

DETERMINING TRANSGENDER

Adjudicating Gender Identity in U.S. Asylum Law

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Transgender legal protections have long been contentious issues, with courts often pathologizing or refusing recognition of transgender identities. Recently, however, courts adjudicating asylum claims have recognized “transgender” as a legitimate category of protection. I take this legal development as an opportunity to ask how courts determine if individuals are transgender. While previous work has shown how courts maintain the gender binary, asylum law offers the first chance to analyze how recognizing a distinct transgender category affects the legal gender order and the classification of trans claimants. Drawing on court decisions, ethnographic observations, and interviews, I argue that the recognition of transgender as a category implicitly acknowledges the malleability of gender. Yet, the adjudication of transgender asylum cases continues to uphold a fixed and binary conception of gender by assuming a “born into the wrong body” narrative and that claimants should always already know their gender identities. Courts thus enforce a cis–trans binary wherein only certain claimants are found “trans enough.”

Keywords: *transgender; asylum; law; classification; gender*

On March 6, 2015, the Ninth Circuit Court of Appeals heard the case of Edin Avendano-Hernandez, a transgender woman from Mexico, who had sought and been denied withholding of removal¹ after being physically and sexually assaulted by Mexican authorities because of her

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gender identity. She was denied in part because Mexico had passed new laws protecting gay people. Her lawyers, however, asserted that as a transgender woman Avendano-Hernandez confronted challenges that were distinct from those faced by gays and lesbians. The court agreed, and rather than granting relief under sexual orientation–based case law as was the usual method, the court set the first precedent for granting relief to “transgender” people as a distinct social group under the auspices of U.S. immigration law.

Before this decision, courts generally recognized transgender claimants under case law granting asylum to a gay man with a female sexual identity (*Hernandez-Montiel* 2000), a precedent that positioned gender identity as an outgrowth of an inner sexual essence. Though scholars have examined how courts adjudicating gender changes and trans discrimination claims maintain the dominant gender order, less work analyzes the construction and institutionalization of the categories themselves. But as with other forms of identity, such as race (Haney López 2006; Sohoni 2007) and sexuality (Zylan 2011), the law partially constitutes the gender categories it purports only to regulate. This is important because the way the law “knows” transgender claimants determines how they will be legally recognized and what protections they will be afforded.

Categorization is fundamental to state power (Scott 1998), and it is therefore vital to examine the processes by which categories are created and naturalized. But it is also important to analyze how individuals are placed into those categories. A seemingly “progressive” change in categories may not be enough to change institutional gender orders if the processes by which people are put in those categories remains structured around a gender binary or other limiting ways of understanding gender. Though activists have taken law’s categorical indeterminacy as an opportunity to gain new forms of recognition—including, to some extent, for transgender people (Kirkland 2006)—these strategies for protecting trans people have largely depended on analogizing trans experiences to those of cisgender women. In this article, I expand on the “determining gender” (Westbrook and Schilt 2014) framework by asking how creating a specifically transgender jurisprudence in asylum law has affected the process of legally categorizing trans and gender-nonconforming people. I demonstrate that these decisions revolve around the creation of a cis–trans binary within the law, revealing how the law not only shapes the gender order but also how gender determinations uphold the legal order and how the institutionalization of gender categories structures the functioning of law.

Specifically, we can see how the state classifies claimants with non-normative gender expressions and how those categories variously reflect and contest existing schemas. Asylum law is a particularly fortuitous area to observe these processes because of the considerable indeterminacy of this area of law and the substantial autonomy that immigration judges wield in crafting classificatory categories. Moreover, immigration law has actively participated in the construction of exclusionary categories aimed at sexual and gender minorities (Cantú 2009; Luibheid 2002), yet sociologists have little explored the creation and deployment of such categories aimed specifically at trans people. In this context, it is important to consider how law as a gendered institution, and gender more broadly, are rearticulated and possibly transformed in the course of legal and policy changes around transgender classification.

I use the development of transgender asylum law to analyze not just how legal institutions determine whether someone is a man or woman but also how the law constitutes the category of transgender. Theoretically, such recognition holds the potential to “undo” gender. Recognizing “transgender” as a legal category of protection implicitly disrupts a binary and static conception of gender. I argue, however, that the way trans cases are adjudicated tends to reinscribe dominant understandings of sex and gender by assuming a “born into the wrong body narrative” and imposing an expectation on claimants to always already know their gender identities. The changed classification practices essentially trade a man–woman binary for a cis–trans one, effectively upholding deeper understandings of gender as essential and limiting the kinds of narratives that are deemed “trans enough.”

DETERMINING GENDER

West and Zimmerman’s (1987) now canonical statement of gender posits the “doing” of gender as an interactional accomplishment, and the face-to-face categorization of people into gender categories based on visual and behavioral cues is central to their theory (also see Kessler and McKenna 1978). However, as Westbrook and Schilt (2014) pointed out, many types of gender determinations—particularly those in legal and policy decisions—occur when a great deal of biographical and/or bodily knowledge is known about the person in question. They thus expanded interactional theories of gender beyond face-to-face interactions to offer a broader conceptualization of “determining gender” as “an umbrella term

for the different subprocesses of attributing or, in some cases, officially deciding another person's gender" (Westbrook and Schilt 2014, 36). They suggested the conceptual move from "doing" to "determining" goes beyond asking how gender is socially attributed to asking how gender attribution challenges or maintains the sex/gender/sexuality system. I ask a similar question, though I am specifically interested in the attribution of *transgender* and how or whether such attributions challenge the hegemonic sex/gender/sexuality system.

