate legal rules and precedents, they usually render

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predictable decisions consistent with the rule-bound nature of law (Tamanaha 2010).

Nevertheless, law's flexibility has profoundly affected current conceptions of identity, particularly race and ethnicity. As Haney Lopez (2006) shows, courts, in the process of determining who was eligible for citizenship, concomitantly decided what counted as "white" and "not white" by drawing on a combination of factors, including skin color, ancestry, scientific opinion, and common knowledge. Pascoe (2009) similarly demonstrates how anti-miscegenation laws worked to define, produce, and reproduce racial categories (also see Sohoni 2007). The law not only codified racial categories, it also powerfully shaped their content, what they mean, and what privileges accrue to them. The same might be said of sexuality. A significant body of research has examined laws governing sexuality (Ashford 2011; Bernstein and Schaffner 2005), how and why sexual minorities seek particular rights (Bernstein and Taylor 2013), how sexual rights issues get framed when making legal claims (Barclay et al. 2009; Cooper and Herman 2013), and the relationship between sexuality and citizenship (Richardson 2004; Stychin 2003). Indeed, research investigating queer asylum has explored some of these issues, including the way that cultural biases—such as the view that homosexuality should be kept private—influences judicial decision-making (Millbank 2005; Millbank 2009a). Other scholars have shown how the legal context shapes the narratives of sexual minorities (Berger 2009; Murray 2014; Shuman and Bohmer 2014) and effaces some identities, such as bisexuality (Rehaag 2009). However, most of this scholarship does not examine the U.S. context. Moreover, while work on queer asylum, like the larger body of sociolegal scholarship on sexuality, analyzes the general relationship between sexuality and law, it dedicates less attention to how sexual identity categories are constructed within the law and even less to how legal actors use the ambiguity of the law to challenge and expand those categories.

Immigration policy, however, has been one of the most visible markers of national exclusion for sexual "others" throughout much of U.S. history (Cantú 2009; Epps et al. 2005) and has, therefore, significantly contoured state and public understandings of sexual identity. In trying to identify "sexual degenerates," the immigration system contributed to the creation and regulation of sexual norms, identities, and behaviors (Luibheid 2002). For instance, the Immigration Act of 1891 brought immigration under federal control and defined exclusionary criteria, including provisions barring persons guilty of crimes of moral turpitude. Though "moral turpitude" was never fully defined, it was

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understood to encompass (and used to exclude) sexual deviants (Canaday 2003). Canaday (2009) further suggests that U.S. citizenship and sexual identity have been intertwined in military, welfare, and immigration policy since at least the end of the nineteenth century and that the homo/hetero binary structured citizenship in many ways, including defining the proper citizen as heterosexual. Key court decisions, such as *Bowers v. Hardwick* (1986),[5] and government policies, such as "Don't Ask, Don't Tell" (DADT), have also worked to define sexual identity (Halley 1999). DADT introduced the status/conduct distinction as an answer to *Hardwick*'s holding that states could criminalize "homosexual sodomy" (i.e., homosexual conduct but not homosexual status or identity). After *Hardwick* judges and litigators behaved as though status and conduct were alternative bases for military anti-gay policy. Accordingly, when plaintiffs made arguments that they were dismissed based on status, they won, and when the dismissal was based on conduct, they lost. However, the majority in *Hardwick* really treats sodomy as a metonym for homosexual personhood (Halley 1996). Through such legal processes, the law delimits certain sexual expressions and experiences that are limited and narrowly constructed, yet appear as social fact. Because the institutional processes are masked, particular sexual expressions take on the appearance of naturally occurring phenomena that are discovered, not created (Zylan 2011).

Given these insights, it is clear that the law has shaped modern sexuality, but might it also be used to challenge existing categories and make new ones? Asylum law is a rich source of data to help answer this question because the asylum process requires explicit discussion of group and individual sexual identity.

Queer Asylum

The possibility of receiving asylum because of persecution on account of one's sexuality is a quite recent development. The 1951 United Nations Refugee Convention established five categories of asylum protection: race, religion, nationality, political opinion, and membership in a particular social group (PSG). However, the United States maintained policy focused on admitting refugees fleeing communist countries or the Middle East until passage of the 1980 Refugee Act, which brought U.S. asylum policy in line with the UN Convention. Under the new

[5] This Supreme Court case ruled that state laws prohibiting sodomy were constitutional.

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guidelines, petitioners must prove either past persecution or well-founded fear of future persecution on account of one of the protected grounds. The 1990 landmark case of Fidel Toboso-Alfonso, a Cuban man who claimed persecution due to his homosexual identity, established that sexual identity could constitute a PSG. Then-attorney general Janet Reno declared that decision precedential in 1994, meaning that sexual minorities no longer had to prove on a case-by-case basis that sexual identity constitutes a PSG. However, queers must demonstrate that they *belong* to a protected PSG and that the PSG is persecuted, meaning that in practice they must prove their sexualities. Here, it is helpful to look at the asylum process more closely.

The asylum process can begin in one of two ways depending on a petitioner's status. If a migrant is documented, arrives at a port of entry and immediately claims fear of persecution in his or her home country, or voluntarily goes to an asylum office within one year of arrival in the United States, s/he can apply for asylum affirmatively. This means that s/he receives a nonconfrontational hearing with an asylum officer, who may either grant asylum directly or deny the claim and refer it to immigration court. If the applicant is granted asylum, s/he receives residency and the ability to begin the naturalization process a year later. If s/he is not granted asylum, s/he must plead the case to an immigration judge, at which point the process becomes identical to that of a defensive application, which occurs when a petitioner is already in deportation proceedings before claiming asylum. In a defensive application, an applicant faces an adversarial hearing before an immigration judge, with a Department of Homeland Security (DHS) lawyer arguing against the claimant. If the immigration judge denies the claim, an applicant may appeal the decision to the Board of Immigration Appeals (BIA). If that too fails, the claimant may appeal to a U.S. Court of Appeals. An asylum seeker can also appeal to the U.S. Supreme Court, but the Court has yet to hear a queer asylum claim.[6]

A successful applicant must prove two things: (1) his/her sexual identity as the basis for membership in a PSG and (2) either past persecution or well-founded fear of future persecution *on account of* that identity. Evidence of a same-sex relationship is ideal, but the burden of proving one's sexual orientation can also be met with testimony from family and friends or evidence of activity in queer social/activist groups, which can present significant challenges for queers who were closeted in their country of

[6] It is important to note that appeals can only be made based on errors of law.

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origin. As some legal scholars contend, this "social visibility" requirement effectively punishes asylum seekers for displaying a symptom of fear and persecution, i.e., hiding their sexual identities (Marouf 2008; Southam 2011). Claimants could face a catch-22 wherein being closeted in their home countries limits those who can attest to their sexuality and may have also prevented persecution that would have made for a stronger asylum claim. The law allows for a claimant's credible testimony alone to constitute proof of sexual identity, but in practice many adjudicators want corroboration.

