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Deciding What Counts as Persecution: An Analysis of Gender and Sexual Orientation Asylum Cases in the United States

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Abstract of the Dissertation

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In the United States, individuals may apply for asylum if they have a "well-founded" fear of persecution in their country of origin based on one of five enumerated grounds: race, religion, national origin, political opinion, or membership in a particular social group. In the late 1980s and early 1990s, the U.S. saw an influx of women and lesbian, gay, bisexual, and transgender (LGBT) applicants. While gender and sexual orientation are not specified in the refugee definition, these applicants contended that their persecution could be attributed to their membership in a particular social group. In response to the growing number of cases, the U.S. has slowly recognized both gender and sexual orientation as legitimate grounds for asylum

While many women and LGBT applicants have made successful cases, a growing body of literature and evidence suggests resistance to and uneven incorporation of gender and sexual orientation into U.S. asylum law. Given that gender and sexual orientation persecutions have been incorporated into the asylum system but have not been specified as enumerated categories, what accounts for the differences between successful and unsuccessful gender and sexual orientation asylum cases in the United States? How are typical asylum terms—such as particular social group, persecution, and credibility—applied in these cases? How do these terms reflect gender, sexual, race, national inequalities? How do they reproduce inequalities? In this dissertation, I dissect the deployment of these terms and the consequences of their interpretation on the outcomes of cases heard by the highest level of appeals in the United States.

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List of Abbreviations

BIA: Board of Immigration Appeals

CAT: Convention Against Torture

CRT: Critical Race Theory

DOJ: Department of Justice

EOIR: Executive Office of Immigration Review

EU: European Union

FGM: Female Genital Mutilation

FLT: Feminist Legal Theory

IJ: Immigration Judge

INS: Immigration and Naturalization Service

LGBT: Lesbian Gay Bisexual Transgender

UN: United Nations

UNHCR: United Nations High Commissioner of Refugees

US: United States

USCIS: United States Citizenship and Immigration Service

VAWA: Violence Against Women Act

WOR: Withholding of Removal

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Chapter 1

Introduction

About 10 years ago, I learned of the 1997 case of Alla Constantinova Pitcherskia, a Russian lesbian woman, who applied for asylum in the United States on the grounds of sexual orientation-based persecution. In Russia, public officials put her in a hospital and performed "therapies" to "cure" her of her attraction to women. These "therapies" included procedures like electroshock in an attempt to alter her brain chemistry and rid her of same-sex desire. The initial response from the U.S. immigration courts was that Pitcherskia was not eligible for asylum. According to the adjudicators, applicants must prove that their persecutors acted on account of discrimination towards a perceived social group. In trying to "cure" Pitcherskia, the court opined, Russian officials did not act with malice, but instead intended to help her, and therefore she was not eligible for relief under the asylum system. The United States Court of Appeals for the 9th Circuit overturned this case in 1997, explaining that applicants need not prove that their persecutors had the intent to harm them if the action itself, like forcing medical treatments, were persecutory in nature and targeted towards a specific group. After this appeal, Pitcherskia received asylum in the United States.

My initial reaction, and the reaction of many others to whom I have explained this case, was one of utter shock. The decision of the initial immigration adjudicators was obviously homophobic: their understanding of homosexuality as something that should be cured or something that could be treated impacted their interpretation of the concept of persecution. Pitcherskia's case indicated a systemic problem of homophobia in the asylum system, a system that is ostensibly intended to help people in need. While I still have this reaction to Pitcherskia's case, I have come to realize that my reaction is equally problematic in that it is deeply nationalist. My initial reaction of shock was not just that Pitcherskia's case was deeply homophobic (and it was), but also that I, on some level, disbelieved that such a practice would occur in the United States. My race, class, cisgender, and citizenship privileges shielded me from encountering the problematic and often antiquated immigration practices that many people encounter daily.

There are many stories that can be told about the asylum process. My intention with this dissertation is to dissect asylum practices as they emerge from the top, practices that I could and did ignore. In doing so, I uncover the sexist, homophobic, and nationalist logic that pervades the contemporary U.S. immigration system. I spotlight modern asylum practices as they both reflect and reproduce inequality at the borders. My ultimate goal, though, is to work to reform these practices, if they can, in fact, be recuperated.

Statement of the Problem

In the United States, individuals may apply for asylum if they have a "well-founded" fear of persecution in their country of origin based on one of five enumerated grounds: race, religion,

national origin, political opinion, or membership in a particular social group. In the late 1980s and early 1990s, the U.S. saw an influx of women and lesbian, gay, bisexual, and transgender (LGBT) applicants. While gender and sexual orientation are not specified in the refugee definition, these applicants contended that their persecution could be attributed to their membership in a particular social group. In response to the growing number of cases, the U.S. has slowly recognized both gender and sexual orientation as legitimate grounds for asylum (Anderson 2001; Anker 1995; Anker et al 1998; Bennett 1999; Hueben 2001; Landau 2005; Martin and Schoenholtz 2000; Randazzo 2005). Specifically, many scholars suggest that the biggest gains for these types of asylum have occurred through case law: judges in immigration courts set the precedent that gender and sexual orientation can constitute a particular social group, which opened doors for future applicants facing similar persecution (Hueben 2001; Landau 2005; Peters 1996).

Yet, legal scholars are quick to note the problems that remain with gender and sexual orientation cases. Despite the courts' recognition of gender and sexual orientation as particular social groups, the United States Citizenship and Immigration Service (USCIS)[1] has not set forth either category as an enumerated ground. Many scholars argue that using the "particular social group" category is insufficient for gender and sexual orientation cases (Birdsong 2008; Ciampa 1996; Chilsolm 2001; Condon 2002; Hueben 2001; Weisblat 1999). Moreover, scholars note that proving important asylum concepts, like persecution, are more difficult when cases are made by women or LGBT individuals (Birdsong 2008; Condon 2002; Goodman 2012; Heyman 2008). In other words, adjudicators, who are used to encountering "traditional" cases of political persecution, are sometimes perplexed by these cases without a clear set of formal guidelines.

Take, for example, the case of R-A-, a Guatemalan woman who came to the United States after years of abuse by her husband. When her asylum case was initially heard in 1999 by an Immigration Judge (IJ), she claimed that she had a well-founded fear of persecution by her husband and that the persecution could be attributed to her membership in a group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" (Department of Homeland Security 2004: 13). The IJ found R-A- to be a credible witness, agreeing that the "particular social group" was appropriately and legitimately defined by R-A- and her counsel. Yet, the USCIS (then called the Immigration and Naturalization Service – INS) was not satisfied with this opinion and appealed to the Board of Immigration Appeals (BIA); it contended that R-A- was not persecuted on account of her membership in a "particular social group." In their final opinion, the BIA overturned the IJ's initial decision and sided with the INS. While the BIA agreed that R-A- had been a victim of domestic abuse, the appeals judges found that this abuse could not be attributed to her status as a Guatemalan woman who was involved with an abusive male companion. In fact, the BIA questioned the IJ's acceptance of that particular social group, which the BIA saw as a fabrication for one asylum case, rather than a group that exists more broadly in Guatemala.

Interestingly, the BIA went further to explain that even if they were to accept that such a group of Guatemalan women existed, R-A- could not prove that her husband abused her on account of this status. For the BIA, R-A- needed to prove that her husband persecuted other Guatemalan women, not just R-A-. If R-A- faced persecution by her husband because of her status in a social group, he would have a history of abuse towards other Guatemalan women. However, because R-A was the only woman targeted, the court interpreted her abuse as a personal dispute between husband and wife, rather than as persecution based on a particular social group.

R-A- was eventually granted asylum in 2010 after nearly 10 years of litigation. However, her case, which has drawn attention from many legal scholars (see Musalo 2010; Rogerson 2009; Sinha 2001), highlights the inconsistent nature of gender asylum hearings. The courts had diverse interpretations of what counted as persecution on account of membership in a particular social group. This case begs the question: how does one prove a particular social group or that violence rises to the level of persecution? Here, we see that Western cultural ideas about gender may factor into the judge's decisions, particularly when it comes to defining gender persecution (for more examples, see Oxford 2005; Sinha 2001).

We see similar, though not identical, problems with sexual orientation asylum cases. A notable case is that of Jorge Soto Vega. In 2003, Soto Vega came to the U.S. from Mexico to gain asylum based on sexual orientation persecution. Detailing years of abuse and harassment from his family and the police, Soto Vega contended that, should he return to Mexico, he would face further persecution. The IJ found Soto Vega's testimony credible, but did not believe that he appeared gay (meaning effeminate). Soto Vega could pass as heterosexual and therefore was not in imminent danger (Soto Vega v. Gonzalez 2006: 3-4). Soto-Vega appealed his case, and in 2004, the BIA upheld the initial decision. Then, in 2006, Soto Vega's case was appealed to the U.S. Circuit Court for the 9th Circuit. The 9th Circuit refuted the BIA's decision, stating that the Immigration Judge and the BIA did not fairly assess Soto Vega's likelihood of persecution and misstated the appropriate burden of proof required to gain asylum (Soto Vega v Gonzalez 2006: 4). The case was remanded to the BIA, which remanded the case to an IJ. In 2007, the IJ granted Soto Vega asylum; the judge found that individuals should not have to hide their sexual orientation in order to prevent persecution and that there was no proof that there would be a place for Soto Vega to safely relocate in Mexico (Lambda Legal 2007).

Soto Vega's case, again, highlights the inconsistency in asylum decisions. Though the IJ and BIA arrived at similar conclusions, the 9th Circuit overturns both, forcing these courts to reconsider the burden of proof placed on Soto Vega. We also see that Western assumptions about the relationship between gender and sexuality factored heavily into this case. For Soto-Vega to prove the likelihood of persecution, he had to show that he could act "gay." For the judges hearing this case, the likelihood of persecution was directly related to the degree of gender conformity: the more gender nonconforming, the greater the probability of persecution. This decision has led scholars, like Hanna (2005), to conclude that masculinity is punished in asylum cases made by gay men (see also Cantú 2005 and Morgan 2006).

While many women and LGBT applicants have made successful cases[2], a growing body of literature and evidence suggests resistance to and uneven incorporation of gender and sexual orientation into U.S. asylum law. Given that gender and sexual orientation persecutions have been incorporated into the asylum system but have not been specified as enumerated categories, what accounts for the differences between successful and unsuccessful gender and sexual orientation asylum cases in the United States? How are typical asylum terms—such as particular social group, persecution, and credibility—applied in these cases? How do these terms reflect gender, sexual, race, national inequalities? How do they reproduce inequalities? The intention of this dissertation is to better understand the deployment of these terms and the consequences of their interpretation on the outcomes of cases heard by the highest level of appeals in the United States.

Scope and Rationale

In this dissertation, I analyze both gender and sexual orientation based cases, bringing them, to an extent, into the same frame of analysis. I made the choice to analyze both types of cases because they exist in a similar marginalized and liminal space in asylum practice. The asylum system, in many ways, caters to a male heterosexual asylum seeker, who has been persecuted in the public sphere (Doyle 2008; Lewis 2010; Nielson 2005). The underlying assumption of the gender and sexuality of the "typical" asylum seeker becomes obvious by dissecting how the terms gender and sexual orientation themselves are deployed in asylum practice. In this context, gender cases are reserved for women's cases, and sexual orientation cases are understood as those who do not conform to normative, cis-gendered heterosexuality (in this case, LBGT). The conflation of the generic terms, gender and sexual orientation, with the "other" reinforces the unacknowledged dominance of maleness and heterosexuality in the asylum context. Understanding how marginalization works for these two groups can illuminate larger processes of discrimination that pervade the asylum system and their deference to the male heterosexual asylum seeker.

In the fields of gender and sexuality studies, scholars debate the utility of bringing gender and sexuality into the same frame of analysis. Rubin (1984) explains that while gender and sexuality may be related in popular discourse, scholars need to analytically disentangle gender and sexuality because they operate distinctly and have different consequences. Though I include both gender and sexual orientation based cases to expose underlying and wide-scale bias in the asylum system, I approach my analysis of these cases as distinct. In the first two substantive chapters (chapters 2 and 3), I analyze gender based cases. In the last two substantive chapters (chapters 4 and 5), I analyze sexual orientation based cases. I made this choice to allow the problems unique to both types of cases to emerge.

In order to do justice to both types of cases, I have utilized theories for each chapter that are most relevant to the data. This means I utilize feminist and queer theory (both from a post-colonial perspective in order to fully explain the role of power in the international context) where applicable, allowing gender or sexuality to come to the forefront of the analysis. In analyzing these terms, I dissect how these terms were often entangled in the discursive practices of the courts, as well as in the experiences of the individual applicants. In other words, I do not assume in my analysis that gender and sexuality are inherently linked, but I do explicate when they overlap in ways that compound the marginalization of some groups (for example, in the case of lesbian asylum seekers—chapter 5) or when one term is deployed as an indicator of another (for example, in the case of gender nonconforming gay men—chapter 4).

It is worth noting that both gender and sexuality are complex and historically contingent terms, which have gained traction as analytically distinct concepts in recent history (see Valentine 2004, 2007 for the ways in which different institutional arenas have distinguished between gender and sexuality, reducing the concepts to finite terms). The judicial context reflects this analytic separation: gender is synonymous with gender identity and sexuality with sexual orientation, even though these categories sometimes overlapped in the applicants' experiences. Moreover, both categories are conflated with their corresponding "marginalized group" (women for gender, and homosexuality for sexual orientation). These usages spotlight the dominance of maleness and heterosexuality in asylum discourse; gender and sexuality are reserved for "minorities," while all other categories are implicitly based on male, heterosexual experience (Bohmer and Shuman 2007).

Procedural Background

The United States adopts its definition for asylum and refugee status from international refugee treaties, specifically the U.N.'s 1951 Convention on the Status of Refugees and the 1967 Protocol to the Convention. These conventions define a refugee as an individual who has a well founded fear of persecution based on "race, religion, nationality, membership in a particular social group, or political opinion." The U.S. formally incorporated this specific definition into U.S. refugee and asylum law in 1980 (Anker and Posner 1981). Though the definition itself refers to a refugee, the U.S. also uses it to adjudicate asylum cases.

The responsibility for making decisions on asylum comes under the jurisdiction of the United States Citizenship and Immigration Service (USCIS). Most decisions about individual cases are made by either asylum officers or Immigration Judges (IJ) in a select number of cities across the United States. The typical asylum applicant will start off on one of two tracks: affirmative or defensive. In the former scenario, an asylum applicant files an affirmative application immediately upon entering the United States at their port of arrival. The application is then reviewed by an asylum officer, who is a local employee of the USCIS. If the application is denied, the applicant can appeal their case to a local USCIS immigration court (or the Executive Office of Immigration Review – EOIR). The case will be heard by an IJ. If the case is again denied, the applicant can appeal to the Board of Immigration Appeals (BIA), then to a U.S. circuit court, and finally to the Supreme Court. Applicants who find themselves in the latter scenario are typically facing deportation. Upon being informed of the intent of removal from the U.S., the applicant will file a defensive application, stating why he or she cannot return to the country of origin. These cases automatically end up with an IJ and, if denied, can also be appealed to the BIA, circuit court, and the Supreme Court (for a flow chart of this process, see asylumlaw.org 2011). Most cases, either affirmative or defensive applications, will not move beyond the immigration court and the Immigration Judge. The reason for the stagnation of many cases is the lack of available resources to make an appeal; though all applicants are eligible for an appeal, the process is costly and time consuming, luxuries not available to many applicants.

While this asylum process is difficult for all applicants, gender and sexual orientation cases are contested in asylum law since they fall under the broad umbrella category, "particular social group." One case, the Matter of Acosta, does provide some context for understanding this category. In this case, the BIA found that a social group was a "group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience…However, 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 identity" (Matter of Acosta 1985: 2).The Matter of Acosta serves as the precedent for gender and sexual orientation cases since it defines membership in a particular social group. However, as many legal scholars have suggested and as I will argue throughout this dissertation, the interpretation of a particular social group is fraught with problematic and stereotypical thinking.

In the late 1980s and early 1990s, individuals began to apply specifically for asylum based on gender and sexual orientation persecutions. Most of these cases were made on the basis of "membership in a particular social group," though some were made on the basis of one or more of the other enumerated grounds of religion, political opinion, nationality, or race. The major landmarks for gender asylum occurred in 1995. This was the year that the U.S.

Department of Justice issued a set of informal guidelines for adjudicating gender asylum cases. The "Gender Considerations" were intended as non-binding guidelines for the asylum officers who review initial applications. Adjudicatory bodies that hear cases on appeals, like IJs, the BIA, and the Circuit Courts, were not subject to these guidelines, though they were welcome to take them into consideration. Relying on international documents, such as those developed by the United Nations High Commissioner of Refugees (UNHCR), the U.S. guidelines, or "considerations," provided examples of gender harms and acknowledged that gender asylum cases could be constructed on the grounds of membership in a particular social group or political opinion (Musalo 2010). In essence, the "Gender Considerations" were meant to direct asylum officers' decisions; but since the guidelines were non-binding, the officers were left to make their individual assessments of what constituted a successful gender persecution case.

The year 1995 also marked a ground breaking gender asylum case, the case of Fauziya Kassindja (improperly spelled by immigration authorities as Kasinga).[3] This case set precedent for future cases of gender asylum and is widely cited by legal scholars and adjudicatory bodies. Kasinga claimed that if she were to return to Togo, she would be subjected to female circumcision. After an appeal to the BIA, her case was granted. The published decision stated that she was a part of a group of "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice" (Matter of Kasinga 1995: 1). Citing Acosta, the BIA found that Kasinga could not change her identity as a "young woman" or as a "member of the Tchamba-Kunsuntu Tribe." If she were to return to Togo, she would be persecuted on the basis of this group membership, which was both fundamental and immutable.

Despite the narrowly defined social group, the Kasinga case often serves as a reference in other gender asylum cases. Yet, even though the Kasinga decision set precedent, asylum officers and adjudicatory bodies can ultimately choose what does and does not count as gender persecution. The case of R-A-, the Guatemalan woman who filed for asylum based on domestic abuse, proves this. When R-A- was denied asylum in 1999, legal scholars bemoaned this decision as a major setback for gender asylum applicants (Musalo 2010; Rogerson 2009).

An interesting set of events was developing alongside the Kasinga decision.[4] Throughout the late 1990s, the Clinton administration started to develop a set of guidelines that would solidify gender as a legitimate ground for asylum and that would set forth adjudication criteria, rather than recommendations. The Department of Justice (DOJ) intended to give the USCIS more direction for adjudicating gender asylum cases more consistently. The DOJ developed a set of formal adjudication criteria, often referred to as the Proposed Rule. By the time the Proposed Rule was ready to be finalized, the Bush administration was entering office, with George W. Bush as head of the DOJ and John Ashcroft as the new Attorney General. Ashcroft, in particular, was known to oppose some types of gender asylum cases, including those based on domestic violence (Rogerson 2009). And so, talk about the Proposed Rule tapered off, and it was never formalized. The new guidelines would have instituted more formal guidelines and alleviated some of the burdens faced by women applicants, but they were a political causality of a shift in governmental power (Rogerson 2009).

Gender asylum has received more administrative attention in the last couple of years. After 10 years of litigation, the contested decision in the case of R-A- was overturned after a recommendation from the Obama administration, paving the way for future domestic abuse based cases (Preston 2009). But still, no formal guidelines exist for adjudicating gender cases generally. In other words, after nearly 20 years of cases, the U.S. has not released formal

guidelines for dealing with gender asylum, unlike other global north nations, such as the U.K., New Zealand, Australia, and Canada, and international bodies, like the UNHCR (Musalo 2003). Decisions remain at the discretion of asylum officers and immigration judges.

The case of Toboso-Alfonso marks the beginning of sexual orientation asylum in the United States. In 1985, Armando Toboso-Alfonso applied for asylum on the basis that he would be harassed, assaulted, and even imprisoned if he returned to Cuba. The IJ hearing this case granted Toboso-Alfonso asylum. Citing the 1985 Matter of Acosta, the judge found that Toboso-Alfonso was, in fact, a member of a particular social group of persecuted gay Cuban men. Though technically gays and lesbians could not legally immigrate to the U.S. at this time (the formal repeal of the exclusion of homosexual immigrants did not occur until 1990), the IJ found that the U.S. never intended for gays and lesbians to live in persecutory conditions. Yet, the INS (now USCIS) appealed this decision, stating that "homosexual activity" should not form the basis of membership in a particular social group, especially when U.S. laws criminalize such activity. In 1990, the BIA dismissed the claim made by the INS; though the BIA did not grant him asylum, the board did grant his petition for withholding of deportation, which ensured that Toboso-Alfonso could stay in the U.S. The case, however, was not published or set as precedent at this time (Randazzo 2005).

The next major case occurred in 1993, when an Immigration Judge granted asylum to Marcelo Tenorio, a gay Brazilian man who was the target of anti-gay violence. The judge cited the Matter of Acosta, noting that Tenorio was "openly homosexual, a characteristic that the court considered immutable, and one which an asylum applicant should not be compelled to change" (see Randazzo 2005: 34). Again, the INS appealed the decision, and again, the BIA ruled in favor of the applicant. In 1999, the BIA dismissed the claim and granted Tenorio asylum.

Though there are no formal guidelines for handling sexual orientation asylum cases, in 1994 Janet Reno made a decision that would open doors for gay and lesbian asylum applicants. Reno set the Toboso-Alfonso case as a precedent; this meant that applicants would not have to prove on a case-by-case basis that sexual orientation constitutes a particular social group. But her decision did not describe any specific guidelines for judges to determine if the applicant faces a fear of persecution or if he/she is a member of that group. The lack of clear guidelines led (and continues to lead) to some questionable decisions by various adjudicatory bodies, specifically on the issue of what counts as persecution. Recall Alla Pitcherskia. The IJ ruled that she was not eligible for asylum because she had not been persecuted; her government had merely tried to help her. This decision was eventually overturned by the 9th Circuit Court of Appeals, which found that "punitive intent" is not a necessary condition to prove persecutory conditions (Randazzo 2005). So, although Alla Pitcherskia's sexual orientation was accepted under the new precedent, her persecution was misunderstood by a biased judge working without concrete guidelines.

In addition to creating murky waters for defining persecution, the lack of clear guidelines leaves asylum officials and adjudicatory bodies to decide who is a member of a particular social group. By not explicitly stating how judges should understand membership in these particular social groups, Reno left a grey area that continues to be a barrier for LGBT applicants. For example, the previous case of Soto-Vega showed that asylum adjudicators may require that the applicant's sexual orientation is "visible" to the public. In order to prove homosexualities, authorities required that he prove gender non-conformity (Hanna 2005). In other words, gender and sexuality are conflated in problematic ways in sexual orientation asylum cases. This conflation is made particularly evident in the case of transgender asylum applicants. Because

many asylum adjudicators believe gender non-conforming individuals must be gay, most transgender applicants make their cases based on homosexuality, even if they do not identify as such (Benson 2008; Jenkins 2009).

The U.S. asylum system has attempted to adapt to the changing nature of global human rights based claims, including those based on gender and sexuality. However, many of those attempts have fallen short because the system itself lacks any clear guidelines for these types of cases. Adjudicators utilize terms that were initially intended to define a "typical" male, heterosexual political asylum seeker, like a particular social group and persecution; however, the intended nature and definitions of these terms are ill-equipped to deal with some of the specific issues arising from gender and sexual orientation based cases that I will explore in this dissertation. In the following chapters, I dissect the usage of these terms and how their interpretation lends to uneven and sometimes unfair asylum adjudication for women and LGBT asylum applicants.

Though some of these procedural issues are distinct to the United States, many global north countries, as the primary recipients of asylum applicants, have encountered similar issues as they have incorporated gender and sexual orientation based cases. In other words, some of these problems are distinctly U.S. exceptionalism, while others are similarly contested on a more global scale. While many nations have signed the same international refugee treaties, state governments remain responsible for the development and implementation of the goals set forth by the treaties, as no regularized monitoring system exists to hold states accountable. This is different from international human rights law, which, at least in theory, monitors the compliance of states in regards to international human rights treaties (Millbank 2004). Given that nations maintain their sovereignty over the asylum process but still operate within the same global context, their responses and problems are likely to have similarities and differences. Most Western countries and political entities, like the United Kingdom, Canada, Australia, and the European Union, encountered many of the same definitional problems as the U.S., including a reluctance to broaden the particular social group category to encompass more private instances of violence typical to women and LGBT applicants. Unlike the U.S., however, all have instituted official guidelines to help adjudicators navigate these cases (Musalo 2003). Still, legal scholars continue to report problems of stereotypical adjudication in some of these states, particularly the U.K., Australia, and Canada (Goodman 2012; Millbank 2004).

Given that other examples of national asylum practices for gender and sexual orientation cases exist, any U.S. based policy recommendations should take these practices into account, learning from their successes and their pitfalls. After I examine the dominant issues emerging from my analysis in chapters 2-5, I conclude with suggestions for policy reform. These conclusions will revisit the interpretation of key terms as suggested by my analysis, but will also consider the guidelines utilized by other nations.

Existing Literature

The existing literature on gender and sexual orientation based asylum emerges from two distinct fields: legal studies and social sciences. Each field has strengths and enhances my dissertation. Ultimately, I seek to bring those strengths into the same frame of analysis to better understand the issues with these types of cases.

Legal Literature

The first set of works on gender and sexual orientation based asylum emerges from the legal field. The aim of this literature is to analyze and critique the disparate outcomes for women and LGBT asylum applicants in the U.S. As is the norm for the legal field, most analyses focus on a few well-known or precedent setting cases. Given the small sample size of cases, the conclusions drawn from this work are less generalizable than the traditional social sciences would prefer. Still, since this group of scholars is deeply familiar with legal terminology and terms, they are particularly well situated to evaluate the application of asylum law and practice in the context of gender and sexual orientation based asylum, especially as it relates to the interpretation of key terms and procedural barriers and guidelines. My study, which includes a substantially larger sample size or "n," can address these interpretational and procedural issues on a broader scale.

Legal Term: Particular Social Group

The first term that faces scrutiny by the legal literature is "particular social group." Marouf (2008) explains the four approaches to determining a particular social group utilized by different nations. First is the protected characteristic approach, which is one of the predominant methods adopted in U.S. adjudication. This approach is evident in the Acosta ruling and defines a group by fundamental and/or immutable characteristics that members of a group are unwilling or unable to change. Both gender and sexual orientation have been considered particular social groups using this approach. The second is an expanded definition of the protected characteristic approach. This perspective, adopted by the United Nations High Commissioner on Refugees (UNHCR) and the European Union, elaborates the protected characteristic definition by including not just groups defined by a common immutable and/or fundamental characteristic, but also groups that are perceived to possess similar characteristics, even if the individual does not identify with that group. The third approach, adopted by the Australian government, is the social perception test. Using this perspective, groups must be recognized by the applicant's society of origin as a group. In other words, individuals cannot perceive themselves as members of a group unless that group has a larger social significance. Last is the social visibility approach, which is a method that is gaining traction in the United States. This approach is closely related to the social perception test in that it requires a societal recognition of a group. The visibility approach also adds that individuals should be identifiable members of that group.

Given these approaches to a particular social group, applicants in the United States who utilize gender or sexual orientation based claims confront issues in adjudication. While both gender and sexual orientation share the similar problem of confused adjudicators and stereotypical thinking, the issues that arise from the particular social group interpretation are different in scope. For women, the primary problem is proving the worthiness of gender as a particular social group. Since half of the world's population consists of women, many of whom do not face persecution, judges wonder how applicants can show that they are at risk on account of their gender. In this sense, adjudicators base their assessments of "minority status" based on numbers, rather on experiences of marginalization and oppression. Whereas adjudicators are reluctant to accept that gender is a group worthy of asylum, they more easily accept that sexual orientation is a social group, that is if the applicant can prove that they are sexual minorities. For

LGBT applicants, the primary struggle is proving that they are actually members of a particular social group in a way that satisfies adjudicators.

Gender based particular social group claims are haunted by a reluctance to accept that women constitute a particular social group worthy of asylum. Though adjudicators do not question if women exist or if the female applicants are actually women, they do wonder if asylum law can and should include women as a particular social group that is at risk and in need of asylum (Bookey 2013). Goeller (2007) explains that this reluctance is largely motivated by a fear of opening the floodgates: if women constitute half of the world's population and they all need asylum, the system cannot accommodate all of those cases. Supporters of gender based claims have repeatedly denied these claims (see Musalo 2010), yet the fear continues to pervade gender based adjudication.[5]

Since gender is often interpreted as too broad to constitute a particular social group, many applicants have resorted to more narrowly defining their groups with another protected characteristic (Randall 2002; Siddiqui 2010). This approach, often referred to as "gender plus," adds religion, political opinion, or ethnicity to the gender claim, tailoring the group to the specific situation of the applicant. While the gender plus social group may have the short term advantage of gaining asylum for an applicant, the long term consequence is the lack of a full gender analysis in these cases. The narrow definition of gender based groups prevents adjudicators from realizing the commonalities of gender based persecution globally.

