

The Fragility of Particular Social Groups

The Differential Weight of Rape in Gender-Based Violence and LGBTQ+ Asylum Cases

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When the men sexually assaulted her, they called her degrading names and told her that they had been sent to “make her a woman.” After this attack, she fled her country and applied for asylum in the U.S. The asylum system would also try to “make her a woman”; the DHS attorney argued that the sexual assault was on account of her gender, a tenuous status for relief, rather than her sexual orientation as a lesbian, a firmer ground. However, the applicant, her attorney, and the expert witness convincingly, and perhaps awkwardly, argued that the men had attacked the applicant because she was a lesbian, not because she was a woman. Absent any previous harm, the sexual assault, because of the homophobic words and actions of the perpetrators, confirmed the attackers’ motivations and her lesbian status within the asylum system. The judge granted her asylum through her membership in an LGBTQ+ particular social group (PSG).

When she was a teen, Mayeli met a young man several years her senior who seemed nice and worked in the city. Soon after meeting her, he asked her to be his girlfriend. While they were not in a relationship from her perspective, the young man came to visit her one day and in her own bedroom lifted up her *corte* [garment], raped her, and quickly left. She did not scream. He came back a few days later, asked to marry her, and raped her again in her room. The third time he returned, he forced her to come live with him and she felt obliged to do so because she was pregnant. Once they arrived, the young man’s mother sent word to Maveli’s family—she had no parents but a grandmother and siblings—that she would now be living with them. In their life together, he choked her, raped her repeatedly, sequestered her in a shack, and hit her repeatedly. She regularly escaped to return home, but the man’s mother or

other members of his family always came to force her back to her common-law husband. The expert witness and attorney argued that she had been forced into marriage and that the rape constituted the initiation of the marital union. The judge granted her asylum through her membership in a PSG substantiated by expert testimony as “an indigenous woman *robada* in Guatemala.”

Gender-based persecution, like other forms of violence considered worthy of protection in the context of asylum, generate “typologies of worthy victims” and “expectations about how asylum seekers should demonstrate their credibility and the legitimacy of their claims.”¹ Drawing on international law, Meghana Nayak orders gender-based persecution in three general types that each carry its own weight of “worthiness” and “burdens of credibility”: targeting because of gendered expectation; gendered acts of violence, such as rape; and violence enacted in reaction to nonconforming gender identities and sexual orientation.² The cases that open this chapter are emblematic of the different ways that rape can work to constitute a particular social group (PSG). In practice, the different forms of gender-based violence, but most particularly in domestic violence cases for cisgender women, have a high degree of variance in decisions that determine the merit of gender-based violence for asylum claims.³ One contributing factor to this is that courts in the U.S. have been unwilling to define gender—or at least “women” or “men”—as the defining feature of a social group.⁴ Importantly, our analysis shows that in law and in society rape is still very much a concept in flux that serves to constitute socially stratified rights based on prevailing ideologies. Heather Hlavka and Sameena Mulla call attention to the cultural repertoires—including prevailing racialized stereotypes, gendered assumptions, and dispositions to minimize the harms of gender-based violence in the interpersonal realm—through which sexual violence is interpreted as legal evidence and shaped into adjudicative practice.⁵

This chapter explores the adjudication of the meaning of rape in asylum cases as a fundamentally cultural practice that, by drawing on prevailing notions of the deservedness of protections, bestows stratified benefits. Importantly, when we use the term “asylum,” we are also referring to withholding of removal, a form of relief with similar requirements that offers more limited protection. Applicants generally apply for both forms of relief simultaneously. Our work in this chapter explores this variability in decisions by assessing the differential impact of rape on defining the bases for asylum-worthy persecution in PSGs.

Sexual orientation, unlike gender, has regularly been found to be an “immutable” characteristic or a “fundamental” identity that individuals in the group should not be forced to change.⁶ We argue that in “sexual minority cases”—the term asylum practice ascribes to LGBTQ+ cases—especially for male homosexuals and transgender women, rape often works to strengthen the PSG on which the asylum claim is based. For lesbians, corrective rape may also effectively strengthen a PSG based on sexual orientation. Lesbians risk categorization as women because gender-based sexual violence is socially tolerated and regularly dismissed in the

asylum system. Scholars have noted the politics of credibility that burden LGBTQ+ applicants in the process of applying for asylum.⁷ In our experience as experts, the harm of rape involving cisgender women needs to be contextualized adequately. Without a clear context, rape presented as a harm that rises to the level of persecution can be detrimental to an asylum argument or diminish the forms of relief that become available to women.

The authors recognize that “women” and “sexual minorities” are not mutually exclusive legal categories. We distinguish these terms through the assignment of individuals to distinct PSGs; cisgender women are likely to be framed through their gender, while LGBTQ+ persons are included in sexuality-based social groups. In this chapter, we address some of the consequences for lesbians, who as cisgender women and sexual minorities, may be included in both categories. Importantly, the legal category “sexual minority” is out of sync with humanities and social science understandings of the irreducibility of sexual orientation, nonbinary gender identities, and transgendered identities into notions of sexual alterity connoted in the term “sexual minority.”⁸

Drawing on our disciplinary training in history and anthropology and over twelve years of experience as expert witnesses, we consider how rape as harm contributes to defining the bases for asylum-worthy persecution in gender-based and LGBTQ+ PSGs. Collectively we have worked on over three hundred cases in the Northern Triangle and the Andes (Peru and Ecuador). These cases are all focused on the full range of gender-based and sexual violence perpetrated against cisgender, heterosexual women and sexual/gender identity minorities. In addition to our experience working as experts, we draw from humanities, social science, and legal studies of asylum, as well as from the texts of precedential cases. References to cases, such as the cases at the beginning of this chapter, are based on a composite of similar cases in order to protect the privacy of individual applicants.

