

**Gay Enough? : Assessing the United States'
Adherence to International Human Rights
Agreements Regarding LGBTQI Asylum
Seekers**

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Introduction

Despite some progress, the persecution of LGBTQI people persists. This, perhaps, manifests most prominently in the fact that the death penalty for being gay occurs in at least eight states.¹ Moreover, between 2008 and 2016, over 2,000 transgender individuals were murdered worldwide, though the numbers are likely higher as many such murders go unreported.² Indeed, state-sponsored homophobia and transphobia translates to high rates of violence and murders of LGBTQI, particularly transgender, individuals, with those committing the violence often going unpunished (*No Safe Place*, Amnesty International; *Sexual and Gender Based Violence*, KIND; *Trans Murder Monitoring*, Trans Respect). The continued persecution of LGBTQI people in many countries around the world raises significant human rights concerns that intersects international human rights law and United States domestic refugee and asylum law. With such prevalent and widespread violence against members of the LGBTQI community, the deportation of an LGBTQI asylum seeker back to their home country is not only in violation of the international principle of non-refoulement³, but, in some instances, can also mean certain death. For example, a transgender woman from El Salvador was deported by the United States and then murdered in her home country just six months later⁴—indeed, these are not isolated cases. Under this context, I ask whether the United States is living up to its obligations to provide protection from persecution to LGBTQI individuals?

In the United States, the 1980 Refugee Act codifies our obligations when it comes to providing protection from persecution for those seeking asylum. The Refugee Act defined a “refugee” to be anyone who is “unable or unwilling to return to their home country because of persecution or fear of persecution on account of

¹ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A. and Mendos, L.R., *State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva; ILGA, May 2017).

² Balzer, Carsten, and Lukas Berredo. TMM Annual Report 2016. Report. 2016. Accessed March 2019. <https://transrespect.org/wp-content/uploads/2016/11/TvT-PS-Vol14-2016.pdf>.

³ *Non-refoulement* is principle of international law that prohibits a country from removing someone to a country where their life or freedom would be threatened on the basis of race, religion, nationality, membership of a particular social group, or political opinion. This is also known as “withholding of removal” in the US.

⁴ “Transgender Woman Deported from US Murdered in El Salvador.” *Washington Blade: Gay News, Politics, LGBT Rights*. February 20, 2019. Accessed March 2019. <https://www.washingtonblade.com/2019/02/17/transgender-woman-deported-from-us-murdered-in-el-salvador/>.

race, religion, nationality, membership of a social group, or political opinion”, increased the annual refugee admissions cap to 50,000, and created the Office of Refugee Resettlement, a federal agency housed in the United States Department of Health and Human Services, to assist with the integration of refugees into American society.⁵ However, although there is some research that examines who gets asylum in the United States and why (or why not), few studies have focused on the extent to which the United States provides protection from persecution for LGBTQI individuals. This dearth of research makes it difficult to evaluate the extent to which LGBTQI people who are persecuted because of who they are and thus are seeking asylum in the United States actually find protection from persecution.

Against this backdrop, this thesis examines whether asylum seekers from countries that persecute LGBTQI people are any more or less likely to find protection from persecution in the United States than asylum seekers from countries that respect and protect the rights of LGBTQI people. I answer this question by first creating an index of LGBTQI acceptance, called the LGBTQI Civil Insecurity Index, which entails coding for seven factors related to LGBTQI protections in the state, including: whether the death penalty for homosexuality exists, state constitutions explicitly protect sexual orientation and gender identity, employment protections and various non-discrimination legislation exists, same sex relations are criminalized or not, conversion therapy is banned, and same-sex marriage or civil partnerships are legal. I then merge these data with data on asylum acceptance rates in the United States, which are disaggregated by the country of origin of the asylum seeker and by year. In analyzing these data, I find that asylum applicants in countries that persecute LGBTQI individuals are statistically significantly more likely to receive asylum in the U.S. than applicants from countries that do not persecute LGBTQI individuals. However, more research is needed before we can confidently conclude that the United States is living up to its charge to provide protection for those fleeing persecution.

The thesis proceeds as follows. First, I define key terms that will be used throughout the paper. Then, I describe the obligations that the United States has to

⁵ U.S. Congress. Senate. Refugee Act of 1980. S.643. 96th Cong. Introduced in 03/13/1979. <https://www.congress.gov/bill/96th-congress/senate-bill/643/>

provide protection from persecution to those who are persecuted because of who they are (i.e., their membership in a social group, per the definition of a refugee under the Geneva Convention on the Status of Refugees), focusing on the 1980 Refugee Act. I then couch domestic law vis-a-vis asylum seekers and refugees against the broader evolution of human rights law in this area. Next, I outline how the United States has succeeded and failed in establishing its own standards for LGBTQI asylum adjudication through the emergence of formative precedents in case law. Next I describe the LGBTQI acceptance index I created for this analysis—in doing so, I hope to make vivid how pervasive the persecution of LGBTQI people continues to be. I then describe the data on asylum acceptance rates that I use for the analysis. After describing the results, I end by discussing the implications of this research.

Key Terms

In the following section, I define key terms that will be used throughout the thesis. This includes the definition of a refugee, the difference between a refugee and an asylum seeker, the principle of non-refoulement, LGBTQI, and SOGI.

A refugee, according to the 1951 Refugee Convention definition, is someone who is unable or unwilling to return to their country of nationality due to a “well-founded fear of persecution for reasons of race, religion, nationality, membership of a social group, or political opinion.”⁶ An asylum seeker is an individual seeking international protection whose application has not yet been processed and decided upon.⁷ The cornerstone of all refugee and asylum law is the principle of non-refoulement, which can be found outlined and defined in multiple international documents and protects refugees from being “refouled” back to their country. Under this principle, countries are obligated to not return refugees to their country of origin if there is a credible threat of their persecution or if their life or freedom would be threatened upon return.⁸ Violation of this principle of non-refoulement is considered to be forbidden and is condemned by the international community.

Terminology and labels around sexuality unfortunately often exclude key members of the community or forgo extra measures to be inclusive and intersectional. For this purposes of this paper, I use **LGBTQI** to reference gender non-conforming, homosexual, transgender, or intersex individuals, as well as anyone falling under the broad sexual minority umbrella. LGBTI is commonly and standardly used by many NGOs and in United Nations publications, though LGBT+ (“+” alluding to the fluidity of other sexual minorities) or LGBTQ (“Q” for queer, but often faced with criticisms of erasing intersex individuals) is also common. I use LGBTQI across my paper for simplicity, uniformity, and inclusivity. Likewise, I use the terms **sexual minorities** and **gender-variant** individuals to broadly refer to the dynamic and fluid nature of many members of the LGBTQI community. Within

⁶ Switzerland. United Nations. *Convention and Protocol on the Status of Refugees*. Accessed March 2019. <https://www.unhcr.org/3b66c2aa10>

⁷ “UNHCR - Asylum-Seekers”, n.d., accessed March 28, 2019, <https://www.unhcr.org/asylum-seekers.html>.

