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"The Unarmed Road of Flight": The Rights of LGBT Asylum-Seekers Under American Refugee Law

Douglas R. Praschak

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I. INTRODUCTION

The United States has a long-running narrative of refugee acceptance.[1] All American schoolchildren, usually around Thanksgiving, learn about the Pilgrims—English Puritans who braved passage to the New World in search of religious tolerance not found in Europe—as a vital part of the United States' collective origin story.[2] Within the American Christian-Judeo tradition Moses, himself a refugee,[3] is viewed as a heroic figure for leading the persecuted and enslaved Israelites out of Egypt,[4] while Adam and Eve are considered tragic figures for being cast out of the Garden of Eden to "till the ground from whence he was taken."[5] The Church of Jesus Christ of Latter-day Saints, a religion founded in upstate New York with now over 16 million members worldwide,[6] is based upon a group of Jesus' disciples who were forced to leave Jerusalem and

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[1] "In 1981 President Ronald Reagan vowed to 'continue America's tradition as a land that welcomes peoples from other countries' and to 'continue to share in the responsibility of welcoming and resettling those who flee oppression.'" Donald Kerwin, *How America's Refugee Policy is Damaging to the World and to Itself*, THE ECONOMIST (June 19, 2018), https://www.economist.com/open-future/2018/06/19/how-americas-refugee-policy-is-damaging-to-the-world-and-to-itself. *But see* Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION INFORMATION SOURCE (Apr. 1, 2006), https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era ("Characterizing the Salvadorans and Guatemalans as 'economic migrants,' the Reagan administration denied that the Salvadoran and Guatemalan governments had violated human rights. As a result, approval rates for Salvadoran and Guatemalan asylum cases were under three percent in 1984.").

[2] Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAGAZINE, Oct. 2010.

[3] "Now when Pharaoh heard this thing, he sought to slay Moses. But Moses fled from the face of Pharaoh, and dwelt in the land of Midian[. . .]." Exodus 2:15 (King James).

[4] *See* Exodus 14; Joshua Stanton, *Moses Was Twice a Refugee*, HUFFINGTON POST (Jan. 6, 2017), https://www.huffingtonpost.com/joshua-stanton/moses-was-twice-a-refugee-parshat-vaera-exodus-62--935_b_8924388.html.

[5] Genesis 3:23 (King James).

[6] THE CHURCH OF JESUS CHRIST AND LATTER-DAY SAINTS, 2017 STATISTICAL REPORTS FOR 2018 APRIL CONFERENCE (Mar. 31, 2018), https://www.mormonnewsroom.org/article/2017-statistical-report-april-2018-general-conference.

came to what eventually became America.[7] The poem inscribed on the base of the Statue of Liberty imprinted these lofty ideals into the American consciousness:

> "Give me your tired, your poor,
>
> Your huddled masses yearning to breathe free,
>
> The wretched refuse of your teeming shore.
>
> Send these, the homeless, tempest-tost to me,
>
> I lift my lamp beside the golden door!"[8]

The United States has no always lived up to these lofty goals. For example, the utter failure to accept refugees fleeing the horrors of Nazi Germany remains one of the nation's darkest chapters.[9] These failings are not entirely behind us. Despite no shortage of ongoing humanitarian crises around the globe, recent polls and political developments indicate that the national attitude dictates a tightening on who can enter the United States as a refugee.[10]

Historically, American acceptance of LGBT individuals has not always been as robust as the romanticization of our acceptance of refugees. It used to be a crime in the vast majority of states to commit sodomy, a legal manifestation of the vitriolic social hatred the LGBT community faced at the time.[11] Since the gay equality movement began in earnest in the 1950s, however, the LGBT community has achieved many victories, culminating in the landmark 2015 case *Obergefell*

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[7] DOUGLAS J. DAVIES, AN INTRODUCTION TO MORMONISM 50 (2003).

[8] Emma Lazarus, THE NEW COLOSSUS (1883).

[9] Barbra L. Bailin, *The Influence of Anti-Semitism on United States Immigration Policy With Respect to German Jews during 1933-1939*, CUNY ACADEMIC WORKS, 4 (2011) ("Seventy-five percent of the approximately 300,000 visa applications submitted by German Jews [between 1933 and 1939] were denied.). This blasé attidute was not limited to the United States. *See, e.g.* Anne Karpf, *We've Been Here Before*, THE GUARDIAN, June 7, 2002 ("[Most people] assume that Jewish refugees were welcomed, at least in the 1930s, with a tolerance that has traditionally been seen as a beacon of Britishness. They're shocked to discover that rabid intolerance - among both press and government - has a strong British pedigree.").

[10] Alan Gomez, *Fewer Americans Believe U.S. Should Accept Refugees*, USA TODAY (May 24, 2018, 10:00 AM), https://www.usatoday.com/story/news/nation/2018/05/24/fewer-americans-believe-united-states-should-accept-refugees/638663002/; *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

[11] WILLIAM N. ESKRIDGE, JR., GAYLAW 24-26 (1999).

v. Hodges,[12] which held that a prohibition on same-sex marriage in unconstitutional and violates the Equal Protection provided by the Fourteenth Amendment.[13] This mirrors more broad liberal attitudes generally held by the American public in support of same-sex marriage.[14] Transgender acceptance has moved at a slower pace, but with more visible representation by transgender individuals in the media, strides are being made.[15]

The divergent paths refugee and LGBT acceptance have taken in the minds of Americans and in the United States legal system warrant a close examination. Particularly, how do they interact with each other? Has greater public acceptance of same-sex marriage led to softer restrictions on refugees fleeing violence based on their sexual orientation? This comment will examine these questions in three parts. First, it will examine the asylum apparatus in America as currently structured, and how it has developed over time. Next, it will look at the current state of LGBT asylum-seekers under American law, as well as LGBT rights more generally. Particularly, this section will attempt to predict how LGBT claims will change in the wake of the recent decision *Matter of A-B-*.[16] Finally, it will attempt to fashion a cohesive, workable system of evaluating the asylum claims of those fleeing sexual orientation-based violence by looking at what is used by other countries. This comment will conclude that because the current policy governing gay and transgender asylum seekers is unfairly discriminatory and does not adequately reflect the social progress these groups have been enjoying in the past decades, asylum standards should be relaxed to be more similar to what nations like Canada and the United Kingdom nations employ.

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[12] 135 S. Ct. 284 (2015).
[13] *Id.*
[14] Justin McCarthy, *Two in Three Americans Support Same-Sex Marriage*, GALLUP (May 23, 2018), https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx.
[15] *See, e.g.* Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (July 23, 2018), https://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz (Olympic gold medalist Bruce Jenner revealing his identity as a male-to-female transgender woman).
[16] 27 I&N Dec. 316 (A.G. 2018).

II. THE DEVELOPMENT OF THE AMERICAN ASYLUM SYSTEM

A. Introduction

This section will discuss the current state of American asylum law and LGBT rights on a macroscale, before narrowing the scope to an examination of the rights gay and transgender applicants have in the next section. First, it will examine how this area of law has developed; specifically, during periods in which there has been an expansion or contraction of the requirements of a successful asylum claim. To conclude, it will look at the development of gay and trans rights, and how closely those expansion of rights enjoyed by same sex couples and LGBT individuals domestically has tracked with the rights enjoyed by LGBT asylum applicants.