Given the reluctance to accept gender as a particular social group, many legal scholars working in this field make legitimizing gender based claims their primary goal (Barreno 2011; Bookey 2013; Goeller 2007; Hueben 2001; Marsden 2014; Morrissey 2012; Musalo 2003, 2010; Peterson 2008; Randall 2002; Siddiqui 2010). The approaches to establishing gender as a group vary. Some try to recuperate the particular social group definition, arguing that gender should be firmly established as a particular social group without question (Hueben 2001) or that gender is clearly immutable and thus satisfies the requirements of the clause (Morrissey 2012). Others, like Peterson (2008), believe that gender should be added as its own enumerated ground for asylum alongside race, religion, nationality, or political opinion. Despite their differences, the development of these approaches is a direct response to adjudicators' skepticism of gender as a worthy ground for asylum.

The problems for sexual orientation based asylum hinges on the identity of the applicant rather than the worthiness of the group. Most adjudicators are not reluctant to accept that sexual orientation constitutes a particular social group; however, the characteristics of that group and whether or not an applicant embodies those characteristics is a primary question. The decision making process has largely involved stereotypes about sexuality, creating instability in the asylum system. One problem has been the perception that gay and lesbian applicants must be gender nonconforming in order to prove that they are homosexual (Hanna 2005; Morgan 2006). Morgan (2006) explains that adjudicators interpret cases through their perceptions (and at times, misperceptions) of the white, middle class, gay male community in the U.S., meaning they favor cases in which applicants are openly gay, knowledgeable about LGBT trivia, and visibly gender nonconforming.

This type of reasoning—that all gay men and lesbians are gender nonconforming—is no longer officially acceptable to some of the circuit courts, but many scholars fear that the growing acceptance of the social visibility test will make adjudicators revert back to similar stereotypical thinking (Brenahan 2011; Marouf 2008; Soucek 2010). According to Soucek (2010), the social visibility test should mirror the social perception approach adopted by the Australian

government. Under the Australian approach, groups have to be visible in their country of origin to be considered for asylum. However, in the U.S. context, social visibility is an individual, not group, characteristic. Visibility, then, requires a certain appearance or an obvious identity, not the societal salience of a group. Choi (2010) and Turk (2013) explain that the emphasis on visibility puts applicants in a "catch 22": if applicants live discretely, they will not be eligible for asylum, but they will avoid persecution; if they live openly as a gay man or a lesbian, they may gain asylum, but they will put themselves at risk for violence. Ultimately, this group of scholars argues that these applicants are put in an impossible situation.

The other problem with proving membership in a particular social group for gay and lesbian applicants has been the confusion between sexual activity and sexual identity (Pftisch 2006; Southam 2011). Engaging in sexual activity with a same-sex partner usually serves as a good indicator of sexual identity for the courts (Choi 2011); however, it cannot be that activity that served as the grounds for persecution (Pftisch 2006). For example, if a man was imprisoned for having sex with another man, he would not automatically have a case for asylum because the imprisonment was based on an action, not an identity. Even though many anti-sexual activity laws were/are rooted in homophobia and stigma towards a group, applicants cannot use these laws to prove persecution on account of their sexual orientation. This distinction, as Pftisch (2006) argues, was fueled at least in part by the fact that the U.S. had anti-sodomy laws until 2003, under which a homosexual identity was not officially criminalized, but homosexual acts were.

I revisit the legal problems with the logic of determining particular social group throughout this dissertation, particularly in chapter 3 (gender cases) and chapter 4 (sexual orientation cases). In doing so, I rely on the expertise of these legal scholars to develop my arguments. There are, however, two problems with this body of literature and the legal explication of the particular social group clause. First, as previously mentioned, the literature is plagued by an issue of small n's. This is the norm for the legal field and so it would be improper to fault these scholars for abiding by their own disciplinary rules. However, the small scale analysis is inappropriate for the social sciences and so I use a larger dataset in order to draw my conclusions. Second, the legal literature largely evaluates terms, like a particular social group, inside the legal framework, meaning many of the evaluations address the law on its own terms. Many of these scholars will evaluate if an adjudicator's interpretation of a particular social group is legally sound (for example - did the adjudicator follow the Acosta decision and accept that gender and/or sexual orientation is immutable?). In my dissertation, I am less concerned about whether or not the adjudication was legally sound, but instead I am interested in the patterns that emerge from the interpretation of these terms and if and how those interpretations reflect larger systems of power.

Legal Term: Persecution

The other term largely contested by legal scholars is "persecution." In order to receive asylum, an applicant must prove that they were persecuted on account of a protected status (in the case of gender and sexual orientation based claims, this status is usually a particular social group). They must also implicate their country of origin in the persecution, either because the state committed persecutory acts or because it failed to protect the applicant from violent individuals. Though the interpretations of persecution may vary, all circuits consistently agree

that the state must have played a role in the violence as a direct perpetrator or as an ineffective or reluctant arbitrator of individual disputes.

Proving the state's role has created difficulty for women applicants. Doyle (2008) explains that the emphasis on the state's role in violence is derived from the male political refugee, whose experience of persecution is clearly rooted in the public sphere. While women rarely have difficulty proving that they experienced violence, they do confront the problem of proving their states' role in that experience. Many women's experience of violence occurs in the home, a realm considered outside the reach of the state. Women applicants, then, have to prove that their country of origin was unwilling or unable to help them escape violence (Condon 2002; Chan 2011; Heyman 2008; Hueben 2001; Marsden 2014; Peterson 2008; Siddiqui 2010). This is particularly difficult in the case of domestic violence cases in which adjudicators understand the cases as interpersonal disputes based on jealousy or revenge, not as issues of uncontrolled or state-sponsored violence (Condon 2002; Hueben 2001; Heyman 2008).

Sexual orientation based persecution is less likely to be understood as an interpersonal dispute because adjudicators recognize a history of state-sponsored violence against LGBT individuals. However, as more states decriminalize homosexuality, some applicants may encounter issues proving the state's role in the violence (Pfitsch 2006). Sussman (2013) provides six indicators that can implicate the state as either a perpetrator or as an unwilling or ineffective political body: the presence of anti-LGBT laws, homophobic cultural practices, mob violence against LGBT individuals, police complicity in violence, the use of "outing" as a weapon, and homophobic structuring of other institutions, such as religion. For Sussman, these indicators clearly entrench the actions, or inactions, by individuals in the context of national practices. However, they are not always recognized by the courts.

Lesbian applicants' cases sit at the intersection of gender and sexual orientation asylum law, creating confusion for adjudicators who have problems understanding both types of cases. As Nielson (2005) explains, many lesbians' experiences of persecution occur in the private sphere as women. However, the harm that they experience may be related to both their gender and sexual orientation. Given the private nature of the violence, lesbians may find more relief making a gender based claim since they have the most in common with other women applicants as compared to sexual orientation cases, in which the adjudication is largely based on a politically active and out gay male applicant. However, a gender-based claim does not entirely match the experience of lesbian applicants given that they also face homophobia, creating confusion for adjudicators as they try to find the root cause or motivator for the persecution.

In addition to proving the state's role, applicants must prove that their experience rises to the level of persecution. In other words, persecution is typically not a minor inconvenience, but rather more extreme in nature. Birdsong (2008) explains that the asylum statute does not clearly define persecution and the circuit courts have conflicting interpretations of this concept, adding more confusion to the adjudicatory process. The 9th Circuit adopts a fairly broad definition, explaining that persecution is "the infliction of suffering or harm upon those who differ ... in a way regarded as offensive" (Birdsong 2008: 206) either imposed by the state or by an individual that the state cannot control. The 1st Circuit has ruled that persecution must threaten life or freedom, but cannot include harassment or minor inconveniences, like brief detentions. The 3rd Circuit adds severe economic deprivation to their definition alongside threats to life, confinement, and torture. With the exception of the economic restrictions clause, none of these definitions account for nonphysical forms of persecution, like psychological torture (Marouf 2011).

The intention of defining persecution as extreme in nature is to grant asylum to the applicants most in need. However, the various definitions presented by the circuit courts may not capture all of the experiences of women and LGBT applicants. For gender based cases, the standard for extreme violence is set by the Kasinga case, which included female circumcision. Legal scholars explain that this practice, often referred to as "female genital mutilation" ("FGM"), is the most demonized type of persecution by the courts (Beety 2007); since adjudicators understand this practice as particularly extreme, it is unfair to make all women prove that their cases rise to this level of severity (Marouf 2011; Sinha 2001). In comparison, domestic violence (Sinha 2001) or the threats of violence or death (Shapiro 2009) seem less serious.

Sexual orientation based case have also confronted issues with the severity of the violence, especially as it relates to the intent of the persecutor. Initially, all of the circuit courts required that applicants prove that their persecutor's had "punitive intent," or that they were acting on account of malice. As described with the case of Pitcherskia, adjudicators understood the actions of the Russian government as a potential cure for Pitcherskia's homosexuality, meaning she could not prove punitive intent (Bennett 1999; Birdsong 2008). Though the 9th Circuit formally overturned this type of logic, the other circuit courts have yet to officially remove punitive intent. This means that applicants whose cases are heard by other circuit courts may still need to satisfy this requirement.

As with the literature addressing a particular social group, this body of works is especially helpful in understanding how the asylum system conceptualizes and understands persecution, as well as the ways in which this definition is inconsistent with the experiences of women and LGBT applicants. I explore the concept of persecution in more depth in chapter 2 (in which I show that nonphysical forms of domestic violence are not taken seriously by the courts) and in chapter 5 (in which I show that lesbian's experiences of persecution are downplayed or understood as irrelevant to their sexual orientation). Again, this body of literature falls short because of its use of small samples and its indebtedness to the legal system. This literature is political in that the aim is to expand the definition of persecution to help more groups of marginalized people. For me, though, this literature is not political enough. That is, the political aims are largely to maintain the status quo, rather than dissecting the ways in which the legal terms are embedded in larger systems of power. In addition to showing how this definition does and does not work for gender and sexual orientation based cases, I am also interested in how both gender and sexuality politics become markers of U.S. nationalism. In other words, I do not approach the term persecution as a neutral legal term that needs expansion. I understand persecution as a term that asylum granting countries deploy to exacerbate their differences from the applicants' countries of origin. In looking to redefine or recuperate this term, the aim is not simply expansion, but also recognition of the global politics that inform its definition.

Procedural Barriers

The final considerations of the legal literature are the institutional policies and procedural barriers in the larger legal and asylum system that may disproportionately impact women and LGBT applicants. The system wide rule that may have the biggest impact on these populations in the REAL ID Act, which was a federal law that initiated stricter border control policies for many types of immigrants. Fletcher (2006) describes how this act, instituted in 2005, has given IJs unilateral discretion to decide on the credibility of an applicant. With the creation of this law, the

IJ does not have to justify why or why not an applicant is considered credible or truthful. These credibility determinations are irrefutable and can be based on factors like the demeanor of an applicant or a slight inconsistency in a story. I consider these issues of credibility in chapter 2 (where I argue that domestic violence victims lack credibility for judges because they may return to their abusive partners) and in chapter 4 (where I show how previous heterosexual relationships or the presence of children may bring gay and lesbian asylum applicants' credibility into question).

The other major institutional barrier for women and LGBT applicants according to legal scholars is the lack of firm national policy addressing some of the very issues for which these populations apply for asylum (Benson 2008; Halatyn 1998; Heyman 2008; Randall 2002; Russ IV 1998). Heyman (2008), for example, points to the history of domestic laws that reflect a tolerance for domestic violence. This backdrop makes the adjudication of domestic violence based cases difficult since the history is to ignore, rather than confront, issues of violence in interpersonal and intimate relationships. Russ IV (1998) and Benson (2008) contend that the U.S. has its own set of human rights violations against LGBT individuals, including violations of rights, discrimination, and violence and hostility from the public and the police. Russ IV asks the provocative question, "could a gay U.S. citizen claim asylum in another country?" These works begin to draw out some of the questions of power that interest me in this dissertation by asserting the false divide between the U.S. and the countries from which applicants flee. Given the importance of thinking through the relationship between domestic policy and immigration law, I bring the Violence Against Women Act (VAWA) into conversation with domestic violence based asylum cases in chapter 2, highlighting progress on the national front and slow incorporation in asylum policy.

Legal Literature Conclusion

The work of legal scholars spotlights some of the key terms in question in this dissertation, including particular social group, persecution, and credibility. In this dissertation, I will look at the interpretation of these terms on a larger scale by referring to my original dataset of published gender and sexual orientation based cases in an effort to bring more reliability to the claims made by this group of experts. As I have mentioned, I am less interested in how these terms stack up against legal logic and more interested in the power relations imbued in their interpretations. How do notions of gender and sexuality impact their interpretation? How do the interpretations reflect larger global tensions? By dissecting these terms more theoretically and using a larger dataset, I bring a necessary social science approach to this field.

Social Science Literature

Scholars from the social sciences have studied gender and sexual orientation based asylum, reflecting on some of the larger power relations that are necessary for understanding this topic. These scholars dissect the stories that applicants have to tell in order to gain asylum and how those stories are embedded in gender, sexual, race, and national politics. Drawing boundaries around what constitutes a refugee has global implications by reinforcing distinctions between the countries from which the applicants flee and the countries to which the applicants flee. The literature explicates two narratives in particular: stories of victimhood and the process of becoming a queer refugee. The first narrative about victimhood emerges largely from the

literature on gender based cases, while the second narrative results from analysis of sexual orientation based cases.

Victim Narratives

One narrative that is critiqued by the social science literature is the victim narrative in gender based asylum cases. These scholars argue that successful applicants will present themselves as the victims in their country of origin (Casey 2012; Coffman 2007; Freedman 2007, 2010; Juss 2015; Kallivayalil 2013; Montoya 2013; Oswin 2001; Oxford 2005). The emphasis on victimhood in the context of gender based claims makes sense given larger feminist concerns about victim narratives historically and globally. Undermining "women as victims" narratives has been an effort for Western feminism (Wolf 1993). Moreover, postcolonial feminist scholars have called for a disruption of the monolithic depictions of helpless women from the "third world" (Mohanty 1984; Mohanty and Alexander 1996). The attention to victim narratives for gender based cases makes sense given this context.

In addition to finding that these stories of victimhood reinforce distinctions between "first" and "third" world countries, these scholars outline some specific consequences that emerge from requiring victim narratives. The short term victories of gaining asylum for women applicants come at the expense of creating a monolithic depiction of helpless women victims from the "third" world (Oswin 2001). This forces women to conform their stories to these monolithic depictions, even if their stories do not quite match. Coffman (2007) argues that the influential Kasinga case created a greater likelihood of success for African women applicants; yet, this success is predicated on an essentialized identity of an African woman, whose body is a victim of patriarchy. Since Kasinga, many cases have constructed similar strategic narratives and representations, which were advantageous for their applicants, but ultimately resulted in an essentialized stereotype of an African woman. In her experience as an expert witness for a case of female circumcision, Coffman was expected to tell a narrative about the applicant that was strikingly similar to the Kasinga narrative, even though her expertise in the applicant's country of origin suggested a very different story, one that might not have even included female circumcision. Coffman suggests that the conflation of all African women's experiences likely leads lawyers to look for any narrative deemed plausible by the courts. The easy acceptance of a monolithic depiction of victimhood forces women to tell certain stories about their experiences, potentially calling their credibility into question if they are found to exaggerate the "truth."

Another consequence of utilizing victim narratives is that judges are likely to accept that some women are more victimized than others. Oxford (2005) explains that some types of harm are more easily accepted in the asylum system, allowing women with specific experiences of persecution to be understood as victims at the expense of others. Using data from her ethnography in Los Angeles immigration courts, she finds that cases are bifurcated into either "ethnocentric" or "exotic" harms, the former being those cases in which the persecution is similar to the "American" experience of harm (such as domestic violence) and the latter being those cases in which the persecution is culturally "other" (such as female circumcision). Judges are more likely to fear "exotic harms," and therefore these cases are more often successful. On the other hand, the judges' cultural assumptions about gender prevent them from seeing "ethnocentric" cases as persecution and thus reject them. In doing so, the judges reinforce the perceived "backwardness" of "exotic" cultures.

This literature is helpful for considering the specific issues for gender based asylum claims. In this dissertation, I revisit some of the ways in which women can and cannot achieve "victim" status in the asylum process. In chapter 2, I find that adjudicators downplay women's experiences of domestic violence because they do not fit the ideal mold of a victim of gender violence. Here, I expand on Oxford's conceptualization of ethnocentric harm and juxtapose domestic violence in U.S. national policy (VAWA) and asylum practices, arguing that U.S. citizens are more likely to be understood as victims than immigrant women applying for asylum. In chapter 3, I follow up on this claim by explaining that the judiciary understanding of gender based violence, and victims of that violence, is largely entrenched in a sex-based model of gender in which "victims" are those who can prove distinct bodily harm.

Becoming a Queer Refugee

The other narrative critiqued by this literature emerges from the work on sexual orientation based cases. This group of scholars finds nothing inherent about being a "queer refugee"; rather, it is a process in which applicants must adjust their stories to the applicable norms of the asylum system and the receiving country of origin in order to present themselves as both "queer" and "refugee" (Berger 2009; Cantú 2005; Kahn 2015; Forbear 2011; Lewis 2013, 2014; Murray 2011, 2014; Shuman and Bohmer 2011). Both of these terms are socially constructed in a particular historical and cultural moment, meaning the interpretation of these terms will largely depend on the background of the adjudicators, as well as the climate of the asylum system itself.

Cantú (2005) draws this conclusion from his experience as an expert witness for five cases in which Mexican men applied for asylum based on sexual orientation persecution. During this time, he identified two issues. First, the applicant has to prove that being gay is "immutable." This has the potential to reinscribe essentialist notions of gay identity. Second, the applicant has to paint his country in racialist and colonialist terms, while denying the role that the U.S. has played in creating oppressive conditions. In doing so, the asylum system serves as a way to differentiate the U.S., a progressive country to which the applicant flees, and Mexico, the country from which the applicants flees (see Murray 2011, 2014 for a similar description of the Canadian context).

Scholars like Berger (2009), Lewis (2013, 2014), and Shuman and Bohmer (2014) explain that another essentialist stereotype perpetuated by the asylum system is the deference to the experiences of the gay male political refugee. "Queer" refugees are expected to be openly gay, politically active, and sexually involved with only members of the same sex. As these scholars explain, this narrative is especially difficult for lesbian applicants to achieve since they are marginalized by both their gender and sexual orientation. Lewis (2013) explains that lesbian women are "deportable subjects," in that their sexual orientation does not conform to the asylum system's expectation of "queer" since they are often not openly and politically gay, nor does their refugee story conform to the expectation of a "refugee" since women more often face violence in the private sphere.

This literature again is helpful for understanding the nuances of sexual orientation based cases. Particularly useful is the destabilization of a static category of the "queer refugee" in favor of a radical social constructionist approach that assumes nothing inherent about "queerness" or "refugee." I elaborate on this perspective in chapter 4 with my analysis of homonormative narratives in sexual orientation cases, as well as in chapter 5 with my analysis of persecution in

the context of lesbian asylum cases. In both chapters, I highlight the prevalence of the gay male political refugee narrative and the ways in which it hinders both lesbian and gay male applicants.

Social Science Literature Conclusion

The social science literature is particularly useful in that it explicates the gender, sexual, racial and national power and politics at play in the asylum system. My dissertation borrows from and expands on this literature, adding some new components to this body of research. First, as with the legal literature, most of these studies are based on small samples (a few cases, film analysis, experience as an expert witness). These small scale analyses have shed light on important issues with gender and sexual orientation based cases, but they may lack generalizability. My dissertation research draws from a larger dataset and thus has the potential to make broader claims. Second, the social science literature clearly understands the legal issues at work in these cases, but does not set out to understand the interpretation of these terms as its goal. In other words, this literature is missing a legal perspective. My dissertation will bring a legal perspective into the analysis.

Bridging the Literatures – Aims of My Dissertation

The strength of the legal analysis is its sophisticated understanding of legal terms and the strength of the social science literature is the description of the power relations underscoring the asylum system. In my dissertation, I will bridge these literatures by looking at the power embedded in the interpretation of specific legal terms, like persecution, particular social group, and credibility. In this sense, my dissertation tells a story about the utility of social science for legal analysis. By dissecting the asylum terms from the framework of legal competence and power relations, my dissertation brings these two literatures into the same frame of analysis.

Theoretical Perspectives

My dissertation is informed by two theoretical perspectives: critical legal studies and theories of gender, sexuality, and migration. I adopt these approaches as guiding principles for this project, leading me to interrogate processes of inequality in the asylum system and to utilize critical methodological strategies to uncover these processes. These perspectives mirror the approaches prevalent in the literature. Since I aim to bridge the legal and social science literature, these theoretical approaches link the content of this dissertation and promote my goal of exposing the ways in which asylum laws and practices reflect and reproduce categories of difference. Throughout my dissertation, I do invoke related and more specific theories to better understand the particular issues at hand in each chapter. The perspectives that I introduce below serve as overarching frameworks for my approach to my dissertation and to the study of gender and sexual orientation based asylum.

Critical Legal Theory

In adopting a critical legal studies approach, I draw from two legal theoretical perspectives: critical race theory (CRT) and feminist legal theory (FLT). Both CRT and FLT approach the law as a source of inequality, policies into which power relations have been written

and continue to perpetuate unequal outcomes for individuals. CRT's main objective is to analyze the relationship between race and the law, looking historically at legal methods of discrimination (slavery, civil rights, see Bell 1988; Crenshaw et al 1995; Delgado 2009), as well as assessing current mechanisms of inequality (unfair incarceration rates, economic discrimination, see Bell 1981, 1992, 2008; Freeman 1990; Delgado and Stegancic 2000). Mainstream FLT is largely concerned with women's equality under the law, again starting historically (women's property and voting rights, see Cady Stanton 1848; Wollstonecraft 1792[2004]) and moving into more current issues (violence against women, economic discrimination, see Grossman 2004; Minow 1990). Some scholars specifically overlap these approaches, for example by analyzing the experiences of women of color with the law (see Austin 1992; Crenshaw 1988; Harris 1990; Wing 2002). In this dissertation, I take this type of intersectional approach to critical legal studies, assessing the law as a site of inequality for many different social statuses (race, nationality, gender, sexuality). I am attuned to the ways in which these statuses intersect and disproportionately impact some groups and benefit others.

The goals of both CRT and FLT are to uncover bias in the law and promote inequality. Some of the methods for achieving these goals include: analyzing legal outcomes for patterns of inequality; correcting white, male bias by giving alternative readings of history; and understanding legal storytelling as both a source of inequality and a potential mechanism for empowerment (Delgado and Stefancic 2012; Levit and Verchick 2006). I utilize all of these approaches. First, I analyze the interpretation of key asylum terms in the context of gender and sexual orientation asylum and assess the impact of their interpretation on case outcomes. I am committed to looking for patterns of inequality in the asylum system. Second, I share the goal of correcting bias in asylum law by unpacking how gender, sexuality, race, and nationality operate in the adjudication of gender and sexual orientation based cases. By focusing the analysis on groups that are marginalized by the asylum system, I add another perspective to the history of immigration practices that spotlights unequal practices. Lastly, I analyze mechanisms of legal storytelling by uncovering the narratives that applicants must employ in order to have successful cases. How these stories get told is just as important as the outcomes of the cases. In other words, successful outcomes predicated on biased logic are still problematic in that they have consequences for other applicants and the potential to perpetuate racism/sexism/homophobia more broadly.

In addition to sharing the goals and methods of CRT and FLT, I borrow two specific insights from these perspectives. First, both CRT and FLT critique liberal strategies that seem progressive, but have the potential to reinscribe racist and/or sexist ideology. CRT, for example, is wary of "liberal" colorblind laws, which treat all races as equal (see Freeman 1978). Though the goal of colorblindness is to remove racial inequality from the law, it does not address the history and continued structural perpetuation of racism, meaning this perspective is not only ineffective, but also ignores, rather than addresses, race. FLT scholars also take issue with "liberal" gender policies, for example, the claim that all women are inherently similar and that any legal redress to gender inequality will have the same desired impact on all women (see Williams 1991). Essentialist politics may not ignore gender (as is the case with colorblindness), but instead make gender hyper visible, serving as a foundation for the idea that women are biologically different from men and erasing important differences between women. What I take away from both of these theories is to resist the temptation that liberal and broad strategies are the best policy and to allow for meaningful difference across groups.

As I will show in chapters 3 and 4, some of these liberal strategies are already employed in the asylum system, resulting in problematic decision making. In chapter 3, I argue that essentialist notions of gender resting on a biological construction of sex pervade the adjudication of gender based cases, benefitting only a small number of female circumcision cases that can clearly show the infliction of harm to the genitalia. In chapter 4, I outline how a homogenous and essentialist understanding of sexual orientation hinders many applicants with less linear and coherent life stories. Some applicants are successfully able to tell their stories using these problematic liberal logics, but their success comes at the expense of reinforcing essentialist understandings of gender and sexuality, and is detrimental to many other applicants. Given that much of the adjudication of gender and sexual orientation based cases relies on broad interpretations, I am reluctant to make sweeping generalizations about how to alter asylum policy without reinforcing the very ideas that I am trying to overturn. I return to this hesitation, informed by CRT and FLT, in my policy-oriented conclusion.

The second insight from CRT and FLT is a healthy dose of skepticism in regards to triumphant legal outcomes. Small and incremental changes in any law will not have the wide-spread impact many CRT and FLT scholars would like to see. Additionally, these changes can be overturned because the law is subject to the historical and cultural environment and therefore is not static (see Haney López 2007; Minow 1990; West 1988). This reminder was particularly useful to me when I came across a few cases in my analysis that seemed to resolve some of the key issues that I set out to critique. For example, the case of Razkane v. Holder (2009) explicitly overturns the use of gender nonconformity as a marker of homosexuality. I entered my dissertation research with the explicit goal of understanding the use of gender politics in sexual orientation based cases. This case seemed to eliminate the problem entirely. However, embracing a CRT and FLT perspective pushed me to think more critically about the impact of this case. Any changes emerging from this case had to be tempered. First, this case outcome would only be applicable to the court in which it was decided, meaning it was only an incremental change. Second, the historical and cultural context which initially allowed adjudicators to conflate gender and sexuality was not completely erased; legal interpretation might continue to utilize stereotypical ideas about homosexuality, but perhaps not as obviously. This led me to the strategy of looking at the development of case law, pointing out successes, failures, and reversions.

Embracing the legal perspectives of CRT and FLT promotes good social science. The interrogation required for this type of legal approach supports a systematic and critical exploration of inequality embedded in the law. Throughout each chapter, this approach is evident is my examination of key asylum terms and their repercussions for sustaining inequality or hindering equality.

Gender, Sexuality, and Migration Studies

In addition to adopting a critical legal perspective, I situate this dissertation in the larger literature on gender, sexuality, and migration. At its core, this body of literature is bound by the theoretical proposition that borders and immigration policies both reflect and reproduce categories of difference. In other words, who is excluded and who is included, who is outside and who is inside, is linked to larger historical and cultural tensions. Border politics reflect these tensions by imposing restrictions for some migrants and opening up pathways for others. For example, post 9-11, the United States restricted migration and travel for many individuals of

Middle Eastern descent, reflecting larger anxieties about ethnic and national affiliations. In the process of reflecting those anxieties, though, post 9-11 immigration policies reproduced ethnic difference by seeking out and identifying Middle Eastern individuals, sometimes falsely, within and at U.S. borders. By deciding who was suspect and who was not, these policies further solidified ethnicity and nationality as categories of difference. In this way, this literature shares some of the same goals of critical legal theory by embedding the discussion of border politics and immigration law in larger structures of inequality.

The gender, sexuality, and migration literature looks specifically at the importance gender and sexuality during immigration processes, as individual identities that are contested or in flux in the process of crossing borders (Cantú 2009; Carillo and Fondevila 2014; Cruz-Malave and Manalasan 2002; Ehrenreich and Hoschild 2002; Espiritu 2003; Gonzalez-Lopez 2005, Hondagneu-Sotelo 1994; Kempadoo 2005; Manalasan 2000; Parrenas 2001, 2006; Peña 2005), or as categories central to the construction of immigration policies and laws (Cantú 2005; Donato, Wagner and Patterson 2008; Luibéid 2002; Epps, Valens and González 2005; White 2014). The literature on the last concern—how categories are constructed and reinforced in immigration law—is particularly useful for my dissertation. These scholars explain that gender and sexuality have served as grounds to include and exclude individuals at the borders (Bell and Binnie 2000; Hubbard 2001; Nagel 2003; Luibhéid 2002). Notably, Luibhéid (2002) suggests that the state's immigration apparatus values patriarchal heterosexuality as a national imperative, in which "race and class dimensions determine whose heterosexualites are valued and whose are subject to surveillance and punishment" (xxi). In other words, the U.S. immigration system used categories based on race, class, gender, and sexuality to deny entry to some immigrants (see also Nagel 2003).