To meet the second requirement, queers must prove past persecution or well-founded fear of future persecution on account of their sexualities. Though neither the Convention nor the Refugee Act explicitly define persecution, it is widely understood to be "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" (Hathaway 1991: 104–05). Thus persecution cannot be sporadic incidents but must be sustained persecution by the government or such that the government is unwilling or unable to stop it. U.S. jurisprudence dictates that persecution may be emotional, psychological, or physical and that adjudicators must consider the cumulative significance of experienced harm (Anker and Ardalan 2012). Alternatively, fear of future persecution must be demonstrated by subjective evidence (i.e., personal testimony) and objective evidence, such as reports on abuse against sexual minorities from human rights groups and, ideally, the U.S. State Department. Though no statute outlines precisely how to determine the level of future threatened persecution, the Supreme Court has ruled that asylum seekers must only prove a "well-founded fear," which is considered a lower threshold than the "clear probability" requirement for withholding of removal.[7] A petitioner's country of origin also bears heavily on his likelihood of success given that a judge is unlikely to find credible an asylum seeker's stated fear of persecution in a country like France as opposed to one such as Iran.

Given the apparent difficulty of proving one's sexuality and persecution on account of it, some critics have asserted that queer asylum claims are more challenging to win, though others, including some judges and advocates, argue that queer claims require the same level of proof as any other claim and are

[7] See *INS v. Cardoza-Fonseca*. Withholding of removal is a lesser form of protection than asylum (e.g., it does not grant residency) but is mandatory if there is a "clear probability" that the petitioner will be persecuted and has not committed a serious crime in the United States.

therefore mostly treated fairly under the law (Harbeck 2010).[8] It is difficult to substantiate either claim because the DHS does not track the number of asylees granted protection as sexual minorities. In 2013, approximately 14 percent of the 25,199 successful asylees—about 3,500 individuals—fell under the PSG classification (Martin and Yankay 2014; Millman 2014), but we cannot know how many were unsuccessful or how many successful claims were for sexual minorities. However, the overall grant rate for asylum in the United States averages about 50 percent, though it varies dramatically by jurisdiction (Ramji-Nogales et al. 2009). Critics have decried many other aspects of the asylum process, as well, including the need for petitioners to characterize their home countries as uniformly oppressive (Carrillo 2010; Shuman and Bohmer 2014) and the use of reductive scholarship to "prove" such conditions (Cantú 2005). For the purposes of this paper, I outline three critiques which directly concern sexuality and that I will reconsider in my findings section: the immutability of identity, sexual stereotypes, and a status/conduct distinction in sexuality.

Many critics contest the assertion that sexual identity is fixed or immutable; this is perhaps the most widespread critique of queer asylum law (see Berg and Millbank 2009; Cantú 2005; Randazzo 2005). Queers are eligible for asylum under the provision that permits a member of a "particular social group" facing persecution to seek refuge in the United States. However, the BIA definition of social group describes membership as being based on an "immutable characteristic" or one that an applicant should not be compelled to change. While this definition ostensibly leaves open the possibility for social constructionist accounts of sexuality, critics argue that the discourse around asylum decisions is largely essentialist, portraying sexuality as inherent and unchanging. This could serve to naturalize a "gay" identity, downplaying cultural difference in sexuality and depicting a "transnational gayness" (Miller 2005: 146). Some detractors suggest that requiring fixed and permanent categories is characteristic of the neoliberal state, which seeks clarity and avoids ambiguity (Kimmel and Llewellyn 2012), while others contend that maintaining rigid boundaries contributes to an othering of queers and preserves the distinction between homosexual and heterosexual (Hinger 2010).

[8] Most of my interviewees felt that queer claims were not treated significantly differently than other claims. Some scholars, however, contend that the "credibility" requirement is particularly difficult for queer asylum seekers (cf., Lewis 2014; Millbank 2009b). Though it bears on some of the issues I consider in this paper, I do not fully address this aspect of the asylum process due to space limitations.

A second issue, closely related to the first, is the use of stereotypes and Western identity categories. In her analysis of lesbian asylum claims, Susan Berger (2009) argues that claimants' narratives must be transformed into something understandable to American immigration officials to be successful. Similarly, several scholars assert that adjudicators rely on mannerisms, dress, and stereotyped conceptions of Western gay identity in deciding if claimants are truly queer (Hinger 2010; Kimmel and Llewellyn 2012; Lewis 2014; Miller 2005). For instance, if a claimant purporting to be gay seems "too masculine," he runs the risk of being denied asylum (Epstein and Carrillo 2014; Hanna 2005). Hinger (2010) suggests that gay men who are not effeminate may be denied asylum for two reasons. First, adjudicators may read his ability to avoid maltreatment as evidence that gays are not sufficiently persecuted as a group. Second, they may find that non-feminine gay men fall outside the bounds of the social group of homosexuals: "If the category of homosexuality incorporates more than individuals whose sexual orientation is readily visible (and thus readily targeted for persecution), a clear social group boundary becomes difficult to draw, and identifying the core of the fundamental identity likewise becomes more difficult" (Hinger 2010: 397). Adjudicators who rely on stereotypes conflate gender and sexuality, concluding that sexuality becomes visible through gender nonconforming behavior. While this is not necessarily true, it is important to note that many countries, like the United States, do take gender nonconformity to signal queerness, so such ideas arise in asylum hearings, frequently, as I will discuss, from claimants themselves when explaining why they were persecuted.

Finally, some critics problematize the fact that asylum explicitly protects identity and not conduct. Theoretically, someone could be denied asylum if they were punished for gay behavior as opposed to identity (Pfitsch 2006) or if they reject an LGBT label (Southam 2011). In practice, as I will show, courts have not sustained these fears but have, rather, tended to collapse identity and conduct, though scholars have also argued that it is problematic to assume that conduct implies identity and vice versa (Halley 1999).

While the critiques outlined above are not without merit, my findings both update the picture and provide a more nuanced perspective. Moreover, my findings show that legal systems significantly impact the construction of sexual identity categories and (re)produce particular understandings of sexuality. But first I turn to a brief discussion of my data and methods.

Data and Methods

I conducted a comprehensive case analysis along with 18 months of field observations and 10 supplemental interviews to

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explore how sexuality is understood in queer asylum claims. I began by collecting appellate court decisions regarding queer asylum by conducting a Lexis Nexis search for cases containing any of the following keywords: sexual orientation, homosexuality, gay, lesbian, sexuality, homosexual, or sexual preference.[9] I further narrowed these results by selecting only cases dealing with asylum and then cross-referenced each set of search results with the others to eliminate duplicates, creating a final list of 153 cases. I adopted a holistic coding method, using both inductive and deductive approaches in analyzing court decisions. I began coding for particular themes, such as status/conduct distinctions in sexuality, discussion of stereotypes, and identity categories that were derived from the prevailing critiques of asylum discussed above, but I allowed other themes to emerge from the data. I also collected the one publicly available BIA decision regarding queer asylum, U.S. Citizenship and Immigration Services (USCIS) training documents, immigration court guideline manuals, and various other government documents that I coded in the same way.