Before beginning, it will be helpful to define what a refugee is. A "refugee," perhaps the term most used in broadcast and print media during the current debate about the United States' role in the world's various humanitarian crises, is a person outside of their country of nationality or habitual residence who is unwilling or unable to return due to a well- founded fear of persecution on account of either their: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion.[17] In order for an applicant to meet this definition, they must establish that one of these five factors was at least "one central reason" for their persecution.[18] They must finally show that either the government was the one carrying out the persecution, or that they were unwilling or unable to prevent it.[19]

B. The Development of American Refugee Law

[17] 8 U.S.C.A § 1101(a)(42).
[18] *Matter of C-T-L-*, 25 I. & N. Dec. 341, 343 (B.I.A. 2010).
[19] Timothy Greenberg, *The United States Is Unwilling to Protect Gang-Based Asylum Applicants*, 61 N.Y.L. SCH. L. REV. 473, 483 (2016).

An article published in 2000 ominously declared that "[t]he United States's commitment to protecting refugees is dying a slow death."[20] In the nearly two decades since, the prognosis of the American asylum system has not seen much improvement.[21] This is a poorly timed downward trend in our refugee policy in light of the myriad of humanitarian crises around the globe.[22] This problem is not going to get better, as climate change is expected to displace people on an unthinkable scale, disproportionately affecting impoverished nations.[23]

This doom and gloom begs the question of where are we, and how did we get here? Despite the lofty ideals espoused in the introduction, a claim that America has ever had an exemplary refugee policy would be dubious at best. In the summer of 1938, on the eve of World War II, 67% of Americans polled were opposed to the admission of Jews fleeing Nazi persecution.[24] That number rose to 83% opposition by April 1939, when the scale of Nazi persecutions were beginning to become clear.[25] The reasons for this were complex—an economy crippled by the Depression, a fear that the refugees would be unable to assimilate, anti-semitism—but clearly show that America's commitment to assisting refugees is not built on as solid a foundation as one might like to believe.[26]

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[20] Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 3 (2000).

[21] *See, e.g.*, Glenys P. Spence, *Colonial Relics: Unearthing the Lingering Tyranny of Colonial Discourse in U.S.-Caribbean Immigration Law and Policy*, 26 J. Civ. Rts. & Econ. Dev. 127, 150 (2011) ("The United States is under an international duty against . . . sending asylum-seekers back to home countries where they may be subject to persecution. The current state of American anti-immigration laws places the United States in direct contravention of this duty.").

[22] Lucas Kowalczyk and Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, CORNELL L. REV. 1219, 1219 (2017) ("The era of the refugee has already begun.").

[23] *Id.*; Coral Davenport, *Major Climate Report Describes a Strong Risk of Crisis as Early as 2040*, N.Y. TIMES, Oct. 7, 2018, https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html ("'In some parts of the world, national borders will become irrelevant,' said Aromar Revi, director of the Indian Institute for Human Settlements . . . 'You can set up a wall to try to contain 10,000 and 20,000 and one million people, but not 10 million.'").

[24] ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, 96 (1957).

[25] *Id* at 98-99.

[26] *Id.*

Global attitudes began to change in 1951 with the enactment of the United Nations Convention on the Status of Refugees.[27] This "Magna Carta of international refugee law" was the product of three weeks of negotiations in the city of Geneva between delegates of twenty six countries—including the United States.[28] The Convention was originally created to resolve the nearly one million refugees still unsettled around Europe, however along with its 1967 protocol it has come to represent one of the most crystalized statements of the rights refugees enjoy; namely, the right to fair treatment for employment, education, and housing.[29]

Despite this signaling from the global community that refugees were being treated as a more important issue in the wake of the Second World War, the United States still did not enact comprehensive refugee legislation.[30] In fact, prior to 1980 United States law contained neither overall standards nor procedure to govern the admittance of refugees.[31] There were several disparate statutes which governed classes of people individually, and whenever a new crisis would spring up Congress would pass a law governing the admittance of people fleeing from it; for example, people coming from Hungary, Cuba, or Indo-China.[32] In 1965, Congress also created a distinct class of immigrants allowed to gain entry to the United States in a separate immigration statute that said those fleeing persecution in Communist dominated countries could take up residence in the United States.[33] This Communist persecution exception was the de facto statute

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[27] Guy S. Goodwin-Gill & Jane McAdam, THE REFUGEE IN INTERNATIONAL LAW 426 (2007).

[28] Marilyn Achiron, *A 'Timeless' Treaty Under Attack, Refugees*, Vol. 2, No. 123, at 8 (2001), available at http://www.unhcr.org/publ/PUBL/3b5e90ea0.pdf

[29] *Id.*; Kevin Walsh, *Victims of a Growing Crisis: A Call for Reform of the United States Immigration Law and Policy Pertaining to Refugees of the Iraq War*, 53 VIL. L. REV. 421, 429 (2008).

[30] *Id.*

[31] Witney Drake, *Disparate Treatment: A Comparison of United States Immigration Policies Toward Asylum-Seekers and Refugees from Colombia and Mexico*, 20 TEX. HISP. J.L. & POL'Y 121, 123 (2014).

[32] *Id.*

[33] Kathryn Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C.J. INT'L L. & COM. REG. 253, 273 (1995).

governing refugee intake for the 1960's and 1970's. In this role, it was painfully inadequate as it set the annual ceiling too low for the scale of the world refugee population and because many refugees were not fleeing Communist dominated countries.[34]

This inadequacy led to the implementation of America's first comprehensive refugee legislation; The Refugee Act of 1980.[35] This act implemented a definition of "refugee" modelled after the UN's, and did away with geographic or ideological restriction.[36] As stated in the previous subsection, this new statutory definition requires "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[37] This definition is still in use today. As the rest of this note will detail, it is the fourth option, membership in a particular social group (hereinafter PSG) which has caused the most litigation, and which most LGBT based asylum claims are lodged under.

C. LGBT Rights in American Refugee Law

LGBT protection in American immigration law is not built on a solid foundation. Under the Immigration Act 1917, homosexuals were prohibited from entering, let alone claiming asylum in, the United States.[38] The Act prohibited those who were "mentally defective" or afflicted with a "constitutional psychopathic inferiority" from entering the country, a definition that included homosexuals.[39] Even for decades after the passage of this Act homosexuality continued to be

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[34] *Id.* at 273-74.

[35] Drake, *supra* 31, at 123; Pub.L 96-212.

[36] *Id.* at 124 ("The definition is purposefully based on the definition of 'refugee' in the 1951 Convention relating to the Status of Refugees, as updated by the 1967 Protocol relating to the Status of Refugees.")

[37] 8 USCS § 1101(a)(42).

[38] The Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 875 (1917) (repealed by the Immigration and Nationality Act, 82-414, ch. 477, § 403(13), 66 Stat. 279 (1952)).