To illustrate her point, Luibhéid traces out the history of immigration laws, which sought to exclude and include immigrants on the basis of race, gender, and sexuality. For example, the Page Law of 1875 specifically called for the exclusion of Asian female prostitutes. Chinese prostitutes were constructed as dangerous to "white lives, institutions, and nation" (53), and were policed through the creation of immigration files that included biographic details and photographs (Luibhéid 2002). The Page Law was followed by the Immigration Act of 1891, which included provisions to exclude individuals who were guilty of crimes of moral turpitude (including sodomy, rape, adultery, and bigamy), as well as individuals who showed signs of "sexually abnormal appetites and behavior" or venereal diseases. This act incorporated the medicalization of sexually "deviant" others, a trend that would continue throughout a large portion of the twentieth and twenty-first centuries. Importantly, the act served as a precursor to the 1952 U.S. Immigration and Nationality Act, which officially banned gays and lesbians from immigrating to the U.S. (Luibhéid 2002).

However, Luibhéid notes that a study of U.S. immigration history cannot be written simply as a history of exclusion; equally as telling are the policies that explicitly called for the *inclusion* of certain individuals. For example, the Gentleman's Agreement of 1908 with Japan ended immigration to the United States for the purpose of labor, but included a provision that allowed Japanese men to send for their wives if they could pay $800 for the reunification process. This emphasis on family reunification constructed the "good other" along race, class, gender, and sexual lines. The good other was of Asian descent, could afford the $800 fee, and was involved in a patriarchal heterosexual relationship. Thus, the U.S. government acknowledged "proper wives" as appropriate immigrants, thereby constructing immigration policy based on a heteropatriarchal model (Luibhéid 2002). Luibhéid's work importantly shows

how state rules about citizenship and immigration not only deny entry to some, but also work to exacerbate differences between citizens and non-citizens by creating laws that reflect racial and sexual tensions.

Luibhéid's analysis informs my work in that I also show how immigration policies (in this case, asylum practices) reflect and reproduce categories of inequality, granting asylum to applicants that fall in line with U.S. politics and denying entry to those who do not. For example, in chapter 4, I show that individuals who conform to a particular conception of homosexuality (linear, coherent stories about their sexual orientation that ideally include political activism) are successful because they mimic the model of gay citizenship that has become palatable to the U.S. public. This model, which Lisa Duggan (2003) calls homonormativity, becomes restrictive for individuals whose experience contradicts this understanding of homosexuality. In the context of asylum, this process reflects existing inequalities by granting asylum only to those that conform to a homonormative narrative, and also reproduces inequality by solidifying this model as the dominant gay and lesbian identity. In this sense, my dissertation expands on Luibhéid's work, as well as the larger literature on gender, sexuality, and migration, by implicating asylum practices in the reproduction of categories of difference and inequality.

The gender, sexuality, and migration literature also points to the utility of understanding historical and current understandings of citizenship; immigration processes reflect notions of citizenship by marking differences between migrants and citizens or by incorporating those that can become good citizens. This means that my dissertation is also informed by the rather large body of critical scholarship that addresses citizenship and nationalism. Feminists, queer theorists, and post-colonial scholars have critiqued the concept of citizenship by noting the gendered, sexualized, and racialized assumptions that underlie its practice. In particular, many scholars have pointed out that the model citizen has been male (Lister 1990; Phillips 1991; Walby 1994), white and male (Alexander 1994; Yuval-Davis 1997) and heterosexual (Cooper 1995; Duggan and Hunter 1995; Herman 1994; Richardson 1996, 1998, 2000; Wilson 1993). Historically, then, citizenship has marked women, racialized minorities, and individuals with non-heteronormative sexualities (Benhabib 2002; Richardson 2000; Yuval-Davis 1997) as non-citizens by restricting rights for these groups.

This framework for understanding citizenship is particularly useful in the context of understanding asylum practices. As previous scholars have noted, the asylum system was developed with the male political asylum seeker in mind, an individual who could not freely access his rights as a citizen in his country of origin (Doyle 2008; Lewis 2010; Nielson 2005). Given this history, the practices and politics of asylum are not necessarily adaptive to women and/or LGBT asylum applicants who have not had access to citizenship rights historically (and sometimes contemporarily) and therefore their struggles have mostly occurred in the private sphere (Lewis 2010). I substantiate this finding by showing that the private nature of many gender and sexual orientation based cases can hinder asylum applicants, especially in the case of domestic violence cases (chapter 2) and lesbian cases (chapter 5). Just as citizenship rights have had to adapt over the course of history, I will argue that asylum practices must do the same. One dominant approach to including marginalized groups as citizens has been to grant them the existing rights and status of the traditional citizen (as evidenced by critical race and feminist legal scholars in the context of civil and women's rights, as well as migration scholars in the context of immigration and assimilation). This assumes a static approach to citizenship and denies the roots on which the concept was created. I will argue in the conclusion that asylum policy must be radically reconceptualized to remove its basis in white, male, and heterosexual

citizen politics. In other words, incorporating women and LGBT individuals into existing policies will not work; the framework must be interrogated and reformulated.

The literature on gender, sexuality, and migration, including its theoretical insights on inequalities and citizenship, informs my dissertation. Each chapter will show how asylum practices, through the interpretation of key terms, both reproduce and reflect inequalities and categories of difference. In doing so, my dissertation adds to this growing body of works.

Method

The aim of this dissertation is to assess patterns in adjudication of gender and sexual orientation based asylum cases with a particular emphasis on the interpretation of legal terminology as it both reflects and reproduces inequality for women and LGB (and sometimes T) applicants. In order to achieve this goal, I draw on two sources of data: interviews with lawyers and my original dataset of published gender and sexual orientation based cases.

I relied on the lawyers as key informants for this research. Since they practice in the field, they directed me towards historical and emergent issues that impact the adjudication of these types of cases. They helped me understand legal terminology and situated those terms in larger asylum practices, providing the legal rationale for different types of interpretation. Throughout the dissertation, I include quotes from the lawyers where it enhances the argument in each chapter. However, the bulk of the analysis is grounded in the case outcomes. I have two reasons for this choice. First, I am interested in how these legal terms are interpreted by asylum adjudicators since their decision making process directly impacts the experiences of applicants. Second, I am hesitant to tell a story about the legal maneuvers that lawyers choose (or are forced) to use to gain asylum for their applicants. Many current asylum practices were developed because of skepticism about the motivations of applicants; lawmakers fear that asylum has the potential to open legal pathways for immigrants with economic, political, and even nefarious motives. In the context of more restrictive policies, lawyers must adapt their strategies to help their clients. For example, since gender and sexual orientation cases are difficult to prove, lawyers will add as many grounds for asylum as possible, even if some of those grounds are only tangentially related to primary reason for the asylum claim. Some of these maneuvers could be interpreted as deceptive and provide further justification for more restrictive asylum and immigration policies. In other words, after my interviews with lawyers, I began to worry about the political repercussions of telling a story about their creative practices. Even though those methods were often grounded in their deep passion for human rights, these intentions could be interpreted differently, leading to consequences for already marginalized groups. This contradicts the post-colonial perspective to which this dissertation is indebted.

Given both my methodological, theoretical, and political goals, the primary source of data is my original dataset of circuit court appellate level gender and sexual orientation asylum cases. In using this data, I analyze asylum practices as they develop from the top level of adjudication. As previously mentioned, the typical asylum case starts with lower level adjudicators, including IJs and the BIA, and only lands in a circuit court after several appeals attempts. In this sense, my analysis is not necessarily representative of lower level asylum practices where most asylum cases are heard. Ideally, I would have access to these lower level cases and could provide a more complete picture of the asylum system. However, as legal scholars have stated for at least a decade, the USCIS guards these case outcomes by not routinely publishing these lower level decisions (Musalo 2003). Some BIA decisions are published, but

not all. Accessing the IJ decisions require lengthy and costly Freedom of Information Act appeals. Even if one were to obtain access to a subset of IJ decisions, these outcomes are not disaggregated by type of asylum claim, making an analysis of certain types of cases extremely difficult. Ultimately, in the conclusion, I call for greater transparency of lower level decision making.

Though I do not have access to IJ and BIA outcomes, I believe that analyzing circuit court decisions has a substantial advantage. The decisions of the circuit courts should act as precedent for the lower courts, at least in theory. Since there are no formal guidelines for dealing with gender and sexual orientation based cases, the decisions of the circuit courts are the primary guiding principles for lower level adjudicators. The circuit courts are where change, even if it is small and incremental, can and does happen in the asylum system. Analyzing the circuit court appellate decisions allows a better understanding of the most powerful voices in the asylum system at this time. Because lower level adjudicators should fall in line with the methods of interpretation of the circuit courts, my analysis can be considered representative of the kind of legal thinking occurring within the asylum court system.

A related and specific concern raised by skeptics of using circuit court data is that the case outcomes are more likely to be negative and thus not representative of lower level decision making. Cases heard by the circuit courts have already been vetted several times, and if other adjudicators did not find reasonable cause to grant asylum, the circuit court probably will agree. Millbank (2010) addresses this concern specifically in her analysis of gender based cases. She explains that circuit court decisions are more likely to have "false positive" outcomes since the circuit court cannot grant asylum; it can only remand back to a lower court, which can choose to grant asylum or not. If there is any bias in the analysis, it is too favorable towards the larger system.

I constructed my dataset of appellate level decisions by searching for key terms using Lexis Nexis Legal. The process for finding gender and sexual orientation based cases varied slightly. To find sexual orientation based cases, I searched for "sexual orientation," as well as related terms to describe the identity of the applicant. These terms included "homosexual," "lesbian," and "gay." These combined searches yielded 196 cases. These cases were mostly made by gay men and lesbians, however some of the cases were clearly trans cases that were interpreted by the courts as sexual orientation, not gender identity. I have included these cases in the analysis since the courts believe that these cases are sexual orientation based cases.

For the gender based cases, I could not rely on using identity based terminology to find cases. I learned from my interviews with lawyers that gender based cases are more easily identified by the type of persecution, rather than the identity of the applicant. Searching for the term "woman" or "women" would yield a large number of cases that were not at all related to gender based persecutions since those terms can be used in any type of case. For example, a woman might apply for asylum based on religious based persecution but her lawyer does not ground her case in a gender based argument. Therefore, to collect a comprehensive gender dataset, I chose two specific types of gender based persecution: domestic violence and female circumcision. I made this choice for two reasons. First, these are the types of gender based cases most frequently discussed in the literature. My analysis, then, can substantiate previous claims that were based on small samples. Second, one type of persecution, domestic violence, is "ethnocentric," in that it frequently occurs in the United States, while the other type, female circumcision, is "exotic," in that it is not culturally familiar. Including familiar and unfamiliar experiences allows me to fully understand the intersection of gender with nationality in the

interpretation of gender based cases. My total number of gender based cases is 193: 53 domestic violence cases and 140 female circumcision cases.

All of the cases initially began as asylum cases, but sometimes the applicants would also apply for withholding of removal (WOR) or relief under the Convention Against Torture (CAT). Both WOR and CAT are very closely related to asylum, but they have stricter standards in that the applicant has to prove a concrete, explicit example of impending persecution in their country of origin, whereas asylum can be based on a more generalized fear. These types of relief are understood by lawyers to be a last effort to help their clients stay in the United States. In some of my appellate level decisions, the applicants did not contest the lower courts' denial of their asylum claim and instead appealed only their WOR or CAT claim. I have chosen to include these cases in the analysis for three reasons. First, these cases continue to refer to the initial asylum claim, providing me with useful data. Second, WOR and CAT claims are very similar to asylum claims and in fact are more stringent. Both types of claims add to my story about immigration practices. Lastly, and perhaps most importantly, the reason that many of these cases became WOR or CAT claims is because of procedural issues imposed by the REAL ID Act. Musalo and Rice (2008) explain that REAL ID created a one-year bar to asylum: if an applicant does not apply within one year of arrival in the United States, they are ineligible for asylum. WOR and CAT, on the other hand, are not time-barred. In other words, the reason for removing the asylum claim is a procedural necessity. The fact that these cases are ineligible for asylum is an important finding in that it creates a somewhat arbitrary barrier for potentially legitimate applicants.

I analyzed all of the cases using the qualitative analysis program, NVIVO. I coded each case for basic descriptive, including the court, year, country of origin, gender, ground for asylum, type of persecution, and outcome of the case.[6] As previously indicated, a circuit court cannot grant asylum. I determined that the outcome of the case was successful if the case was remanded to a lower court, which should make a new decision consistent with the logic of the circuit court. If the case was denied, I determined that the case was unsuccessful. I looked for basic patterns across successful and unsuccessful cases, including if applicants from certain countries of origin, or cases heard by certain circuit courts, were more likely to be successful. None of these indicators were correlated with the outcome of the case.

In addition to coding for basic variables, I also analyzed the cases for the interpretation of legal terms. I coded each case for the terms "particular social group," "persecution," and "credibility." In this sense, the analysis is deductive since I sought to understand the invocation of these terms and their impact on the outcomes of cases. However, my reading of these terms was grounded in the text itself; the patterns of interpretation emerged from an initial close reading of the cases. I specifically looked for how gender, sexuality, race, and nationality impacted the interpretation of these terms. Once I conducted this initial reading, I reread and recoded the cases for my inductive based codes. I include more specific details about my coding methods in all of the chapters that follow. Though each chapter utilizes the same method, the analysis of the terms and their specificities are guided by the theoretical perspectives introduced in each chapter.

Each of my chapters presents a unique finding from my analysis of the cases. I use statistical analysis where useful. However, I found that my limited number of cases prevented me from drawing any real statistical conclusions. Therefore, the power of my dissertation is in the qualitative analysis of the cases as they emerge over nearly three decades (1985-2013). In each chapter, I show how the interpretation of key terms has evolved and where problems remain. I

use this analysis to develop targeted policy recommendations in each chapter, as well as in the conclusion to the dissertation.

Chapter Overview

In the chapters that follow, I present four distinct arguments, linked together by similar theoretical approaches and methodological tactics. Each chapter tells a story about the interpretation of key legal terms and the ways in which that interpretation is related to power and inequality. By bringing these chapters together, my dissertation provides a broad overview of the problems with gender and sexual orientation based asylum, which ultimately informs my policy suggestions featured in the final conclusion.

Chapter 2 addresses barriers for applicants seeking asylum on the grounds of domestic abuse in their country of origin. As the literature suggests, domestic violence based cases have received uneven adjudication since judges are likely to understand this type of violence as interpersonal and private, and therefore outside the boundaries of asylum law. I find support for this argument specifically in the interpretation of two key asylum terms: persecution and credibility. I find that both definitions are too narrow to encompass the experiences of women who face domestic violence, especially when that violence occurs in the home. In this chapter, I make the argument that while U.S. national policies, like the Violence Against Women Act (VAWA), are becoming more inclusive to include the experiences of victims of domestic violence, asylum policy is lagging behind, meaning non-citizens are not granted the same considerations and protections as citizens. By bringing VAWA into the conversation about asylum policy, I aim to highlight this differential treatment, as well as to transform asylum practices to help more women globally.

Chapter 3 uncovers the role that biological essentialism plays in the gender based asylum adjudication. Previous scholarship highlights the cultural components of judges' decision making, including their tendency to understand domestic violence as an ethnocentric harm not worthy of asylum and to view female circumcision as barbaric and exotic and thus worthy of asylum. In this chapter, I add more nuance to this argument by suggesting that biological essentialism is a tool upon which the ethnocentric/exotic framework rests. I identify three legal maneuvers rooted in biological essentialism—seeking immutability, favoring particularity, and universalizing Kasinga—that allow asylum adjudicators to not only grant asylum in female circumcision, but also to distinguish the practice as barbaric and inherently different from U.S. gender politics. Adjudicators, then, reproduce racial difference in these cases by relying on the sexual elements of these cases that seem distant from U.S. gender practices.

Chapter 4 explores sexual orientation based asylum cases through the theoretical framework of homonationalism. In this chapter, I juxtapose three successful and three unsuccessful cases of sexual orientation based asylum to show the differences in the construction of both identity and persecution. I find that successful applicants can prove a linear and coherent identity in line with Western ideologies of sexual orientation. Moreover, successful applicants can show clear and direct bodily harm. The pairing of these criteria highlights what Jaspir Puar (2007, 2013) calls "homonationalism," or the phenomenon in which some sexual minorities' bodies are deemed worthy of protection from the state, while others are not. This chapter explores which sexual identities are palatable to asylum adjudicators, and which are not, and spotlights the role that the immigration service plays in reproducing inequality and difference at the border.

Chapter 5 looks at the discrepancy between gay men and lesbian women's asylum cases. The existing literature suggests that lesbian women confront difficulty in the asylum system because their stories do not conform to existing narratives about gay male identities that are linear and public. I addressed this issue in chapter 4. In chapter 5, I present a new dimension for the differences between these cases: the interpretation of persecution. I argue that the lesbian women's experiences of persecution in my dataset are interpreted as "less serious" by judges. First, I entertain the possibility that lesbian cases are actually less serious in nature. I find that if the women in my dataset do have "objectively" less serious experiences of persecution, it is only because they hold substantial class privilege, allowing them to leave persecutory conditions before they escalate. The second and more probably explanation is that the judges are skeptical of lesbian sexuality, meaning they do not interpret any experiences of violence as persecution under asylum law. I juxtapose similar cases made by gay men and lesbian women, with nearly identical stories, to show how the skepticism about lesbian sexuality hinders judges from understanding their experiences of violence as persecution on account of their sexual orientation.

Each chapter presents a new argument for the literature, drawing together existing knowledge from the legal field and from academia. Taken together, these chapters demonstrate the necessity of policy reform for gender and sexual orientation asylum, especially in the interpretation of key asylum terms like particular social group, persecution, and credibility. In the conclusion, I draw on the insights from each chapter, as well as other asylum policies from across the globe, to suggest a concrete set of policy changes that will rectify the problems observed in the asylum system.

End Notes

[1] Formerly the U.S. Immigration and Naturalization Service (INS).

[2]The number of cases overall is difficult, if not impossible, to obtain. The United States Citizenship and Immigration Service (USCIS) does not disaggregate the asylum cases by type of persecution.

[3]I will use the improper spelling of "Kasinga" throughout the dissertation, since this is the usage adopted by the courts. I have made this choice to keep the language consistent throughout the text. I recognize, however, that this misspelling is likely not benign; that is, the privilege of the courts at the very least allowed them to not correct the mistake or at most provoked them to misspell the term in the first place.

[4]This history is not frequently discussed in the literature. In fact, I did not discover this information until I had read dozens and dozens of articles on the subject.

[5]The legal literature does not expound on this fear of the floodgates. Turning to the work of social scientists working on issues of gender, sexuality, and migration is useful here. Immigrant women historically have been seen as a threat to the nation because their reproductive potential fuels underlying concerns and fears of racial purity in the United States (see Luibhéid 2002 and Cantú 2009). Cantú's discussion of the San Diego roadside signs of presumably Mexican immigrant women and their families "fleeing" across the border is particularly illustrative of this fear.

[6]It is worth noting that many asylum applicants require translators to present their cases in U.S. courts, which undoubtedly affects the telling of their stories. My analysis of the appellate cases cannot capture the complexity of this issue, but I was attuned to instances in which cases were appealed because the applicant's initial statement was misheard or misunderstood by initial adjudicators.

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Chapter 2

Reconciling Domestic Violence Asylum and the Principles of the Violence Against Women Act

In the United States, the Violence Against Women Act (VAWA), first passed in 1994 and reauthorized several times since, intended to provide concrete protections for women, ultimately coinciding with lower overall rates of victimization. One area which has seen a tremendous impact is domestic violence; rates have decreased by 67% between 1993 and 2010 (White House 2013). In addition to the tangible impact on the lives of individuals living in a household with violence, VAWA has shifted the national narratives about violence against women generally and domestic violence specifically. Whereas domestic violence was once considered an interpersonal issue, violence in the private sphere is now very much public. Women, previously scared to speak about their experiences, are more likely than ever to tell their stories without fear of ridicule. In many ways, the impact of VAWA has changed the landscape of thinking about gender based violence in the United States.

Arguably, VAWA falls short in its implementation; the reliance on the criminal justice system reinforces the individual nature of domestic violence and many sub-sets of victims remain unprotected. Yet, each instantiation of VAWA shows a greater commitment to addressing domestic violence in a comprehensive and effective way. For example, the 2013 adoption of VAWA provides not only financial resources for protection services through the criminal justice system, but it also requires sensitivity trainings for all professionals working with victims and more funding for psychological services for women (U.S. Congress 2013). These additional provisions suggest that the intent of VAWA is expanding to include a wider definition of the harms experienced by victims of domestic violence, as well as a broader vision of the services and protections available to women.

Despite the expanding intentions of VAWA, suspicion and skepticism permeate another area of the law that extends protections to victims of domestic violence: the U.S. asylum system (Bookey 2013). Judges are reluctant to accept an argument for gender based violence and tend to adopt an individualized framework in which domestic violence is treated as a personal dispute in the family context (Freedman 2010; Heyman 2008; Marsden 2014; Musalo 2010). Though some provisions, including immigration guidelines and case law, have attempted to address the unique issues faced by women fearing return to their husbands or family, current asylum practices in the United States largely present more hurdles than gateways (Bookey 2013). This is exacerbated by the reluctance to enumerate gender as its own group worthy of asylum, favoring the use of the vague "membership in a particular social group" (Musalo 2003).

My analysis of published asylum decisions for women fleeing domestic violence reveals two specific ways in which current asylum practices are inconsistent with the U.S. national conversation about violence against women. First, the definition of "persecution" is too narrow to encompass the range of experiences of women, and men, who are victims of domestic violence. The intention of VAWA is to encompass a larger range of abuses and the cumulative impact of violence in the home, an intention not evident in cases of domestic violence asylum.

Second, proving the credibility of the asylum applicant is difficult when the abuse happened in the home with little corroborating evidence from the public sphere. While federal guidelines in the context of both asylum law and national policy are supposed to loosen the credibility requirement for victims of domestic violence, current cases show that skepticism prevails when applicants make this type of claim. By placing these two policies—one intended for citizens and one intended for non-citizens, I explore how immigration and asylum policy can extend its reach to more women globally and grant the same considerations to asylum applicants as it does its own citizens.

Background

In the United States, individuals can apply for asylum if they have a well-founded fear of persecution in their country of origin on account of their race, nationality, religion, political opinion, or membership in a particular social group (Anker and Posner 1981). A nexus, or a link, must exist between the persecution and the reason for which the applicant applies for asylum. Gender is not specifically referenced in this definition, but increasingly victims (mostly women) of gender based harms make the case that their gender constitutes a particular social group (Anderson 2001; Musalo 2010; Siddiqui 2010). In order to construct a particular social group, asylum adjudicators largely accept the precedent from the 1985 case, Matter of Acosta. Acosta dictates that a particular social group is identified by common immutable characteristics that are fundamental to individual identities. Given that gender is understood by the courts to be both immutable and fundamental, many women have successfully gained entrance on account of a gender based group (Musalo 2003).

No formal rules exist for adjudicating these types of cases, but the United States Citizenship and Immigration Service (USCIS, formally the Immigration and Naturalization Service, INS) did release a set of nonbinding guidelines in 1995. These guidelines were meant to establish gender based harms as legitimate bases for asylum cases. The document details gender based persecution globally, stating that "although woman applicants frequently present asylum claims for reasons similar to male applicants, they may also have experiences particular to their gender" (Coven 1996: 4). Asylum adjudicators are instructed to take these claims seriously, be sensitive to cultural differences that might prevent women from telling their stories, and account for the private nature of violence against women.

Despite the gains for some women asylum applicants, gender is not specified as a particular social group, leading many scholars to suggest that gender based cases lack legitimacy in the asylum system (Anderson 2001; Chrisholm 2000; Fletcher 2006). Because other grounds for asylum, like race, religion, political opinion, and nationality, are clearly specified by the asylum definition, requiring women to make the claim that their gender constitutes a particular social group adds an additional evidentiary burden .While all asylum applicants face the issue of establishing a group claim, women making gender based claims must establish not only that they are members of a particular social group, but also that their gender social group is worthy of asylum (Musalo 2003, 2010). Many of the precedents for gender based claims have been very narrowly defined (e.g. women from a specific tribe who are circumcised, women from a specific country who live under the authority of their husband but oppose that authority), preventing the asylum system from more generally accepting the legitimacy of gender as a social group, as well as the commonalities of women who experience violence worldwide (Bookey 2013). The lack of acceptance is evident in the recent case of Nadia Maatougui v Eric Holder. The U.S. Court of

Appeals for the 10th Circuit argued that gender alone cannot serve as a ground for asylum; gender must be coupled with some other group claim, such as political opinion, race, nationality, religion (Maatougui v. Holder 2013). This adds another layer of difficulty for victims of domestic abuse whose persecution is solely gender based.

Further complicating domestic violence asylum cases are the problems of the individual nature of interpersonal violence. The most well-publicized and influential case of Rodi Alvarado (R-A-) demonstrates some of these problems. In the late 1990s, Alvarado applied for asylum, explaining that if she were to return to Guatemala, her husband would continue his horrific cycle of abuse against her. Specifically, Alvarado detailed years of physical and sexual torture, resulting in injuries such as a broken jaw bone, and constructed her asylum case on the grounds that she was persecuted as member of a group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" (see Department of Homeland Security 2004: 13).The original asylum adjudicator determined that her case was invalid because Alvarado could not prove that her husband was a *social* threat; he never tried to abuse other women and therefore she could not prove that her experience rose to the level of persecution. At the core of the adjudicator's argument was that domestic violence is an interpersonal issue, not a matter for the courts (Sinha 2001). After about a decade of appeals and interventions from human rights organizations, like the Center for Gender and Refugee Studies, Alvarado was finally granted asylum, but this success is tempered by the continued lack of legislation and guidelines from administrative bodies (Frydman 2010).

On the tail of this case, the Obama administration stated that it would create a clearer set of guidelines for adjudicators to better address the specific, and often private, issues faced by women (Rogerson 2009). No such guidelines were ever published. Given this context, this paper will describe the past and current problems with the adjudication of domestic violence based asylum cases in order to promote better policies that are in line with larger and already existing U.S. agendas for combating violence against women.

Data and Method

My analysis and findings are derived from my original dataset of all published asylum cases dealing specifically with domestic violence. I collected 53 cases, ranging from the year 1997-2013, from Lexis Nexis Legal. Keywords, including domestic violence and asylum, were used to locate relevant cases. For the purposes of this research, domestic violence includes abuses that happen in the home by an intimate partner or a close family member. I included cases if domestic violence was a harm faced by the applicant; I excluded cases if domestic violence was referenced, but not in relation to the applicant. Most applicants made their case on account of a particular social group, but the social group was often narrowly defined for the applicant's specific situation (for example, women from a specific country who are abused by their husbands).

All of the cases are appellate level decisions heard by U.S. circuit courts; these cases serve as the existing precedents for lower courts and asylum adjudicators. Many applicants will also choose to expand their cases to improve their probability of success, applying for asylum, withholding of removal, and protection under the Convention Against Torture. Of the 53 cases, 10 were successful (meaning they were remanded to a lower court for reconsideration consistent with the appeals court decision) and 43 were unsuccessful (meaning the appeal was dismissed).[1]

The analysis highlights the problems with the past and present circuit decisions and is not intended to make claims about asylum adjudicators at lower levels. In fact, making any claims about lower level adjudication would be nearly impossible since the USCIS guards their initial decisions, refusing to publish them or disaggregate by the type of asylum claim (Musalo 2010).[2] By analyzing the appellate decisions, though, this paper will highlight the generally accepted practices and prevalent asylum narratives in the United States, providing a large-scale structural analysis. Since these cases serve as precedent, lower court decisions should hypothetically fall in line with these decisions.

Analysis: Problems and Inconsistencies

I focus my analysis on two specific legal terms in asylum practice: persecution and credibility.[3] Both of these elements are essential for making a successful asylum claim, but present problems for victims of domestic violence, whose experience of violence is often cumulative and occurs in the private sphere. These practices not only create burdens for the (mostly women) applicants who attempt to escape persecutory conditions in the home, but also contradict the intentions of VAWA and other national agendas for combating violence against women.

Persecution

According to asylum practices, persecution generally "involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds" (Kondakova et al v. Ashcroft 2004). The interpretation of this definition has largely involved physical harms, or the threat of physical harms, rather than other types of human rights abuses. Some circuit courts have expanded this definition to include extreme economic deprivation (Birdsong, 2008), though most courts reserve the concept of persecution for the most extreme forms of bodily harm (Fisher and Lavasani v INS 1996).

Over time, the USCIS has loosened these guidelines to include other forms of persecution, including psychological torture. According to the USCIS Refugee, Asylum, and International Operations (RAIO) Directorate Officer Training document (2011), psychological torture alone should be enough to constitute persecution (23). For example, in the ethnicity-based asylum case of Zakia Mashiri v Ashcroft (2004), the U.S. Court of Appeals for the 9th Circuit held that repeated threats of violence can constitute psychological torture and therefore should be considered persecution. The recognition of psychological torture exists in asylum law, but, as I will argue, it does not carry over seamlessly into the adjudication of domestic violence asylum cases.

Many victims of domestic violence can attest that their experiences encompass a much wider range of abuse, including emotional and psychological abuse, withholding of financial assets, and scare tactics to prevent them from seeking resources (Wilson 2005). Since this psychological abuse happens behind doors, it may be more difficult for women victims to prove its existence. The most recent version of VAWA (2013) addresses this larger context by including provisions that specifically address these components: more money is given for psychological services and more training is provided for professionals to help identify women in need of help, but who are afraid to come forward and purposefully try to hide their abuse.