Limiting my analysis to appellate and BIA decisions is somewhat problematic because it selects for cases that have been rejected by an immigration judge and appealed at least once. However, immigration court records and most BIA decisions are not published. Appealed cases may be somewhat different from those that do not get appealed. At a minimum, appealed cases have been denied at least once, and those who appeal unfavorable decisions are more likely to have legal representation.[10] But by accounting for these limitations published cases can still be extremely informative (Siegelman and Donohue 1990). To correct for any bias introduced by my use of BIA and appeals decisions, I supplemented my document analysis with 18 months of participant observation at Advocates for Immigrant Rights (AIR),[11] an immigrant rights organization with a national presence on queer immigration issues that provides legal representation to queer asylum seekers. I provided research assistance in exchange for being allowed to observe their weekly case update meetings where the legal team discusses the status of their cases

[9] I conducted this search on July 8, 2013, so my results reflect cases as of that date. I excluded search terms such as "transgender" because I am specifically interested in cases dealing with sexuality rather than gender identity.

[10] According to Ramji-Nogales et al. (2009), approximately two-thirds of asylum seekers are represented by attorneys at the immigration court level. By contrast, 84% of petitioners in my sample of appellate cases had legal representation.

[11] For confidentiality, this is not the organization's real name. My observations with AIR occurred between July 2013 and December 2014.

as well as client intakes from that week and makes decisions on which cases to accept, reject, retain in-house, and send to their network of pro-bono attorneys. Through AIR, I was also able to observe eight asylum merits hearings, which allowed me to see the workings of hearings in real-time at the immigration court level (as opposed to the BIA or appellate level that my other data concern). In addition to the on-going informal questioning I engaged in with the legal team at AIR, I conducted more formal semistructured interviews with two attorneys and two paralegals in the practice. For ethical reasons, I refrain from direct discussion of AIR's decisions regarding particular clients, though my observations with them do inform my analysis, particularly in regard to lawyer's goals and their framing of arguments. Furthermore, I assign pseudonyms for asylum seekers, paralegals, and judges that I describe in my field work.

Finally, I conducted five semistructured interviews with immigration lawyers from various parts of the United States and with one immigration judge.[12] Interviewees were chosen for their national presence on queer immigration issues or their considerable experience with queer asylum claims, or both. Interviews lasted about one hour, and I transcribed and coded each interview using the coding scheme derived from my document analysis. Unlike other people involved in this study, I use the actual names of lawyers I interviewed because they gave the interviews in their capacity as public experts and granted permission for their names to be used.

Findings

Immutable Identities, Fixed Categories

Setting the standard for what constitutes a "particular social group," the BIA stated in *Matter of Acosta* (1985: 233) that "whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences." This definition is more flexible than many critics assume. One could include religion, a category explicitly protected by the 1980 Refugee Act, in this definition of immutable. Even though one can change religions, it is protected as a trait that one should not be compelled to change. Sexual orientation is similar in this respect. In fact, the USCIS training module for adjudicating queer asylum claims makes this

[12] Though I attempted to recruit additional judges, most declined to be interviewed.

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clear in its definition of a "particular social group": "the group is comprised of individuals who share a common, innate characteristic–such as sex, color, kinship ties, or past experience–that members cannot change or … the group is comprised of individuals who share a characteristic that is so fundamental to the members' identity or conscience that they should not be required to change it" (USCIS 2011: 16). The manual goes on to state that asylum officers can choose whether to classify sexual orientation, gender identity, or intersexuality as either innate or fundamental but that both characterizations are protected.

Bisexual claimants frequently disrupt preconceived notions of sexuality as either heterosexual or homosexual and fixed. As the Immigration Equality Asylum Manual[13] states of bisexual petitioners, "Asylum adjudicators often want the issues in cases to be black and white. It is not hard to imagine an asylum adjudicator taking the position that if the applicant is attracted to both sexes, she should simply 'choose' to be with members of the opposite sex to avoid future persecution." Indeed, while questioning José Lopez, a bisexual Guatemalan man, whose hearing I observed, the DHS attorney asked, "So being with a man is something you can control or not?" to which José, slightly confused by the question, answered yes. During redirect his lawyer corrected the confusion:

> Lawyer: "The government attorney asked you earlier if you can control who you're with, and you said yes. But you can't control how you feel, right?"
>
> José: "No."
>
> Lawyer: "And how do you feel?"
>
> José: "I notice pretty girls, but I am more attracted to men."

When I asked Victoria Neilson, former Legal Director for Immigration Equality, if she had ever had a client who had past heterosexual relationships and how she went about showing that the client could still be queer, she offered a response that I quote at length for its edifying power:

> Sure, that comes up with some frequency. I think … some people are bisexual, and … I think that identity is probably more misunderstood than L, G, or T. I think there's sort of a different narrative if somebody had a, say, heterosexual marriage in the past. One is like, "Well I didn't come out until

[13] Available online at http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/

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> later in life," which seems pretty easy to comprehend. Or it could be like "I kind of always knew I was gay, but I tried to marry to see if that could make me 'normal,'" or, "I tried to marry to please my family." I think that narrative works. I think a true narrative that's a little harder for an adjudicator to understand is, "Yes, I loved my husband, and that could've worked. But it didn't just because of our personalities. And now I'm in love with a woman, and that's who I want to be with the rest of my life." I think that is also true in some instances, but I think that can be harder for an adjudicator to understand, how like your sexual orientation is immutable and fundamental to identity if it's mutable.[14]

Though Neilson admits that bisexual claims are often more difficult, they are by no means impossible. Indeed, all of my interviewees had successfully represented bisexuals or claimants with past heterosexual experiences—sometimes even spouses and children. These cases depend heavily on claimants' credibility and how they will be perceived in their home country. As immigration attorney Michael Jarecki stated: "[T]here's just a heteronormative understanding of lifestyle in a lot of these countries and then there's 'other.' And that 'other' can be everything else, like anything from any different sexual desire from maybe cross-dressing to leather, to any of these—that's all grouped together . . . "[15] Thus, if one can show that a bisexual will be perceived as "other" in his/her home country, claims are winnable. To complicate matters further, Aaron Morris, Legal Director for Immigration Equality, was also in the process of putting together a claim for a couple, one of whom identified as a bisexual woman while the other identified as genderqueer[16] with an ambiguous sexual orientation. That is, he uses masculine pronouns but is biologically female, keeps many identification documents under a female name, and presents androgynously. Cases like these disrupt notions that gender and sexuality are static and essential.

Some appellate decisions also suggest that the immutability standard has some flexibility. In 2005, the Ninth Circuit ruled on the case of Miguel Pozos, a (possibly) gay man from Mexico. Pozos admitted homosexual conduct while living in Mexico (part of his persecution claim included being forced to work as a prostitute) but insisted that he had not engaged in any homosexual sex since coming to the United States. He testified that he

[14] Author interview with Victoria Neilson, August 13, 2013, New York City, NY.