Westbrook and Schilt demonstrated that criteria for determining gender vary across social contexts. In nonsexualized gender-integrated spaces such as workplaces, identity-based criteria suffice for determining gender, as long as that identity is as a man or woman. In sexual, sexualized, and gender-segregated settings, however, more rigid biology-based criteria predominate. They identified the presence or absence of a penis as particularly important. Because the body can be surgically altered, this allows liberal notions of gender self-determination to exist side-by-side with more biology-based understandings of gender. Such conceptualizations tend to reabsorb trans people into the binary gender system.

Their findings are echoed by work examining how social actors decide if individuals are "trans enough." Trans people are often expected to conform to the monolithic perception that trans individuals were "born into the wrong body" and desire medical intervention (Fink and Miller 2014), even when it does not describe their experience. Johnson (2017) termed this "transnormativity" and explained, "In addition to accountability to hegemonic standards of sex category and gender, trans people are also held accountable to transnormative standards that are specific to trans people . . . an ideology that structures trans identification, experience, and narratives into a *realness* or *trans enough* hierarchy that is heavily reliant on accountability to a medically-based, heteronormative model" (467–68). This is particularly salient for nonbinary trans people, who tend to downplay the fluidity of their genders to fit prevailing narratives of trans identity (Darwin 2017; Garrison 2018). How does such transnormativity play out in legal institutions?

In this article, I seek to expand the determining gender framework to consider not just how institutional actors classify trans people as "men" or "women" but how they classify claimants *as trans*. Similar to Westbrook and Schilt, I find that courts largely depend on identity-based criteria for making gender determinations. But rather than classification being as a man or woman, courts determine whether claimants are cisgender or transgender. Moreover, though biology-based criteria are not the dominant

form of evidence in trans asylum cases, courts often fall back on them to bolster their identity-based claims. Courts therefore tend to reabsorb trans people into the dominant sex/gender/sexuality system and reinforce a circumscribed definition of what it means to be trans.

TRANSGENDER CLASSIFICATION

As theories of doing and determining gender suggest, categorization is a fundamental issue for trans people, whether in face-to-face interactions or institutional spaces. Because trans people trouble classification systems premised on a binary understanding of gender and sexuality, they have been heralded as having the potential to “undo” gender (Deutsch 2007; Risman 2009). Yet, as several scholars have suggested, this potential is generally unfulfilled, as social actors and institutions find ways to reabsorb trans people into the existing sex–gender–sexuality framework (Connell 2010; Schilt and Westbrook 2009). For instance, in her study of trans people in the workplace, Connell (2010) found that many of her interviewees intentionally sought to undermine conventional gender expectations by maintaining gender characteristics that did not “match” their gender identity. While these may be interpreted as moments of chipping away at the gender order, she found that others generally held her interlocutors accountable to conventional gender expectations.

Trans people also face significant classification dilemmas in more formal institutional settings, ranging from the criminal justice system (Jenness and Fenstermaker 2014) to accessing social services (Valentine 2007). The institution of medicine has provided one of the most enduring sites of classificatory struggle for trans people. Since at least the mid-twentieth century, psychiatry has exercised professional authority over issues of gender identity, and practitioners have historically considered trans people to be mentally ill (Meyerowitz 2002). Although the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association 2013) renamed “gender identity disorder” as “gender dysphoria” in an attempt to destigmatize the diagnosis, physicians still act as gatekeepers for trans people to access care (Dewey and Gesbeck 2017). In such capacities, doctors may require trans people to fulfill certain gendered expectations to receive care and may be the sole authority on whether someone is “trans enough.” Trans people face similar challenges in many institutional contexts, and while institutions share logics of gender classifica-

tion and draw support from one another, it is important to note how such logics diverge across institutions.

Scholars have explored these logics in a range of institutional settings, including workplaces (Connell 2010; Schilt 2010), medicine (Davis, Dewey, and Murphy 2016), and the family (Meadow 2011; Pfeffer 2010). Yet, of the myriad classification situations trans people face, the law presents some of the most significant, for it determines a range of material benefits, many of which depend on an official gender classification. Scholars have recently devoted more attention to transgender encounters with the law, and particularly the law's need to categorize trans people (Meadow 2010; Spade 2011).

Most existing work on transgender legal issues focuses on how transgender claimants fare when making anti-discrimination claims or when attempting to attain corrected birth certificates or other state documents (Currah and Moore 2009; Kirkland 2003; Spade 2011). These assessments have found that courts generally fail to recognize trans identities in non-pathologized ways and do not grant legitimacy to transgender people's lives. Meadow (2010) showed that transgender people seeking gender reclassification have rarely been successful, and that the state imposes expectations of gender coherence on individuals. As such, successful petitioners required some form of gender-confirming medicine, a requirement that upholds a dichotomous view of gender. Kirkland's (2003) analysis of transgender legal victories demonstrated that even when transgender people win their claims, it is often at the expense of being properly recognized by the law. Paths to victory included transgender claimants describing themselves as ill and in need of the state's benevolent care, or presenting their claim as analogous to a more general genre of sex stereotypes that courts were familiar with based on the experiences of non-transgender women. While these and other studies demonstrate how the law participates in upholding particular conceptions of gender by classifying people as "men" or "women" using gendered logics, they have not analyzed how the institutionalization of a transgender legal category affects the hegemonic gender order. Asylum law allows us to examine for the first time how "transgender" as a legal category is constituted and affects institutional gender determinations.