Though VAWA is still largely criminal justice focused, each instantiation expands the protection needed for victims of domestic violence and addresses the closeted fears of many women.

However in the asylum context, the narrow interpretation of persecution, limited to mostly physical forms of violence or public displays of threats and psychological torture, prevents many victims of domestic violence from proving that their abuse is "extreme" in nature. In the very first case in my dataset, Maria Soccoro Lirio-Biscocho v the Immigration and Naturalizations Service (1997), the U.S. Court of Appeals for the 9th Circuit argued that there is a qualitative difference between persecution and the types of abuse faced by the typical victim of domestic violence. Lirio-Biscocho fled the Phillipines because her husband would yell at her, slap her, and threaten her with a belt. This abuse would often occur when her husband was drunk and created a living environment full of fear. The 9th Circuit rejected the argument that Lirio-Biscocho was persecuted on account her status in a group of married women in the Philippines who were mistreated by spouses. Instead, the 9th Circuit found that her mistreatment was "not the kind of persecution for which Congress provided asylum" (Lirio-Biscocho v. INS 1997: 4). The 9th Circuit not only dismissed her claim, but also downplayed the severity of domestic violence in the household. The Court wrote, "Being yelled at by a spouse, slapped perhaps once, and threatened frequently but never hit with a belt, rises considerably less far toward the level which would be classified as persecution than the conduct in Fisher [the case which defined persecution as an extreme concept]" (Lirio-Biscocho v. INS 1997: 5).

Being yelled at and threatened frequently, but only physically violated occasionally, was not extreme enough for the 9th Circuit.[4] Stating that the Lirio-Biscocho was "slapped perhaps once" and "threatened frequently but never hit with a belt" not only minimized Lirio-Biscocho's experience, but also suggested a tolerance for a certain amount of foul play in a marriage. Moreover, the 9th Circuit did not account for the cumulative impact of domestic violence, nor the propensity for such situations to escalate. While Lirio-Biscocho may have only been hit a few times, she lived in a nearly constant state of fear, like many victims of domestic violence worldwide. Being constantly berated and threatened becomes intolerable and arguably could constitute a "threat of injury to one's person or freedom" as set out by the original definition.

At this point in time, 1997, VAWA had only been in effect for 3 years, arguably not enough time to realize the full political and cultural effect of the legislation. This case, though, grounds the adjudication of domestic violence asylum historically, showing the casual acceptance of violence and the minimization of applicants' experiences. Since asylum adjudicators did not recognize the severity of women's experiences, they could not rule in favor of the applicants using the existing legal frameworks. Yet, the 2000s saw little change in the courts determination about domestic violence as a form of persecution worthy of asylum.

In the case of Aminata Dieng v Michael Mukasey (2008), the U.S. Court of Appeals for the 4th Circuit was skeptical that domestic violence could be considered "torture." Dieng applied for asylum because of the abuse she underwent at the hands of her husband in Senegal. The marriage, arranged by Dieng's parents, was fraught with disagreement and violence. Dieng recounted beatings when she refused to have sexual intercourse with her husband, Malick Talla, and when she refused to have her daughter circumcised. Dieng eventually fled her home, sheltering her daughter with a friend, but setting out for the United States with her son. In addition to questioning Dieng's credibility generally, the 4th Circuit reasoned that her experiences, even if they were true, were not serious enough to constitute persecution or to provide evidence for future persecution. The 4th Circuit opined that they could "not conclude that the IJ [who initially heard the case] abused his discretion by denying asylum on grounds that

Dieng 'may suffer other serious harm upon' her return to Senegal" (Dieng v. Mukasey 2008: 27). In an effort to gain relief, Dieng also filed a Convention Against Torture (CAT) application,[5] a decision made by many asylum applicants and their lawyers to cover all of their bases if the asylum claim is denied. Again, the 4th Circuit denied Dieng's claim that "…she would likely be 'tortured' " (Dieng v. Mukasey 2008: 3).

In this case, the 4th Circuit dismissed Dieng's experiences of domestic violence. The primary cause of the 4th Circuit's skepticism was Dieng's credibility, but the Court also made some problematic assertions about domestic violence in relation to the definition of persecution. The Court explained that Dieng's stories, even if they were true, were not enough evidence to suggest that she would be a victim of domestic violence again if she were to return to Senegal. Yet, if the Court took the spirit of VAWA and research about domestic violence seriously, it should have concluded that Dieng's history of abuse *does* suggest the likelihood of future abuse, especially if law enforcement is unwilling or unable to mediate the situation (Abramsky et al. 2011). Even the use of the quotations around the word torture indicated skepticism about whether or not domestic violence is actually torture, again suggesting a casual acceptance of violence and a denial of the applicant's experience.

Later in 2008, one case, Elizabeth Simeni Ngengwe v Michael Mukasey, opened the possibility for a change in the circuit courts. Ngengwe suffered abuse by her in-laws behind closed doors after her husband died. In accordance with the mourning rituals of her tribe, her in-laws shaved her head with a broken bottle and detained her for several months. The IJ initially hearing the case "…determined that 'this mourning tradition that she was required to undergo' did not constitute 'serious harm or suffering,' and the injuries inflicted by her in-laws were 'not severe or prolonged' " (Ngwengwe v. Mukasey 2008: 16). The decision was upheld by the BIA. The U.S. Court of Appeals for the 8th Circuit, however, overturned the decision, explaining that "The IJ did not consider Ngengwe's argument that her in-laws confiscated all of her property, and threatened to take her children. This, too, is related to whether non-physical persecution occurred" (Ngwengwe v. Mukasey 2008; 17-18). In other words, the Court essentially agreed with the IJ and BIA that the mourning tradition did not constitute persecution, but acquiesced that the other penalties imposed by the in-laws constituted non-physical persecution.

On one hand, the 8th Circuit showed some progress in expanding the definition of persecution to encompass a range of experiences of domestic violence. The confiscation of children and property were non-physical, but were enough to constitute persecution in the eyes of the Court. This opened up a space for other women whose experiences include withholding money, property, and/or children as part of their abuse. Still, the Court agreed that the two months in which Ngengwe was held captive was not "severe or prolonged" enough to constitute persecution. The Court only conceded to the claim of persecution in conjunction with the additional non-physical forms of persecution. While this case brought non-physical abuses into the conversation about domestic violence asylum cases, the refusal to admit that Ngengwe's two months of captivity was persecution imposed a barrier for women who have evidence of one relatively extreme instance of violence, but cannot justify to the courts that the experience was prolonged enough. Again, this type of logic denies the women's experience and discounts the cumulative nature of domestic violence.

The previous cases all occurred before the groundbreaking decision in the case Rodi Alvarado, which was supposed to open doors for women fleeing domestic violence. The Alvarado decision should have required that courts take women's experiences of violence seriously and acknowledge the unique issues faced by women when the violence is interpersonal

and out of sight of the general public. Even though VAWA should have influenced the courts' decision making before Alvarado's case, it is possible that the courts required a precedent before bringing their own practices in line with current U.S. agendas for violence against women. But in 2011, the case of Blanca Mendez-Garcia v Eric Holder revealed a reversion to the earlier types of thinking about domestic violence, specifically questioning what constitutes violence and persecution.

Mendez-Garcia fled her home in Guatemala because she feared that her husband, Forencio Diaz, would murder her. In a statement eerily similar to the sentiments of the first case of Maria Lirio-Biscocho , the U.S. Court of Appeals for the 7th Circuit opined that "Here, Diaz's past violence includes shoving, a slap, and swinging a belt without making contact, none of which shows a propensity for murder" (Mendez-Garcia v. Holder 2011: 10).. In addition to dispelling the violent nature of Diaz's actions, the Court further attempted to deny the fact that Diaz was a threat to Mendez-Garcia, arguing that "When Mendez-Garcia left their daughter in Guatemala for three years, Diaz did not seek custody, although he threatened to do so. Then, from 2005 to 2008, he again warned Mendez-Garcia that he would somehow take Anayeli from her, but took no steps in that direction. During the same period, he asserted that he still had a 'right' he planned to exercise over her, but did nothing about it" (Mendez-Garcia v. Holder 2011: 10). According to the Court, Diaz mostly did not follow through on his threats.

In this decision, the 7th Circuit downplayed the significance of the violence faced by Mendez-Garcia by stating that shoving and slapping do not show a propensity for murder. By doing so, the Court dismissed the violence faced by Mendez-Garcia as a "real" concern: though she may have been hit, she most likely will not be murdered. The likelihood of murder should not be a factor in determining whether or not persecution has occurred. The 7th Circuit dismissed the shoving and slapping as violence, even though they do indicate a propensity for more violence (Abramsky et al. 2011). The 7th Circuit also explained that Diaz, the husband, failed to follow through on a number of threats and therefore Mendez-Garcia was in no real danger. Yet, as indicated by the RAIO officer training, repeated threats should constitute psychological torture. This sentiment is also captured by VAWA, which recognizes that threats are themselves acts of psychological violence, that often turn into instances of physical violence and that previous abuse is a likely predictor of future abuse. The 7th Circuit took none of this seriously.

The most obvious source of contention for asylum adjudicators is the difficulty in reconciling the current definition of persecution and the types of violence experienced by these women. The circuit courts downplay the significance of their experiences (only a few slaps, or threatened but not hit with a belt) and question whether this type of violence that happens in the home is actually violence. While the Courts opine that repeated instances of verbal abuse do not rise to the level of persecution or torture, the RAIO guidelines and the intent of VAWA state otherwise. Specifically, VAWA increased policing and prosecution of perpetrators of physical and psychological abuse in the home, further criminalizing a wider range of domestic violence experiences (White House 2013).

Underlying the reluctance to accept domestic violence as persecution is an implicit recognition and acceptance of the high rates of domestic violence worldwide. As Oxford (2005) documented in her ethnography of immigration courts in Los Angeles, asylum adjudicators fear that allowing entry to victims of domestic violence will open the floodgates for immigrants looking to escape an abusive partner. Since domestic violence is so prevalent worldwide, too many immigrants would use this as an "excuse" to come to the United States. This floodgate argument coincides with fears around immigration generally. It is not only ethnocentric (Oxford

2005), but unfounded: the floodgate argument has no basis in empirical evidence (Condon 2002; Fletcher 2006; Hueben 2001; Siddiqui 2010). By creating barriers for victims of domestic abuse, the asylum system not only turns away legitimate asylum applicants, but also implicitly accepts domestic violence as a part of intimate relationships.

Credibility

The asylum system has put a series of "safeguards" in place in order to prevent illegitimate applicants from gaining entry to the United States. In other words, asylum adjudicators try to locate dishonest applicants who lie for the sake of crossing U.S. borders. Current guidelines dictate that applicants must be "credible," meaning honest and trustworthy. Credibility is often determined by the consistency of the applicants' stories and corroborating evidence from other sources, but is sometimes based on an asylum adjudicator's personal assessment of their character and demeanor (McKinnon 2009). These subjective determinations often go unquestioned since the REAL ID Act gave immigration judges complete jurisdiction over questions of applicants' credibility (Fletcher 2006). In other words, determining credibility can be more subjective than objective.

Generally speaking, credibility can be difficult to prove. Many applicants inadvertently have gaps in their stories because they cannot remember every detail of the past years. Not all corroborating evidence is taken seriously by adjudicators, creating a problem for applicants trying to satisfy this evidentiary burden. Victims of domestic violence applying for asylum do encounter these problems, but their cases are compounded by the personal and private nature of their persecution. Specifically, asylum adjudicators question the credibility of women who did not leave their abusive husbands or partners assuming that legitimately fearful applicants would try to flee. Many women who stay with an abusive spouse also do not seek out medical treatment or police intervention, meaning there is little to no evidence to corroborate their stories. Ultimately, the credibility requirement is more suited for cases of public and state-sponsored violence, rather than persecution in the household (Zeigler and Stewart 2009).

VAWA does recognize that domestic violence hinders women from seeking out services to protect themselves. This is most evident in the increase in sensitivity trainings for professionals who regularly find themselves in contact with victims of domestic violence. These trainings not only help professionals identify potential victims of abuse, but also teach them to help victims feel safe when telling their stories. In this way, VAWA attempts to create conditions that enable women to tell their stories, knowing that they will be heard and believed. The asylum system's credibility requirement creates the opposite conditions, working to find holes in women's narratives. While the credibility requirement in the asylum system is intended to safeguard against fraudulent claims, it often stands as a complicating barrier for women making asylum cases.

In my dataset of appellate cases, credibility became a major issue in the mid-2000s. One of the first cases to address the issue of credibility directly is that of Lorraine Fiadjoe v Attorney General. In this case, the U.S. Court of Appeals for the 3rd Circuit invoked a set of INS guidelines that ask asylum adjudicators to apply some leniency in assessing credibility for victims of domestic violence. In this case, the IJ and BIA initially made "an adverse credibility determination" (Fiadgoe v. Attorney General 2005: 25) because there were minor inconsistencies in Fiadjoe's story. The U.S. Court of Appeals for the 3rd Circuit reversed the lower courts' decisions, arguing that the INS intended for more flexibility in determining credibility for

victims of gender based violence. Specifically, the INS published a set of guidelines entitled "Consideration for Asylum Officers Adjudicating Asylum Claims from Women," which were not binding but intended to instruct asylum adjudicators in the courtroom. The 3rd Circuit cited these guidelines in order to provide justification for Fiadjoe's inconsistencies:

> ... Women who have been subject to domestic or sexual abuse may be psychologically traumatized…The demeanor of traumatized applicants can vary. They may appear numb or show emotional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling….In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility. It bears reiteration that the foregoing considerations of demeanor can be the products of trauma or culture, not credibility. Poor interview techniques/cross-cultural skills may cause faulty negative credibility findings (Fiadjoe v. Attorney General 2005: 50-51).

Importantly, the 3rd Circuit cited both personal and cultural reasons that might impact asylum adjudicators' reception of women applicants. Of particular interest is the discussion of the trauma and stigma associated with domestic violence that prevents women from seeking out help in their countries of origin and makes them seem dishonest when they arrive in the United States.

Asylum practice dictates that applicants must explain their reasons for applying for asylum upon entry into the United States or upon first application. Asylum adjudicators expect the stories to be linear and entirely coherent, a requirement which is difficult for victims of domestic violence (McKinnon 2009). Given a history of abuse, applicants like Fiadjoe might feel uncomfortable explaining their stories to an asylum officer, especially a male officer, in a new and unfamiliar place with a different set of cultural norms and expectations. While many adjudicators believe reluctance to share stories and changes in the timeline of abuse indicate dishonesty, this tentativeness may be a bi-product of the applicant's abuse or their lack of familiarity with asylum law and U.S. customs or norms. The 3rd Circuit's invocation of the INS guidelines for women applicants embraced the principles of VAWA and brought asylum practice in line with Congressional legislation.

The progress of Fiadjoe was short-lived. Soon after, the courts reverted to questioning the credibility of applicants with a line of thinking that borders on victim blaming. In the case of Xi Yan Lin v Attorney General (2008), the U.S. Court of Appeals for the 2nd Circuit refused to accept Lin's claim that her marriage was forced and also that she was abused by her husband. On both accounts, the Court finds Lin's case misguided, writing that "Despite Lin's characterization of her husband as a gambler, drunkard, adulterer, and abuser, by her own testimony, she did not attempt - nor did she wish - to end the marriage for several years. Rather, she testified that she wanted her husband to 'return back' to her" (Lin v. Attorney General 2008: 5). Lin never initiated divorce proceedings, leaving the 2nd Circuit to conclude that she did not fear her husband.

Here, the 2nd Circuit may have misinterpreted Lin's testimony. The 2nd Circuit determined that her desire to have her husband back indicated that Lin's acceptance of a marriage that she claimed to be forced, as well as her lack of fear of her husband. Another

reading of wanting her husband to "return back" to her might be that she loved her husband (despite the forced nature of her marriage), but did not want to continue living with the current drunk and abusive version of him. This could be a translation issue or a misunderstanding. The 2nd Circuit did not explore the issue in full detail and instead denied her claim. By rejecting her testimony and raising skepticism about Lin's motivations and actions, the Court did not capture the spirit of VAWA, nor the INS guidelines.

Credibility remains an issue to this day. The circuit courts continue to question women who have less than linear stories or who express a desire to stay with their partners. A case from 2013, Sabas Judith Palmer-Romero v Eric Holder, indicates another growing issue for proving credibility: the lack of corroborating evidence. Typical asylum practice requires that another source corroborate the story of the applicant in order to prove the social nature of the persecution, as well as to safeguard against fraudulent claims. While this requirement may be easy to satisfy with instances of state-sponsored violence, it is somewhat harder to prove when the violence happens in the private sphere and when victims fear involving outside individuals and/or organizations.

Palma-Romero left her country of origin, Honduras, after her ex-husband tried to run her over with his car. The applicant was unharmed, but her brother lost an arm trying to save her. Palma-Romero wanted to remain in the United States to avoid another life-threatening incident. The U.S. Court of Appeals for the 7th Circuit dismissed her claim, refusing to overturn the IJ's determination about her adverse credibility. The initial IJ did not believe Palma-Romero was credible, nor that she had been persecuted on account of membership in a particular social group. The 7th Circuit wrote:

> First the IJ noted that her testimony had changed significantly from her original account, and thus he no longer regarded her as credible. Palma-Romero had not provided any corroborating evidence, such as affidavits from her brothers in Honduras or her children living in the United States, or medical records documenting the injuries her ex-husband had inflicted. And, the IJ continued, Palma-Romero still had not explained how her husband's malice established that she faced persecution on account of her membership in a particular social group (Palma-Romero v. Holder 2013: 4).

The lack of medical evidence factored substantially into the IJ's adverse credibility determination. Though the medical evidence in this case is that of the brother's injuries, not the wife's, the requirement of corroborating medical evidence creates a set of conditions that may be insurmountable for many women fleeing an abusive relationship.

Collecting a substantial paper trail of abuse is difficult. It requires an applicant to have the resources to seek help. Women, already marginalized on account of their gender, have a hard time garnering the economic and political resources necessary to create such a paper trail. Victims of domestic violence have even more difficulty because they may fear retaliation if they introduce outside officials into the home. Asking victims of domestic violence to have the foresight and ability to document their abuse is what some legal scholars call an unfair evidentiary burden.

The credibility requirement creates obstacles for victims of domestic abuse applying for asylum and reflects existing suspicions about immigrants. Again, the logic of the floodgate argument seems to be at play here. Asylum adjudicators adopt the logic of skepticism for fear that illegitimate immigrants might gain entry to the United States. These tactics—requiring women to totally disavow their persecutors and to tell linear stories with corroborating evidence—might work in more public instances of persecution, but present a barrier when the

abuse occurs in the private sphere. Victims of domestic abuse often lack resources outside the home and may fear future abuse if they tell their stories. This is a problem not just for applicants from other countries, but also for many women in the United States (Burman and Chantler 2005). Adopting the principles of VAWA, specifically recognizing the reasons for the potential gaps in women's stories and the lack of corroborating evidence, would alleviate some of the burden of proving credibility in this context.

Conclusion

The requirements for gaining asylum in the United States create a unique set of barriers for women who are victims of domestic violence in their country of origin. The concept of persecution is too narrow to encompass the personal and ongoing nature of the violence. The credibility requirement is difficult to satisfy because of the lack of corroborating evidence, as well as the cyclical nature of abusive relationships. Though some case law and immigration guidelines should lessen these burdens for women victims, this analysis indicates more hurdles than gateways. Asylum practices could benefit from embracing some of the principles of VAWA.

First, embracing the intent of VAWA could help asylum adjudicators better understand domestic violence within the framework of persecution as an "extreme concept." Currently, many adjudicators downplay or dismiss the significance of violence in the household. A better understanding of the intent and goals of VAWA would expand their understanding of domestic violence as a legitimate ground for asylum. VAWA requires police and legal intervention when one partner or family member abuses another; police and other officials are trained to respond to instances of domestic violence and to be sensitive to the stigma associated with these types of relationships. VAWA requires the criminal justice system to accept the seriousness, and even the extremeness, of domestic violence. If the asylum system would adopt a similar perspective, the definition of persecution would present less of an issue for victims of domestic violence. The first place to start is a set of binding, not non-binding, guidelines that specifically state the serious nature of domestic violence and that remind asylum adjudicators to give noncitizens the same rights granted to citizen victims. This protection would not only rectify some of the issues with domestic violence adjudication, but also bring asylum practice in line with VAWA, which does intend to extend protections to immigrant victims (U.S. Congress 2013: 59).

Second, the skepticism that leads asylum adjudicators to question the honesty of victims of domestic violence could also be corrected by adopting the principles of VAWA. Some of the circuit courts have actually made this very argument. In the case of Lopez-Umanzor v Gonzales (2005), the 9th Circuit specifically argued that "In enacting VAWA, Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations" (22-23). One myth or misconception that permeates the asylum system is that abused women will or should leave their abusive husbands. Yet many individuals return to their abusive partners; these relationships often include emotional and psychological manipulation, resulting in a cycle of leaving and returning. In addition to the components of manipulation that prevent many women from leaving, escaping domestic violence is further complicated by the applicants' locations in the global South where they are economically and politically disadvantaged. Many women

applicants lack economic and political resources on account of their gender and on account of their geographical location.

Another misconception prevalent in the asylum system is that all women have access to medical and police facilities and will use them. Lack of services, as well as a fear of retribution for bringing outside officials into the home, prevents many women from seeking out help in their country of origin. Again, a set of binding guidelines could alleviate these issues with the credibility requirement. The non-binding guidelines, "Consideration for Asylum Officers Adjudicating Asylum Claims from Women," could be a starting point. The Considerations ask asylum adjudicators to recognize the reasons behind inconsistencies in a woman's story, including fear of U.S. officials, cultural barriers stigmatizing sharing intimate details of the home, or psychological trauma from abuse. If these non-binding guidelines became binding, the asylum system could begin to address the issues with the credibility of victims of domestic violence.

The core of these two adjudicatory issues is a fear of opening the floodgates for the many victims of domestic violence worldwide. Legal scholars have largely dismissed the floodgate argument, explaining that the U.S. has yet to see a flood of woman asylum applicants, despite some gains in asylum practice, and that applicants will still have to satisfy a set of evidentiary requirements, which will distinguish legitimate from dishonest applicants (Condon 2002; Fletcher 2006; Hueben 2001; Siddiqui 2010). If asylum adjudicators are fearful that too many victims of domestic violence will find their way to U.S. borders, federal legislators can take some steps to help ensure lower rates of abuse worldwide. This does not mean penalizing developing countries that do not effectively deal with domestic violence. This means acknowledging and dealing with the many ways in which U.S. foreign and economic policies create unstable conditions in developing countries, leading to higher rates of violence generally. U.S. military occupation, for example, breeds instability and violence, especially against women (Enloe 2000). U.S. economic policies disadvantage developing countries, leaving many individuals feeling frustrated and out of control (Stiglitz 2003). Addressing the role of the United States in creating unequal and discriminatory practices generally and for women specifically is one way to decrease the number of asylum applicants. In other words, the solution must happen at two levels: immediate relief for victims of domestic violence and long-term strategies for reducing violence. Both strategies require a critical assessment of U.S. policy, both at home and abroad.

End Notes

[1]Millbank and Dauvergne (2010) found that analyzing appellate court cases resulted in a greater representation of positive cases, which may be misleading. They suspect some of their cases were "false positives," since the positive decisions by appellate courts may ultimately be turned negative when remanded to the lower courts for decision. My dataset does not appear to include an overrepresentation of positive cases.

[2]A recent study by Bookey (2013) indicates that many of these same problems exist at lower levels of adjudication. In this study, Bookey analyzed 206 initial level domestic violence asylum cases and found that subjective judicial interpretations impact the outcomes of many women's cases.

[3]Basic variables (including applicant country of origin and circuit court) were not statistically significant.

[4]A similar pattern is observed in honor killings cases: judges require that applicants must have received more than one death threat to prove a likelihood of murder upon return to their country of origin (Shapiro 2009).

[5]Convention Against Torture (CAT) is intended to provide protection to tortured people around the globe. The threshold is higher for making this type of claim; if an applicant does not receive asylum, it is unlikely that CAT will be granted (Mautino 2012).

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Chapter 3

Biological Essentialism and Gender Based Asylum Adjudication

In the world of gender based asylum, no two applicants are as well-known as Fauziya Kasinga and Rodi Alvarado Peña. Both applicants received national attention for their struggles with the asylum system. Though the United States eventually granted asylum to both, the length of time spent in the system and the very different treatments by the courts signaled problems with gender-based asylum adjudication. Kasinga, the landmark case for female circumcision based cases, received asylum after only one appeal; the Board of Immigration Appeals (BIA) found that her circumcision, or "female genital mutilation," constituted persecution on account of her membership in a group of "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation" (Matter of Kasinga 1995: 357). Alvarado (referred to as R-A- by the courts), on the other hand, spent nearly 15 years attempting to prove to the United States Citizenship and Immigration Service (USCIS) that domestic violence constituted persecution on account of her gender. Reluctant to accept that domestic violence is a gender issue, the courts repeatedly denied her appeals, only to finally grant asylum in 2010 and to set a loose precedent for women victims of domestic violence (Frydman 2010). The differences between these cases have prompted legal and academic authors to conclude that cases of female circumcision are more easily accepted by the asylum system than cases of domestic violence.

Explanations for this disparity abound. The most prominent explanation in the literature is that female circumcision is more easily understood as a "barbaric" cultural practice (Oxford 2005; Sinha 2001). Since domestic violence occurs often in the United States, adjudicators are less likely to adopt a gender (and thus, cultural) based lens towards this practice, instead favoring an interpersonal approach between victim and victimizer. Female circumcision, on the other hand, is an unfamiliar and often demonized practice, leading adjudicators to readily accept the claim that it constitutes persecution. In other words, among scholars the predominant explanation for the disparity is the understanding of the violence as it relates to adjudicator's own cultural and gender frameworks.

In this chapter, I expand the analysis of the differences between these two types of cases to include the role of biological essentialism. I look specifically at domestic violence and female circumcision cases because they have been the primary targets of analysis in the literature, but a more fundamental analysis of the differences in adjudication has yet to be developed. I argue that Western gender ideology, and its overreliance on the biologically sexed body, is at the core of judicial arbitration, influencing what groups are deemed worthy of asylum and which individuals fit into these groups. The Western conflation of gender and biological sex means that asylum adjudicators more readily accepted sex-based arguments, particularly those predicated on harm to the sexed body. Put simply, for asylum adjudicators, sex, not gender, is the primary marker of a social group worthy of asylum. Specifically, my analysis suggests that biological essentialism underlies the legal maneuvers adopted by judges to grant asylum in female circumcision cases. I

ultimately argue that biological essentialism serves as another cornerstone on which the nationalist practices of the asylum system demonize the countries from which applicants apply.

Background: Gender Based Asylum

In order to receive asylum, an individual must prove a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. This definition, hailing from the United Nation's Convention and Protocol Relating to the Status of Refugees, does not reference gender, leading the U.S. and other signatory nations to conclude that gender constitutes a particular social group. In the U.S. context, the precedent for defining membership in a particular social group emerges from the Matter of Acosta (1985). In Acosta, the BIA found that a particular social group is a "group of persons, all of whom share a common, immutable characteristic. *i.e.,* a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed" (Matter of Acosta 1985: 212). The BIA specifically referred to "sex" as one of the characteristics deemed immutable and fundamental and thus eligible for "social group" status.

By the early 2000s, legal scholars recognized a set of problems emerging with gender based asylum adjudication. Whereas the scholarship in the 1990s fought to add gender to the scope of asylum policy, this new body of literature started to parse out the differences and unique problems for specific types of gender-based cases (Coffman 2007; Heyman 2008; Marsden 2014; Sinha 2001; Oxford 2005). Sinha (2001) initially noticed the difference between domestic violence and female circumcision cases after reviewing the different outcomes of Kasinga and Alvarado. Sinha argued that the difference between these two cases, initiated in the same time period, was the judges' understandings of the cultural underpinnings of the violence. Asylum law requires that the perpetrator's motivations must be rooted in their culture: the violence must not only be perpetrated on account of a social status, but must also be so engrained in the culture that the state is implicated as either a perpetrator or an ineffective bystander. In the case of Alvarado, the judges failed to see a cultural dimension to the violence. Female circumcision, like in the case of Kasinga, was "exotic" and, to the judges, firmly entrenched in the "backwards" cultural practices of the participants. This cultural framing, according to Sinha, explained the different outcomes in the cases.

Oxford (2005) followed this analysis with an ethnography of Los Angeles immigration courts and added terminology to help explain the disparity between different types of cases. According to Oxford, judges placed harm in one of two categories: ethnocentric and exotic. Ethnocentric harms are those that are culturally familiar to the judges, like domestic violence. The judges do not understand these harms as violence because they are familiar and therefore naturalized, and seemingly pervasive. To grant asylum for ethnocentric harms is also to implicate one's own culture. If domestic violence happens in the U.S. and everywhere else, then it must not be exceptional and worthy of asylum. Exotic harms are those that are culturally unfamiliar, like female circumcision and honor killings. These types of cases seemed exceptional and especially barbaric to the judges, resulting in positive outcomes. Unlike cases of domestic violence, judges believed there were a more finite number of these types of cases and that these applicants were especially worthy of asylum. The judges, then, served as the "protectors" of the "victim" women from mostly African countries, exacerbating the perceived exotic nature of these cases.

