

NLGLA MICHAEL GREENBERG WRITING COMPETITION

Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases

Deborah A. Morgan*

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I. INTRODUCTION

Asylum seekers who are lesbian, gay, bisexual, and transgender (LGBT) come to the United States to escape persecution including police abuse, harsh penalties (including death) for consensual sex,

* Associate Managing Editor, *American University Law Review*, Volume 55; J.D. candidate 2006, American University, Washington College of Law; M.A. 1995, University of Oregon; B.A. 1989, Sheffield University, England. I would like to thank the National Lesbian & Gay Law Association for honoring this Article with First Place in the 2005 Michael Greenburg Student Writing Competition and the staff of the *Tulane Journal of Law and Sexuality* for continuing their work despite personal and institutional problems caused by Hurricane Katrina. Thanks also go to Professor Darren Hutchinson for his guidance during the writing of an earlier version of this Article as a research paper for his Critical Race Theory seminar. Special thanks go to Christopher Nugent, Esq., of Holland & Knight L.L.P., for his expert review and helpful comments and his tireless advocacy on behalf of LGBT and HIV-positive immigrants. Finally, I would especially like to thank my friend “Mohammad” for his permission to tell his story; my sincere best wishes to him as he starts his new life in the United States.

incarceration, drug or electroshock “treatments,” and government inaction to prevent antigay violence.¹ Once they arrive, they have to convince an immigration official that they are homosexual and that the persecution they suffered or fear suffering in their home countries was because of their sexual orientation.² However, it is not good enough for an asylum applicant simply to be attracted to people of the same sex; the applicant must be “gay enough” for the government to find that they have met their burden of proof.³ This often means that applicants must mold aspects of their life and identity to fit U.S. norms and expectations of what it means to be LGBT.

The experiences of LGBT asylum seekers illustrate that socially constructed identity categories are especially malleable at the literal and figurative borders that asylum seekers cross during the immigration process.⁴ Because the process by which immigrants adopt (or are assigned) racial and sexual identities as Americans exposes the dynamics of racial formation and diversity, Robert Chang has urged other scholars to include immigrant experiences in their analyses of U.S. communities of color.⁵ Yet, few queer theory scholars include a race perspective,⁶ few immigration scholars work from a Critical Race Theory (CRT) perspective,⁷ and few CRT scholars include the empirical experiences of

1. See Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 605-06 (1993) (describing persecution of LGBT individuals around the world).

2. Robert C. Leitner, Comment, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 687-88 (2004).

3. See, e.g., Fadi Hanna, Case Comment, *In re Soto Vega: Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 913 (2005) (arguing that a homosexual asylum seeker increasingly needs to prove he is “gay enough” to win protection from a U.S. court); Stephanie Francis Ward, *How Gay Must Gay Be? Court Is Asked*, 45 A.B.A. J. E-REP. (Nov. 12, 2004), at 5 (asking “how gay is gay enough” in the case of Jorge Soto Vega, a Mexican national seeking asylum on the basis of sexual orientation, which was then on appeal to the United States Court of Appeals for the Ninth Circuit).

4. See generally ROBERT S. CHANG, *Centering the Immigrant in the Inter/National Imagination*, in *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 27 (1999) (exploring the relationship between the immigrant and the United States in light of politics and economics).

5. See *id.*

6. But see, e.g., Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 26 (1995) (addressing intersections of race and sex in “nascent Queer legal culture”).

7. See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 527-29 (critiquing doctrinal analyses in immigration laws); Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1204 (1997) (arguing that immigration scholarship would benefit from embracing CRT methods of analyzing systemic discrimination and including narratives of immigrants themselves).

LGBT immigrants in their multidimensional analyses.⁸ This Article begins this theoretical work by drawing on CRT literature and extending theories of multidimensionality and transparency to the immigration context.

This Article argues that the facially neutral asylum process conceals the fact that immigration officials and judges make decisions based on racialized sexual stereotypes and culturally specific notions of homosexuality, thus discriminating against those who do not conform. Part II describes the asylum process to expose the challenges that applicants face in “proving” their homosexuality in a system grounded in racism and homophobia. Part III draws on theories of multidimensionality and unconscious bias in order to show how the intersection of racialized sexual stereotypes and essentialist gay stereotypes affects the likelihood of success of applicants for sexual orientation asylum. Part IV draws on theories of transparency to suggest ways in which the immigration system could uncover and de-emphasize the white norms employed in asylum decisions in order to minimize discrimination against those who do not conform to stereotypical expectations of homosexual identity. The Article concludes by suggesting that the current system discriminates against asylum applicants who do not conform to racialized sexual stereotypes and behavioral white gay norms, and that the government could improve the system with cross-cultural sexuality training and procedures to make discriminatory assumptions transparent.

II. BACKGROUND

This Part provides an overview of the racist and homophobic historical context in which the sexual orientation asylum process arose. It describes the requirements for asylum and the general characteristics of the applicants, noting the general invisibility of lesbians in the process. Finally, this Part details the story of Mohammad, an Iranian gay man attempting to gain asylum, and illustrates the way in which the system fails to provide safety to those who need it.

8. *But see, e.g.,* Elvia R. Arriola, *Queering the Painted Ladies: Gender, Race, Class, and Sexual Identity at the Mexican Border in the Case of Two Paulas*, 1 SEATTLE J. FOR SOC. JUST. 679, 679-84 (2003) (discussing the social factors impacting the lives of a gay Latino cross-dresser in Mexico and a white transgender female in the United States).

A. *Racism and Homophobia in the Immigration Process*

Many commentators have noted that the history of immigration in the United States is one of racism and white supremacy.⁹ Prior to 1952, naturalization laws often excluded “nonwhites” from citizenship, while encouraging immigration when it served the nation’s economic needs.¹⁰ For example, African-Americans, originally brought to the United States as slaves to serve the economic needs of white colonizers, gained full citizenship rights only with the ratification of the Fourteenth Amendment in 1868.¹¹ Similarly, Asian immigrants gained rights to citizenship in 1943, after more than half a century of immigration for economic purposes.¹² More recently, the government has conducted immigration sweeps of thousands of Muslim, Arab, and South Asian immigrants as presumptive terrorists and has used these sweeps to deport immigrants for minor immigration regulations that usually go unenforced.¹³ Although most immigration laws are now facially race-neutral, racism still has a pervasive impact on who becomes an immigrant.

Queer theory scholars have discussed the homophobic legacy of an immigration system that prevented homosexuals (or those perceived as homosexuals) from entering the United States.¹⁴ Until 1990, U.S. immigration laws barred homosexuals as “sexual deviants,” using an outdated and abandoned psychological classification of homosexuality as a mental disorder.¹⁵ The same year that the government lifted the

9. See, e.g., Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9-11?”*, 7 J. GENDER RACE & JUST. 315, 317-32 (2003) (describing the discriminatory racial impact of immigration policies including slavery, Chinese exclusion, national origin quotas, and 9-11 backlash).

10. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (discussing how the government has defined and redefined the socially constructed category of “white” to restrict immigration and establish racial divisions).

11. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.”); LÓPEZ, *supra* note 10, at 40.

12. See Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600; LÓPEZ, *supra* note 10, at 37-38.

13. See Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1267-70 (2004) (discussing racist government profiling after September 11).

14. See, e.g., NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE* 61-69 (4th ed. 2004) (describing historical and current immigration regulations that affect LGBT noncitizens).

15. See Immigration and Nationality Act Amendments, Pub. L. No. 89-236, § 15, 79 Stat. 911, 919 (1965) (repealed by Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990)); see also Jin S. Park, Comment, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1118-19

homosexual ban, the Board of Immigration Appeals (BIA) granted a man withholding of deportation based on his persecution by the Cuban government for his membership in a particular social group, namely homosexuals.¹⁶ Attorney General Reno designated the opinion precedential four years later, thus establishing a well-founded fear of persecution on account of sexual orientation as a valid basis for claiming asylum.¹⁷ However, this seemingly progressive policy belies the government's ambivalence toward LGBT asylum seekers.

The sexual orientation asylum policy came almost a decade before the United States Supreme Court ruled that states could no longer criminalize consensual homosexual sex.¹⁸ Thus, for a decade the government could still use proof of homosexual activity as evidence of criminal activity and moral unfitness, a reason to bar entry to the United States and a basis for denial of citizenship.¹⁹ Today, despite facial improvements to an overtly homophobic system, the immigration process still contains remnants of antigay bias.²⁰ Sexual orientation asylum arose out of this racist and homophobic system, and the manner in which applicants must prove their fitness for asylum illustrates the unconsciously discriminatory nature of the system.

