Case Comment

Punishing Masculinity in Gay Asylum Claims

In re Soto Vega, No. A-95880786 (B.I.A. Jan. 27, 2004).

Does a homosexual asylum seeker need to prove he is "gay enough" to win protection from a U.S. court? Increasingly, and troublingly, the answer is yes. In *In re Soto Vega*,[1] the Board of Immigration Appeals (BIA) denied a gay man's application for asylum because he appeared too stereotypically heterosexual. The decision is representative of a trend in immigration law to equate visibility with the potential for antihomosexual persecution.

This Comment argues that visibility should be irrelevant in sexual-orientation-based asylum cases. As I discuss in Part I, cases such as *Soto Vega* punish homosexuals who "cover" their sexual identity and reward those who "reverse cover," or act more visibly "gay." This system of incentives is inconsistent with the purpose and structure of asylum law for at least two reasons. First, as I argue in Part II, covering one's sexual orientation is a natural response to homophobic persecution. Thus, the visibility requirement punishes asylum applicants for exhibiting a symptom of persecution and is therefore inconsistent with the fear-based standard of asylum. Second, the visibility requirement assumes that conspicuous homosexuals have fundamentally different identities than inconspicuous homosexuals, such that they constitute a different social group for asylum purposes. This belief is grounded in a performance-as-identity model—suggesting that identity is determined by behavior rather than by immutable characteristics. As I argue in Part III, however, asylum law protects homosexuals on the basis of their immutable sexual orientation and thus precludes the performance-as-identity model.

1. No. A-95880786 (B.I.A. Jan. 27, 2004). The Ninth Circuit has agreed to hear *Soto Vega* on appeal. Soto Vega v. Ashcroft, No. 04-70868 (9th Cir. filed Oct. 25, 2004).

I

Under the Refugee Act of 1980, a successful asylum applicant must establish a "well-founded fear of persecution on account of" a protected characteristic, which includes "membership in a particular social group."[2] The BIA's decision in *In re Toboso-Alfonso*,[3] later made binding precedent by then-Attorney General Janet Reno,[4] designated homosexuals as a "particular social group" within the meaning of the Act. Since then, several hundred applicants have been awarded asylum based on sexual orientation.[5]

Applying the "well-founded fear" standard, the BIA recently denied the asylum application of a thirty-three-year-old gay man, Jorge Soto Vega, adopting in full the opinion of the immigration judge (IJ).[6] While accepting that Soto Vega was homosexual, the IJ reasoned that he was not stereotypically gay enough to objectively fear identification as such, remarking that "I didn't see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays."[7] In other words, Soto Vega's homosexuality was invisible to an ordinary person with no prior knowledge of it: "[I]t would not be obvious that he [is] homosexual unless he made . . . it obvious himself."[8] Based on this lack of visibility, the IJ concluded that Soto Vega had failed to "demonstrate[] a reasonable fear of future persecution"[9] on the basis of his homosexuality, and therefore denied asylum.[10] Other recent IJ opinions that have been affirmed by the BIA and federal courts echo, albeit more subtly, the *Soto Vega* IJ's reasoning.[11]

2. 8 U.S.C. § 1101(a)(42)(A) (2000).

3. 20 I. & N. Dec. 819 (B.I.A. 1990).

4. *Reno Designates Gay Case as Precedent*, 71 INTERPRETER RELEASES 859 (1994) (discussing Att'y Gen. Order No. 1895-94 (June 19, 1994)). This decision is binding on asylum offices, immigration courts, and the BIA, but not on federal courts.

5. 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 13 & n.10 (2d ed. 2000) [hereinafter HANDBOOK], *available at* http://www.lgirtf.org/handbook.html.

6. *In re Soto Vega*, No. A-95880786.

7. *In re* Soto Vega, No. A-95880786, at 3 (Immigration Ct. Jan. 21, 2003).

8. *Id.* at 5.

9. *Id*. at 3.

10. *Id*. at 6. Specifically, because of his ability to disguise his sexuality, Soto Vega failed to show that the threat of homosexual persecution that he faced existed countrywide. *See In re* R-, 20 I. & N. Dec. 621 (B.I.A. 1992) (holding that an applicant is expected to avoid persecution by moving within his own country); 8 C.F.R. § 208.13(b)(1)(i)(B) (2004) (same).