⁸ “UNHCR - Note on Non-Refoulement (Submitted by the High ...”, n.d., accessed March 28, 2019, <https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>.

this paper, I may interchange LGBTQI with **queer**, a formerly derogatory term for members of the LGBTI community. In recent years, the term queer has been reclaimed by some parts of the LGBTQI community and used in resistance to homophobia as a way to self-identify under the LGBTI umbrella. Despite this, in the 1990's, many LGBTQI of color shifted away from self-identifying as queer, **gay**, or **lesbian** as a result of experiencing rampant racism within the community and feeling as though the term was not culturally aware to their unique experiences and challenges. As a result, African Americans in the LGBTQI community created the term **same gender loving**, to embody this cultural awareness, resist anti-Blackness in the LGBTQI community, and serve as an Afrocentric alternative to other terms.⁹ Likewise, Native Americans and other indigenous communities may identify as **two-spirit**, which draws on reclaiming native ideas of being born with a “female” and “male” spirit and encompasses sexual and gender fluidity.¹⁰ Finally, I use another common acronym in human rights law is **SOGI**, which stands for “sexual orientation and gender identity”, most often to refer to sexual orientation and gender identity-based violence or persecution. The acronym was popularized after being used in the Yogyakarta Principles.¹¹

Sexuality and gender identity are traits which may be less visible to strangers than race or gender would be. For this reason, many LGBT+ individuals, for those who are able to, have to deal with **coming out** to their friends, families, and community. Even in countries with strong protections and high social acceptance of LGBT+ individuals, coming “out” can be a stressful and alienating process. In countries where these protections are not in place, coming out can be dangerous and life-threatening. All LGBT+ individuals deserve the right to live freely and safely “out” as themselves, with their full protection of rights.

For the purposes of cross-analyzing countries asylum-seekers and refugees flee from and their levels of legal protections for LGBTI individuals, I have created the **LGBTQI Civil Insecurity Index (CII)**. The higher the LGBTQI Civil Insecurity Index, the less legal protections and provisions for LGBTQI-equality a country has in place. This index is created by coding various protections with a 1 if

⁹ Black XChange Mens, “What Is Same Gender Loving”, <http://bmxnational.org/faqs/what-is-same-gender-loving/>.

¹⁰ “Two Spirit | Health Resources”, n.d., accessed March , 2019, <https://www.ihs.gov/lgbt/health/twospirit/>.

¹¹ “Yogyakarta Principles”, 2006, <https://yogyakartaprinciples.org/>.

they discriminate or allow for discrimination of LGBTQI individuals and a 0 if the law does discriminate or does not allow for discrimination of LGBTQI individuals. The Civil Insecurity Index is named so because it refers to the lack of protection of civil rights for LGBTQI individuals, thus threatening their security and safety in living freely and openly.

Chapter 1: US Immigration Law

Understanding the nuances of the United States' interpretation and adherence to international asylum law, especially pertaining to marginalized LGBTQI groups, requires understanding the United States' own restricted history of immigration law. Much of the United States' immigration laws circle around the continuing principles of inclusion and exclusion of certain immigrant groups, whether those groups be defined by national origin, ethnicity, or "desirability". One of the first laws passed to control the flow of not only immigration, but sexuality as well was the 1875 Page Act, which sought to curtail the growing population of Chinese laborers on the west coast by prohibiting criminals, prostitutes, and non-consensual transport of Chinese immigrants; this act effectively closed the borders to all Chinese women¹². The passage of the first *major* immigration control legislation, the Chinese Exclusion Act of 1882, was propelled by the shift from acceptance of Chinese immigrants, whose labor contributed massively to large-scale infrastructure projects, to salient anti-immigrant feelings originating from anxieties about job security/competition and ethnic discrimination.¹³ This law introduced a bureaucratic shift towards the racializing and policing of immigrant identities by barring their entry, naturalization, and presence in the United States. Over the next decades, new legislation quickly emerged, delineating who was and who was not an acceptable immigrant – contract laborers, felons, polygamist, mentally and/or physically defective persons, and those dependent on government support – and how to police the presence of those who were deemed unacceptable – internal passports, restriction of property rights, required reporting of admissibility information, and deportation.¹⁴ These subsequent acts furthered the policing of sexual 'deviancy' – polygamy– and gave psychiatrists the discretion to define mental and physical defects, which often included homosexuality. Satisfied with the success of Exclusion Act, politicians renewed it for 10 more years in 1892.

¹² U.S. Immigration Legislation: 1875 Page Law. (2019), accessed 9 Feb. 2019. http://library.uwb.edu/Static/USImmigration/1875_page_law.html.

¹³ "Milestones: 1866–1898 - Office Of The Historian", accessed January 2019, <https://history.state.gov/milestones/1866-1898/chinese-immigration>.

¹⁴ "Summary of Immigration Laws 1875 - 1918." *Summary of 1920s Quota Laws*, accessed on February 2019, people.sunyulster.edu/voughth/immlaws1875_1918.htm.

Congress expanded the list of undesirables banned from immigrating into the United States with the Immigration Act of 1917; the U.S. government now regulated sexual acts and identities through a number of terms: insane persons, mentally/physically defective persons, polygamists, prostitutes, and the newly added “persons with constitutional psychopathic inferiority”, which was applied to “out” homosexual immigrants¹⁵. The Immigration Acts of 1921 and 1924 established national origin quotas, rigged to prioritize northern European immigrants and discriminate against southern and eastern Europeans, but more importantly led to the creation of Border Patrol, an institution created for the purpose of policing bodies presumed to be foreign.¹⁶ The Immigration and Nationality Act of 1952 gave Border Patrol immense new powers – now, not only could Border Patrol arrest, detain, and deport individuals, they could question any person’s right to be in the US.¹⁷

The Immigration and Nationality Act of 1965 shifted away from quotas and towards a more diverse pool of immigrants, also prioritizing family reunification, high skilled workers, and refugees/asylum seekers.¹⁸ However, an amendment to the INA banned individuals guilty of “sexual deviancy” from permission to enter the United States.¹⁹ Because same-sex marriage was not recognized in the United States, homosexual immigrants were barred from entering the United States under two restrictions: “sexual deviancy” and family reunification.

Though the Refugee Act of 1980 was by no means the earliest of legislation relating to refugees, this act solidified and streamlined policies from older legislation and created a uniform and standardized set of provisions. Congress passed this act to codify and solidify the United States’ commitment to adhere and follow the 1967 Protocol.²⁰ This act standardized asylum procedures, increased the number of refugees accepted annually and created both emergency absorption mechanisms for times of international crises and the Office of Refugee Resettlement to oversee

¹⁵ Tracy Davis, “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States”, August 2002.

¹⁶ Airriess, Christopher A.; *Contemporary Ethnic Geographies in America*, p. 40. ISBN 1442218576

¹⁷ Ibid.

¹⁸ Immigration and Nationality Act of 1965, Public Law 89-236 (1965), <https://www.govinfo.gov/content/pkg/STATUTE-79/pdf/STATUTE-79-Pg911.pdf>.

¹⁹ Ibid.

²⁰ Grace, et al. v. Whitaker (2018), United States District Court for the District of Columbia, No. 18-cv-01853, <https://www.aclu.org/legal-document/grace-v-whitaker-opinion>.

refugee resettlement in the United States²¹ The Office of Refugee Resettlement is responsible for transitioning refugees into society by helping them with job training, English-language classes, and cash assistance.²² The baseline refugee cap was set to 50,000 in 1980, though the Carter administration used one of its newly created mechanisms to increase the refugee cap to 231,000 that year – the highest in history.²³ ²⁴ Since 1980, the cap has fluctuated according to the saliency of international human rights crises or increased anti-immigrant rhetoric in the United States, as in recent years under the Trump administration.

