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Essentializing Cultures in US Asylum Law

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Essentialing Cultures in US Asylum Law

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INTRODUCTION

Cultural essentialism is the distillation of a community's culture to a few elements that are salient to the outsider—elements typically tied to racist or sexist stereotypes, ignoring the depth and complexity of the culture.[1] Legal advocates perpetuate cultural essentialization in asylum proceedings when they shape the story[2] of the culture in their clients' home countries into the most legally and emotionally palatable case possible. Both immigration legal structures and our broader

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Further, the authors acknowledge that their perspectives on cultural themes are informed by their own cultural, racial, and class identities. Professor Kelley-Widmer identifies as a white woman from a middle class, rural family in upstate New York. Professor McKee identifies as mixed-race Asian American, from the middle class in Oklahoma.

[1] *See, e.g.*, Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 87 (2005) (describing essentialism as "self-defining" and "other-defining," such that the party engaging in essentialism views themselves as lacking the trait they attribute to the essentialized party); *cf.* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (defining gender essentialism as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"); Aaron R. Petty, *Accommodating "Religion,"* 83 TENN. L. REV. 529, 542 (2016) (discussing multiple definitions of "essentialism" and concluding that "[o]verall, essentialist definitions focus attention away from complexities and subtleties").

[2] *See* Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122 (2002) ("Narrative, or storytelling, is the primary means by which we as lawyers advance our clients' causes.").

legal institutions encourage such essentalization.[3] The asylum sphere especially requires compelling, credible stories that tick all the elements and align with precedent, resulting in formulaic, flattened stories.[4] This article seeks to examine and redress this essentialization across asylum cases.

When the Board of Immigration Appeals (BIA or Board) and federal appellate courts find in favor of an asylum seeker, country-conditions evidence that presents a single story[5] plays a significant part in the court's narrative, providing a roadmap for practitioners to prevail in similar cases.[6] Prime examples of such essentialization come from cases involving Islam, where religion is essentialized;[7] cases involving queer applicants, who are pigeonholed into a monolithic "'gay' identity"[8]; and domestic-violence cases originating in Mexico and Central America, where an extensive body of case law entrenches cultural stereotyping,[9] which is exemplified in the case study below. This essentialized reduction of a person's story is harmful in many ways: it perpetuates colonial, racist stereotypes and amplifies the victim-

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[3] *Id.* at 123 ("[O]ur legal institutions, and the courtroom in particular, require that we construct narratives that resonate with well-settled norms, values and attitudes.").

[4] *See* Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 754 (2017) ("[T]he notion of the 'helpless victim' is written into asylum law."); Jessica Mayo, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 WASH. L. REV. 1485, 1496 (2012) (discussing how an attorney must take a client's story and craft it into the form required for an asylum application).

[5] The phrase "a single story" arises from Chimamanda Ngozi Adichie's TED Talk, "The Danger of a Single Story." Chimamanda N. Adichie, *The Danger of a Single Story*, TED (July 2009), https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story [https://perma.cc/F5D8-GKBQ]. In that talk, Adichie discussed how hearing only a single story about a person or country unfamiliar to us can result in critical misunderstandings. But litigation in any area of law typically requires a single story, and this is especially true for asylum seekers, who may be relating a story of a country and culture with which the adjudicator has no experience.

[6] *See infra* Part II for discussion of asylum cases by Latinx women from Mexico and Central America in which courts and/or advocates rely on a story of how these countries are dominated by a culture of "machismo," which results in the subjugation of women.

[7] *See* Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7, 8–9 (2000); Pooja R. Dadhania, *Gender-Based Religious Persecution*, 107 MINN. L. REV. 1563, 1617–18 (2023).

[8] Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims*, 50 LAW & SOC'Y REV. 856, 864 (2016); Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 TULANE J. L. & SEXUALITY 135, 148–50 (2006).

[9] *See infra* Section I.C. (discussing the history of particular social group and claims based on intimate partner violence); Sabrineh Ardalan, *Challenging Stereotypes in Refugee Protection*, 40 B.U. INT'L L.J. 31, 38–39 (2022) (describing how "generalizations about social and political context" in political opinion asylum cases "may inadvertently reinforce harmful stereotypes . . . which in turn may fortify U.S. adjudicators and borders against certain claims").

savior narrative.[10] These harms arise not only when advocates essentialize applicants' experiences, but also when they essentialize cultures[11] in applicants' countries.[12] Applicants, too, are impacted, as they may feel forced to join a narrative, silencing their true perceptions of their cultures.[13]

Further, legal practitioners in the asylum field are in a perilous position, regardless of whether they either comply with or attempt to challenge this system. As advocates, our complicity in this process only furthers the entrenchment of racist and colonial othering. However, adopting a litigation strategy that ignores case law providing essentialized blueprints of a successful story can undermine the client's chances[14] by throwing the case off the predictable path adjudicators expect or crowding the record with legally irrelevant information.

As practicing asylum attorneys in law school clinics, we have been part of the essentializing phenomenon at both the trial and appellate levels. For example, in the case of our client, Berta,[15] our litigation strategy required us to maximize discussion of harmful elements of society in Berta's home country, flattening its cultural landscape into one of danger and repression.[16] When she was a girl of fourteen years in her

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[10] *See, e.g.*, Karla M. McKanders, *Decolonizing Colorblind Asylum Narratives*, 67 ST. LOUIS U. L.J. 523, 525 (2023); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1431–33 (1993); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 525 (1994); Regina Graycar, *Telling Tales: Legal Stories About Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 297, 298 (1996); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L. L.J. 201, 201–02 (2001); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT'L L.J. 141, 188–91 (2015); Nanansi, *supra* note 4, at 754–55.

[11] We refer to "cultures" of an applicant's country or community, rather than the singular "culture," to reflect the multifaceted and overlapping nature of culture rather than to imply uniformity of culture. *See infra* Section I.A. (defining "culture").

[12] For previous scholarly exploration of cultural essentialism in the international human rights legal sphere more broadly, see, e.g., Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUM. 89, 89–90 (2000); Mutua, *supra* note 10, at 216; Michelle A. McKinley, *Cultural Culprits*, 24 BERKELEY J. GENDER L. & JUST. 91, 93 (2009) (also discussing US asylum law).

[13] Akram, *supra* note 7, at 10 (discussing how stereotypes of Islam can silence refugees).

[14] *See* Mayo, *supra* note 4, at 1502, for a discussion of the problematic victim narrative in individual asylum cases. "Regardless of the attorney's misgivings regarding the use of the victim narrative, zealous advocacy requires that the attorney not subvert the client's goals for some higher ideological cause of usurping the victim narrative." *Id.*

[15] "Berta" and other names used in this article are not our clients' real names. Further, the cases described here are either anonymized cases we have litigated or composed of an amalgam of cases we have litigated that share the common characteristics mentioned within.

[16] *See* Weissman, *supra* note 10, at 188–91 (discussing how immigration remedies require demonization of culture through the example of Mexican asylum claims' reliance on "the master narrative of violence associated with Mexico").

Central American hometown, Berta married a man twice her age.[17] Her physically abusive father pressured Berta to accept the older man's proposal despite her reluctance, in part because the marriage would relieve the impoverished nine-person family of one mouth to feed. As soon as she was married, Berta's husband began regularly raping and beating her. So began over a decade of abuse that severely traumatized Berta and ultimately led to her asylum claim in the United States, won on this basis almost exactly twenty years after her marriage.

Berta's story, as condensed above, easily falls into the well-worn pattern of asylum claims relating to domestic violence.[18] To explain why Berta suffered domestic violence in a manner acceptable to the asylum system, we focused on the cultural norm of "machismo" in her Central American country, especially in defining her "particular social group" (PSG).[19] This narrative trope is readily recognizable to immigration adjudicators and advocates alike,[20] and it appears across numerous asylum cases from this part of the world.[21] Further, we argued that Berta's painful history qualified as persecution in part by explaining the cultural forces that both allowed her to be married off so young and then to be entrapped by her new

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[17] This story is from a case that we litigated in immigration court in 2021–22, with identifying details changed or omitted.

[18] See *infra* Section I.C. for a discussion of numerous decisions from the Board of Immigration Appeals and US Circuit Courts of Appeals that address claims involving gender-based domestic abuse of a Latinx woman and the cultural phenomenon of "machismo."

[19] "Particular social group" is one of the five grounds for asylum protection. 8 U.S.C. § 1101(a)(42)(A). We discuss this ground in detail. *See infra* Part II.

[20] *See* Mayo, *supra* note 4, at 1498 ("The search for narrative coherence and fidelity leads to the creation of certain formulaic structures that are readily recognizable, and thus effective, narrative forms. The victim narrative is one of these structures."); Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379, 408 (2008) (discussing the well-worn storyline "Third World Immigrant Women are Victims"); Nanasi, *supra* note 4, at 754–55 (describing asylum law's domestic violence "stock story"). The victim storyline appears in other areas of civil and humanitarian law as well—for example, in disability rights litigation: "If a plaintiff's story cannot or does not fit into the 'set pattern' of victimhood, her pain may go unseen, and ultimately unremedied." Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 287 (2001).

[21] *See, e.g.*, Zometa-Orellana v. Garland, 19 F.4th 970, 977–78 (6th Cir. 2021) (addressing the asylum seeker's argument that she was persecuted on account of her antimachismo political opinion because of the "primacy of 'machismo' culture in El Salvador"); Pojoy-De Leon v. Barr, 984 F.3d 11, 17 (1st Cir. 2020) (addressing the asylum seeker's argument that Guatemala's machismo culture is evidence that she has a well-founded fear of future persecution); Gonzales-Veliz v. Barr, 938 F.3d 219, 232 (5th Cir. 2019) (considering the asylum seeker's argument that "women unable to leave their relationship" is a particular social group in part because of "widespread machismo culture" in Honduras); Alvarez Lagos v. Barr, 927 F.3d 236, 250 (4th Cir. 2019) (finding support for the asylum seeker's proposed particular social group—unmarried mothers in Honduras living under the control of gangs—in her expert witness's testimony of a "very machista" culture in Honduras).

husband with no recourse. We highlighted high rates of child marriage[22] via news articles and scholarly reports[23] of girls in her home country, patterns of domestic abuse inflicted upon these girls and young women, and police complacency in the face of spousal violence. We submitted country conditions that described the cultural norm of "machismo," a phenomenon we framed as creating a "breeding ground for abuse"[24] of women in these countries. Our expert witness testified to the failures of Berta's state to protect women from gender-based violence. We argued that her country's cultural norms suggest that women are inferior and lack credibility when reporting crimes against them. We relied heavily on these accurate but negative facts because the legal framework demands a narrow version of the country conditions that would best explain Berta's story, leaving out the nuances.

This article seeks to examine the cultural essentialization at play in cases like Berta's; that is, how the legal process creates and reproduces perceptions of the cultural environments from which asylum claims arise. Part I defines culture and then explains how the asylum process essentializes cultures through its legal framework, requiring cultural context by tracing the iterative case law that enshrines a particular narrative for a country's culture.[25] Part II catalogues the harms (and possible benefits) caused by essentializing cultures, both for participants in the system and for society at large, in a critique informed by critical race legal theory. Part III proposes solutions ranging from an abolitionist approach to structural reforms to concrete client representation and litigation strategies, together with ideas for communicating with adjudicators and the media. And although

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[22] We use the term "child marriage" here to refer to marriage involving a child under the age of eighteen, as this was the age we relied upon in our briefing to the court. However, we note that relying on the US age of majority is, in itself, a form of cultural superiority, as it assumes the legitimacy of this age cutoff and no other. At the time of our client's marriage in the early 2000s, youth marriage was lawful in her home state, although it was banned in 2016.

[23] This form of evidence is typical in asylum litigation. *See* Weissman, *supra* note 10, at 191 (stating that a "typical [asylum] submission would include the journalistic accounts of the violence with blaring headlines about brutal crime from which there is no escape or accountability").

[24] We used this exact phrase in our legal brief, quoting Rosa M. Gonzalez-Guarda et al., *Needs and Preferences for the Prevention of Intimate Partner Violence among Hispanics: A Community's Perspective*, 4 J. PRIMARY PREVENTION 221 (2013).

[25] For example, in a recent line of Fourth Circuit cases regarding gang-extortion asylum claims in Central American countries, each case builds upon the prior cases to present a picture of these countries as riddled by such extortion. *See generally* Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015); Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017); Salgado-Sosa v. Sessions, 882 F.3d 451 (4th Cir. 2018); *Alvarez Lagos*, 927 F.3d at 236; Hernandez-Cartegena v. Barr, 977 F.3d 316, 319 (4th Cir. 2020); Perez Vasquez v. Garland, 4 F.4th 213 (4th Cir. 2021).

this may often not be possible, there may be cases in which legal theories that leave room for complex or even positive narratives of a client's country of origin are appropriate. Finally, just as we are more than merely legal advocates, we propose considering more than merely legal means as a mechanism for promoting alternative perspectives of the client's culture.

I. THE RELEVANCE OF CULTURE TO ASYLUM LAW

This part first defines "culture," starting with a broad view and then narrowing the term to how it is used within this article. We consider various definitions of culture and ultimately find that culture is not a static, singular object, but a web or set of norms and is constructed within a context.[26] This part then explains the legal framework for asylum law and describes how asylum law structures incorporate the use of culture, providing specific examples of where culture often appears. Finally, it examines case studies to show how certain cultural norms have been essentialized in the asylum canon.

A. Culture Defined

Legal scholar Naomi Mezey has commented that "[t]he notion of culture is everywhere invoked and virtually nowhere explained."[27] Merriam-Webster defines culture in two ways: first, as "the customary beliefs, social forms, and material traits of a racial, religious, or social group," and second, as "the set of shared attitudes, values, goals, and practices that characterizes an institution or organization."[28] These descriptions provide a common, nonacademic understanding of culture as a set of customs, beliefs, and traits of a group. Such a straightforward definition can be helpful when exploring the impact of cultural essentialization on the public, as we do in Part II. But, as legal scholar Leti Volpp notes, it is flawed, because this definition frames culture as "a noun, a fixed and static thing, rather than

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[26] *See* CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS, & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 50 (1st ed. 2017) (discussing the multiple and intersecting cultural identities each person uniquely holds); Eduardo R.C. Capulong, *Client As Subject: Humanizing the Legal Curriculum*, 23 CLINICAL L. REV. 37, 47 (2016) (arguing that "we access reality not so much through our senses, as is commonly believed, but through our biases, which has profound implications for the creation of 'fact'").

[27] Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001).

[28] *Culture*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/culture [https://perma.cc/ZC52-LBP7].

conceived as an adjective modifying particular practices."[29] This article argues that culture is fluid and everchanging.

Anthropologist Clifford Geertz offers another definition of culture, referring to it as layered "webs of significance,"[30] explaining that culture is not just the surface level events, rituals, customs, or ideas a group espouses, but also includes the underlying meaning of each behavior and pattern.[31] Culture is thus "a multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another, which are at once strange, irregular, and inexplicit."[32] Anthropologists refer to culture as "thick,"[33] a multidimensional, ever-shifting[34] set of norms, beliefs, and practices that at once connects groups of people with shared traits but also lacks precise boundaries, such that all people who share an attribute (say, a nationality) fall into or out of that practice or belief. Legal scholars Tamar Frankel and Tomasz Braun explain that culture includes beliefs and can be "understood as a set of rules and desired postures, and behaviors forming the heritage of contemporary societies."[35] These overlapping definitions of culture as a series of intersecting, constantly changing beliefs and rules both capture the true nature of culture but also reveal that culture is a concept not well-suited for dissection in a court of law, which demands consistency and precision.

Many scholars have explored how culture and law inform one another.[36] Culture can influence legal proceedings in areas

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[29] Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y. & L. 393, 394 (2003).

[30] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 5 (1973).

[31] *Id.* at 9–10.

[32] *Id.* at 10.

[33] *Id.* at 6 (discussing Gilbert Ryle's concept of a "thick description" of culture practiced by ethnographers).

[34] Scholar Naomi Mezey describes culture "as a set of shared signifying practices that are always in the making and always up for grabs." Mezey, *supra* note 27, at 37.

[35] Tamar Frankel & Tomasz Braun, *Law and Culture*, 101 B.U. L. REV. ONLINE 157, 161 (2021).

[36] *See, e.g.*, *id.* at 157 (describing law and culture as "systems [that] impose on each person and organization required rules of behavior" and exploring how they relate to and shape one another); Livia Holden, *Cultural Expertise and Law: An Historical Overview*, 38 LAW & HIST. REV. 29, 29 (2020) (describing the historical overlap of the studies of law and anthropology); Menachem Mautner, *Three Approaches to Law and Culture*, 99 CORNELL L. REV. 839, 841, 844 (2011) (describing the various scholarly theories on the connections between law and culture, such as the idea that culture creates law: "law begins as culture, eventually becoming the law of the nation"); Mezey, *supra* note 27, at 38 (arguing that "a cultural study of law envisions a robust interpretation of how conventionally understood legal and cultural meanings inform each other such that they are no longer intelligible as strictly legal or cultural"); *see also* Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation*

such as criminal law,[37] family law,[38] and foreign affairs.[39] And although, at least in some of these areas, courts have wrestled with the definition of culture and its impact on the law,[40] they have not done so in immigration cases.