B. *The Asylum Process*

In 1951, the United Nations opened for signature the United Nations Convention Relating to the Status of Refugees to provide protection for war refugees.²¹ Future refugees were included in the redrafted 1967 United Nations Protocol Relating to the Status of

(1995) (noting that immigration regulations barred homosexuals as "mentally defective" from 1917-52, then as "sexual deviants" until 1990).

16. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990).

17. See Att'y Gen. Order No. 1895-94 (June 19, 1994), reported at 71 No. 25 Interpreter Releases 859, 860 (July 1, 1994) (designating as precedential *In re Toboso-Alfonso*).

18. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986), which held that states could criminalize homosexual sex).

19. See, e.g., 8 U.S.C.A. § 1182(a)(2)(A)(i)(I) (2005) (barring individuals convicted of a "crime of moral turpitude"); § 1427(d) (requiring applicants for naturalization to have "good moral character").

20. See, e.g., *id.* § 1182(a)(1)(A)(i) (barring entry to the United States for individuals who are HIV-positive unless they have a valid waiver); Uniting American Families Act, S. 1278, 109th Cong. (2005) (attempting to remedy current discriminatory immigration laws that bar sponsorship of same-sex partners under family immigration provisions available to opposite-sex spouses).

21. See MIDWEST HUMAN RIGHTS P'SHIP FOR SEXUAL ORIENTATION & LESBIAN & GAY IMMIGRATION RIGHTS TASK FORCE, PREPARING SEXUAL ORIENTATION-BASED ASYLUM CLAIMS: A HANDBOOK FOR ADVOCATES AND ASYLUM SEEKERS, pt. I, at 10 & n.2 (2d ed. 2000), <http://www.immigrationequality.org/uploadedfiles/handbookpart1.pdf> [hereinafter HANDBOOK]; 19 U.S.T. 6223, 189 U.N.T.S. 150 (1951).

Refugees.²² The United States acceded to the Protocol in 1967, but Congress did not enact its own Refugee Act until 1980.²³ The U.S. government codified the Protocol such that an applicant for asylum: (1) must have “a well-founded fear of persecution;” (2) the fear must be based on past persecution or the risk of future persecution; (3) the persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and (4) the persecutor must be the government or someone whom the government is unwilling or unable to control.²⁴ Subsequent case law has found that the category “particular social group” includes homosexuals.²⁵

The applicant bears the burden of proof to establish an asylum claim.²⁶ A successful sexual orientation asylum claim therefore depends on establishing two primary elements. First, asylum applicants must have suffered persecution because of affiliation with a “particular social group” whose members possess “common, immutable characteristic[s]” fundamental to their identity.²⁷ The sexual orientation asylum applicant must establish “a well-founded fear of persecution . . . because of his [or] her membership” in the “particular social group” of homosexuals.²⁸ Second, asylum applicants must demonstrate a fear of persecution on the basis of their identity and establish a nexus between the persecution and their group membership.²⁹ Thus, the sexual orientation asylum applicant must explain the basis of his or her fear with personal testimony and supporting evidence that proves he or she is homosexual and that he or she was persecuted on account of that homosexuality.³⁰

Immigration advocates have articulated the problems that sexual orientation asylum applicants are likely to experience when they not only

22. See HANDBOOK, *supra* note 21, pt. I, at 10; 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967).

23. See HANDBOOK, *supra* note 21, pt. I, at 10 (noting that the definition of refugee applies to those with a “well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”).

24. 8 U.S.C.A. § 1101(a)(42) (2005) (describing the requirements for refugee status, which are equivalent to those of an asylum seeker).

25. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (granting withholding of deportation on the basis of government persecution of the applicant for his homosexuality).

26. See 8 C.F.R. § 208.13(a) (2005) (requiring that an asylum applicant “establish that he or she is a refugee as defined in section 101(a)(42) of the [Immigration and Naturalization] Act”).

27. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (noting that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties or . . . a shared past experience such as former military leadership”).

28. HANDBOOK, *supra* note 21, pt. I, at 11-12 (noting that all applicants must clearly describe their homosexual identity).

29. See *id.* at 12.

30. See *id.* (noting that an applicant should tell the truth about the reasons for fear of persecution because credibility of testimony is key to a successful asylum case).

have to disclose, but also affirmatively have to prove to immigration officials that they are “gay enough” to deserve sanctuary in the United States.³¹ It is likely that the stress or trauma of remembering and reliving the persecution will affect an applicant’s memory, testimony, and demeanor.³² The applicant may not believe such personal information is relevant in an official proceeding, or they may fear telling a person in authority about their sexual orientation because they fear adverse reactions.³³ Applicants may also fear rejection or isolation from their newly adopted immigrant communities, particularly if that community is from a country hostile to homosexuality.³⁴ While an applicant’s testimony, “if credible, may be sufficient to sustain the burden of proof without corroboration[.]”³⁵ individual experiences indicate that it is unlikely that the trier of fact will find the applicant’s testimony credible without some supporting evidence.³⁶ Unfortunately, applicants may have difficulty locating supplementary documentation on conditions in their country because of the social invisibility of LGBT individuals due to the dangers of being open about one’s sexual orientation or because of government censorship.³⁷ Thus, establishing “gayness” often depends upon a discretionary credibility determination by an immigration official.

C. *Characteristics of Asylum Applicants*

The United States Citizenship and Immigration Service (USCIS), formerly the Immigration and Naturalization Service (INS), does not break down its general asylum statistics according to the basis of the claim, so there are no official statistics available to indicate the number

31. *See id.* at 14.

32. *See id.* at 14-15 (advising attorneys to adopt a “client-centered” approach with sexual orientation asylum applicants).

33. *See id.* at 15-16 (discussing the attorney’s role in conveying to the client the importance of sharing all relevant information relating to their sexual orientation claim); *see also* John Leland, *Gays Seeking Asylum Find Familiar Prejudices in U.S.*, N.Y. TIMES, Aug. 1, 2001, at A10 (describing the fears of a Brazilian asylum applicant that the asylum officer would tell him that “fags must die,” or would ask him if he was ashamed of his homosexuality).

34. *See* HANDBOOK, *supra* note 21, pt. II, at 120, <http://www.immigrationequality.org/uploadedfiles/handbookpart2.pdf> (noting that applicants may fear reprisal from family, friends, or government representatives); *see also* Leland, *supra* note 33, at A10 (describing how a lesbian applicant from Lebanon stated that she lived in constant fear that her Arab-American co-workers and neighbors would discover her sexual orientation and subject her to the same persecution she had suffered in Beirut).

35. 8 C.F.R. § 208.13(a) (2005).

36. *See infra* Part II.D (describing the experiences of Mohammad, an Iranian gay man).

37. *See* HANDBOOK, *supra* note 21, pt. II, at 117-18 (providing tips on how to locate documentary evidence for a sexual orientation asylum case).

of sexual orientation asylum claims filed or approved.³⁸ However, it does make available some general information about the characteristics of asylum seekers. For example, in 2004, USCIS received over 27,500 asylum applications, including 3,629 from Europe, 5,512 from Asia, 7,020 from Africa, and 11,022 from the Americas.³⁹ These figures included 3,543 from Haiti, 2,839 individuals from China, 2,452 from Colombia, 1,418 from Venezuela, 1,189 from Cameroon, and over 1,400 from Mexico.⁴⁰ It is impossible to know whether the countries of origin hold constant for sexual orientation asylum cases, but comparisons to Canada indicate a similar national origin breakdown.⁴¹ Thus, it is likely that a large proportion of sexual orientation asylum applicants are persons of color.

According to 2003 statistics, male applicants filed sixty-two percent of the new asylum claims.⁴² The lack of a data breakdown by gender specific to sexual orientation asylum claims makes it impossible to estimate the number of women who apply for asylum on that basis; however, it is likely that male applicants outnumber female applicants by

38. One estimate indicates that over the five year period from 1994 to 1999, which spans the inclusion of homosexuals as a "particular social group," the Attorney General "granted asylum to about 300 gays and lesbians." Denise C. Hammond, *Immigration and Sexual Orientation: Developing Standards, Options, and Obstacles*, 77 No. 4 Interpreter Releases 113, 118 (Jan. 24, 2000).

39. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 55-57, tbl. 18 (2005), <http://uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.htm> [hereinafter YEARBOOK 2004] (itemizing asylum claims filed by country of origin). Data for other years appears consistent, although they indicate a dramatic drop in the total number of asylum applications filed in the United States. For example, in 2003, USCIS received over 42,000 asylum applications, including 4569 from Europe, 11,578 from Asia, 9342 from Africa, and 16,083 from the Americas. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 60-62, tbl.18 (2004), <http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf> [hereinafter YEARBOOK 2003] (itemizing asylum claims filed by country of origin). These figures included 4750 individuals from China, 4547 from Colombia, 3846 from Mexico, and 3276 from Haiti. See *id.* at 46 (noting that claims from Indonesia, Guatemala, and Venezuela had grown the most during 2003).

40. See YEARBOOK 2004, *supra* note 39, tbl. 18 (failing to provide accurate total application figures for Mexico). Adding numbers for Mexican asylum seekers in the table, including 52 applicants granted asylum and 1128 referred to an immigration judge past filing deadline, provides an estimation of upwards of 1400 applications from Mexico. See *id.*

41. Canada's statistics for sexual orientation asylum claims indicate that the largest "source country" is Pakistan, followed by Mexico, Colombia, and China. See Marina Jimenez, *Gay Refugee Claimants Seeking Haven in Canada: Bogus Applications Partly Account for Surging Number, Refugee Experts Say*, GLOBE & MAIL (Toronto), Apr. 24, 2004, at A7 (reporting that in the previous three years, 2500 applicants from seventy-five countries sought asylum on the basis of sexual orientation).

42. See YEARBOOK 2003, *supra* note 39, at 46 (noting also that the median age of applicants was thirty-three years). A comparable gender breakdown for 2004 was not available as of March 2006.

a considerable margin.⁴³ The fact that the landmark cases in the area of sexual orientation asylum law deal with male applicants appears to bolster this assertion.⁴⁴ In addition, research uncovered only three successful lesbian asylum cases, all of which were granted at least seven years after the first successful male claim. The INS granted sexual orientation asylum in 1999 to a Mexican lesbian whose father tried to kill her after the police raided her lesbian feminist group's office and threatened her with arrest.⁴⁵ Two years previously, in 1997, the BIA granted asylum to a Russian lesbian who had been institutionalized and subjected to "curative" drug treatments by her own government; the BIA decision followed a reversal by the United States Court of Appeals for the Ninth Circuit of the BIA's denial of her petition for review.⁴⁶ Both of these cases dealt with women who identified openly and politically as lesbians, so neither case dealt with constructions of sexual identity in the same ways as the leading male cases do. The third case in 1997 concerned an Iranian woman, who "was in a secret lesbian relationship" when the Iranian Revolutionary Committee "detained and brutally beat[]" her.⁴⁷ This lesbian invisibility in the asylum context parallels the

43. I base this assertion on available case law as well as on conversations with Chris Nugent, Community Services Team Administrator for Holland & Knight L.L.P., a national expert on sexual orientation asylum claims, and a member of the board of Immigration Equality, who both represents clients and maintains a listserv to distribute sexual orientation asylum information and cases. See Holland & Knight, Holland & Knight Lawyer Wins Daniel Levy Memorial Award for Outstanding Achievement in Immigration Law (June 9, 2004), <http://www.hkllaw.com/Publications/OtherPublication.asp?ArticleID-2569>.

44. See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1095 & n.7 (9th Cir. 2000) (overturning the BIA's denial of asylum for a Mexican "gay man with female sexual identity"); *In re Tenório*, No. A72-093-558, at 11 (I.J. July 26, 1993) (granting asylum to a Brazilian gay male subjected to physical violence); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990) (granting withholding of deportation to a Cuban gay man persecuted on account of his sexual orientation).

45. See Lesbian & Gay Immigration Rights Task Force, *Mexican Lesbian First To Be Granted Asylum in U.S.: Jacque Larrainzer Finds Solace in Helping Others*, STATUS REP., Fall 1999, at 6 (describing the facts of Larrainzer's case and noting that she was the first lesbian from Mexico to gain asylum). The article does not state when the government first granted a lesbian asylum and, significantly, I have been unable to find that information in any other article written on the topic.

46. See *Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (holding that the BIA's requirement that an applicant prove subjective intent to punish was unjustified and that, under Ninth Circuit precedent, aversion therapy constituted persecution even if it was intended to "cure" the applicant); see also Kristie Bowerman, Note, *Pitcherskaia v. I.N.S.: The Ninth Circuit Attempts To Cure the Definition of Persecution*, 7 TUL. J. L. & SEXUALITY 101, 101-06 (1997) (discussing the procedural history and precedent of the case).

47. Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417, 431 (2005) (noting that a significant factor in the success of the woman's asylum application was the fact that her

general exclusion of lesbians, particularly lesbians of color, from consideration in legal scholarship and practice.⁴⁸ Sadly, uncovering the way in which the asylum process views lesbian identity would require a significant investigative effort that is beyond the scope of this Article.⁴⁹ Thus, much of this Article discusses only racial constructions of gayness, or male homosexuality, deferring discussion of lesbian issues for another time.

D. Not Gay Enough for the Government: The Case of “Mohammad”

Mohammad was born and raised in Iran.⁵⁰ He is in his late twenties and has known of his sexual attraction to other men for at least a decade.⁵¹ Around the age of twenty-one, Mohammad was sexually abused repeatedly by a male guard in the Basiji, a paramilitary volunteer force of the Iranian government that enforces religious law.⁵² The guard threatened to expose Mohammad as a homosexual if he told anyone about the abuse.⁵³ Mohammad suffered in silence because of the stigma

“hidden, private behavior came to the attention of the authorities who then brutally mistreated her”).

48. See, e.g., Berta Esperanza Hernández-Truyol, *Latinas—Everywhere Alien: Culture, Gender, and Sex*, in *CRITICAL RACE FEMINISM: A READER* 57, 66 (Adrien Katherine Wing ed., 2d ed. 2003) (arguing that “[t]he combination of otherness has rendered Latina lesbians multiply invisible and virtually nonexistent; they have existed at the margins of the margins”).

49. Victoria Neilson of Immigration Equality has written one of the few articles to concentrate on lesbians who seek asylum based on their sexual orientation and discusses the barriers lesbians must overcome to succeed under current asylum jurisprudence. See generally Neilson, *supra* note 47, at 425-36 (discussing how the persecution that lesbians face often occurs in the private sphere and comparing the challenges applicants face in proving lesbian asylum claims to those faced in proving gender-based asylum claims). In recognition of the different issues existing between gay men and lesbians seeking asylum, the International Gay and Lesbian Human Rights Commission has produced a “thematic packet” on lesbian issues. See INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, ASYLUM DOCUMENTATION PROGRAM, ADP COUNTRY FACT SHEET 4 (2004), <http://www.iglhrc.org/files/iglhrc/ADP%20Country%20Fact%20Sheet.pdf> (listing three thematic packets—Transgender Issues, Islamic World, and Lesbian Issues—among almost 150 country-specific asylum packets).

50. This is one of several pseudonyms the asylum-seeker has chosen to use in public interviews about his immigration situation. I am telling this story with the permission of “Mohammad” and his lawyer, using publicly available interviews in the sources cited and details from personal conversations. See, e.g., Mike Hudson, *Escaping Abuse Overseas: Gay Men from Conservative Countries Are Winning the Right to Asylum in the United States*, *ADVOCATE*, May 24, 2005, at 36-39 (discussing the immigration situation of “Mohammad”); *Human Rights Show—Torture Survivors* (KPFT Pacifica radio broadcast July 21, 2004) (on file with author) (interviewing “Aiden” about his persecution in Iran); Bryan Anderton, *Gay Iranian Faces Deportation: Judge Denies Asylum After Seeking Proof*, *WASH. BLADE*, Dec. 12, 2003, http://washblade.com/print.cfm?content_id=1752 (last visited Mar. 18, 2006) (describing the immigration system’s treatment of “Aiden”).