In 1986, Reagan signed the Immigration Reform and Control Act (IRCA) into law, which criminalized knowingly hiring undocumented immigrants, but adjusted the status for profitable seasonal agricultural workers and those with amnesty.²⁵ When the American Psychiatric Association declassified homosexuality as a mental disorder in 1987, the Immigration and Naturalization Service (INS) refused to change its position banning sexual minorities, arguing that their definitions connotated “legal-political rather than medicalized identity categories.”²⁶ Without medical rationale, immigration services had complete autonomy to subjectively identify who they believed to be queer. Simultaneously, and in the midst of the AIDS epidemic, President Reagan banned the immigration of HIV positive individuals, which disproportionately affected members of the LGBTQI community.²⁷

The 1990’s saw punitive immigration policies and increased funding for the INS and Border Patrol pass with bipartisan support. Homosexual and queer immigrants were categorically prohibited from immigrating into the U.S. until the passage of the Immigration Act of 1990, which removed “sexual deviancy” in prohibited persons.²⁸ Despite this facade of progress, the lingering effects from the AIDS crisis folded into the passage of the 1993 ban on the immigration of

²¹ “Refugee Timeline | USCIS”, n.d., accessed March 28, 2019, <https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline>.

²² Immigration and Nationality Act of 1980, Public Law 96-212 (1980), <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>.

²³ Ibid.

²⁴ Migration Policy Institute (MPI) analysis of WRAPS data from the State Department Bureau of Population, Refugees, and Migration. Available at <http://www.wrapsnet.org/admissions-and-arrivals/>.

²⁵ Immigration Reform and Control Act (1986), 8 U.S.C. 1101 note, <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3445.pdf>.

²⁶ Valens, Keja, et al. *Passing Lines: Sexuality and Immigrants*. Harvard Univ. p.17. Press, 2005.

²⁷ “Immigration | The Center for HIV Law and Policy”, n.d., accessed March 28, 2019, <https://www.hivlawandpolicy.org/issues/immigration>.

²⁸ “Sexual Deviants Need Not Apply (Chapter 7) - The Immigration and ...”, n.d., accessed January, 2019, <https://www.cambridge.org/core/books/immigration-and-nationality-act-of-1965/sexual-deviants-need-not-apply/C643A34C7CBA6C9DDF05C6DEF83BFA90>.

HIV-positive individuals, further strengthening the 1987 policy.²⁹ The ban was met with fierce debate in Congress and protest from LGBTQI activists.³⁰ Another austere policy called the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 expanded deportable offenses, created a mechanism for expedited removal proceedings of ineligible applicants, denied work permits for applicants during the asylum process, and expanded border fence funding.^{31 32} Furthermore, asylum applicants that failed to establish a “credible fear” of persecution in their first interview could be subjected to expedited deportation and without a right to an appeal.³³ This legislation also prevented asylum applicants from requesting court adjudicators to consider new evidence of persecution in the applicant’s appeal of a prior decision.³⁴ This increased stringency to consider new evidence led to the deportation of many asylum claimants who may have been granted asylum, had they introduced that evidence in their first judgement. IIRIRA significantly increased fears of deportations for undocumented immigrants, who were subject to mandatory detention if they arrived at the border without paperwork, and placed restrictions on asylum applicants, who now had only one year to file for asylum.^{35 36}

Despite these austerity measures, the earliest and most dependable protections for LGBTQI individuals emerged as a result of the pivotal 1994 case, *Matter of Toboso-Alfonso*, which found a gay Cuban man eligible to stay in the United States because going back to Cuba would, more likely than not, threaten his life, a principle also known as non-refoulement.³⁷ Though queer immigrants may not have been explicitly banned from entry into the United States following 1990, the passage of the Defense of Marriage Act (DOMA) in 1996 defined that the term

²⁹ "HIV Ban End & HIV-Based Immigration", 2019. *Immigration Equality*. <https://www.immigrationequality.org/get-legal-help/our-legal-resources/visa-questions/hiv-ban-hiv-based-immigration-applications/#.XlyFiRNKiCQ>.

³⁰ “U.S. Immigration and Travel Policy”, n.d., accessed March 28, 2019, <http://www.actupny.org/actions/Immigration.html>.

³¹ Illegal Immigration Reform and Immigrant Responsibility Act, H.R. 3610. 1996. <https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg3009.pdf>.

³² Keith, Linda & Holmes, Jennifer. (2009). A Rare Examination of Typically Unobservable Factors in US Asylum Decisions. *Journal of Refugee Studies*. 22. 10.1093/jrs/fep008.

³³ Ibid.

³⁴ *Gebremaria v. United States AG Ashcroft* (2004), United States Eighth Circuit Court, No. 03-2492.

³⁵ Cantú Lionel, et al. *The Sexuality of Migration: Border Crossings and Mexican Immigrant Men*. p.58. New York University Press, 2009.

³⁶ 9/11 and the Transformation of U.S. Immigration Law and Policy”, n.d., accessed March 28, 2019, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/9-11_transformation_of_us_immigration_law_policy/.

³⁷ *Matter of Toboso-Alfonso*, United States Board of Immigration Appeals, 12 March 1990.

“marriage” and “spouse” referred to the union between a man and a woman under federal law, meaning that marriages between homosexual couples were not recognized and thus could not form the basis for family/marriage reunification visas.³⁸ Homosexual couples could not petition for family-based visas until 2013, when DOMA was finally overruled in *United States v. Windsor*.³⁹ Despite this, homosexual couples face more challenges in proving the legitimacy of their relationship to immigration services than heterosexual couples do. Immigration services often require partners to prove that they had “joint official financial assets and responsibilities” and that both partners lived together by requesting joint leases, bills, or official documents; in countries that do not protect LGBTQI couples from employment or housing discrimination, it may be likely that one partner excludes themselves from being named on official documents.⁴⁰ Prior heterosexual marriages, which may disadvantage bisexual immigrants, raise skepticism among officials; civil unions do not grant any immigration benefits at all.⁴¹ In 2012, USCIS updated policies to validate transgender individuals and their marriages by amending official documents to legally reflect their post-transition gender.⁴² The memo is no longer on the USCIS website.⁴³

In the aftermath of September 11, rhetoric surrounding immigration completely transformed into conversations about national security, vulnerabilities within national security, and how to catch criminals and supposed terrorists at United States points of entry. Emotionally-charged rhetoric resulted in legislators rigorously funding border walls, tightening asylum application laws, stripping due process protections, and barring assistance to undocumented immigrants.⁴⁴ ⁴⁵ Even the shift of immigration services from the Department of Justice to the Department of Homeland Security and the separation of the INS into United States Citizen and Immigration Services (USCIS), Customs and Border Protection (CBP), and

³⁸ "United States v. Windsor." Oyez. Accessed March 28, 2019. <https://www.oyez.org/cases/2012/12-307>.

³⁹ "Marriage Equality in Immigration Law: Immigration Benefits for Same ...", n.d., accessed March, 2019, <https://www.ilrc.org/marriage-equality-immigration-law-immigration-benefits-same-sex-married-couples>.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² "Immigration Resources | Transgender Law Center", n.d., accessed March, 2019, <https://transgenderlawcenter.org/resources/immigration>.

⁴³ "Adjudication of Immigration Benefits for Transgender Individuals," n.d., accessed March 29, 2019, [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Report)

⁴⁴ Real ID Act of 2005, 8 USC 1101 (2005)
<https://www.govinfo.gov/content/pkg/STATUTE-119/pdf/STATUTE-119-Pg231.pdf#page=72>

⁴⁵ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R.4437, accessed February 2019, <https://www.congress.gov/bill/109th-congress/house-bill/4437>.