[15] Author interview with Michael Jarecki, February 7, 2014, Chicago, IL.

[16] Genderqueer is a term that some adopt to signal that they do not identify with any specific gender.

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continued to have sexual fantasies about both men *and* women and disavowed a homosexual identity. The decision states that "Both Pozos and the social worker who examined him testified that they did not know what Pozos's sexual orientation was," and later that "[Pozos] was diagnosed with sexual aversion disorder, and has eschewed sexual relations with either gender" (*Pozos v. Gonzales* 2005: 632). The court ultimately granted Pozos asylum based on imputed homosexual identity without ever settling on what his sexual orientation was. This case is unique but suggests that rigid sexual identity categories viewed as immutable are not always necessary for successful asylum claims.

Nevertheless, and as my observations with AIR corroborate, lawyers do not routinely make strong constructionist arguments about sexuality in asylum hearings for at least two reasons. First, it is more pragmatic to leave undisturbed the notion that sexuality is inborn and immutable for most cases; the Immigration Equality Asylum Manual even advises lawyers to avoid phrases like "sexual preference" or "lifestyle" so as not to imply choice. These risk-reduction strategies fit readily with prevailing notions of sexuality in the Western world and are easily digestible for adjudicators (Berger 2009; Murray 2014). Second, many asylum seekers themselves view their sexualities as inborn and constitutive of their true selves. For instance, Maria, a lesbian claimant from Mexico, said in response to being asked why she wanted to stay in the United States that "I want you to give me the opportunity to be me," and Liu, a gay Malaysian asylee, said that being in the closet would be "going against who I am."[17]

Yet narratives suggesting more fluidity and choice in sexual identity can be valid, and as the above cases show, asylum adjudicators are increasingly recognizing this. Indeed, the immigration judge I interviewed evinced an extremely sophisticated view of sexuality and had even granted protection to some petitioners claiming "queer" as their identity. It is certainly tentative, but wider recognition of fluid and ambiguous sexual identities requires us to update some critiques of asylum law, particularly those suggesting that bisexual and sexually fluid applicants cannot be successful (cf., Sin 2015; Southam 2011). This issue dovetails with another prominent critique of asylum law, which contends that petitioners must adopt Western identity categories and conform to Western stereotypes of gay identity to make successful claims, and that such stereotyping can serve as the basis for the universalization of identity categories.

[17] Author observations. For the privacy of claimants, I do not provide dates or locations of the asylum hearings observed.

Stereotypes Are My Best Friend and My Worst Enemy

No one involved in queer asylum would maintain that gender stereotypes do not play a role, and that is not my assertion here. Attorneys often describe their clients as gender nonconforming when it is true, and they do so for a reason.[18] As Aaron Morris states, "[S]tereotypes are my best friend and my worst enemy. If you walk in and you are like a male dancer hair stylist who is especially effeminate and meets the expectation of what a gay guy might look like, probably they're not going to be that concerned about your sexual orientation." Conversely, he continues, "If you are more of a linebacker with a wife and two kids who has either naturally developed almost no stereotyped sexual orientation aspect or attribute or has tried very hard not to do those things, then it's harder."[19] Moreover, gender nonconformity often plays into persecution claims for queer claimants, as one exchange from my field notes illustrates:

> Lawyer: Are people who are merely perceived to be gay likely to be targeted for violence?
>
> Expert witness: Yes, male bodied people who engage in gender non-conforming behavior are likely to be assumed gay. It is really gender non-conformity that is punished and assumed to mean gay in Malaysia.

Even so, being an effeminate man does not guarantee a successful claim, and being masculine does not guarantee an unsuccessful one. As all of my interviewees proclaimed, and my observations corroborated, being "feminine" may help, but regardless of a claimant's gender expression, it is the overall narrative and evidence that make or break a claim. Daniel Tenreiro, an immigration attorney, said:

> I know there's been some controversy, and I totally disagree with some of the—like a *New York Times* article that was out there a few years ago that basically said you have to femme it up. I think, unless you're a drag queen, then by all means be a drag queen and be who you are. But if you're not, I think that can actually really backfire because it's not going to be believable.[20]

A variety of advocates have provided input, suggesting ways besides "common sense" understandings of sexuality to

[18] In four of the eight hearings I observed, claimants described themselves or were described by their lawyers as gender nonconforming.

[19] Author interview with Aaron Morris, August 13, 2013, New York City, NY.

[20] Author interview with Daniel Tenreiro via telephone, September 16, 2013.

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adjudicate queer asylum claims, and, in turn, reliance on stereotypes and Western identity categories has decreased over time.

In 2011, Immigration Equality, the most prominent national advocacy organization for queer immigrants, helped USCIS redesign its training for asylum officers; in fact, the Legal Director of Immigration Equality now trains all new asylum officers on handling queer asylum claims and even trains some immigration judges in the New York City area.[21] Reflecting the input of advocates, the training manual now includes explanations of LGBT terms. Seeking to address the issue of sexualized stereotypes, the manual states, "Some adjudicators mistakenly believe that social visibility or distinction requires that the applicant 'look gay or act gay.' In this context, social visibility or distinction does not mean visible to the eye. Rather, this means that the society in question distinguishes individuals who share this trait from individuals who do not" (USCIS 2011: 16). The manual goes on to explain that applicants may express themselves differently than LGBTQ people in the United States and may claim to be visible as a sexual minority in his or her home country even though s/he does not seem stereotypically gay by U.S. standards. It further elaborates that cultural cues regarding sexuality vary from culture to culture and that some applicants may not even identify with labels such as "gay" and "lesbian." Addressing this issue during our interview, Victoria Neilson said, "[S]omebody might not come in and say, 'I'm a transgender woman from Ecuador.' She might just come in and say 'I'm a woman' or 'I'm an effeminate gay man' even though they look like a woman … they don't have to adopt the … politically correct New York/San Francisco language to have an identity that should be protected."[22] As this suggests, it is not necessary to adopt a Western identity or enact a stereotypical gender performance to make an asylum claim, and adjudicators are increasingly aware that they cannot base universal notions of what it means to be gay on Western stereotypes. Attorneys, in turn, capitalize on this increasing understanding of cultural relativism to begin framing inchoate social constructionist understandings of sexuality. The following appellate case demonstrates this point.

Critics widely cite the case of Geovanni Hernandez-Montiel as problematic because, they argue, it conflates gender and sexuality and bifurcates gay men into "feminine" and "masculine" groups (Kimmel

[21] This came about through a "listening session" held by the DHS where Immigration Equality suggested that there should be training for LGBT issues to which DHS agreed. Immigration Equality subsequently provided trainings and worked with USCIS to produce a training module.

[22] Author interview with Victoria Neilson, August 13, 2013, New York City, NY.