Transgender Asylum Law

U.S. asylum law offers protection for individuals suffering persecution due to race, religion, nationality, political opinion, or membership in a

particular social group. To receive asylum, claimants must prove either past persecution or well-founded fear of future persecution because of a protected ground. LGBTQ people are eligible under the “particular social group” standard, but this means that they must prove that they belong to a group that should be protected, which means in practice that LGBTQ people must prove their gender or sexuality. It was only in 1990 that the Board of Immigration Appeals, the appellate body for all immigration law, issued a landmark decision in the case of Fidel Toboso-Alfonso, a Cuban man who claimed persecution due to his homosexual identity, establishing that sexual identity could constitute a particular social group (*Matter of Toboso-Alfonso* 1990). There is now strong case law guaranteeing sexual minorities the right to seek asylum.

This protection was extended to transgender petitioners with the *Hernandez-Montiel* (2000) case, which involved a young person from Mexico who claimed his social group was “gay men with female sexual identities.” The decision has been widely criticized for bifurcating gay men into “feminine” and “masculine” groups, conflating gender and sexuality, and failing to recognize *Hernandez-Montiel* as transgender (Jenkins 2009; Kimmel and Llewellyn 2012). Nevertheless, the decision has allowed transgender claimants to seek asylum because of their gender identities, although it does so by declaring their gender to be an outward expression of their *sexuality*, an issue I will consider in more detail shortly.

These issues dovetail with a central debate within socio-legal scholarship, namely, whether law engenders cultural change or simply reflects it. In a powerful illustration of law failing to create social change, Edelman (2016) has shown that courts often defer to organizations when determining compliance with antidiscrimination laws by inferring nondiscrimination from the mere presence of organizational structures (such as antiharassment policies and grievance procedures). Conversely, scholars of race and sexuality have shown that laws may create social categories where none previously existed, which can change social reality (Haney López 2006; Zylan 2011). Sohoni (2007) showed, for example, that the racial category “Asian” was a bureaucratically created fiction used to enforce anti-miscegenation laws, but its creation eventually engendered a new consciousness among various ethnic groups to identify as Asian.

Drawing on both lines of scholarship, I contend that transgender asylum law works as a mechanism for consolidating certain gender categories, but it also creates possibilities for recognizing new identities and crafting new categories that may (or may not) more accurately reflect

social reality. Gender determinations also participate in creating new law by setting legal standards for deciding claimants' genders and creating new protected groups under the law. Thus, by shaping appellate jurisprudence, gender classifications contour the law while simultaneously defining gender. Asylum law is therefore a site where new state-recognized gender identities may proliferate, though it also represents yet another way by which the state can regulate gender.

METHODS

This study is part of a larger project analyzing the development of LGBTQ asylum law from its inception in 1990 to 2016 and draws on legal and documentary analysis, semistructured interviews, and ethnographic observations in immigration court and with a legal nonprofit. I collected appellate decisions regarding LGBTQ asylum through the LexisNexis database by searching for the keyword "asylum" in conjunction with the terms *gay*, *lesbian*, *sexuality*, *sexual orientation*, *transgender*, *transsexual*, and *gender identity*. This resulted in a set of 203 decisions, of which 14 dealt specifically with transgender claims. I also collected relevant Board of Immigration Appeals decisions and governmental and nongovernmental organization documents. For this portion of the project, I coded decisions for three broad themes: evidence of gender/sexuality (What constitutes proof of one's identity?), conflation of gender/sexuality (Do courts recognize a distinction between gender and sexuality?), and identity narratives (How does the claimant describe their identity?).

To supplement the limited view provided by relying on the written record, and because of the small number of cases explicitly addressing transgender issues, I conducted 22 semistructured interviews with lawyers, judges, and social science experts who serve as expert witnesses in LGBTQ asylum cases. I recruited interviewees based on their centrality to the field, their extensive experience working on LGBTQ immigration issues, or both. Interviews were recorded and transcribed, and lasted one hour on average. I coded interviews using the coding scheme derived from my document analysis. While I use pseudonyms for all individuals observed during field work, most interviewees gave interviews in their capacity as public figures and gave permission for their names to be used.

Finally, I conducted two years of ethnographic observation with Advocates for Immigrant Rights (AIR), a pseudonym for a nonprofit organization with a national presence on LGBTQ immigration issues

that also represents LGBTQ asylum seekers in court. In exchange for research assistance, I was allowed to observe AIR's weekly case meetings where they discuss the status of pending claims, the intake of new cases, and other practice-related issues. In addition to formal interviews with several staff members, I engaged in numerous informal conversations with AIR legal staff and completed small administrative and research tasks to help prepare several asylum claims. Through AIR, I observed 12 LGBTQ asylum hearings, including two for transgender women, and obtained court documents and transcripts for two additional cases for transgender women. Given the limitations of the legal archive (transcripts are not produced for most asylum hearings), these observations proved invaluable in revealing the everyday adjudication of asylum claims and represent a unique data source not available in other studies of U.S. LGBTQ asylum law.