Immigration and Customs Enforcement (ICE) expressed the newly-formulated security-oriented lens that Americans would now view immigration through.⁴⁶ Xenophobia and anti-immigrant sentiment paved the way for legislation which made undocumented presence in the United States a felony and deportable offense. Muslim, Arab, or South Asian (MASA) immigrants were disproportionately targeted by the DHS and immigration services. Visa qualifications and requirements were tightened across the board, including student, tourist, and business visas.⁴⁷ The passage of the intrusive National Security Entry-Exit Regulation System (NSEERS) in 2002 tracked noncitizens from Muslim-majority countries and required them to register when they entered and exited the country, resulting in over 13,000 deportations.⁴⁸ From September 11, 2001 to August 6, 2002, the Department of Justice used its newly-passed security regulation, which allowed them to detain any individual for 48 hours or more in “emergency circumstances”, to detain 762 primarily MASA male noncitizens without releasing identities or informing families about their detention.⁴⁹ Up until 2009, many of these immigration cases were sealed, giving the public little to no information about the circumstances surrounding their detention.⁵⁰ In addition, between September 11 and the end of 2003, nearly 15,300 asylum seekers were detained at the border under the DHS’s Operation Liberty Shield; scholars and activists suspect many were detained because they arrived from countries where the United States suspected Al Qaeda was based in.⁵¹ In 2003, an independently conducted report by the UNHCR found that asylum inspectors in United States airports had clear biases against asylum seekers and repeatedly wrongfully informed or intimidated them about the success of their asylum claims.⁵²

The Bush administration drastically increased funding for the Department of Homeland Security in the years after 9/11, which it used to increase its screening, detention, and deportation capacities.⁵³ Likewise, the 2001 Patriot Act and 2005

⁴⁶ 9/11 and the Transformation of U.S. Immigration Law and Policy”, n.d., accessed March, 2019.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Keith, Linda & Holmes, Jennifer. (2009). A Rare Examination of Typically Unobservable Factors in US Asylum Decisions, p 404. *Journal of Refugee Studies*. 22. 10.1093/jrs/fep008.

⁵² Schoenholtz, Andrew I., "Refugee Protection in the United States Post-September 11" (2005), p.333. Georgetown Law Faculty Publications and Other Works. 564. <https://scholarship.law.georgetown.edu/facpub/564>.

⁵³ Ibid.

REAL ID Act broadly expanded the definition of “terrorist activity” and thus broadened the scope of policeable suspicious activities. The REAL ID Act, however, had specifically negative implications for asylum seekers by shifting and increasing the burden of proof and the necessary supply of corroborating evidence of “persecution based on a protected class” onto the claimant.⁵⁴ Now, asylum seekers needed to explicitly demonstrate that the “central reason” for their persecution or fear of persecution is due to one of the five protected categories for refugees.⁵⁵ Naturally, the approval rates of affirmative asylum claims adjudicated after 9/11 dropped from 57% to around 40% in the years following 2001; the success rate of defensive claims following 2002 dropped from 25% to 10%.⁵⁶

Beginning with his campaign, President Donald Trump promised to sharply decrease immigration into the United States as a whole and maintain a keen focus on aggressively monitoring the U.S./Mexico border, in part through the construction of a physical wall. Built and powered off of anti-immigrant racism, Trump spoke of Mexican “rapists, drug dealers, and criminals” pouring through the border, endangering the livelihoods of Americans and pools of resources they enjoyed.⁵⁷ In 2015, he called the admission of Syrian refugees into the United States a “Trojan horse”, alleging that their immigration into the country would increase terrorist threats to Americans.⁵⁸ While broader immigration limitations remain challenged by Congress, since the 2016 election, the Trump administration has successfully expanded the policing power and scope of immigration authorities, removed Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) for noncitizens, and cut refugee admissions to its lowest cap since the passage of the 1980 Refugee Act.⁵⁹ Circulating videos of ICE agents raiding homes and businesses and picking up unauthorized immigrants on their way home from

⁵⁴ *Immigration Basics: Real ID Act*, Immigration Equality, accessed February 2019. <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-real-id-act/#.XJFyvBNKiCQ>

⁵⁵ Keith, Linda & Holmes, Jennifer. (2009). A Rare Examination of Typically Unobservable Factors in US Asylum Decisions, p 404. *Journal of Refugee Studies*. 22. 10.1093/jrs/sep008.

⁵⁶ Schoenholtz, Andrew I., "Refugee Protection in the United States Post-September 11" (2005), p. 342-357. Georgetown Law Faculty Publications and Other Works. 564.

⁵⁷ “Drug Dealers, Criminals, rapists’: What Trump Thinks of Mexicans”, n.d., accessed March, 2019, https://www.bbc.com/news/video_and_audio/headlines/37230916/drug-dealers-criminals-rapists-what-trump-thinks-of-mexicans.

⁵⁸ “Donald Trump: Syrian Refugees a ‘Trojan horse’ - CNNPolitics”, n.d., accessed March, 2019, <https://www.cnn.com/2015/11/16/politics/donald-trump-syrian-refugees/index.html>.

⁵⁹ “Trump’s First Year on Immigration Policy: Rhetoric Vs. Reality”, n.d., accessed March, 2019, <https://www.migrationpolicy.org/research/trump-first-year-immigration-policy-rhetoric-vs-reality>.

work or school are just one part of the terrifying reality of living under the Trump administration without paperwork.⁶⁰ The Trump administration has also targeted and destabilized the lives of DACA and TPS recipients, both of whom were previously protected by past administrations – the former protects mainly young adults currently in school and the latter protects foreign nationals from countries with ongoing armed conflict or an environmental disaster.⁶¹

But aside from bigger picture cuts to immigration across the board, the Trump administration and Department of Homeland Security have specifically enacted policies with sole purpose of deterring and punishing asylum seekers away through the closing of borders and in the words of Amnesty International, “making life so intolerable in immigration detention facilities, that asylum-seekers would think twice before requesting protection in the United States.”⁶² These policies, and the blatant disregard for the human rights of migrants, signal to the world that the United States is no longer interested in adhering to the praxis of international refugee frameworks. The impacts of both these drastic direct and indirect cuts to refugee admissions, such as the refugee cap being set to one of its lowest in history, have only been underscored by a sluggish and unmanageable backlog of asylum processing, leaving applicants waiting for credible fear interviews for upwards of two years.⁶³ As of January 2018, USCIS changed its “first come, first serve” asylum processing system to a system that processes most recently filed claims first, working backwards.⁶⁴ Stating intentions of quickly clearing the backlog, the system update has only left those already waiting for years with even more indefinite wait times on their asylum request; by May 2018, the backlog of federal immigration cases was 700,000.⁶⁵ Furthermore, immigration attorneys have made complaints that USCIS continues to lose paperwork essential for proving the credibility of asylum claims or completely fails to get back to applicants in a timely manner.⁶⁶

⁶⁰ “150 Immigrants Arrested In Southern California ICE Raids”, n.d., accessed March, 2019, <https://sacramento.cbslocal.com/2018/09/27/socal-ice-raids-150-arrested/>.

⁶¹ “Temporary Protected Status: An Overview”. 2019. *American Immigration Council*. <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview>.

⁶² “USA: “You Don’t Have Any Rights Here””. 2019. *Amnesty.Org*. <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/>.

⁶³ “The Painful, Endless Wait For LGBT Asylum Seekers”. 2018. *The Daily Beast*. <https://www.thedailybeast.com/the-painful-endless-wait-for-lgbt-asylum-seekers>.

⁶⁴ “Want Asylum In America? Get Ready For Hell.”. 2018. *The Daily Beast*. <https://www.thedailybeast.com/want-asylum-in-america-get-ready-for-hell>.

⁶⁵ “Immigration Court Backlog Jumps While Case Processing Slows”. 2018. *Trac.Syr.Edu*. <https://trac.syr.edu/immigration/reports/516/>.