The exoticization of female circumcision becomes especially obvious when scholars expose the narratives African women are almost forced to tell to have successful outcomes. Coffman (2007) described her role as an expert witness for a woman fleeing Kenya. The woman's lawyer tried to evoke a specific and problematic narrative about the barbaric practices of the Kenyan Maasai, the applicant's supposed ethnic group, by relying on the Kasinga case. The lawyer ignored the fact that Kasinga fled Togo, treating the two ethnic and national contexts as identical. This resulted not only in the homogenous construction of the African continent, but also potential perjury if Coffman corroborated his narrative. Coffman expressed her discomfort with the case when she suspected that the applicant was not actually part of the Maasai tribe. Her discontent was not necessarily directed towards the applicant, but towards the lawyer who most likely sought to utilize a narrative to an African women's case that would be successful. The asylum narratives produced about female circumcision play into longstanding colonial representations of African savagery, and African sameness.

In chapter 2, I established that domestic violence cases heard in the U.S. are understood as interpersonal, which hinders assessments of credibility and persecution. This assertion fits into the argument about the prevalence of a cultural framework: domestic violence is interpreted largely as an interpersonal issue, eliding the larger gender and thus social context. In other contexts, such as the European Union (EU), however, domestic violence is marked as a cultural issue, particularly as violence that happens amongst cultural "others." Montoya and Agustín (2013) explains that domestic violence cases are successful in the EU precisely because it is understood as a backwards cultural practice at least in theory. This lends further support to the idea that the judges' countries of origins and their cultural ideas about gender and gender relations will impact how they understand cases: since domestic violence is more stigmatized in the EU than in the U.S., it is more likely to be understood as a cultural practice of "others" and therefore is more likely to be successful than in other contexts.

The framework of cultural based arguments and their relevance for case outcomes serves as a basis for this chapter. The cultural framework of the judges will impact the outcome of the case. However, I am adding more nuance to this framework. Biological essentialism, foundational for Western gender ideology, is also part of the judges' cultural repertoire and will similarly impact which cases are deemed worthy of asylum.

Adding Biological Essentialism

In this chapter, I explain how biological essentialism underlies the legal maneuvers adopted by judges to justify granting asylum in female circumcision cases. Judges see these cases as obviously worthy of asylum because Western gender ideology reduces gender to the sexed body (Butler 1990; Oyewumi 1997, 2005) and because female circumcision is demonized in popular discourse (Njambi 2004). In this context, because judges envision the sexed body when they think of gender, female circumcision cases seem particularly obvious. Domestic violence could theoretically be viewed as harm to the sexed body, in that female bodies are victimized in individual struggles to maintain men's superiority. However, the cultural familiarity of domestic violence coupled with the propensity to see the sexed body primarily in terms of genitalia prevents this understanding. Female circumcision, on the other hand, is not only culturally unfamiliar, but is more clearly marked as a sex specific practice. Marks on faces and limbs seem to carry less weight for judges than those on labia or vulvas. In this way,

biological essentialism becomes a mechanism of the ethnocentric/exotic framework, a way to further demonize unfamiliar cultural practices through the invocation of harm to the sexed body.

I will show that the sexed-based logic operates in female circumcision cases through the use of three legal maneuvers: seeking immutability, favoring particularity, and universalizing the case of Kasinga. These maneuvers adopted by judges both reinforce the salience of sex over gender and operate as a mechanism of demonizing non-Western, mostly African (and sometimes Middle Eastern) practices. In this sense, racial/ethnic/cultural tensions are read through sex/gender politics, not only further linking race and sex, but also making them nearly indistinguishable.

Colonial history reveals the ease through which white, Westerners have reduced racial Others to biology: biological difference is central to the construction of race and thus imperial politics have emphasized the biological body of the Other, especially in terms of genitalia and other sex-based characteristics (McClintock 1995). While white, Western colonizers rooted their civilization in their intellectual endeavors of the mind, they viewed the colonized Others as more instinctual, natural, and bodily. This distinction served as justification for the "civilizing," colonial practices as Western expansion moved across the globe (Fanon 1965; Said 1979).

Sexual difference, then, served as a justification for and basis of racial difference. The preoccupation with sexual difference is best exemplified by the case of Sarah Baartman, popularly known as the Hottentot Venus. In the early 1800s, Baartman, a black woman from South Africa, was showcased across Europe for her "exotic" sex characteristics, including large buttocks and elongated labia. For the white, European spectators, her body stood in stark contrast to white women's bodies, which were viewed as less sexual and more civilized. This difference solidified the idea for many white Europeans, including scientists and doctors, that black Africans were biologically different from them and served as a justification for continuing civilizing and colonial practices. Even after Baartman's death, her body, including her brain and genitals, were dissected by doctors to identify biological characteristics specific to non-white bodies (Holmes 2007).

It is within this context of the historical preoccupation with African women's bodies and the link between biological difference and sexual difference that current female circumcision cases are decided. This is not to say that other women applicants, specifically victims of domestic violence hailing from mostly Latin American and Asian countries, are not marked by racial difference. However, since the type of persecution that they claim is reminiscent of U.S. gender politics, judges do not want to demonize them. Their cases do not offer the same opportunity for reinforcing a biological and sexed account of race. The reliance on biological essentialism, and specifically reducing persecution to harm to genitals, becomes a tool to "other" African practices and to distinguish civilized, U.S.-based gender politics from non-Western, "backwards" cultures.

Data

My analysis and findings are derived from my original dataset of all published gender based asylum cases. One hundred ninety-three cases, ranging in time from 1985-2013, were collected from Lexis Nexis Legal. Sets of key words—domestic violence, female circumcision, female genital mutilation, female genital cutting, and asylum—were used to locate relevant cases. Some cases had to be excluded because they only referenced a major case of female

circumcision or domestic violence; the applicants were not claiming these forms of persecution as a basis for asylum.

As I described in the introduction, all of the cases are appellate level decisions heard by U.S. Circuit Courts; these cases serve as the existing precedents for lower courts and asylum adjudicators. While these cases do act as precedent, they are not representative of the decisions made at the lower levels of the asylum process. The lower level case decisions are nearly impossible to access since the USCIS guards their initial decisions, refusing to publish them or disaggregate by the type of asylum claim (Musalo 2010). Though this dataset cannot draw conclusions about all asylum cases, the findings do illuminate the prevailing precedents for adjudication at nearly the highest level of appeals, the U.S. Circuit Courts of Appeals.

My dataset includes 53 cases of domestic violence based asylum and 140 cases of female circumcision. Each case was coded for basic descriptive information, including the country of origin, judge, circuit court number, and outcome of the case. I also analyzed each case for the social group, including gender, gender plus, political opinion, or not specific. It is through the analysis of the social group claims that I identified the ways in which biological essentialism was used as a justification for granting asylum for female circumcision cases. The three legal maneuvers—seeking immutability, favoring particularity, and universalizing the case of Kasinga—hinge on the construction and/or misapplication of particular social group claims.

Seeking Immutability

The first legal maneuver—seeking the immutability of the particular social group—finds its roots in the Matter of Acosta, which is the legal U.S. for identifying a particular social group. According to the BIA, a particular social group is a "group of persons, all of whom share a common, immutable characteristic. *i.e.,* a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed" (Matter of Acosta 1985: 212). The BIA specifically refers to "sex" as one of the characteristics deemed immutable and fundamental and thus eligible for "social group" status.

The BIA's use of the word "sex" over "gender" is illustrative of Western gender ideology. A review of the "Gender Guidelines," published in 1996 and intended to serve as background for asylum adjudicators, shows a similar confusion about "sex" and "gender," slipping easily between these two terms. This slippage is predictable given that the sexed body serves as the foundation for gender differences in Western cultures. In both popular rhetoric and traditional[1] feminist/social science literature, gender (man/woman, masculine/feminine) is a set of binary characteristics attached to binary sexed bodies (male/female). Popular rhetoric is more likely to assume a direct correlation between sex and gender (sex chromosomes and genitalia necessarily determine an individual's gender characteristics), while social science literature asserts a more fluid relationship between the two (biologically sexed bodies can possess a range of gender characteristics and may even identify with a gender different from their biological characteristics). Still, both usages are predicated on a binary and reproductive model of sex which assumes two different biologically sexed bodies (Butler 1990; Oyewumi 1997, 2005).

Even if the BIA used the term "gender" instead of "sex," its understanding of the category would likely be the same since these terms do not have significantly different meanings for the general population. Popularly, most rhetoric assumes a direct relationship between sex and gender (males will be men, females will be women), which allows these terms to be used

interchangeably in Western discourse. The BIA's explanation that a particular social group must be one based on an immutable characteristic that an applicant is unwilling or unable to change provokes a reduction of the category to the sexed body. The immutability of the sexed body, as I will argue, appears undeniable to the judges, allowing them to apply an essentialist framework.

In female circumcision cases, the judges see the sexed body as marker of gender and since they see the sexed body as immutable, the applicants can prove their membership in a particular social group of victimized women.The courts easily move between the terms sex and gender, but clearly favor biologically based sexed groups. For example, in the case of Khadija Mohammed v Alberto Gonzales (2005), the United States Court of Appeals for the 9th Circuit uses both terms "sex" and "gender," but the definition of a particular social group refers specifically to biological sex. Mohammed first applied for asylum on the grounds of her ethnic association—the Benadiri clan in Somalia. She contended that she had been circumcised on account of this membership and should be granted asylum in the United States. The IJ and BIA denied asylum, arguing that her persecution occurred in the past and that she could not prove continued persecution on account of her membership in a particular social group. The 9th Circuit overturned this decision, adding more clearly the "gender" (read: sex) based components that make Mohammed's claim viable. Again, the court used the terms sex and gender interchangeably, but referred to a set of definitions, including from the United Nations High Commissioner of Refugees, that clearly entrenched the context of this case in the sexed body. The court cited that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic" (UNHCR as cited in Mohammed v Gonzalez 2005: 28). In other words, women can have literally nothing else in common except their genitalia, ironically removing the "social" from the social group definition. On this ground, the court determined that Mohammed had been persecuted and her case was remanded to a lower court to grant asylum. In this case, the reference to an immutable sexed body works in favor of the applicant, creating a viable social group and ground for asylum.

On the other hand, the sex-based construction, and thus the immutability of the group, is not always evident to the adjudicators in domestic violence based cases. Though many of the cases refer to Acosta and its invocation of sex as a cognizable indicator of a social group, most of the constructions of the gender social group are less likely to invoke an overly biological version of gender, often to the detriment of their cases. In other words, the judges may slip between the terms sex and gender, but they don't use the same sex-based logic as in female circumcision cases, making it more difficult to prove the immutability of the particular social group. For example, in the case of Martha Ramirez-Alvarado v Attorney General of the United States (2011), the court rejects her construction of a particular social group of women who are involved with and abused by gang members in El Salvador. The IJ first hearing the case explained that Ramirez-Alvarado was not a member of a particular social group "merely by virtue of her rejection of the relationship with Mr. Alex El Candado'" (2011: 5). The United States Court of Appeals for the 3rd Circuit further substantiated this argument by claiming that Ramirez-Alvardo could not prove continuing harm because she was an ex-girlfriend of a gang member; she had no evidence to prove that she would continue to be targeted by her former boyfriend since she was no longer engaged in a relationship with him and there is no evidence to prove "that once a woman is chosen by a member of [the gang] La Mara Salvatrucha as his girlfriend 'there is literally nothing she can do to break free from that targeting' " (cited from petitioner's brief in Ramirez-Alvarado v AG: 10).

In this case, the construction of the particular social group was very different from the Mohammed case. Mohammed's particular social group was one built on a common set of immutable sex-based characteristics that inherently put women at risk. The social group in Ramirez-Alvarado's case was based on her decision to engage in a heterosexual relationship with a gang member, resulting domestic violence. Since Mohammed's group appeared firmly entrenched in the biological, she established the immutability of the particular social group. On the other hand, Ramirez-Alvarado's group was based on a temporary association as a woman in a heterosexual relationship, something that was understood as fleeting, not immutable.

As women, ostensibly both applicants should have access to the definition proffered in Mohammed's case, which suggested that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic" (UNHCR as cited in Mohammed v Gonzalez 2005: 28). Ramirez-Alvarado, technically, is also a member of this group. Instead, the court reduces Ramirez-Alvarado's group to her personal decision, not her unchanging sex characteristics. In other words, the judges fail to attribute the case to sex or to see the biological sameness of women. The point here is not that the judges should have seen this biological sameness. The point is that the judges do see immutable biological sex in the cases of female circumcision, but they do not in cases of domestic violence.

Ultimately, immutability serves as a justification for granting asylum in female circumcision cases, while it hinders domestic violence cases. Immutability, and its reliance on the biological sexed body, becomes a tool or a legal maneuver to grant asylum in cases that judges already see as barbaric or culturally backwards. The invocation of harm to that immutably sexed body provides an opportunity for judges to demonize black African practices. The refusal to see the immutability of biological sex in cases of domestic violence highlights the extent to which judges do not understand domestic violence as equally problematic. As articulated by Oxford (2005) with the ethnocentric/exotic framework, domestic violence, or an ethnocentric harm, is culturally familiar to judges and so they want to distance themselves and their decisions from the implication that domestic violence is a cultural problem. In this sense, the biologically sexed body not only serves as a backdrop for determining the immutability of a particularly social group, but it also becomes a battleground for global sex/gender politics.

Favoring Particularity

The second legal maneuver utilized to grant asylum in female circumcision cases is the emphasis on the "particular" component of the particular social group clause. Judges hone in on this particularity in female circumcision cases by identifying subsets of larger populations whose bodies, specifically genitalia, are at risk. In the case of female circumcision, this means identifying not just gender, but also a nation and often a tribal affiliation that puts the applicant at greater risk for "mutilation" of their genitals. In other words, the type of persecution –female circumcision—substantiates the particularity to the judges precisely because it involves the genitals. This stands in stark contrast to cases of domestic violence, which are interpreted as entirely too broad with no objective basis in "gender."

In the case of Hafza H. Hassan v Alberto Gonzales (2007), the U.S. Court of Appeals for the 8th Circuit discussed specifically the particularity of women facing female circumcision. In this case, the court ruled that, while gender social groups are often too vague or broadly defined,

female circumcision represents one of the specific instances in which particularity can be achieved. The court writes:

> Here, however, we hold that a fact finder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM. As the Ninth Circuit noted in *Mohammed*, 'there is little question that genital mutilation occurs to a particular individual because she is a female… We, therefore, conclude that Hassan was persecuted on account of her membership in a particular social group, Somali' (Hassan v Gonzales 2007: 8-9).

By including Somali as a nationality, the 8th Circuit delimits the boundaries of the particular social group affiliation. However, it is more than just Hassan's nationality that makes her case specific enough to constitute persecution based on membership in that group of Somali females; it is the rate or prevalence of female circumcision that makes the group particular. Referencing Mohammed (heard by the 9th Circuit and discussed earlier in this chapter), the court finds that genital mutilation is a gender specific practice, meaning Hassan can prove that the persecution is on account of her gender. For this court, female circumcision is unquestionably about gender. A closer reading of Hassan's case illustrates what makes cases of female circumcision particular and particularly about gender. In this case, the 8th Circuit not only asked for her personal testimony about her circumcision, but also referenced a letter from her physician proving that she had circumcised genitals. Because the 8th Circuit can observe the outcome of this practice, they believe that group membership can literally be read on Hassan's sexed body.

In contrast to female circumcision cases, judges perceive the group claims in domestic violence cases as too broad, contradicting the *particular* component of the "particular social group" clause. In 2009, the United States Court of Appeals for the 1st Circuit heard the case of Maguette Faye v Eric Holder. Faye, a woman from Senegal, contended that she was persecuted on account of her religious beliefs, as well as on account of her membership in a group of women who had children out of wedlock and who had been abused by their husbands. Though this social group seems overly specific in its very detailed explication of the boundaries of the affiliation, the BIA and the 1st Circuit disagreed. The 1st Circuit upheld the BIA's finding that Faye failed to propose a specific social group. The court states specifically that "the group of 'women who had a child out of wedlock/are considered adulterers because they gave birth to a child allegedly not their husband's/have been abused by their husbands' did not provide well-defined boundaries for determining the group's membership" (Faye v Holder 2009: 6-7). The boundaries around who is a member of this group and who is not were too flexible for the 1st Circuit. All women could fall into this social group; if all women are potentially targets, the court can find nothing particular about this group specifically. Whereas Hassan referenced her nationality and could point to a specific practice and provide evidence with her body, Faye's group appears too broad for the courts.

The fear of opening the floodgates for half of the world's population appears to be at the root of the rejection of "broad"-based claims. In Nadia Maatougui v Eric Holder (2013), a case about both domestic violence and violence towards newly divorced women in Morocco, the United States Court for the 10th Circuit revisited their assertion that gender on its own cannot constitute a particular social group; it must be coupled with at least nationality or tribal affiliation. Citing itself from a previous case the 10th Circuit wrote, "gender alone is not a sufficiently distinct 'social group' on which to base a 'refugee' finding" (cited in Maatougui v Holder 2013: 25). The 10th Circuit then reinforced its reluctance to allow "half a nation's residents" (women) to claim asylum, warning about the implications of gender based asylum

cases, particularly the possibility of opening the floodgates (an argument largely disproven by legal researchers, see Condon 2002, Fletcher 2006, Hueben 2001, Siddiqui 2010). The court claims that cases can be made more specific by adding nationality or some other status, however, in this case and the case of Faye cited above, neither could sufficiently prove to the court that the group was narrow enough.

In the cases of Faye and Maatougui, the courts refuse to recognize a concrete grounding for their particular social groups, even though both social groups are arguably more narrowly defined than the cases of female circumcision, including the case of Hassan, which ultimately fall back on just gender and nationality. Both Faye and Maatougui have not only delimited by gender and religion/nationality, but have also drawn very concrete boundaries around the subset of the population that is targeted (women who have children out of wedlock and are abused by their husbands for Faye and women who have abused and are newly divorced in Morroco for Maatougui). The difference appears to be the relationship to the sexed-body and the ability to use that sexed body as a marker of difference and persecution. The judges not only see the sexed body in Hassan's case, but also can use observations to show the particularity of her body.

Universalizing Kasinga

The last mechanism utilized to grant asylum in female circumcision cases is adopting the precedent of the case of Kasinga. This mechanism highlights the underlying biological logic in these cases because it requires an explicit universalization of African women's bodies that was only implicit in the last two mechanisms. In the previous cases, female circumcision served as a sort of prerequisite for defining the social group. However, gender plus ethnicity or nationality ultimately served as the ground for asylum. In this subset of 37 cases (about 19.2% of the total number of cases, the act of female circumcision itself is what serves as the actual ground for asylum. The judges do not describe any particular gender social group, but instead assume that the act itself constitutes persecution. The same assumption is not available to victims of domestic violence, as judges do not view this violence as inherently tied to the sexed body.

Allowing the act of female circumcision to stand as its own ground for asylum is problematic though legal interpretation. According to asylum practice, an act of persecution technically cannot serve as the common denominator for a "particular social group" (Birdsong 2008). In order to be understood as persecution in the asylum context, the persecutor must be motivated by some preexisting social reason (for example, prejudice against a religious or ethnic group). For example, any acts of war would not be considered persecution unless there was a specific and targeted cleansing effort aimed at a particular group. Understood through this perspective, the act of female circumcision should not unquestionably serve as "ground" for asylum; applicants and adjudicators should fully explicate the "social group" on which this applicant claims asylum. Many of the cases of female circumcision, though, completely elide the construction of a social group by stating that the Kasinga case serves as precedent. Kasinga was granted asylum because she was circumcised as a woman in her tribe in Togo. Adjudicators accept that all female circumcision is considered gender based persecution, even though Kasinga defined a fairly narrow group delineated not just by gender, but tribe and nationality. The universality of Kasinga is only possible if adjudicators erase national and tribal differences between African women, approaching all African women as potential victims of harm to their sexed body (see Mohanty 1984; Oyewumi 2005). The similarity, then, is their genitalia and the practices that affect their genitalia, practices that are deemed barbaric by the courts.

The asylum system is particularly adept in dealing with cases that appear relatively obvious to adjudicators. Since sex (specifically genitalia) seems like an obvious marker of "gender" and the persecution in question involves genitalia, adjudicators believe the applicant's claim is clearly a gender based case, just like Kasinga's. Again, this requires the suspension of the reality that many of these women are differently positioned geographically across Africa. However, since Kasinga is a gender based precedent for the courts, many applicants successfully apply for asylum "on the grounds of FGM," despite its shaky basis in asylum law. For example, in Nan Marie Kone v Erik Holder (2010), one of the grounds on which Kone applied for asylum was the fact that she had been circumcised in Cote d'Ivoire. Kone also invoked other grounds, including persecution on account of some rebellious political activity. However, it is the female circumcision component that the court finds most compelling. The U.S. Court of Appeals for the 2nd Circuit invokes the case of Kasinga to establish that female circumcision constitutes persecution under asylum law, even though Kasinga's case occurs in an entirely different context. For the court, the shared experience of persecution serves as enough similarity to rule in Kone's favor.

Kone's case is particularly compelling to the court because she voluntarily undergoes a physical examination of her genitals to prove that she has suffered persecution. Adjudicators likely find this evidence compelling because it appears objective (genitals have either been circumcised or not), and since the objective evidence involves the sexed body, they more clearly understand the practice of circumcision as sex, and ultimately, gender specific. Given the ability to observe the practice on the body, adjudicators seem less concerned with substantiating the particular social group claim, and instead turn their attention to uncovering the "truth" of the applicant's body. Many applicants who apply for asylum on the grounds of female circumcision can satisfy the court's desire for empirical evidence about the state of their genitals. Medical exams may provide evidence that appear indisputable to the courts, but the extension of this logic becomes especially problematic given the colonial history of exploring and exploiting the bodies of women of color, including African women (Fanon 1965; Mohanty 1984; McClintock 1995). The case of Sarata Fall Kaba v. Eric Holder (2012) highlights the preoccupation with observing, or not observing, genitals as a marker of gender persecution. The U.S. Circuit Court of Appeals for the 6th Circuit denied asylum because Kaba did not produce legitimate medical evidence of her circumcision. Kaba had, in fact, undergone an exam, but the court did not believe the document was legitimate. She did not want to submit to another exam and so the court denied her case. The desire to observe Kaba's body not only signals the colonial legacy at play, but also shows the reliance on universalizing the bodies of African women. For the court, the way to find the similarity between Kaba and other women, like Kasinga, is through physical examination of the sexed body, a type of evidence that appears objective to the adjudicators.

The same type of univeralization is not observed in the cases of domestic violence. In fact, only one case in the dataset of domestic violence cases utilizes the same logic of using the violence as a "ground for asylum" and it was unsuccessful. In the case of Yury Mabel Archaga-Ponce v. U.S. Attorney General (2011), the U.S. Court of Appeals for the 11th Circuit finds that Archaga-Ponce's assumption that domestic violence was inherently a gender based persecution was unfounded. The 11th Circuit writes:

> Archaga-Ponce is a victim of domestic violence, and she claims that she and victims like her constitute a particular social group. She argues membership in this social group, in turn, establishes the required nexus between the harm she suffered or might suffer and a statutorily protected ground… Based on our review of the record and the parties'

> briefs, we agree with the BIA's determination to the contrary and conclude that substantial evidence supported its order dismissing Archaga-Ponce's appeal. Accordingly, we deny her petition for review (Archaga-Ponce v. U.S. Attorney General 2011: 3).

Here, the 11th Circuit dismisses that domestic violence is a type of harm that automatically substantiates a gender social group claim. Archaga-Ponce contends that she deserves the presumption of the gender component of her case because the type of violence is itself gendered. She argues that she should not have to prove the social group and the nexus between the violence and that group. The court disagrees. This varies from the cases of female circumcision, specifically the case of Kone, in which adjudicators accept the practice as sex, and therefore, gender specific. For the 11th Circuit, victims of domestic violence are not eligible for this same assumption.

The fact that female circumcision is understood as a universally gendered experience, and domestic violence is not, substantiates the underlying biological logic at play in gender based cases. Adjudicators assume a univeralization of African women's bodies that harkens back to problematic colonial explorations and displays of black genitals and sexual difference. This univeralization allows for the extrapolation of one case, Kasinga, to all relevant cases, especially if the applicant willingly undergoes a physical examination. In other words, adjudicators seem to believe that they can read racial or national difference through sexual difference (in this case, "marked" genitals), a practice that we have observed throughout colonial history.

Conclusion

These three maneuvers—seeking immutability, favoring particularity, and universalizing Kasinga, highlight the underlying biological essentialism at play in gender based asylum adjudication. They are mobilized to grant asylum in female circumcision, a type of persecution that judges already view as culturally barbaric. In this way, biological essentialism becomes a tool of the ethnocentric/exotic framework of harm (Oxford 2005) in which asylum adjudicators actively distance their cultures of origin from the backwards gender practices of cultural Others. Judges are reinforcing ethnic difference by uncovering sexual difference, in this case practices involving the genitals. Female circumcision asylum cases, then, are a continuation of colonial trends towards seeking biological justifications for racial difference.

The legal maneuvers—rooted in essentialist politics—are favored by many activists and practioners because they reinforce the universal experience of patriarchy and women's subordination across the globe. Many are dismayed by the consequences of an extremely essentialist framework that works in favor of only genital based practices. But the underlying critique is mostly the disproportionate impact for some women, not the use of the essentialist politics themselves. When given the chance, activists and practioners invoke the same universalizing narratives about domestic violence as a women's issue (see for example Hueben 2001), showing a willingness to utilize these politics for the short-term gain of winning asylum. I suggest that we must be wary of these legal tactics, even if they provide momentary relief to applicants in need. In the conclusion, I revisit the essentialist politics of defining membership in a particular social group and suggest ways to bring a social perspective to the understanding of this term.

End Notes

[1]I use “traditional” here to indicate that this is not the opinion held by all feminists or social sciences (see for example, Butler 1990; Fausto-Sterling 1993).

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Chapter 4

Homonationalism and Sexual Orientation Based Asylum Cases

While the United States now promotes itself internationally for its progressive sexual politics, the history of U.S. immigration reveals a quite different story. Since its inception, the U.S. government has identified and policed non-heteronormative immigrants at its borders in an effort to protect the nation (Luibhéid 2002). In other words, U.S. immigration policies have historically reflected a "heteronationalism," in which the heterosexual nuclear family was the cornerstone of U.S. nationalism; other sexualities were deviant and threats to the national project (Luibhéid 2002; McClintock 1995; Nagel 1998, 2003). The McCarren Walter Act of 1952, for example, excluded homosexual immigrants from entering the U.S.; immigrants could be flagged and deported if their sexual orientation became evident to border officials (Canaday 2003; Luibhéid 1998, 2002). This law was not repealed until 1990.

In an ironic turn of events, the very same process of identifying one's sexuality at the border that could previously lead to exclusion is now an important component for gay, lesbian, and bisexual (GLB) immigrants seeking asylum in the United States. In the U.S., individuals can apply for asylum if they can prove that they were persecuted in their country of origin on account of one of five protected grounds: race, ethnicity, religion, political opinion, or membership in a particular social group (Anker and Posner, 1981). Increasingly, GLB applicants make the case that their sexual orientation constitutes a particular social group. The process of establishing sexual orientation as a social group was a hard won battle, though now most courts accept it as fact (Randazzo 2005).

In addition to proving their identity, applicants must provide evidence that their persecution is a result of their sexual orientation and was unavoidable in their country of origin. Though this requirement is intended to distinguish those applicants most in need of asylum, the consequence is that applicants must describe their countries in regressive terms in order to gain entry. In other words, applicants must distinguish the United States as a progressive nation compared to their less progressive, even regressive, "developing" countries of origin. In the case of sexual orientation asylum, a country's stance on gay rights becomes implicated in the asylum adjudication process (Cantú 2005; Luibhéid 2002).

What the previous scholarship on sexual orientation asylum highlights (or in some instances has only alluded to) is the link between the asylum process for GLB applicants and homonationalism. In *Terrorist Assemblages: Homonationalism in Queer Times*, Jaspir Puar (2007) explains that while homosexuality was previously constructed as antithetical to the national project, the state now incorporates the homosexual in ways that reflect white, Western privilege. Specifically, homonationalism operates by "Westernizing" homosexual identity, racializing the anti-homosexual, and elevating powerful nations over weaker ones. Importantly, incorporation of homosexuals into the national imaginary serves a strategic global purpose: Western nations may now employ sexual politics as a ground for national superiority or as a mechanism for proving progressiveness in the current global community.