DETERMINING TRANSGENDER

I present my findings in two broad themes. First, I consider the conflation and mutual constitution of gender and sexuality in LGBTQ asylum law and the eventual move from recognizing transgender people as sexual minorities to categorizing them as distinct from cisgender LGB people. Next, I analyze how trans claimants narrate their identities to courts and what constitutes proof of transgender status. I show that, despite new categories, consistent, linear identity narratives that suggest a fixed gender identity and clear movement from one gender to its assumed opposite continue to predominate as the preferred "proof" of transgender status. In short, transgender determinations uphold a circumscribed view of gender that relies on assumptions of gender inherency and a distinct cis-trans binary.

Gender, Sexuality, or Both?

Transgender claimants have been receiving asylum since the 1990s, but they have done so by positioning themselves as sexual minorities and fitting their claims into sexual orientation-based jurisprudence. They have done so for three pragmatic reasons. First, gender nonconformity is common to both sexual orientation and gender identity claims, and it is often this gender nonconformity that makes asylum seekers visible and targeted for persecution. Second, some claimants that we might call "transgender" by U.S. criteria do not understand themselves that way. Third, grouping

transgender claimants under sexual orientation–based law was what worked, and lawyers were content to follow that path if it worked for their clients. As anthropologist and early LGBTQ asylum advocate, Heather McClure, explained:

[Transgender asylum] was under asylum based on sexual orientation, so a lot of the narratives followed lock step with those narratives . . . there were a couple of imperatives in those cases. One was to establish the viability as an applicant under asylum based on sexual orientation, so showing a pattern of same-sex relationships, same-sex desire. . . . But the other thing was showing that . . . a gender identity, as a transgendered [*sic*] person, was not casual . . . because a lot of times the trial attorneys would say, "Well, stop dressing like that."

McClure suggested that couching transgender protection within sexual orientation–based law meant that transgender claimants had to make sexuality-based arguments about same-sex desire, rather than making gender identity-based arguments. Moreover, they had to contend with challenges from government representatives about how their gender nonconformity related to their sexuality. Both imperatives limited trans legal recognition.

However, gender nonconformity frequently comes up in sexual orientation–based asylum claims, as well. Asked whether people who are merely perceived to be gay may be targeted for violence, one expert witness in an asylum hearing explained, "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" [field notes]. Some have seen this as particularly important since the Board of Immigration Appeals declared in 2008 that "particular social groups" must be "socially visible." However, U.S. Citizenship and Immigration Services (USCIS) guidance clarified that this does not mean individuals must be visible as minorities: "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).

Nonetheless, gender nonconformity allowed transgender applicants to connect their claims to those of LGBQ claimants, particularly because many cultures did not distinguish between gay and transgender. As immigration attorney Michael Jarecki stated, "There'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 . . . that's all grouped together as gay, not normal." Many transgender asylum claims illustrate this relationship. One court wrote, "Because of her sexual orientation and gender identity, Bibiano did not conform to gender norms in Mexico. As a result, Bibiano was harassed, beaten, and sexually assaulted" (*Bibiano* 2016, 969), while another stated, "Godoy-Ramirez was raped on account of her transgender identity and presumed homosexuality" (*Godoy-Ramirez* 2015, 792).

These issues came to a head in the first precedential case dealing with gender nonconformity, that of *Geovanni Hernandez-Montiel* (2000), a person from Mexico who was ultimately classified as a gay man with a female sexual identity. Critics fault the decision for failing to recognize Hernandez-Montiel as a transgender woman. However, it is unclear from the legal record whether Hernandez-Montiel identified as transgender, and at least one attorney familiar with the case believes that Hernandez-Montiel explicitly identified as a gay man with a female sexual identity.² This would likely come as no surprise to scholars familiar with gender and sexual typologies in Latin America, where sexuality is sometimes organized according to gender presentation. Only "feminine" men who typically take the receptive role in sexual intercourse would be considered gay, while "masculine" men would be considered straight or "normal" (Carrillo 2002).

Rejecting both the immigration judge's and Board's conclusion that Hernandez-Montiel could simply stop dressing as a female to avoid persecution, the Ninth Circuit declared that "gay men with female sexual identities" constitute a distinct social group in Mexico and "sexual orientation and sexual identity are immutable. . . . Sexual identity is inherent to one's very identity as a person" (*Hernandez-Montiel* 2000, 1093). The court went on to write, "Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails" (1094). Hernandez-Montiel was re-scripted from a cross-dressing prostitute to someone with a fundamental sexual identity manifested through his gender expression.