THE PROBLEM OF RAPE IN LAW IN THE AMERICAS AND IN PRECEDENTIAL ASYLUM CASES

Relevant International Frameworks for Understanding the Harm of Rape

In general, condemnation of rape as a harm is found not only internally in country-specific penal codes or laws that prohibit violence against women but also in international humanitarian law. Defining rape as a humanitarian harm was first codified in the Geneva Convention (1949), which has both general protections and special protections for women.⁹ The Statutes of the International Criminal Tribunals for Yugoslavia (1993) and Rwanda (1994) defined rape as a crime against humanity in the context of war.¹⁰ The Rome Statute (1998) defines rape both as a crime against humanity and as a war crime.¹¹

In the Americas specifically, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, better known as the Belém do Pará Convention, defined standards for states that have ratified it in Central and South America. The Belém do Pará Convention requires states to proactively

provide appropriate specialized services for women who have been subjected to violence[,] . . . provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life[,] . . . [and conduct] research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes.¹²

In addition, in the Americas rape is an implied harm in article 5.1 of the Inter-American Convention on Human Rights, which guarantees that “every person has the right to have his physical, mental, and moral integrity respected.”¹³

On November 19, 2015, the Inter-American Court of Human Rights,¹⁴ in *Velásquez Paiz and Others vs. Guatemala*,¹⁵ ruled that Guatemalan authorities were culpable in failing to ensure the right to physical integrity and right to life of women. Ruling on a particularly well evidenced case of rape leading to murder, the court noted that Guatemalan police did not pursue the woman’s kidnapper, despite having ample cause. Further, the court ruled that police officers’ refusal to act on the complaint was not an isolated instance of police and the courts failing to grasp the gravity of crimes against women, particularly rape and murder. Guatemala was cited in this ruling as making little effort to prevent and prosecute crimes against women in a systemic way, despite the country’s recognition of violence against women as criminal and its signing of international conventions that compel the country to safeguard women’s lives.

Rape in U.S. Asylum Law

Sexual assault survivors, like other applicants for asylum and withholding of removal, must demonstrate that the harm they experienced rises to the level of persecution, that the perpetrator was motivated because of the applicant’s “race, religion, nationality, membership in a particular social group, or political opinion,” and that the government is unwilling or unable to protect them.¹⁶ The Immigration and Nationality Act (INA) does not define “persecution,” but, as discussed below, in case law sexual assault is considered a serious harm that rises to the level of persecution. Women and sexual minorities must demonstrate that they were sexually assaulted on account of a protected ground, usually a gender-based PSG or one framed through sexual orientation or gender identity, rather than due to personal animosity or common criminality. Finally, sexual assault survivors must demonstrate that the government is directly involved in the persecution or that

the government is acquiescent because it fails to protect victims from harm by private actors.¹⁷

Women and sexual minorities are targeted for high levels of violence, including sexual assault. In our cases, we find that assailants usually indicate that they are raping the victim because of their status as a woman or as a sexual minority. It is common for a male perpetrator to tell a woman that he is raping her because she is “his woman.” Likewise, rapists tell LGBTQ+ persons that they are sexually assaulting them because they are “gay.” While government agents, usually security officials, may sexually assault women and sexual minorities, perpetrators are likely to be private actors. Despite these apparent similarities in the situations of women and LGBTQ+ rape survivors, a defining difference is that women lack status in the asylum system. As discussed below, women’s gender-based PSGs are fragile and continually challenged, while sexuality-based PSGs have been continuously reaffirmed in case law. This distinction is determinative in sexual assault cases because sexual minorities can connect this form of persecution to a stable protected ground, thereby demonstrating nexus, a necessary requirement for obtaining asylum. Because women’s gender is regularly invalidated as a basis for protection, they are more likely to be disqualified for asylum protection. In their cases, sexual assault is likely to be deemed a private crime, one motivated by the depraved nature of the perpetrator. As Sarah Hinger observes, implicit in asylum law is the assumption that “persecution is not only defined by the physical severity of the injury, but also, simultaneously, through the relationship between the harm and the identity characteristic.”¹⁸

Rape and Persecution. Rape has been recognized as a harm that rises to the level of persecution since *Lazo-Majano v. INS* in 1987.¹⁹ In this case, Ms. Lazo-Majano was repeatedly sexually assaulted by a general during the Salvadoran civil war. Reflective of women’s cases that we are familiar with in our work as experts, the sexual assaults she suffered were included in a complex of other gender-based violence. She had been “bullied, beaten, injured, raped and enslaved.” Her request for asylum was denied by an immigration judge (IJ) and by the Board of Immigration Appeals (BIA). In her final appeal to the Ninth Circuit Court of Appeals, the judges decided that the general’s sexual assaults were motivated by her imputed political opinion, not by her gender status. In this decision, adjudicators advanced an argument that feminism, a belief that women should not be subordinated to men, can be considered a political opinion. The dissenting judge, in reference to the sexual and physical assaults, countered that “such mistreatment is clearly personal in nature and does not constitute political persecution. . . . [She] was abused and dominated by an individual purely for sexual, and clearly ego reasons.” While this was a minority opinion in the decision, this judge articulated the still-dominant view that sexual violence

against women constitutes a private crime, a determination repeatedly used to deny women asylum relief.