Immigration cases have long relied on fixed ideas of culture, sometimes as part of a racist stereotype.[41] This is especially true in asylum and refugee law. Indeed, US asylum case law *requires* adjudicators to examine culture.[42] But despite this requirement, asylum law does not explicitly define culture. Instead, there are a variety of means through which evidence of a community's norms, practices, and beliefs is admitted into asylum proceedings. From this evidence and the stories that accompany it, a fixed idea of a specific community's culture emerges. And in cases that proceed to the BIA and federal court, that fixed idea can become a significant aspect of the law governing asylum.

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to Explore an Emerging Field, 6 ANNU. REV. L. & SOC. SCI. 487, 487 (2010) (exploring law's role in shaping racial categories and race's role in impacting the construction of law—a relationship similar to that between law and culture).

[37] *See, e.g.*, Michele Wen Chen Wu, *Culture Is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975, 977 (2003) (discussing American perception of culture as a defense for infanticide committed by Asian communities in the United States); *see generally* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 729 (2010) (describing a study that found that "cultural predispositions have a much larger impact on outcome judgments than do legal definitions" on acquaintance-rape criminal cases).

[38] *See, e.g.*, Melissa L. Breger, *Reforming by Re-norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 171, 176–77 (2017) (explaining that "how a legal system operates often reveals the roots of a societal culture" and exploring how modern phenomena like "rape culture" and "toxic masculinity" interplay with the legal system); Volpp, *supra* note 29, at 394 (discussing the perceptions of culture's impact on intimate partner violence across various racial groups in the United States).

[39] *See*, *e.g.*, Leti Volpp, *Protecting the Nation from "Honor Killings": The Construction of a Problem*, 34 CONST. COMMENT 133, 134 (2019) (discussing the Trump administration's focus on so-called "honor killings" as a perceived part of Muslim culture and using this conception as part of the justification for the 2017 travel bans); Weissman, *supra* note 10, at 191 (discussing narrative of Mexican criminality infusing the national US conversation).

[40] *See, e.g.*, United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001) (rejecting the defendant's argument that she assisted her boyfriend with drug trafficking because of Mexican culture's patriarchal demand that women be subservient to men, and stating, "[w]e are concerned about the danger that recognizing cultural heritage as an independent ground for departure presents both of perpetuating stereotypes and . . . of stripping whole classes of potential crime victim of the full protection of the law"); United States v. Castillo, 386 F.3d 632, 639 (5th Cir. 2004) (Pickering, J., dissenting) (disagreeing with a downward departure in sentencing due to "cultural assimilation").

[41] *See, e.g.*, Kitty Calavita, *Immigration, Law, Race, and Identity*, 3 ANN. REV. L. SOC. SCI. 1, 1 (2007); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 L. & HIST. REV. 69, 71 (2003).

[42] *See infra* Section I.B.

B. The Legal Framework for Asylum

Asylum may only be granted to a person who, pursuant to the definition of a refugee,[43] has a well-founded fear of persecution on account of a protected ground: the person's race, religion, nationality, political opinion, or particular social group (PSG).[44] Regardless of which protected ground the person claims, they must demonstrate that it exists in their country and that they are a part of it. While some protected grounds may be more recognizable than others, they almost always require a broader reference to the applicant's country due to the stringent corroboration requirements of asylum law.[45]

Of all the protected grounds, the applicant's culture tends to play the largest role in cases addressing the PSG ground.[46] This section traces the evolution of PSGs: how the agency and courts have defined them, the role culture has played in that evolution, and how the law operates to require essentialization—using cases based on domestic violence as examples. This section then addresses the types of evidence that establish cultural traditions and norms in an asylum applicant's country. Lastly, this section investigates "machismo" as an example of a purported cultural norm that is widely used in domestic violence cases and addresses how essentialization plays into related PSGs.

1. Definition of "Particular Social Group"

The legal term "particular social group" has a long and complicated history involving both international and domestic law.[47] Because the term is not defined in either an international

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[43] 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B); *see generally* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:1 (2022).

[44] 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i).

[45] *See id.* § 1158(b)(1)(B)(ii) (permitting an adjudicator to require corroborating evidence even when the applicant's testimony is credible, unless the applicant cannot reasonably obtain the evidence); *see also* Melanie A. Conroy, *Real Bias: How Real Id's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 24–34 (2009) (discussing the impact of REAL ID's harsh corroboration requirements on LGBTQ+ asylum claims).

[46] Although other elements of the asylum definition—such as political opinion, religion, nexus, and whether the government is unable or unwilling to control the persecutor—can also involve examination of culture, the discussion of culture in those contexts is beyond the scope of this article. For exploration of these issues, see Sabrineh Ardalan's discussion of these issues in her article, *Challenging Stereotypes in Refugee Protection*, *supra* note 9, at 44, and Pooja R. Dadhania's discussion of essentializing Islam in her article, *supra* note 7, at 1617.

[47] *See* Nicholas R. Bednar & Margaret Penland, *Asylum's Interpretative Impasse: Interpreting "Persecution" and "Particular Social Group" Using International Human Rights Law*, 26 MINN. J. INT'L L. 145, 149–50 (2017) (explaining the relationship

agreement nor domestic legislation,[48] its definition has evolved through case law.

The Board first formulated a PSG definition in *Matter of Acosta*.[49] In that case, the Board held that PSGs must be based on an "immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[50] The Board listed a number of characteristics this definition could encompass: "class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity."[51] The immutability test was widely accepted by scholars and domestic and international courts, and it was the definitive rule for PSGs for twenty years.[52] *Acosta*'s list of immutable characteristics likewise attained critical importance in the PSG analysis. Accordingly, immigration adjudicators and courts have recognized that PSGs may rest on members' ethnicity, gender,[53] family,[54] and linguistic commonalities.[55] Adjudicators and courts have not recognized a shared culture, despite its explicit

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between the 1951 Refugee Convention, the 1967 Protocol, and the 1980 US Refugee Act); Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far:* Matter of A-B-*, "Particular Social Group," and* Chevron, 29 CORNELL J.L. & PUB. POL'Y 345, 354–57 (2019) (explaining the international background for the term "particular social group" and the congressional record from its domestic incorporation). Readers may wish to refer to the above sources for a more in-depth treatment of this legal history.

[48] Natalie Nanansi, *Death of the Particular Social Group*, 45 N.Y.U. REV. L. & SOC. CHANGE 260, 265 (2021) ("Neither the United Nations nor U.S. legislative history provide insight into the meaning of the term."). However, other countries have taken the step to provide a definition for this term, such as Ireland's recognition of groups based on "the female or the male sex." Refugee Act, 1996 (Act No. 17/1996) (Ir.), https://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/print.html [https://perma.cc/R48N-RPKT].

[49] Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985); *see* David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 233–34 (1988).

[50] *Acosta*, 19 I & N Dec. at 232–33.

[51] *Id.* For more on the Board's reasoning, see 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*, 27 YALE L. & POL'Y REV. 47, 52 (2008).

[52] *See* Kelley-Widmer & Rich, *supra* note 47, at 58–59.

[53] *See* Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1236–37 (2009) (collecting cases in which PSGs rested on ethnicity or gender).

[54] *See, e.g.*, Matter of L-E-A-, 28 I. & N. Dec. 304, 305 (B.I.A. 2021) (citing Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015), Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011), Torres v. Mukasey, 551 F.3d 616, 629 (7th Cir. 2008), Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993)) (reversing Matter of L-E-A-, 27 I.& N. Dec. 581 (A.G. 2019) and noting that federal courts have found that an applicant's family can be a social group)); *see generally* Marouf, *supra* note 51, at 51–53, 91–92 (discussing the evolution of family as a protected characteristic).

[55] *See, e.g.*, Matter of H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996).

inclusion in *Acosta's* list of immutable characteristics. Culture has, however, become important to demonstrate that other characteristics are, in fact, immutable.

Accordingly, the Board relied on culture to delineate immutable characteristics of the PSG in *Matter of Kasinga*, a case addressing a respondent who feared female genital mutilation (FGM) in her home country.[56] In *Kasinga*, the Board found that "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" were a PSG.[57] Perhaps because *Acosta* explicitly listed "shared . . . cultural . . . origins" as a potentially immutable characteristic, the majority never actually addressed the practice as cultural,[58] instead focusing on the immutable "characteristic of [women] having intact genitalia."[59] Nonetheless, cultural evidence permeated the record through expert documentation, US Department of State (DOS) reports, the applicant's testimony, and reports by the Immigration and Naturalization Service (now known as Legacy INS)—indeed, Legacy INS itself characterized FGM as cultural.[60] The Board's reliance on such evidence set the course for how culture would play into future asylum claims: it would not itself be an immutable characteristic, but it could be proof of one.[61]

Interestingly, the Board defined the PSG in *Kasinga* as opposition to a cultural practice (FGM), rather than support for a condition (intact genitalia).[62] Although a few courts had

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[56] Matter of Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

[57] *Id.* at 365.

[58] *Acosta*, 19 I. & N. Dec. at 233; *see Kasinga*, 21 I. & N. Dec. at 361, 370. Concurring Board Members, however, did characterize FGM as cultural. *See id.* at 370–71 (Filppu & Heilman, Board Members, concurring).

[59] *Acosta*, 19 I. & N. Dec. at 233–34; *Kasinga*, 21 I. & N. Dec. at 366 ("The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.").

[60] *Id.* at 360–62, 370.

[61] For an analysis of how *Kasinga* reified Westernized norms and racialized cultural narratives, see McKanders, *supra* note 10, at 524–25 (2023).

[62] *See Kasinga*, 21 I. & N. Dec. at 365. The Board's formulation also later caused confusion because of its circularity: the PSG was defined by opposition to the persecution itself, a characteristic that all individuals share. Since then, the Board and federal courts have clarified that the PSG must exist independently of the persecution, although some confusion still remains. *See* Jeffrey S. Chase, *9th Cir. Sets BIA Straight on 'Circularity,'* OPS./ANALYSIS IMMIGR. L. BLOG (Aug. 10, 2020), https://www.jeffreyschase.com/blog/2020/8/10/9th-cir-sets-bia-straight-on-circularity [https://perma.cc/W5RW-3WH5] (discussing Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018) and subsequent decisions by the Board and federal courts disagreeing on the circularity of certain particular social groups); Jim Feroli, *Circularity in Particular Social Group Decisions*, ASYLUMIST BLOG (Dec. 22, 2021), https://www.asylumist.com/2021/12/22/circularity-in-particular-social-group-decisions/ [https://perma.cc/T399-YZN9] (discussing Matter of M-E-V-G-, 26 I. & N. Dec.

already published cases involving PSGs based on members' opposition to cultural norms or practices,[63] *Kasinga* inspired more advocates to formulate PSGs this way—even when the challenged cultural norms or practices were not extreme enough to constitute persecution themselves.[64] These PSGs have had mixed success, in part because of the Board's addition of two new elements: particularity and social distinction (initially designated "social visibility").[65] These two elements caused considerable confusion and have been the focus of most PSG-based asylum decisions since they were announced.[66]

a. Particularity and Social Distinction

Despite *Acosta*'s clear definition of PSG requiring only that group members share immutable characteristics, several federal circuit courts imposed additional requirements on applicants seeking to delineate PSGs: particularity and social distinction.[67] A social group is particular when it is "discrete," with "definable boundaries," and not "amorphous, overbroad, diffuse, or subjective."[68] It is socially distinct when the applicant's society perceives "those with a common immutable characteristic [as] set apart, or distinct, from other persons within the society in some significant way."[69] These elements—especially the latter,

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227 (B.I.A. 2014), and Fifth Circuit decisions rejecting particular social groups as circular).

[63] *See, e.g.*, Safaie v. I.N.S., 25 F.3d 636, 640 (8th Cir. 1994) (finding "Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior . . . may well satisfy the [BIA's PSG] definition"); Fatin v. I.N.S., 12 F.3d 1233, 1241 (3d Cir. 1993) (finding "'Iranian women who *refuse to conform* to the government's gender-specific laws and social norms' . . . may well satisfy the BIA's [PSG] definition").

[64] *See* discussion *infra* Section I.B.2.

[65] *M-E-V-G-*, 26 I. & N. Dec. at 236.

[66] *See* Fatma Marouf, *Becoming Unconventional: Constricting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. INT'L L. 487, 491–92 (2019).

[67] *See, e.g.*, Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (finding the petitioner's nuclear family a particular social group in part because their characteristics were identifiable); Gomez v. I.N.S., 947 F.2d 660, 664 (2d Cir. 1991) ("Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete."); Saleh v. U.S. Dep't of Just., 962 F.2d 234, 240 (2d Cir. 1992); Hernandez-Ortiz v. I.N.S., 777 F.2d 509, 516 (9th Cir. 1985) (noting petitioner's family was "a small, readily identifiable group"). For a discussion of PSG elements and how they evolved, see Helen P. Grant, *Survival of Only the Fittest Social Groups: The Evolutionary Impact of Social Distinction and Particularity*, 38 U. PA. J. INT'L L. 895, 932 n.198 (2017); Elizabeth Zambrana, *The Social Distinction of "Invisible" Harms: How Recent Developments in the Particular Social Group Standard Fall Short for Victims of Gender-Based Harms Committed by Private Actors*, 36 WOMEN'S RTS. L. REP. 236, 241 (2015).

[68] *M-E-V-G-*, 26 I. & N. Dec. at 239.

[69] *Id.* at 238.

which is explicitly contextual[70]—also require the adjudicator to inquire into cultural norms and practices.

The Board and courts have addressed whether PSGs that rest on opposition to a cultural norm or practice, like the PSG in *Kasinga*, are particular and socially distinct. Whether they are tends to correlate with how abhorrent our society perceives the cultural norm to be.[71] This is consistent with cultural essentialism: by defining other societies' cultures as inferior, our society reinforces its own superiority.[72] Therefore, the Board and courts have tended to reject claims based on opposition to arranged marriage, compelled or not.[73] But at least one court has upheld a PSG where the applicants were in danger because they had wed over the father of the bride's opposition.[74] In *Al*

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[70] When defining "social distinction," the Board acknowledged the role of culture, stating, "[i]n assessing a claim, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality." Matter of W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014). The Board also noted that whether a society recognizes a group as socially distinct or not could be due to "a host of reasons, such as sociopolitical or cultural conditions in the country." *M-E-V-G-*, 26 I. & N. Dec. at 240.

[71] *See* McKinley, *supra* note 12, at 93 (discussing how asylum law puts "culture—particularly 'African culture'—[ ] on trial in US courtrooms"). Makau Mutua has highlighted this promotion of a Eurocentric ideal and the subjugation of Third World cultures through international human rights law. Mutua, *supra* note 10, at 205. Note that opposition to practices disconnected from cultural norms typically fails as the basis for PSGs. Accordingly, the Board rejected proposed social groups based on opposition to gang recruitment efforts in *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (finding "persons resistant to gang membership" lacked particularity and social visibility) and *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582–84 (B.I.A. 2008) (finding "Salvadoran youths who have resisted gang recruitment[ ] or family members of such Salvadoran youth" lacked both particularity and social visibility). In neither of these cases was gang recruitment related to culture. But when gang violence does relate to cultural norms, the outcome is different. *See infra* text accompanying note 132.

[72] *See* Khan, *supra* note 1, at 87 ("The thesis that Muslim militants are essentialist terrorists obviously falls into the definition of other-defining essentialism. No Muslim culture . . . has defined itself as essentially violent. Nor have they defined Islam as an essentially violent faith. To the contrary, self-defining essentialism of Islam proclaims it to be the faith of peace, an essential meaning of the word 'Islam.'").

[73] Matter of A-T-, 24 I. & N. Dec. 296, 302 (B.I.A. 2007), *vacated on other grounds*, 24 I. & N. Dec. 617 (A.G. 2008); Xiao Fen Lian v. Holder, 313 F. App'x 393, 395 (2d Cir. 2009) (finding "'young, unmarried, financially-dependent women' whose relatives attempt to force them into arranged marriages" lacked particularity and social distinction); Fejza v. U.S. Att'y Gen., 489 F. App'x 326, 329–30 (11th Cir. 2012) (rejecting the PSG "women in Albania who refuse their families' arranged marriages" as lacking social visibility and particularity). In *Matter of A-T-*, the Board did not discuss arranged marriage as a cultural practice. And yet, it is widely understood as such. *See, e.g.*, Naema N. Tahir, *Understanding Arranged Marriage: An Unbiased Analysis of a Traditional Marital Institution*, 35 INT'L J.L., POL'Y, & FAM. 1, 1 (2021) (addressing arranged marriage as a cultural practice). *See generally* Máiréad Enright, *Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage*, 72 MOD. L. REV. 331, 331 (2009) (positing that the regulation of British Muslim "forced and arranged marriage" practices rest on the essentialization of culture, and that this myopic focus prevents policymakers from considering the socioeconomic factors at play).