51. Interview with Mohammad, in Washington, D.C., (2004).

52. See *id.*

53. See *id.*

and harsh punishment associated with being gay in Iran.⁵⁴ When he finally escaped the harassment and abuse, the guard made good on his threat and filed criminal charges, accusing Mohammad of being a homosexual, which is a crime punishable by death.⁵⁵ The government investigated the charges, searched Mohammad's house, and told Mohammad's family that he was a homosexual.⁵⁶ As a result, Mohammad's father beat him and threw him out of the home, and his family disowned him.⁵⁷

Shortly thereafter, on a Web site for gay Iranians, Mohammad met and fell in love with an Iranian-American man and came to the United States to be with him.⁵⁸ After his arrival, Mohammad applied for asylum based on his sexual orientation and his fear of government persecution if he returned to Iran.⁵⁹ Filing for asylum was not an easy choice for Mohammad; he is a reserved and private person who, for good reason, does not trust strangers with personal details of his life.⁶⁰ He was afraid that he would experience similar social and governmental retaliation for revealing his homosexuality in the United States as he had in Iran.⁶¹ But Mohammad was searching for permanent freedom and safety, so he applied for asylum based on his sexual orientation.⁶²

At Mohammad's asylum interview, the immigration officer listened to Mohammad's story and then asked him how she was supposed to believe he was gay when he was "not feminine in any way."⁶³ She referred his case to the immigration court, and Mohammad submitted affidavits from friends and his partner of one year to prove to the immigration judge that he was indeed a homosexual.⁶⁴ The judge

54. *See id.*

55. *See Human Rights Show, supra* note 50; Navid Afshar, *Death Is How Iran Deals with Gay Men*, HOUSTON VOICE, July 30, 2004, http://www.houstonvoice.com/print.cfm?content_id=1369 (noting that the punishment for homosexuality is death for men and one hundred lashes for women).

56. *See Human Rights Show, supra* note 50.

57. *See id.*

58. *See* Anderton, *supra* note 50.

59. *See id.*

60. *See* Interview with Mohammad, *supra* note 51.

61. *See id.*

62. *See id.*

63. Anderton, *supra* note 50; *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., FREQUENTLY ASKED QUESTIONS ABOUT ASYLUM, at <http://uscis.gov/graphics/services/asylum/faq.htm> (last modified Jan. 21, 2006) [hereinafter FREQUENTLY ASKED QUESTIONS] (explaining that an asylum officer will review the application, information on country conditions, and evaluate the applicant's testimony).

64. *See* Anderton, *supra* note 50; FREQUENTLY ASKED QUESTIONS, *supra* note 63 (noting that an asylum officer will refer an applicant's case to an immigration court to review *de novo* when she is unable to approve the application and the applicant is not in valid status).

reviewed the information afresh, and asked Mohammad and his partner many questions about their relationship, but ultimately denied Mohammad's application.⁶⁵ One problem appeared to be that Mohammad and his partner lived together, but had concealed the nature of their relationship from his partner's family under the guise of being "roommates."⁶⁶ The judge reasoned that Mohammad was able to hide his sexual orientation well enough to pass as a heterosexual; therefore, upon returning to Iran he could do the same and not have any further problems.⁶⁷ Mohammad appealed to the BIA, including letters of support from the U.N. High Commissioner for Refugees and HOMAN, a gay Iranian group.⁶⁸ Unfortunately, the Board affirmed the immigration judge's decision without opinion and ordered Mohammad deported.⁶⁹ In the face of concrete evidence to the contrary, the government upheld a decision that assumed Mohammad's ability to "pass" in the United States as a heterosexual was transferable to Iran, despite the high degree of risk to his life that would occur should he fail to convince even one person with his deception.⁷⁰

Mohammad received a "bag and baggage" letter from the government to report for deportation to Iran, where he honestly expected to be arrested and killed for his homosexuality.⁷¹ Attorneys with the Gay, Lesbian, Bisexual, and Transgender Workgroup of Holland & Knight, L.L.P., who specialize in sexual orientation asylum cases, took Mohammad's case *pro bono* and appealed to the government to reopen the case to consider new evidence.⁷² Mohammad waited for a decision on his asylum claim for more than a year; his lawyer had negotiated with the government not to detain him during the pendency of the motion to reopen.⁷³ On the advice of his lawyer, Mohammad marshalled evidence, including a psychological evaluation and affidavits from gay

65. See Anderton, *supra* note 50.

66. See *id.*

67. See *id.* One commentator has noted that such visibility requirements are inconsistent with the fear-based standard of asylum because the act of concealing one's homosexuality is itself evidence of fear of persecution on the basis of sexual orientation. See Hanna, *supra* note 3, at 917-18 (criticizing the government's apparent rewarding of "reverse covering" where gays are asked to "perform according to stereotype" in sexual orientation asylum claims).

68. See Anderton, *supra* note 50.

69. See *id.*

70. See *id.*

71. See Press Release, Holland & Knight Lawyers Secure Asylum Relief for Persecuted Iranian Gay Man (Dec. 14, 2004), <http://www.hklaw.com/Publications/OtherPublication.asp?ArticleID=2814> (discussing the case of "Mohammed").

72. See *id.*

73. Mohammad recently learned that the immigration judge approved his application, after the government dropped all objections. See *id.*

organizations, friends, and his boyfriend, to satisfy the concerns of the Department of Homeland Security (DHS) and the immigration judge regarding the authenticity of his sexual identity.⁷⁴ His lawyer's advice comports with Professor Muneer Ahmad's assertion that those who are successful in their claims are likely those who employ a narrative that "resonate[s] with the values, beliefs and assumptions of" the judge by "draw[ing] upon prevailing norms and beliefs, no matter how problematic they may be."⁷⁵ Thus, because Mohammad had to provide proof comporting with judicial stereotypes of what it means to be gay, his membership in gay organizations, subscriptions to gay publications, and participation in gay pride parades may have increased his chances of gaining asylum in the United States based on his sexual orientation more than his personal testimony concerning who he is and what he had endured.

III. UNCOVERING BIAS IN SEXUAL ORIENTATION ASYLUM DECISIONS

Charles Lawrence has described the impact in legal decisions of "unconscious racism," that is, racism that is not overt but which results from those "ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."⁷⁶ Regardless of whether it is intentional or unconscious, the injury of racial discrimination is the same.⁷⁷ Transmission of cultural stereotypes is "[a] crucial factor in the process that produces unconscious racism."⁷⁸ Therefore, the best way to uncover evidence of a discriminatory act is to look for the "cultural meaning" of that act.⁷⁹ Similarly, interrogating the cultural meanings of facially neutral evidentiary requirements helps to uncover the unconscious bias inherent in sexual orientation asylum judicial decisions. Professor Darren Hutchinson has noted that "a structural analysis of judicial bias [will]

74. See Interview with Mohammad, *supra* note 51.

75. Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122 (2002) (discussing the strategic decisions that lawyers make about employing problematic stereotypes in legal storytelling).

76. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (describing the current impact of a shared history and culture of American racism).

77. See *id.* at 319 (criticizing the requirement of intent to discriminate in equal protection jurisprudence as setting up a false dichotomy that assumes intentional discrimination is somehow worse than unconscious discrimination).

78. *Id.* at 343 (positing that a person exposed to media stereotypes of black people would internalize the stereotypes and employ them unconsciously in everyday decision-making).

79. *Id.* at 324 (noting that even though it is impossible to see the collective unconscious, evidence can be found).

lead to a richer understanding of subordination by uncovering the subtle, hidden, and ideological roots and manifestations of oppression.”⁸⁰ Judges likely share the same biases as the general public, and thus, the legal system furthers systems of subjugation found more broadly in society.⁸¹ Thus, the following sections explore the cultural implications of what it means to be “gay enough for the government” to uncover two intertwined, unconscious biases employed in asylum decisions: racialized sexual stereotypes and white-specific gay stereotypes.

A. *Racial Stereotypes and Essentialism*

Critical Race Theory (CRT) scholars have exposed the entrenchment of racism in the legal system and have attempted to articulate ways in which it can be challenged.⁸² A key feature of CRT writings is the balancing of a critique of “race” as a socially constructed and malleable falsehood with the fact that racism is concrete and causes tangible suffering for individuals.⁸³ Early CRT scholars focused only on the impact of race, but the analyses have become more nuanced over time, including additional facets of identity.⁸⁴ Professor Hutchinson has written extensively on the interconnection of racism and homophobia, advocating a multidimensional approach to challenge racialized heterosexist subordination.⁸⁵ Such a multidimensional analysis

80. Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U. J. GENDER SOC. POL’Y & L. 13, 14-15 (2002) (noting that judicial bias exists as part of a larger system of multidimensional domination).

81. See, e.g., Pamela D. Bridgewater & Brenda V. Smith, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1, 5 (2002) (noting that a study in Arizona found that LGBT individuals reported overt and covert discrimination as court participants).

82. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (collecting edited versions of CRT scholarship); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (compiling early CRT writings).

83. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6-9 (1994) (encouraging CRT scholars to challenge racism while employing arguments that race is a social construct).