Political Opinion. Political opinion is distinct from the other protected grounds in that it is based on attitude rather than status. “Political opinion” refers to a broad range of attitudes, actual or imputed, that individuals have concerning their government or society. To establish political opinion as a basis for asylum, the applicant must demonstrate that the perpetrator perceived that the victim held an oppositional view and harmed the individual for that reason. Ms. Lazo-Majano, for example, had to demonstrate that her rapist perceived her lack of consent to his right to sexually and physically assault her. She was, then, granted asylum based on her attitude about male domination rather than on her status as a woman who had been sexually assaulted.²⁰

The question of whether a woman demonstrates sufficient resistance to harm would continue to define women’s asylum cases. In *Fatin v. INS*, the applicant presented both gender-based PSGs and feminism as a political opinion.²¹ In this case, Ms. Fatin, who left Iran shortly before the culmination of the 1979 Iranian Revolution, requested asylum because she feared persecution under the new regime as a “woman,” as a member in the subgroup “Iranian women who refuse to conform to the government’s gender-specific laws and social norms,” and as a “feminist.” The Third Circuit judges determined that the category “woman” was too broad. In consideration of the second gender-based PSG, the judges focused on the degree to which Ms. Fatin would resist Islamic law by wearing the chador, or veil, despite the severe penalty for noncompliance, which she described as “74 lashes, a year’s imprisonment, and in many cases brutal rapes and death.” Because Ms. Fatin indicated that she would try to avoid wearing the chador rather than engage in full noncompliance due to the risk of harm to her, the judges determined that her level of resistance was inadequate to include her within the social group defined through her gender and undermined her claim based on her feminist political opinion.

Gender-Based Harm. In 1996, the BIA’s decision in *Matter of Kasinga* was the first precedent decision that established that women fleeing gender-based persecution were eligible for asylum. The BIA’s definition of a gender-based PSG for Ms. Kasinga, however, still emphasized an element of her opposition to harm, “young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice.”²² In this case, the applicant was a young woman from Togo who, after her father died, was forced by her aunt into a polygamous marriage with a much older man who planned to force her to undergo FGM before consummating the marriage. Fearing FGM, Ms. Kasinga fled her country. In its review, the BIA found that FGM is persecution that is practiced “to overcome sexual characteristics of young women of

the tribe who have not been, and do not wish to be, subjected to FGM,” confirming her as a member of a particular social group.

In a concurring opinion, a Board member questioned the inclusion of opposition to harm in a gender-based PSG by comparing the situation of Ms. Kasinga to that of a prior case that concerned a man who had experienced persecution in Somalia on account of his clan membership. The judge pointed out that the court had not examined the male applicant’s attitude toward his persecution and that the only distinction between the two cases was that Ms. Kasinga is a woman.

It may be true that sometimes an individual woman’s political opinion may overlap or coexist with her membership in a group designated as a particular social group; however, that does not detract from the fact that social group membership is a status-based ground protected under the Act, just as is religion or ethnicity. While it is not impossible that a political or social opinion, either actual or imputed, may be shared by persons whom, as a result, we would characterize as constituting a particular social group[,] . . . as I have stated, the applicant’s political or social views—her attitude or intent—is not relevant to our definition of the social group to which she belongs, but rather to whether the harm or abuse she faces constitutes persecution.²³

Matter of Kasinga recognized a gender-based social group, defined through gender plus other characteristics (referred to as “gender plus” by some researchers), that could be used by women fleeing other kinds of gender-based violence, including rape.²⁴ An element of resistance to gender-based harm continued to be regularly incorporated in gender plus PSGs. In 1996, the IJ granted Ms. Rodi Alvarado asylum on the basis of a gender-based PSG, “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,” and her political opinion that “women should not be dominated by men.”²⁵ Ms. Alvarado was subjected to over a decade of egregious abuse, including serial rape, and threats to her life by her spouse in Guatemala. The IJ found that the physical and sexual assaults she suffered rose to the level of persecution and that this persecution was on account of her gender-based PSG, citing *Matter of Kasinga*, and on her political opinion, citing *Lazo-Majano v. INS*. However, the INS appealed this decision to the BIA, which ruled in 1999 that though Ms. Alvarado had suffered harm rising to the level of persecution, the persecution was not on account of a protected ground. The BIA determined that her spouse abused her for personal reasons, “because she was *his* wife,” and that her resistance against him was not political opinion but a “common human desire not to be harmed or abused” (emphasis in original).²⁶

Attorney General Janet Reno vacated this decision in 2001 and remanded it to the BIA to reconsider after the finalization of a proposed regulation that, among other guidance, would have confirmed gender as the basis of a particular social group.²⁷ This regulation has never been finalized.²⁸ In an analysis of 45 unpublished decisions after *Matter of R-A-* was vacated, Karen Musalo and Stephen Knight found that immigration judges inconsistently recognized

gender-based PSGs.²⁹ The researchers noted that in a case concerning a Peruvian lesbian who had been raped, because of the controversy over gender-based PSGs, the immigration judge relied instead on precedent decisions that affirmed a PSG based on sexual orientation. Blaine Bookey analyzed 206 case outcomes for domestic and sexual violence between 1994 and 2012 and confirmed that many immigration judges refused to recognize gender-based PSGs because they lacked “social visibility” and “particularity” and, on this basis, denied asylum to women fleeing domestic violence.³⁰ In a case concerning a Guatemalan woman who had endured severe physical and sexual assault by her partner, the immigration judge determined that her abuser “was simply a horrible husband who lacked a basic sense of morality” and that she was a “victim of crime which was perpetrated without reason.” In a case concerning a survivor of sexual assault, the IJ determined that rape is a private, criminal act, “an isolated, random act of violence ‘untethered’ to the government,” and denied the woman’s asylum claim.³¹

Adjudicators continue to vacillate regarding the validity of gender-based social groups. In 2014, the BIA issued a precedential opinion, *Matter of A-R-C-G-*, recognizing that women fleeing domestic violence may merit asylum protection.³² In this case, Ms. C.G. had endured years of physical and sexual assault in Guatemala. The BIA overruled the immigration judge, who had determined that the abuse Ms. C.G. had suffered was not persecution but constituted “criminal acts” perpetrated “arbitrarily” and “without reason.” In 2018, Attorney General Jeff Sessions vacated *Matter of A-R-C-G-* in *Matter of A-B-*, which concerned a Salvadoran woman whose husband had regularly physically and sexually assaulted her in the course of their relationship.³³ Sessions determined that “generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for Asylum.” He decided that the applicant’s gender-based social group was invalid and that the abuse she had suffered was “private, criminal activity.”³⁴ The lack of consistent recognition of gender-based claims jeopardizes women who have been sexually assaulted. When rape is considered part of a complex of other types of violence, rather than augment the level of harm, adjudicators may subsume sexual assault under the general category “domestic violence,” which does not warrant asylum protection.