⁶⁶ “Want Asylum In America? Get Ready For Hell.”. 2018. *The Daily Beast*.

While asylum applicants can request a work authorization permit, without access to public benefits, education, healthcare, or housing, many applicants and their families cannot truly start living their life in the United States while they await their asylum claims to be processed.⁶⁷

Asylum seekers now face unprecedented challenges and hostility in seeking refuge in the United States. In narrowing eligibility criteria, enabling illegal family separation at the border, and shifting where and for how long asylum seekers must wait out their claims, the United States has been complicit in the abuses of vulnerable migrants fleeing persecution and their rights, particularly those fleeing from the Northern Triangle (El Salvador, Honduras, and Guatemala).⁶⁸ In June 2018, President Trump suggested that migrants arriving at the border without documentation be immediately deported without due process or an appearance before an immigration judge.⁶⁹ The Supreme Court, however, has ruled on multiple accounts that all persons, citizens or noncitizens, have the right to due process, as outlined in the Fifth and 14th Amendments.⁷⁰ Trump's attempts to employ "expedited removal" could come easily, as the legislation for it already exists in the 1996 IIRIRA, which the administration has been attempting to strengthen since it came into office.⁷¹

In blatant violation of the internationally agreed upon principle of non-refoulement, the United States has mandated that asylum seekers arriving along the southern border stay in Mexican encampments and wait in a first come, first serve queue, where the number of available asylum applications are "metered".⁷² Asylum seekers waiting for asylum are vulnerable to exploitation by local gangs or local immigration authorities and the spread of disease in unmaintained and unsanitary encampments. LGBTQI asylum seekers face particular challenges in

⁶⁷ "The Painful, Endless Wait For LGBT Asylum Seekers". 2018. *The Daily Beast*.

⁶⁸ "Trump Is Sending LGBTQ Migrants 'back to hell' - The Washington Post", n.d., accessed March, 2019, https://www.washingtonpost.com/opinions/trump-is-sending-lgbtq-migrants-back-to-hell/2018/07/24/eb305d72-8ec3-1e8-8322-b5482bf5e0f5_story.html.

⁶⁹ "Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights", n.d., accessed March, 2019, <https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html>.

⁷⁰ "Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights", n.d., accessed March, 2019.

⁷¹ "A Primer on Expedited Removal | American Immigration Council", n.d., accessed March, 2019, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

⁷² Nick Miroff, "Hundreds of Migrant Families Arrive at Remote Border Crossings, Overwhelming U.S. Agents", December 22, 2018, https://www.washingtonpost.com/world/national-security/hundreds-of-immigrant-families-arrive-at-remote-border-crossings-overwhelming-us-agents/2018/12/22/44f869f2-055d-11e9-9122-82e98f91ee6f_story.html?utm_term=.9a387445a2c3.

these encampments, dealing with harassment from other migrants or locals that often results in them splintering off together.⁷³ LGBTQI asylum seekers, mostly from the Northern Triangle fleeing homophobic/transphobic violence, are often denied food, water, or housing from other migrants and are verbally abused by local residents.⁷⁴ After the arrival of the most recent Central American migrant caravan in late 2018, the Trump administration ordered 5,000 members of the National Guard to patrol the Mexico border.⁷⁵ A month later, immigration authorities teargassed asylum seekers and other migrants as they attempted to cross into the United States.⁷⁶

Though the Trump administration refuses to acknowledge the “zero tolerance” family separation at the border an official policy, thousands of parents who traveled to the United States with their children are being prosecuted for illegal entry, while their children are separately sent to the Office of Refugee Resettlement.⁷⁷ As of 2018, the exact number of families separated by the Trump administration was unknown and untracked by the Department of Health and Human Services.⁷⁸ A federal report from February 2019 detailed over 4,500 complaints of sexual assault and harassment of minors in immigration detention services dating from 2014 to 2018.⁷⁹ Transgender women, often housed in male detention facilities, also often face repeated sexual assault and harassment from other migrants or immigration officers.⁸⁰ These abuses continue despite the guidelines on protecting trans women in detention centers that ICE issued.⁸¹

Special attention should also be paid to the Trump Administration's erasure of legal protections of LGBTQI individuals' rights and access to essential services. Transgender individuals were specifically targeted by the administration through

⁷³ “LGBT Splinter Group From Migrant Caravan Is The 1st To Arrive”, n.d., accessed March 29, 2019, <https://www.npr.org/2018/11/13/667622622/lgbt-caravan-splinter-group-is-the-first-to-arrive-in-tijuana>.

⁷⁴ “LGBT Splinter Group From Migrant Caravan Is The 1st To Arrive”, n.d., accessed March 29, 2019.

⁷⁵ “Donald Trump on Immigration: Pros, Cons, Impact”, n.d., accessed March, 2019, <https://www.thebalance.com/donald-trump-immigration-impact-on-economy-4151107>.

⁷⁶ “U.S. Agents Fire Tear Gas Across Mexican Border”, n.d., accessed March, 2019, <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html>.

⁷⁷ “Trump’s First Year on Immigration Policy: Rhetoric Vs. Reality”, n.d., accessed March, 2019.

⁷⁸ “Separated Children Placed in Office of Refugee Resettlement Care”, January 2019, accessed March, 2019, <https://www.oversight.gov/report/hhsoig/separated-children-placed-office-refugee-resettlement-care>.

⁷⁹ Matthew Haag, “Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Center”, February 27, 2019. Accessed March, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

⁸⁰ Human Rights Watch, Do you See How Much I’m Suffering Here? March 2016. Available at: www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf

⁸¹ ICE. Transgender Care Memorandum, June 2015.

policies that prioritize religious freedom and otherwise indirectly harm LGBTQI individuals. In 2017 alone, the Trump administration rescinded Title IX protections for transgender individuals, rolled back anti-discrimination protections in healthcare for trans individuals, withdrew protections for anti-LGBTQI housing discrimination, sent anti-LGBT hate groups to the UN Commission on the Status of Women conference, attempt to define “transgender out of existence”⁸², and struck proposals to include questions about sexuality and gender-identity on a number of various federal surveys (including the 2020 Census).⁸³ Perhaps, the policy change that got the most attention was the Trump administration’s ban on transgender individuals serving in the military and its subsequent efforts to discharge and stop recruitment of trans individuals.⁸⁴ The Trump administration has also expanded legal forms of discrimination against trans and queer communities by granting more protections to religious freedom, even if that freedom inhibits the freedoms of LGBTQI individuals. In 2018, the Department of Labor granted broad religious exemptions in adhering to antidiscrimination protections and deleted language determining the balance between protection for freedom of religion and the protection of LGBT rights.⁸⁵ The policy shift that had the most impact on LGBTQI asylum seekers, however, was United States Attorney General Jeff Sessions’ ruling that domestic violence and gang-violence could no longer serve as grounds for asylum, as they instead constituted “private violence”.⁸⁶ This ruling overturned an Obama administration-era protection that sought to expand asylum protections for women.⁸⁷ A significant portion of the threats of persecution that LGBTQI asylum seekers face is often at the hands of loved ones or homophobic, transphobic gang members, and other non-governmental actors.⁸⁸ This policy shift has drastic implications for the protection of LGBTQI individuals, especially trans individuals fleeing from the Northern Triangle, who are often specifically targeted by gangs and are left unprotected by their governments.

⁸² Erica Green, “‘Transgender’ Could Be Defined Out of Existence Under Trump Administration”, October 21, 2018, <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

⁸³ “Trump’s record of action against transgender people”, National Center for Transgender Equality”, n.d., accessed March, 2019, <https://transequality.org/the-discrimination-administration>.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Katie Benner, “Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum”, June 11, 2018.