In a follow-up article from 2013, "Rethinking Homonationalism," Puar refines her concept, stating that homonationalism is not simply a mechanism of identity politics or a process of distinguishing "good" from "bad" queers, but rather it is the historical convergence of the state, capitalism, and sexuality that makes certain national/legal/cultural processes possible. Homonationalism is the context from which certain practices, like granting citizenship rights (or at least partial rights associated with citizenship) to some individuals rather than others, emerges. Puar writes, "It [homonationalism] is rather a facet of modernity and a historical shift marked by the entrance of (some) homosexual bodies as worthy of protection by nation-states, a constitutive and fundamental reorientation of the relationship between the state, capitalism, and sexuality" (337). She implicates liberal gay and lesbian rights discourses, which promote the appearance of a progressive state by permitting legal and cultural rights to some (Western, white) nonheteronormative citizens, but at the same time denying, refusing, and ignoring the rights of others. Here, Puar uses the example of pinkwashing in the Israeli-Palestine context: gay rights give legitimacy to the state of Israel, which otherwise tramples the rights of Palestinans.

It is this process by which some bodies are incorporated and protected that needs to be examined. In this chapter, I turn to my dataset of 196 published sexual orientation asylum cases to assess which types of applicants are privileged and how the treatment and protection of their bodies is used as a marker of national progress. I make an analytical distinction between sexual orientation asylum cases that employ a narrative of "the homosexual" versus other less (homo)normative sexual identities. In the asylum system "the homosexual" is a unitary and fixed identity characterized by visibility, coherence, and linearity. These features, notably, are consistent with a homonormative identity construction which privileges white, Western gay male sexual politics (Duggan 2003). My analysis indicates that applicants that can adopt the narrative of "the homosexual" (e.g. homonormative, white, visible, coherent, male) have greater success than applicants' identities that are not easily encapsulated by this single narrative (e.g. invisible or less visible, nonlinear over the life course, and/or female). Moreover, applicants must also show an infliction of bodily harm to signify a need for asylum; the treatment of their bodies in their country of origin must vary significantly from the protection that the United States purports to offer. I fully explicate how both of these processes—constructing the normative homosexual identity and proving infliction of bodily harm—operate in six current cases of sexual orientation asylum. In doing so, I show that the adjudication of sexual orientation asylum is one of the processes made possible under what Puar calls homonationalism. This chapter adds to the larger goal of understanding the legal interpretation of terms and processes, in this case identity construction and the concept of persecution.

The Homosexual Versus Other: Identity Construction

One of the most significant problems for GLB applicants in the past decade has been proving that they are actually homosexual to asylum adjudicators who believe that all gay men and lesbians are gender non-conforming. Fears of borders that are too permeable, or the floodgate argument, make asylum officers and immigration judges skeptical of granting asylum, especially to applicants that do not adhere to their expectations (Hanna 2005; Morgan 2006). Though the use of stereotypes of gender nonconformity has been explicitly overturned by the U.S. Circuit Courts in recent cases, many applicants still confront skepticism that their identity is not what they claim (Breshanan 2011; Soucek 2010).

In my analysis, I distinguish the discursively produced category, "the homosexual," from other less normative sexual identities in order to show how sexual orientation based adjudication is a practice of homonationalism. This practice privileges a very specific type of homonormative identity to the exclusion of most others. The convergence of the national asylum regime, homonormativity, and a liberal gay rights agenda promotes a narrative of a singular and fixed homosexual identity constructed along racialized, classed, and gendered lines. Following Luibheid (2002) and White (2013)'s Foucauldian analyses of immigration processes, I, too, make the argument that national borders serve as sites for the discursive (re)production of sexual identities. In the asylum context, I find that applicants must present an identity consistent with a white, Western construction of homosexuality, which is one that is visible to others and coherent and linear throughout the life course. Both of these components are gendered: lesbian applicants (and women generally) are often rendered invisible in their countries of origin and not credible in the asylum system (Bohmer and Shuman 2008; Lewis 2013; McKinnon 2009). The asylum system is thus implicated in the discursive production of a socially palatable, normalized version of homosexuality that excludes those people, bodies, and identities that break the mold.

I find that visibility is an issue for asylum applicants generally and for applicants making a particular social group claim especially. Following the evolution of international asylum adjudication, including new guidelines developed by the United Nations High Commission of Refugees, many courts now require that a particular social group must be one that is visible within an applicant's country of origin. The Board of Immigration Appeals (BIA) first adopted this approach with the case, *In re C-A-*; the BIA argued that confidential informants were not an easily recognizable group in their country of origin and thus did not constitute a particular social group, setting the bar for the social visibility test quite high (Breshanan 2011: 660). After this decision, legal scholars began to worry about the implications for sexual orientation related cases, including the use of stereotypes to determine visibility (Breshanan 2011; Soucek 2010; Turk 2013) and the problems for applicants who purposely cover or hide their sexual orientation to avoid persecution (Choi 2010; Marouf 2008).

These legal scholars have legitimate cause for concern. The emerging adoption of social visibility as a marker of membership in a particular social group coupled with a dominant homonormative framework that privileges "out" and politically active homosexuals (Duggan 2003) opens the door for visibility to be the cornerstone of sexual orientation based asylum cases. While meeting the visibility requirement is difficult for many applicants, the challenge is even greater for women and lesbian applicants. Women are less likely to participate in the public and political arena (Bohmer and Shuman 2008) and their persecution is more likely to occur in the private sphere (Minter 1996).

In addition to being visible, I find that applicants must have a linear and coherent story about their sexuality. This is the product of both the asylum system's insistence on consistent storytelling and a dominant homonormative framework, which treats homosexuality as an unchanging and inherent feature of identity (for example, the prevalence of the "born this way" slogan highlights the extent to which sexuality, and specifically non-heteronormative sexualities, are understood as static and biological in U.S. popular discourse). In the asylum context, applicants must immediately reveal their orientation, and their autobiography must entirely confirm it. Hesitance in sharing one's identity with an immigration official or evidence of a previous heterosexual relationship will undermine an applicant's story and often render the case unsuccessful.

The emphasis on a linear and coherent identity is difficult for all applicants. For example, some applicants in my dataset faced family pressures to couple themselves with a member of the opposite sex, while others got married as a pathway for immigration. However, lesbian applicants seem to have a harder time creating a linear narrative than gay men. These issues emerge from gendered assumptions in both the sending and receiving contexts. In the sending context, many lesbians will marry in their country of origin because of gendered expectations of domesticity. Significantly, women often enter into relationships with men, and even have children, to gain status or to avoid negative attention (Minter 1996). This interrupts any "coherent" lesbian identity. In the receiving context of the United States, judges are especially skeptical of the credibility of women asylum applicants (McKinnon 2009). Bohmer and Shumer (2008) suggest that this skepticism emerges from a masculinist adoption of gender norms in which violence against women is normalized and women's agency is downplayed. Lesbian asylum applicants create even more uncertainty for asylum adjudicators, who are reluctant to accept the legitimacy of a lesbian identity and even more skeptical to accept evidence or proof that a woman has engaged in a sexual relationship with another woman (Lewis 2010). This leads Nielson (2005) to conclude that many lesbian women may find greater success by making their asylum case in terms of gender rather than sexuality. I address the issues specific to lesbian women in more detail in chapter 5.

Bodily Harms: Narratives of Abuse and Protection

Proving persecution on account of a protected status can be difficult for all asylum applicants. Persecution is a concept that rises above the level of an individual altercation and indicates a systemic pattern of violence and discrimination within a country (Anker and Posner 1981; Salkeld v Gonzales 2005). In order to successfully prove persecution, applicants must show that their country of origin contributed to their circumstances: either the state government committed the act, or it is unwilling or unable to protect citizens from individual persecutors. Though this requirement is intended to distinguish those applicants most in need of asylum, the consequence is that applicants must describe their countries in regressive terms in order to gain entry. In the case of sexual orientation asylum, a country's inability or unwillingness to accept and protect GLB individuals at the least and a country's systemic persecution of the GLB community at the most becomes a requirement for a successful asylum case (Cantú 2005; Luibhéid 2002).

Murray (2014) explains the centrality of the narrative of "migration to liberation" (452) in the Canadian asylum context: GLB applicants must simultaneously espouse the national rhetoric of progressive Canadian sexual politics while disavowing and dissociating from their country of origins. Sexual politics, then, become a marker of progress; Canada in this case, or the country to which the applicant flees, is elevated above the "developing" countries from which the applicant flees. The use of sexual politics as a requirement for asylum adjudication points to the processes of homonationalism in action: gay rights in the Western context give legitimacy to Western states, despite other human rights or even gay rights abuses.

What I am adding to this conversation is the centrality of protecting bodies, albeit certain bodies that can align with the discursively produced category of "the homosexual." In my analysis, I find that narratives of bodily harm are privileged by asylum adjudicators. The treatment of GLB bodies in the applicants' country of origin must represent a clear and distinct departure from sexual politics of the body in the United States. The importance of bodily harm is

two-fold: it is not only implicit in the elevation of individual rights claims over group rights claims (Donnelly 2013), but it also offers one key dimension by which the U.S. can try to build a progressive agenda. Though the U.S. cannot claim to have a ubiquitously progressive gay rights stance (after all, gay marriage and work equality are still not legal in all states), federal law does criminalize hate crimes based on sexual orientation (though some state laws do not, see Human Right Campaign 2013). The U.S. does purport to use its criminal justice system to prosecute crimes against individuals' bodies, thereby making it a "safe place" for sexual minorities (again, albeit certain sexual minorities that are mostly white and middle-class). It is through this framework that body politics become central to understanding the concept of persecution in sexual orientation based cases.

Case Studies

My analysis and findings are derived from my original dataset of all published sexual orientation based asylum cases. One hundred and ninety six cases, ranging from the year 1985-2013, were collected from Lexis Nexis Legal. Sets of key words—sexual orientation, homosexual, gay, lesbian and asylum—were used to locate relevant cases. Some cases had to be excluded because they only referenced sexual orientation; the applicants were not claiming their sexuality as a basis for asylum. Most applicants made their case on account of a particular social group, but some did include other grounds for asylum, including race, political opinion, and religion.

As described in the introduction, all of the cases are appellate level decisions heard by U.S. Circuit Courts; these cases serve as the existing precedents for lower courts and asylum adjudicators. While these cases do act as precedent, they are not representative of the decisions made at the lower levels of the asylum process. The lower level case decisions are nearly impossible to access since the United States Citizenship and Immigration Service (USCIS) guards their initial decisions, refusing to publish them or disaggregate by the type of asylum claim (Musalo 2010). Though this dataset cannot draw conclusions about all asylum cases, the findings do illuminate the prevailing precedents for adjudication at nearly the highest level of appeals (the Supreme Court being the only higher level of adjudication).

Of the 196 cases, 43 were successful (meaning they were remanded to a lower court for reconsideration) and 153 were unsuccessful (meaning the appeal was dismissed by the Circuit Court and the applicant either has to appeal again or enter deportation proceedings). Though the patterns of identity and bodily harms are evident in the larger dataset, I use six current cases from the years 2010-2013 to outline my argument. Because case law is always evolving, I chose these six cases to highlight the most current issues in sexual orientation based asylum adjudication.

Successful Cases

The three successful asylum cases provide evidence for the salient narrative of "the homosexual" and the centrality of bodily harms. The first case, Miguel A. Rosiles-Camarena v. Eric H. Holder (2013), highlights most significantly the narrative of "the homosexual." Rosiles-Camarena's case began with an approval from the IJ. Upon hearing the case, the IJ concluded that the applicant was likely to be persecuted on account of his status as a HIV-positive gay man in Mexico. The IJ relied on the rates of murder on the basis of sexual orientation—148 persons between 1995 and 2006—and expert testimony on the frequency of physical attacks against homosexuals (Rosiles-Camarena v. Holder 2013: 3). In reviewing the case, the BIA remanded back to the IJ, stating that 148 cases over the course of 9 years amounted to 12 or 13 killings a

year. The BIA claimed that while 12 or 13 deaths a year are unfortunate, the original facts did not compel them to find that Rosiles-Camarena would be more likely than not to be persecuted in Mexico. Upon remand, the IJ reversed his/her original decision in line with the BIA. Rosiles-Camarena then appealed to the U.S. Court of Appeals for the Seventh Circuit, who remanded back to the BIA. The BIA held its same position that Rosiles-Camarena did not have a likelihood of future persecution.

It is at this point that Rosiles-Camarena appealed his case again to the Seventh Circuit. According to the applicant, the BIA erred in its determination about future persecution by relying solely on the rates of murder. Further, Rosiles-Camarena contended that he was at greater risk for persecution. The Seventh Circuit wrote,

> For although we have mentioned so far only the statistical risk of death for homosexuals as a group, Rosiles-Camarena contends that he is at greater risk. He is not only gay and HIV positive but also "out" and planning to live openly with his partner…He adds that, because he has lived in the United States most of his life and does not know contemporary Mexican customs, he will find it hard to avoid attracting attention from persons who might do him harm (Rosiles-Camarena v Holder 2013: 13-14).

Ultimately, the Seventh Circuit does not opine on the likelihood that the applicant will face future persecution: the court left that determination up to the BIA. However, the court did remand the case back to the BIA to reconsider the probability that Rosiles-Camarena was more likely than not to face broader persecution, not just murder, should he return to Mexico.

Though the Seventh Circuit did not make a determination about future persecution, it was clearly persuaded by Rosiles-Camarena's claim that he could likely face persecution in his country of origin. The court made a point to highlight the public nature of the applicant's sexual orientation and his inability to avoid attention in Mexico. Here, the court implicitly reinforced a category of gay men who are visible and either unwilling or unable to hide their identity by asking the BIA to reconsider Rosiles-Camarena's case in light of these facts. This decision privileged a visible, public, "out of the closet" individual, an identity that the applicant, and maybe the court, believe is attainable in the United States, but not Mexico. In highlighting the applicant's visibility and his lack of familiarity with Mexican customs, the Seventh Circuit brought white, Western norms of homosexuality into the frame of discussion, privileging Western gay identity while simultaneously allowing negative stereotypes of backwards Mexican sexual politics to stand. Importantly, this dichotomy is factually inaccurate: the U.S. is not the immaculate safe haven for the LGBT community (as evidenced by the Federal Bureau of Investigation's (2011) hate crimes reporting), and Mexico is not unilaterally an unsafe and/or homophobic nation (for example, Mexico has just legalized same-sex marriage, see Kahn 2015).

It is also worth noting the importance, but perhaps not centrality, of bodily harms in this case. The likelihood of murder, the ultimate in bodily harm, was an important factor in the original IJ's decision to grant Rosiles-Camarena asylum. Though the BIA disagreed that the murder rate was an indication of future persecution, the Seventh Circuit clearly believed that there was some credibility to Rosiles-Camarena's case by remanding it back to the BIA in the first place. The series of back and forth between the IJ, the BIA, and the Seventh Circuit highlights that the possibility of murder is a serious consideration in asylum adjudication, prompting multiple appeals and overturned decisions.

In the next case, John Doe v. Eric H. Holder (2013), the major tension was not Doe's identity (all of the courts easily accept his sexuality), but instead his government's willingness to protect him from bodily harm. Doe was outed as homosexual while he was at a Russian

university and joined a club called Kletka, an openly gay organization on campus. After being spotted with members from the club, people from his university began mocking him. Soon after, verbal harassment led to violence, and Doe was violently attacked on two different instances, one which resulted in a three week long hospitalization (Doe v. Holder 2013: 6-7).

Both the IJ and the BIA believed that Doe was homosexual. The IJ and the BIA instead took issue with Doe's argument that the Russian government was unwilling or unable to protect him from harm. Though Doe had evidence that he reported the incidents to the police and that they did not prosecute his attackers, the IJ and the BIA found that he could not show that the violence was on account of his sexual orientation, nor could he implicate the government in his persecution. Further, the IJ suggested that Doe could relocate within Russia to avoid future harm. Doe appealed his case to the U.S. Court of Appeals for the Ninth Circuit, which granted a review of his petition and remanded to the BIA for further reconsideration. The Ninth Circuit ruled that the BIA erroneously concluded that Doe did not provide evidence of the Russian government's failure to protect him and that he could easily relocate within Russia (Doe v. Holder 2013: 19-20). The Ninth Circuit wrote that they were unconvinced by the IJ and the BIA's adjudication and that, "The Government failed to present any evidence to rebut Doe's undisputed testimony that he suffered serious assaults at the hands of individuals on account of his homosexuality or to show that the Russian government was able and willing to control nongovernmental actors who attack homosexuals" (Doe v Holder 2013: 20).

The easy acceptance of Doe's identity shows the dominance of the narrative of "the homosexual" in the asylum system. Doe's identity, unlike many other applicants, was never questioned. His participation in an openly gay organization was consistent enough with the white, Western construction of the "out" and politically active gay man. While the acceptance of his identity might seem progressive to some (and perhaps it is progress compared to the restrictive immigration and asylum practices in the past), this privileging comes at the expense of other applicants, particularly those that do not conform to this narrative.

The crux of Doe's case, though, was the treatment of gay people in Russia. Russian gay politics is a highly public and politicized issue, with many U.S. and international gay rights organizations condemning the country's anti-gay laws (Elder 2013), so it is unsurprising that the Ninth Circuit sided with Doe on this issue. The failure to prosecute the perpetrators and, more importantly, the failure of the government to protect Doe from this violence in the first place was the key issue for the Ninth Circuit. Here the Ninth Circuit reprimanded the initial decision making for not ruling in favor of Doe, especially in light of the "serious" nature of the assaults. In making this argument the Ninth Circuit made an explicit statement about the importance of bodily harm when considering asylum cases.

The last case, Dennis Quiambo Vitug v. Eric H. Holder (2013), pushes the argument about the prevalence of bodily harm even further: in this case, the U.S. Court of Appeals for the Ninth Circuit shows the extent to which the treatment of bodies is understood as a marker of progress and a way to elevate U.S. sexual politics over applicants' countries of origin. Vitug's case was initially accepted by an IJ, who found that he was homosexual: Vitug's peers identified him as gay from an early age because of his effeminate behaviors. The IJ found that he would likely face continued persecution if he returned to the Philippines. The government contested this claim and appealed to the BIA, arguing that Vitug did not prove that his country's government was unwilling or unable to protect him (Vitug v Holder 2013: 7-8).

The BIA ruled in favor of the government, at which point Vitug appealed to the U.S. Circuit Court for the Ninth Circuit. Vitug contended that he should be considered for

withholding of removal (another process for allowing relief in the United States). The Ninth Circuit agreed and remanded his petition for a review of withholding of removal to the BIA for reconsideration. The Ninth Circuit asked the BIA to take seriously the bodily harms that Vitug might face. The court wrote,

> The government did refer to Vitug's documentary evidence regarding gay activism in the Philippines and the passage of a local ordinance in Quezon to protect homosexuals from employment discrimination. Such evidence, however, does not indicate that there is any less violence against gay men or that police have become more responsive to reports of antigay hate crimes (Vitug v Holder 2013: 20)

In other words, the potential for violence and the inability of the police to respond to this violence was a marker of Vitug's need for relief in the United States.

Though gender stereotypes are no longer allowed in sexual orientation based adjudication, this case shows the ease with which gender nonconforming gay men have in proving their identity. Vitug's identity was never questioned: his effeminate looks and behavior from an early age led people to make assumptions about his sexual orientation and then later persecute him on account of this identity. The fact that the courts reiterated Vitug's effeminacy in their decision lends some credibility to argument that gender nonconformity might still be privileged in this type of asylum adjudication. It also provides evidence for the argument about coherence and linearity in sexual orientation: Vitug was not only visibly gay, but his identity had remained constant over his entire life course.

Since Vitug's identity was not in question, the contention in this case was sexual politics in the Philippines. On appeal, the BIA agreed that Vitug did not show evidence that his government was unwilling or unable to protect him. The Ninth Circuit disagreed: a few anti-discrimination employment laws did not mean that Vitug was safe in his country of origin. The potential for bodily harms, then, factored more heavily for the Ninth Circuit than other gay rights considerations.

Taken together, these cases are evidence of the types of practices made possible with homonationalism. The discursive (re)production of a white, Western homosexual identity onto the bodies of migrants and the protection of some bodies over others shows the ways in which borders, and in this case the process of asylum, work to promote the semblance of a progressive U.S. agenda and simultaneously reprimand applicants' countries of origin for backwards sexual politics.

Unsuccessful Cases

The successful cases highlight the types of narratives privileged in the asylum system. The three unsuccessful cases demonstrate how individuals who do not conform to the narratives of "the homosexual" and bodily harm are dismissed by the asylum system. In the first case, Lucas Eduardo Velez v. Attorney General of the United States (2010), the applicant could not prove to the courts that he had an objective fear of persecution in his country of origin and thus was not eligible for asylum. In the initial hearing with the IJ and then the BIA, Velez testified about "the practice of police, paramilitary groups and guerillas attacking 'undesirables,' including sexual minorities, called 'social cleansing'" (Velez v AG 2010: 2). Though the IJ and the BIA did not dispute that Velez was gay, they reduced the acts of violence in Colombia to "isolated incidents of private violence" (Velez v. AG 2010: 2).

The U.S. Court of Appeals for the Eleventh Circuit Court of Appeals agreed that Velez did not have a credible case for fear of future persecution. In making this argument, the court contended that only some homosexuals, mainly those who were highly socially visible, would be targets of violence and social cleansing. The court opined,

> This evidence showed that homosexuals in Colombia, especially transvestite prostitutes and non-governmental organization ('NGO') activists, are sometimes victims of violence and social cleansing…Contrary to Velez's assertions, the newly submitted evidence does not show that violence against homosexuals has increased since the IJ's decision. Notably, Velez is neither a transvestite prostitute nor an NGO activist, so much of this evidence is of marginal relevance to his persecution claim (Velez v. AG 2010: 3).

Since Velez did not fit into one of these visible groups— gender nonconforming sex workers and gay rights political activists—he was not at risk for violence and his petition for review was denied.

The Eleventh Circuit elevated certain groups of sexual minorities over others and invoked two of the components that were evident in the successful cases: gender nonconformity and public, "out" identities. Though the court would probably make the argument that it was merely referring to the evidence, the easy acceptance that some groups will be targeted over others speaks to the dominance of the narrative of "the homosexual" in sexual orientation asylum adjudication. The court chose to highlight the vulnerability of some groups and thereby discredited any other evidence or subjective fear that Velez may have presented.

The centrality of bodily harms is also evident in this case. Notably, the Eleventh Circuit pointed out that some groups were more at risk for bodily harms like violence and social cleansing. Those groups, the court implied, would be eligible for asylum because of the extreme nature of their claims. Velez was not at risk for these bodily harms and thus had no legitimate reason to be granted asylum.

The second case, Oleksiy Dorosh and Kucherov v. Attorney General of the United States; (2011), not only indicates the importance of public visibility, but also the necessity of a coherent homosexual identity and the presence of bodily harms. In this case, the applicants, Dorosh and Kucherov, a gay couple from the Ukraine, did not display a coherent timeline of their sexuality and their relationship, nor did they prove that their attacks resulted in extreme harm. When they first arrived in the United States, they immediately gave testimony to immigration officials that they feared persecution based on their sexual orientation in the Ukraine. As they navigated the asylum process, adjudicators at all levels questioned their credibility, pointing out flaws in the coherence of their story and their sexual history.

After many appeals, the case landed in the U.S Court of Appeals for the Third Circuit, which upheld the lower courts determination about their lack of credibility. The Third Circuit wrote,

> According to petitioners' own tally, the IJ identified at least sixteen separate inconsistencies or falsehoods in their testimony….The IJ found that petitioners contradicted themselves and each other through statements made in their various applications and interviews with immigration authorities, as well as in their court testimony. The IJ cited inconsistencies covering numerous issues, including information about petitioners' prior marriages in Ukraine, details about their relationship with each other, specifics about threats that they allegedly received (or did not receive) prior to being assaulted on October 28, 2004, and the nature of the injuries that they allegedly

suffered in the assault. As the BIA observed on appeal, the many inconsistencies 'covered most aspects of petitioners' case' (Dorosh and Kucherov v. AG 2011: 5-6). The court specifically pointed out the holes in the story about their relationship, as well as their previous marriages, both of which undermined their narrative about their sexual orientations. Moreover, the court claimed that the applicants did not elaborate on the "nature of the injuries that they allegedly suffered." Later in the decision, the court agreed with the IJ that the applicants could not prove the severity of their attacks, noting that "…the IJ refused to credit the medical evidence as sufficient to establish lasting injuries, and thus found that 'it can only conclude that [petitioners] suffered a single assault, which resulted in minor injuries that did not require hospitalization and that healed within a few days.' The record supports the IJ's determination" (Dorosh and Kucherov v. AG 2011: 11).

Credibility in this case hinged on both identity determinations and the centrality of bodily harms. First, Dorosh and Kucherov's relationship was questioned because of "inconsistencies" in their stories, notably the heterosexual relationships in which they engaged. These applicants did not present a coherent narrative of their sexual orientation as evidenced in the successful cases of asylum. As a comparison, in the previous case of Dennis Quiambo Vitug, the applicant's identity was not questioned because he was identified as homosexual from a young age. This long-term linear narrative was not present in Dorosh and Kucherov's case. Their previous relationships with women hindered their case, rendering them both invisible in their country of origin (though, notably, not invisible enough to keep them from being attacked) and not credible in the asylum context. At least to some extent, Dorosh and Kucherov were aware of the need to present a linear narrative to the courts. For example, Dorosh lied to all of the courts about having children (Dorosh and Kucherov v. AG 2011: 8), probably in an attempt to present a coherent narrative for adjudicators who are skeptical of immigrants' credibility.

Moreover, the IJ, the BIA, and the Third Circuit were not compelled by the applicants' story of their assault. The IJ explained that Dorosh and Kucherov were not seriously harmed and their injuries did not require hospitalization. The BIA and the Third Circuit agreed. Here, the courts highlighted the necessity of harm to the body. Assault alone is not evidence for asylum; assault must result in severe bodily harm that results in long-term injuries. This sets a high bar for asylum applicants: they must not only prove an attack, but produce the resulting medical records of extreme bodily harms from that attack.

The last case, Margarita Michulena v. Attorney General of the United States (2010), brings a more substantial gender bias into the frame of analysis. Very few lesbian cases appeared in my dataset, and even fewer received asylum. The overall dismissal of lesbian claims points to the skepticism about women's sexuality by asylum adjudicators. In the case of Michulena, the lack of a linear narrative became central to the initial dismissal of her case. The initial IJ and the BIA dismissed her claim because of several inconsistencies, most notably her prior relationships with men in Latvia and the United States. The Third Circuit reviewed Michulena's sexual history:

> Michulena claimed that she married her first husband in 1990, but that the relationship ended after they had lived together for approximately one year. In 1996, Michulena began a relationship with Viktorija Timonina. Over the next two years, the couple was victimized by physical attacks, harassment, and vandalism. Michulena and Timonina traveled separately to the United States and, once here, began living together. Timonina's asylum application was granted in September 2002. In November 2002, however, the couple broke up and Michulena started dating Alex Vargas, a United

> States citizen. Michulena married Vargas, although he later filed an affidavit with immigration authorities asserting that the marriage was not bona fide. Shortly thereafter, Michulena resumed her relationship with Timonina (Michulena v. AG 2010: 1-2).

The Third Circuit later opined that her nonlinear narrative of lesbian identity and relationships should not necessarily hinder her case, finding that "We note, however, that several of those determinations are suspect, particularly the conclusion that Michulena's two marriages and the timing of her personal relationships undermined her allegation that she is a lesbian" (Michulena v AG 2010: 4). This recognition that lesbian women may have nonlinear stories is a step in the right direction. It begins to address the different gendered expectations on women, especially the cultural directive to get married and have children. However, the Third Circuit does not explicitly overturn this type of logic in decision making, instead making it a "note" and not an important component of their adjudication.

The Third Circuit ultimately denied Michulena's case because she could not provide corroborating medical evidence of her attacks. The Third Circuit determined that Michulena should have provided a report that documented her injuries. Again, this speaks to the centrality of bodily harms resulting in medical intervention. Importantly, the requirement of providing medical documentation presents an unfair evidentiary burden to applicants who may not have access to medical care in their country of origin or who may fear retaliation if they report their crimes to a hospital.

These unsuccessful cases tell a story about which types of cases are met with skepticism from the courts and therefore which types of bodies are privileged and worthy of protection in the United States. Whereas the narrative of "the homosexual" was evident in the successful cases, these applicants were outliers from this narrative on some key dimension: gender, visibility, coherence, linearity. Looking at these unsuccessful cases highlights the practices made possible under homonationalism, practices that assert the purported progressive nature of U.S. sexual politics, which reinforce and protect white, Western, male homosexual identity construction.

Conclusion

In my analysis, I have implicated sexual orientation based asylum adjudication as a practice of homonationalism, which allow for the protection of some applicants over others. As Puar suggests, some bodies are deemed worthy of protection by the nation states, while the rights of others are less important. Significantly, I highlight the success of cases in which the applicant can discursively produce the identity of "the homosexual," a narrative which requires that applicants present a visible, linear, coherent narrative of homosexuality in line with white, Western gay homonormativity (Duggan 2003). Moreover, I demonstrate the centrality of bodily harms, or those bodies that are worthy of protection, to show the ways in which extreme harm and medical intervention factor into sexual orientation based asylum cases. Specifically, I find that cases hinge on the infliction of long-term bodily harm in the applicants' countries of origin juxtaposed with the purported relief that the U.S. can provide.