Sexuality-Based Harm. Unlike cisgender, heterosexual women, who are framed through often multiple and creative gender-based PSGs, there is strong legal recognition that sexual orientation and gender identity are, on their own, protected grounds that may merit asylum protection. Sexual minorities were excluded from immigration to the United States until the Immigration Act of 1990.³⁵ That same year, protections for gay men were recognized in *Matter of Toboso-Alfonso*,³⁶ designated as precedent by Attorney General Janet Reno in 1994. Lesbians may be included in this PSG based on sexual orientation.³⁷ Gender identity was confirmed as a basis for membership in a sexuality-based PSG in 2003 in *Hernandez-Montiel v. INS*,

a case that involved “a gay male with a female sexual identity.”³⁸ The case *Amanfi v. Ashcroft*, also in 2003, determined that heterosexual individuals who are perceived as gender nonconforming merit asylum protection.³⁹ There are no precedential cases that specifically recognize asylum protection for bisexual people, though in practice they have been included as individuals who are perceived as homosexual.⁴⁰ In 2005, the Ninth Circuit confirmed the validity of sexuality-based PSGs in *Karouni v. Gonzales*: “to the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a ‘particular social group’ (emphasis in original).⁴¹

In LGBTQ+ cases that include sexual assault, as in women’s claims, adjudicators usually cite *Lazo-Majano v. INS* as a precedential decision that recognizes sexual assault as persecution. However, different determinations about rapists’ motivations complicate women’s claims and facilitate claims by sexual minorities. Adjudicators considered Ms. Lazo-Majano’s gender status insufficient motivation for her sexual assault and instead considered sexual assault to be retribution for and punishment of her imputed or actual political opinion. In LGBTQ+ cases, the perpetrators’ motivations are directly connected to the applicant’s sexual orientation and gender identity; that is, for LGBTQ+ persons the nexus between this form of persecution and a protected ground is regularly confirmed. In *Hernandez-Montiel v. INS* the Ninth Circuit judges determined in 2000, “Through police harassment and rape, Geovanni suffered past persecution in Mexico on account of his sexual orientation for being a gay man with a female sexual identity.” The court ruled that “sexual orientation and sexual identity are immutable” and “are so fundamental to one’s identity that persons should not be required to abandon them.”⁴² In *Avendano-Hernandez v. Lynch*, a 2015 case concerning a transgender woman from Mexico who was raped by police and military officers, Ninth Circuit judges ruled that rape of LGBTQ+ persons may even rise to the level of torture: “Rape and sexual abuse due to a person’s gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes.”⁴³ Significantly, in these cases the survivors of the sexual assaults were not required to show resistance to the perpetrators, nor did adjudicators examine their attitudes about the status of sexual minorities in their home countries. The challenges to LGBTQ+ asylum cases that include sexual assault focus on demonstrating the applicants’ gender nonconformity and their inclusion in acknowledged PSGs. When rape is framed as sexuality-based violence, applicants generally face fewer obstacles to gaining asylum.⁴⁴ In contrast, cisgender women must demonstrate that they were raped on account of their gender, a weaker claim because male violence against women is normalized. Men can be “horrible” and abuse women “without reason.”⁴⁵

The strength of sexuality-based PSGs is reflected in their citation by adjudicators to validate gender-based PSGs for women. For example, in *Mohammed v. Gonzales*, in 2005, the Ninth Circuit judges cited *Hernandez-Montiel v. INS* to

validate Ms. Mohammed's gender-based PSG and, separately, to establish nexus to persecution.⁴⁶ In this case, Ms. Mohammed was subjected to FGM as a small child in Somalia; her request for asylum was denied by the immigration judge and the BIA because it was determined that, as FGM had already occurred, there was no fear of future persecution. In citing the *Hernandez-Montiel* case, the judges asserted an equivalency between gender and male homosexuality to establish that being female is an "innate" characteristic. The judges ruled that just as "persecution on account of homosexuality can constitute persecution on account of membership in a particular social group[,] . . . possession of the immutable trait of being female is a motivating factor—if not a but-for cause—of the persecution." The judges decided that FGM is "a permanent and continuing harm" that is linked to other forms of gender-based harm, including rape, because in her country "women are subordinated systematically in the country's overwhelmingly patriarchal culture."⁴⁷

The Problem of Rape, in Theory

The interpretations that have been given to the harm of rape in the context of asylum law reflect debates in social theory on the subject. Specifically, in asylum law rape is too often construed as an interpersonal, intimate, or private act that is seldom contextualized as a product of a particular sociocultural historical context. This especially narrow conceptualization is shared in the operationalizing of U.S. rape laws, which until the 1980s situated the harm of rape in a woman's resistance and lack of consent to sexual acts.⁴⁸ While the need to demonstrate resistance particularly to physical expressions of force has subsided, consent-based definitions still put the harm of rape firmly in the context of the interpersonal. This despite MacKinnon's well-known work in *Toward a Feminist Theory of the State* (1989) that noted the important role that socialization plays in mediating the experience of force and consent.⁴⁹

The harm of sexual violence is misunderstood by the prevailing cultural view, often still reflected in scholarship, that sexual violence is a private or individualized problem.⁵⁰ That rape is a private matter—as a cultural conception—has significant historical roots in U.S. law. According to Estelle Freedman, in the U.S. in the seventeenth and eighteenth centuries, rape was identified as interpersonal and seen as a violation or appropriation of a man's sexual rights over his wife or daughter and, for some men, a state-sanctioned right over their female slaves.⁵¹ Even in the nineteenth and early twentieth centuries, rape was typically viewed as an interpersonal violation of women's purity, not a violation of her consent or personhood. In many respects, these understandings were reinforced by the fact that only men—white men, more precisely—enjoyed fully the privileges of citizenship. Freedman notes that the efforts to define women's personhood and access to citizenship in the twentieth century map onto a growing reconceptualization of rape as consent-based violations of personhood.