⁸⁸ “LGBTQ Asylum Seekers’ Lives Will Be Endangered By New Trump Rule”, n.d., November 8, 2018, <https://transequality.org/press/releases/lgbtq-asylum-seekers-lives-will-be-endangered-by-new-trump-rule>.

In 1980, Congress signed the Refugee Act, which cemented our commitment to the Geneva Convention and the 1967 Protocol Relating to the Status of Refugee by creating actual domestic policy. In the current climate surrounding refugees and asylum seekers, activists and scholars alike are keen on pressing the United States government for answers and proof that we really are adhering to the policies outlined in the Refugee Act and 1967 Protocol. Likewise, prior to the 1990s, when the ban on gay immigration was lifted, the United States had spent a century constructing the identity of a homosexual or gender-variant individual in order to be able to police and exclude it from entering into the country.^{89 90} Now, the Trump administration is doing everything it can to not only exclude LGBTQI migrants, but erase protections for LGBTQI members living in the United States as well, through the restriction of domestic and gang violence as grounds for asylum and the retraction of informative memos that instructed immigration authorities on best practices in helping LGBTQI people. While the extremism of Trump's policies on immigration may shock some, the United State's track record on immigration has always been less focused on providing refuge for those fleeing humanitarian crises and adhering to international frameworks than it has been on prioritizing the values of the administration in office.

⁸⁹ Cantú Lionel, et al. *The Sexuality of Migration: Border Crossings and Mexican Immigrant Men*, p. 41. New York University Press, 2009.

⁹⁰ Eithne Luibhéid, *Entry Denied Controlling Sexuality at the Border*. Univ. of Minnesota Press, 2010.

Chapter 2:

Evolution of International Human Rights Law

Despite its insistence on spreading democratic values, since 2002, the United States' has refrained from signing onto treaties that solidify its stance on protecting human rights. Because international human rights treaties are non-enforceable, member states may disingenuously sign onto them with no intentions of tangibly committing to the provisions in them. Likewise, ratification by more powerful countries, even if symbolic, signifies to smaller countries a credible commitment to the values of that treaty. In the case of the United States, failing to ratify a treaty can signal to smaller countries that they also might not need to credibly commit to those values. Following the atrocities of World War II, the international community established the United Nations Charter in 1945 and the Universal Declaration of Human Rights in 1948, both of which outlined expectations for member states' protection of human rights, including the right of movement "within each state" and the right to seek and enjoy asylum from persecution.⁹¹ Neither of these rights, however, requires member states to admit migrants or asylum seekers. Shortly after the creation of the United Nations, 144 of the 192 United Nations member states, excluding the U.S., signed onto the 1951 Refugee Convention, iterating its support in protecting the rights of displaced persons and the core principle of non-refoulement, which prevented states from returning refugees to a country where their safety or freedom would be threatened.⁹² The United States, however, did sign onto the 1967 Protocol Relating to the Status of Refugees, which extended the 1951 Convention to apply beyond its post-World War II parameters. The United Nations passed several treaties committing parties to protecting civil, political, cultural, and economic rights: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965; the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966; the International Covenant on Civil and

⁹¹ "A Short History of Human Rights", accessed March 4, 2019. Adapted from David Shiman, Teaching Human Rights, (Denver: Center for Teaching International Relations Publications, U of Denver, 1993). <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm>.

⁹² "UNHCR - Convention and Protocol Relating to the Status of Refugees", n.d., accessed March 2019, <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html.3/4/19>.

Political Rights (ICCPR) in 1966. The UN Human Rights Committee has affirmed that the ICCPR and ICESCR protect LGBTQI individuals from discrimination, stating that its references to ‘sex’ includes sexual orientation, if not explicitly mentioned.⁹³ Gradually, the United States became more reserved in its ratifications, failing to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the 1989 Convention on the Rights of the Child (CRC), which the United States helped draft. Though the United States did ratify the 1984 Convention Against Torture, which precludes member states from refouling individuals who believe they will be tortured upon return to their home country, it did so with reservations declaring national sovereignty supreme over international commitments.⁹⁴ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) of 1990 aimed to guarantee safe working conditions and human rights for migrant workers, but was ratified by only smaller migrant-sending member states, and not by major migrant-receiving member states.⁹⁵ Only in the 1994 *Toonen v Australia* case did the UN Human Rights Committee first affirm that human rights law prohibited discrimination on the basis of sexual orientation.⁹⁶ Because sexual orientation and gender identity were not saliently recognized as identities needing specific protections when many treaties were first created, the United Nations has made amendments to earlier treaties to include explicit expectations of protections. One of the first UN agencies to make this change was the World Health Organization (WHO), which removed homosexuality as a disorder or disease in 1992 from the International Classification of Diseases – still five years later than the American Psychiatric Association’s removal in 1987.⁹⁷ New language protecting sexual

⁹³ Shana Tabak, “Global Human Rights Frameworks Applicable to LGBTI Migrants”, accessed March 2019, <https://www.fmreview.org/sogi/tabak-levitan-frameworks>.

⁹⁴ “OHCHR | Convention Against Torture”, accessed March 2019, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

⁹⁵ “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.” Conclusion date: December 18, 1990. United Nations Treaty Series Online, registration no. 39481 https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND.

⁹⁶ “United Nations: General assembly to address sexual orientation and gender identity - Statement affirms promise of Universal Declaration of Human Rights,” 2008. Amnesty International. <https://www.amnesty.org/download/Documents/56000/ior410452008en.pdf>

⁹⁷ “Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights and United Nations,” 2016. Pretoria University Law Press. http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf

orientation first came in resolutions addressing arbitrary executions and the death penalty.⁹⁸ Talks stressing the importance of protecting LGBTQI rights began in 1995, but didn't come to committee until 2003, when Brazil tabled a Resolution covering freedom of sexual orientation and gender identity as a protected right.⁹⁹

The United Nations and pro-LGBT NGOs came together in 2006 to draft the Yogyakarta Principles, defining rights protecting queer individuals.¹⁰⁰ The first affirmation that sexual orientation was a protected human right came in 2008 as a declaration from the member states of North and South America, but not enough member states supported the measure to pass it as a resolution.¹⁰¹ In fact, 54 countries co-sponsored a statement opposing LGBTQI rights.¹⁰² Regardless, in 2008 an informal UN LGBTI Core Group was established to further discuss the international protections needed by the LGBTI community, as first outlined in the Yogyakarta Principles.¹⁰³ These measures led to the UN Human Rights Council (UNHRC) finally, but barely passing a resolution documenting and acknowledging the discrimination faced by LGBTI individuals in 2011, but when the UNHRC led a panel in 2012 to discuss SOGI¹⁰⁴-based violence and discrimination, a number of member states walked out of the Council chamber or voiced opposition on religious or cultural grounds.¹⁰⁵ ¹⁰⁶ The UNHCR passed a resolution on best practices to combat SOGI-based discrimination by a majority vote for the first time in 2014.¹⁰⁷ The UN has since made progress including SOGI rights on UN agendas, leading to the

⁹⁸ Ibid.

⁹⁹ "Brazilian Resolution on Human Rights and Sexual Orientation," 2003. International Lesbian, Gay, Bisexual, Trans and Intersex Association. https://web.archive.org/web/20091030051521/http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=44&FileID=406

¹⁰⁰ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>

¹⁰¹ "United Nations: General assembly to address sexual orientation and gender identity - Statement affirms promise of Universal Declaration of Human Rights," 2008. Amnesty International.

¹⁰² Ibid.