[39] Margot Canaday, *"Who Is a Homosexual?": The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law*, 28 LAW & SOC. INQUIRY 351, 358 n.17 (2003).

considered a mental defect according to the Public Health Service, so this definition continued to prevail.[40]

This viewpoint of precluding homosexuals from immigrating due to their sexual orientation being a mental illness was reaffirmed with the passage of the Immigration and Nationality Act 1952, which included language precluding those with a "psychopathic personality, epilepsy, or mental defect" from receiving American visas,[41] a clause that was used to deny entry to homosexual foreign nationals.[42] If either of these previous two statutes were not sufficiently unambiguous in their bigotry against the LGBT community, in 1965 Congress passed an amendment which substituted "sexual deviation" for "epilepsy" in determining who was barred from entry into the United States.[43] This remained the status quo until 1990, when Congress removed this section of the Act with the passage of the Immigration Act 1990.[44] As discussed in the previous subsection, this Act implemented the presently used "membership in a particular social group" language that is typically used to evaluate LGBT asylum claims today.[45] I will analyze the contours of how these claims function in practice in the next section, but first I will

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[40] Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1118 (1995).

[41] Pub. L. No. 414, 66 Stat. 163, 182 (1952).

[42] Park, s*upra* note 39, at 1118.

[43] *Id*; Immigration and Nationality Act, amendments, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965) (superseded 1990).

[44] Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990). It is interesting to note, however, that judicial progress in lieu of legislative action was being made previous to this. In 1982, the Northern District of California held that; (1) Homosexuality is not a mental affliction, and (2) denying immigration on the basis of sexual orientation violated the First Amendment guarantee of freedom of association. *Lesbian/Gay Freedom Day Comm., Inc. v. United States Immigration & Naturalization Serv.*, 541 F. Supp. 569 (N.D. Cal. 1982).

[45] Park, s*upra* note 39, at 1122. A notable case that utilized this criteria was the landmark (albeit not legally binding on other judges) was handed down by San Francisco Immigration Judge Philip Leadbetter in 1993 when he granted asylum to a gay Brazilian man who fled his home country due to the incessant violence he was victim to there. Brian F. Henes, *The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes*, 8 TEMP. INT'L & COMP. L.J. 377 (1994). In the opinion, Judge Leadbetter wrote "anti-gay groups appear to be prevalent in Brazilian society and continue to commit violence against homosexuals, with little official investigations and few criminal charges being brought against the perpetrators." Paul Ben-Itzak, Gay Brazilian Granted Asylum Details Beatings, Reuters, Aug. 3, 1993, available in LEXIS, News Library, U.S. File.

conclude this section with an examination of how closely societal attitudes towards and legal protections of the gay and transgender community have tracked with how they are treated under American refugee law.

D. The Evolution of LGBT Rights in the United States

In 1953, *ONE*, the first magazine aimed at advancing the equality of sexual minorities, published an article which urged its readers to consider the possibility of fighting for the rights of same-sex couples to marry.[46] The thought of gay couples being able to marry, let alone be open about their sexual orientation, in 1953 (incidentally, only three years after the UN established protocols on refugee resettlement under the UNHCR)[47] was considered to be extremely far-fetched.[48] The combination of social conservatism and the burgeoning Cold War and attached anti-Communist sentiment led to fierce anti-gay fervor.[49] Suspected homosexuals and Communists were driven from jobs in the government at every level.[50] One of the reasons for this association was the theory that were a Communist to find out about a government employee's sexuality, they could be blackmailed into divulging sensitive information, or becoming a direct Soviet operative.[51] President Dwight Eisenhower issued an executive order in 1953 ordering that all government workers be investigated for "any criminal . . . conduct, habitual use of intoxicants

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[46] CARLOS A. BALL, AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 1 (2016).

[47] *See* Park, s*upra* note 39, at 426

[48] Ball, s*upra* note 45.

[49] SUSAN GLUCK MEZEY, QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY 17 (2007).

[50] *Id*.

[51] *Id* at 18. This logic may have been built on faulty grounds, however, as until Stalin's death in 1953 consensual homosexual sex was a offense punishable by five years hard labor in the Soviet Union. Rustam Alexander, *Soviet Legal and Criminological Debates on the Decriminalization of Homosexuality (1965–75)*, 77 SLAVIC REV. 30, 32 (2018). Ironically, much like how the American government viewed homosexuality as a sign of Communism, the Communist Party in the USSR saw homosexuality as a product of capitalist decadence, and therefore worthy of vigorous oppression. Laura Engelstein, *Soviet Policy Toward Male Homosexuality: Its Origins and Historical Roots*, 29 J. OF HOMOSEXUALITY 155 (1995).

to excess, drug addiction, or sexual perversion."[52] By the end of 1955, more than 650 homosexuals had been discharged from government jobs.[53] A government report later found no relation between homosexuality and security violations.[54]

This coupling of anti-Communist and anti-gay sentiments, along with other religious and political bigotries, led to a nation heavily opposed to the LGBT community. As late as 1968, every state in the country had a law on the books which punished gay or lesbian sexual expression.[55] Challenging these laws, commonly known as "sodomy statutes," as an unconstitutional invasion of their privacy galvanized the LGBT community.[56] The first case to reach the Supreme Court directly addressing this Constitutional challenge was *Bowers v. Hardwick*, in which an Atlanta man was caught by a police officer receiving oral sex from another man in his apartment in violation of a Georgia sodomy statute.[57]

In a 5-4 opinion, the Court said that they were "quite unwilling" to find a "fundamental right to engage in homosexual sodomy" under the Fifth and Fourteenth Amendment.[58] A concurring Justice Burger agreed with the Court's opinion, but wrote separately to "underscore

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[52] *Id; see also Exec. Order No. 10450* ("[T]he interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States.").

[53] Mezey, *supra* note 48 at 18.

[54] *Id.*

[55] RUTHANN ROBSON, GAY MEN, LESBIANS, AND THE LAW 19 (1997).

[56] Mezey, *supra* note 48 at 47.

[57] 478 U.S. 186 (1986). It is worth giving a more detailed account of the facts (which are not given in the Supreme Court opinion) to illustrate the atmosphere of sexual McCarthyism that pervaded the country even during the 1980s. Leaving the gay bar where he worked, Michael Hardwick threw a beer bottle into a trashcan. At that moment a police officer drove by, eventually stopping him to ask where the beer was. The officer accused Mr. Hardwick of throwing the beer away to evade the officer, and gave him a ticket for drinking in public. The ticket had a court date for which the date and given day of the week did not coincide. After Mr. Hardwick missed the first court date the police officer took the rare step of processing an arrest warrant himself (something he hadn't done in his ten years on the job). Pursuant to this, he went to Mr. Hardwick's apartment but he was not there. Three weeks later, after Mr. Hardwick had paid his fine and the warrant had expired, the officer returned to the apartment once again to see Mr. Hardwick performing oral sex on another man. This combination of facts—two consenting adults in a private residence—gave the ACLU a perfect test to challenge the Constitutionality of sodomy laws. CARLOS A. BALL, JANE S. SCHACTER & WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 152-55 (3d ed. 2008).

[58] *Bowers*, 478 U.S. at 191.