84. See, e.g., Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L.J. 103, 108 (1994) (discussing how “multiple intersectionality . . . rejects any attempt to analyze” facts of discrimination based on race, sex, and sexual orientation separately); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-45 (1991) (discussing intersecting patterns of racism and sexism in the context of violence against women); Valdes, *supra* note 6, at 55 (“Multiplicity highlights the multi-dimensionality of human identities while intersectionality additionally critiques systemic failures to recognize the social and legal significance of multiplicity.”).

85. See, e.g., Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 107-13

recognizes that some characteristics privilege while some subordinate individuals and that a person's experience of oppression depends upon their specific multidimensional location within the system.⁸⁶ Multidimensionality exposes the ways in which individuals and social structures subjugate individuals on the basis of interlocking racist, sexist, and heterosexist stereotypes.⁸⁷

In particular, Professor Hutchinson has argued that "white supremacist culture has assigned a battery of sexual stereotypes to each marginalized racial group [in the United States]."⁸⁸ This analysis applies equally well to the international and immigration context. Many of these racialized sexual stereotypes arose out of patriarchal and economic distinctions of male and female immigrants during different eras of racist immigration policy.⁸⁹ For example, whites' treatment of African-American sexuality as a reproductive commodity during slavery resulted in a racist sexual stereotype of African-Americans as promiscuous and aggressive.⁹⁰ Stereotypes of Asian-American men as asexual, passive, and weak, and Asian-American women as docile, servile, and sexually submissive arose from early sexist and racist immigration policies that encouraged the importation of Asian men to meet society's economic needs, but barred the immigration of women, except to serve the sexual needs of men.⁹¹ Because these sexualized stereotypes are grounded in essentialist notions of heterosexuality, they leave no room for the existence of an LGBT person of color.⁹² In fact, there is a dearth of conceptual space for stereotypes for LGBT people of color since "gay'

(1999) (advocating inclusion of a multidimensional approach to challenge the heteronormativity of antiracist theory).

86. See, e.g., Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309-13 (2001) (describing the conceptual and substantive ways in which multidimensionality theory extends the reach of intersectionality theory).

87. See *id.* at 309-16.

88. Hutchinson, *supra* note 85, at 80 (positing that these stereotypes have justified systems of violence and oppression against people of color).

89. See *id.* at 81-96.

90. See *id.* at 81-86 (noting the heterosexual nature of racialized sexual constructs).

91. See *id.* at 89-96 (discussing sexualized stereotypes fostered by immigration from cheap male labor in the eighteenth century to modern-day mail order brides).

92. See, e.g., *id.* at 81 (arguing that the stereotypes "take[] on a 'homosexual' tone" in LGBT communities); see Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 570 (1997) (arguing that police could not conceive of the murder of a poor Latino as having an antigay motive because of the stereotype of Latin men as macho and therefore heterosexual).

stereotypes [often] conflict with ‘racial’ stereotypes.”⁹³ For example, stereotypes of Latino masculinity conflict with stereotypes of gay effeminacy.⁹⁴

To uncover the dimensions of subjugation for LGBT immigrants, it is necessary to extend these multidimensional analyses beyond the borders of the United States to include culturally specific markers of identity, and to recognize that the immigration process imbues those social characteristics with new meanings and priorities as U.S. society assimilates “foreign” characteristics to fit pre-existing categories. Given that the origins of racialized sexual stereotypes lie in immigration history, there is no reason to believe that they stop at the borders of the United States. It is more likely that, for example, essentialist racial stereotypes of black men as sexually aggressive apply to both African-American men and African men, irrespective of cultural differences. Thus, in the asylum context, judges are likely to ascribe these characteristics to nonwhite asylum seekers and assess their demeanor, a key element of an asylum claim, based on unconscious heterosexist sexualized racist expectations. In the same way that pervasive sexual stereotypes “racialize” immigrants upon entry into the United States, culturally specific white constructs of sexuality attempt to mold the various expressions of sexuality into a gay identity. The following Part explores how culturally specific white notions of “gayness” create additional evidentiary hurdles for gay asylum seekers.

B. Globalized Gay Stereotypes

Sonia Katyal has similarly challenged the notion of a global gay identity and has offered an instructive analysis of the international scope of sexual behavior and identity. Katyal asserts that there are three models of homosexuality: (1) the “substitutive” model of gay rights whereby a gay identity is inferred from and interchangeable with homosexual conduct; (2) the “transformative” model where homosexuality merges with transgenderism; and (3) the “additive” model where homosexual conduct is “separate from . . . sexual identity.”⁹⁵ The first model mirrors the gay rights paradigm in the United States and Western Europe, and a

93. Hutchinson, *supra* note 85, at 102 (noting that heteronormativity in antiracism may reflect the fact that there are fewer stereotypes of LGBT individuals of color than there are of heterosexuals of color).

94. *See id.*

95. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 101-02 (2002) (noting that laws based on sexual orientation impose a context-specific relationship of conduct and identity).

brief overview of its origins and inherent assumptions will explain the model's impact on asylum seekers.

Commentators have noted that U.S. gay activists adopted the "substitutive model" as a necessary strategy following *Bowers v. Hardwick*, the gay rights case which foreclosed constitutional protection on the basis of same-sex sexual behavior.⁹⁶ In *Bowers*, the Supreme Court legitimized the ability of states to treat homosexuals as criminals by virtue of their private conduct, thus forcing activists to articulate a right to equality without mentioning sexual behavior.⁹⁷ Much LGBT litigation activity, until *Lawrence v. Texas*⁹⁸ overturned the *Bowers* decision in 2003, employed a "discourse of equivalents" rhetoric whereby LGBT activists asserted their rights to equality based on an immutable homosexual identity analogous to race.⁹⁹ CRT commentators have criticized the comparative (or substitutive) model of gay rights because it ignores the intersection of race and sexual orientation and mirrors white norms and values to the exclusion and erasure of LGBT people of color.¹⁰⁰ Thus, the construction of homosexual identity as a basis for asylum arose from a historical context that conflated homosexual identity with conduct and obscured the multidimensional experiences of LGBT people of color.¹⁰¹

A further problem with the comparative model is that it assumes that homosexual characteristics carry fixed and clear meanings.¹⁰² It constitutes a form of "gay essentialism" which presumes clarity of boundaries between heterosexual and homosexual identity and requires

96. See 478 U.S. 186, 190-96 (1986); see, e.g., Katyal, *supra* note 95, at 102-03 (noting that this model is limited in the cross-cultural context).

97. See Katyal, *supra* note 95, at 102-03.

98. See 539 U.S. 558, 578 (2003) (overruling *Bowers* and finding that homosexuals have a liberty interest in conducting personal relationships free from government interference).

99. Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994) (arguing that comparing the strategy undermines both the gay rights movement and the larger civil rights movement).

100. See, e.g., Arriola, *supra* note 84, at 139-41 (proposing instead that analysts adopt a holistic model of equality that recognizes the multidimensional nature of an individual's identity); Hutchinson, *supra* note 92, at 583-84 (describing how analogies of the LGBT rights movement to the civil rights movement omit LGBT individuals of color from either group); Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1360-61 (2000) (arguing that the approach marginalizes LGBT people of color and creates a white-normative construction of LGBT identity that hinders equality efforts).

101. See Hutchinson, *supra* note 92, at 619 (arguing that the politics of gay and lesbian rights do not include intersecting issues of importance to LGBT people of color, such as racism, poverty, and homophobia).

102. See Arriola, *supra* note 84, at 139-40 (asserting that traits become more or less prominent depending on context).

public expression of private sexual behavior.¹⁰³ Katyal argues that the substitutive model “fails to recognize and incorporate different social meanings for same-sex sexual practices. Moreover, it represents a peculiarly stunted view of the complex relationship between identity and conduct, ignores the need for privacy and autonomy, and runs the risk of excluding many individuals from concurrent models of constitutional protection.”¹⁰⁴ The prevalent stereotype of a homosexual identity is based on upper-class white male norms of behavior, which marginalizes LGBT persons of color.¹⁰⁵ Thus, under the substitutive model, a homosexual is someone who not only has homosexual sex, but who also has a visible homosexual identity that conforms to stereotypical white norms.