[74] Al-Ghorbani v. Holder, 585 F.3d 980, 998 (6th Cir. 2009).

Ghorbani v. Holder, the Sixth Circuit approved a PSG that rested in part on opposition to a tradition of requiring paternal permission for marriage.[75] The Sixth Circuit found that the PSG was immutable because the right to marry is fundamental; the PSG was particular because the applicants "actively oppose[d]" the tradition, and the PSG was socially distinct because the applicant's community had identified them as opposing this marriage tradition.[76] At first blush, paternal permission for a marriage would not seem inconsistent with Eurocentric culture. But in *Al Ghorbani*, the evidence established that the cultural norm was so exacting that the father in question, who was a general, had imprisoned and beat one of the applicants, sent guards to the applicants' house and threated to kill their family, and shot his own son when he informed him of the marriage. Further, the applicant's wife would have been subjected to an honor killing upon return to Yemen.[77] Thus the culture in Yemen, according to the narrative in this case, was not merely a culture requiring paternal permission to marry, but of violent retribution and honor killing—behavior proscribed in Western culture (at least, Western culture as it is portrayed in the law).[78] And although the court acknowledged that this cultural norm was based on social standing rather than religion, it nonetheless described the norm as "Islamic," illustrating the tendency of courts to essentialize nonwestern religions as well.[79] Thus, courts have approved PSGs based on the opposition to cultural and religious norms in Muslim societies; however, many of these cases only analyzed the immutability element pursuant to *Acosta* and *Kasinga*, ignoring particularity and visibility.[80]

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[75] *Id.* at 995. The applicants proposed the following social groups: "people who have flaunted traditional Islamic values by marrying despite the disapproval of traditional families," "young, westernized people who have defied the traditional norms of society," "the Al–Ghorbani (or Alghurbani) family," "their family, who, as members of a less valued social class, i.e. traditionally meatcutters . . . have defied the norms of Yemeni society by getting married despite being forbidden to," and "those who dishonored the family by disobedience or marrying without permission." *Id.* (alterations, citations, and internal quotation marks omitted).

[76] *Id.* at 995–97.

[77] *Id.* at 987–88.

[78] *See infra* notes 215–223 and accompanying text.

[79] *Al-Ghorbani*, 585 F.3d at 995–96; *see* Dadhania, *supra* note 7, at 1617 (discussing how Islam is often essentialized in asylum cases).

[80] *See, e.g.*, Yadegar–Sargis v. I.N.S., 297 F.3d 596, 603 (7th Cir. 2002) (identifying "Christian women in Iran who do not wish to adhere to the Islamic female dress code" as a particular social group but denying asylum on other grounds); Safaie v. I.N.S., 25 F.3d 636, 640 (8th Cir. 1994) (concluding that "Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior" could constitute a particular social group), *superseded by statute on other grounds*, *as recognized in* Rife v. Ashcroft, 374 F.3d 606, 614–15 (8th Cir. 2004); Escobar v. Holder,

Other courts have begun to question the necessity of including the applicant's opposition to a cultural practice as a characteristic of the PSG, finding such characteristics unnecessarily circular or complex. For example, the Second Circuit in *Gao v. Gonzales* approved the PSG of "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable," without the applicant's proposed characteristic of opposition to compulsory marriage.[81] The court reasoned that this opposition fell under the requirement that the applicant be "unable or unwilling to avail . . . herself of the protection of . . . [her country of origin] because of a well-founded fear persecution."[82] Similarly, the Tenth Circuit in *Niang v. Gonzales* concluded that there was no need to include "opposition to FGM" as a PSG characteristic, although that opposition was relevant to nexus.[83] Pursuant to the reasoning of these courts, PSGs could rest solely on sex and kinship ties, such as women from a particular area or tribe.[84] In such cases, culture might be relevant in determining what a society deems to be "kinship ties," such as clans in Somalia,[85] but would more likely relate to nexus and other asylum elements.

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657 F.3d 537, 545 (7th Cir. 2011) (finding "former truckers who resisted FARC" to be a PSG because this status cannot be changed).

[81] Gao v. Gonzales, 440 F.3d 62, 70 (2d Cir. 2006), *cert. granted, judgment vacated sub nom.* Keisler v. Hong Yin Gao, 552 U.S. 801 (2007) (instructing the Second Circuit to reconsider its decision in light of Gonzales v. Thomas, 547 U.S. 183 (2006), which prohibited the Ninth Circuit from addressing whether a family can be a PSG before the agency had decided the issue).

[82] *Id.* at 70 n.6.

[83] Niang v. Gonzales, 422 F.3d 1187, 1201 (10th Cir. 2005).

[84] *See* Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) ("We . . . remand for the BIA to determine in the first instance whether women in Guatemala constitute a particular social group, and, if so, whether Perdomo has demonstrated a fear of persecution 'on account of' her membership in such a group."); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) ("[W]e hold that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM."); Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) ("In short, we conclude that Mohamed's claim that she was persecuted 'on account of' her membership in a social group, whether it be defined as the social group comprised of Somalian females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan, not only reflects a plausible construction of our asylum law, but the only plausible construction."); *Niang*, 422 F.3d at 1199–200 ("Applying the *Acosta* definition of *social group*, the female members of a tribe would be a social group . . . . We are not persuaded that the BIA, contrary to the language of *Acosta*, requires more than gender plus tribal membership to identify a social group."). Note, however, that all of these cases apart from *Perdomo* predate *Matter of E-A-G-* and *Matter of S-E-G-* and thus do not address particularity or social visibility.

[85] *See* Matter of W-G-R-, 26 I. & N. Dec. 208, 219 (B.I.A. 2014) (discussing how country-conditions evidence supported the presence of clans in Somalia in *Matter of H-*, 21 I. & N. Dec. 337 (B.I.A. 1996)). Nonlegal scholars have similarly acknowledged that clans are deeply embedded in Somali culture. *See, e.g.*, Deborah L. Scuglik & Renato D. Alarcon, *Growing Up Whole: Somali Children and Adolescents in America*, 2 PSYCHIATRY

As the case law indicates, the less congruent the relevant society's cultural norms are with those in the United States, the more likely a PSG opposing those norms will succeed.[86] Although the difference between forced and arranged marriages is not always a clear one,[87] claims involving a marriage that the court recognized as forced—an anathema in the West—have succeeded.[88] In contrast, those involving opposition to an *arranged* marriage—which Western culture does not embrace,[89] but still recognizes as a valid marital system[90]—have failed.[91] Similarly, PSGs based on a woman's opposition to Islamic requirements for dress and behavior—which are inconsistent with Judeo-Christian Western norms—have succeeded.[92] But

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(EDGMONT) 20, 26 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000212/ [https://perma.cc/W6JY-TAWG].

[86] Gregor Noll, *Asylum Claims and the Translation of Culture into Politics*, 41 TEX. INT'L L.J. 491, 495–96 (2006) (critically analyzing the willingness of northern states to protect asylum applicants from female genital mutilation, which typically occurs in southern states, but not from domestic violence, which often occurs in northern states).

[87] At its core, a marriage is forced when a person will face severe consequences for refusing to marry. *See Arranged Marriage*, TAHIRIH JUST. CTR., https://preventforcedmarriage.org/understanding-arranged-and-forced-marriage/ [https://perma.cc/D4S4-U2J3]; *What Is Forced Marriage?*, UNCHAINED AT LAST, https://www.unchainedatlast.org/about-arranged-forced-marriage/ [https://perma.cc/E9JA-EF5D]. For a considered analysis of how adjudicators characterize marriages as "arranged" or "forced" and the impacts of such characterizations, see Natalie Nanasi, *An "I Do" I Choose: How the Fight for Marriage Access Supports A Per Se Finding of Persecution for Asylum Cases Based on Forced Marriage*, 28 COLUM. J. GENDER & L. 48, 53–56 (2014).

[88] *See, e.g.*, Gao v. Gonzales, 440 F.3d 62, 70 (2d Cir. 2006); Yi Meng Tang v. Gonzales, 200 F. App'x 68, 70 (2d Cir. 2006) (remanding for the BIA to determine whether the applicant, who was in an intimate relationship with a woman and "threatened with forced marriage in an area of China where forced marriages are considered valid and enforceable," could obtain asylum based on a PSG); Himanje v. Gonzales, 184 F. App'x 105, 107 (2d Cir. 2006) (remanding to determine if the Zambian applicant was eligible for asylum given her claim that she was sold into marriage); Bi Xia Qu v. Holder, 618 F.3d 602, 607 (6th Cir. 2010) (finding the applicant had established a PSG based on her abduction for the purpose of a forced marriage where such marriages were recognized). Such claims certainly do not always succeed at the agency level, and at least one commentator has noted a troubling failure by the agency to recognize forced marriage as a basis for asylum. *See* Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. 55, 57, 68–69 (2010).

[89] Tahir, *supra* note 73, at 3.

[90] Serving as evidence of the West's willingness to entertain arranged marriage as a legitimate practice, arranged marriage is the subject of a popular television reality show. *See Indian Matchmaking*, NETFLIX, https://www.netflix.com/title/80244565 [https://perma.cc/9YN4-ZX6M]. In contrast, one can hardly imagine a reality television show centering on FGM.

[91] *See supra* note 73 (discussing cases).

[92] Although courts recognize opposition to a dress code as a PSG, applicants raising this claim tend to lose on other grounds. *See, e.g.*, Yadegar–Sargis v. I.N.S., 297 F.3d 596, 603, 605–06 (7th Cir. 2002) (identifying "Christian women in Iran who do not wish to adhere to the Islamic female dress code" as a particular social group but denying asylum on other grounds); Safaie v. I.N.S., 25 F.3d 636, 640 (8th Cir. 1994) (concluding that "Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior" could constitute a particular social group); Fatin v. I.N.S.,

PSGs based on a person who engaged in adultery—a practice of which Western culture also largely disapproves[93]—have failed.[94] And PSGs based on FGM—even those performed by medical personnel—typically succeed.[95] This pattern echoes the implicit incorporation of Western cultural norms into the law.[96]

The Board has also considered other means of demonstrating the particularity and social visibility of a PSG, specifically relying on historical and political events,[97] as well as

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12 F.3d 1233, 1241 (3d Cir. 1993) (acknowledging that a woman's opposition to Iranian dress codes may be sufficiently profound to constitute the basis for a PSG, but that the applicant had not established she was a member of this group).

[93] *See, e.g.*, Megan Brenan, *Americans Say Birth Control, Divorce Most 'Morally Acceptable*,*'* GALLUP (June 9, 2022), https://news.gallup.com/poll/393515/americans-say-birth-control-divorce-morally-acceptable.aspx [https://perma.cc/VV4Z-NS3N] (revealing that 9 percent of respondents in the United States found extramarital affairs morally acceptable).

[94] *See, e.g.*, Haimour v. Gonzales, 165 F. App'x 594, 597 (10th Cir. 2006) (rejecting proposed group of people "who ha[ve] had sexual relations outside marriage and thereby brought dishonor upon the Abu Al-Fadel tribe or family"); Fejza v. U.S. Att'y Gen., 489 F. App'x 326, 330 (11th Cir. 2012) (listing cases). In one case, the Seventh Circuit flatly rejected the Board's formulation of the PSG as "Muslim women falsely accused of adultery," instead embracing the applicant's formulation that "all Jordanian women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed without any protection from the Jordanian government." Sarhan v. Holder, 658 F.3d 649, 654 (7th Cir. 2011) (emphasis omitted). The Seventh Circuit approved of this PSG, reasoning, "[i]t is a function of a pre-existing moral code in Jordanian society, just as the dress code for 'modest' women that helped to define a social group in *Yadegar–Sargis* . . . . Social stigma causes the violence. Society as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the appropriate punishment—in this case, death." *Id.* at 655.

[95] *See* Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004) (describing the range of "surgical operations" that comprises FGM); Bah v. Gonzales, 462 F.3d 637, 643–44 (6th Cir. 2006) (Gibbons, J., concurring) (reasoning that FGM as performed by medical personnel on the asylum applicant as a child was persecution, even though the applicant did not resist, but refusing to remand because the applicant failed to show future persecution); Sene v. Gonzales, 180 F. App'x 551, 560 (6th Cir. 2006) (Clay, J., dissenting) (stating that "[f]emale genital mutilation constitutes persecution in this Circuit regardless of whether performed by a surgeon or a soldier"); *see generally* U.N. HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION 9–11 (2009), https://www.refworld.org/pdfid/4a0c28492.pdf [https://perma.cc/YH48-SE52] (describing all forms of FGM, including FGM performed by trained professionals, as persecution).

[96] *See supra* notes 86–92 and accompanying text; *see also infra* Section I.B.2.

[97] *See, e.g.*, Matter of W-G-R-, 26 I. & N. Dec. 208, 219–20 (B.I.A. 2014) (analyzing *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) and explaining that the PSG, "former member[s] of the national police," was particular and socially visible given the applicant's long service during El Salvador's civil conflict); Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007) (reasoning that "wealthy Guatemalans" were not a PSG because, "[w]ith the signing of the [1996] peace accords, the guerrillas renounced the use of force to achieve political goals. Although the level of crime and violence now seems to be higher than in the recent past, the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance").

economic and political structures.[98] But as immigration case law demonstrates, culture has played an increasing role in the formulation of PSGs. Indeed, at least two courts have stated that even groups the Board has long recognized as PSGs must be revisited in each individual case because "social distinction involves proof of social views."[99]

As case law narrowed the definition of PSG, a few successful PSG formulations emerged as guideposts for many applicants. Advocates realized that their cases had to hew closely to these guideposts, as well as the narratives accompanying them, given their history of success before the Board and courts. These narratives depend on a snapshot of the applicant's culture and leave no room for complexity. And each successful asylum claim that relies on such a narrative encourages advocates to further shape the cultural evidence in their cases to align with the successful narrative—in other words, to essentialize the applicant's culture.

2. Cultural Evidence in US Asylum Law

To corroborate their claims regarding culture, asylum applicants typically submit personal declarations (by the applicant, eye witnesses, family members and friends), expert-witness declarations, DOS reports, and other reports, often by nongovernmental organizations and the media. All of these

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[98] *See* Matter of M-E-V-G-, 26 I. & N. Dec. 227, 241 (B.I.A. 2014) ("For example, in an underdeveloped, oligarchical society, 'landowners' may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada."); Matter of A-M-E- & J-G-U, 24 I. & N. Dec. 69, 76, 76 n.8 (B.I.A. 2007) ("Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more . . . . The 1997 Profile notes that 80 percent of Guatemalans live in poverty, with 59 percent in extreme poverty.") (emphasis omitted). The difference between what is "historical," "political," and "economic" and what is "cultural" can be murky. Certainly, underlying causes for historical, political, and economic events and structures can themselves be due to culture. For example, if women are not permitted an education for cultural reasons, that prohibition can have devastating economic impacts. *See* Relebohile Moletsane, *'Cultural' Practices Continue to Force Girls Out of School: Time to Act Decisively*, BROOKINGS INST. (Mar. 7, 2017), https://www.brookings.edu/blog/education-plus-development/2017/03/07/cultural-practices-continue-to-force-girls-out-of-school-time-to-act-decisively [https://perma.cc/2RR9-Y2TT]; QUENTIN WODON ET AL., WORLD BANK GRP., MISSED OPPORTUNITIES: THE HIGH COST OF NOT EDUCATING GIRLS 6 (2018), https://openknowledge.worldbank.org/bitstream/handle/10986/29956/HighCostOfNotEducatingGirls.pdf?sequence=6&isAllowed=y [https://perma.cc/9NHC-BRH4]. But we would argue that the events and structures themselves are not cultural. For example, no country has a culture of poverty or civil conflict in that these things are culturally embraced. Accordingly, we have briefly identified evidence of historical, political, and economic events and structures as independent from cultural evidence to the extent that adjudicators rely on it without inquiring into underlying cultural causes.