In doing so, the court subsumed Hernandez-Montiel's gender presentation within a biologized and "immutable" sexuality.³ Instead of recognizing the fluidity and constructedness of gender, gender became a biologized manifestation of a fixed inner sexual essence. While some contend that *Hernandez-Montiel* implies the mutability of gender (Kirkland 2003), a reading I agree with theoretically, the decision has not been interpreted that

way in practice, and as I will show, no trans claims have attempted to make such arguments. Rather, the legal determination of Hernandez-Montiel's gender still defined him as a man, though one who took on some traditionally feminine characteristics as an expression of his sexual identity.

According to Victoria Neilson, former Legal Director of Immigration Equality, "There were several Ninth Circuit cases after that case [*Hernandez-Montiel*] that used that language," illustrating law's power to engender new social realities. At least two of those cases eventually made it to the appeals court, one claiming a "female sexual identity" (*Ornelas-Chavez* 2006) and another that attempted to attain protection as a transgender woman (*Reyes-Reyes* 2004).

Luis Reyes-Reyes was a Salvadoran transgender woman who, unlike Hernandez-Montiel, explicitly identified as transgender to the court. Reyes-Reyes's lawyer wrote in an article discussing the case, "I discussed the matter of transgender identity at great length with my client. Reyes-Reyes does identify as transgender, and it seemed appropriate to refer to the client as such throughout the briefing (and during oral argument)" (Landau 2004-2005, 249). Nevertheless, the court never acknowledged Reyes-Reyes as a transgender woman and used masculine pronouns to refer to her. Reyes-Reyes's "transsexual behavior" is construed as an outward expression of "his" sexuality, not her gender identity. Further cementing this interpretation, the court quoted the passage from *Hernandez-Montiel* discussed above that asserts that "sexual identity" may manifest itself through dress or appearance. Despite the explicit opportunity to categorize Reyes-Reyes and future claimants as transgender women, the court continued classifying transgender applicants as gay men who manifest their sexual identities through gendered behavior.⁴

Thus, the institutional determination of (trans)gender consisted of narratives connecting claimants' gender identities to same-sex desire. While courts often took notice of physical cues of gender, notably, they did not require proof of body modification in the way that other areas of law do. Gender determinations in asylum law have revolved less around biology than around proving that claimants are sufficiently feminized in the eyes of their persecutors and courts, a criterion that has remained mostly unchanged even with the advent of new categories, as I will discuss below. These examples demonstrate that gender and sexuality have been tightly intertwined in constituting a rather broad understanding of transgender in asylum law, whether applicants have claimed to be gay men with female sexual identities (*Hernandez-Montiel* 2000; *Ornelas-Chavez* 2006), transsexual (*N-A-M* 2009; *Morales* 2007), or transgender (*Ramos*

2016; Moreno 2015; Bibiano 2016). The latest precedent regarding transgender claimants complicates this relationship further.

In Edin Avendano-Hernandez's case, Avendano-Hernandez attempted to claim a transgender identity, but the immigration judge refused to acknowledge her as such, using masculine pronouns and insisting that Avendano-Hernandez was "still male," even though she "dresses as a woman, takes female hormones, and has identified as a woman for over a decade" (Avendano-Hernandez 2015, 1075). The Board acknowledged Avendano-Hernandez using female pronouns but still denied her claim, citing new laws protecting gays and lesbians in Mexico. This necessitated a new approach from Avendano-Hernandez's lawyers, who could no longer rely on courts finding uniformly negative conditions for all LGBTQ people in Mexico. Instead, Avendano-Hernandez's argument asserted that gay and transgender people face *different* circumstances because of their divergent gender identities, an argument the court accepted, writing, "Laws recognizing same-sex marriage may do little to protect a transgender woman like Avendano-Hernandez from discrimination, police harassment, and violent attacks in daily life" (Avendano-Hernandez 2015, 1080). This marked the first time an appellate body performed an analysis that separated the experiences of cisgender sexual minorities from transgender individuals.

In another passage, the court acknowledged the intertwined yet distinct nature of gender and sexual identity and how that interaction may uniquely affect transgender women:

While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct. . . . Of course, transgender women and men may be subject to harassment precisely because of their association with homosexuality. . . . Yet significant evidence suggests that transgender persons are often especially visible, and vulnerable, to harassment and persecution due to their often public nonconformance with normative gender roles. (Avendano-Hernandez, 2015, 1081)

In the space of one page, the Ninth Circuit set a new standard for evaluating transgender asylum claims that requires adjudicators to consider the ways that gender and sexual identity both intersect and diverge in structuring the lived experiences of transgender people. Unlike *Hernandez-Montiel* (2000), this decision no longer characterizes gender identity as an outgrowth of one's sexual orientation. Rather, transgender is rendered a distinct social group eligible for asylum on its own, a deci-

sion that implicitly recognizes the malleability of gender given that trans identities are premised on transgressing or changing genders.