Social commentators around the world have identified the “export” of the U.S. model of homosexuality as an identity as a form of cultural imperialism and have identified the concept of homosexuality as a “white disease.”¹⁰⁶ This assertion has patently homophobic overtones, but many share its critique of the universality of homosexual identity. For example Scott Long, a long-time advocate of LGBT human rights, has argued that proponents of the homosexuality identity model err when they assert that “there is a thing called ‘sexual orientation’ which is an identifiable status; that this thing is somehow relevant and applicable transnationally and transculturally; and . . . that this identity or quality is also fundamental and immutable.”¹⁰⁷ Thus, nationalism and rejection of imperialism may complicate evidentiary requirements for sexual orientation asylum because some people who are “homosexual”

103. Katyal, *supra* note 95, at 109 (arguing that the substitutive model implies both a legal and personal “interchangeability between gay sexual conduct and sexual identity”).

104. *Id.* at 123 (warning against imposing the substitutive model of homosexuality on other cultures lest LGBT civil rights become a new symbol of recolonization).

105. See Hutchinson, *supra* note 100, at 1360 (noting that both pro- and antigay activists employ essentialist concepts of homosexuality).

106. Katyal, *supra* note 95, at 127 (noting that homosexuality is seen as an “undesirable byproduct of foreign influence and globalization”); see Hernández-Truyol, *supra* note 48, at 64 (noting that the Latino/a community considers Latina lesbians to have caught “the Anglos’ disease”); Katyal, *supra* note 95, at 98-99 (noting that homosexuality is seen as an undesirable byproduct of foreign influence and globalization); Cheikh Traoré, *Long Road Home: One Face of Gay Africa*, THE GULLY, Dec. 4, 2002, http://www.thegully.com/essays/africa/021204_traore_gay_afr_AIDS.html (observing that Africans see homosexuality as a “white disease”); Huso Yi, *Life and Death in Queer Korea: Homo Koreanus*, THE GULLY (Mar. 20, 2003), http://www.thegully.com/essays/asia/030320_homo_koreanus.html (discussing how many Koreans insist that there are no gays and lesbians in Korea and that it is a “foreign problem”).

107. Symposium, *Recent Developments in International Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 179 (2001) (noting that some cultures do not categorize desire by the gender of its object).

(according to U.S. definitions that conflate sexual identity with sexual behavior) do not identify as such.¹⁰⁸

C. Stereotypes in the Asylum Process

The government appears to have adopted the substitutive model of homosexual identity in its adjudication of sexual orientation asylum cases.¹⁰⁹ “[I]nstead of weighing the merits of an individual’s asylum claim,” the court instead analyzes whether or not the applicant conforms to an expected construction of homosexuality.¹¹⁰ The criteria used to ascertain whether or not the applicant’s identity and behavior meet the evidentiary requirements are based on racialized sexual stereotypes and white gay norms.¹¹¹ Thus, the paradigmatic asylum applicant is one who

108. See, e.g., Katyal, *supra* note 95, at 153 (providing the example of India, where in the public health context workers “use the term ‘men who have sex with men’ (MSM)” so as to ensure outreach to men who may be married and consider themselves heterosexual, but who engage in homosexual activity). The term MSM is also the term generally used for homosexual men in Nigeria. See U.N. Office for the Coordination of Humanitarian Affairs, Nigeria: Persecuted Gay Community Cautiously Seeks a Voice (May 7, 2004), <http://www.irinnews.org/report.asp?ReportID=40958> (noting that homosexual practice carries a fourteen year jail sentence under Nigerian federal law, but a death sentence by stoning under Shari’ah law which is applicable in twelve northern states). It is interesting that in the United States, the public health community also often employs the term MSM (or WSW—women who have sex with women) in outreach materials, indicating an awareness that there is more diversity in sexual identity even within the United States than the substitutive model implies. See, e.g., Daniel Knight, M.D., *Health Care Screening for Men Who Have Sex With Men*, AM. FAM. PHYSICIAN, May 1, 2004, available at <http://www.aafp.org/afp/20040501/2149.pdf> (noting that disease statistics for self-reported gay and bisexual men are underinclusive); CTRS. FOR DISEASE CONTROL & PREVENTION, HIV/AIDS & U.S. WOMEN WHO HAVE SEX WITH WOMEN (July 2003), <http://www.cdc.gov/hiv/pubs/facts/wsw.htm> (discussing methods to inhibit female-to-female HIV transmission); ADVOCATES FOR YOUTH, LATINO YOUNG MEN WHO HAVE SEX WITH MEN: UNIQUE NEEDS AND CHALLENGES (June 2002), http://www.advocatesforyouth.org/publications/transitions/transitions1404_8.pdf (noting that Latino MSM seldom identify as gay or bisexual).

109. See *supra* Part II.D (describing how the government did not consider Mohammad gay because his external masculine identity did not match his asserted homosexual behavior).

110. Symposium, *supra* note 107, at 186-87 (quoting the comments of Lavi Soloway, the founder of Immigration Equality and discussing the difficulties of articulating asylum claims based on persecution on the basis of sexual orientation in societies where constructions of homosexual status and homosexual conduct differ from those in the United States). The REAL ID Act of 2005 has revised the asylum provisions of the United States Code, changing the way asylum cases filed after May 11, 2005 will be evaluated. See Pub. L. No. 109-13, 119 Stat. 302 (2005). These changes may have a significant impact on LGBT applicants’ ability to prove their asylum cases, exacerbating the problems detailed *supra* Part II.B. See, e.g., 8 U.S.C.A. § 1158(b)(1)(B)(i) (2005) (requiring applicants to establish that the asserted ground for asylum was a “central reason” for their persecution); § 1158(b)(1)(B)(ii) (heightening the requirement for corroboration by establishing that testimony alone is only sufficient where it “is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee”); § 1158(b)(1)(B)(iii) (establishing a “totality of the circumstances” test for applicant credibility determinations that covers all past statements and evidence).

111. See Hutchinson, *supra* note 100, at 1360-61.

has proof that, before coming to the United States, he had lived an openly gay lifestyle and had been threatened based on his sexual orientation.¹¹² This presents a problem for applicants like Mohammad who, under racialized heterosexist stereotypes, are masculine and do not therefore physically conform to culturally specific notions of homosexuality and who come from countries where the threat of a death sentence severely constrains the available range of gay social activities.¹¹³

Elvia Arriola's critique of the comparative model of equal rights seems equally applicable to the asylum context where "[a] typical inquiry asks whether you are the member of a protected group, rather than whether you have suffered prejudice because of a trait that is irrelevant to your moral worth."¹¹⁴ The rationale for requiring extrinsic evidence to confirm the applicant's own testimony lies in the belief that the sexual orientation asylum system is vulnerable to fraud and false claims.¹¹⁵ However, closer analysis reveals that the fact-finders' own narrow understanding of sexual identity encourages the very fraudulent claims that the immigration authorities fear. Typical questions posed to determine whether or not an applicant is "really gay" reveal unconscious adherence to racialized sexual stereotypes and white gay norms. A Canadian attorney who has represented more than sixty gay refugee claimants noted: "I used to call it Gay 101. Immigration and Refugee Board members ask claimants what day the Gay Pride parade was on, where the gay bars in Toronto are located and whether they were in a relationship."¹¹⁶ Thus, the courts' evidentiary requirements focus more on

112. See Leitner, *supra* note 2, at 691-93 (exploring rulings that differentiate between status and conduct to find that the ability to live a discreetly homosexual lifestyle does not entitle an applicant to asylum).

113. See IMMIGRATION EQUAL. & MIDWEST IMMIGRANT & HUMAN RIGHTS CTR., WINNING ASYLUM, WITHHOLDING AND CAT CASES BASED ON SEXUAL ORIENTATION, TRANSGENDER IDENTITY AND/OR HIV POSITIVE STATUS 51 (3d ed. 2006), http://www.immigrationequality.org/uploadedfiles/manual_complete.pdf ("In cases where the applicant does not fit the U.S. stereotype of gay man or lesbian woman, the applicant's representative must make sure that the record contains as much corroborating evidence as possible that the applicant really is homosexual."); HANDBOOK, *supra* note 21, pt. II, at 3 (reporting that a government Trial Attorney doubted a gay asylum-seeker's claim because he "did not belong to any gay or lesbian organizations, was previously involved in a heterosexual relationship, and had not "come out" to his doctor, family, or friends").

114. Arriola, *supra* note 84, at 131 (describing "fixed [and] immutable" bases employed in discrimination theory).

115. See Jimenez, *supra* note 41, at A7 (reporting that Canada's influx of 2500 applicants in three years may be due to the fact that sexual orientation asylum is an easily manipulated claim).

116. *Id.* (noting that the judge would be better off using "gaydar" to determine whether the claims were fraudulent).

knowledge of gay trivia than on actual experiences and culturally relevant identity markers.