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and Llewellyn 2012; Miller 2005). These critiques are not without merit, but a more nuanced reading of *Hernandez-Montiel* (2000) offers insights missed by critics. Hernandez-Montiel was a Mexican man who sought asylum in 1995 in the United States after being abused by his family and schoolmates and being raped and assaulted by the police. During his hearing, Professor Thomas Davies testified that different groups of homosexuals in Mexico face varying levels of abuse. Gay men who take the stereotypical "female" role, he stated, are subject to greater abuse and discrimination, and thus, "gay men with female sexual identities" constitute a distinct group in Mexico. The judge, however, found Hernandez-Montiel's social group to be "homosexual males who wish to dress as a woman [sic]" and concluded that his abuse was due to his choice to dress in women's clothing, not because he was gay. On appeal, the BIA agreed with the judge, classifying Hernandez-Montiel's social group as "homosexual males who dress as females" and further that "he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual" (*Hernandez-Montiel* 2000: 1089). The Ninth Circuit issued a decision in 2000 that roundly criticized both the judge and the BIA. Drawing on Professor Davies' expert testimony, the court ruled that "gay men with female sexual identities" constitute a particular social group in Mexico: "Their female sexual identities unite this group of gay men, and their sexual identities are so fundamental to their human identities that they should not be required to change them" (ibid: 1094). The court further noted that "Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails" (ibid: 1094). Hernandez-Montiel was rescripted from a cross-dressing prostitute to someone with a fundamental sexual identity manifested through his physical appearance.

As noted above, one line of critique against this decision revolves around the apparent conflation of gender and sexuality in the court's ruling. Sexualities scholars have argued for a distinction between gender and sexuality for some time (cf., Sedgwick 1990), so to suggest that sexuality manifests through gender presentation seems only to reinscribe stereotypes of feminine gay men and masculine lesbians. Critics subscribing to this view seem to prefer to classify Hernandez-Montiel as a transsexual. This construction is overly narrow. First, Hernandez-Montiel self-identified as a "gay man with a female sexual identity."[23] Second, queer communities in Mexico use a variety of classificatory schemas to construct sexual identities, some based on gender role, others based on object choice, and still others, like

[23] Author interview with Aaron Morris, August 13, 2013, New York City, NY.

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Hernandez-Montiel's, that are a hybrid of the two (Carrillo 2002; Prieur 1998), and none of these necessarily map squarely onto institutionalized U.S. identity categories. Once contextualized, critiques centering on gender and sexuality conflation become somewhat flaccid. Rather, the decision sets a precedent for accepting sexual identities that are unfamiliar to Americans and pushes adjudicators to carefully consider cultural context.[24]

The second concern with *Hernandez-Montiel*—that it dichotomizes gay men into feminine and masculine groups where the feminine is subject to greater abuse—was borne out in some cases at the immigration court and BIA levels, but appellate courts corrected these cases. Noting that some immigration judges had been misinterpreting the *Hernandez-Montiel* decision, the Ninth Circuit wrote in *Karouni v. Gonzales* (2005: 1172):

> Though the issue presented in *Hernandez-Montiel* was narrowly cast to encompass only 'gay men with female sexual identities in Mexico,' *Hernandez-Montiel* clearly suggests that *all* alien homosexuals are members of a 'particular social group' within the meaning of the INA ... Thus, to the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a 'particular social group' (emphasis in original).

Likewise, in *Pena-Torres v. Gonzales* (2005), the Ninth Circuit again clarified that "homosexual males in Mexico" constituted a particular social group. In *Boer-Sedano v. Gonzales* (2005), where an immigration judge ruled that the majority of anti-gay violence in Mexico was against transvestites and that as a "low-profile, non-transvestite gay man," Boer-Sedano would not be subject to persecution, the Ninth Circuit once again corrected the judge and BIA. A judge rendered a similar judgment in *Comparan v. Gonzales* (2005), which was also remanded by the Ninth Circuit on the same grounds. Notably, after these cases, all of which reached the Ninth Circuit in 2005, no further cases have reached an appeals court due to misinterpretation of *Hernandez-Montiel*. Unfortunately, cases where judges used inappropriate stereotypes did continue, but as the following cases will show, such decisions are routinely vacated by appellate courts.[25]

[24] Though one might note that this case could also be misinterpreted to suggest that Latin American sexualities are fully defined along gendered lines, risking a problematic neocolonial rendering of non-U.S. residents as "less modern" or "more traditional others."

[25] This may mean that the most vulnerable, including those without legal representation, may more frequently be subjected to stereotyping, though it is difficult to know with certainty given data limitations.

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In the Eighth Circuit case *Shahinaj v. Gonzales* (2007: 1028), for instance, an immigration judge had ruled that "Neither [Shahinaj]'s dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual, nor is there any indication that he engaged in a pattern or practice of behavior in [sic] homosexuals in Albania, which gives expression to his claim at present." The Eighth Circuit vacated the decision due to the judge's use of stereotypes and remanded with instructions that the case go to a different judge. In an especially egregious case involving a man from Guyana, the immigration judge wrote that "violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people" (*Ali v. Mukasey* 2008: 487) before going on to berate the claimant. This decision, too, was struck down by the Second Circuit. An immigration judge's adverse credibility decision based on her conception of how an Iranian gay man would act was similarly vacated by the Ninth Circuit (*Hassani v. Mukasey* 2008). In the highly cited *Razkane v. Holder* the Tenth Circuit remanded the case based on the judge's inappropriate use of stereotypes to discredit the claimant. The unanimous decision included a strongly worded admonishment of such arbitrariness in the law:

> To condone this style of judging, unhinged from the prerequisite of substantial evidence, would inevitably lead to unpredictable, inconsistent, and unreviewable results. The fair adjudication of a claim for restriction on removal is dependent on a system grounded in the requirement of substantial evidence and free from vagaries flowing from notions of the assigned [immigration judge]. Such stereotyping would not be tolerated in other contexts, such as race or religion (2009: 1288).

Citing this passage, the Eleventh Circuit struck down another decision dependent on an immigration judge's personal perception. In *Todorovic v. U.S. Attorney General* (2010: 1323), the IJ had written that "the Court studied the demeanor of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay." Though appeals to circuit courts are rarely successful, it is notable that *every* time a case came before an appellate court where the IJ used stereotypes to determine a claimant's sexual orientation, it was vacated and remanded. It is also noteworthy that *Todorovic* in 2010 was the last case in my dataset to involve stereotyping issues. While this certainly does not mean that stereotyping is no longer an issue—indeed, my interviews demonstrate the opposite—it does

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suggest that stereotyping may be less of an issue than it previously was and that gender boundaries may not be getting policed as strictly as they once were. The efforts of advocates educating courts combined with precedential appellate decisions may account for this change.