[99] S.E.R.L. v. U.S. Att'y Gen., 894 F.3d 535, 555–56 (3d Cir. 2018); *see* Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014).

sources are prone to essentializing an applicant's culture. First, an applicant's declaration narrates their personal story, including their community's culture.[100] Expert witness declarations explain the cultural backdrop of a client's case.[101] Such experts can include "academic experts who specialize in the country, including those who have visited the particular region. Political scientists, anthropologists, or human rights experts also can provide helpful information on current political and social conditions" and the like.[102] But the most recognized means of introducing evidence of a community's culture are DOS reports. These reports are critical to asylum litigation because immigration adjudicators view them as the definitive source for social, economic, political, and cultural conditions in foreign countries.[103] Other significant DOS sources include Religious Freedom Reports[104] and Travel Advisories.[105] Scholars have noted that this heavy reliance on the US government's descriptions of events and conditions abroad is problematic for its potential to be influenced by US foreign policy considerations[106] and for its decentering of the voices of the people of those countries.[107] In addition to DOS sources, advocates commonly submit US news articles and reports by

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[100] Stacy Caplow, *Putting the 'I' in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 J. LEGAL WRITING INST. 249, 251 (2008) (the asylum declaration typically includes discussion of "cultural practices").

[101] ANKER, *supra* note 43, § 3:10 (discussing rights of applicant to present expert testimony and types of experts usually proffered); *see also* Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J.L. & SOC. JUST. 229, 230 (2015) ("In the United States, judges frequently rely upon the testimony and opinions of cultural experts.").

[102] ANKER, *supra* note 43, § 3:10.

[103] *Id.* § 3:13 ("The Board and several courts have recognized that State Department country condition reports on human rights are particularly probative.").

[104] *International Religious Freedom Reports*, U.S. DEP'T STATE, https://www.state.gov/international-religious-freedom-reports/ [https://perma.cc/65RN-SPBG].

[105] *Travel Advisories*, U.S. DEP'T STATE, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/ [https://perma.cc/5QNT-FPZA].

[106] ANKER, *supra* note 43, § 3:13 ("Non-governmental organizations (NGOs), commentators, and federal courts have criticized adjudicators' excessive dependence on State Department reports, which, especially in the past, were influenced by U.S. foreign policy considerations.").

[107] *See* Ardalan, *supra* note 9, at 44 (explaining that DOS reports are almost always admitted into the record in removal proceedings, if not by the applicant's attorney, then by the DHS attorney); *see also* Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 203 (2000) (explaining that judges expect them and often weigh them more heavily than other evidence of country conditions); *see e.g.*, Matter of H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209, 213 (B.I.A. 2010); Gonahasa v. U.S. I.N.S., 181 F.3d 538, 542 (4th Cir. 1999); Mitev v. I.N.S., 67 F.3d 1325, 1332 (7th Cir. 1995); Kazlauskas v. I.N.S., 46 F.3d 902, 906 (9th Cir. 1995). *But see* Matter of J-G-T-, 28 I. & N. Dec. 97, 105 (B.I.A. 2020) (stating that State Department country reports provide "important evidence that should be given reasoned consideration" but "should not be given dispositive weight to the exclusion of all other country conditions evidence").

well-known human rights organizations, such as Amnesty International and Human Rights Watch.[108]

All of this evidence can contribute to the essentialization of a community's culture.[109] Expert witnesses, who must situate asylum claims within a greater cultural context, may essentialize a community's culture by focusing too narrowly on "structures that create and perpetuate marginalization and violence."[110] News articles and reports by both nongovernmental and governmental sources that only present one view can essentialize a community's culture by focusing on limited aspects of it as relevant to a particular subject, especially when these articles are drafted by outsiders.

C. Essentialization Case Study: "Machismo" as a Cultural Theme in Particular Social Group Case Law

Court and Board opinions tend to tell a single story[111] about culture—one that supports the asylum claim or undermines it—and there is rarely any acknowledgment that multiple aspects of a culture exist. Circuit courts have not directly addressed the phenomenon of essentializing or stereotyping culture, but the Board and the Executive Office of Immigration Review have. For asylum claims arising from domestic violence, the emblematic example of cultural essentialization is the concept of "machismo."

The Merriam-Webster dictionary defines "machismo" as "a strong sense of masculine pride: an exaggerated masculinity"

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[108] *See* 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02 (2024) (describing how asylum claims must be corroborated with reports on country conditions and listing human rights organizations that author such reports); U.S. DEP'T JUST., COUNTRY RESEARCH LISTINGS, https://www.justice.gov/eoir/country-research-listings#C [https://perma.cc/CJZ7-8GCM] (listing hyperlinks to reports by country and including reports by Amnesty International and Human Rights Watch).

[109] *See* Jawziya F. Zaman, *Why I Left Immigration Law*, DISSENT MAG. (July 12, 2017), https://www.dissentmagazine.org/online_articles/left-immigration-law [https://perma.cc/3FUY-ZS7U] (describing the essentialism inherent in preparing an asylum case she eventually won for a lesbian Muslim woman: "I'll paint a picture of yet another oppressed Muslim woman whom the United States must save from her backward culture. I'll draw on media articles and the State Department's annual country reports on human rights practices to support my argument that the experiences of sexual minorities in her country can be easily reduced to one truth: suffering, persecution, or death. I'll speak to a few academics who study the country, and provide the court with an expert letter from whichever one corroborates my conclusions without complicating the issue").

[110] Lauren Heidbrink, *Enabling or Subverting Legal Violence? Expert Witnesses in Immigration Proceedings*, 46 ANNALS ANTHROPOLOGICAL PRACT. 80, 82 (2022).

[111] *See generally* Adichie, *supra* note 5 (discussing this concept as coined by author Chimamanda Ngozie Adichie).

or "an exaggerated or exhilarating sense of power or strength."[112] Machismo is associated with male-dominated, patriarchal cultures.[113] It has also been viewed as part of Latin American culture, with roots in Spain, and a major reason for the prevalence of domestic violence in Mexico and Central American countries.[114] And since *Matter of Kasinga*,[115] evidence of such a culture has become critical in cases brought by individuals—most prominently, Latina women—who fear physical or sexual violence.[116] As such, it is a prime example of how asylum law has developed to essentialize culture—in particular, Latin American culture—leaving no room for complexity, and reinforcing negative stereotypes of nonwhite asylum seekers.

1. "Machismo" in Agency and Federal Court Opinions

The first case to explicitly recognize the cultural equivalent of "machismo"—although it did not use that specific term—was *Matter of R-A-*,[117] a case decided by the Board in 1999 that involved extreme physical and sexual violence against the

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[112] *Machismo*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/machismo [https://perma.cc/8PWF-8ZSX].

[113] Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 861–62 (2003); Meredith Kimelblatt, *Reducing Harmful Effects of Machismo Culture on Latin American Domestic Violence Laws: Amending the Convention of Belém Do Pará to Resemble the Istanbul Convention*, 49 GEO. WASH. INT'L L. REV. 405, 412–13 (2016).

[114] Hernandez, *supra* note 113, at 862 (noting the varying definitions of "machismo" in Latin American countries, but stating, "it is difficult to find a definition of machismo that does not aim to define males by their treatment of females. Machismo seems to entail what is socially and culturally to be male, but it also defines what it is to be female"); Kimelblatt, *supra* note 113, at 406–07 (explaining that "[o]ne contributing factor to these [high] rates of domestic violence is the interplay between *machismo* and *marianismo*, which are prominent social constructs about gender that play significant roles in shaping cultural ideals and accepted behaviors throughout Latin America. Hyper-masculine machismo idealizations of aggression and dominance sharply contrast hyper-feminine marianismo associations with submissiveness and self-sacrifice") (citations omitted).

[115] *See supra* Section I.B. (discussing *Kasinga*).

[116] *See* Ardalan, *supra* note 9, at 33–34 ("Attorneys may also submit evidence of a 'culture of machismo' to help explain power dynamics and societal tolerance of abusive relationships and to debunk outdated understandings of gender-based violence as a 'private' or 'purely personal' matter . . . . [These stereotypes] are particularly insidious in contexts like gender asylum, where generalizations about a culture of machismo may vilify all men in a country—men who are in turn indiscriminately labeled criminals, murderers, and rapists, in an effort to justify closing borders and turning back bona fide refugees. Given the pernicious effects of such stereotypes, this longstanding tension in asylum law requires further attention.").

[117] Matter of R-A-, 22 I. & N. Dec. 906, 908, 910–11 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008). For more on the history and progeny of this case, see Meaghan L. McGinnis, *Post* Matter of A-R-C-G-*: An Expansion of American Compassion for International Domestic Violence Victims*, 121 PENN ST. L. REV. 555, 560–61, 567 (2016).

applicant by her husband in Guatemala.[118] The immigration judge had found that the applicant was a member of the PSG of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[119] In its reversal of this PSG, the Board described the applicant's expert as testifying that Latin American culture is "patriarchal," and acknowledging "the militaristic and violent nature of societies undergoing civil war, alcoholism, and sexual abuse in general."[120] At the same time, the Board noted that the expert also testified that "husbands are supposed to honor, respect, and take care of their wives, and that spous[al] abuse is something that is present 'underground' or 'underneath in the culture.'"[121] The Board then rejected the PSG,[122] reasoning that the evidence did not establish this group was recognized as a group in Guatemala,[123] and that the applicant's evidence did not establish that spousal abuse was "important" in Guatemala.[124]

The expert's nuanced testimony that "husbands are supposed to honor, respect, and take care of their wives" in Guatemala, which the Board went through the trouble to describe, could not have helped. This testimony, which eschewed a one-dimensional, essentialized story of Guatemalan culture, allowed the Board to rely on culture to reject the group, potentially priming advocates in future cases to omit cultural contours that could backfire.

Five Board Members vigorously dissented from the majority's analysis.[125] They reasoned that in both *R-A-* and *Kasinga*, the applicants opposed a practice "ingrained in the culture," and they characterized both cultures as espousing a norm of "male domination."[126] This discussion flattened the description of Guatemalan culture, yet centered it in the analysis. The question was not whether Guatemalan society

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[118] Matter of R-A-, 22 I. & N. Dec. 906, 908–09 (A.G. 2001).

[119] *Id.* at 917.

[120] *Id.* at 910.

[121] *Id.*

[122] The applicant also proposed other social groups, including "Guatemalan women" and "battered spouses." *Id.* at 920 n.2. The Board did not separately address these groups, stating simply that they failed the nexus requirement. *Id.*

[123] *Id.* at 918. The Board elaborated on this reasoning by stating that neither the victims nor their male persecutors viewed the victims as part of this group. *Id.* This reasoning foreshadowed the BIA's addition of the "social distinction" element to PSGs in later years.

[124] *R-A-*, 22 I. & N. Dec. at 919.

[125] These members were John Guendelsberger, Board Member, joined by Paul W. Schmidt, Chairman; Gustavo D. Villageliu, Lory Diana Rosenberg, and Anthony C. Moscato, Board Members. *Id.* at 929.

[126] *Id.* at 932 (Guendelsberger, Board Member, dissenting).

approved of spousal abuse in particular, but whether that abuse was entrenched because of cultural beliefs.[127] And as discussed below, the vacatur of *Matter of R-A-*[128] ultimately validated the dissent's focus on culture when analyzing PSG characteristics.

The Board's next major case addressing domestic violence, *Matter of A-R-C-G-*,[129] referenced culture in every step of its analysis.[130] As the first case to affirm the grant of asylum based on domestic violence, *Matter of A-R-C-G-* became the lynchpin for asylum claims of this type.[131] "[M]arried women in Guatemala who are unable to leave the relationship" became a PSG, largely because the Board found that "Guatemala has a culture of 'machismo and family violence.'"[132]

Between 2018 and 2020, the Trump administration, which was notoriously hostile to asylum,[133] turned the concept of essentializing culture on its head. In 2018, claiming that the Board and immigration judges were engaging in cultural stereotyping, Attorney General Jeff Sessions issued *Matter of A-B-*,[134] which overruled *Matter of A-R-C-G-* and severely restricted PSGs based on domestic violence. Sessions reprimanded the Board for its "conclusory assertions of countrywide negative cultural stereotypes," referencing *Matter of A-R-C-G-*'s description of Guatemala's "culture of machismo and family violence."[135] Two years later, Attorney General William Barr

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[127] *Ingrained*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/ingrained [https://perma.cc/JRN4-M8AJ].

[128] Former Attorney General Janet Reno vacated *Matter of R-A-* on her last day in office. Kit Johnson, *RIP Janet Reno*, IMMIGRATIONPROF BLOG (Nov. 7, 2016), https://lawprofessors.typepad.com/immigration/2016/11/rip-janet-reno.html [https://perma.cc/5DBH-YU2S]. The applicant in that case, Rodi Alvarado, finally obtained asylum, ten years after the Board rejected her application. *See* Julia Preston, *U.S. May Be Open to Asylum for Spouse Abuse*, N.Y. TIMES (Oct. 29, 2009), https://www.nytimes.com/2009/10/30/us/30asylum.html [https://perma.cc/2BVH-CAZU] (noting that the Obama administration had recommended asylum for Ms. Alvarado); *Matter of R-A-*, HASTINGS CTR. GENDER & REFUGEE STUDS., https://cgrs.uchastings.edu/our-work/matter-r-a- [https://perma.cc/UB6B-Q3B9] (tracing the history of Ms. Alvarado's case from its inception to the grant of asylum in 2009).

[129] Matter of A-R-C-G-, 26 I. & N. Dec. 388, 390–91 (B.I.A. 2014).

[130] *See* Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 7 (2016) (discussing the analysis in *Matter of A-R-C-G-*, and the role cultural evidence played in this case and its progeny).

[131] *See id.* at 6.

[132] *A-R-C-G-*, 26 I. & N. Dec. at 388, 394. For an extensive study of how such asylum claims fared in unpublished immigration court and Board cases, see generally Blaine Bookey, *Domestic Violence As A Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107 (2013).

[133] *See* Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 1, 5–7 (2020).

[134] Matter of A-B-, 27 I. & N. Dec. 316, 331 (A.G. 2018), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021).

[135] *Id.* at 336 n.9.

repeated this admonishment in *Matter of A-C-A-A-*,[136] rejecting the PSG of "Salvadoran females."[137] And on December 11, 2020, EOIR Director James McHenry III issued a policy memorandum[138] explaining a new regulation that barred evidence "promot[ing] cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender."[139] All three administrative actions significantly restricted the availability of asylum, and grant rates plummeted.[140] This, as well as President Donald Trump's frequent use of such stereotyping himself,[141] rendered the agency's purported rejection of stereotypes and supposed embrace of nuanced cultural evidence as disingenuous and manipulative.[142] And under the Biden administration, *Matter of A-B-* and *Matter of A-C-A-A-* were vacated, and the regulation was preliminarily enjoined.[143]

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[136] Matter of A-C-A-A-, 28 I. & N. Dec. 84, 96 n.4 (A.G. 2020), *vacated*, 28 I. & N. Dec. 351, 351 (A.G. 2021).

[137] *Id.* at 91.

[138] U.S. DEP'T JUST., EXEC. OFF. IMMIGR. REV., GUIDANCE REGARDING NEW REGULATIONS GOVERNING PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL & CREDIBLE FEAR & REASONABLE FEAR REVIEWS, PM 21-09 (2020), https://www.justice.gov/eoir/page/file/1357496/download [hereinafter *McHenry Memorandum*] [https://perma.cc/NUR6-ZZTF]. On January 21, 2021, the Northern District of California preliminarily enjoined the McHenry Memorandum and the regulations it addressed. Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021) (order granting preliminary injunction).

[139] *McHenry Memorandum*, *supra* note 138, at 7. The memorandum did not bar evidence that an alleged persecutor holds stereotypical views of the applicant, although it is unclear how a persecutor's views of an applicant could be deemed "stereotypical" without evidence of cultural stereotypes that exist in the applicant's (and persecutor's) country.

[140] *See* Jaclyn Kelley-Widmer, *Unseen Policies: Trump's Little-Known Immigration Rules as Executive Power Grab*, 35 GEO. IMMIGR. L.J. 801, 835–36 (2021) (discussing immigration adjudication policies under the Trump administration as causing major backlogs); Harris, *supra* note 133, at 6, 43–44, 69; *see Asylum Grant Rates Climb Under Biden*, TRAC IMMIGR. (Nov. 10, 2021), https://trac.syr.edu/immigration/reports/667/ [https://perma.cc/75X8-WN77].

[141] Examples of such stereotyping include President Trump's statement in 2015, "[immigrants are] taking our jobs, they're taking our manufacturing jobs, they're taking our money, they're killing us," Josh Boak, *Trump Taps Stereotypes About Immigrants*, HISPANIC OUTLOOK ON EDUC. MAG. (Feb. 2019), https://www.hispanicoutlook.com/articles/trump-stereotypes-immigrants [https://perma.cc/752N-6F9X]; *see* Yamiche Alcindor, *Trump Insists on Using Racist Language. Will That Approach Win Him Support?*, PBS NEWSHOUR (July 2, 2020, 6:40 PM), https://www.pbs.org/newshour/show/trump-insists-on-using-racist-language-will-that-approach-win-him-support (last visited Dec. 28, 2023); and his question "why America would want immigrants from 'all these shithole countries' . . . the U.S. should have more people coming in from places like Norway," Ali Vitali et al., *Trump Referred to Haiti and African Nations as 'Shithole' Countries*, NBC NEWS (Jan. 12, 2018, 7:47 AM), https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946 [https://perma.cc/A6AE-YAX4].