11. *See, e.g.*, Abdul-Karim v. Ashcroft, 102 Fed. Appx. 613 (9th Cir. 2004). The IJ denied asylum despite recognizing that effeminate Lebanese gay men may be in danger of persecution—noting that "Lebanese soldiers . . . would seek out and arrest individuals . . . for acting effeminate or on the 'gay side.'" *In re* Abdul Karim, No. A-72661821, at 9 (Immigration Ct. June 11, 1998).

Jorge Soto Vega freely admitted his homosexuality in both the United States and his native Mexico but, in the eyes of the IJ, skillfully concealed his orientation on a day-to-day basis—in essence, by acting "normal" rather than "queer." This is homosexual covering: the process by which gay individuals alter their conduct by, for example, displaying only gender-typical traits to allow others to ignore their sexual orientation.[12] Reverse covering, on the other hand, occurs when "[s]traights . . . ask gays to perform according to stereotype."[13] The demand that gay asylum applicants reverse cover in order to obtain asylum is eerily explicit in *Soto Vega*.

In articulating a demand to reverse cover, *Soto Vega* is not an outlier so much as the continuation of a disquieting trend in sexual-orientation-based asylum law. The case employs elements of the reasoning used in the landmark decision *Hernandez-Montiel v. INS*, in which the Ninth Circuit distinguished between subsets of the Mexican homosexual population.[14] The court granted the asylum application of a man who began dressing and acting like a woman at age twelve.[15] It characterized his "'particular social group'" as "[g]ay men with female sexual identities," which it called a "subset of the gay male population,"[16] and based its decision on the claim that female-acting homosexual men are subject to higher levels of abuse than male-acting homosexual men.[17] The Ninth Circuit has since reconfirmed this reasoning, in *Reyes-Reyes v. Ashcroft*.[18]

The court's conclusion that such persecution was not "a reasonable possibility," *id*., suggests that, in the IJ's view, Abdul-Karim did not act effeminate enough for it to be a concern.

12. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002). Yoshino notes that gay men can cover their sexuality by abstaining from sodomy, not engaging in public displays of same-sex affection, displaying only gender-typical traits, being straight-culture focused, refraining from gay activism, prioritizing other identities over their gay identity, allying with straight people and the mainstream, and being single or secretly coupled. *Id.* at 842-48.

Soto Vega was penalized not only for his gender-typical appearance but for the other ways in which he covered. His failure to engage in gay activism, for example, prevented him from claiming political asylum. *Cf.* HANDBOOK, *supra* note 5, at 38-39.

13. Yoshino, *supra* note 12, at 909.

14. 225 F.3d 1084 (9th Cir. 2000).

15. *Id*. at 1095 & n.7.

16. *Id*. at 1094.

17. *Id*. at 1089; *see also* Jason Cox, Casenote, *Redefining Gender:* Hernandez-Montiel v. INS, 24 HOUS. J. INT'L L. 187, 190-91 (2001) (reporting testimony that "'female' acting homosexuals are subjected to higher levels of abuse and ostracization than 'male' acting homosexuals").

18. 384 F.3d 782, 785 (9th Cir. 2004) (holding that the BIA improperly denied a gay man relief under the Convention Against Torture because his "female sexual identity" and "a characteristically female appearance, mannerisms, and gestures" would clearly subject him to abuse in El Salvador). Although Reyes-Reyes, like Hernandez-Montiel, was arguably transgendered, *see* Bob Egelko, *Court Says Transgender Man Can Apply Again for Asylum*, S.F. CHRON., Sept. 14, 2004, at B4, the court clearly did not understand him as such, *Reyes-Reyes*, 384 F.3d at 785 (describing his "homosexual orientation"). Instead, the case operates within the legal framework of homosexual asylum, and the court regarded the applicant *as if* he were an effeminate gay man rather than a transgendered individual.

In granting asylum to an effeminate gay man precisely *because* he was so effeminate, the *Hernandez-Montiel* court rewarded reverse covering. Standing alone, that decision said nothing about gay men who did cover; effeminacy simply helped to articulate the social group narrowly.[19] But when the IJ in *Soto Vega* actually punished covering, the other shoe dropped. Taken together, *Hernandez-Montiel* and *Soto Vega* suggest that courts perceive gay asylum applicants on a covering spectrum stretching from those who "act straight," or cover, to those who "act gay," or reverse cover. Grants of sexual-orientation-based asylum increasingly depend on where the applicant lies on this covering spectrum. *Soto Vega* involved a gay man with a male sexual identity who was thus denied asylum. In *Hernandez-Montiel* and *Reyes-Reyes*, on the other hand, the applicants were effeminate, and so the courts looked on them more favorably.[20]

The rest of this Comment will argue that the covering-spectrum framework incorrectly assumes that homosexual men who cover are less vulnerable to persecution and unjustifiably treats gays who cover as a social group distinct from those who don't.