[his] view" that there is no fundamental Constitutional right to "commit homosexual sodomy."[59] He comes to this conclusion by relying on the "ancient roots" of laws against sodomy, looking at the traditions of Roman Law, Christian-Judeo moral and ethical standards, and the English common law that would inform the colonies' early legal codes.[60]

Almost immediately, *Bowers* became one of the most criticized decisions in the Court's history.[61] Much of this criticism centered on the Court's acceptance that homosexuality has been invariably viewed as a societal ill,[62] punishable by the strictest means possible.[63] This was not the case, as not only had societies accepted homosexual conduct in the past, oral sex (the crime being punished in *Bowers*) was not a crime in any state at the time of the ratification of the Fourteenth Amendment.[64] Possibly due to this unpopularity in legal and academic circles, LGBT activists would not wait long until mounting another legal challenge to the Constitutionality of sodomy statutes.

This challenge would come with *Lawrence v. Texas*.[65] This case, with facts broadly similar to *Hardwick* (in which a police officer enters someone's apartment to find them engaged in a consensual homosexual act and subsequently charges them under an applicable state law statute)[66] allowed activists to make a new attempt at having sodomy statutes declared unconstitutional by a

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[59] *Id.* at 196 (Burger, J. concurring). "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id* at 197.

[60] *Id*. at 196-97 (Burger, J. concurring). A dissenting opinion points out the absurdity of drafting secular legislation to impose conformity to a religious doctrine on the entire citizenry without advancing a different adequate justification. *Id.* at 211 (Blackmun, J. dissenting).

[61] Ball et. al., *supra* note 56 at 164-65.

[62] *Bowers*, 478 U.S. at 193 ("Proscriptions against [consensual homosesuxal sodomy] have ancient roots."); *see also Bowers*, 478 U.S. at 197 (Burger, J. concurring) ("Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'").

[63] *See* Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073.

[64] *Id*. at 1086-89.

[65] 539 U.S. 558 (2003).

[66] *Id.* at 562-63.

refreshed Supreme Court. Acknowledging the criticisms of the *Bowers* opinion, particularly the mischaracterization and weaponization of the history of the criminality of homosexuality and homosexual acts, *Lawrence* decided 6-3, held that the right to privacy included the right to engage in consensual homosexual acts in private.[67] Despite this victory for the LGBT community, a dissent written by Justice Scalia painted a grim picture of just how far they yet had to go by arguing that the Court's attitude towards homosexuality was out of step with mainstream thought of the time.[68]

The same year that *Lawrence* was decided, there was another victory for LGBT activists, with Massachusetts' highest court hold that prohibiting same-sex marriage causes "a deep and scarring hardship on a very real segment of the community for no rational reason,"[69] and that a marriage ban of this sort goes against the Massachusetts constitution.[70] Perhaps vindicating Justice Scalia's doubt as to how mainstream American acceptance of homosexuality was, there was an overwhelming rejection of same-sex marriage the next year, with all eleven states voting in referendums passing laws to limit marriage to a man and a woman, some by extremely wide margins.[71] Over the next decade there were many legal and political skirmishes on the issue of same-sex marriage, until in 2015 the Supreme Court finally ruled on the issue once and for all,

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[67] *Id.* at 578. ("*Bowers* was not correct when it was decided, and it is not correct today. . . [It] should be and now is overruled.").

[68] "Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as 'discrimination' which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream.'" *Id.* at 602–603 (Scalia, J. dissenting).

[69] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

[70] *Id*. at 974-75.

[71] Joel Roberts, *11 States Ban Same-Sex Marriage*, CBS NEWS (September 30, 2004), https://www.cbsnews.com/news/11-states-ban-same-sex-marriage/. ("The bans won by a 3-to-1 margin in Kentucky and Georgia, 3-to-2 in Ohio, and 6-to-1 in Mississippi.").

holding that a prohibition on same-sex marriage is unconstitutional on a federal level.[72] *Obergefell* signalled a change in judicial approach same-sex marriage. The Court now recognized that homosexuality is an intrinsic, innate part of who a person is, and to deny someone the right to marry based on that violates due process principles.[73]

Like *Lawrence*, *Obergefell* was certainly a major victory for the LGBT movement. However, to say that the fight for equality is over would be like saying that the fight for racial equality ended with *Brown v. Board of Education.*[74] Many obstacles still remain.

That said, America has certainly experienced a massive shift in public thinking on the matter of homosexuality. In 1996, 27% of Americans surveyed thought same-sex marriage should be legal. By 2013 that number had climbed to 53%.[75] As of May 2018, public support of same-sex marriage is 67%.[76] Acceptance of the LGBT community is no longer the fringe issue that it was as recently as the mid-2000s. It is now firmly entrenched into the American consciousness in much the same was that the ideals of racial equality are.[77] Upon this foundation, it is now time to rethink how we as a nation handle LGBT refugees from countries without our same enlightened attitude towards same-sex relations. In the remainder of this note, I will address how we can do so. I will begin by examining how American refugee law currently handles applicants who claim asylum due to persecution based on sexual orientation.

III. THE CURRENT STATE OF LGBT ASYLUM SEEKERS

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[72] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[73] Leifa Mayers, *Globalised Imaginaries of Love and Hate: Immutability, Violence, and LGBT Human Rights*, 26 FEMINIST LEGAL STUD. 141 (2018).

[74] Ball, s*upra* note 45 at 6.

[75] Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013), https://news.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx.

[76] Justin McCarthy, *Two in Three Americans Support Same-Sex Marriage*, GALLUP (May 23, 2018) https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx.

[77] *Id.*

With a bit of background on the development of both the American refugee system and LGBT rights, this section will bring the two together into a cohesive overview of how American refugee law handles asylum seekers who flee their home country due to LGBT based persecution. This will be done by examining how LGBT asylum claims are handled in practice and comparing it to how claims from other groups, such as victims of domestic violence, are handled, and exploring how recent legal and political developments may impact LGBT asylum seekers.

Life is not easy for those who come to the United States to lodge an LGBT based asylum claim.[78] Once in the United States they may have left the pervasive sexual orientation-based violence of their home countries behind them,[79] but they are then thrust into a legal system ill-equipped to deal with their claims. Many applicants do not know that sexual orientation is a PSG protected by American asylum policy. Some may be afraid of the backlash they would receive from their own immigrant community if they come out as a member of the LGBT community.[80] Many asylum officers and immigration judges do not fully understand the issues of sexual orientation or gender identity, and how they relate to the persecution they receive in their home country.[81] The two primary issues I will address in this section pertain to these lack of understandings. The first are issues relating to the identity of the applicants. The second are issues relating to their persecution, in particular who is doing the persecuting.

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[78] *See, e.g.* Jose A. Del Real, *'They Were Abusing Us the Whole Way': A Tough Path for Gay and Trans Migrants*, N.Y. TIMES, July 11, 2018, at A12 ("[Transexual Salvadoran women] were forced to cut their long hair and live as men; they were beaten; they were coerced into sex work; they were threatened into servitude as drug mules and gun traffickers.").

[79] This is, of course, not to say that America does not have its own issues with violence motivated by sexual orientation. *See* NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 (2017), http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf.

[80] Bernardo M. Velasco, *Who Are the Real Refugees? Labels as Evidence of a "Particular Social Group,"* 236 ARIZONA L. REV. 235, 238 (2017).

[81] HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 44 (2006).