[142] *See* Harris, *supra* note 133, at 43–44.

[143] *See* Matter of A-C-A-A-, 28 I. & N. Dec. 351, 351 (2021); Minha Jutt, *"Build Back Better": Domestic Violence-Based Asylum After the "Death to Asylum" Rule*, 70 U.

In federal court, asylum claims, including those citing evidence of "machismo," often fail. This is unsurprising, given the often highly deferential standards of review courts employ[144] and the limited number of cases they review.[145] Nonetheless, in at least three cases, federal courts have explicitly rested positive outcomes on evidence of "machismo." In *Alvarez Lagos v. Barr*,[146] the Fourth Circuit noted evidence of "a 'very patriarchal,' 'very machista' culture 'that largely sanctions violence against women'" in Honduras.[147] This evidence demonstrated nexus: why the petitioner's membership in the PSG, "unmarried mothers in Honduras living under the control of gangs," made her, as opposed to others, likely to suffer persecution.[148] In connection with this cultural evidence, the court noted evidence that the "absence of a dominant male" predicted that the petitioner would suffer violence, and reasoned that such evidence made it difficult to distinguish her past criminal victimization from "her status as an unprotected female."[149] Thus, cultural evidence did powerful work here supporting nexus, potentially eliminating the argument that the petitioner was merely a crime victim, and indicating the likelihood of future persecution.

Cultural evidence had an equally powerful, if completely different impact, in *Hernandez-Chacon v. Barr*,[150] a Second Circuit case. Despite overwhelming evidence of violence against women in El Salvador, the sadistic abuse of women by gangs, and the justice system's "dreadful practice . . . to favor

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KAN. L. REV. 561, 571, 573 (2022) (citing Matter of A-B-, 28 I. & N. Dec. 307, 309 (A.G. 2021) and *Pangea Legal Servs.*, 512 F. Supp. 3d at 971).

144 *See* Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 886 (2009).

145 Courts only review orders of removal. 8 U.S.C. § 1252(a)(1). They therefore have no opportunity to consider cases in which the Board granted asylum. Further, applicants with viable claims often lack the wherewithal to petition federal courts. This is because substantive and procedural requirements for petitions are difficult to understand, especially for individuals who do not speak English. *See*, *e.g.*, Santos-Zacaria v. Garland, 598 U.S. 411, 430 (2023) ("And how are noncitizens—already navigating a complex bureaucracy, often *pro se* and in a foreign language—to tell the difference [between when a petition is exhausted and when it requires a motion to reconsider]?"); Higgs v. Att'y. Gen., 655 F.3d 333, 340 (3d Cir. 2011), *as amended* (Sept. 19, 2011) ("In immigration cases, *pro se* pleadings are often written by individuals with limited fluency in English . . . . [and] the law itself is complicated and difficult to navigate."). Not only that, but attorneys are expensive, and in our experience, relatively few immigration attorneys practice in federal court.

146 Alvarez Lagos v. Barr, 927 F.3d 236, 250–53, 256–57 (4th Cir. 2019) (relying on cultural evidence to find nexus).

147 *Id.* at 250.

148 *Id.*

149 *Id.*

150 Hernandez-Chacon v. Barr, 948 F.3d 94, 97 (2d Cir. 2020) (recognizing that opposition to a culture of male domination could be a political act).

aggressors and assassins and to punish victims of gender violence," the court found the petitioner's PSG, "El Salvadoran women who have rejected the sexual advances of a gang member," not socially distinct, and thus not cognizable.[151] Instead, the court granted her petition on the basis of her political opinion: "her opposition to the male-dominated social norms in El Salvador and her taking a stance against a culture that perpetuates female subordination and the brutal treatment of women."[152] After noting the power of gangs throughout El Salvador, the court rejected the immigration judge's reasoning that the petitioner was merely refusing to be a crime victim, reasoning that her resistance "arguably took on a political dimension by transcending mere self-protection to also constitute a challenge to the authority of the MS gang."[153]

Most recently, the Third Circuit granted an asylum petition in *Avila v. Attorney General*,[154] reverting to the Board's original reliance on cultural evidence to establish an asylum seeker's PSG: "[j]ust as the cultural attitudes toward gender were relevant in *Matter of A-R-C-G-*, evidence in the record as to the 'machismo culture' in Honduras may be relevant to assessing whether Avila has a cognizable PSG."[155]

As these cases demonstrate, federal courts may not always be open to evidence of "machismo," but such evidence is capable of having considerable positive impact on an individual's asylum case. Federal courts have not only affirmed the Board's reliance on culture to establish PSGs, but they have also expanded the impact of cultural evidence to nexus, the likelihood of future persecution, and political opinion. By closely tying culture to high rates of violence against women and the governmental failure or acceptance of such violence, these cases telegraph to immigration advocates that successful asylum claims—at least claims based on violence against women—must present culture as monolithic and wholly negative for the asylum seekers. There is no room for complexity.

2. The Use of "Machismo" by Asylum Advocates

Given the sporadic but positive impact of evidence of "machismo" on asylum claims at the Board and in federal court, advocates unsurprisingly continue to essentialize foreign

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151 *Id.* at 99–100, 102.
152 *Id.* at 97, 102.
153 *Id.* at 103–04.
154 Avila v. Att'y Gen., 82 F.4th 250 (3d Cir. 2023).
155 *Id.* at 263.

cultures in asylum claims: to establish PSGs,[156] nexus,[157] persecution on account of political opinion,[158] governmental unwillingness to protect,[159] and the likelihood of persecution or torture.[160] But as discussed next, this flattening of culture causes clients and advocates to suffer and potentially deprives the public of a fuller understanding of cultures in countries beyond the United States. Addressing this problem will take time and care; there are no easy solutions.

II. THE PROBLEMATIC IMPACT OF ESSENTIALIZATION

Cultural essentialism occurs when any legal regime, media outlet, or other source of knowledge uses stereotyping and generalizations to understand cultural phenomena, employing a predictable "stock story" shorthand[161] rather than engaging in a

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[156] *See, e.g.*, Betancourt-Aplicano v. Sessions, 747 F. App'x 279, 283 (6th Cir. 2018) (finding evidence that "gangs target women more frequently in order to bolster the gang members' feeling of 'machismo'" did not compel a conclusion that "'single unprotected female business owners out in the community selling food' is not . . . socially distinct" (quoting Bentacourt-Aplicano's testimony)); Gonzales-Veliz v. Barr, 938 F.3d 219, 232 (5th Cir. 2019) (finding "reports of a widespread *machismo* culture" did not indicate how Hondurans perceived "women who are unable to leave their relationship" as a distinct group); Osorto-Romero v. Sessions, 732 F. App'x 62, 64 (2d Cir. 2018) (finding evidence that "gangs 'project ownership or domination over women living in their territory' and 'view women to be their property,' in part as a result of the country's machismo culture" insufficient to establish that the proposed PSG was socially distinct (quoting Osorto-Romero's testimony)); S.E.R.L. v. U.S. Att'y Gen., 894 F.3d 535, 556–57 (3d Cir. 2018) (rejecting "immediate family members of Honduran women unable to leave a domestic relationship" because it was not compelled to find the cultural evidence demonstrated social distinction). *But see* Alvizuriz-Lorenzo v. U.S. Att'y Gen., 791 F. App'x 70, 77, 81 (11th Cir. 2019) (Wilson, J. dissenting) (relying on the applicant's evidence of "Guatemala's culture of 'machismo and family violence'" to find "girls or young women in Guatemala who cannot leave their family as a result of their age or economic conditions" as a socially distinct PSG (quoting Alvizuriz-Lorenzo's testimony)).

[157] *See* Alvarez Lagos v. Barr, 927 F.3d 236, 250 (4th Cir. 2019).

[158] *See, e.g.*, Hernandez-Chacon v. Barr, 948 F.3d 94, 98–99 (2d Cir. 2020); Zometa-Orellana v. Garland, 19 F.4th 970, 977 (6th Cir. 2021) (rejecting political opinion claim because the applicant never expressed her antimachismo opinion to anyone besides her persecutor).

[159] Sanchez-Amador v. Garland, 30 F.4th 529, 532 (5th Cir. 2022) (denying claim because the applicant failed to report offenses, and when she did, she failed to remain in the country for the investigation); Ramirez-Yoc v. Whitaker, 748 F. App'x 700, 701 (6th Cir. 2019) (finding evidence of a "machismo" culture in Guatemala did not indicate police unwillingness to protect the applicant).

[160] Pojoy-De Leon v. Barr, 984 F.3d 11, 17 (1st Cir. 2020) (affirming that a culture of machismo was insufficient to establish a likelihood of persecution); Carranza Moreno v. Garland, 851 F. App'x 681, 685 (9th Cir. 2021) (finding insufficient evidence the applicant would be tortured despite her testimony about a culture of machismo in Mexico because she testified she was not afraid of anyone except her stepfather).

[161] Professor Elizabeth Keyes explains that "stock stories" are psychologically easier on adjudicators, who can more quickly process predictable storylines. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 238–40 (2012); *see also* GROSE & JOHNSON, *supra* note 26, at 17 (discussing "masterplots").

more nuanced portrait of the culture. In the United States, cultural essentialism is commonly applied to people of color and non-Western countries in both the media[162] and in judicial contexts.[163] While asylum law necessarily requires a focus on an applicant's country of origin,[164] stereotypes can stand in to inform how an adjudicator understands the actions of a nonwhite asylum applicant or others in their narratives.[165] Professor Haney López explains that "[t]he racially discriminatory application of neutral laws is particularly pronounced in areas where the law regulates behavior understood in racial terms"[166]—areas such as asylum law, which depends on detailed exploration of the motivations of the applicants, their persecutors, and the government actors within their cultural context.[167] The cultural evidence that advocates submit, and upon which the courts then rely, supports this analysis. And this evidence typically furthers single narratives about the applicant's country[168]—or other identity markers, such as religion[169]—because litigation strategy and the structure of asylum law demand this singular narrative. This process often inadvertently reinforces Eurocentric conceptions of cultures, made even more problematic by the fact that the majority of practicing immigration attorneys in the United States

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[162] *See* Tanya Golash-Boza, *A Critical and Comprehensive Sociological Theory of Race and Racism*, 2 SOCIO. RACE & ETHNICITY 129, 135 (2016) (describing how "representations of Latinas as maids reinforce the idea that Latinas are destined for low wage occupations" and also how Hollywood has portrayed the Arab world as a "backward, barbaric, and patriarchal" culture requiring Americans to go to Iraq and Afghanistan to "rescue women from their brutal, oppressive Arab husbands").

[163] *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 96–98 (2006) (describing how facially neutral laws are applied with racially discriminatory effect in the criminal justice system).

[164] *See infra* Part II.

[165] For example, a judge might ascribe certain cultural motivations to an applicant's persecutors based on the culture of the sending country, and they may be more reliant on such cultural assumptions when the people involved are not white. *See* Volpp, *supra* note 12, at 89 (describing how white people are seen as not having culture, so culture is not seen as a motivator for their actions; in contrast, a negative culture is the ascribed reasoning for behaviors of people of color).

[166] *See* LÓPEZ, *supra* note 163, at 97.

[167] Lindsey M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733, 748 (2021) (discussing the structure of asylum law as including evidence on all of these players and focusing on the powerlessness of the applicant within the structures of her home country); *see also supra* Part II.

[168] *See supra* Section I.B.2.

[169] Professor Pooja Dadhania cautions against essentialization of Islam in particular, noting that "Western" adjudicators and advocates must "interrogate their own unconscious cognitive biases that lead them to equate Islam with the subordination of women in a way that they may not for other religions." Dadhania, *supra* note 7, at 1618.

submitting such evidence are white women[170] whose practice must involve perpetuating stereotypes that "other" their clients. Thus, broadly speaking, essentialism is a racialized, imperialist construct of the cultures of the primarily nonwhite, nonwealthy societies which are generally the projects of human rights law.

Cultural essentialization impacts broad societal understandings of cultures and peoples and has particular effects on the various participants in the asylum law process.[171] Essentializing a client's culture in the way the asylum process demands may have the upside of drawing attention to oppressive but culturally accepted behaviors, potentially enabling broad societal change within the culture and country. It can also streamline the litigation process, making the case narratives easier for both adjudicators and advocates to articulate and understand through predictable stories.[172] Shifting the focus to culture can also help explain some phenomena that an adjudicator otherwise may reject as unable to support an asylum claim by situating the conflict in a broader context.[173] Still, these benefits have significant negative impacts.

Indeed, cultural essentialism reinforces racism, stereotypes, and the narrative of Western moral superiority.[174] "Blaring headlines" about violence in other countries abound in

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[170] *See Immigration Attorney Demographics and Statistics in the U.S.*, ZIPPIA (Sept.F 9, 2022), https://www.zippia.com/immigration-attorney-jobs/demographics/ [https://perma.cc/MH9C-VHLG] (showing that approximately 60 percent of immigration attorneys are women, and about 80 percent of immigration attorneys are white); *see also Profile of the Legal Profession 2022, Lawyers by Race and Ethnicity*, AM. BAR ASS'N (2022), https://www.abalegalprofile.com/demographics.php [https://perma.cc/F8TD-VXVD] (noting that in 2022, women made up 38 percent of the legal profession, and white people made up 81 percent of the legal profession). We note that, as women—one of us a white woman—our identities overlap with the majority of practicing immigration attorneys. We also note that the perpetuation of Eurocentric stock stories impacts attorneys of color in a particular, devastating way. *See* discussion *infra* Section II.0.

[171] For a parallel discussion of the criminal justice system and how dehumanizing and racialized stereotypes similar to cultural essentialization harm parties, the criminal system, and society, see Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell? The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 473–78 (2021).

[172] *See* Zaman, *supra* note 109 ("There's an easy formula immigration attorneys follow to make that case. We inventory our clients' lives, excavate fragments of their past—collect this bit of ugliness, that bit of violence—and cobble together a selective biography that contrasts the grinding reality of what they left behind to the infinite possibility that America represents.").

[173] *See* Natalie Nanansi, *Are Domestic Abusers Terrorists? Rhetoric, Reality, and Asylum Law*, 91 TEMP. L. REV. 215, 245 (2019) (arguing that the law should reconceptualize domestic violence as a form of terrorism to "underscore[ ] the political, societal, cultural, and public dimensions of the problem" rather than seeing it as simply an interpersonal dispute).

[174] Culturally essentialist systems "partake of and fortify a broader global imperialist narrative." McKinley, *supra* note 12, at 97.

media.[175] Negative portrayals of various cultures can perpetuate the idea "that non-western cultures are inherently more sexist, brutal, illiberal, and intolerant."[176] Studies show that many people in the United States have serious misconceptions about immigrants that lead to mistaken views that do not comport with reality.[177] This cultural essentialism has a major negative impact on how society sees asylum cases and asylum seekers.[178] The harms do not end there, however, as cultural essentialism also negatively impacts applicants, advocates, and adjudicators.

A. Harms to Applicants

Essentialization harms asylum applicants, who have a range of experiences in, and feelings about, their countries of origin. As an applicant tells their story to their attorney, the attorney will ask questions about the cultural norms of the client's community and the actions or reactions of their government.[179] Even where an individual recognizes that their country is not a safe place for them to be, they often have conflicting feelings about their homeland—it can be a place that has rejected or betrayed them, as well as a place that holds their loved ones, treasured memories, and favorite foods or traditions.[180] For example, a gay client we represented expressed both extreme distress at the way the homophobic murder of his friend had never been investigated, but also told us of the existential anxiety that he felt over permanently removing himself from his native soil, never to see his home city again.

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[175] Weissman, *supra* note 10, at 191.

[176] McKinley, *supra* note 12, at 95–96.

[177] Joel Rose, *A Majority of Americans See An 'Invasion' at the Southern Border, NPR Poll Finds*, NPR (Aug. 18, 2022), https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds [https://perma.cc/M9R2-PKJJ].

[178] "Othering" also affects how society views public policy problems, including capital punishment, prisoner reentry, and global trade policies. *See, e.g.*, Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 395 (2016).

[179] See *supra* Part I.B. for a discussion of the asylum elements and why the attorneys must ask these questions.