However, this view of transgender—as being completely distinct from one’s sexuality—is a particular cultural conception of that identity that is characteristic of the contemporary West (Valentine 2007). Even today, many queer claimants continue to understand their identities in ways that conjoin gender and sexuality. Keren Zwick, director of the National Immigrant Justice Center’s LGBT Project, explained, “We have plenty of clients who are clearly transgender . . . who categorize themselves as gay because they think they have to have sex reassignment surgery or something to be able to characterize yourself as transgender.” Similarly, immigration attorney Peter Perkowski said of trans people, “Their sexual identity is not necessarily the same as their gender identity. But instead of identifying as trans, they identify as gay. In fact, they use that word to describe their gender identity, and it’s inaccurate.” Though Perkowski asserted that seemingly transgender claimants who self-identify as “gay” are misunderstanding the term rather than realizing that the term *gay* itself shifts meanings as it travels, his comment points to the potential trouble some claimants could face in a post-*Avendano* (2015) world. Whereas a *Hernandez-Montiel* (2000) standard maintained room for those who saw themselves as “gay” when a U.S. audience might label them “transgender,” it is unclear whether the *Avendano* standard will. The *Avendano* standard signals a shift away from the need to connect one’s gender non-conformity to same-sex desire and toward the need to present oneself as “trans enough.” Identity-based criteria still predominate, but the standards for classifying trans asylum seekers now entail a need to articulate a narrative that clearly distinguishes the claimant from cisgender applicants. In the next section, I consider how claimants themselves talk about their identities and how this contributes to the legal constitution of the “transgender” category.

Narrating (Trans)Gender

Asylum law is unique in that it is one of the few areas of law protecting transgender people that does not require bodily alterations or medical interventions to affirm one’s gender identity. Rather, identity narratives stand as the predominant proof of one’s gender. But hegemonic narrative forms can be constraining. The structure of the stories offered in successful LGBTQ asylum claims often follows the Western “coming out” narrative, with a linear identity development path and a fixed endpoint (Berg

and Millbank 2009; Murray 2014). This is echoed in my field work, where lawyers typically guided clients through questions meant to elicit just such a trajectory of identity development. All asylum seekers—LGBQ and trans—during my field work testified that they have “always known” that they were “different.” Gabriela, a Honduran transgender woman, stated that she had known “as long as [she] can remember,” while Josefina, a Mexican transgender woman, asserted that she “felt this way [her] entire life” [field notes]. Appellate decisions similarly suggest the importance of such narratives, as when the Tenth Circuit noted, “At the age of 11 she discovered that she had what we might call a discrepancy in her gender” (*N-A-M*, 2009, 1054). Acceptable narratives for trans claimants, then, are those that clearly establish the petitioner as being trans, rather than cisgender, a marked change from the *Hernandez-Montiel* era where gender determinations depended on narratives portraying a feminized, though seemingly still cisgender, individual.

Although *Avendano* (2015) explicitly recognizes transgender as an identity and thus implicitly acknowledges gender’s malleability, courts impose a requirement of consistent gender identity across the life course, tacitly enforcing the expectation that one’s “true” gender is fixed and essential. Three appellate claims—*Jeune* (2016), *Moiseev* (2016), and *Talipov* (2014)—were all denied either fully or in part because courts determined that the claimants’ realizations of their gender identity was not new information and could have been presented earlier. In *Talipov*’s case, the court wrote, “*Talipov* relies on evidence that he only recently began hormone therapy, started using makeup, started wearing women’s clothes, and began living openly as a male-to-female transgender person. These events may have been recent, but . . . he could at any time have assumed a woman’s habit and presentation” (*Talipov* 2014, 8). The use of masculine pronouns here is notable and indicates that the court found *Talipov* to fall on the wrong side of the cis–trans binary that is central to the transgender determination process. In all three cases, the courts rely on the claimants’ own testimonies that they have always known at some level that they were “different,” but rather than acknowledging the difficulties of the coming out and transition process, all three courts impose an imperative that transgender applicants come out from the start of their proceedings.

A related implication is that claimants will move from one gender to its presumed opposite—that is, from identifying as a man to a woman. With the exception of *Hernandez-Montiel*’s (2000) ambiguous identification, all successful transgender claimants in the legal archive and my

field work suggested they desired to become women. As Eva, a Mexican transgender woman, asserted to the judge, “I’m a transgender with implants. . . . I’m not just a male that is gay. Twenty-four hours a day I’m a female.” Similarly, when asked what it meant to her to be transgender, Josefina stated, “It means I dress as a woman, act like a woman, represent myself as a woman.” Conversely, those who presented more ambiguous cases, such as Jeune, were unsuccessful. Jeune described themselves, like Hernandez-Montiel, as a “gay man who also dresses as a woman,” but offered no clear narrative of transition or a wish to become a “woman.” Consequently, the court denied their claim, concluding that “being a gay man who dresses like a woman does not necessarily mean that one is also a transgender individual” (*Jeune* 2016, 802).

Although identity narratives are the predominant form of evidence in asylum claims, it is impossible to ignore the ways that the interactional doing of gender are intertwined with the institutional determination of gender, particularly in asylum offices and immigration courts where applicants tell their stories directly to adjudicators. One’s assertion of preferred pronouns and names is a narrative strategy employed to do gender (Pilcher 2017). Josefina, Gabriela, and Bibi all requested that courts address them by their female names and with feminine pronouns, whereas Eva, who was not represented by a lawyer, referred to herself as a woman but was mis-gendered by the court. Nevertheless, all four asserted a female identity through their use of names and pronouns and were (at least eventually) recognized as such by courts. This shows movement in the legal system. In almost all cases before *Avendano* (2015), including *Hernandez-Montiel* (2000), claimants were referred to using masculine pronouns. Even Reyes-Reyes, who was described as having a “deep female identity” and going by names such as Josephine, Linda, and Cukita (*Reyes-Reyes* 2004, 785), was referred to as “he.” By contrast, almost all cases since *Avendano* use feminine pronouns.