A. The Issue of Identity

A question of asylum policy that has evolved alongside the larger debate about LGBT rights explained in the previous section is to what extent is someone's sexuality a part of one's self. In other words, is one's sexual or gender identity an innate, immutable part of who a person is, or is it merely a quality that a person possesses? This is an important question to answer in an asylum context as United States courts have generally been more favorable to asylum claims from LGBT applicants than from other vulnerable groups.[82] Ensuring that LGBT asylum seekers can successfully fit into the PSG category of applicants is essential for their claims to be successful,[83] so it is vital that the United States recognize that the LGBT community is a distinct social group made up of individuals with a shared characteristic that separates them from the rest of their society.[84] A determination that this shared characteristic is an innate part of who someone is will make a judge more likely to grant asylum than if they think their being gay or transgender is a choice.

Immigration law is both influenced by and sheds light on the socio-economic climate of the society it governs.[85] Therefore, if the prevailing thought today about the LGBT community is that it is an innate, unchosen, immutable part of one's self it will be more favorable to LGBT asylum seekers. This is an especially urgent question for transgender asylum seekers, as they still face issues having to do with their identity in the United States than the gay and lesbian community generally no longer does.

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[82] Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. REV. 100, 122-23.
[83] Unless, of course, they are applying under one of the other categories, such as religious or political persecution.
[84] Meyers, s*upra* note 72.
[85] *Id*.

Previously, the American asylum apparatus utilized an "immutable characteristic" requirement for applicants under the PSG category.[86] This approach began with the 1985 case *Matter of Acosta*,[87] where a man from El Salvador attempted to claim asylum on the grounds that he would be in danger if he returned to his home country since employees of the taxi company he worked for were under constant threat and in fact were occasionally attacked by guerilla military groups.[88] The immigration court held that in order to qualify for asylum as a member of a particular social group one must be a "a member of a group of persons all of whom share a common, immutable characteristic."[89] This immutable characteristic must be something that the members of the group are either unable to change or should not be required to change because the characteristic "is fundamental to their identities or consciences."[90] In this case, it was held that employment for a particular taxi company did not constitute an immutable characteristic for the applicant.[91]

This immutable characteristic test was first applied to an LGBT asylum case in 2000, with *Hernandez-Montiel v. I.N.S.*[92] Around the age of twelve a Mexican boy, Geovanni, began to behave in a way that would typically be described as feminine.[93] When he refused to stop, his parents allowed him to be expelled from school and kicked him out of their home.[94] By the age of 15 he was regularly be raped and abused by local police.[95] Geovanni eventually found his way

[86] Meyers, s*upra* note 72.
[87] A-24159781.
[88] *Id.* at 216.
[89] *Id*. at 233.
[90] *Id.*
[91] *Id.*
[92] 225 F.3d 1084.
[93] *Id.* at 1088.
[94] *Id.*
[95] *Id.*

to the United States, where he claimed asylum based on his membership in a particular social group.[96] Citing *Matter of Acosta*, the court found that sexual orientation and identity "are so fundamental to one's identity that a person should not be required to abandon them."[97] Overturning a lower court, which held that Geovanni should merely stop wearing female clothing when in Mexico, the Ninth Circuit had no issue finding that "gay men with female sexual identities in Mexico" is a valid PSG for the purposes of asylum.[98]

Coming at a time when many states still had sodomy statutes on the books,[99] *Hernandez-Montiel* was a groundbreaking recognition of gay and lesbian identity in immigration law. It did not, however, extend the same recognition to transgender applicants. Geovanni had not taken the step of gender reassignment surgery, so the court explicitly said that they need not consider whether transgender would qualify as a PSG.[100]

Subsequent developments in the caselaw would add two further requirements—particularity, and social distinctness.[101] The "particularity" requirement says that a purported social group cannot be too indeterminate or amorphous.[102] The social distinction element requires that the group actually be perceived as a group by their society.[103] This can be corroborated by evidence such as witness testimony, historical and contemporaneous press accounts, and country condition reports to demonstrate that the group in question is perceived as distinct.[104]

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[96] *Id.*
[97] Hernandez-Montiel, 225 F.3d at 1094.
[98] *Id.*
[99] Robson, s*upra* note 54, at 19.
[100] *Hernandez-Montiel*, 225 F.3d 1084 at 1095n7.
[101] See, e.g., *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)
[102] Ivan A. Tereschenko, The Board of Immigration Appeals' Continuous Search for the Definition of "Membership in a Particular Social Group" in Matter of M-E-V-G- and Matter of W-G-R-: in the Context of Youth Resistant to Gang Recruitment in Central America, 30 CONN. J. INT'L L. 93, 102 (2014)
[103] *M-E-V-G-*, at 238.
[104] Nicholas R. Bednar, Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications, 100 MINN. L. REV. 355, 357 (2016)

Under the tripartite standard used in *Matter of M-E-V-G-*, transgender identity presents unique issues that gay and lesbian identity do not. Not only are people often afraid to be openly transgender because of the possible social and physical repercussions, but many times they are unsure of their identity themselves.[105] This difficulty has given rise to a feeling in asylum law, which persists to this day, that male-to-female transgender should simply change the way they carry themselves in order to avoid persecution in their home country.[106] For example, in *Miranda v. INS*,[107] the Eighth Circuit denied an appeal for asylum from a post operation male-to-female Honduran woman because, though the court acknowledged that "Miranda will face some social difficulties" moving to her home country, but the "potential difficulty in readjusting to life in Honduras" is insufficient to sustain a claim.[108] This is a cruel holding that tacitly states that, though the court knows she will face abuse, it is insufficient to allow an asylum claim until it actually happens. More recently, the Board of Immigration Appeals has rejected this approach. In 2014 the BIA reversed the finding of a lower court that a transgender Mexican woman should be returned to her home country because she can change the way she carries herself to avoid persecution.[109]

Considering the current "innateness" approach, this should be the approach that courts continue to take. Transgender individuals, whether pre or post-gender reassignment surgery,

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[105] Brent L. Bilodeau & Kristen A. Renn, *Analysis of LGBT Identity Development Models and Implications for Practice*, 111 NEW DIRECTIONS FOR STUDENT SERVICES 25, 26 (2005). ("[D]efensive strategies [to minimize LGBT feelings] are maintained for an unspecified time period in an attempt to minimize an individual's same-gender feelings. The process of expending energy to deny and minimize feelings may have negative consequences for overall emotional health.").

[106] ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW (2016).

[107] 51 F.3d 767 (1995).

[108] *Id.*

[109] Howell, *supra* note 102, at 185.

should not be expected to change or mask something that is so innate to their identity that they could not change it previously, even in the face of horrific abuse in their home country.

B. The Issue of the Non-Government Actor

A persistent issue with asylum claims is the extent to which it matters who is carrying out the persecution of the applicant, specifically in the context of non-state and non-governmental actors. It is well documented that when the state itself is persecuting an asylee on account of a particular characteristic of theirs it will be good evidence of a valid asylum claim.[110] Difficulty arises when the persecution is being carried out by someone with no affiliation with the government, or by a gang or crime syndicate who holds quasi-governmental power over a given area.