The idea that rape is an interpersonal problem—and read as a private act—lies at the core of the limitations to evidencing and stabilizing gender-identity-focused PSGs for cisgender women. While PSGs such as “Guatemalan women” or “Guatemalan Indigenous women” exist, harms of rape do not easily confirm membership in those groups, even though men often explicitly state that they rape women because they are a “dirty woman,” a “bad woman,” or even “my woman.” Importantly, while rape is not a harm that is limited to gendered women, the ways in which rape is enacted and understood in society and law is a product of a particular sociocultural historical context.

There is a significant body of scholarship that for decades has foregrounded that social historical contexts constitute rape as a harm that cannot be either defined or understood as interpersonal.⁵² Sexual violence, as an experience, is widely understood to alter selfhood,⁵³ as it particularly targets women’s ability to reason.⁵⁴ In the Peruvian context, Jelke Boesten has argued that the nexus between wartime sexual violence and sexual violence in peacetime can be studied by tracing its social vestiges: patriarchal gender scripts that “impose dominance and affirm hierarchies.”⁵⁵ As Rita Laura Sagato argues for the case of Juárez, representations of sexual violence in particular are expressions of dominance and control requiring an audience where “some bodies are in their death chosen to represent the drama of domination” that enacts and validates authority itself.⁵⁶ The role of patriarchal domination in making enactments of rape possible has been discussed often within the constraints of interpersonal acts.⁵⁷

More recently, scholars have also shown that sexual violence is scaffolded by language, practices, and discourses that Nicola Gavey notes produce “cultural conditions of possibility” in particular places.⁵⁸ Rape as a harm is, in social theory, inexorably bound to the cultural context in which it is conjured as an act. This is not to say that sexual violence resides in the essential nature of any particular culture; cross-cultural research on sexual violence rejects this assumption.⁵⁹ Rather acts of rape always express cultural patterns or, as perhaps Gavey might say, are made possible by their “cultural conditions of possibility.” This line of argument is borne out in findings that show that the harm of rape is employed in political opinion cases, as in *Lazo-Majano v. INS*, where rape by men is a way to suppress opposition to male dominance as a political opinion.⁶⁰

In the sections that follow, based on cases on which we have worked, we trace how the legacy of rape as an interpersonal act marks the way that cisgender women must show the basis of their opposition to male domination—often encapsulated as a form of political opinion—for rape to be considered linked to a ground for protection. Importantly, the perceived location of rape as a harm taking place in the public sphere for LGBTQ+ cases repositions the evidence for violence against gay men and transgender women in a more favorable light. Cisgender women need to overcome the burden of the evidence of their harm that by default is located in a private sphere where they are presumed to be targeted as individuals,

despite cross-cultural research that demonstrates the cultural conditionality of intimate sexual violence.⁶¹

Cis-women, Rape, and Asylum

The context of a relationship in which the woman finds herself becomes central to the way that rape features as a harm for cis-women. Examples of PSGs that follow this pattern are “Guatemalan women unable to leave their relationship,” “Guatemalan women living without a male protective figure,” “immediate family members of,” and “Guatemalan women forced into marriage.” Given that PSGs have “no statutory definition,”⁶² expert testimony “contribute[s] to the development of case law and precedent over time.”⁶³ The importance of a woman’s relationship to contextualizing the harm of rape is in part an artifact of the way that the gender-based violence PSGs have come to be constituted and challenged, as we discussed above, but it is also a result of the challenges inherent in this expression of gender-based violence in society and law.

Focusing on how asylum seeker narratives are structured allows more nuanced thinking about the insufficiency of rape in intimacy to sustain a claim for asylum and evidence membership in a particular social group for cisgender women. Narratives that include rape do not typically feature it as a particularly noteworthy harm but rather one harm among many that substantiate a woman’s experience of gender inequality in society and in a relationship. To understand this better, this section focuses on forced marriage, which is encapsulated in PSGs like “Guatemalan women forced into marriage.” Forced marriages take place as part of the normalization of violence in gender role expectations. Gender role expectations have developed in Guatemala as part of a long, state-sponsored history comprising violence against women; unequal societal access to education, political representation, and economic opportunities; and the country’s legal legacy that had defined women and children for centuries as property of men. While no longer sanctioned by law, many customary practices such as forced sex to initiate new intimate partnerships discussed by Cecilia Menjívar as *robadas* (translated as “stolen” or “captured”) continue to persist.⁶⁴

In one specific example, Lisbeth’s relationship had the classic signs of forced marriage or *robada* typology as her husband believed himself to be of a higher social status, paid Lisbeth’s parents for their daughter, and rapidly engaged Lisbeth in a relationship against her consent when she was fifteen years old. Forced marriages are most common in Guatemala in circumstances of social inequality, when women are teenagers, and when the man is older than the woman, as in Lisbeth’s case. *Robada* relationships are dually reflective of the greater vulnerability that Lisbeth had because of her family’s poverty and her young age. Forced relationships deeply complicate leaving a relationship, as Lisbeth’s story below evidences. According to a study by the United Nations Fund for Population Activities (UNFPA), the Ford Foundation, and the Guatemalan government, in Guatemala

there are a significant number of “early” or “infant/child” unions that, because of the power inequities that sustain them, need to be understood as forced unions.⁶⁵ Research has demonstrated that child unions derail a woman’s ability to determine her own life course, often leading to teen pregnancies, higher rates of interpersonal violence, and lack of control over household resources.⁶⁶