The U.S. asylum system also appears to accept the “transformative” model of homosexual identity, providing that the applicant physically conforms to certain racialized heterosexist sexual stereotypes of the opposite biological sex.¹¹⁷ Take, for example, the story of an asylum applicant who comes from a country that does not subscribe to the “substitutive” model of homosexuality.¹¹⁸ The immigration judge doubted the applicant’s statement that the police had abused him for homosexual acts, but had done nothing to his sexual partner.¹¹⁹ Viewed from the U.S. perspective, where homosexual behavior substitutes for identity, such a story is illogical. Why, the judge wondered, did the police not persecute both men since they were both engaging in homosexual activity?¹²⁰ The only way for the judge to make sense of the event was to ascribe the abuse to something other than sexual orientation.¹²¹ However, the applicant was from a country that distinguished sexual identity based on heterosexist gendered sexual roles where only the “feminized” partner was considered homosexual.¹²² Therefore, the police did not abuse the applicant’s sexual partner, because, as the “masculine” partner, he was *not* a homosexual.¹²³

Once the judge understood the distinction, he granted the applicant asylum; the applicant had established the requisite homosexual behavior and identity and established that his persecution was because of that identity.¹²⁴ However, it is unclear how the court would have ruled on an application from the applicant’s sexual partner, even if the police had abused them both. The partner would be able to establish persecution on the basis of his sexual conduct, but he would not be able to establish the requisite social group membership since he does not outwardly identify

117. See Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 *FORDHAM URB. L.J.* 237, 250-54, 255 (2005) (discussing how recent asylum cases embrace a “performative” concept of identity for male-to-female transgender applicants that “recognize[s] the ways that identity is shaped by one’s gender performance”).

118. See Symposium, *supra* note 107, at 187 (arguing that cultural misinterpretations can complicate a case).

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*; see, e.g., Arriola, *supra* note 8, at 691 (describing the prevailing heterosexist gender stereotypes of homosexuals in Mexico in “transgenderist terms—lesbians as women who want to be men, or gay men as wanting to be women”).

123. See Symposium, *supra* note 107, at 187.

124. See *id.* (noting how the asylum applicant had to explain “passive” and “active” sexual roles to the judge).

as “gay.” This analysis indicates that the U.S. system seems to reject the “additive” model of homosexuality as “not gay enough” for asylum purposes; thus, there are many people around the world who would be unable to provide the requisite proof of their homosexuality to justify a grant of asylum under the current U.S. discriminatory conditions.

Acceptance of transformative models of male homosexuality may lead immigration officials to assess incorrectly who is “gay enough” on the basis of stereotypical physically “feminine” characteristics as indicators of homosexual identity. For example, as in Mohammad’s case, judges in both Canada and the United States have rejected claims because gay men were not “visibly effeminate.”¹²⁵ Misguided reliance on physical stereotypes to determine if an applicant is gay similarly opens the system to manipulation by those willing to “play gay” for immigration papers. Paradoxically, the most vulnerable asylum applicants may be the ones least able to meet the evidentiary requirements to “prove” their homosexuality. For example, *pro se* applicants are less likely to have access to expert testimony or research on country conditions to back up their claims of membership in the “particular social group” of homosexuals; yet, such extrinsic evidence can make or break a sexual orientation asylum claim.¹²⁶

The judicial focus on determining who is “really” gay, by using racialized sexual stereotypes and white gay norms, forecloses any multidimensional approach to sexual orientation asylum claims because it requires that the applicant establish that his persecutors chose him

125. See Lambda Legal, Lambda Legal Asks Federal Appeals Court to Grant Asylum to Gay Mexican Immigrant Who Suffered Severe Persecution from Police and Public (Oct. 26, 2004), <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1543> (criticizing the immigration judge’s comments that the man did not appear gay to him and that he could hide his sexual orientation if he so chose and go back to Mexico); Ben Townley, *Gay Asylum-Seeker Rejected as Too Butch*, YALE GLOBAL ONLINE, May 5, 2004, <http://yaleglobal.yale.edu/article.print?id=3965> (reporting that the immigration board commented that an applicant who did not appear gay would be in no danger in his homeland despite testimony about threats of blackmail from the police).

126. See, e.g., Adrian Brune, *Md. Man Fights Deportation to Gambia*, WASH. BLADE, Aug. 20, 2004, available at <http://www.washblade.com/2004/8-20/news/localnews/mdman.cfm> (describing the experiences of Yorro Kuyateh, a Gambian gay man who unsuccessfully represented himself *pro se* at an asylum proceeding where the immigration judge ordered the DHS trial attorney both to examine and cross-examine him). See generally Juana María Rodríguez, *The Subject on Trial: Reading In re Tenorio as Transnational Narrative*, in QUEER LATINIDAD: IDENTITY PRACTICES, DISCURSIVE SPACES 84, 84-100 (2003) (describing how, in *In re Tenório*, No. A72-093-558 (I.J. July 26, 1993), the testimony of an expert witness was important to establish the requisite basis for asylum where a judge employing racialized stereotypes did not believe that the applicant was gay).

because of his sexual orientation alone.¹²⁷ As Professor Hutchinson has argued, such an essentialist approach to oppressive violence obscures the reality of a person's subjugation, whereas a multidimensional approach rightfully exposes the act as one based on interlocking race, sexuality, and gender constructs.¹²⁸ A multidimensional approach avoids the essentialist trap of focusing solely on overt discrimination to the detriment of structural discrimination and recognizes the particular vulnerability of LGBT individuals with multiple sources of oppression.¹²⁹ Thus, it is not that judges should abandon the requirement of proof *per se*, but they should reject unconsciously racist evidentiary requirements that attach more worth to malleable physical characteristics and knowledge of gay trivia than to testimony about same-sex relationships and persecution by government officials who threaten to expose the applicant's homosexuality.

IV. IMPROVING SEXUAL ORIENTATION ASYLUM DECISIONS

Immigration officials who make asylum decisions do so in a manner that lacks "transparency," a phenomenon which Barbara Flagg has described as the "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."¹³⁰ Flagg argues that white decision makers should strive to deconstruct transparency (and thus work to dismantle structural racism) by making explicit "the unacknowledged whiteness of facially neutral criteria of decision."¹³¹ Society assumes whiteness as a norm, and also assumes heterosexuality as a norm.¹³² Extending the notion of

127. See Rodríguez, *supra* note 126, at 95. One Ninth Circuit opinion is notable for its recognition of the multidimensional nature of oppressive violence, and expands the ability of applicants to prove persecution based on aspects of their homosexual identity that are seen as tangential under the substitutive model. See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (granting a petition for review and remanding to the BIA with instructions to approve the application for asylum).

128. See Hutchinson, *supra* note 85, at 20-33 (deducing that oppressive violence is multidimensional because violence is a system of subordination and subordination is multilayered).

129. Cf. Hutchinson, *supra* note 92, at 636-38 (arguing that a multidimensional analysis leads to a better result because it takes into consideration issues of importance to those who are excluded under essentialist models).

130. Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (arguing that whites tend not to have any consciousness of their "whiteness").

131. *Id.*

132. See Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondence Through Work in Women's Studies*, in *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 22, 24, 31-32 (Leslie Bender & Daan Braveman eds., 1995) (noting that "whites are taught to think of their lives as morally neutral, normative, and average,

transparency to the immigration context allows us to posit that failure to recognize unconscious racialized sexual stereotypes and white gay norms allows discriminatory results in asylum cases. For example, transparency requires immigration judges to recognize that requiring an asylum applicant to be “out” once they arrive in the United States, treated as a prerequisite under current asylum adjudication criteria, has racially specific disparate effects because many applicants of color come from places where visibly gay behavior was avoided under penalty of severe criminal sanction. Such a requirement may also have class-based disparate effects since, as a general proposition, those with class privilege have more opportunity to live an openly gay life.¹³³ Thus, to counteract the negative effects of a lack of transparency, a judge must search out the invisible cultural biases of neutral requirements that harm marginalized groups. By making transparent the asylum officer’s reliance on racialized sexual stereotypes of masculinity and white gay essentialist norms, decisions such as the one that found Mohammed “not gay enough” would be avoided.