Much of the literature and case law dealing with this issue is in the context of victims fleeing domestic violence in their home country. The case that introduced much of the legal thought in this area was *Matter of R.A.*[111] In this case, a woman fled her home in Guatemala to escape the brutal and prolonged beatings she received from her husband.[112] She claimed asylum in the United States on the basis of her possessing a political opinion (that her resisting the abuse was interpreted as a political act for which she was being punished), or alternatively that she was a member of a PSG (Guatemalan women involved with Guatemalan men who believe in domination and subjugation of their partners).[113] After a protracted fourteen year legal odyssey

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[110] *See, e.g.* Ruqiang Yu v. Holder, 693 F.3d 294 (2d Cir. 2012) (Chinese citizen was jailed and later fired from a state owned airplane factory after attempting to bring corruption of management to the attention of the government); Fedunyak v. Gonzales, 477 F.3d 1126 (9th Cir. 2007) (Ukrainian businessman persecuted for complaining to higher government officials about the extortionate practices of local officials and police.).

[111] 22 I.&N. Dec. 906 (BIA 1999).

[112] *Id.* at 909 ("One night, he woke the respondent, struck her face, whipped her with an electrical cord, pulled out a machete and threatened to deface her, to cut off her arms and legs, and to leave her in a wheelchair if she ever tried to leave him. He warned her that he would be able to find her wherever she was.").

[113] *Id.* at 911.

which saw her case pass over the desk of three Attorney Generals, R.A. was granted asylum status in 2009 after receiving summary judgement from an immigration judge.[114]

The unpublished 2009 decision in *Matter of L.R.*[115] is a more recent decision with similar facts and which look a similar trajectory. A Mexican woman and her three children, all of whom were a product of rape, fled the severe abuse of her husband and applied for asylum in the United States.[116] In a brief in support of the asylum claim the Department of Homeland Security argued that the applicant's PSG could be defined by; (1) the asylee's gender, (2) her relationship status, and (3) her society's perception of that status.[117] Much like in *Matter of R-A-*, the claim was initially rejected with the judge finding that there was no cognizable asylum claim because L.R.'s abuser was merely a "violent man."[118] This decision was ultimately overturned and remanded by the BIA, with asylum ultimately being granted in 2010.[119]

Though asylum was ultimately granted in both *Matter of R-.A-.* and *Matter of L-R-*, neither case has precedential value on other courts.[120] This has not stopped them from being hugely influential on how immigration courts approach asylum claims from abused women.[121] While this is not a note on victims of domestic violence applying for asylum in the United States, the approach that courts have taken in granting asylum to women being persecuted by non-state actors can

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[114] *Matter of R-A-*, CENTER FOR GENDER & REFUGEE STUDIES, https://cgrs.uchastings.edu/our-work/matter-r-a-.
[115] DHS's Supplemental Brief, *Matter of L-R-* (BIA Apr. 13, 2009), available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.
[116] Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2529 (2014).
[117] *Id.*
[118] Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U.J. GENDER SOC. POL'Y & L. 529, 557 (2015).
[119] *Matter of L-R-*, *supra* note 111.
[120] Marsden, *supra* note 112.
[121] Lauren N. Kostes, *Domestic Violent and American Asylum Law: The Complicated and Convoluted Road Post Matter of A-R-C-G-*, 30 CONN. J. INT'L L. 211, 227-228 (2015).

inform how they approach claims from LGBT asylees facing similar persecution. This is especially true in light of the sea change case *Matter of A-B-*.[122]

C. *Matter of A-B-*

Decided in June 2018 by the President Trump appointed Attorney General Jeff Sessions, this case once again had facts very similar to *Matter of R.A.* A woman from El Salvador fled an abusive relationship and claimed asylum in the United States on account of her membership in the PSG of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common."[123] Initially, her claim was rejected but upon appeal to the BIA the court remanded with an order to grant asylum.[124] A.G. Sessions intervened and decided to have his office reject the claim itself, in the process overruling the 2014 case *Matter of A-R-C-G-* which held that "married women in Guatemala who are unable to leave their relationship" could constitute a particular social group for the purposes of asylum proceedings.[125]

Much of the opinion attempts to answer the question of "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[126] Though this case deals with a woman fleeing domestic violence, it is not difficult to see how the answer to this question will have massive implications for LGBT asylum seekers.

The answer A.G. Session comes to is that "[a]n applicant seeking to establish persecution based on violent conduct of a private actor must show more than difficulty . . . controlling private behavior."[127] The person claiming asylum needs to show that "the government condoned [the

[122] 27 I&N Dec. 316 (A.G. 2018).
[123] *Id.* at 321.
[124] *Id.*
[125] Matter of A-R-C-G-, 26 I&N Dec. 388, 389 (BIA 2014).
[126] *Id.* at 323.
[127] *Id.* at 337 (internal quotes omitted).

persecution], or at least demonstrated a complete helplessness to protect the victim."[128] The incompetence of local police to investigate or act upon a particular report of an individual crime will not necessarily show an inability or unwillingness to control crime.[129] Instead, an applicant must show "not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it."[130] This standard was not satisfied in this case as "the respondent not only reached out to police, but received various restraining orders and had him arrested on at least one occasion."[131] The fact that the protection A-B- received after going to the proper authorities was ineffective has no bearing on her right to be granted asylum in the United States, as "[n]o country provides its citizens with complete security from private criminal activity, and perfect protection is not required."[132]

The full effects of *Matter of A-B-* are yet to be felt. Much of the opinion is non-binding dicta, so there is some measure of skepticism that the sweeping language used has any effect at all.[133] However, if a woman who went several times to local police for protection only to fail to receive it each time is not considered to be the victim of an apathetic and ineffectual government it is difficult to imagine a scenario where persecution by a non-state actor will give rise to a successful asylum claim. For this, and other reasons, backlash from the public and immigration law community has been overwhelmingly negative.[134] *Matter of A-B-*'s restriction on persecution

[128] *Id.*
[129] Matter of R-A-, 27 I&N Dec. 316.
[130] *Id.* at 338.
[131] *Id.* at 343.
[132] *Id.*
[133] *Matter of A-B- Consideration*, IMMIGRANT LEGAL RESOURCE CENTER, 3 (Oct. 2018)
[134] Bea Bischoff, *Jeff Sessions Is Hijacking Immigration Law*, SLATE (June 13, 2018, 2:27 PM), https://slate.com/news-and-politics/2018/06/in-matter-of-a-b-jeff-sessions-hijacked-immigration-law-by-abusing-a-rarely-used-provision.html; *Backgrounder and Briefing on Matter of A-B-*, CENTER FOR GENDER & REFUGEE STUDIES (June 20, 2018), https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b.

of non-governmental actors will certainly, at a minimum, make claiming asylum more difficult. At worse, it will make it impossible for many people who previously would have had a valid claim.

To conclude, this comment will examine the present state of asylum law and policy as applies to LGBT applicants. A policy that has in the past been liberal towards allowing people persecuted by non-state actors has suddenly experience a great contraction of who will be allowed in, at the precise moment when many countries are electing leaders with policies and rhetoric that could predictably give rise to anti-LGBT violence.[135] This whiplash that occurs within American refugee policy is untenable and unsustainable, especially in light of the anticipated increase in asylum seekers that is anticipated in the coming years and decades.[136] The remainder of this note will attempt to answer the vital question of what can be done about this. It will do so by examining how other countries handle LGBT asylum claims, particularly when the persecution is being done by non-state actors, in order to develop a workable framework that can be used fairly moving forward.