Lisbeth endured physical, emotional, psychological, and sexual abuse at the hands of her husband. The abuse was worse when he was drunk. Her husband was a chronic alcoholic who spent much of the household funds on alcohol; Lisbeth would hide money she earned to use for the family’s essential needs so that her husband would not use it to buy alcohol. Lisbeth filed a complaint against her husband over twenty years ago, which landed him in jail for a few days, but he was quickly released, and the abuse continued to escalate. Lisbeth’s narratives, like those of many asylum seekers we work with, place rape as one abuse among many that show that gender inequality is tolerated in a family and society. In cases where rape is a particularly egregious harm, the narratives are more oriented to substantiating, not membership in a PSG, but rather relief under the Convention Against Torture (CAT). In Lisbeth’s case, the physical and sexual abuse was so intense that her older son assisted her financially and helped build a shack that could be locked from the inside where she could protect herself and the smaller children when her husband was drunk and violent toward them. Sometimes her husband hit the door with a machete, terrifying Lisbeth and her daughter, who were protecting the grandchild and who felt their lives were in danger.

Despite its recent prohibition in Guatemalan law, rape is still used to initiate a forced marriage. Sonia, another applicant, told her attorney that one day when she was taking the bus home, a man got on the bus with her and forced her to get off with him. As they deboarded, he began kicking at her legs to make her keep walking. He forced her inside a house, pushed her onto a bed, and raped her. After the rape, he told her that if she told her family he would hurt them and make them and her disappear. He told her the police would not help her and that he now owned her. He told everyone at work that she was “his woman.” He raped her repeatedly and beat her if she resisted. She felt her life was no longer her own. As time went on, his displays of violence became increasingly public. He forced her to move in with him and became so violent that Sonia regularly feared for her life.

This form of engagement into intimacy had, until changes in gender-based violence law at the end of the 2000s, been enshrined in the Guatemalan Penal Code. The penal code had stated that criminal responsibility of persons accused of the crimes of rape, sexual assault, dishonest sexual abuse, and sexual abduction was to be vacated should there be a “legitimate marriage of the victim with the offending party as long as the victim is older than twelve years old” (Decreto 17-73 §III at 200). Early unions in which girls are younger than eighteen, whether engaged in by forcible intercourse or other means, are defined by the United Nations as contrary to the rights of children.⁶⁷ Early unions, also termed child marriages, have well-documented detrimental health and economic consequences for women, includ-

ing lifetime loss of income,⁶⁸ increased rates of gender-based violence, and higher rates of maternal mortality.⁶⁹ As a result, early unions are explicitly defined as a human rights violation globally and are included in the Fifth Goal of the United Nations Sustainable Development Goals.⁷⁰

Narratives of rape feature particularly large when they are the focus of the PSG, as they typically are for forced marriages like Sonia's or Lisbeth's where rape evidences a history of persecution. Forced marriages, despite having commonalities with early marriages in terms of harm, differ in that forced marriages are socially recognized as a kind of intimate union that takes place in some ladino and Indigenous communities. Alice Y. Taylor et al. found that there are significant social supports for forced marriages that are entrenched in ideas of what women's agency should be and whether parents have agency in the marital choices of their daughters.⁷¹ Menjívar defines *robada* as a cultural practice where "women are being 'taken' or 'stolen' as part of courtship" and where the relationship becomes one of "extreme control over their bodies, social relations, and physical movement; [and there is] a social premium on their honor and 'good behavior,' the expectation that they will be partnered and be mothers, and the devaluation of their suffering and their lives more generally."⁷²

According to Kim Thuy Seelinger, while most forced marriage cases originate on the African continent, Guatemala is the most common country for asylum claims of forced marriage in the Americas.⁷³ Some studies suggest that, in general, 10 percent of Guatemalan women enter intimate partnerships before the age of fifteen and that this figure is 13 percent for rural Guatemala women.⁷⁴ Generally, 29 percent of Guatemalan women are engaged in unions before they are eighteen. Beyond Guatemala, 34 percent of Honduran women, 24 percent of Salvadoran women, and 35 percent of Nicaraguan women are in intimate unions before they turn eighteen.⁷⁵ International advocates and analysts find that poverty, discriminatory gender norms toward women, and unenforced laws are key causes for the phenomenon of early unions.⁷⁶

Gendered targeting is defined through a woman's relationship even in forced marriage PSGs, such as *robadas*, that are characterized by forcible intercourse as marriage initiation and rape as a central form of persecution. Establishing gender-based targeting in PSGs beyond forced sex is much more difficult given the instability in changing case laws since 2016, which has increased the burden on experts to substantiate legal and cultural norms that define women's status in their home countries.

Rape and LGBTQ+ Cases

Expert witnesses in LGBTQ+ cases conduct research that includes documenting how individuals would be perceived as gender nonconforming in their home country, the types of violence they would likely be targeted with, and why perpetrators would be motivated to harm the individuals. In the over one hundred LGBTQ+ affidavits the first author of this chapter has completed, all

the applicants had experienced sexual violence or feared future sexual assault.⁷⁷ Vulnerability to sexual assault is embedded in the precedential cases discussed above that recognized sexual orientation and gender identity as bases for PSGs. There is a strong presumption that when LGBTQ+ persons, especially male homosexuals and transgender women, are sexually assaulted, these attacks are motivated by their sexual orientation or gender identity. Sexual assault, in these cases, often serves to confirm the applicant's membership in a sexuality-based PSG. For example, in a hearing for a gay man who had been sexually assaulted by gang members, the Department of Homeland Security (DHS) attorney asked the expert whether gang members also regularly attacked women. The apparent objective of the attorney was to challenge the nexus between the man's sexual orientation and the assault by asserting equivalence between the harm he suffered and the sexual assault of women, a harm frequently minimized and treated with skepticism in immigration courts.⁷⁸ Casting doubt on the motivations of the perpetrators, in this instance, was a tactic to undermine the applicant's claim to be a sexual minority.