Nonetheless, while advocates are open to unfamiliar sexual identities and allow clients to use whatever terminology they wish in their personal affidavits, lawyers themselves may impose familiar labels on clients to make them legible to the court (Berger 2009). As immigration attorney Keren Zwick said:

> A lot of our, especially our Spanish speaking clients … if they don't use the word "gay" then we use the words that they use because … being effective is really in my mind a matter of … using the terminology that they feel most comfortable with. And sometimes it's a matter of educating them. So explaining … do you feel … inside like you identify as female? And if they answer the questions that are markers of being a transgender person even though they've never perhaps used those words to describe themselves … explaining to them that in the United States this is what that word means, and this is how you can use it if you want.[26]

Similarly, in discussing how she handles Latino men who call themselves "gay" but fit American understandings of transgender, Julie Birch, a paralegal at AIR, suggested:

> I would probably say transgender in the brief. I think it's a little bit easier to just put it in terms of this is a word that we know describes what they're trying to say to us. And so it's kind of easier as far as explaining it to the person who's adjudicating their case.[27]

Even though interviewees indicated that they sometimes guide clients toward Western categories, all also suggested that they would still help a claimant who did not adopt such labels, as immigration attorney Aneesha Gandhi explained:

> But when it comes to the law … I think that we are trying to fit it into this very small grouping of case law that we have so far. So I think that making a new argument, while I know our project would do it if the opportunity arose … right now at least we're not trying to push because we don't have a

[26] Author interview with Keren Zwick, January 24, 2014, Chicago, IL.

[27] Author field observations.

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> client really that is saying "I'm queer" or something like that. We're not trying to push that.[28]

Thus, all of my interviewees suggested that oftentimes it is a matter of educating clients about available identity categories, and for claimants who do not already use Western labels, it is frequently because they simply had not heard the words before or are reluctant to use them because of the negative connotations they carried in their home countries (Berg and Millbank 2009). Though lawyers sometimes guide clients to Western labels, my interviewees all asserted that they do not force labels on claimants and are willing to do whatever works for the applicant. Indeed, AIR recently accepted a client who identifies as "pansexual" and rejects gendered pronouns.[29] Nevertheless, "educating" clients about Western labels may involve subtle coercion on the part of lawyers, even if it is unintentional.

Taken together, these data indicate several changes in queer asylum in the past 15 years. First, it appears that gendered stereotypes of gayness are less prominent than they once were, and when such erroneous methods are used to determine a claimant's sexuality, they are routinely remanded by appellate courts. Second, Western sexual identity categories are not prerequisites for successful asylum claims. Finally, courts are not straightforwardly universalizing Western identity categories. Rather, non-Western sexual identities are being incorporated into legal conceptions of sexuality in the United States via asylum case law and the migration of immigrants to the United States. Nevertheless, my data also show that asylum seekers are still categorized using Western categories, even when courts use such labels in strange ways, such as labeling someone a "gay man with a female sexual identity." Encouragingly, some jurisdictions are beginning to classify queer asylum seekers simply as "sexual minorities" rather than attempting to fit each person into a particular identity.[30] Though guidelines and precedential court decisions direct government actors not to use stereotypes, it is difficult to know how much officials are still influenced by their preconceived notions of what it means to be queer, and, as my data show, immigration attorneys often take advantage of "masculine lesbians" and "feminine gay men" stereotypes if they believe it will help their cases. Claimants may even use such stereotypes

[28] Author interview with Aneesha Gandhi, January 24, 2014, Chicago, IL.

[29] This client qualified for another form of immigration relief and is therefore unlikely to make an asylum claim.

[30] Author interview with Aaron Morris, August 13, 2013, New York City, NY. Also see USCIS (2011).

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when their culture subscribes to them. Kwame Twumasi, a gay Togolese asylum seeker did just this during his testimony: "I was like a girl. Only difference is I have a penis."[31] This question of what it means to be queer leads directly to my last line of inquiry, namely, is sexuality defined by status or conduct?

Status or Conduct?

The question of status versus conduct arose in the first asylum hearing I observed. Kofi Addai, a young Ghanaian man, testified that he had sex with another boy when they were both about 12, and since that time he had not engaged in any sexual intimacy with men because he was afraid for his life. In fact, he had tried to have a romantic relationship with a woman, but, according to Kofi, she broke up with him because he was "like a woman." During cross-examination, the DHS attorney jumped on the chance to show that Kofi was not actually gay due to his relationship with a woman, asking, "Did you have sex with a girl?" Kofi answered that he had tried to have sex with the woman he dated briefly. The DHS lawyer followed up, "Did you have sex through to completion?" He had not. But even if he had, would that change anything? Kofi ultimately received asylum, but based on my research, these types of questions are not uncommon. In Kwame's hearing, introduced above, the DHS attorney questioned the claimant over his knowledge of the location of a local gay club. Both of these lines of questioning are examples of *conduct* associated with being gay, and they bring us full circle back to *Toboso-Alfonso* (1990), the precedent-setting first queer asylum claim, which took careful pains to distinguish homosexual identity from homosexual conduct, explicitly protecting only the former.[32] But, as these examples show, courts often rely on conduct to determine identity, collapsing the two in the process. Commenting on how he proves sexuality, Aaron Morris speaks to this issue:

> You know, there's a judge, for example, in New York who's very fair, he's kinda old school, like old white guy. He always wants a letter from a paramour—that's like his catchphrase—"I need a letter from a paramour." I'm like what if he's never had a boyfriend? What if he's having clandestine sex in toilets? There's a whole host of things that manifest themselves

[31] Author field notes.

[32] The relationship between status and conduct has been an issue in claims based on religion and political opinion, as well. However, as Anker and Ardalan (2012) point out, courts have more clearly delineated the types of conduct reasonably associated with religious practice and political expression while the same is not necessarily true for sexuality claims. Sexual orientation is also somewhat unique because U.S. audiences tend to view it as inhering in the body (and also as visible through the body via gender nonconformity, etc.) and, therefore, not always dependent on conduct.

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> as a gay person that may not meet the expectation of the letter from a paramour. But that judge has a hard time granting a case unless there's someone in this country who can confirm your sexual orientation based on the fact that you have been gay together.[33]

This question of status versus conduct has been central in determining queer identities. Aside from gendered stereotypes, what actually *constitutes* queerness? For immigration courts, and the legal system in general, queer *acts* seem to signal queer identities (Halley 1996). Some decisions disrupt this easy connection while others reinforce it.

USCIS guidance to asylum adjudicators, for instance, states that, "The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about 'what he or she does in bed' is never appropriate" (USCIS 2011: 34). But in relation to determining persecution, the same manual states that "punishing conduct or sexual activity between consenting adults of the same sex is tantamount to punishing a person simply for being gay. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution and not simply prosecution" (ibid: 19). This seems to suggest, then, that persecution may be based on sexual activity because it implies identity, but determining credibility should be based on a claimant's felt identity. Theoretically, this formula could constrain some asylum seekers who do not feel they have a queer identity, but in practice it seems that the status/conduct distinction is more of a traditional holdover than an exclusionary mechanism. Though imputing a queer identity onto a claimant may be seen as a form of symbolic violence, collapsing identity and conduct essentially allows petitioners to make a claim based on *either*, which actually results in an expansion of possible queer asylum claims.