IV. A BETTER WAY FORWARD: ASYLUM CLAIMS ABROAD

Fashioning asylum policy can sometimes become a "race to the bottom," with the end goal having a more restrictive policy than comparable countries to avoid allowing an influx of people the country might not be equipped to handle.[137] With this in mind, it is important to now create a coherent, workable framework for assessing which LGBT applicants that can be used for the next presidential administration, whoever that may be. A framework that takes into account the realities

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[135] *See, e.g.* Mariana Simões, *Brazil's Polarizing New President, Jair Bolsonaro, in His Own Words*, N.Y. TIMES, October 28, 2018, at A6 ("In June 2011, [Brazilian president Jair Bolsonaro said he would 'rather his son die in a car accident than be gay,' adding: 'If a gay couple came to live in my building, my property will lose value. If they walk around holding hands, kissing, it will lose value! No one says that out of fear of being pinned as homophobe.'").

[136] Davenport, *supra* note 22.

[137] Valarie Blake, *Mass African Migration into Europe: Human Rights and State Obligations*, 32 HAMLINE J. PUB. L. & POL'Y 135, 174-75 (2010).

of the non-governmental actors who tend to persecute this group around the globe, and the governments which turn a blind eye to it.

A. The Issue of the Non-Government Actor

As described in the previous section, the post-A.G. Session rule is that it is not sufficient for an applicant to show that the government had or continues to have difficult controlling behavior by a private actor; they must show that the government is completely unable or unwilling to prevent it. This does not fit with the issues that LGBT individuals face around the world.

The massive change in attitude towards the LGBT community in the United States has somewhat been mirrored on a global scale. Many countries now some form of legal protection for the LGBT community in place. For example, Mexico's has been said to have stronger guarantees of LGBT rights than the United States,[138] and the constitution of Brazil prohibits "any forms of discrimination,"[139] a clause which has been used to extend these protections to the gay and lesbian community.[140] So while LGBT persecution may be pervasive in a country, as it is in both Brazil and Mexico,[141] the government has plausible deniability to say that they are doing their part to prevent LGBT persecution but it is the local police who are not enforcing the laws. This is, in fact, the very argument the Attorney General made in denying the applicant's claim in *Matter of A-B.*[142]

The standard in this case would not be an issue for LGBT asylum seekers in many countries where sexual orientation-motivated violence is still carried out by the state. For example in

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[138] Caroline Beer & Victor Cruz-Aceves, *Mexico's LGBT rights are stronger than the US's. Here's why*, WORLD ECONOMIC FORUM (Apr. 26 2018), https://www.weforum.org/agenda/2018/04/religion-the-state-and-the-states-explain-why-mexico-has-stronger-lgbt-rights-than-the-us. (Mexico decriminalised sodomy on a national scale in 1871, over 120 years before the US.)

[139] CONSTITUIÇÃO FEDERAL, Title I, Art. 3, cl. IV (Braz.) ("[P]romover o bem de todos, sem preconceitos de origem, raça, sexo, cor, *idade e quaisquer outras formas de discriminação*.")

[140] Sergio Carrara, *Discrimination, Policies, and Sexual Rights in Brazil*, 28 CADERNOS DE SAÚDE PÚBLICA 184 (2012).

[141] Sam Cowie, *Violent Deaths of LGBT People in Brazil Hit All-Time High*, THE GUARDIAN, Jan. 22, 2018.

[142] *Matter of A-B-*, 27 I&N Dec. 316 at 337.

Chechnya, an autonomous region in Russia that borders Georgia and Azerbaijan, homosexuals have become the government's scapegoat of choice.[143] Gay men are routinely rounded up and tortured because of their sexual orientation.[144] At first it was massively popular vigilante groups doing this, but has since turned into the police undertaking these operations.[145] Unlike in Russia, Iran has some perhaps surprisingly progressive attitudes and policies towards the LGBT community. For example, it is possible for transgender individuals to secure government funding to undergo gender reassignment surgery.[146] Despite this, there are several Iranian laws which make life for homosexuals extremely difficult and dangerous. Local leaders say homosexuality is "moral bankruptcy" and "modern western barbarism."[147] Men face the death penalty for being a "passive" participant in homosexual activity, and fathers can perform "honor killings" of children they discover have homosexual tendencies and only receive a prison sentence of between three and ten years.[148]

In countries like Iran and Russia, where the persecution is being carried out and condoned by government actors, asylum claims are as close to a slam dunk as is possible in a field as mercurial as asylum law. At the very least, it can be said that all the classic elements of an asylum claim are present; people are being persecuted due to their status in a particular social group (the LGBT community) by their government. Cases like this are relatively straight forward. Difficulties and ambiguities arise, however, when individuals are being persecuted in a country where homosexuality is ostensibly legal. Many countries do not have active governmental

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[143] Masha Gessen, *The Year Russian L.G.B.T. Persecution Defied Belief*, NEW YORKER, December 27, 2017.
[144] *Id.*
[145] *Id*.
[146] Rachel Banning-Lover, *Where are the Most Difficult Places in the World to Be Gay or Transgender?*, THE GUARDIAN, March 1, 2017.
[147] *Id.*
[148] Mohammad Nayyeri, *Physical Chastisement of Children and Impunity for Fathers under Iranian Law*, INSIGHT IRAN, May 9, 2015.

campaigns against homosexuality yet still experience the same issues that nations like Russia and Iran do.

In Honduras, for example, while gay marriage may not be legal there is legislation which criminalizes discrimination on the grounds of sexual orientation.[149] Despite this, more transgender individuals are murdered relative to the general population than any other country on earth.[150] This is set against the backdrop of a society with endemic issues in policing murder on the whole,[151] so the question becomes at what point do we say the government is condoning these murders, rather than just having trouble with enforcement?[152] In the next section, I will attempt to answer this question by looking at the asylum systems and how they deal with the issue of the non-government actor.

B. LGBT Asylum Abroad

Many countries have a Constitutional provision that guarantees the rights of certain protected classes of refugees the right to claim asylum in their country.[153] For example, Article 13 of Cuba's constitution guarantees that the country "grants asylum to those persecuted for their ideals or struggles for democratic rights against imperialism, fascism, colonialism and neocolonialism; against discrimination and racism . . . for their progressive political, scientific, artistic, and literary activities."[154] There are many, many more countries with similar Constitutional provisions.[155] While these nations doubtlessly have difficulties living up to this

[149] Kevin Lees, *Honduran LGBT Activists Fear Ongoing Threat Upon Hernández Inauguration*, HUFFINGTON POST, January 24, 2014.
[150] Banning-Lover, *supra* note 140.
[151] *Id.*
[152] Which A.G. Sessions says is not a valid reason to be granted asylum. *Supra* note 118.
[153] Lucas Kowalczyk and Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219 (2017).
[154] CUBA CONST. art. XIII
[155] See Kowalczyk & Versteeg, *supra* note 147, at 1287.

lofty goal, it arguably shows that other countries have a more deep-seeded commitment to accepting refugees than the United States. Exploring the merits and feasibility of an amendment to the United States Constitution outlining the country's commitment to refugee acceptance is beyond the scope of this paper. Regardless, many countries have coherent, workable refugee policies absent a constitutional safeguard that the United States could look to to help shape theirs.