One significant issue deserving of transparency analysis is the historical context in which the immigration courts wrote the opinions which became precedential in sexual orientation asylum law. In the 1990s, *Bowers* was still good law and the Supreme Court (and U.S. society) equated homosexuality with criminal behavior.¹³⁴ In addition, the first sexual orientation asylum cases were written in the context of an overtly homophobic immigration system.¹³⁵ Prevailing views of homosexuals as criminals and deviants undoubtedly mingled (consciously or unconsciously) with racial stereotypes of immigrants to influence the way in which the immigration judges adjudicated the first sexual orientation asylum claims and the evidence they considered relevant. These decisions have become precedent for all other sexual orientation cases; thus racialized homophobia and heterosexism are now encoded in the case law.¹³⁶ It is too soon to know whether the influence

and also ideal” while noting further the unearned advantages and privileges that attach to heterosexuality).

133. See Arriola, *supra* note 8, at 706-07 (comparing the freedom of a white, educated, transgendered American female to that of a poor Mexican whose ability to be “out” was contextual and depended on being in safe settings).

134. See *supra* notes 18-20 and accompanying text (describing the social and political ramifications of the *Bowers* holding that states could consider homosexual sex a criminal act).

135. See *supra* notes 14-20 and accompanying text (discussing the ban on homosexual immigration until 1990).

136. See *supra* notes 44-48 and accompanying text (discussing early precedent and the dearth of lesbian case law). See generally Leitner, *supra* note 2, at 681 (criticizing the fact that

of the holding in *Lawrence* that recognized and respected public and private expressions of sexual identity will carry over into the asylum context and lead to new precedential opinions evincing a more nuanced understanding of the nature of homosexuality.¹³⁷

One solution to the problem of judges employing racialized sexual stereotypes and white gay norms in asylum decisions would be to increase training on these matters. This would involve providing concrete, factual reference information on the various ways in which sexuality is expressed around the world, as well as developing methods by which judges could assess whether they were employing stereotypes in their decision making. Training is especially important at the

few immigration opinions are designated precedential because it provides judges with little guidance on how to decide diverse cases fairly).

137. The Ninth Circuit adopted exactly this nuanced approach in a recent case. In *Karouni v. Gonzales*, the court considered the case for asylum and withholding of removal of a Lebanese man, who is gay, has AIDS, and follows the Shi'ite religion. See 399 F.3d 1163, 1166 (9th Cir. 2005). The immigration judge denied Karouni's application, finding that he failed to show past persecution and a well-founded fear of future persecution. See *id.* at 1165-66. The BIA affirmed without opinion. See *id.* at 1166. Karouni did not challenge the findings on past persecution, so the only issue on appeal was whether he had a well-founded fear of future persecution. See *id.* at 1170 n.9. The court reviewed evidence that the Hizballah enforcement of Islamic law against homosexuals in Lebanon posed a credible threat to Karouni's safety, especially because Karouni had been outed as a homosexual by a friend who was arrested and interrogated by the Hizballah. See *id.* at 1167-69. The court also noted that Karouni's HIV status would place him in additional danger because it is regarded as "a stamp of verification of homosexuality." *Id.* at 1169. On this evidence, the Ninth Circuit found Karouni statutorily eligible for asylum and remanded the case to the BIA to determine if he met the higher standard for withholding of removal. See *id.* at 1178-79.

In reaching its decision, the court made two significant observations. First, it clarified its past holding in the case of *Hernandez-Montiel*, which found that "gay men with female sexual identities" constituted a particular social group for asylum purposes, and affirmed that "all alien homosexuals are members of a 'particular social group' within the meaning of the [asylum provisions] of the [Immigration and Nationality Act]." *Id.* at 1172. Thus, the court explicitly rejected any attempt to narrow the scope of identities that the BIA could consider "acceptable" for asylum purposes. See *id.* Although the Ninth Circuit's holding is only binding on the BIA in that circuit, it provides a basis for judicial acceptance of the "additive" model as "gay enough" for asylum.

Second, when chastising the Attorney General for arguing that Karouni could avoid future persecution in Lebanon by abstaining from homosexual conduct, the court cited *Lawrence* for the proposition that sexual conduct should be properly treated as a fundamental element of homosexual identity. See *id.* at 1173. The court stated:

[W]e see no appreciable difference between an individual, such as Karouni, being persecuted for being a homosexual and being persecuted for engaging in homosexual acts. The persecution Karouni fears, regardless of how it is characterized by the Attorney General, qualifies as persecution on account of . . . Karouni's membership in the particular social group of homosexuals.

Id. The court's flat rejection of the Attorney General's argument that Karouni could "choose" to hide his homosexuality has obvious value in cases such as Mohammad's where applicants are judged to be not "gay enough" to deserve asylum.

immigration court level because immigration judges make demeanor determinations based on the credibility of the applicant that are crucial to the asylum application, and appellate courts rarely review these determinations *de novo*. Thus, it is important that judges exercise discretion and carefully evaluate all possible evidence and testimony from a neutral standpoint that does not impose upon the applicant racialized sexual stereotypes or white norms of gayness.¹³⁸

A restructuring of asylum application evidentiary requirements could improve the ability of an applicant to claim asylum without opening the process to fraud. Such an expansion of requirements would comport with recent case law where courts have granted immigration protection to include previously excluded groups.¹³⁹ But the difficulty lies in finding the right balance to recognize multidimensional identity and intersecting reasons for oppression without diluting evidentiary standards so much that anyone who has ever had a “queer experience” can claim sexual orientation asylum. The government should put standards in place that require asylum officers and judges to evaluate evidence from a culturally neutral standpoint, looking for actual culturally specific evidence of persecution on the basis of sexual orientation. Thus, in cases like Mohammad’s, evidence that the persecutors could identify the applicant as homosexual would be more relevant than whether the judge could identify the applicant as homosexual.

V. CONCLUSION

Sexual orientation asylum has provided scores of homosexuals with refuge in the United States in the last quarter century. It has allowed LGBT people who would otherwise live in fear of persecution on the basis of their private sexual activity (or public identity) to come to the United States and start anew. However, the process is not without problems. As Robert Chang has recognized, “[a] crucial site where

138. *Cf.* Katyal, *supra* note 95, at 101 (arguing that substitutive legal models preclude context-specific inquiries).

139. *See, e.g.,* Hernandez v. Ashcroft, 345 F.3d 824, 835-41 (9th Cir. 2003) (extending Violence Against Women Act immigration remedies to a woman who suffered domestic violence while outside of the United States). A gender asylum case which uses evidence of domestic violence that the government is unable or unwilling to prevent is currently pending with BIA, awaiting a decision from the Attorney General. *See* Editorial, *Give Me Your Tired . . . And Abused?*, CHRISTIAN SCI. MONITOR, May 18, 2005, at 8 (noting that the Department of Justice is stalling on clarifying asylum law by refusing to make a decision in the case of Rodi Alvarado); Nat’l Immigration Law Ctr., DHS Supports Asylum for Battered Women Denied Help from Their Home Governments (Apr. 2, 2004), <http://www.nilc.org/immlawpolicy/asylrefs/ar114.htm> (noting that the government supported extension of asylum in *In re R.A.*).

racism, sexism, and heterosexism are being rearticulated is the border.”¹⁴⁰ In an attempt to unpack this assertion, this Article has drawn on CRT models to critique the ways in which the sexual orientation asylum process forces applicants to adopt a culturally specific sexual identity in order to meet evidentiary requirements. I argue that recognition of a sexual orientation asylum applicant’s multidimensional identity is fundamental to an accurate representation of the basis of their subjugation. Hopefully, this Article’s conclusions will encourage scholars to include immigrant experiences in their writing in order to avoid models that essentialize on the basis of U.S. cultural norms.

Recognition of the diversity of immigrant reality compels a conclusion that the current asylum system is flawed, but it is not beyond repair. However, these changes require the government to work to change the process by which asylum seekers gain asylum on the basis of sexual orientation because it is a product of a historically racist and homophobic immigration system which today continues to use facially neutral policies to discriminate against people of color and LGBT individuals. In the asylum context, discrimination results from judges determining who is “gay enough” by unconsciously employing mutually exclusive notions of white gay essentialism and racialized sexual stereotypes when making demeanor and credibility determinations. The government and courts should attempt to lessen the cultural specificity of the discretionary decisions by training judges to be sensitive to the diversity of behavior and identity and mandating transparent evidentiary requirements. With minor procedural changes and concrete judicial guidelines, those who most deserve asylum will be better able to establish that they are “gay enough for the government.”

140. CHANG, *supra* note 4, at 33 (arguing that race scholars could strengthen their analyses by looking beyond the confines of the United States to consider the relationship of colonialism and imperialism to patriarchy and racism).