This rejection of a status/conduct distinction is laid bare in *Karouni v. Gonzales* (2005: 1173) when the Ninth Circuit writes: "[W]e see no appreciable difference between an individual … being persecuted for being a homosexual and being persecuted for engaging in homosexual acts. [Either way] the persecution … qualifies as persecution on account of … membership in the particular social group of homosexuals." In this case, the Attorney General argued that Karouni would only be persecuted in Lebanon for homosexual *acts*, not his *status* as a homosexual. Aside from the other flaws in the government's argument, the court goes on to say that "the Attorney General appears content with

[33] Author interview with Aaron Morris, August 13, 2013, New York City, NY.

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saddling Karouni with the Hobson's choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy. In our view, neither option is acceptable" (ibid: 1173). Facing a slightly different argument, the Third Circuit also rejected a government assertion that an Argentinean man was only persecuted because he attended gay bars (*Maldonado v. Attorney General* 2006). The government argued that because Maldonado was only persecuted while engaging in a particular activity (leaving gay bars), he was free to change that behavior and avoid persecution. The Third Circuit drew on *Karouni* to rule that being persecuted for attending a gay club was tantamount to being persecuted for being gay because the attackers presumably believed Maldonado to be gay based on context. In both *Karouni* and *Maldonado*, circuit courts took activities (sex or bar attendance) to imply identity and found that they were grounds for asylum. Clearly, then, courts view conduct as a protected aspect of sexuality. However, it also seems that conduct is not always necessary for identity.

In *Ali v. Mukasey* (2008: 487), for example, an IJ ruled that Ali would "need a partner or cooperating person" to even be identified as homosexual, implying that homosexual sex or coupling was *necessary* to a gay identity. The Second Circuit explicitly rejected this statement in its decision, suggesting that gay sex or relationships may not always be a necessary component of a queer identity. Similarly, in *Razkane*, cited above, an IJ ruled that Razkane would only be persecuted in Morocco if he engaged in "the type of overt homosexuality that would bring him to the attention of the authorities or of the society in general" (*Razkane v. Holder* 2009: 1286). Though the Tenth Circuit remanded this case based on the IJ's use of stereotypes, it also suggests that conduct or activity is not required to claim a queer identity. Conversely, some cases are successful where identity is only *imputed* from conduct.

In the case of Miguel Pozos discussed above, for example, Pozos explicitly stated that he was *not* homosexual, though he complicated that statement by saying that he had sexual fantasies about both men and women. However, part of his persecution claim involved forced same-sex prostitution. There is thus a disjuncture between Pozos' identification and conduct (and we might add his desires, as well, if we take into account his fantasies). Nevertheless, Pozos received asylum for sexual identity. Before Pozos, in the exceedingly strange case of Kwasi Amanfi, the Third Circuit explicitly ruled that one can claim asylum for imputed sexual identity. Amanfi, a Ghanaian man, claimed to have been kidnapped by a cult that planned to sacrifice him, but he had learned from his grandfather that the cult believed

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homosexuals to be impure and unsuitable for sacrifice. He shared this knowledge with a fellow prisoner, and the two conspired to be caught engaging in a homosexual sex act by guards, which they did. After allegedly enduring 2 months of abuse in the custody of Ghanaian police, Amanfi escaped and claimed asylum in the United States, where the Third Circuit ruled that a claim based on imputed homosexuality was possible because persecution ultimately depends on what others label the victim, not how the victim himself identifies (*Amanfi v. Ashcroft* 2003). This precedential decision borders on granting asylum protections explicitly to sex acts, but it continues to connect those acts to an identity, if only an imputed one. Conceivably, however, imputed identity claims could allow a host of queers who reject defined identity categories to avail themselves of asylum, though there is no evidence that this is happening yet.

As this section demonstrates, the status/conduct distinction is becoming increasingly muddied. Courts seem to recognize that persecution can arise from conduct alone, but they continue to couch this recognition in terms of identity, either by supplying the claimant with an identity or granting protection based on imputed identity. This is likely because *Toboso-Alfonso* (1990) explicitly protects only identities, but it also seems like an anachronistic holdover from the *Bowers v. Hardwick* (1986) era when the "act defined the class." Notably, other areas of asylum law, such as protections for political opinion and religion, protect something akin to conduct (e.g., political activism and worship), yet officials have been wary of extending such protections to sexual conduct without the veneer of identity. The fact that we do not protect sexual conduct, per se, suggests that asylum remains a regulatory passageway where identities are assigned and immigrant populations are managed by the state. Nevertheless, the flexibility of those assigned identities and what conduct implies has allowed valid asylum claims to proliferate beyond just the "immutable homosexual" outlined by *Toboso-Alfonso* (1990) over 25 years ago.

Discussion

Lawyers and adjudicators ambivalently draw on two discourses of sexuality—one essentialist and another constructionist—in order to make claims about and understand sexual identity in queer asylum cases in the United States. As a result, conceptions of sexuality in these claims alternate between disrupting and reinforcing currently dominant ideas of sexuality as inherent and biological. Lawyers often reify notions of innate

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sexuality for strategic purposes—that is, in order to make sexuality claims readily digestible for American adjudicators (Berger 2009; Shuman and Bohmer 2014). After all, the ultimate responsibility of the attorney is to secure a positive outcome for his/her client, and "strategic essentialism" (Spivak 1996) is often the best way to accomplish this. Many attorneys themselves believe in a biological basis to sexuality, some more than others, so, at times, essentialist arguments simply reflect a view that an attorney is comfortable asserting. Nevertheless, queer asylum advocates have tried to expand legal understandings of sexuality and identity, both through precedent-setting court cases and administrative means. These expansions often take the form of incipient social constructionist understandings of sexuality through the lens of cultural relativism or sexual fluidity—and, it is important to note that, like essentialist arguments, constructionist ones may also be strategic. If a client identifies as "genderqueer," for instance, it may make more sense to present a constructionist argument from the start. My findings are thus consistent with Ewick and Silbey's (1995) assertion that narratives can both reinforce and disrupt hegemony depending on the context. Asylum claims that connect individual lives to social structures, such as those that reveal state failures to protect citizens or that sexuality is contoured by cultural forces, wield the potential to render hegemony visible and, therefore, challengeable, while those that forward essentialist arguments are less likely to do so. In light of these findings, we must reconsider some of the critiques levied against LGBTQ asylum.

My data suggest that concerns about defining sexuality as "immutable" rarely affect applicants in practice today. In fact, the law allows for sexuality to be classified as "fundamental," similarly to religion or political opinion, and thus potentially leaves room for more constructionist accounts of sexuality. Indeed, USCIS training material explicitly provides constructionist definitions of gender and gender identity and implicitly suggests that sexuality, too, is socially constructed by acknowledging the myriad ways that sexual expressions, behaviors, and identifications vary from culture to culture. Moreover, all of my interviewees had successfully represented bisexual claimants or claimants who had heterosexual relationships in the past. Often their arguments in such cases *do* verge on biologizing sexuality by arguing that the petitioner simply had not realized s/he was gay yet or that social circumstances pressured him or her into a heterosexual relationship (though, as discussed above, this is partially strategic). But even this narrative implicitly recognizes the malleability of sexuality, and evidence suggests that clients who simply have fluid sexualities can also make valid claims as long as their narratives are credible. Finally, we must acknowledge that perceptions of

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sexuality as innate and immutable pervade our culture, and for asylum law to even implicitly recognize fluidity and constructedness is a remarkable development.