The trajectory of the United Kingdom's refugee policy can provide useful guidance. In decades past, the UK's asylum policy had been dogged by many of the same issues that the United States faced (and continues to face).[156] Judges did not understand why LGBT asylum seekers could just stop being so outwardly gay, or why they were applying for asylum if they had never been persecuted (due to the fact that they had never revealed their sexuality for fear of physical reprisal).[157] This approach began to change with the case of *J v. Sec'y of State for the Home Dep't.*[158] The applicant in this case was a homosexual Iranian man who was never persecuted because he kept his sexual orientation and same-sex relationship a secret.[159] In grappling with the question of whether to grant asylum when there was no act of persecution, the court cited a decision from the High Court of Australia with similar facts which stated "[i]n many—perhaps the majority of—cases . . . the applicant has [hid their sexual orientation] only because of the threat of harm . . . It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct."[160] In applying this reasoning to the fasts of the case, the court concluded that even

[156] Aaron Ponce, *Shoring up Judicial Awareness: LGBT Refugees and the Recognition of Social Categories*, 18 NEW ENG. J. INT'L & COMP. L. 185
[157] *Id.*
[158] (2006) EWCA (Civ) 1238 (Eng.).
[159] *Id.* at 1-2.
[160] *Id.* at 5.

though the asylee had not suffered persecution in the classic sense of the word he should be allowed to remain in the country.[161]

This, I argue, should be the determinative consideration in evaluating asylum claims. Even when there is no instance of persecution based on sexual orientation or gender identity to point to, the LGBT community in many countries live in constant, justifiable fear of having their orientation found out and receiving punishment or backlash because of it. In nations with anti-LGBT legislation on the books, this would be a straightforward standard to apply. How would it work where the anti-LGBT persecution, or threat of persecution, comes from non-state actors again requires us to look abroad.

Canadian immigration guidelines dictate that persecution can come in several forms. These include the obvious, like legislation and encouraging the abuse, but also includes an inability by the state to protect its citizens from harm.[162] This approach was utilized in the Canadian Supreme Court case *Canada v. Ward*.[163] This case established the proposition that asylum standards can be met if state authorities were "unable to offer effective protection."[164] This holding is important because it means that an asylee need not have put their life at risk in order to prove that the state was unable to protect them by asking them to report their abuse to the authorities, possibly making their punishment at the hands of the abusers worse.[165] Australia has established similar guidelines, allowing the experience of other asylees (specifically, women fleeing domestic abuse) from similar situations to be corroborated to show a pattern of state failure to protect its citizens from abuse.[166]

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[161] *Id.* at 7-8.
[162] Danette Gomez, *Last In Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 982 (2004).
[163] [1993] 2 S.C.R. 689 (Can.).
[164] *Id.* at 714.
[165] Gomez, *supra* note 156, at 980.
[166] *Id.* at 984.

Applying this standard to cases of LGBT asylees fleeing violence in, for example, Central America, where the violence is not being undertaken by the state but the state has nonetheless shown an inability or unwillingness to stop it would allow a much more fair and equitable standard of who may be granted asylum.

C. The Floodgate Concern

One of the most common arguments against more liberalized asylum standards is that less stringent requirements will "open the floodgates," leading to an unmanageable amount of asylum claims.[167] This argument, casting the American asylum apparatus as the sea-wall heroically protecting the American public from a torrent of unwanted and implicitly dangerous immigrants from settling in the country much as the dykes of Amsterdam or the canals of Venice prevent those cities from total destruction, has long been a argument used by opponents of asylum.[168] Americans have long held sympathy for those escaping persecution, so painting us as possibly becoming pushovers and allowing in too many applicants has been one of the sole rhetorical devices that has been safe to use without appearing to be unsympathetic to those suffering.[169] This final subsection will examine this argument, specifically whether it has any merit, and whether it is justification enough to consistently reject asylum claims. It will come to the conclusion that no, there is no compelling evidence that the floodgates argument has merit and should not serve as justification for our currently strict asylum standards.

The first issue to address is whether there is merit to the floodgate argument. This argument was invoked in *In re R-A-*, where the worry was that granting the applicant's claim would result

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[167] Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135, 180 (2012).
[168] *Id.* at 139-40.
[169] Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119 (2007).

in an increase in victims of domestic violence applying for asylum in the United States.[170] This increase has not occurred, a point conceded by the Immigration and Customs Enforcement agency (ICE) in a brief prepared for the similar case of *Matter of L-R-*.[171] Victims of domestic violence must continue to meet a high evidentiary threshold for admission, a requirement that does not invite weak applicants to try their luck.[172] Similarly, there is no reason to believe that these same high standards would not apply to LGBT asylum seekers.

The fact that the relaxed standards in the wake of *In re R-A-* did not lead to a marked increase in claims is borne out by similar experiences in Canada.[173] Since Canada became the first country to publish guidelines on asylum applicants fleeing gendered violence in 1993, the country has not experiences an increase in claims of these sort.[174] In fact, in the seven years after the adoption of these guidelines there was a decline in asylum claims on the basis of gendered violence.[175] The reasons that make this so, such as a lack of resources, or an inability to leave, would also apply to LGBT asylees.[176] As mentioned previously, many LGBT asylum seekers do not even know that they belong to a protected class.[177]

If such ignorance exists in the United States, it is also likely to extend to those still in their home country, especially in light of the fact that in many countries LGBT individuals are so widely persecuted that there is no LGBT community to speak of, through which information about various nations' asylum standards. Therefore, for all of the reasons stated in this section, the floodgates

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[170] Harville, *supra* note 161, at 180.
[171] *Id.*
[172] Katelyn Masetta- Alvarez, *Tearing Down the Wall Between Refugee and Gang-Based-Asylum Seekers: Why the United States Should Reconsider Its Stance on Central-American Gang-Based Asylum Claims*, 50 CASE W. RES. J. INT'L L. 377, 405 (2018).
[173] Harville, *supra* note 161, at 180.
[174] Musalo, *supra* note 163, at 133.
[175] *Id.*
[176] *See id.*
[177] HUMAN RIGHTS WATCH, s*upra* note 79.

argument is not a compelling reason to retain our restrictive asylum standards, and the recommendations of the rest of this comment would be able to be put into effect without fear that doing so would overwhelm our asylum system.

V. CONCLUSION

America's reputation as a beacon of human-right and immigration acceptance and integration is in peril. Our unwillingness to accept LGBT asylees contrasted with our liberalized laws and attitudes on gay marriage gives off an air of hypocrisy, and we cannot expect other countries to improve their treatment of the LGBT community if the "home of the free" refuses to accept the most desperate kind of people on Earth who are "yearning to breathe free."[178] This entails the next administration adopting a more holistic approach to evaluating asylees, especially those whose persecution comes at the hands of non-state actors.

[178] Lazarus, s*upra* note 8.