[180] Psychiatrists use the term "cultural bereavement" to refer to the complex feelings of missing home that immigrants and children of immigrants feel. *See* Alisha Haridasani Gupta, *Missing the Home You Needed to Leave*, N.Y. TIMES (Oct. 22, 2022), https://www.nytimes.com/2022/10/22/well/family/bereavement-culture-refugee-immigrant.html [https://perma.cc/C5EG-WLGC]; *see also* Zaman, *supra* note 109 ("[T]he law demands just one story from our clients about their lives and where they come from, and it's not a story of resilience and success. This narrative obstructs the possibility that an immigrant's relationship with the country of her birth might be complicated in ways we don't understand—that she could be forced from her home and still have no other, or that she could loathe it and long for it at the same time.").

But an applicant must flatten the contours of their feelings and experiences of their home country before the court. Applicants understand that they must emphasize negative aspects of their home country to have a stronger case, shifting blame away from themselves and to their persecutor and their government.[181] Clients sometimes express that they feel like they must demonize their home state, participating in telling that single story that will track for the adjudicator and result in the outcome the applicant needs. One applicant with whom we worked, a teenage boy who had fled a Southeast Asian country, knew how he was "supposed to act" but resisted the idea that he must tell the asylum officer a "sob story" about how his country treated him—"do I have to be all dramatic about it?" he asked.

The performance asylum seekers feel compelled to produce can include a "flat sort of 'migration to liberation'" narrative that portrays the applicant fleeing an "oppressive, homophobic, terrible country of origin to seek refuge in what is characterized as a liberated, tolerant, inclusive Western society."[182] Further, those whose personal experiences really do not fit the typical mold are harmed by the inherent stereotyping.[183] This essentialization both demonizes the applicant's culture and also recruits the applicant to join in condemning their own culture, unintentionally harming the applicant and potentially adding to their trauma while trying to help them.[184]

B. Harms to Advocates

Advocates are also harmed by cultural essentialization. The harm of reducing a culture to its negative aspects draws attention away from similar negative aspects in Western culture, and it increases the likelihood of "othering" those who share the essentialized culture,[185] which can impact the advocate in at least four ways. First, othering increases the likelihood of implicit and explicit bias toward the othered group, particularly

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[181] *See* David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 160 (2018) ("At the individual level, perceptions of blame can make the difference of whether a migrant is targeted for deportation or eligible for discretionary relief.").

[182] *Women of Color Collective Honors Tsion Gurmu '15 of the Black Alliance for Just* Immigration, NYU L. NEWS (Apr. 14, 2022), https://www.law.nyu.edu/news/tsion-gurmu-women-color-collective-alumna-award [https://perma.cc/4TAC-EYVZ].

[183] *See* Ardalan, *supra* note 9, at 39.

[184] *See* Haynes, *supra* note 20, at 390 (discussing how human rights advocacy can "strip[ ] away" an applicant's personhood outside of her case, telling only a victim story to the court).

[185] *See*, *e.g.*, Volpp, *supra* note 29, at 108–09, 115; Mutua, *supra* note 10, at 205; McKinley, *supra* note 12, at 97.

when the advocate does not share many identity markers with their clients.[186] This bias may come through in the advocate's interactions with their individual clients and can influence the way they talk and think about the applicant's country of origin and cultural experiences. For example, it may result in an inaccurate narrowing of the advocate's perception of the client's country. If an advocate has repeatedly narrated the story of Mexico as a gang-infested country with a "machismo" culture, how will that advocate be able to think openly when working with a male Mexican client who was formerly gang involved? How will that advocate talk to others about Mexico? Will they be willing to even take a vacation to Mexico?

Second, advocates who do share culture and community with their clients, such as those who come from immigrant families, may also uniquely struggle with the demands of engaging deeply with their clients' lives and stories, leading to greater burnout.[187] Professor Julia Vásquez has described the disproportionate effects of the immigration system on advocates who are members of the community they serve, highlighting the experiences of "immigration attorneys who identify as people of color from an immigrant background and practice through the lens of immigrant rights."[188] Such advocates may be less able to separate their personal identities and home lives from their work, and thus find that working with their clients' stories can deeply impact their mental health and wellbeing.[189] Thus, when advocacy all but requires the advocate to perpetuate essentialized characterizations of their own community, this experience can cause particular challenges in the impacted advocate's professional and personal life. These advocates may feel especially guilty or uncomfortable in participating in essentialization and may, like applicants, have complex views on their own cultural community.

Third, essentialization and othering may lead to poorly conceived strategies for assisting the perceived victims of the

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[186] Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 618 (2009); *see* Emily C. Torstveit Ngara, *Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice*, 12 STAN. J. C-R & C-L. 389, 397 (2016).

[187] *See* Eloy Gardea, *Between Two Worlds: Experiencing Burnout at the Crossroads of Culture and the Immigration System as a First-Generation Attorney*, AM. BAR ASS'N (May 19, 2022), https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/between-to-worlds-experiencing-burnout-at-the-crossroads-of-culture-and/ [https://perma.cc/N4ZR-GBXP]; Julia Vásquez, *The Impacted Immigration Lawyer in the Era of Trump: Empathy, Wellbeing, and Sustainable Lawyering*, 50 SOUTHWESTERN L. REV. 275, 277, 284–85, 289–91 (2021).

[188] *Id*. at 277.

[189] *Id*. at 289.

culture—strategies that perpetuate the problem in other forms.[190] Reliance on stereotypes limits creativity and openness in litigation strategy, causing the advocate to recycle the "stock stories" the judge wants to hear. Though a stock story can help streamline an applicant's case, hewing too closely to the story or deviating too far can both be damaging.[191] For example, when an applicant's story is too close to an oft repeated stock story that the adjudicator views with suspicion, the predictable narrative may harm the case.

Fourth, this rote advocacy can also cause attorneys to feel like they are complicit in perpetuating harmful narratives because the system forces them to "neatly package [their] clients' stories" into a well-worn trope.[192] After all, lawyers know that "trials are often won or lost based on the power of the story being told,"[193] so they cannot afford to significantly deviate from the norm and thereby put their clients at risk.[194] Further, asylum attorneys report their distress at participating in a system that is "antiquated and racist," contributing to the trauma the attorneys themselves experience.[195]

C. Harms to Adjudicators

Like advocates, adjudicators are also impacted by cultural essentialization. This phenomenon can impact them both as adjudicators and personally. Adjudicators hear endless first-person stories from individual applicants that are often heartbreaking, disturbing, and challenging, even as they may follow expected tracks.[196] Adjudicators also take in the sweeping

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[190] *See* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6–7 (2002); *see also* Susan Bibler Coutin, *'Otro Mundo Es Posible': Tempering the Power of Immigration Law Through Activism, Advocacy, and Action*, 67 BUFF. L. REV. 653, 681–82 (2019); McKanders, *supra* note 10, at 535–38.

[191] *See supra* note 20 and accompanying text.

[192] Harris & Mellinger, *supra* note 167, at 752–53.

[193] Keyes, *supra* note 161, at 239 (arguing that narratives are indispensable for understanding the world around us, including in immigration cases).

[194] *See* Coutin, *supra* note 188, at 682–83 (noting that "the arguments put forward in [immigration] applications must adhere to existing definitions of deservingness").

[195] Harris & Mellinger, *supra* note 165, at 752; *see also* Mark Rabil et al., *Secondary Trauma in Lawyering: Stories, Studies, and Strategies*, 56 WAKE FOREST L. REV. 825, 833 (2021) (discussing the traumatic stress lawyers experience); Zaman, *supra* note 109 (discussing the author's frustration and discomfort at being "implicated in the flawed premises of immigration law, including its reductionist narratives about other countries and its dehumanization of foreigners").

[196] *See* Kate Aschenbrenner, *In Pursuit of Calmer Waters: Managing the Impact of Trauma Exposure on Immigration Adjudicator*s, 24 KAN. J.L. & PUB. POL'Y 401, 403 (2015) (discussing the high volume of traumatizing stories trial-level immigration adjudicators are exposed to).

cultural essentialism perpetrated by the media, which can influence their perception of world events.[197] Judges are also informed by their own life experiences and cultural perspectives.[198]

When these stories follow predictable patterns, they can help judges process the stories,[199] but can also impact judges' ability to be impartial and treat each case individually.[200] Professor Keyes explains that the cognitive load of processing narratives is lighter when the story follows a predictable pattern.[201] Further, there are limited practical options other than relying on standard stories about given countries—judges do not have control over the record or personal knowledge about most countries of origin around the world. Adjudicators generally must rely on the narratives advocates supply, and though they could in theory challenge some of these stock stories through questioning, they may lack capacity or understanding to do so. Judges lack sufficient resources to delve into country conditions on their own; the workload for immigration judges (IJs) is tremendously high, and IJs spend almost all of their working hours on the bench.[202] They are dealing with a heavy workload due to a massive backlog[203] and have often been under tremendous case completion quotas[204] or goals that force them to rush through adjudications. Therefore, IJs do not have time to do the work it would take to formulate their own understandings

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[197] Keyes, *supra* note 161, at 216; *see also supra* Section I.C.

[198] Sagiv, *supra* note 101, at 229–30.

[199] Keyes, *supra* note 161, at 239–44 (discussing the cognitive processes that cause adjudicators to rely more on predictable narratives).

[200] *See* Rubenstein, *supra* note 181, at 152–53 (discussing "cultural worldviews" and confirmation bias as it comes into play in immigration adjudication).

[201] Keyes, *supra* note 161, at 239.

[202] According to a 2008 study, immigration judges only had four hours per week for administrative tasks, including country conditions research. Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 81–82 (2008). Likewise, a 2019 study of immigration judges found similar time pressures. *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts*,*"* 33 GEO. IMMIGR. L.J. 261, 282–83 (2019).

[203] *See, e.g.*, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC IMMIGR. (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675/ [https://perma.cc/365H-7KY4] (stating that in December 2021, the backlog of pending cases was at 1,596,193—the largest in history).

[204] For example, in October 2018, the Trump administration began requiring immigration judges to complete seven hundred cases per year. *US Immigration Judges Told to Process 700 Cases a Year*, BBC NEWS, (Apr. 3, 2018), https://www.bbc.com/news/world-us-canada-43623919 [https://perma.cc/BL27-8BVG]; *see also* Jain, *supra* note 202, at 299–300 (describing increasing time pressures and case quotas faced by immigration judges, beginning with the George W. Bush administration); *see also* Kelley-Widmer, *supra* note 140, at 839 (discussing "case completion quotas and other performance metrics" for immigration judges during the Trump administration).

of country conditions, and they must rely on routine understandings of the facts about various cultures.[205] In the meantime, they have to keep up with the everchanging law on particular social groups and other elements of asylum law that interact with essentialized narratives.[206] Further, because binding Board and federal circuit court precedents promote certain narratives,[207] IJs are implicitly encouraged to accept these narratives to avoid being overruled, a situation that can both diminish their professional standing and create more work for them as they must deal with the remanded cases.[208]

Additionally, immigration judges must wrestle with their own implicit biases as they evaluate each claim individually.[209] Although similar stories can make it easier for busy adjudicators to process, reviewing many similar stories can make judges suspicious and increase bias. Though many applicants likely have valid claims, there may also be some who recycle near parallel facts and thus dilute the power of the story.[210] Yet, when

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[205] Jain, *supra* note 202, at 282–83 (surveying immigration judges and finding that most stated that they do not have sufficient time to complete their cases and often must work unpaid overtime); Lustig et al., *supra* note 202, at 66 (quoting various immigration judges about this issue, including one who stated that "[t]he volume is constant and unrelenting. There is not enough time to do research and adequately read about country conditions, especially for more exotic countries where the asylum claims are not as routine").

[206] Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, 63 FED. L. 67, 69 (2016) (discussing challenges immigration judges face, including the increasing sophistication of case law: "[t]he definitions of what constitutes a particular social group (PSG) for asylum purposes are an example of the ever-changing nature of refugee law").

[207] *See supra* Section I.

[208] *See* Jain, *supra* note 202, at 284 (noting that surveyed immigration judges feel pressure to conform their decisions to the political and judicial structures above them, quoting one IJ saying, "Who is your boss? Day-to-day, your boss is the EOIR, but when the Court of Appeals reverses the decision, then your boss is the Court of Appeals").

[209] *See generally* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, AM. BAR ASS'N (Nov. 1, 2015), https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/fall/who_me_am_i_guilty_of_implicit_bias/?login [https://perma.cc/ZGD5-SH5J] (also on file with authors) (describing the inner thought process of an immigration judge aware of her own bias and working to adjudicate fairly).

[210] As one writer noted: "[i]t is not enough for asylum applicants to say that they were threatened, or even beaten. They have to furnish horror stories. It's not enough to say that they were raped. The officials require details. Inevitably, these atrocity stories are inflated, as new applicants for asylum get more inventive about what was done to them, competing with the lore that has already been established, with applicants whose stories, both real and fake, are so much more dramatic, whose plight is so much more perilous, than theirs." Suketu Mehta, *The Asylum Seeker*, NEW YORKER (July 25, 2011), https://www.newyorker.com/magazine/2011/08/01/the-asylum-seeker (last visited Dec. 28, 2023) (quoting a former immigration lawyer as stating, "[t]he immigration people know the stories. There's one for each country. There's the Colombian rape story—they all say they were raped by the FARC. There's the Rwandan rape story, the Tibetan refugee story. The details for each are the same"); *see, e.g.*, Ping Weng v. Holder, 430 F. App'x 71, 72 (2d Cir. 2011) (affirming an adverse credibility finding based on the

a story does challenge the dominant narrative, this too can complicate the adjudicative process. For example, we represented a Guatemalan client who worked as a security guard for a foreign company conducting mining operations on Indigenous lands. The more common story would be one from the Indigenous perspective, showing that the company was harming an Indigenous asylum seeker and their community.[211] However, our client claimed to have been beaten and threatened by Indigenous activists who resented him for his role in the company and, by extension, the extractive devastation of the land. This story both challenged the stock story of the Indigenous applicant generally as the victim[212] within the cultural landscape and seemed to contribute to the judge's skepticism—he found our client lacked credibility and denied the case on this basis.

Finally, cultural essentialism impacts adjudicators personally in similar ways to advocates, causing them distress at participating in a system that relies on stereotypes[213] and cementing certain problematic or one-sided understandings of various cultures around the world.[214] Adjudicators are thus forced into a challenging bind, in which they must both rely upon stereotypes, and yet resist them. The next section discusses potential actions that advocates may be able to take to reduce the harms caused by essentializing culture.

III. PROPOSED SOLUTIONS: FROM ABOLITION TO REFLECTION

In this part, we first explore big-picture legal changes that could reduce essentialism, from a whole-scale reimagining of the immigration system through collaboration between impacted immigrants, lawyers, and other stakeholders to a reformist approach, including changing the system to reduce

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petitioner's "'hesitant,' 'repetitive,' and 'nonresponsive' testimony, which gave the impression that she was 'simply reciting from a script'").

[211] *See* Raquel Aldana & Randall S. Abated, *Banning Metal Mining in Guatemala*, 40 VT. L. REV. 597, 614–15 (2016) (discussing human rights violations from metal mining projects for indigenous peoples in Guatemala).

[212] We acknowledge the unquestionable marginalization of indigenous people in Guatemala, see *Americas and the Caribbean: Guatemala*, U.N. WOMEN, https://lac.unwomen.org/en/donde-estamos/guatemala [https://perma.cc/GW56-3X4E], and have represented many such applicants; we raise this example here for its opposition to that more common pattern.

[213] Keyes, *supra* note 161, at 238–40.

[214] *See* Ahmad, *supra* note 2, at 122 (discussing the tension between zealous representation and ethical lawyering that all but requires lawyers to advance problematic narratives); *see also* Capulong, *supra* note 26, at 47 (discussing "the transhistorical and transcultural nature of storytelling and the way in which narrative *creates* 'fact' and therefore is key to persuasive legal argument").

reliance on retraumatizing personal narratives. Next, we discuss strategies for advocates working with clients, including approaches for client interactions and case presentation to an adjudicator, as well as solutions for the advocates themselves.

A. Abolitionist Approach to Systemic Change

In keeping with an abolitionist ethic,[215] we first question the value of the legal requirements for asylum that rely on cultural evidence and challenge the existence of these structures. The interpretive frameworks used to explain and examine culture in the asylum context rely on an inherently colonial, racialized notion of culture from the perspective of the "West." As Professor Makau Mutua has explained, international human rights law—from which US asylum law is derived—has a Eurocentric construction which evolved to impose Western morality "on the rest of the world."[216] The cultural critiques embedded in asylum structures can be viewed as de facto critiques of and directives to other countries, especially those from the developing world, chastising them for "cultural deviation from human rights" under "savage culture[s]."[217]

The US asylum system is thus based on a historical and colonial context that smacks of white saviorism. In the classic human rights law paradigm, including asylum law, the person or group seeking vindication of their rights (the "victim") must be fleeing a perpetrator (the "savage") from which their state will not protect them—making the state "the operational instrument of savagery."[218] The nations receiving the "victims" for protection within the international frameworks are thus the "saviors" of the system.[219] Of course, today, not only "Western" countries

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[215] *See generally* Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (discussing social movements and their visions for transformative change); Amna A. Akbar, Sameer M. Ashar, & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 851 (2021) (describing abolition as part of movements building toward "a more equal world"); *see* PATRISSE CULLORS, TWELVE STEPS TO CHANGING YOURSELF AND THE WORLD: AN ABOLITIONIST'S HANDBOOK 6–11 (2021) (explaining abolition as a transformative practice and social justice movement working to dismantle structures of oppression).