In addition to doing gender through their name and pronoun choice, the claimants I observed also testified that they used hormones, had (or wanted to get) breast implants, and adopted feminine mannerisms. It is also present in written decisions, where courts often take note of a claimant’s choice of name, hairstyle, dress, and body modifications. In the *Avendano* case, the court noted that Avendano-Hernandez “dresses as a woman [and] takes female hormones” (*Avendano* 2015, 1075), and in *Morales* (2007), the court took notice that Morales dressed as a woman and had breast implants.

Notably, courts have made it clear that adjudicators cannot use gendered stereotypes to determine someone's sexuality (*Karouni* 2005; *Razkane* 2009) and have seemingly suggested the same in regard to gender identity (see *Ornelas-Chavez* 2006). However, "demeanor" may be used to make credibility determinations. This may affect transgender claimants more than LGBTQ petitioners because gender is generally viewed as more discernable from one's bodily presentation than sexuality (West and Zimmerman 1987). As Heather McClure commented, "Seeing is believing, and that's true in asylum courts." She further explained, especially in the early development of this area of law, "It might be particularly important that the applicant come into that courtroom cross-dressed." Similarly, immigration attorney Aneesh Gandhi suggested, "When somebody says they're a transgender woman or man I just kind of . . . you know. They say it, they give me the reasons why they say it, or they present in a certain way, so I don't really think about their credibility as much." In explaining how she makes such determinations, one former immigration judge explained that, "it's consistency of behavior with a story," suggesting that doing and determining gender are intertwined in asylum determinations.

My findings show that although "transgender" as a distinct legal category in asylum law is new, the recognition of transgender claimants by various means is not. Though recognizing trans claimants as sexual minorities may have failed to properly represent their identities, it afforded them access to asylum protections. Moreover, it recognized the close relationship between sexuality and gender. It also demonstrated the indeterminacy and multivocality of law. Legal advocates have been able to strategically use the "particular social group" category and the initial Board of Immigration Appeals ruling granting protection to a "homosexual" man (*Matter of Toboso-Alfonso* 1990) to expand protections beyond gay men to include lesbians, bisexuals, trans, and gender-nonconforming individuals, and more (Vogler 2016). The *Avendano* (2015) decision calling for analyses that distinguish between sexuality and gender identity reflects a long process of cultural change penetrating the legal sphere through the accumulation of claims in asylum offices and immigration courts. For example, in a nonprecedential decision, one appellate court recognized a claimant as "transsexual" as early as 2007 (*Morales*), and all of my interviewees successfully represented or worked with transgender claimants who received asylum as transgender men and women well before *Avendano*. Josefina, whose hearing I observed before *Avendano*, received asylum as part of the group "transgender women in Mexico" under the authority of *Toboso-*

Alfonso, yet the judge's decision offered remarkably similar reasoning as *Avendano*. Thus, while "transgender" was not codified as legal precedent until 2015, trans claimants have been bringing such claims to asylum offices and immigration courts since the 1990s.

The Ninth Circuit's shift in jurisprudence appears to reflect two cultural developments, one in the United States and one in Mexico. First, as Mexico has extended more legal protections to gays and lesbians, asylum claims for LGB claimants have become more difficult, meaning that attorneys have had to position transgender claimants as different from cisgender LGBs and as uniquely vulnerable. Such arguments are evident in *Avendano* (2015), *Jeune* (2010), *Moreno* (2015), *Godoy-Ramirez* (2015), and *Ramos* (2016) at the appellate level, as well as all four trans cases from my field work. Second, in the United States, transgender identities have been gaining greater cultural recognition and acceptance as identities that are separate from (though perhaps related to) sexuality (Valentine 2007). Adjudicators thus have been exposed to these narratives, both as cultural actors and as judges hearing such explanations from claimants. For instance, in her hearing, Josefina sought to explain the difference between being transgender and being gay as she understood it, saying, "Transgender means you dress and act like a woman and are attracted to men. Gay means you act like a man and are attracted to men." Faced with these new narratives, adjudicators in lower tribunals have used the ambiguity of legal categories to grant such individuals asylum.

Despite this apparent change in legal classification practices, the way that transgender claimants are constituted before the law is mostly unchanged. Courts continue to expect consistent and fixed gender identities, imposing an imperative that trans claimants come out to the state immediately. Successful trans claimants also generally express desires to transition and physically alter their bodies, suggesting that courts prefer applicants who move clearly from one gender to the other. It is thus an open question whether the "transgender" category will make room for genderqueer or other gender-nonconforming individuals who do not adopt male or female identities and appearances. Courts may find such claimants not "trans enough" to fall on the trans side of the cis-trans binary that has become central to transgender determinations.

CONCLUSION

I have argued for an expansion of the determining gender framework to account for how specifically transgender attributions are made by courts.