¹⁰³ "Keeping LGBT Rights Active on the UN Agenda", 2015. PassBlue, accessed February, 2019, <https://www.passblue.com/2015/12/08/keeping-lgbt-rights-active-on-the-un-agenda/>.

¹⁰⁴ SOGI is an acronym for "sexual orientation and gender identity"

¹⁰⁵ "Council establishes mandate on Côte d'Ivoire, adopts protocol to child rights treaty, requests study on discrimination and sexual orientation," 2011. Human Rights Council, accessed March 2019. <https://web.archive.org/web/20110624081557/http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E>

¹⁰⁶ "Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity," 2012. Arc International, accessed March 2019. <http://arc-international.net/global-advocacy/human-rights-council/hrc19/panel-summary/>

¹⁰⁷ "Resolution on Human Rights, Sexual Orientation, and Gender Identity," 2014. A/HRC/27/L.27/Rev.1, United Nations Human Rights Council. <https://www.scribd.com/document/241092505/Resolution-on-Human-Rights-Sexual-Orientation-and-Gender-Identity>

creation of information campaigns, such as UN Free & Equal, an LGBTI Inclusions Index, a program meant to offer governments advice on SOGI-protections in their countries through UN-appointed independent, and numerous reports detailing the effects of criminalization and discrimination against the community.¹⁰⁸

¹⁰⁸ “Keeping LGBT Rights Active on the UN Agenda”, 2015. PassBlue, accessed February, 2019.

Chapter 3: Case History

Following decades of exclusionary immigration legislation for sexually-fluid and gender-variant individuals, the emergence of LGBTQI asylum protections came ironically. The very category used to exclude queer immigrants for decades now formed the claim that could grant them entry. Through the passage of the 1980 Refugee Act, the United States formally adopted the definitions of a refugee from the UN 1951 Convention Relating to the Status of Refugees and the 1967 UN Protocol Relating to the Status of Refugees.¹⁰⁹ Under this definition, a refugee is someone who is unwilling or unable to return to their home country because of a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹⁰ Those fleeing persecution may apply for asylum either affirmatively or defensively. Within one year of arriving in the United States, affirmative applicants will directly and voluntarily apply to begin the asylum process. Alternatively, an apprehension by immigration services begins the defensive asylum process, where an applicant files for asylum in order to remain in the United States.¹¹¹ In both systems, adjudicators base their decision upon the credibility of an applicant’s story on their fears of persecution on the basis of their protected identity.¹¹² Applicants may also receive limited protections and benefits under the Convention Against Torture or through a withholding of removal.¹¹³

To be granted asylum, claimants need to prove first, that they have a well-founded fear of persecution, and second, that this persecution was due to their race, religion, nationality, membership of a social group, or political opinion. Early protections of LGBTQI asylum seekers emerged through precedent, instead of through deliberate inclusion in human rights legislation. Because of this, SOGI-based claims have been interpreted to fall under the protected class of

¹⁰⁹ Tracy Davis, “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States”, August 2002, <http://www.wcl.american.edu/hrbrief/v6i3/immigration.htm>.

¹¹⁰ “What Is a Refugee? Definition and Meaning | USA for UNHCR”, n.d., accessed February, 2019, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>.

¹¹¹ Jaya Ramji-Nogales, Andrew Schoenholtz I., and Philip Schrag G., “Refugee Roulette: Disparities in Asylum Adjudication” 60, November 1, 2007, <https://www.jstor.org/stable/40040412>.

¹¹² *Ibid.*, 306.

¹¹³ *Ibid.*, 309

“membership in a particular social group”. To qualify as a social group, it must constitute a group of individuals who share a “common immutable characteristic” or share a characteristic “so fundamental to one’s identity that it ought not be required to change”.¹¹⁴ Proving membership to this group has been less challenging than proving a “well-founded fear of persecution” as a *result* of this membership. Analyzing precedential cases longitudinally reveals the wax and wane of U.S. immigration protections relating to the protection of LGBTQI asylum seekers.

The first appeal that established that sexual orientation was included as a characteristic for a “member of a social group”, by refugee definitions, was *Matter of Toboso-Alfonso* in 1990, where, after years of harassment at the hands of Cuban government officials and national authorities, Toboso-Alfonso, a gay man, was threatened and told to leave Cuba or face four years in prison.¹¹⁵ Though Toboso-Alfonso was denied asylum, the Board of Immigration Appeals (BIA) granted him a stay of deportation under principles of non-refoulement.¹¹⁶ This case had no precedential value until 1994 when United States Attorney General Janet Reno ordered that “an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group.”¹¹⁷ Though the impacts of *Matter of Toboso-Alfonso* were monumental for LGBTQI individuals, some scholars attach less value to the case, arguing that it was more likely the United States granted a stay of deportation due to the complex U.S.-Cuban relations at the time and less due to the applicant’s sexuality.¹¹⁸

The 1997 *Pitcherskaia v. INS* case established that even if the harm experienced by the asylum seeker was unintentional, if the asylum seeker perceived it to be abuse, such as a Russian lesbian being subjected to corrective electro-shock therapy, then the harm may be considered persecution.¹¹⁹ If national authorities were either participants, complicit, or willfully negligent in the abuse of the

¹¹⁴ Tracy Davis., “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States”, August 2002.

¹¹⁵ *Matter of Toboso-Alfonso*, Board of Immigration Appeals (1990), 819.
<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3222.pdf>

¹¹⁶ *Ibid.*

¹¹⁷ Tracy Davis., “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States”, August 2002.

¹¹⁸ Cantú Lionel, et al. *The Sexuality of Migration: Border Crossings and Mexican Immigrant Men*. p.55. New York University Press, 2009.

¹¹⁹ *Pitcherskaia v. INS*, Board of Immigration Appeals (1996), No. 95-70887.
<https://www.immigrationequality.org/wp-content/uploads/2013/09/Pitcherskaia-pdf.htm>

claimant, that abuse may constitute persecution, as an individual may fear reporting to the authorities. This interpretation has been reinforced by multiple cases including *Reyes-Reyes v. Ashcroft (2004)*, *Ornelas Chavez v. Gonzalez (2006)*, and *Nabuwala v. Gonzalez (2007)*.¹²⁰

The earliest protections for transgender individuals came in 2000 under *Hernandez-Montiel v. INS* when the court determined that “Mexican gay men with female sexual identities” constituted a social group.¹²¹ The court also came to two critical conclusions: “sexual orientation and sexual identity are immutable” and that “sexual identity is inherent to one’s very identity as a person”.¹²² This decision was reaffirmed by *Reyes-Reyes v. Ashcroft* in 2004, confirming that identifying as transgender and being willfully neglected protection by national authorities rendered that claimant subjected to persecution.¹²³ In *Morales v. Gonzalez* (2007), a Mexican transgender woman’s inability to receive protection from local authorities, who were either involved or complicit in the abuse, was considered to be grounds for aid under the Convention Against Torture (CAT).¹²⁴

Karouni v. Gonzalez, decided in 2005, held that an “all alien homosexuals are members of a ‘particular social group’”, including a gay HIV-positive Lebanese man.¹²⁵ Further language relating to HIV-positive status came under *Boer-Sedano v. Gonzalez* in 2005, stating that in certain circumstances, an individual’s health status may make internal relocation unreasonable due to availability of medication or discrimination against HIV/AIDS-status.¹²⁶ The inaccessibility of HIV medication and deliberate retaliatory denial of medication for a would-be imprisoned HIV-positive gay man in Nigeria affected another case, *Eneh v. Holder* (2010), and overruled a previous denial of his protection under CAT.¹²⁷

¹²⁰ Immigration Equality, “Precedential LGBTQ/H Asylum Cases”, n.d., accessed March 2018, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/precedential-lgbth-asylum-cases/#.XJHrsRNKiCR>.