[216] Mutua, *supra* note 10, at 211, 214–16; *see also* Gurmu, *supra* note 182 (discussing reliance of asylum adjudicators on "Euro-centric stock stories" and placing higher value on European cultural norms, such as perceptions of time or modes of storytelling).

[217] *See* Mutua, *supra* note 10, at 203.

[218] *Id.* at 202–03; *see also* Caroline Bettinger-Lopez et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. POVERTY L. & POL'Y 337, 338 (2011) ("Critiques of international human rights lawyering point to imperialist narratives and 'victim essentializing' often perpetuated by human rights lawyering.").

[219] Mutua, *supra* note 10, at 204.

accept refugees, and the countries hosting the highest numbers of refugees—in order—are Turkey, Iran, Colombia, Germany, and Pakistan.[220] This is cruelly ironic considering the history of colonizing nations creating forced migration,[221] then failing to ameliorate it both historically and recently, such as with the United States's withdrawal from Afghanistan in 2021.[222] Yet given the historical context, international instruments governing refugee law continue to reflect the values of so-called Western, and largely white, nations.[223]

In light of the above, we support an opportunity to rethink the asylum process as a whole, eliminating the need for applicants to "demonize" their cultures in addition to other changes.[224] Rebuilding a new system from the ground up would be the ideal way to achieve not only harm reduction, but an imaginative new vision for humanitarian protections in a changing, increasingly mobile world. For example, as climate change continues, mass migrations are likely, but climate-related reasons for movement are not a legal basis for refugee status.[225] While the scope of this article does not include a full exploration of what it would take to rebuild the system for

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[220] *Refugee Data Finder*, U.N. REFUGEE AGENCY, https://www.unhcr.org/refugee-statistics/ [https://perma.cc/ELF6-BCVA].

[221] *See* E. Tendayi Achiume, *Migration As Decolonization*, 71 STAN. L. REV. 1509, 1550–51 (2019) (discussing the relationships between colonizing "First World" countries and the colonized "Third World" nations and arguing that the First World cannot continue to exclude, but rather must include, Third World peoples).

[222] Despite the US involvement in the government of Afghanistan for twenty years, when the United States withdrew from Afghanistan, it did not fully or cohesively account for the safety of Afghan allies. Even since assisting in evacuating Afghans at risk, the United States still has not passed the Afghan Adjustment Act to provide long-term legal status to these refugees. Dara Lind, *The Afghan Adjustment Act of 2023: Everything You Need to Know*, IMMIGR. IMPACT (July 18, 2023), https://immigrationimpact.com/2023/07/18/afghan-adjustment-act-2023-everything-you-need-to-know/ [https://perma.cc/W32C-MWGB].

[223] For more on racialized settler colonialism, see generally Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720 (2021); E. Tendayi Achiume, *Transnational Racial (In)justice in Liberal Democratic Empire*, 134 HARV. L. REV. F. 378, 380 (2021); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 268 (2015).

[224] Others have offered proposals to rethink various aspects of immigration law. Akbar et al., *supra* note 215, at 461 (describing the Movement for Black Lives' Vision for a world without immigration detention and enforcement); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 597–99 (2016) (explaining the intertwined nature of the criminal and immigration systems and challenging the current paradigm in which "deportations . . . [are] distributed along the lines of migrant criminality").

[225] Tim McDonnell, *The Refugees The World Barely Pays Attention To*, NPR NEWS, (June 20, 2018, 11:25 AM) https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to [https://perma.cc/43JK-V98T]; Amanda Taub, *Global Warming Is Bringing More Change Than Just Heat*, N.Y. TIMES (July 19, 2023), https://www.nytimes.com/2023/07/19/world/climate-change-migration.html [https://perma.cc/YQ33-8EWK].

managing and integrating forcibly displaced peoples, a reenvisioning would have to include a more capacious definition of a refugee, or more types of legal pathways for the forcibly displaced. Rather than taking an approach that presumes new arrivals are not "refugees" and that the state has the right—even the obligation—to exclude them,[226] the United States could borrow a system from countries like Argentina. In 2009, Argentina adopted a humanitarian approach that presumes the right to migrate, espousing principles of equal treatment and nondiscrimination.[227] Further, as specific nations face wars and climate disasters, which are not covered by current refugee definitions, the United States could create a plan to legally accommodate these groups through programs like the proposed Afghan Adjustment Act.[228]

In creating a new set of standards based on the right to migrate and accounting for human and natural disasters that cause movement but are not yet covered by refugee law, collaboration across and participation from many groups would be necessary. Historians, geographers, sociologists, and political scientists attuned to the reasons for movement around the world could explain and predict future movements. Lawyers, lawmakers, and judges could construct frameworks and embed them into the law. Refugee and immigrant communities themselves, who have been through both migration and the accompanying government bureaucracy, could help make any new system human centered. State and county legislators, business leaders, and providers of housing, job training, and healthcare could work on the complex coordination of resources that would be necessary to complement the legal pathways.[229] In creating a legal system to address various reasons for forced

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[226] *See* Achiume, *supra* note 221, at 1524 (discussing nation-state sovereignty and political community).

[227] *See, e.g.*, Barbara Hines, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 CORNELL INT'L L.J. 471, 489 (2010) (describing the human-rights-based approach in Argentina). *But see* David C. Baluarte, *The Right to Migrate: A Human Rights Response to Immigration Restrictionism in Argentina*, 18 WASH. U. GLOBAL STUD. L. REV. 293, 335 (2019) (describing policies created in apparent backlash to this approach).

[228] *See* Lind, *supra* note 222.

[229] In summer 2023, debates around how to welcome arriving asylum seekers—or whether to do so at all—became a prominent issue with the change of Title 42 at the border. For example, many counties in upstate New York attempted to close their communities to new arrivals by banning the bussing of immigrants to upstate counties and banning local hotels from housing them. *See* Estelle McKee & Jaclyn Kelley-Widmer, Opinion, *Why Upstate Counties Should Welcome, Not Ban, Migrants*, SYRACUSE POST STANDARD (June 7, 2023, 8:30 AM) https://www.syracuse.com/opinion/2023/06/why-upstate-ny-counties-should-welcome-not-ban-migrants-guest-opinion-by-estelle-mckee-jaclyn-kelley-widmer.html [https://perma.cc/C7BY-CQBH].

migration, including those within and without the current refugee definition, all these constituents and more should design practical systems that function together with the legal system, urgently addressing the need to update both the law and the outdated, uncoordinated procedures on which we rely.

B. Reformist Approaches to Systemic Change

Recognizing that the abolitionist solutions described above are not likely to be realized in the near future, we turn to more incremental approaches that could work to adjust the system we have to make it less reliant on essentialism. These could include definitional changes in the law, increased adjudicative time for each case, and greater access to counsel.

First, to minimize the need for cultural evidence to support PSG-based cases, the Immigration and Nationality Act or Code of Federal Regulations could be amended to include gender as a sixth ground for asylum or as a named potential basis for a PSG. This would reduce or eliminate the need to essentialize for purposes of the PSG formulation. Multiple authors have discussed related possibilities at length,[230] so this article does not explore this proposal further here. However, it is notable that women and members of gender minority groups seeking asylum often must slot their claims within the PSG ground,[231] and proving the PSG adds an extra hurdle for women that other asylum seekers do not face. [232] Other countries have

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[230] *See, e.g.*, Aimee Heitz, *Providing a Pathway to Asylum: Re-Interpreting "Social Group" to Include Gender*, 23 IND. INT'L & COMP. L. REV. 213, 214–16, 240 (2013); Michelle Shapiro, *Revitalizing and Reforming International Asylum Law: A Proposal to Add Gender to the Refugee Definition*, 36 GEO. IMMIGR. L.J. 795, 797–98, 806, 812 (2022); *see* Karen Musalo, *Guest Post: The Wrong Answer to the Right Question: How to Address the Failure of Protection for Gender-Based Claims?*, IMMIGRATIONPROF BLOG (Mar. 9, 2021), https://lawprofessors.typepad.com/immigration/2021/03/guest-post-the-wrong-answer-to-the-right-question-how-to-address-the-failure-of-protection-for-gende.html [https://perma.cc/D7PX-FE6X] (arguing that adding gender would be a too limited solution, leaving other deserving applicants unprotected and flaws in the legal framework for particular social group and nexus unresolved); M. Isabel Medina, *Guest Post: A Response to Professor Musalo: Naming What Matters—Recognition of Gender as a Protected Classification for Refugee Law*, IMMIGRATIONPROF BLOG (Mar. 15, 2021), https://lawprofessors.typepad.com/immigration/2021/03/guest-post-a-response-to-professor-musalo-naming-what-matters-recognition-of-gender-as-a-protected-c.html [https://perma.cc/D9AT-G6NQ].

[231] Professor Pooja Dadhania posits that women are more likely to experience harm in the private sphere rather than in public spaces, and because the Convention drafters had publicly visible persecution in mind when creating the refugee definition, some harms that women typically face are not explicitly included there. Dadhania, *supra* note 7, at 1563–65, 1568, 1580, 1612. Therefore, women must resort to PSG-based claims.

[232] Shapiro, *supra* note 230, at 806, 812 (arguing in favor of adding gender as a sixth protected ground, via international protocol).

made gender a legally recognized ground.[233] Still, even if gender were part of the official definition of PSG, the applicant would still need to prove nexus and likelihood of harm; so this solution would have limited impact on essentialization. But it would be a positive change that would make a real difference in the difficulty of litigating such cases.

Second, changes to asylum to remove constraints currently on adjudicators could be impactful. Adjusting the schedule and other constraints on adjudicators could help reduce their reliance on essentialized stories.[234] First, judges and asylum officers must be accorded sufficient time to process the vast number of stories they hear. The various quota systems governing these adjudicators lead to rushed decisions, as described above. The minimal time off the bench[235] (or out of the interview room, for asylum officers) means that adjudicators are almost always actively with applicants and attorneys, leaving little to no time to do any research on individual cases or perform individualized analysis. IJs are encouraged to provide oral decisions,[236] meaning they speak their decisions aloud without taking the space to write them—a hallmark of judicial decision-making in most other courts. While judges become practiced at issuing oral decisions, they are, by design, spending less time on such decisions, and must make them publicly without opportunity to revise or consult with law clerks, making them less formal and well-reasoned. IJs also have minimal time for

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[233] *Id.* at 807–09 (discussing European countries); *Countries with Asylum/Refugee Laws That Explicitly Protect Those Fleeing Gender-Based Persecution*, TAHIRIH JUST. CTR. (2021), https://www.tahirih.org/wp-content/uploads/2021/03/Appendix-1-List-of-other-countries-with-gender-listed-in-asylum-laws.pdf [https://perma.cc/R4PX-85CY] (listing countries with laws that explicitly protect those fleeing gender-based persecution).

[234] Keyes, *supra* note 161, at 250–51 (noting that "[t]he psychological phenomena [of using shortcuts to understand narratives] all thrive in settings like Immigration Court where judgments are by necessity rushed or based on incomplete information. Some of the structural changes required to alter the way judges hear narratives then depend upon changing the character of those settings").

[235] *See* Dorothy A. Harbeck, *In Borrowed Robes: A Day in the Life of an Immigration Judge*, AM. BAR ASS'N (July 1, 2017), https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/summer/borrowed-robes-day-life-immigratijudge/ [https://perma.cc/C3LB-W2G5] (and on file with authors) (discussing a typical day for an immigration judge, which can include seven or more master calendar hearings and two asylum hearings in a single day); *see* Marks, *supra* note 209 (discussing structural supports needed to counteract implicit bias in judges).

[236] *See* Harbeck, *supra* note 235 (describing an asylum case the author adjudicated in an immigration detention center: "After a 70-minute hearing, I immediately dictated a 25-minute extemporaneous oral decision into the record. I could not refer to a transcript when rendering my decision, as written transcripts of the proceedings are created only after my decisions are appealed"); *see also* Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431 (2011).

training and professional development[237] that could provide education on specific countries or cultural phenomena, address issues of bias in adjudication, or provide resources to help them process the vicarious trauma they experience.

To address these issues, judges must be given a schedule that leaves more time off the bench. This could take various forms: whether one day a week without hearings, several afternoons a week open, or a week without hearings every six weeks, adjudicators must be released from the punishing schedule that forces them to take psychological and logistical shortcuts in adjudication.

Such a shift would also assist with reduction in burnout for adjudicators, thus hopefully keeping more of them in their roles for longer. For example, the asylum office has tremendous turnover,[238] perhaps in part because officers can only listen to intense stories of trauma for six hours a day, five days a week, for so long. The feelings many adjudicators suffer of complicity in the system and being a cog in a wheel would be reduced if these adjudicators had more time to make individualized rather than formulaic decisions.

However, with providing more space and time for adjudicators comes the problem of ever-increasing backlog, which is already astronomical.[239] This means, of course, that more judges and asylum officers would be needed—and they are already needed, even without the proposed lighter caseloads. More people may be willing to take and remain in these jobs if the conditions were revised, which could help solve both problems and allow timely, but not rushed, adjudication.

Finally, greater access to counsel for these cases would allow more applicants to present nuanced stories with a wider range of cultural depictions. Although greater access to counsel would have a necessarily limited impact if the law continues to require cultural arguments, we agree with Professor Keyes that greater access to counsel would permit critical "sustained evidence gathering, careful case theory development, [and] prepar[ation of] character witnesses who can be enlisted to

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[237] *See, e.g.*, Nolan Rappaport, Opinion, *How Many of Our Immigration Judges are Amateurs at Immigration Law?*, HILL (Nov. 23, 2020), https://thehill.com/opinion/immigration/527104-how-many-of-our-immigration-judges-are-amateurs-at-immigration-law/ [https://perma.cc/9U4X-VNUT].

[238] *See* Walter A. Ewing & Benjamin Johnson, *Asylum Essentials: The U.S. Asylum Program Needs More Resources, Not Restrictions*, IMMIGR. POL'Y CTR. (Feb. 2005), https://www.ilw.com/articles/2005,0907-ewing.shtm [https://perma.cc/25BD-ZESQ].

[239] *See, e.g.*, TRAC IMMIGR., *supra* note 203 (stating that in December 2021, the backlog of pending cases was at 1,596,193—the largest in history).

compellingly tell the counter-narrative."[240] This could allow more varied stories to be developed, at least interpersonally, if not on the record. Adding more nuanced country-conditions evidence to the record could only work if advocates could spend more time on cases to more delicately present them—it is counterproductive to risk providing more nuance in a way that could muddy the waters and heighten the risk that an adjudicator cherry picks ambiguous or negative evidence to deny the case. Given the wide latitude IJ decisions are given on appeal, presenting evidence that is not entirely pointed in one direction is risky, and we think it unlikely—and possibly unethical—that advocates would jeopardize their client's case in favor of the greater good of resisting racist or biased narratives. However, greater access to counsel would also assist with our next set of proposals, which involve the relationship between the attorney and their client.

C. Strategies in Client Representation

Advocates working with clients can take various steps in their practice to reduce essentialism while working with clients, presenting the case to an adjudicator or to the media, and reflecting on their own practices.

1. Working with Clients

Attorneys must zealously represent their clients, which in the immigration world often means telling negative or stereotypical stories about the client's culture.[241] This inherently involves extensive questions and many detailed discussions about the client's experiences in their home country and the challenges they have faced because of cultural norms, such as machismo.[242] This focus on the problematic or harmful aspects of their country has attendant psychological harms for the clients.

Commentators such as Professor Dina Haynes, have proposed the bifurcated strategy of preparing clients for the oversimplified narrative of their personal story that may be

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[240] Keyes, *supra* note 161, at 252.

[241] *See supra* Part I.