I proposed that this “determining transgender” paradigm depends less on a man–woman binary than a cis–trans one, wherein claimants must do more to prove that they are “trans enough” than that they have taken steps to fully transition to the “opposite” sex, as many social institutions require. While the move to recognize transgender claimants implicitly recognizes the malleability of gender, by requiring that claimants offer narratives suggesting that they were “born into the wrong body” and that they desire to transition from one gender to its purported opposite, courts continue to uphold deeper conceptions of gender as fixed and essential and to establish a new regulatory binary that strictly separates cis and trans people.

Before this change, U.S. asylum law couched transgender claims within a body of sexual orientation–based law that positioned gender identity as an outward expression of one’s inner sexuality. Doing so reinforced a dichotomous and fixed view of gender by refusing to acknowledge the malleability of gender and instead positing that it reflected a fixed inner sexual essence. Thus, asylum seekers and their advocates *have* successfully shifted legal understandings of transgender identity to some extent. They have done so by rendering cultural developments around transgender identity legible to adjudicators through the deployment of transgender identity narratives that challenged subsuming transgender asylum protections within sexuality-based law. This was possible in part because of the indeterminacy of the law, especially the “particular social group” category. As legal precedent, *Avendano* (2015) establishes a new norm in the Foucauldian sense, and we can see that playing out in the cases that have followed, where claimants adopt explicitly transgender identities, use feminine pronouns, and make arguments that separate the experiences of transgender and cisgender people. Yet, transgender recognition remains relatively limited, and the recognition that has been achieved has mostly not challenged gender as a regulatory structure.

For trans migrants, therefore, the asylum process may simply add another site of state surveillance and regulation that narrowly constructs only certain gender expressions and narratives as “truly” trans. The developments in trans asylum law also echo findings from scholars who have contended that simply adding more categories will not alleviate gender inequalities if new categories don’t also disrupt the hierarchies underlying such categorizations (Nisar 2018; Westbrook and Saperstein 2015). We can glean a similar insight from trans asylum law. Namely, recognizing trans people as trans may do little to shift embedded notions of binary and essential gender identities if the classification process continues to assume movement from one gender to its purported opposite and that claimants

have “always” known that their true gender identity was different from the one they were assigned at birth. Likewise, if the classification process depends on determining whether claimants are cisgender or transgender, we may merely be trading one binary for another.

Moreover, as McKinnon (2016b) asserted, although recognizing transgender claimants acknowledges some of the risks of transgressing gender boundaries, it does so by “walling off the concepts of gender and gender-based violence from the concepts of gender identity and expression” (246). The protection of some forms of gender transgression may therefore create limitations for others, in this case cisgender women fleeing violence that is more easily construed as personal or relational. Indeed, the Board of Immigration Appeals recently announced that domestic violence would no longer be grounds for asylum in the U.S. (*Matter of A-B* 2018), and even before that decision, cisgender women confronted more obstacles to gaining asylum for gender-based violence than LGBTQ migrants did for sexuality-based violence (McKinnon 2016a).

Although law can be both regulatory and productive of social change, I have shown that asylum law largely works to consolidate and recognize particular gender identities in bureaucratically constrained ways, rendering gender “others” visible and governable by the state. While the flexibility of the law allows trans people to make citizenship claims based on formerly excluded identities, this surface malleability upholds law’s deeper durability as a regulatory structure governing acceptable gender expressions. The law’s recognition of new identities may do little to ameliorate gender inequalities and trans marginalization if broader understandings of gender as innate and binary remain firmly intact. Inclusion of at least some trans identities in asylum protections is encouraging, but thinking more critically about the narratives presented may suggest ways for further structural change.

While sociologists of culture remind us that the stories most likely to resonate are those that follow conventional norms (Polletta 2006), they also demonstrate that stories can be forms of resistance that may change social structures (Ewick and Silbey 2003). We can apply these same insights to gender narratives. Though courts are highly formalized, constraining institutional spaces, they also provide opportunities for presenting new narratives. Those most likely to affect widespread change are those that use the language of the institutional space but communicate new points of view, challenge false universals, and name new issues (Polletta 2006, 107). In the case of gender, this means asserting the

constructedness of sex and gender and challenging the status of the traditional “coming out” narrative as a universal experience. Certainly, this is a difficult proposition for marginalized actors in a highly constrained legal system. Nevertheless, law’s regulatory force *can* be used for social change, but only if we confront courts with new stories and know that such change is likely to come in the form of small, incremental steps. Adding new categories signals a nascent shift in the legal accountability structure that maintains the gender order, which can create space for new forms of resistance.

NOTES

1. Receiving withholding entails the same requirements as receiving asylum, though it does not grant a path to citizenship.

2. Author interview with Aaron Morris.

3. This seems to be a mirror image of earlier sexological understandings of homosexuality as the result of internal “gender inversion.” This conflation also is notable because asylum law has historically sought to protect only “immutable” characteristics. However, asylum law does not, in fact, require that protected characteristics be “immutable” (see *Matter of Acosta* 1985), but many adjudicators use the language of immutability in “particular social group” decisions. Nevertheless, agency guidelines explicitly direct adjudicators that gender and sexual identity are protected characteristics, even if adjudicators believe them to be mutable (USCIS 2011, 16).

4. I say “gay men” here intentionally because no appellate body has yet considered a claim by a trans man.

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