II

The covering spectrum is fundamentally about visibility. Among asylum applicants, those who do not or cannot cover are more visibly gay, and are thus seen as more vulnerable to persecution and ultimately more deserving of asylum than those who cover. The visibility requirement is neither unique to asylum law[21] nor, within it, to sexual-orientation-based asylum. Of the four enumerated grounds for asylum—race, nationality, religion, and political opinion[22]—the last two are likely to be invisible characteristics. Yet political asylum cases have considered it important that an individual was "a highly visible member" of the party or group whose

19. *See* Cox, *supra* note 17, at 201 (arguing that the court was simply "refin[ing] the definition" of the homosexual social group "to include an obscure subset" of it).

20. The covering spectrum exists regardless of whether *Hernandez-Montiel* is read as treating the applicant's effeminacy as a fundamental aspect of his gay sexual identity, *see* 225 F.3d at 1093. Demands to cover are harmful precisely because, as the court says in *Hernandez-Montiel*, "[s]exual identity . . . manifests itself outwardly," *id.*; *see* Yoshino, *supra* note 12, at 778. Even if effeminacy is a fundamental aspect of some gay men's identity, this does not mean that those men cannot, with pain and difficulty, cover.

21. Visibility also plays a role in assessing constitutional rights. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (articulating factors influential in determining the appropriate tier of Fourteenth Amendment scrutiny, among them the "high visibility" of the characteristic).

22. 8 U.S.C. § 1101(a)(42)(A) (2000).

opinions were disfavored.[23] Similarly, for religious asylum, courts have considered whether the petitioner's religion can be "readily identified."[24] Importing this reasoning to the ill-defined social group category,[25] courts have observed that, like "race, religion, nationality and political opinion[,] the attributes of a particular social group must be recognizable."[26]

Visibility is not an independent requirement for asylum but a means of ascertaining whether persecution occurs "on account of" the protected characteristic.[27] In asylum cases, a nexus must exist between an asylum applicant's persecution and his protected characteristic. To satisfy this requirement, courts have suggested that at a minimum, it is necessary that "the persecutor could become aware" of the protected characteristic.[28] Visibility is the most obvious and convenient way of showing that this possibility exists. Thus, in cases such as *Reyes-Reyes*, appearance becomes the requisite nexus between fear of persecution and homosexuality.[29]

It seems superficially reasonable to conclude that, for a gay individual who appears and acts heterosexual, sexuality will never trigger persecution. However, well-founded *fear* of persecution is the central inquiry in any asylum claim. Denying asylum to gays who cover overlooks the possibility that they hide their sexual identity out of fear of the persecution that would result if they did not. For many homosexuals, gay visibility is inversely related to fear; when fear increases, visibility decreases.[30] A study of homosexual persecution in Egypt documents how an increasing public awareness that "colored underwear, long hair, and tattoos were all telltale signs" of homosexuality led the gay community to avoid these things.[31] In

23. Ganut v. Ashcroft, 85 Fed. Appx. 38, 38 (9th Cir. 2003); *see also* Corado v. Ashcroft, 384 F.3d 945, 946 (8th Cir. 2004) (observing that the applicant was a "visible member of an opposition political party").

24. Singh v. Ilchert, 801 F. Supp. 313, 321 (N.D. Cal. 1992).

25. Castellano-Chacon v. INS, 341 F.3d 533, 546 (6th Cir. 2003) ("[The definition of a social group] remains elusive and inconsistent. The circuits that have taken a position on this issue have adopted overlapping definitions . . . .").

26. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

27. 8 U.S.C. § 1101(a)(42)(A); *see also* Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992) ("[T]he victim needs to show the persecutor had a protected basis (such as the victim's political opinion) in mind in undertaking the persecution.").

28. *In re* Mogharrabi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987); *cf.* Najafi v. INS, 104 F.3d 943, 949 (7th Cir. 1997) ("[W]e do not require evidence that the Iranian government has taken prior notice of Najafi.").

29. Reyes-Reyes v. Ashcroft, 384 F.3d 782, 785 (2004) ("[H]e will be discriminated against, abused, raped, or possibly even killed *because of his appearance* and sexual orientation." (emphasis added)).

30. Scholars have long realized the propensity of homosexuals to become less conspicuous when the going gets tough. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 731 (1985) ("[S]ecrecy does enable homosexuals to 'exit' from prejudice . . . .").

31. HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT'S CRACKDOWN ON HOMOSEXUAL CONDUCT 18 (2004). One young gay man believed he would avoid arrest because, according to these factors, "my friends and I thought we were not

another case, fear of persecution led a homosexual couple in Bangladesh to "conduct[] themselves in a discreet manner,"[32] because being conspicuous would lead to "the possibility of being bashed by the police."[33] In these cases, invisibility, not visibility, serves as a nexus between the individual's fear of persecution and his homosexuality.[34]

When covering is the result of fear,[35] denial of asylum based even in part on gay visibility contravenes the central goal of asylum law. Sexual-orientation-based asylum seeks to protect a person's right to be homosexual when threatened by fear of official persecution.[36] If we accept that covering is burdensome for gay individuals,[37] any voluntary assumption of this burden is then arguably evidence that a well-founded fear exists.

Covering motivated by fear—what I call "reactionary covering"—is, in fact, more than mere evidence of fear of persecution: It constitutes persecution. Although the cases discussed thus far have dealt with "gay" traits (such as effeminate dress or bearing), "gay" acts (such as homosexual sex) can also reveal one's sexual orientation. As a result, covering can lead to the avoidance of all emotional and physical contact with the same sex, both public and private. When fear forces a gay individual to live like a straight one, covering approaches outright conversion, which has been seen by American courts as persecution that meets the fear-based standard.[38] The High Court of Australia has taken the next logical step and recognized reactionary covering as grounds for granting asylum.[39] Treating covering as

effeminate." *Id*. at 19 (internal quotation marks omitted). Generally, "men who had sex with men rarely rendered themselves . . . conspicuous." *Id.* at 18.

32. Appellant S395/2002 v. Minister for Immigration & Multicultural Affairs (2003) 203 A.L.R. 112, 117 (Austl.) (internal quotation marks omitted).

33. *Id*. at 125 (internal quotation marks omitted).

34. Asylum requires a showing of both subjective and objective fear. Covering to avoid persecution clearly demonstrates that "an applicant ha[s] a genuine concern that he will be persecuted," Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997), meeting the subjective test. The objective test asks if a reasonable person would experience similar fear, Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir. 1993), and requires further examination of what motivated the applicant's covering.

35. *See Appellant S395/2002*, 203 A.L.R. at 123 ("In many—perhaps the majority of—cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm.").

36. Threatened persecution must be "by the government or by a group which the government is unable to control." McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981).

37. Yoshino argues that covering burdens not only action but homosexual identity itself. Yoshino, *supra* note 12, at 778.

38. In *Pitcherskaia v. INS*, demands on an female asylum applicant to convert rose to the level of persecution when the Russian government "registered her as a 'suspected lesbian' and told her she must undergo treatment" and when her "ex-girlfriend was . . . subjected to electric shock treatment and other so-called 'therapies' in an effort to change her sexual orientation." 118 F.3d at 644; *cf.* Yoshino, *supra* note 12, at 778 ("[W]e cannot assume that acts of covering are always less severe than acts of conversion.").

39. *See Appellant S395/2002*, 203 A.L.R. at 117 (holding that, for Bangladeshi homosexuals, "the need to act discreetly to avoid the threat of serious harm constituted persecution"). *Appellant*

grounds to *deny* asylum, as in *Soto Vega*, is a troubling anomaly that needs to be undone.

III

That the visibility requirement for sexual-orientation-based asylum overlooks the possibility of reactionary covering is reason enough to abandon it. More fundamentally, however, the problem with the visibility requirement is that it conceptualizes homosexual identity in a way that is inconsistent with the immutability element of asylum law. In *Soto Vega* and other cases that apply the covering spectrum, judges assume that sexual orientation is expressed through action—through the doing of all those "stereotypical things that society assesses to gays."[40] In placing applicants along a covering spectrum, the absence of gay behavior becomes indicative of a fundamental difference in gay identity.

Within the framework of asylum law, however, one is either gay or not. Homosexuality is not treated as a behavior that is subject to gradations, but as an immutable trait. Several circuits, along with the BIA, have held that an immutable characteristic is sufficient to establish a particular social group.[41] It is on this basis that homosexuals are recognized as a particular social group: homosexuality is immutable.[42] An immutability-based legal standard for those persecuted on the basis of their sexual orientation must recognize that while some gay people are capable of resisting *any* expression of that orientation, they are still gay and not necessarily immune from fear of persecution.