[242] In discussing victimization narratives for women in particular, Professor Haynes cautions that "the lawyer must be careful of winning the battle, but losing the war, so to speak—the battle being gaining the client asylum, and the war being the larger struggle of women everywhere to avoid being reduced to the Victim Subject." Haynes, *supra* note 20, at 409. The same can be said of the tension between the goal of winning an individual asylum case and the desire to provide counternarratives and push back against stereotypes.

necessary to prevail on their asylum claims, and also to make space for the client to privately share with the advocate—should the client choose to do so—positive aspects of their lives and culture beyond the asylum proceedings.[243] Thus, when working with clients, advocates can strive to talk about more than just the negative aspects of their countries. Of course, resources for this may be constrained—many attorneys simply do not have time given their high caseloads. But to the extent resources allow, a client-centered approach could involve engagement with more than just the "bad" elements of the client's culture.[244] This can mean asking a client about good memories from their childhood, their favorite foods from home, or cultural traditions beyond those that are directly relevant to the claim. Through this process, advocates actively resist essentialization; they humanize their clients and earn their trust, and they may find nuggets of information that are ultimately legally relevant or that assist in presenting the client as the complete, complex person they are.

Further, advocates can explicitly separate the "client" as a person from their "case"—the legal process in which they are involved. The legal story that advocates must tell is only a small part of who the client is; it will not capture the entirety of their experience.[245] Advocates can explicitly acknowledge that fact to their clients as they explain what the asylum process requires. Often, as a nonlawyer, a client will not know which parts of their case are the most important and will tell the attorney about various aspects of their life that will not make it into the legal briefing or direct examination in court. The attorney can explicitly acknowledge to the client that, although the experience of telling their story of trauma can be therapeutic or validating for some, it is not meant to capture who they are as a person. The asylum process is reductive of both the client's personhood and the complexities of their country and culture. The attorney can explain this to the client, as a client-centered way of focusing the client on their "case" as separate from who they are. With this concept on the table, attorneys can work with their client to decide what to include and exclude in their case theory, individualizing the story and avoiding reproduction of

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[243] *See id.* at 401 n.64.

[244] *See id.* at 415.

[245] Miller, *supra* note 10, at 489 (discussing the awkward gap between the client's actual life story and the legal theory that must be expressed in the narrative of the case).

refugee stereotypes[246] through this collaborative lawyering process. For example, an attorney might talk with the client about the pros and cons of discussing her status as a mother. On the one hand, motherhood can be a validating trait for an applicant, though it may not be legally relevant. Even then, the client may have complex feelings about this part of her identity, especially if some of her children are with her in the United States and others are in the home country, which often occurs.

Clients will often have complicated feelings about their own participation in the demonization of their countries.[247] They may struggle with having to malign or permanently abandon their home country, never to return, despite the fact that they had many good times there as well. One of our clients told us that he was hesitant to apply for asylum because it meant saying that he and his country had mutually disavowed one another—making him feel, in his words, "homeless." With this in mind, advocates have the opportunity to acknowledge those complicated feelings and sit with their client in that grief.

However, the process of sharing grief bridges into the need for other resources and methods for clients to heal and for attorneys to process. Most attorneys are not cross-trained in social work, clinical psychology, or related disciplines; they may not even have been trained to work with trauma survivors. Further, the attorney-client relationship can become complicated, ethically and professionally, if the attorney starts to behave as a therapist. Therefore, this article recommends establishing a referral system for mental health practitioners that can support the clients an attorney serves. Such additional, external supports, both during and after the legal case is underway, may be the most realistic way for some advocates to support their clients who are traumatized by both their prior experiences and the process of seeking asylum.[248]

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[246] New York University School of Law, *Women of Color Collective Honors Tsion Gurmu '15*, YOUTUBE (Mar. 2, 2022), https://www.youtube.com/watch?v=MxTgUqSSBJY [https://perma.cc/PY8N-8U3D] (urging that advocates keep in mind "the immense power attorneys and advocates wield" in asylum proceedings and strive to "reject[] coaching clients into producing particular types of formulaic refugee narratives").

[247] *See*, *e.g.*, EDAFE OKPORO, ASYLUM: A MEMOIR AND MANIFESTO 40, 85–86 (2021) (describing the homophobia he faced in his country, including his family pressure to marry a woman, but also his intense desire to call his mother); CLEMANTINE WAMARIYA & ELIZABETH WEILL, THE GIRL WHO SMILED BEADS 93–95 (2018) (discussing Ms. Wamariya's feelings about the word genocide as used by the UN and Americans when describing what happened in her home country of Rwanda).

[248] Professor Haynes suggests that "[r]ather than subvert the client's immediate goal—obtaining asylum—why not obtain the asylum first, and then also discuss other remedies that might provide her some sense of agency and control and an opportunity to heal?" Haynes, *supra* note 20, at 409.

Further, attorneys themselves must have access to ongoing professional development, both in country conditions and cultural norms of their clients' sending countries, as well as in working with trauma survivors, including those from various cultural backgrounds.[249] Such training will allow the attorney to stay up to speed with the substantive issues and also will inform how to approach their client in a culturally respectful manner. For advocates, the goal is to implement cultural humility to empower clients, avoiding easy tropes and ensuring they can tell their story authentically.[250]

2. Presenting the Case to an Adjudicator

When presenting the case before an IJ or asylum officer, an advocate's primary goal is, of course, to win the case for their client—a process that requires an essentialized story.[251] Attorneys typically cannot dilute the power of the story about, for example, the oppressive homophobic conditions in a country a gay client is fleeing, as this strategy could distract or confuse the judge—or worse, give them a reason to deny the case. Still, there are ways to more subtly refine the narratives attorneys present in court.

First, in preparing evidence on country conditions, advocates can seek articles and cultural experts from the country of origin of the applicant, not just experts from the United States.[252] Of course, advocates still must include US DOS reports and other standard, US-based articles,[253] but including evidence from an expert who shares identities with an applicant can help provide more nuanced information.[254] And even if the story presented by the expert remains relatively one-sided, as is

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[249] Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 67 (2001) (discussing avoiding making assumptions for the reasons for client behavior and instead positing other reasons for a client's action).

[250] *See* Dadhania, *supra* note 7, at 1619 (arguing that "adjudicators and advocates should avoid the pitfalls of essentializing and demonizing a religion by being aware of how they frame their narratives"); *see* Gurmu, *supra* note 180 (discussing the dangers of asking clients to perform tropes such as the "happy migrant" who was "saved" by coming to the United States, which can perhaps bolster a client's chances of success, but is disempowering and an unrealistic portrayal of their experiences).

[251] *See* discussion *supra* Part I.

[252] This suggestion was proposed by Tsion Gurmu, Legal Director, Black Alliance for Just Immigration (BAJI), Question-and-Answer Session at Cornell Law School Clinics' Joint Class after Presentation on Intercultural Effectiveness (Mar. 1, 2022).

[253] *See* discussion *supra* Part I.

[254] We note that this suggestion has also been made by Tsion Gurmu during a talk at Cornell Law School: "We have to bolster our cases with country-conditions experts, ideally from the country of origin, who can speak to the nuances of the claims we're making." Gurmu, Question-and-Answer Session, *supra* note 252.

the necessary litigation strategy, the expert still can bring authenticity and subvert unnecessary reliance on only Western sources. For example, in *Velasquez-Banegas*,[255] the expert witness, Dr. Suyapa Portillo, was a queer Honduran-American woman,[256] and thus shared several identities with the Honduran applicant perceived as gay. She studied the experiences of LGBTQI+ communities in Honduras from a perspective "of participant-observer and a Honduran,"[257] adding legitimacy and lived experience to her role as an expert while providing essential litigation support for the case.

Second, in court, attorneys can explicitly acknowledge when they are implicating or pushing against a stock story, if such notice can fit with the litigation strategy. Acknowledgement like this might be most helpful when the advocate has a case that requires creating a space outside the predictable story. For example, in the case discussed above in which a Guatemalan worker was being attacked by the local Indigenous community,[258] the story we had to tell was in conflict with the stock story of the Indigenous community as the victims. A case that deviates from the stereotypical may benefit from the attorney "giv[ing] the judge psychological permission to see this case as sui generis by subtly calling to her attention the unhelpfulness of allowing those external narratives to enter the courtroom."[259] This could be helpful because adjudicators are generally reluctant to shift their understanding from stock stories and may not even be aware that they are relying on tropes.[260]

Another way to challenge or complicate stock stories could be to provide more perspective on the client's experience in the United States. Many asylum narratives, whether

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[255] Velasquez-Banegas v. Lynch, 846 F.3d 258, 261 (7th Cir. 2017).

[256] *See* Suyapa Portillo Villeda, *Biography of Suyapa Portillo Villeda*, WOMEN ALSO KNOW HIST. (2023), https://womenalsoknowhistory.com/individual-scholar-page/?pdb=3749 [https://perma.cc/8JPW-FRRQ].

[257] *See id.*

[258] *See* discussion of this case *supra* Part I and notes 210–211.

[259] Keyes, *supra* note 161, at 253.

[260] *See* Rubenstein, *supra* note 181, at 152–54 (explaining that "cultural-cognition theory predicts that when lay people are faced with conflicting empirical accounts of immigration crime, undocumented employment, and so on, they will gravitate toward the opinions of their trusted, culturally aligned experts"). For more on expansive migrant narratives across spaces, The Butterfly Lab for Immigrant Narrative Strategy, a nonprofit immigrant advocacy group, envisions building a "narrative infrastructure" that challenges settler colonialism, normalizes migration, and collaborates across disciplines to create an "ecosystem" where nonessentialized migrant narratives can thrive. Jeff Chang et al., *A Future for All of Us*, BUTTERFLY LAB at 6–7, 18, 20 (Mar. 2022), https://www.raceforward.org/research/reports/future-all-us-report-phase-1-butterfly-lab-immigrant-narrative-strategy [https://perma.cc/JEQ6-DBDJ].

provided in the client's voice or in the attorney's briefing and statements, lionize the United States for being a progressive haven, setting up contrast to the client's home country. But these stories omit the challenges that new arrivals to this country face, even if those challenges are not life-threatening. Advocates can prepare a story that does not ignore the very real issues that an applicant faces in the United States.[261] For example, a gay client we represented was at a high risk of being killed in his African home country. In the United States, this risk is much lower, but he is still a target of discrimination, harassment, and potentially worse as a gay Black immigrant man in America. Inclusion of this postflight perspective is not essential to the merits of the asylum case, so it does not risk the individual's outcome, but even a sentence or two could widen the story just a bit[262] and challenge the idea of the United States as savior.[263] In this way, the asylum advocate can present at least a partial counterstory without risking the success of the case.[264]

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[261] *See*, *e.g.*, Sharita Gruberg et al., *The State of the LGBTQ Community in 2020*, CTR. AM. PROGRESS (Oct. 6, 2020), https://www.americanprogress.org/article/state-lgbtq-community-2020/ [https://perma.cc/W23Y-ETRF].

[262] Similarly, Prof. Keyes suggests that an attorney can challenge the good/bad immigrant dichotomy through narratives that "begin[to] creat[e] a narrative space somewhere other than that of good and bad, a space that can be broadened over time by other clients and other narratives, step by painstaking step." Keyes, *supra* note 161, at 253–54; *see also* Walter I. Gonçalves Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. SOC. JUST. 333, 341 (2020) (acknowledging, in the context of criminal defense strategies, that "implicit biases are malleable and can be gradually unlearned and replaced with new mental associations"). Still, some advocates may be uncomfortable with this complication of the narrative, as it could be an unwelcome distraction to the adjudicator and dilute the persuasive value of the story. *See* Ahmad, *supra* note 2, at 122 ("At the end of the day, though, in order for our narratives to be effective, they must draw upon prevailing norms and beliefs, no matter how problematic they may be."); *see also* Zaman, *supra* note 109 (describing how immigration law "insist[s] that [immigration attorneys] reinforce tired stereotypes about the global South").

[263] Attorney Tsion Gurmu urges advocates to "avoid the flat sort of 'migration to liberation' narratives" that show the home country as uncivilized and oppressive in contrast to the United States as a liberal, tolerant society. Gurmu, *supra* note 182. We are concerned that complicating the narrative of the home country can risk the success of the case, unless done very subtly, and we know that adjudicators may also be persuaded by the contrast to the United States. *See* discussion of *Velasquez-Banegas* above. However, the "liberation" side of the narrative has more space for nuance, in our view.

[264] *See* Conway, *supra* note 171, at 519 n. 397; Coutin, *supra* note 190, at 664–65 ("One way that immigrants and their allies combat illegalization is through counter-narratives that question boundary-setting, challenge assumptions of criminality, and denounce racialization.").

3. Presenting the Case in the Media and Other Public Spaces

Even an advocate with the goal of empowering clients can struggle to do so effectively and authentically through publicity in news sources and other forms of media. Challenges include constraints related to grants or other funding sources that come with an agenda and require the advocate to tell a proscribed story; clients who do not wish to participate in the media process and understandably prefer to be more private about their experiences; reporters or writers who wish to highlight particular parts of the story;[265] and the cases themselves, which are often ongoing in some way. For example, when an advocate does appellate-level cases, a win solves one problem for the client, but the client must often go through a new trial. When an advocate handles trial-level cases, a win there soon gives way to new challenges, such as obtaining work authorization, petitioning other family members, and gathering more evidence for a green card application.

Still, while the stories we tell in court must be framed for maximum effect, we have much more room for creativity outside of the legal corners of the case. Professor Keyes urges advocates to engage in "micro-activism," seeking narrative spaces to tells stories outside the courtroom.[266] This idea easily applies to discussions of culture in stories we tell about, or with, asylum applicants. For example, for a story about an asylum win, an attorney could ask the reporter to cover what the client is doing now that she has won asylum, including elements of her culture she continues to participate in from afar or within the local diaspora of her community. Further, advocates can be mindful of their portrayal of the client's country of origin to the reporter, framing the situation broadly and without racialized terms. These more complex stories could help slowly shift the mismatch in public perception between media coverage and the actual law and experiences of immigrants.

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[265] For example, legal aid attorneys and other grant-funded legal services, such as law school clinics, often highlight positive case stories as part of their grant reporting and to solicit additional funding. Media outlets may often have a particular angle they wish to take on a story, however, which can replicate essentialization.

[266] Keyes, *supra* note 161, at 255–56; *see also* Chang et al., *supra* note 260, at 22 (discussing a "narrative ecosystem" of storytelling outside the legal context).

4. Advocate Reflection

Finally, many clinical scholars writing about their work espouse reflective practices as an integral part of client representation.[267] Professor Haynes urges the lawyer to:

> look deeply and reflectively at her own positions and goals, and understand how those might shape the direction in which she guides her client . . . the lawyer will have to struggle with questions about what cases to take and which narratives to put forward, in furtherance of whose goals.[268]

Professor Karla M. McKanders encourages clinical professors to center critical, decolonial theories in teaching law students engaged in asylum law.[269] Such consideration of the interaction between the advocate's worldview, the legal system, the stories of the case, and their interactions could aid the advocate in presenting a story that minimizes essentialization wherever possible.

The advocate is still bound by the demands of the law, so critical self-reflection on these issues may not ultimately change much about the story put forth in litigation. But the advocate is not just a lawyer; they are also a human, a person who is impacted by the work they are doing.[270] Reflection may allow the advocate to identify how their work both supports and—if it does—subverts the system, but it also may benefit them outside the legal system. Anyone engaged in this work is likely to experience the slow decline of their own openmindedness about situations around the world, like an immigration judge who can no longer be fully objective about repetitive asylum claims,[271] or an attorney who cannot fathom visiting a country where her clients are from because the place has taken on a violent mythology in her mind.[272] To allow them space to process their role in the system in which they are complicit, advocates and judges should seek mental health resources to deal with the secondary trauma they

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[267] *See*, *e.g.*, Haynes, *supra* note 20, at 415; GROSE & JOHNSON, *supra* note 26, at 37–39; *see* Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 319 (2014).

[268] Haynes, *supra* note 20, at 415.

[269] Karla M. McKanders, *Decolonizing Colorblind Asylum Narratives*, 67 ST. LOUIS U. L.J. 523, 526 (2023).

[270] Rabil et al., *supra* note 195, at 846 (explaining that "[s]econdary trauma not only affects physical health but also directly impacts the lawyering process. Lawyers can suffer from memory, attention, and concentration problems . . . [and also] confirmation bias or tunnel vision" as a result of their participation in the system).

[271] *See* Marks, *supra* note 209 (describing the inner thought process of an immigration judge aware of her own bias and working to adjudicate fairly).

[272] *See* discussion of an attorney who may be unwilling to visit Mexico, *supra* Section II.2.

experience and the entrenched essentialism that they ultimately help perpetuate, allowing them space to process their role in the system in which they are complicit.

CONCLUSION

Cultural essentialization in US asylum law arose through a meandering legal path through international humanitarian law, black letter law, and the evolution of case doctrine. These legal frameworks create an inherently colonial, racist, and stereotypical structure that requires asylum applicants, their advocates, and adjudicators to rely on reductive and harmful cultural narratives. We call for envisioning a legal structure that would abolish the need to present such evidence. In the short term, we offer strategies and solutions for harm reduction and thoughtful intervention to disrupt these tropes and empower clients and communities.