In all instances of asylum, the underlying logic is that the receiving country can provide protection to applicant. This is inherent in the process of "seeking relief." What other scholars (like Cantú 2005; Luibhéid 2002; White 2013) and I have argued is that sexual politics not only become pivotal to border crossing, but also further divide our ideas about "First World"/ "developed nations" compared to "Third World"/ "developing nations." Sexual politics and gay

rights, then, become a marker of progress in the contemporary era, rendering non-Western countries as culturally "backwards" or "regressive."

It is worth adding that the U.S. is not even the safe haven it purports to be. While the U.S. may have federal hate crime legislation, some states do not incorporate sexual orientation as a ground for hate crime protections, making some places more dangerous than others (Human Rights Campaign 2013). Sexual orientation bias is the second leading cause of hate crimes in the U.S., preceded only by racial bias (Federal Bureau of Investigation 2011). The U.S. is far from a "safe" place for these applicants. In fact, Russ IV (1998) made the controversial argument that gay and lesbian individuals in the U.S. may have legitimate credibility for asylum in other countries: the perpetration of violence and the lack of a unified response to this violence is and should be a reason to leave the U.S. in search of a safer environment.

The point is that the dichotomy promoted by the process of asylum is false and arbitrary. The requirement that applicants present their countries of origin as regressive speaks volumes about the political intentions of the asylum system. This is not to say that the asylum system does not provide needed relief to many applicants every year. It does. But the very thorough process through which applicants must implicate their countries of origin in their persecution is not only a difficult evidentiary burden, it also promotes some very problematic politics that assert Western dominance.

Moving forward, legal scholars, activists, and asylum adjudicators should consider which types of narratives are privileged in the asylum system. Rectifying the dominance of the narrative of "the homosexual" and the centrality of bodily harms will enable success for more asylum applicants, who previously found themselves ostracized and unrepresented in decision making. This will not only help many individual applicants, but it also a necessary first step in breaking down normative Western assumptions about sexuality.

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Chapter 5

Lesbian Asylum and the Problems of Gender

In June 2007, the United States Court of Appeals for the 11th Circuit heard the appeals case of Ingrida Mockeviciene and Vesta Mockeviciute, a daughter and mother who were fleeing Lithuania because of the daughter's sexual orientation. They recounted over a decade of personal and police harassment after Mockeviciene came out as a lesbian and left her husband. Over time, the harassment escalated to violence, including detention in prison. As is typical with any asylum proceeding, the case began with an Immigration Judge (IJ). The IJ dismissed the case, claiming that both mother and daughter lacked credibility. At the heart of the IJ's determination was a question about Mockeviciene's sexuality. Was she really a lesbian? The IJ provided the following rationale for his decision:

> (1) Mockeviciene "defined" being a lesbian as 'a woman who wants to be around other women and . . . it does not necessarily involve sexual relationships' (2) although she had been in the United States for four years, she had not had a lesbian partner, so that she was '[a]t best . . a non-practicing lesbian'; (3) she had 'no documents to establish that she is a lesbian,' and the letters or notes she did submit were not originals and did not 'mention with any degree of specificity the lesbian relationships of [Mockeviciene], only addressing the conclusion that [Mockeviciene] is indeed a lesbian' (4) she had 'not joined any groups while being here in the United States for four years that involve[d] lesbian activities' (5) she did not produce any witnesses to 'attest to the fact that she is indeed a lesbian' (6) she provided no documentation of her problems with the police; and (7) although her mother was currently visiting her, her mother did not testify at the hearing (Mockeviciene and Mockeviciute v. Attorney General 2007: 7-8).

As noted above, the IJ found no evidence that Mockeviciene was a lesbian. Specifically, she did not appropriately define what it meant to be a lesbian, she had not engaged in a recent relationships or political activism groups, and she could not produce witnesses or documentation to attest to her sexual orientation. According to the IJ, a lesbian must be visible and actively engaged in sexual relationships to substantiate the persecution that she had endured.

Mockeviciene and Mockevicute appealed their case to the Board of Immigration Appeals (BIA), arguing that the IJ used a personal bias in determining that Mockeviciene was not a lesbian. Rather than overturning the IJ's decision, the BIA upheld it: the BIA introduced new evidence that Mockeviciene had recently become sexually involved with a man, which lent support to the IJ's credibility determination. Finally, the case arrived at the U.S. Circuit Court of Appeals for the 11th Circuit. Though the 11th Circuit raised some concerns about the reasoning behind the credibility decision, namely the lack of a current sexual relationship with a woman, the court ultimately not only upheld the lower courts' final decision to deny asylum, but also did not use this opportunity to reprimand the lower courts' biased deployment of stereotypes about lesbian women. Instead, the 11th Circuit chose not to overturn the credibility determination, agreeing that the recent sexual relationship with a man supported the IJ's initial decision.

Two months prior to this decision, the United States Court of Appeals for the 8th Circuit grappled with similar questions of credibility determinations for gay applicants. In the case of David Shahinaj, the initial IJ argued that the Albanian applicant did not convince the court that he was homosexual. The IJ wrote:

> 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 homosexuals in Albania, which gives expression to his claim at present. He never reported the abuse, the physical abuse that he received from the police, the sexual assault to any homosexual organization which one would suppose would have reported it and provided counseling at least to him. While one can understand that he would not report it to the police, since they were the alleged perpetrators, it is simply implausible that he would not report it to an organization whose job it is to represent the interest of homosexuals in Albania (Shahinaj v. Gonzales 2007: 2-3)

Again, the IJ used his personal opinions about sexual orientation, including a bias about gender presentation and sexual activity, to determine the credibility of the applicant. Shahinaj appealed to the BIA and ultimately the 8th Circuit, pursuing the argument that personal subjectivity influenced the outcome of his case. Unlike the case of Mockeviciene and Mockeviciute, the circuit court explicitly reprimanded the unfair adjudication of the Shahinaj's case, remanding the case back to a different IJ for a decision consistent with the 8th Circuit's decision.

These two cases, separated by only two months with very different outcomes, draw attention to the importance of exploring the role of gender in sexual orientation asylum cases. The disparity between the outcomes is at least in part due to the larger body of case law for gay men's cases. Most cases are made by gay men because lesbian women are marginalized by not only their sexual orientation, but also their gender, rendering them less likely to leave their country of origin in pursuit of asylum (Bohmer and Shuman 2008; Lewis 2013; McKinnon 2009; Shuman and Bohmer 2014. Yet, there is likely a theoretical argument to be made about the patriarchal nature of national and immigration policies, as well as a general skepticism about women's (especially immigrant women's) sexuality (Luibhéid 1998. 2002).

In recent years, an emerging body of sexual and migration studies literature has addressed the disparity evident in the two opening cases (Berger 2009; Lewis 2010, 2013, 2014; Lewis and Naples 2014; Luibhéid 2002; Shuman and Bohmer 2014). I also explored this disparity in chapter 4 in the context of homonationalism and homonormativity. This group of sexual and migration scholars and I have argued that the narrative of the Western gay male applicant has overshadowed lesbian asylum cases in sexual orientation cases, provoking judges to look for typically male characteristics of childlessness and political activity as markers of sexual orientation. These expectations do not reflect the social position of women around the world, who are often valued for the children they produce, and for whom the public sphere of political activity is less accessible. This work adds a much needed critique of asylum adjudication and ultimately pushes the migration studies literature forward.

In this chapter, I present a new, and potentially controversial, explanatory factor for the relative lack of presence and success of lesbian asylum applications: the nature of the cases made by lesbian women versus gay men. In my dataset, lesbian experiences of persecution are interpreted as "less serious" than those of gay men. In making this claim, I do not mean to diminish the experiences of violence and discrimination against lesbian women around the world. Instead, I argue that the cases, and the ways in which they are described by the courts,

appear to be "objectively" less violent. My use of quotations around the terms "less serious" and "objectively" signals my discontent with thinking about some experiences of discrimination as worse than others (in fact, I have argued against this type of classification in chapter 2 with my analysis of domestic violence asylum cases). However, since the system itself prioritizes cases of extreme and public violence, an analysis of the types of harms experienced by lesbian women and gay men can add a missing piece to our understanding of the disparities between these two populations. In addition to presenting the evidence of the differences in persecution, I theoretically explore some of the gendered reasons perpetuating this distinction in my dataset, including turning to theories of masculinities and sexuality.

Existing Literature

A substantial body of legal literature addresses some of the major barriers for lesbian, gay, bisexual, and transgender (LGBT) asylum applicants, though very few legal scholars disaggregate their analyses by gender. As a whole, the legal literature extrapolates the procedural issues for gay men to the larger population of LGBT individuals with little reflection on the disparities between men's, women's, and trans people's cases. The reasons for overlooking these discrepancies are practical and political. Practically, legal scholars focus on procedural issues as they emerge in their own practice or observations. Politically, it is advantageous to diminish differences between these cases to substantiate a larger argument about the particular social group of sexual orientation.

In practice, legal scholars write about procedural issues evident in highly publicized precedential cases or their own work with applicants. Most of the high profile cases are those of gay men; this explains part of the lack of attention to lesbian cases. Over the past two decades the procedural issue which has garnered the most attention is the interpretation of sexual orientation as a particular social group in asylum law and practice. In the United States, individuals can apply for asylum if they have a well-founded fear of persecution in their country of origin on account of their race, nationality, religion, political opinion, or membership in a particular social group (Anker and Posner 1981). Sexual orientation is not specifically referenced in this definition, but increasingly victims of homophobia make the case that their sexual orientation constitutes a particular social group (Bennett 1999; Birdsong 2008; Landau 2005; Millbank 2004).

In order to construct a particular social group, asylum adjudicators largely accept the precedent from the 1985 case, Matter of Acosta. Acosta dictates that a particular social group is identified by common immutable characteristics that are fundamental to individual identities (Matter of Acosta 1985). In the 1990 case of Toboso-Alfonso, an IJ cited Acosta and found that sexual orientation constituted both a fundamental and immutable identity for gay men (Matter of Toboso-Alfonso 1990). In 1994, Attorney General Janet Reno set the Toboso-Alfonso case as a precedent; this meant that applicants would not have to prove on a case-by-case basis that sexual orientation constitutes a particular social group. Yet, her decision did not describe any specific guidelines for judges to determine if the applicant is a member of that group (Randazzo 2005).

This lack of clarification or guidance serves as the basis for the critical legal investigations of sexual orientation asylum cases. Notably, legal scholars explain that judges deploy stereotypes of gender nonconformity to determine if the (mostly male) applicants are gay or not (Cianciarulo 2009; Hanna 2005; Marouf 2008; Morgan 2006; O'Dwyer 2007). Hanna (2005) notes how gay men with gender conforming masculinity are punished in the asylum

system: judges are less likely to question effeminate gay men, who easily conform to the judges' notions of sexual orientation. In this respect, some legal scholars have explored the analytical power of gender, but have limited this analysis to gay men.

Washing over the differences between gay men and lesbian women may be more than simply a result of practicality. Politically, as I learned in my interviews, many of the legal scholars are seeking to legitimize sexual orientation as a particular social group that is easily accepted by the courts. Since gay men represent the majority of precedents and precedents are an easy way to establish the viability of a group, legal scholars may find it advantageous to minimize or diminish the differences between gay men and lesbian women. Still, there are some important differences explored by a more critical group of scholars that should not be overlooked.

The interdisciplinary literature from the field of sexuality and migration studies parses out some of the nuances of lesbian asylum cases (Berger 2009; Bohmer and Shuman 2008; Lewis 2010, 2013, 2014; Lewis and Naples 2014; Luibhéid 2002; Shuman and Bohmer 2014). This literature starts from the assumption that national borders serve as sites for the discursive production of gender and sexuality. Rather than assuming a fixed notion of sexuality, these scholars presume nothing inherent about sexual identity and instead implicate immigration laws in the institutionalization of a static category of homosexuality predicated on white, Western, male stereotypes. Luibhéid (2002) argues that U.S. immigration law mutates with historical global and racialized tensions, always attempting to maintain the superiority of the white, heterosexual, traditionally gendered heterosexual family. Notable is the law that excluded all homosexual immigrants from entry into the United States from 1952-1990. By writing and rewriting immigration policy, lawmakers seek to exclude those that challenge normative assumptions about race, gender, and sexuality and in doing so actually reinforce and reify those categories of difference.

Contemporary asylum practices follow in this tradition by adopting a static and male dominated construction of sexual orientation. As discussed in chapter 4, asylum adjudicators expect gay applicants to tell a linear and coherent story about their sexual orientation. Applicants that have engaged in prior heterosexual relationships or have children directly contradict the coherence preferred (and, in practice, required) by asylum adjudicators. Lesbian women, subject to traditional gender norms and the constraints of homophobia, have often engaged in heterosexual activity in an effort to conform to societal expectations or to "pass" in their country of origin, precluding a linear narrative about sexual orientation (see also Lewis 2010, 2013). In addition to coherent stories, asylum adjudicators look for signs of politically active LGBT individuals, arguing that they are most at risk for persecution. As Berger (2009) suggests, this model for determining risk emerges from the history and development of asylum practice, in which mostly male applicants have participated in risky political activism in the public sphere. Violence against lesbian women, like violence against heterosexual women, is more likely to occur in the private sphere; lesbian asylum applicants, then, are at a disadvantage because their stories do not conform to the public narratives assumed by asylum adjudicators. The problem of private harm has led legal scholar Victoria Nielson (2005) to suggest that lesbian women may have better luck applying for gender based asylum. Though gender is more difficult to prove as a particular social group, asylum adjudicators have some experience dealing with the more private nature of gender based claims.

In addition to the gender expectations placed on women in their countries of origin that prohibit the linear and public stories required by asylum adjudicators, women applicants are

subject to a set of norms about their gender performance in the court room. While all asylum applicants must prove themselves credible witness, asylum adjudicators expect women to show "appropriate" (gender conforming) emotion and demeanor in the courtroom to substantiate their credibility (McKinnon 2009; Shuman and Bohmer 2014). Yet, as Luibhéid (1998) explains in "Looking Like a Lesbian," immigration officials have a long history of outing lesbian women by observing traditionally masculine characteristics, style of dress, and demeanor. This places lesbian women in a tricky situation: if they are gender conforming, they negate their claim about their lesbian identity and if they are gender nonconforming, they disrupt asylum adjudicators' expectations of how a woman ought to act.

Underlying the deconstruction of sexual categories is a critique of the cultural essentialism that emerges from the process of asylum. In an attempt to define what it means to be a lesbian, the immigration process not only elevates a white, Western conception of homosexual orientation, but also critiques the non-white, non-Western countries from which the applicants flee (Cantú 2005). Berger (2009) questions the politics of immigration activist organizations: demonizing the gender and sexual politics of applicants' countries of origin may serve the short term strategy of gaining asylum for some lesbian women, but in the long run, it further dichotomizes the U.S. from the mostly "Third World" countries of the applicants (a claim I also have made throughout this dissertation). Despite the noted cultural and sexual essentialism in the asylum process, Lewis (2010, 2014) provides a number of positive examples of migrant lesbian activism that directly contradict these stereotypes in the asylum system and allow women to tell their stories in a way that feels true and comfortable to them.

This literature provides a theoretical basis for my examination of the differences between the cases of gay men and lesbian women. Following scholars like Luibhéid, Lewis, Shuman and Bomer, and Nielson, I look for the gender specific factors that might explain the discrepancy between these types of cases. In this paper, I explore the differences in the types of persecution presented by gay men and lesbian women applicants, as well as some reasons for this discrepancy. I find that lesbian women's cases are less likely to be interpreted as "extreme" in nature, which makes judges less likely to grant them asylum. Ultimately, I argue that looking for extreme cases of violence not only exacerbates differences between the U.S. and the countries from which the applicants flee, but also has unintended gender consequences since lesbian women appealing their cases will have more problems satisfying this requirement.

Data

My analysis and findings are derived from my original dataset of all published sexual orientation based asylum cases. One hundred ninety-six cases, ranging in time from 1985-2013, were collected from Lexis Nexis Legal. Sets of key words—sexual orientation, homosexual, gay, lesbian and asylum—were used to locate relevant cases. Some cases had to be excluded because they only referenced sexual orientation; the applicants were not claiming their sexuality as a basis for asylum. Most applicants made their case on account of a particular social group, but some did include other grounds for asylum, including race, political opinion, and religion.

As described in the introduction, all of the cases are appellate level decisions heard by U.S. Circuit Courts; these cases serve as the existing precedents for lower courts and asylum adjudicators. While these cases do act as precedent, they are not representative of the decisions made at the lower levels of the asylum process. The lower level case decisions are nearly impossible to access since the United States Citizenship and Immigration Service (USCIS)

guards their initial decisions, refusing to publish them or disaggregate by the type of asylum claim (Musalo 2010). Though this dataset cannot draw conclusions about all asylum cases, the findings do illuminate the prevailing precedents for adjudication at nearly the highest level of appeals (the Supreme Court being the only higher level of adjudication).

Of the 196 cases, 21 cases were made by women, 174 cases were made by men. The relatively small number of cases made by women can be explained by the importance of gender in these cases: as suggested by the sexuality and migration literature, women lack the resources needed to leave their country of origin, making an asylum case less likely. Of the cases made by women, 2 (or 9.5%) were successful and 19 were unsuccessful. Of the cases made by men, 41 (or 23.5%) were successful and 133 were unsuccessful. Though the difference between the number of successful cases between women and men is stark, quantitative analysis indicates that this is not a statistically significant difference. That is, gender cannot be shown statistically to be an explanatory factor; however, the lack of statistical significance is the result of a limited number of women's cases generally, not necessarily the result of no meaningful differences between the types of cases. Without a larger sample, quantitative analysis cannot capture the nuanced differences between women's and men's cases. Therefore, I turn to qualitative analysis to parse out the ways in which gender operates in these cases.

I coded all of the cases for the gender of the applicant, as well as other basic variables, such as court, country of origin, and year of the case. More substantively, I used an inductive approach to analyzing the data, allowing the relevant codes to emerge from my reading of the cases. Since the literature makes assumptions about credibility determinations for gay men and lesbians, I coded all cases for the judges' assessment of the applicants' truthfulness. The sexuality and migration literature predicts that lesbians are more likely to have adverse credibility findings than gay men. They are more likely to have children and they are less likely to leave "the closet" for a public expression of their sexuality, making them less credible witnesses with less believable stories for asylum adjudicators. Despite the use of this claim in the literature, there has yet to be a comparative study that disaggregates credibility determinations by gender. My dataset, which includes cases of gay men and lesbians, is equipped to substantiate this claim. I find support for the argument: 85.7% of women have adverse credibility determinations compared to 51.1% of men.

While this finding empirically lends support to the claims in the sexuality and migration literature, it is my other substantive finding that serves as the basis for this chapter: the persecution claims by lesbian women were interpreted as "less serious" than those of gay men. Though I am highly skeptical of distinguishing between types of violence, I recognize that this is a salient framework for asylum adjudicators and it is likely to have an impact on the adjudication of cases. I coded all of the cases for the type of persecution experienced by the applicant as discussed by the court; these codes include "extreme violence," "isolated violence," "unrelated violence," "discredited violence," or "nonviolence." In some instances, the type of persecution was not discussed in the case; the case involved another procedural issue of the case and so the court did not engage in a conversation about the type of violence specifically. I have excluded the cases without descriptions of the type of persecution from this portion of the analysis. In total, 85 cases did not include descriptions, of which 3 were lesbian cases, and the other 82 were made by gay men.

The remaining 112 cases did include a description of the type of persecution: 19 made by women and 94 made by men. I coded cases as "extreme violence" if the applicants faced repeated acts of violence or if they had injuries that resulted in an extended hospital stay. Cases

of "isolated violence" were instances in which the applicant had only one violent encounter and/or very minor injuries. Cases of "unrelated violence" involved acts of violence, but the judge's did not tie those acts to the sexual orientation of the applicant. "Discredited violence" was any violence in which the judges did not believe actually occurred. "Nonviolence" included cases in which the persecution was non-violent in nature, including economic discrimination or harassment not resulting in a physical altercation. In total, I coded 36 cases as "extreme violence" and the remaining 87 cases as isolated, unrelated, discredited, or nonviolence. Of the lesbian cases that included descriptions of persecution, only 2 (or 11.8%) were coded as "extreme violence," compared to 34 (or 36.2%) of gay men's cases. Put differently, lesbians were less likely to have credited experiences of extreme violence than gay men in my dataset. All cases coded as "extreme violence" were successful.

This finding warrants more theoretical and empirical explanation. What is qualitatively different about the cases of lesbians and gay men? What are some potential explanations for this observed pattern? I present two potential explanations for this discrepancy, including theoretical explications and illustrative examples. The first explanation entertains the possibility that women really are at less risk. The second, and more plausible explanation, addresses the gendered dimensions of the judge's decision making, turning more specifically to theories of gender, masculinity, and heteronormativity.

Explanation 1: Lesbian women actually experience less violence.

Finding that the lesbian women in my dataset are less likely to have credited experiences of extreme violence does require an examination of the simplest explanation: lesbian women actually experience less violence. In other words, the reason that I observe less extreme cases in my dataset is because lesbian women are less at risk than gay men worldwide. I believe this claim is probably unnecessary (smaller rates of violence against a group should not prohibit that group from applying for asylum), but more importantly, not supported by evidence. The human rights reports on global LGBT hate crimes assume that men and women are equally at risk Human Rights Watch 2013; Human Rights Council 2011). Additionally, these reports find that lesbian women are at risk for certain types of violence not experience by men. For example, the Human Rights Council 2011 report finds that many lesbian women are the victims of rape, often in an attempt to alter their sexual orientation.

If the women in my dataset experience less violence, there must be something exceptional about them that make their stories less extreme. This indicates the need for an intersectional approach to examine the impact of not just gender, but also class, nationality, ethnicity, and other social statuses (Hill Collins 1999). There is some evidence to suggest that the women in my dataset are economically privileged and therefore are able to utilize the asylum system more easily than other women. As the sexuality and migration literature points out, women are less likely to apply for asylum because they often lack economic resources to leave their countries of origin and start asylum petitions (Lewis 2010). The logical extension of this argument, then, is that the women who do enter the asylum system are amongst the most privileged and can leave their country of origin before the persecution escalates to "extreme violence."

The case of Belinda Burog-Perez v. Immigration and Naturalization Service (2004) exemplifies the intersection of class, gender, and sexuality and its impact on the types of persecution claimed by an applicant. Burog-Perez left the Phillipines after she observed a

number of her patients leaving her dentistry practice once they discovered that she was a lesbian. Since she experienced a decline in her patients, she could no longer afford to pay her expenses, which forced her to leave the Phillipines. Once in the U.S., Burog-Perez applied for asylum, contending that she faced economic persecution in her country of origin. Hearing the case on appeals, the U.S. Circuit Court for the 9th Circuit explained that her situation did not constitute "economic deprivation" and that she could not adequately prove that her patients deliberately left her practice because of her sexual orientation. According to the 9th Circuit, economic harm can only be the basis for persecution if the applicant can show "a probability of *deliberate* imposition of *substantial* economic disadvantage" (emphasis in original, cited in Burog-Perez v. INS 2004: 5). In other words, Burog-Perez could not prove that her patients left her practice because she is gay (though no other explanation reasonably accounts for the decline in her client list), nor could she prove that she faced a significant hardship from the decrease in patients (though her entire livelihood depended on a thriving practice).

The 9th Circuit's points about "deliberate imposition" and "substantial economic disadvantage" are well taken: as all of the circuit courts have ruled, persecution should not be deployed so easily (if everything is persecution, then nothing is). Arguably, though, Burog-Perez's description and evidence of her situation substantiated both the deliberate nature of her patients' decisions to leave, as well as the hardship imposed by this loss. However, the merits of Burog-Perez's case are less important for this portion of the analysis than the type of persecution and its intersection with her class position. As a dentist, Burog-Perez occupied a privileged class position in the Philippines. Her first indication that she was targeted for persecution was that her patients were leaving her practice and she left the Philippines shortly after. In other words, Burog-Perez not only had the economic resources to leave her country of origin, but also had the resources to leave the Philippines quickly before more of the community became aware of her sexual orientation. This is not to suggest that Burog-Perez absolutely would have faced violence if she remained in her country, but her ability to move easily across borders suggests a privilege not experienced by many asylum and refugee applicants, especially women applicants.

The next case of Salama Rababa Badawy v Attorney General (2010) further substantiates the relative privilege of the women in my dataset. Badawy spent most of her life in the U.S., migrating from Egypt at the age 3. After committing a drug-related felony, Badawy's presence in the U.S. raised a red flag for immigration officials. Felonies by immigrants generally result in automatic expulsion from U.S. borders, but Badawy initiated an asylum claim on the basis that she would be persecuted if she returned to Egypt "because she is a lesbian and because she has two children born out of wedlock, visible tattoos, and a criminal record involving drugs" (Badawy v. Attorney General 2010: 2). In rejecting her case, the U.S. Court of Appeals for the 3rd Circuit found that she did not have an "objective" fear of persecution; since Badawy had not resided in Egypt since the age of 3, she only had second hand evidence to substantiate her fear. The 3rd Circuit wrote:

> On direct examination, Badawy stated that in Egypt 'they don't believe in having kids out of wedlock, . . they're very strict on women[,]' and that tattoos are "against the Muslim religion." Later, however, when asked by her attorney, '[w]hat do you know about Egypt that makes you afraid to go there," Badawy responded, "I don't know [any]thing about Egypt. . . . I just know how Muslims are, and I know how people from my county are.' Part of this knowledge apparently came from Badawy's brother, who told her that Egyptian citizens have been known to harm and kill women because of

> their tattoos. But this nonspecific, secondhand assertion fails to meet Badawy's burden of proof (Badawy v. Attorney General 2010: 4-5).

Essentially, Badawy determined that she was fearful of returning to Egypt based on her experiences with people in the United States, as well as the descriptions from her brother who had traveled to the country.

The 3rd Circuit's point was fair: Badawy made a shoddy case for asylum, relying very little on real evidence and mostly on a series of personal stereotypes about Egyptian people and culture. She had not traveled to Egypt since the age of 3 so she had no experiences of discrimination or violence, nor could she even attest to the cultural climate. However, the fact that Badawy's poorly constructed case could make it to the highest level of appeals supports the argument that lesbians who can apply for asylum are amongst the most privileged. Living most of her life in the United States, Badawy already experienced a level of economic privilege unknown to most people around the globe. Her geographic location in the U.S. meant that she could access resources not available to many other asylum applicants. In other words, many other cases would not make it this far in the asylum system, but the fact that this case appears in front of the 3rd Circuit indicates that there is something exceptional about the applicant.

Since most women globally occupy a less privileged class position than men and lesbian women are then triply marginalized by the sexual orientation, gender, and class, it makes sense that the lesbian women that can appeal their asylum cases are amongst the most privileged. In the cases presented above, class and/or location privilege worked to reduce or completely eliminate the two applicants' experiences of persecution, thereby explaining the "less serious" nature of their cases. This might, at least in part, explain the discrepancy between the cases.

Explanation 2: Judges believe lesbian women are less at risk.

The second, and perhaps more likely explanation, is that judges believe that lesbian women are at less risk for violence and therefore are less likely to believe that they are the victims of persecution. The logic for this explanation is embedded in the legal interpretation of the asylum definition of a particular social group and the required nexus between the violence and the applicant's group claim. In order to be eligible for asylum, an applicant must prove that his/her identity is immutable and so fundamental that he/she should be unwilling or unable to change it (Matter of Acosta 1985). The assumption is that there are some identities that cannot be changed and cannot be hidden, therefore putting some applicants at greater risk. As Janet Reno declared in 1994, sexual orientation does constitute a particular social group, in so far as it is both an unchangeable and central identity. The burden, then, for gay, lesbian, and bisexual applicants is to prove that they are members of a particular social group and that a nexus exists between the violence that they experience and their sexual orientation.

As described in chapter 4, proving membership in a particular social group has been fraught with stereotypical and problematic judicial interpretation, especially for lesbian women whose stories do not fit into a white, Western gay male trajectory. Here, I argue that the skepticism about lesbian women's sexuality filters into the judicial interpretation of the actual violence experienced by these women, creating an additional barrier of satisfying the nexus requirement. I find that judges discount the experiences of the lesbian women in my dataset as "isolated" or "unrelated" experiences of violence; since the judges question the fundamentality of the women's sexuality, they determine that their experiences of violence do not rise to

"extreme" persecution. At the core of these determinations is that women can avoid persecution because their identities are less fundamental, unlike gay men.

