

The Double Bind of Transgender Asylum Claims: A Critical Intervention

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ABSTRACT

This paper explores transgender asylum claims as a means of assessing the law's ability to better the life chances of the transgender community. Rights discourse lies at the intersection of human rights and critical legal studies; therefore, this analysis allows for a meaningful pathway of change to be made moving forward.

This project draws on analysis of competing ideas surrounding the use value of rights and a case study of twenty-first century trans litigation. It is the hope that this work will illustrate the ambivalence of rights discourse.

INTRODUCTION

Asylum cases based on sexual orientation, and their differing outcomes, allow for a study of variation pertaining to transgender status. Therefore, this paper asks how claiming asylum affects the legal personhood and rights of transgender individuals. More specifically, do these claims improve or worsen the status of transgender individuals within the political community? By focusing on claims, the petitioner's country of origin, and the United States' norms, the picture of a successful asylum claim should rise to the surface. Examining the results will allow me to dive into my particular interest of whether or not the expansion of rights under the law are truly emancipatory. It is my hypothesis that these cases have been disproportionately beneficial to the state to solidify notions of gender identity, raising questions about the most beneficial way to move forward. While recognizing the limitations of rights, I hope to illuminate the possibility afforded to us by making visible the inner workings of the state. What becomes of our strategies with a critical framework in mind?

METHODS AND MATERIALS

I will address these questions by examining the existing body of work on transgender litigation and activism, focusing on why some authors find transgender litigation promising for questioning existing definitions of sex and gender in law.

I will begin by engaging with theorists who believe in the

I will turn to an analysis of case law pertaining to transgender asylum to the United States. All of my cases come from the post *Hernandez-Montiel* (2000) period and revolve around plaintiffs whose home country is Mexico.



Figure 1: Gavel

DISCUSSION

My discussion of theory began with a reading of Taylor Flynn's work to gauge the opinion of a scholar who was optimistic about right's ability to better the life chances of trans people.

From there I looked at the work of both Dean Spade and Wendy Brown as examples of critics of rights. However, while this was the stance that I ultimately believed that I would find the most compelling, I landed on a conclusion that relied on the ambivalence of rights.

Ultimately, it seemed that an understanding of the criticism of rights and institutions lends itself to a more radical notion of how to move forward in enacting change. I found myself compelled by Golder's usage of Foucault's guarantee of futurity. Therefore, when we understand how power is reproduced in the liberal framework, we can create the necessary tools and strategies to work to shatter the perceived norms of man.

CASE STUDY

I revolved my own analysis around three decisions pertaining to transgender asylum claims. All three involved plaintiffs who were citizens of Mexico and transgender women.

Geovanni Hernandez-Montiel v. INS (2000)

Avendano-Hernandez v. Lynch (2015)

Francisco Javier Flores Medina v. Sessions (2018)

Ultimately, in looking at these three cases, I was able to track the change of the law that pertains to these very issues. While the court is slow-moving in its ability to reflect societal change, the actions of the Ninth Circuit demonstrate the kind of radical action necessary to improve the life chances on transgender asylum seekers.

CONCLUSIONS

The LGBTQ community, largely relegated to the margins of society, inherits the possibility born out of a reading of the optimists and critics. Therefore, as we collectively work towards our modern reproduction of "man," we must think about how the dispossessed provide a diagnostic for our attendance to the ambivalence of rights. Only when we engage with rights in a way that highlights both their limitations and entanglement with oppressive power structures, but also their liberatory possibilities can we begin to achieve meaningful change. Transgender asylum cases are only the beginning stages of change, but if we deploy our methodology correctly, they will merely be the beginning of a cascade of difference.

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