In the over three hundred affidavits we have collectively completed, cisgender, heterosexual men are uniquely the perpetrators of sexual violence against women and sexual minorities in the countries on which we focus. An expert witness in LGBTQ+ cases must explain that not all same-sex activity is considered gender non-conforming; men may maintain their heterosexual status if they are the aggressors in sexual assaults on male-assigned sexual minorities. In other words, vulnerability to sexual assault is a characteristic that differentiates gay men and transgender women from heterosexual men. The definition of homosexuality in the United States is distinct from how it is viewed in some Latin American countries. In a recent study of sexual behavior in the U.S., the researchers found that participants were likely to characterize men as homosexual after only one same-sex encounter.⁷⁹ Contrarily, in some Latin American countries, men who have sexual contact with other assigned males are not necessarily considered homosexual. Patriarchal norms that legitimate male violence against women also permit heterosexual men to degrade and punish perceived gender-nonconforming males by sexual assault.⁸⁰ In the cases that the first author of this chapter works on, perceived male homosexuals and transgender women are routinely raped by men who identify and are perceived as heterosexual. These cases suggest that in some cultures there is not a meaningful distinction between homosexual men and transgender women, who are similarly stigmatized as passive, effeminate, and penetrated men who have rejected the proper role of the male. Perpetrators use similar pejorative language in their physical and sexual assaults on both groups. Perceived male gender non-conformity is sharply defined as "other," a view shared by the immigration attorney Michael Jarecki: "There's just a heteronormative understanding of lifestyle in a lot of these countries and then there's other. And that other can be everything else. . . . [T]hat's all grouped together as gay, not normal."⁸¹

In practice, the acknowledgment that sexual assault is a harm that distinguishes male homosexuals and transgender women from heterosexual men functions to confirm status within a sexuality-based PSG. This was the situation in a case in which the applicant identified as a heterosexual man but was perceived to be homosexual by his community and gang members. In his hometown, he was publicly harassed for being homosexual because of his appearance and his relationships with gay men. Gang members attempted to force him to collaborate in criminal acts and, because he refused, tortured and repeatedly sexually assaulted him. During these assaults, gang members called him pejorative names for homosexual men and threatened to kill him and his family if he reported the assaults. For the immigration judge, the serial rapes were the main evidence that the applicant was perceived as homosexual, overriding information that might have indicated otherwise, including his heterosexual relationship and children in another town where there were no accounts that he was perceived as homosexual. The judge decided that the sexual assaults were perpetrated because of the applicant's imputed status as a homosexual and granted asylum.

Researchers regularly argue that a factor that facilitates the asylum cases of homosexual men and transgender women is that the harm they experience regularly occurs in the public realm and is perpetrated by public actors, including government officials. Cisgender women, including lesbians, contrarily, are more likely to be targeted with violence by private actors in the private, domestic sphere and therefore face greater challenges in their asylum claims.⁸² The asylum system does privilege public harm, often recognizing it as evidence that the government does not protect a societal group. In the precedential cases for the establishment of sexuality-based PSGs, for example, the perpetrators of the applicants' sexual assaults were government officials, thus meeting the two prongs of persecution: serious harm and governmental complicity or acquiescence in the harm. But even in cases in which homosexual men and transgender women are sexually assaulted by private actors, immigration judges are still more likely to grant asylum than in cases of cisgender women who face similar violence. In the above case, while the applicant did endure public denigration because of the perception that he was gay, he was granted asylum on account of persecution carried out by gang members who are private actors. Another example is the case of a transgender woman who was sexually assaulted by family members. In this case, the applicant, who identified and was perceived as a gay male in her home country, was physically and emotionally abused by her parents and regularly raped by her uncle. Her uncle told her she was his property and threatened to kill her if she told anyone about the assaults. When she attempted to report the sexual assaults to the police, they refused to help her. The expert presented evidence on gender norms that condone violence against gender-nonconforming persons, information on the assault and murder of LGBTQ+ persons, and documentation that security officials refuse to assist

sexual minorities and perpetrate violence against them. The judge determined that, although the sexual assaults were committed by a family member in the domestic sphere, they were motivated by the perceived sexual orientation of the applicant and granted asylum.

Lesbians are sexual minorities who precariously are also women. Affidavits in lesbian asylum cases typically include information on the status of sexual minorities as well as documentation of gender-based violence against women. While it might seem reasonable to argue that lesbians, who are at the intersection of homophobic and gender-based violence, are more vulnerable to persecution, in fact, their status as women is regularly ignored in asylum hearings.⁸³ In the debriefing after an asylum hearing for a lesbian, the first author of this chapter asked the applicant's attorney why none of the information on gender-based violence was addressed; the attorney explained that "judges don't care about gender-based violence." Lesbians' status as women, however, still has an impact on the outcomes of their cases. According to recent research analyzing the outcomes of asylum cases for gay and bisexual men and lesbians, though lesbians were more likely to report sexual violence in their asylum applications, they were more than twice as likely to fail in their claims than male sexual minorities.⁸⁴ Lesbians' status as a sexual minority is also regularly challenged because, like women in general, they are more likely to experience persecution by private actors, often family members. Because of repression, lesbians may mask their sexual orientation, making it more difficult for them to establish intimate relations with other women, evidence frequently required in asylum hearings, and to have engaged in heterosexual relationships with men, sometimes coerced or forced, which judges may interpret as invalidating their credibility as members of a sexual minority.⁸⁵ Lesbians, in fact, are invisible in their home countries and in research on sexual minorities carried out by national entities, the U.S. State Department, and the United Nations, all of which overwhelmingly focus on gay men and transgender women.