While the link between action and identity has been emphasized in other contexts,[43] it has no place in sexual-orientation-based asylum. A

S395/2002 corrected the requirement to cover that had been repeatedly imposed on asylum applicants by the Australian lower courts. *See* Jenni Millbank, *Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation*, 18 GEO. IMMIGR. L.J. 71, 95 (2003) (concluding that of Australian homosexual asylum cases from 1994 to 2000, "one-third . . . raised the issue of secrecy (or 'discretion') and one-fifth expressly *required* it of applicants in returning them to their home countries").

40. *In re* Soto Vega, No. A-95880786, at 3 (Immigration Ct. Jan. 21, 2003).

41. *See, e.g.*, Lukwago v. Ashcroft, 329 F.3d 157, 171 (3d Cir. 2003); Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000); Mya Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998); Meguenine v. INS, 139 F.3d 25, 27 n.2 (1st Cir. 1998); *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

42. *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 823 (B.I.A. 1990).

43. *See, e.g.*, Judith Butler, *Imitation and Gender Insubordination*, *in* THE LESBIAN AND GAY STUDIES READER 307, 317 (Henry Abelove et al. eds., 1993) (arguing that sexuality, by means of gender, "is a performance that . . . *produces* on the skin, through the gesture, the move, the gait (that array of corporeal theatrics understood as gender presentation), the illusion of an inner depth").

"performative model"[44] of identity would suggest that someone cannot be eligible for asylum on the grounds of sexual orientation unless he manifests his orientation through his appearance or behavior. This is not how homosexuality has been treated in asylum law. In *In re Acosta*, the BIA defined an immutable characteristic as one that individuals "either cannot change, or should not be required to change."[45] It is their core sexual identity, separate from action, that immigration courts have long recognized the inability of gay men to change.[46] When courts deny asylum to gay individuals who do not act gay, using a performative model, they wrongly assume that homosexual identity is constituted by action.[47]

When gender-conforming homosexuals are less intensely persecuted in a specific country, it does not negate the fact that they are fundamentally persecuted for their homosexuality.[48] Crucially, immutable homosexual identity is distinct from social perception of what is "gay." A performative model contravenes the immutability standard because it relies on variable social and cultural perceptions[49] of what actions characterize homosexuality. American courts, driven by the immutability requirement, should focus on that which is temporally and culturally constant—an applicant's core homosexual identity. The sexual identity that asylum law seeks to protect is unchanged by covering and unrelated to visibility.

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44. Yoshino, *supra* note 12, at 871 (explaining that "one's identity will be formed in part through one's acts and social situation").

45. 19 I. & N. Dec. at 233.

46. *See, e.g.*, *In re* S-, 8 I. & N. Dec. 409, 413-14 (B.I.A. 1959) (rejecting the idea that if a homosexual is "seek[ing] treatment" then he is somehow changed and no longer a homosexual).

47. Treating homosexual behavior as equivalent to homosexuality implies that heterosexual individuals who act gay should be eligible for sexual-orientation-based asylum. Surprisingly, a federal court has drawn that very implication. *Amanfi v. Ashcroft* involved a heterosexual asylum applicant from Ghana who escaped human sacrifice in a religious ceremony by purposefully "engag[ing] in a homosexual act," thus rendering himself "unclean"; he claimed to have been subsequently persecuted on the basis of his perceived homosexuality. 328 F.3d 719, 723 (3d Cir. 2003). Accepting the possibility that a heterosexual—as a result of one isolated action—might deserve asylum as a "homosexual," the court remanded the case for further consideration. It is a strange state of affairs when heterosexuals—by reverse covering—are eligible for sexual-orientation-based asylum while some homosexuals are not. *But cf.* Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. (forthcoming Feb. 2005) (arguing that perceived homosexuality and adopted gender-atypical behavior should be protected under the homosexual social group standard).

48. For example, a study found that among imprisoned homosexuals in Egypt, masculine gay men were subject to comparatively less abuse. One such man reasoned that it was because "I have muscles, I look like a man. The guards respected me." HUMAN RIGHTS WATCH, *supra* note 31, at 33. By contrast, an effeminate man was "treated especially badly by everybody—the officers, other prisoners." *Id.* at 39. Regardless, both men were jailed due to their homosexuality.

49. Hernandez-Montiel v. INS, 225 F.3d 1084, 1089 (9th Cir. 2000); *see also* HUMAN RIGHTS WATCH, *supra* note 31, at 97 ("Police single out suspects on the basis of a battery of stereotypes: . . . ways of dressing, walking, talking . . . . [T]he law helps *create* something like a sexual identity." (internal quotation marks omitted)).