The background for this judicial decision making likely is a result of the popular and scientific conceptions of men's sexuality generally. For decades, scientific literature has adopted misguided assumptions about men's sexuality, particularly as both static and uncontrollable. Notably, scientists have "found" that fluidity in men's sexuality is unlikely, arguing, for example, that bisexuality does not exist in men (most recently in Rieger, Chivers and Bailey 2005). This assumes a sort of "one-drop" rule and a rather immutable understanding of men's sexuality: any homosexual activity is equated with homosexual identity and therefore men are either gay or straight. These studies are a good example of how cultural ideas impact scientific knowledge. Since heterosexuality is linked to masculinity, any deviation is understood as a transgression against masculinity. In other words, only truly heterosexual men are masculine, while all others occupy a subservient position in the masculine framework (Connell 2005). The scientific literature has sought to justify this hierarchy of masculinity by denigrating any homosexual activity as evidence of a less masculine man. Understood from this perspective, if a man is willing to sacrifice his masculinity and his privilege, his sexual orientation must be important to him (in asylum terms – fundamental) and inherent (in asylum terms – immutable).

As social scientists, we know that this understanding, even with its basis in "science," is the result of hetero- and gender-normativity. Yet, this conception floats around in popular discourse somewhat unproblematically, supported by that same heteronormative regime that created its existence in the first place. Judges make their decisions in this context. Given this regime, gay men are seen as not only immutably gay, but also visible targets for persecution. In this context of skepticism, their experiences of violence are minimized as less serious, isolated, and/or unrelated violence. I will show how this pattern plays out in comparable cases of lesbian women and gay men; they have very similar experiences of persecution, yet end with very different outcomes.

In the first set of examples, both applicants experienced violence and harassment even after they attempted to hide their sexuality. Though these experiences of the applicants are very similar, the judges come to very different conclusions, determining that the lesbian women could not prove a nexus between her sexual orientation and the violence, while the gay man easily could. The first case (discussed in the beginning of this chapter) is the case of Mockeviciene and Mockevicute v Attorney General (2004). Mockeviciene's problems began when she told her husband that she was a lesbian. Soon after, she began having problems with the Lithuanian police, who detained her, searched her home, and physically and sexually assaulted her. The IJ hearing this case undermined her credibility because she could not prove that she was a lesbian. As quoted in the introduction, the IJ gave a number of reasons for this conclusion, including that she inappropriately defined "lesbian," she did not have a recent partner (making her a "non-practicing lesbian"), she had no evidence of being in a lesbian relationship in Lithuania, she did not participate in lesbian activities, and she had no documentation from the police of her altercations. The judge implies that her sexuality is mutable—unless she is actively practicing lesbianism, it is not central to her identity. Yet we do not need to assume that her identity is mutable to explain why she might not have been "practicing." Her daily actions were scrutinized after she came out and she was repeatedly assaulted. Given this context of fear, it is possible that Mockeviciene would not pursue a relationship that would likely exacerbate their persecution. In other words, Mockeviciene likely tried to minimize any attention to her sexuality.

Since the court finds that Mockeviciene is not a "practicing" lesbian, the court cannot logically find that the violence that she experienced was a result of her sexual orientation. The actions of the police and the public are random, unrelated, and not so serious, meaning her experiences cannot rise to the level of persecution. Mockeviciene's experience points to the "catch 22" in which many LBGT applicants find themselves: if they disclose their sexuality, they are eligible for asylum, but face increased persecution; if they don't disclose their sexuality, they can't satisfy a particular social group claim, and must remain hidden to avoid persecution (Choi 2010). This catch 22 is clearly at play in Mockeviciene's case: she cannot prove an "out" sexual identity and therefore cannot prove that the persecution was on account of her sexual orientation. As I discussed in Chapter 4, the requirements for proving an "out" homosexual orientation (linearity, public and political disclosure) are already gendered in that they are based on the experiences of gay men. Important for this chapter, however, is that even when gay men stay "in the closet," their decision to remain hidden was less scrutinized than the lesbian women, like Mockeviciene, and did not always adversely the judge's interpretation of the violence experienced.

In the case of Tarik Razkane v. Eric Holder (2009), the U.S. Court of Appeals for the 10th Circuit recognized that Razkane, a gay man from Morocco, attempted to hide his sexuality by avoiding contact with other gay men. Despite his attempts, community members still believed he was gay and attacked him. The implicit assumption here is that Razkane's sexual orientation was irrefutable and obvious: it was knowable regardless of any attempts to "cover." Razkane could prove that his sexual orientation was immutable and therefore could also show that he was fearful on account of his sexual orientation. Since the judge's believe that Razkane is an obvious gay man, they find a nexus between his attacks and his sexual orientation.

The same logic in this case could easily have been employed in Mockeviciene's case: she attempted to hide her sexuality by avoiding contact with other lesbians, but was attacked anyway. However, the circuit court does not adopt this logic, instead allowing the IJ's decision about her "non-practicing" lesbian identity to stand. In other words, Mockeviciene's sexuality was more refutable than Razkane's: she could choose to be a "non-practicing" lesbian and avoid persecution. Embedded in these outcomes is the logic that gay men are more visible and thus more at risk than lesbian women: Mockeviciene could hide her sexual orientation, Razkane couldn't. This perspective of disbelief serves as the context in which the judges determine the relative risk of both applicants, even though their experiences of violence in their country of origin are nearly identical. Yet, the violence in Mockeviciene's case is deemed "unrelated" to her sexual orientation, while the violence in Razkane's case easily satisfies the nexus between persecution and his sexual orientation.

In the second set of examples, both applicants feared detention by the police. In the first case, the lesbian applicant had actually been detained, while in the second case, the gay male applicant only feared detention. Despite the similar fears, the courts come to different conclusions, arguing that the lesbian applicant cannot prove that the violence was related to her sexual orientation, whereas the gay man was obviously a target on account of his homosexuality. In the first case, Chang Qing Zheng v. Attorney General (2010), Zheng applied for asylum in the U.S. on the pretense that she feared China's one child policy. She later revised this claim to state that her real fear was based on her sexual orientation. While in China, she was forcibly dragged into a police department by her hair and was detained with her girlfriend. On appeal, the U.S. Court of Appeals for the 3rd Circuit agreed with the initial IJ and the BIA, who both found that the situation described by Zheng did not constitute persecution. The 3rd Circuit wrote that, "The

IJ and the BIA correctly concluded that this isolated incident of harassment does not rise to the level of persecution, which is defined as including 'threats to life, confinement, torture, [or] economic restrictions so severe that they constitute a real threat to life or freedom'" (as cited in Zheng v. Attorney General 2010: 4).

Here, the court is downplaying Zheng's experience of forcible detention. In this context, it seems rather obvious that the court is blatantly disregarding Zheng's experience of violence. Ignoring a detention by a public official seems to fly in the face of all asylum precedent. A closer examination of the case shows that all of the judges throughout the process were skeptical that Zheng was actually a lesbian because she had children, a factor that will more often adversely affect lesbian women than gay men (Lewis 2010; Shuman and Hesford 2014). Though the 9th Circuit chose not to make a direct ruling on the identity claim, the skepticism permeates into other aspects of adjudication, notably that Zheng is exaggerating the severity and the impact of the violence. In other words, since the court does not believe that Zheng is a lesbian, she cannot prove the nexus between the detention and her sexual orientation. This makes the judges believe that her experience with the police an isolated and unrelated incident since they were simply acting irrationally and not motivated by homophobia. The U.S. Circuit Court for the Third Circuit agreed with the lower courts determinations, stating that "The IJ and the BIA correctly concluded that this isolated incident of harassment does not rise to the level of persecution, which is defined as including "threats to life, confinement, torture, [or] economic restrictions so severe that they constitute a real threat to life or freedom" (Zheng v. Attorney General 2010: 4).. Ultimately, the interpretation of her persecution is filtered through larger concerns about her sexual orientation, provoking the judges to conclude that this case is not extreme in nature and thus unworthy of asylum.

A similar skepticism is not observed in the case of Nasser Mustapha Karouni v Alberto Gonzales (2005). Karouni also applied for asylum based on the fear of forcible detention. However, in this case, the U.S. Circuit Court of Appeals for the 9th Circuit granted Karouni asylum not because of his experience in detention, but because he *knew* people who were forcibly detained on account of being homosexual in Lebanon. The difference between these two cases is rather shocking: Zheng and Karouni have the same fear (forcible detention), but Zheng has an actual experience of detention, while Karouni only knows people with this experience. Nevertheless, Karouni is granted asylum while Zheng's petition is denied. At the heart of this difference is the nexus requirement: the judge believes that Karouni is an obvious gay man and therefore he has a legitimate fear of detention, whereas Zheng is a questionable lesbian and therefore the detention was an unrelated event unlikely to escalate to any more violence. Put more simply, Karouni can satisfy the nexus requirement and Zheng cannot.

In the gay men's cases, the judges' belief about their sexuality allows the applicants to satisfy the nexus requirement: these men cannot avoid persecution because their sexuality is immutable and obvious. On the other hand, the skepticism about lesbian sexuality impacts the women's abilities to satisfy the nexus requirement: the women most likely are not lesbians (or at least "not practicing" lesbians) and so any violence that they experience is not a direct result of their sexual orientation and therefore does not rise to the level of persecution. Lawyers are keenly aware of this predicament; one prominent lawyer in the field even confiding in me that "the nexus requirement is the biggest issue moving forward for cases of gender and sexual orientation asylum." The appellate level data not only substantiates this claim, but also suggests that lesbian women may encounter this issue more than gay men. Judges perceive less violence

on account of their sexual orientation and therefore dismiss lesbian women's cases as unrelated or isolated.

Conclusion

The tagline from these findings—that lesbian women have "less serious" cases of persecution—could be misunderstood as a justification for maintaining the asylum status quo. But in fact, I am arguing just the opposite. Lesbian women are deeply disadvantaged in the asylum system—many face extreme economic barriers to even entering an asylum application, and for the women who are able to make a claim, their stories are deemed unbelievable, their identities denied. I have presented two equally viable arguments for the judicial interpretation of the "less serious" nature of the cases: the exceptionality of the women in my dataset and the stereotypes of gender and sexuality that hinder judges from believing that lesbian women face persecution on account of their sexual orientation. I am not arguing that gay men have an easy experience with the asylum system, but I do suggest that lesbian women have an extremely difficult time making a case for asylum.

Giving asylum to the most extreme cases is common asylum practice. The system is supposed to be reserved for the most extreme cases, to help those most in need. While this seems like a noble goal, postcolonial scholars have aptly noted that the insistence on narratives about backwards cultural practices serves to further distinguish the global South countries from which the applicants flee from the United States (Cantú 2005). In this sense, the "noble" cause is actually nationalism.

In the case of LGBT asylum, granting asylum to the most extreme cases not only further exacerbates erroneous perceptions of protectors and victims in the global arena, but also has unintended gender consequences. The lesbian women in my dataset confronted a barrier in satisfying the nexus requirement to the judges, even when their circumstances were comparable to similar cases made by a gay man. The core difference was that the judges did not believe that the lesbian women had faced violence on account of their sexual orientation. In the case of Mockeviciene, the judges suggested that she could move more fluidly in and out of her lesbian identity, becoming a "non-practicing" lesbian, and thus eliminating persecution on account of her sexual orientation. In the case of Zheng, the court's skepticism about her sexuality filtered down into its understanding of the actual violence experienced, leading them to conclude that a police detention was not an example of persecution, even when precedent suggests otherwise.

The findings in this analysis suggest the need for substantial changes to the nexus requirement. Both Mockeviciene and Zheng had fairly serious accusations of violence—beatings and forcible detention—that were overlooked because they were not "on account of a protected status." Severity of persecution should not be determined by the nexus of that violence; it should be judged on its own accord. Requiring a nexus only serves to exacerbate differences between the country from which the applicant flees and the U.S., making sexual politics a marker of distinction between "progressive" and "backwards" countries. This makes the asylum system less functional as a human rights mechanism and instead more political than it should be. I will return to the nexus requirement and its relationship to persecution with more specific avenues for reform in the conclusion to this dissertation.

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Chapter 6

Conclusion

Throughout the chapters, I have presented several arguments about the ways in which the asylum system works, and more importantly, does not work for women and LGBT asylum applicants. I have grounded my analysis in the interpretation of key terms and the ways in which those terms are inflected with notions of gender, sexuality, race, and nationality. My analysis strengthens our understanding of the asylum system by bridging the fields of legal studies and gender, sexuality, and migration studies. Importantly, the use of a larger sample size increases the generalizablity of my findings, unlike most other research on asylum practices.

The aim of the dissertation is to expose the problematic practices that prevent these populations from accessing the U.S. asylum system fairly and adequately. In keeping with this goal, each chapter dissected key asylum terms and their interpretation by U.S. circuit courts. The conclusion, therefore, must address some of the overarching problems of interpretation evident across all of the cases. In this conclusion, I present three key legal terms—group membership, persecution, and credibility—that hinder women and LGBT applicants and suggest avenues for reform. I ground these proposals in a universal human rights perspective.

The Utility of Universal Human Rights

Current asylum and refugee practice hails from the international arena, specifically with the United Nations (U.N.) 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees. At present, 142 nations have signed both of these documents, indicating substantial support for the terms of asylum and refugee status on a global level (UNHCR 2011). Notably, the U.S. resisted signing these documents, ratifying the Protocol as late as1980 (Anker and Posner 1981) and refusing to codify the Convention entirely (UNHCR 2011). This is indicative of the reluctant approach that the U.S. has taken to international policy and global human rights norms generally, an approach that some have called "American exceptionalism" (Lipset 1997).

Even after the U.S. adopted these international treaties, the codification of the terms has remained distinctly national, allowing the U.S. courts to interpret the definitions in line with domestic ideals. Rather than incorporating the sentiments of the United Nations High Commissioner on Refugees, particularly on the issues of gender and sexual orientation, the U.S. asylum process remains rather insulated. This is particularly troubling give that its international record on women's issues is particularly abysmal (the U.S. is one of only 7 countries in the U.N. to not ratify CEDAW or the Convention on the Elimination of All Forms of Discrimination Against Women, see Baldez 2013) and its rates of violence against the LGBT community remain too high (see Federal Bureau of Investigation's (2011) report on hate crimes).

I introduce the juxtaposition between U.S. policy and the international arena not to exacerbate claims of "American exceptionalism." Instead, I intend to point out that there are other ways to adjudicate gender and sexual orientation asylum cases, particularly in less

problematic ways. In suggesting a move towards universal human rights, my policy suggestions require the adoption of the terms set out by the UNHCR and the International Bill of Human Rights. I recognize the problems associated with this approach, especially taking into account the claims that universal human rights are more "western" than global in practice (for a discussion, see Donnelly 2013). Still, including more universally agreed upon terms and conditions can lead to less exceptional and nationalist U.S. policies.

Group Membership

When creating a definition of asylum and refugee status after World War 2, the international community intended that this practice should be reserved for egregious cases of violence and discrimination targeted toward a particular group. Throughout the decades and the subsequent renewals and adoptions of the international asylum and refugee treaties, nations have retained this sentiment, allowing protection to individuals who have been targeted on account of a social reason, including race, religion, nationality, political opinion, or membership in a particular social group (Anker and Posner 1981). Limiting the scope of asylum has allayed fears that the process will be used by immigrants intending to enter a nation for purposes other than protection from persecution. Legal scholars refer to this fear as the floodgate argument, or the idea that a legal avenue for immigration creates opportunities for "undeserving" migrants to cross borders (Musalo 2010). In the asylum context, legal scholars provide ample evidence to suggest that, in practice, the floodgates rarely open, even when changes in asylum law and practice alleviate some of the more stringent criteria for applicants (Condon 2002, Fletcher 2006, Hueben 2001, Siddiqui 2010).

In the context of gender and sexual orientation based asylum, both gender and sexual orientation fall under the "particular social group" category of the asylum definition, relying on the Matter of Acosta which defines a social group as one that is both immutable and fundamental to an individual's identity (Matter of Acosta 1985). As highlighted by previous scholarship and the four substantive chapters of this dissertation, adjudicators often approach the particular social group clause with skepticism because they have fewer decades of precedent to reference, unlike the other four enumerate categories of race, religion, nationality, and political opinion. With less guidance and a fear of opening the floodgates for too many immigrants, adjudicators stringently interpret (or as I will ultimately argue, misinterpret) the particular social group clause to the detriment of women and LGBT applicants.

The four substantive chapters of this dissertation highlighted problems of social group interpretation. A common theme that emerges from the judicial interpretation of the group definition is that adjudicators rely on essentialist understandings of both gender and sexual orientation, which not only contradicts the social spirit of the asylum definition, but also hinders many women and LGBT applicants. In the examination of domestic violence asylum cases and the Violence Against Women Act in chapter 2, I argued that many of the women applicants could not prove that their violence was a result of gender inequality, reducing their cases to individual-level or interpersonal issues. By ignoring the social roots of violence against women, adjudicators created a situation in which victims of domestic violence could not prove the gender component of their gender based cases. In chapter 3, I juxtaposed cases of domestic violence asylum with cases of female circumcision, again arguing that adjudicators fail to recognize the social nature of gender inequality and violence. Instead, adjudicators relied on a sex-based approach to granting gender asylum, favoring cases of female circumcision in which the female

genitalia served as a clear indicator of membership in a particular social group. Both chapters 2 and 3 suggest that gender is ultimately interpreted through an essentialist framework. Rather than understanding gender as a social category, adjudicators resort to a biological approach, granting asylum to those cases that refer to the sexed body instead of the social nature of gender inequality.

I observed a similar essentialist approach in the adjudication of sexual orientation based asylum cases. In chapter 4, I highlighted the salience of a homonormative framework in the interpretation of a particular social group. Cases which conformed to linear and coherent story telling of sexual identity were granted asylum, while other cases that deviated from a traditional story about homosexuality, for example the presence of an opposite sex lover or a child, confused adjudicators. The success of a case ultimately hinged on a singular conception of sexual orientation, one in which an individual's sexuality is static and unchanging throughout the life course. Chapter 5 featured even more skepticism about sexual orientation asylum cases, particularly for lesbian asylum applicants. Adjudicators discounted lesbian sexual identity as worthy of asylum. Gay men's sexuality, understood as less fluid and more stable, was not just more believable to adjudicators, but it was also seen as a greater transgression of social norms. Lesbian women's sexuality, on the other hand, was conceived as less challenging and less likely to receive negative attention in the applicant's country of origin, making their cases less successful. Both chapters 4 and 5 reveal an essentialist approach to interpreting sexual orientation, one in which only certain applicants (gay men who conform to white, Western norms of homosexuality) were deemed "gay enough" (Morgan 2006) for asylum.

Taken together, these chapters indicate substantial problems with the interpretation of a particular social group in the U.S. context of gender and sexual orientation based asylum. A term that should be interpreted through a social (or even sociological) lens instead relies on an essentialist and overly biological framework of gender and sexual orientation. The question, then, is can we recuperate the term, "particular social group," in a way that encompasses the range of asylum cases, including gender and sexual orientation cases, observed in the 21st century? Currently, the most expansive (or dare I say, lenient) definition of a particular social group belongs to the United Nations High Commissioner of Refugees (UNHCR). The UNHCR defines a particular social group as "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights" (UNHCR as cited in Marouf 2008: 62). This group should only be questioned "if a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental," in which case "further analysis ...[should] be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society" (UNHCR as cited in Marouf 2008: 62). With this definition, the UNHCR expands the U.S. definition of a particular social group by including more provisions beyond a characteristic that is either fundamental or immutable. Specifically, the UNHCR broadens a group to include not just fundamental identities, but also common characteristics central to an individual's exercise of their human rights or their conscience. The UNHCR also adds that social groups should only be questioned in instances in which those characteristics are determined to be either unalterable or not fundamental.

The UNHCR definition is a tremendous improvement over the U.S. definition, which largely refers to the Acosta decision limiting particular social groups to those that include fundamental or immutable characteristics. The UNHCR provides more guidance on what

constitutes a group by adding more provisions for the types of characteristics that should be understood as fundamental or unchangeable. Adopting the terms of the UNHCR begin to bring asylum practice in line with a universal human rights approach, in which all individuals, regardless of identity, are granted certain rights, including the right to bodily protection, by the virtue of being human (Donnelly 2013).

Persecution

If we remove the ground for asylum and move towards a more universal human rights approach, we will have to revisit the concept of persecution, since it will serve as a central component of asylum adjudication. However, as indicated by the chapters of this dissertation, the interpretation of persecution came with its own set of problems. Two specific issues were the reservation of this term for the most extreme cases and the requirement that applicants juxtapose their countries of origin with the U.S. context. Both of these issues can be eliminated by moving towards a universal human rights perspective.

A central theme of all of the chapters was the narrow interpretation of persecution, reserving the term for cases of bodily harm that seemed most extreme and obvious to adjudicators. This perspective limited the range of violence and discrimination that could constitute a worthy ground for asylum, thereby denying protection to individuals in need. The problem was exacerbated in cases of gender and sexual orientation based asylum since the adjudicators' cultural lenses often prevented them from understanding some women and LGBT experiences as violence or as an escalating persecutory situation. Both chapters on gender cases explicated the ways in which cultural perceptions of gender impact the judicial interpretation of persecution. In chapter 2, adjudicators denied asylum to some of the women applicants on the ground that the violence in the household had not escalated to extreme bodily harm or a threat of death. Within this framework, a victim of domestic violence must have evidence from a police department or medical professional to substantiate their bruises or their fear for their life. Adjudicators believed this tactic prevented illegitimate claims from entering the system, but in practice, the requirement hindered some of the women applicants, who may have legitimate reasons for avoiding formal avenues of recourse against their violent partner. On the other hand, in chapter 3, I argued that the framework of biological essentialism promoted adjudicators to easily understand female circumcision as a bodily harm worthy of asylum. Whereas domestic violence cases seemed less substantial to asylum adjudicators, female circumcision cases fit into the adjudicators' perception of a "Third World" woman whose bodies were at risk in their country of origin. The reduction of gender to the genitalia allowed adjudicators to make sense of female circumcision as not just gender specific violence, but also an example of extreme bodily harm and persecution.

Similarly, both chapters on sexual orientation cases highlight the role that stereotypes and cultural attitudes of sexuality play in the judicial interpretation of persecution. In both chapters 4 and 5, I showed how adjudicators reserved asylum for cases clearly involving the threat of physical and bodily harm. Just like the cases of domestic violence asylum, this interpretation hindered asylum applicants who could prove an escalation of discrimination, but not harm to their bodies. The failure to acknowledge a broader spectrum of persecution was a central theme of chapter 5 in lesbian asylum cases; adjudicators failed to acknowledge violence that might be recognized in other types of asylum cases. This pattern became particularly obvious when lesbian cases were juxtaposed with cases of gay men. Adjudicators ignored instances in which

lesbian women could prove abuse or detention by the police, and instead suggested that these instances lacked social significance, and therefore did not fall under the jurisdiction of asylum practice. In other words, even when some of the lesbian applicants in my dataset could prove bodily harm, their cases were downplayed because of a cultural skepticism about lesbian sexuality.

Removing the ground for asylum and moving towards a model that addresses the experience of persecution, not the social group, can rectify the problems observed in the chapters of this dissertation. Using a universal human rights model to determine persecution eliminates the cultural skepticisms that impact adjudicators' assessments of past and future violence and persecution. The list of what constitutes persecution should be extracted from the International Bill of Human Rights (see United Nations 1996). Many of the items from this bill are already recognized by the U.S. asylum system (protection against torture and slavery, most notably), but many have not (economic opportunity and food/housing, for example). Using this model, applicants would prove that their fundamental rights have been violated, regardless of the role of the state.

A universal human rights model would also alleviate the requirement that applicants juxtapose their country of origin with the receiving context, in this case the U.S. As I have suggested throughout the chapters, the process of asylum requires that applicants embed their persecution in the "backwards" practices in their country of origin. Either their country must be directly implicated in the persecution or their country must be ineffective at protecting its citizens. The purpose of this process has become more political than useful or practical. The initial asylum treaties were developed and adopted to account for the centrality of the nation-state. In the mid 1900s, the nation-state was, arguably, the most salient political unit (Anker and Posner 1981). Therefore, the development of the treaties reflected the role of the nation-state as both persecutor and protector by requiring that applicants apply for protection from their country of origin in a different country. Though the intention was to reserve asylum for those in most need, this process falls short in its current implementation in that it reinforces historical colonial narratives (however unintentionally) and ignores the increasing salience of a global community, now less defined by national borders.

A theme running through all four chapters is that women's and LGBT rights are used as markers of progress; asylum applicants must prove that their countries of origin lag behind "progressive" countries like the United States, who purport to extend gender and sexuality rights to their citizens. This theme was especially obvious in chapters 3 and 4. In chapter 3, I explicated how U.S. adjudicators described female circumcision in great detail to show the "backwards" bodily practices in the applicants' countries of origin. Since this practice does not occur in the U.S. cultural context, the adjudicators were shocked and awed. This reaction differed substantially from their responses to domestic violence, a practice that is more culturally familiar in the U.S. In chapter 4, I argued that adjudicators were especially receptive to cases that included extreme physical beatings and permanent scars. I suggested that this pattern was influenced by the context of U.S. LBGT rights, in which some violence is still observed and many forms of discrimination, including housing and occupation, are still legal. In other words, adjudicators reserve asylum for those applicants whose experience appear to vary most from the experience of LGBT citizens in the U.S.

This process of juxtaposing countries of origin reflects and reinforces historical colonialist narratives in which Western countries used the "savagery" of the people of their colonial lands to serve as a justification for imperialism, believing their territorial expansion was

a civilizing process (McClintock 1995). Even if asylum adjudicators do not have demonizing other countries as their explicit intention, the consequence is still very real in the implementation of this practice. Reinforcing the "savage" or "backwards" nature of "Third World" countries in any context perpetuates the imperial logic that justifies continued colonialist practices, like structural adjustment programs, military occupation, and other neoliberal reforms. And yet, as I have suggested throughout this dissertation, the dichotomy between the U.S. and many of the countries from which applicants apply is simply false: the U.S. retains its own set of gender, sexual, and racial politics that could be described as discriminatory or even persecutory.

A universal human rights perspective to asylum practice can help alleviate the dichotomization between sending and receiving countries inherent in the current process. While a universal human rights model does recognize the primary role that states play as protectors, this model also recognizes that some rights (particularly freedom and protection from bodily harm) are universally granted by virtue of being human (Donnelly 2013). In other words, to prove persecution under a universal human rights framework, applicants do not necessarily need to implicate their country of origin. This requirement is unnecessary if applicants can prove that their rights were violated in their country of origin, regardless of the government's culpability. Moving away from implicating applicants' countries of origin not only has the theoretical advantage of eliminating the repetition of colonialist narratives, but it also has the practical implication of alleviating barriers for many women and LGBT applicants. As I have shown throughout the dissertation, many of these applicants cannot prove their states' role in the persecution because their experiences occur in the private sphere with little to no state intervention. Removing the role of the country origin, then, has both theoretical and practical advantages.

Credibility

Throughout the dissertation, I have shown that skepticism pervades the adjudication of gender and sexual orientation asylum cases. Many adjudicators seem wary of gender and sexual orientation based cases, fearing that these cases will open the floodgates for too many immigrants to the U.S. Even if we move away from the ground for asylum and embed the concept of persecution in a universal human rights framework, we still need to address that adjudicators are less likely to believe the stories of some applicants over others. This problem of credibility was especially obvious in chapters 2 and 5, in which adjudicators disregarded the experiences of victims of domestic violence and lesbian applicants. As I mentioned, the issue of credibility is directly related to and exacerbated by the REAL ID Act, which grants unilateral and unquestioned authority to adjudicators to determine if an applicant is lying. Even with more inclusive asylum practices that embrace universal human rights, adjudicators would still have the ability to reject applicants on the basis of credibility with little to no oversight. Any reform to asylum practice, then, must include the repeal of the REAL ID Act.

The REAL ID Act was a post-9/11, U.S.-specific reactionary bill that continues to restrict immigration to the United States. REAL ID amplified border patrol, limited VISAs to immigrants from many countries, increased deportations, and made asylum and refugee practices more stringent (Fletcher 2006). Most notably, lower level asylum adjudicators have the ability to reject asylum applicants with no explanation other than not liking the applicants' demeanor. This is too much power given to one individual. Adjudicators should base their determinations on a thorough review of the application, not a whim or a feeling. Moreover, in the case of rejecting

applicants, more than one adjudicator should review the application to ensure reliability. Repealing REAL ID is necessary to bring U.S. asylum practice in line with current international and global politics. If only one reform emerges from this dissertation, I hope it is the repeal of REAL ID.

Conclusion

I have made this set of policy recommendations based on the problems that I observed in my dissertation data. Current asylum practices present too many barriers for women and LGBT applicants and therefore must be reformed as the global community recognizes a wider range of human rights agendas. As the reader may have already guessed, my suggestions reflect my personal political objection to increased border control and immigration practices. Restricting migration historically has only led to greater discrimination, both within and outside borders. Importantly, though, refugee and asylum practices are not the area to restrict migration opportunities, especially when individuals' lives are at stake.

Moving forward, research on gender and sexual orientation asylum cases should continue to draw from both legal and sociological works, so that these complimentary literatures can engage in fruitful conversation to create social change. Throughout the dissertation, I have suggested that the narratives required by the legal field hinder women and LGBT asylum applicants. Additional research should not only continue to expose these narratives, but also include the voices of asylum applicants, who must face a system that may not understand their unique circumstances. Continued reflection and engagement across disciplines and fields, as well as the incorporation of migrant voices, will strengthen our knowledge on gender and sexual orientation asylum cases in the United States.

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