The lack of documentation on the specific status of lesbians is a serious impediment in preparing for an asylum hearing and the reason that lesbians are somewhat awkwardly included in a generic "homosexual" PSG that is framed around the experiences of homosexual men and transgender women.⁸⁶ An example is the 2020 *Xochihua-Jaimes v. Barr* case.⁸⁷ Ms. Xochihua-Jaimes is a lesbian who was repeatedly raped as a small child by family members and as a teenager, by a teacher who impregnated her. As a young woman, she began a relationship with a prominent leader in the Mexican Zeta drug cartel who continually raped her. She had several children as a result of this coerced relationship. He beat her, threatened to kill her, raped her twelve-year-old daughter, and mobilized other Zeta cartel members, including members of his family, to attack her. She was not eligible for asylum, but judges did evaluate her situation based on the Convention Against Torture. In determining the likelihood of future torture, it was her

status as a sexual minority that was cited, not her status as a woman, despite the fact that at the time of her hearing Mexico was well documented as one of the most dangerous countries in the world for women because of high rates of sexual assault and femicide.⁸⁸ Instead, adjudicators framed her risk of future torture through the precedential *Avendando-Hernandez* case, which, as noted above, concerned a transgender woman. They wrote, “Even if Los Zetas did not find her, Petitioner is at heightened risk throughout Mexico on account of her sexual orientation. Extensive record evidence demonstrates that LGBTQ+ individuals are at risk throughout Mexico.” The judges determined that the serial rapes she endured over many years constituted torture on account of her sexual orientation, also citing *Avendano-Hernandez*: “Rape and sexual assault may constitute torture, and ‘certainly rise to the level of torture for CAT purposes’ when inflicted due to the victim’s sexual orientation.”⁸⁹ To offer Ms. Xochihua-Jaimes protection, adjudicators ignored her status as a cisgender woman and instead incorporated her in a sexuality-based PSG framed through the experiences of a transgender woman.

CONCLUSION

The weight or relevance given to rape in asylum claims differs depending on whether it is defined as gender-based or sexuality-based targeting. By looking at relevant case law and our own work as experts in asylum cases, we argue that in practice asylum adjudication ascribes women and sexual minorities distinct collective identities, or PSGs, that reframe the weight given to rape based on the identity of the target. Gender-based and, in particular, domestic violence cases in which women are raped in their intimate partnerships, have a high degree of variance in decisions that determine the merit of gender-based violence. We attribute this differential assessment of the harms of rape to two coexistent processes. First, it is a result of the ways that law and legal practice reproduce prevailing U.S.-based cultural assumptions of rape that theorists of rape have actively debunked. Second, courts in the U.S. have been unwilling to define gender—or at least “women”—as the defining feature of a social group but have made it clear that sexual minorities—including those defined by variance from the gender binary—are to be considered a social group. As a result, experts working on LGBTQ+ and gender-based violence cases for women are tasked with different work. To evidence gender-based targeting, rape as persecution is insufficient evidence that a cisgender woman was targeted because of her gender, so experts must engage with explaining the country’s gender-based violence laws, cultural conditions of discrimination against women, and the application of laws that protect women in society, as well as prevailing normative expectations, including those that are opposed by the applicant, among other conditions that pattern the applicant’s particular targeting. For LGBTQ+ cases, rape is central to evidencing the PSG itself.

NOTES

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11. Rome Statute of the International Criminal Court (1998).
12. Belém do Pará Convention 33 I.L.M. 1618 (1994).
13. Inter-American Convention on Human Rights (1969), entered into force July 18, 1978.
14. The Inter-American Court of Human Rights has an active archive of cases and hearings organized by country and topic that may be of use to experts and attorneys.
15. CIDH, Nov. 19, 2015.
16. 8 U.S.C. §1101(a)(42)(A).
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19. Lazo-Majano v. INS, 813 F.2d 1432 (1987).
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21. Fatin v. INS, 12 F.3d 1233 (1993).
22. Matter of Kasinga, 21 I&N 357 (BIA 1996).
23. *Ibid.*
24. Karen Musalo and Stephen Knight, "Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions," *Westlaw* (Dec. 2003): 1–25.
25. Matter of R-A-, 22 I&N Dec. 906 (A.G. 2001; BIA 1999).
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27. Federal Regulation Asylum and Withholding Definitions.
28. Matter of R-A-, 24 I&N Dec. 629 (A.G. 2008).
29. Musalo and Knight, "Asylum for Victims of Gender Violence."
30. Blaine Bookey, "Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012," *Hastings Women Law Journal* 24:1 (2013): 107–48; Fatma E. Marouf, "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group,' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender," *Yale Law & Policy Review* 27:1 (2008): 47–106.

31. Bookey, "Domestic Violence as a Basis for Asylum," 130.
32. *Matter of A-R-C-G-*, 26 I&N Dec 388 (2015).
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34. *Ibid.*
35. Jin S. Park, "Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians under U.S. Immigration Policy," *UCLA Law Review* 42 (1995): 1115–56; Margo Canady, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009).
36. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (1990).
37. *Pitcherskaia v. INS*, 118 F.3d 641 (1997), is a precedential case for a Russian lesbian in which it was determined that the applicant does not have to demonstrate that the perpetrator intended to harm or punish her for the harm to rise to the level of persecution. The woman was forced to undergo electroshock treatment to "cure" her of her homosexuality.
38. *Hernández-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).
39. *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003).
40. Immigration Equality, "Challenging Asylum Cases," n.d.; Apphia Kumar, "I Was the First Bisexual Person Granted Asylum in the U.S.: A First-Person Account for #BiWeek," *glaad*, Sept. 20, 2017.
41. *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005); Stefan Vogler, "Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims," *Law & Society Review* 50:4 (2016): 856–89.
42. *Hernández-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).
43. *Avendano-Hernandez v. Lynch*, No. 13–73744 (9th Cir. 2015).
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