Critiques centering on asylum law's dependence on Western identities and stereotypes also warrant reconsideration. As we saw above, many issues remain in this area, but things are slowly changing. The government has signaled a willingness to acknowledge sexual identities unfamiliar to American audiences, as in *Hernandez-Montiel* (2000). Problematically, we still use Western terms to create these identity categories, but this too is changing as evidenced by the New York area asylum offices beginning to use "sexual minorities" to identify LGBTQ cases rather than forcing each claimant into a predetermined box. Stereotypes represent a more obstinate problem. Part of this is likely because courts are hesitant to define sexuality (Goldberg 2002), yet that is precisely what they must do in queer asylum claims. Relying on supposed visible markers of an identity thus may allay some judicial concerns over the indeterminacy of sexual identity. My data suggest that reliance on stereotypes has decreased significantly since the inception of queer asylum and that there are stricter guidelines and clearer judicial precedent to guide adjudicators today. Nevertheless, the use of stereotypes has produced lasting effects that must be remedied. For instance, some potential asylum seekers and lawyers falsely believe that for a man to receive asylum he must be effeminate.[34] Part of this view is likely due to the highly publicized nature of cases like that of Jorge Soto Vega[35] and the absence of media attention surrounding more quotidian cases that would work to dismantle this perception.

Despite improvements, asylum remains a regulatory process (Kimmel and Llewellyn 2012; Shuman and Bohmer 2014). Asylum seekers must prove their sexual identities to the state in a highly formalized setting and offer a narrative that must be deemed credible by powerful state actors. The state, furthermore, engages in the biopolitical practice of classifying asylum seekers, rendering sexual identities visible and thus amenable to the state's regulatory oversight. As Chandan Reddy (2005: 115) contends, the legal archive is not a passive repository of information, but an "active technique by which sexual, racial, gendered, and national differences, both historical and future, are suppressed, frozen, redirected as the occasion for a universal knowledge." On

[34] Author field observations.

[35] Soto Vega was a "masculine" gay man from Mexico whose asylum claim was initially rejected by a judge because he "looked heterosexual" and could thus pass as such in Mexico (see Hanna 2005).

the one hand, the flexibility of the law allows asylum seekers to make citizenship claims based on formerly excluded queer identities and may form the basis for recognition of new sexual identities in other institutional realms. On the other, this flexibility lends durability to the law as a regulatory structure (Sewell 1992; Silbey and Ewick 2003) and upholds its supposed objectivity.

Conclusion

In this paper, I have argued that the asylum process is both regulatory and generative of sexual identities and that the law plays a powerful role in shaping sexual identity. I have further shown how strategic legal actors take advantage of the ambiguity of the law to craft more inclusive sexual identity categories. Queer asylum claims, in particular, often seem to push the boundaries of established conceptions of sexuality in order to engender changes in legal definitions of sexuality and to expand the categories worthy of protection as a "particular social group" under asylum law. This occurs partly because courts are forced to confront gender and sexual identities unfamiliar to U.S. audiences and adapt existing legal protections for asylum seekers to fit these new social groups. But legal advocates dedicated to the issues of queer immigration have also proved an instrumental force in this area of law through educating immigration officials about sexuality and sexual expressions around the world (both through trainings and in court) and pushing forward impact cases just as other "cause" lawyers do (Sarat and Scheingold 2005). As a Foucauldian notion of power and normalization would suggest, change happens incrementally, with particular identities gaining institutional recognition. Recognized identities then constrain subsequent asylum seekers who may not fit established categories. For instance, after the *Hernandez-Montiel* (2000) decision, many lawyers began classifying clients as "gay men with female sexual identities" because it was an institutionally accepted label. It took clarification from the Ninth Circuit, as described above, before attorneys were comfortable using only "gay man" as a label, though, of course, this simply established another norm. Presumably, this process could continue ad infinitum to encompass a greater diversity of identities, demonstrating what Hacking (2007) calls "looping effects," wherein institutional and lay knowledge of identity constantly interact and "loop" back onto each other to create ever-changing understandings of identity. Nonetheless, encounters with the state *do* require classification. A radically queer anti-identity approach does not seem possible

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in the current architecture of recognition, though imputed identity claims may be one route to such a challenge.

Though the United States has historically sought to produce a heterosexual nation and to shore up the homosexual/heterosexual binary (Canaday 2009), queer asylum suggests that this divide is not so clear, and part of the reason is, paradoxically, because of the state. Recognition of queer sexual identities through asylum law increasingly blurs any (imagined) crisp dividing line between heterosexuals and homosexuals, as bisexuals and even those with imputed and ambiguous sexual identities are officially recognized by the state. Just as the state contributed to the consolidation of a modern gay identity through the legal regulation of sexuality and thus paved the way for gay rights claims that we see today (Canaday 2003), the law may now be contributing to the consolidation of other sexual identities and creating potential for greater activism around these queer subjectivities. Asylum thus throws into sharp relief the role that law plays in co-constructing identities through a dialectical process. As new social identity categories arise they are measured against accepted legal categories and, at times, incorporated into the pantheon of accepted identities, only to have the new categories challenged later. The law, to an extent, reflects larger social changes, but not always straightforwardly or unproblematically. There is often a lag in the law, and frequently categories only imperfectly fit actors' lived experiences of their identities. In other words, the legal system both reflects the dynamics of sexual stratification within our culture and influences them through its own internal developments.

Though we must be cautious of generalizing too much from the asylum context, that essentialist and constructionist discourses of sexual identity coexist in partial tension in asylum law suggests that some institutionalized American conceptions of sexuality are being forced to deal with sexualities from other cultures in new ways—often at the behest of queer immigration advocates—and also that larger currents of social change around identity are penetrating the legal sphere. Wider social change around gender and sexual identities is evident in many facets of everyday life, from Facebook's recent decision to add more than 50 new possible gender identifications for users to millennials' rejection of traditional sexual categories (Schulman 2013). The most carefully adjudicated asylum claims are beginning to confront this ever-changing reality and suggest that we could, and indeed are, moving toward societal and legal understandings of sexuality as differently constituted for people located in various social constellations and that what it means to have a queer identity varies along many social dimensions.

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Stefan Vogler *is a Ph.D. candidate in sociology at Northwestern University, where he is also affiliated with the Gender and Sexuality Studies and Legal Studies programs. His research revolves around the topics of law, science, and sexuality, and his dissertation examines how different forms of expertise inform decision-making about sexuality in various areas of law.*

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