¹²¹ *Hernandez-Montiel v. INS* (1999), CA Ninth Circuit Court of Appeals, No. 98-70582, <https://www.immigrationequality.org/wp-content/uploads/2013/09/hernandez-montiel.pdf>

¹²² Cantú Lionel, et al. *The Sexuality of Migration: Border Crossings and Mexican Immigrant Men*. p.55. New York University Press, 2009.

¹²³ *Reyes-Reyes v. Ashcroft* (2004), CA Ninth Circuit Court of Appeals, No. 03-72100, <https://www.immigrationequality.org/wp-content/uploads/2011/05/Reyes-Reyes.pdf>.

¹²⁴ *Morales v. Gonzalez* (2007), WA Ninth Circuit Court of Appeals, No. 05-70672, <https://www.immigrationequality.org/wp-content/uploads/2011/05/Morales.pdf>.

¹²⁵ *Karouni v. Gonzalez* (2005), CA Ninth Circuit Court of Appeals, No. 02-72651, <http://www.ca9.uscourts.gov/datastore/opinions/2005/03/07/0272651.pdf>.

¹²⁶ *Boer-Sedano v. Gonzalez* (2005), CA Ninth Circuit Court of Appeals, No. 03-73154 <https://www.immigrationequality.org/wp-content/uploads/2011/05/Boer-Sedano.pdf>.

¹²⁷ *Eneh v. Holder* (2010), CA Ninth Circuit Court of Appeals, No. 05-75264, <http://cdn.ca9.uscourts.gov/datastore/opinions/2010/04/15/05-75264.pdf>.

Adhering to the definition of a refugee, proving “membership to a social group” requires proving that one faces persecution as a result of being recognized as a member of that social group. Adjudicators interpreted this as adjudicating claims based on whether the applicant looked, acted, or talked like a homosexual. A key contradiction in this reasoning is that persecution due to appearing like a homosexual or transgender individual may be the precise reason why the applicant does not look or act “straight”.¹²⁸ One of the first cases that rejected homosexual stereotypes as being grounds for inadmission was *Shahinaj v. Gonzalez* (2007), which overruled a decision that denied asylum because the claimant did not “act, dress, or exhibit the mannerisms of a homosexual” or participate in any homosexual organizations.¹²⁹ *Ali v. Mukasey* (2008), *Razkane v. Holder* (2009), and *Todorovic v. U.S. Attorney General* (2010) also overruled decisions in which the judges used homophobic stereotypes relating to not presenting “effeminate enough” to be identified as gay.¹³⁰

Alternatively, cases can often establish harmful precedents, such as *Ixtlilco-Morales v. Keiseler* (2007), in which the court found that discrimination in Mexico overall and universally “did not rise to the level of persecution”.¹³¹ Discrimination, ostracization, stigmatization, and rejection from loved ones may be harmful to one’s psyche, but still may not qualify as persecution. At times, these rulings are the result of poor country information guides on the status of human rights protections and abuses for LGBTQI individuals. Poor country information resources may cause adjudicators to recommend relocation within a country (*Salkeld v. Gonzales*, Peru 2005)¹³², to acknowledge a country’s poor SOGI protections and still deny asylum (*Kimumwe v. Gonzales*, Zimbabwe 2005)¹³³, or to fail to establish a “pattern of systematic persecution” for homosexuals

¹²⁸ Bohmer, Carol, and Amy Shuman. *Rejecting Refugees: Political Asylum in the 21st Century*. Routledge, 2010, pp. 239

¹²⁹ *Shahinaj v. Gonzalez* (2007), US Eighth Circuit Court of Appeals, No. 06-1573, <http://www.immigrationequality.org/wp-content/uploads/2011/08/shahinaj.pdf>.

¹³⁰ *Razkane v. Holder* (2009), CA Tenth Circuit Court of Appeals, No. 08-9519, <https://www.ca10.uscourts.gov/opinions/08/08-9519.pdf>.

¹³¹ *Ixtlilco-Morales v. Keiseler* (2007), US Eighth Circuit Court of Appeals, No. 06-4123 <https://ecf.ca8.uscourts.gov/opndir/07/11/064123P.pdf>.

¹³² *Salkeld v. Gonzalez* (2005), US Eighth Circuit Court of Appeals, No. 04-1709 <http://www.immigrationequality.org/wp-content/uploads/2011/08/salkeld.pdf>.

¹³³ *Kimumwe v. Gonzalez* (2005), United States Eighth Court of Appeals, No. 04-2716, <http://www.immigrationequality.org/wp-content/uploads/2011/08/kimumwe.pdf>.

(*Joaquin-Porras v. Gonzales*, Costa Rica 2005).¹³⁴ Until the late 1990's, country information reports failed to clearly and completely outline the status of SOGI-based human rights in a country. Since then, mainstream NGOs and smaller SOGI-focused NGOs have increased their reporting and created comprehensive information guides that prove critical to many individuals' successful asylum claims.¹³⁵ These human rights organizations do still have significant room for improvement. NGOs can do more to acknowledge the differences between discrimination and persecution, amount of protection granted by state or local authorities (or lack thereof), and the fact that their reports are explicitly used within the refugee determination process.

Likewise, establishing patterns of abuse that amount to persecution of the claimant can often be challenging, especially since the passage of the 2005 REAL ID Act, which increased the burden of proof and documentation of corroborating evidence of persecution. For example, an initial denial of asylum for a gay Mexican man on grounds of lack of evidence was overruled in *Bringas-Rodriguez v. Sessions* (2017), but in 2016, *Jeune v. United States AG* decided that a Haitian transgender woman would be denied asylum for lack of evidence regarding threats of “future persecution” and failure to prove that current discrimination and ostracization amounted to persecution.¹³⁶

Asylum seekers who **fail to disclose** their sexual orientation or gender identity early in their adjudication process may face significantly more challenges in proving the credibility of their claim. The first account an applicant gives to immigration authorities is monumental in shaping the final decision of the case. Withholding information can create suspicion of the applicant's credibility, even if they had valid reasoning to suppress disclosure. In *Gebremeria v. Ashcroft* (2004), an Ethiopian woman's failure to disclose her HIV-positive status in the court's first decision led to the appeals court denying the consideration of that new evidence as

¹³⁴ *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (ed Cir. 2006), United States Court of Appeals for the Second Circuit, 18 January 2006, available at: https://www.refworld.org/cases,USA_CA_2,4821a86e2.html [accessed 29 March 2019]

¹³⁵ Nicole LaViolette (2009) Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process, *The International Journal of Human Rights*, 13:2-3, 437-476, DOI: 10.1080/13642980902758234 3/8/19

¹³⁶ *Jeune v. United States AG* (2016), United States Eleventh Circuit Court of Appeals, No. 13-11683 <http://media.ca11.uscourts.gov/opinions/pub/files/201311683.pdf>.

possibly resulting in HIV-related persecution.¹³⁷ There are many valid reasons for why a claimant could fail to disclose this information early on, including having internalized homophobia or shame regarding HIV-status, lacking trust in immigration officials, wanting to avoid shame surround sexual assault or sexualisation, or failing to understand it as relevant to the asylum process.¹³⁸

¹³⁷ *Gebremaria v. Ashcroft* (2004), United States Eighth Circuit Court of Appeals, No. 03-2492, <http://www.immigrationequality.org/wp-content/uploads/2011/08/gebremaria1.pdf>.

¹³⁸ "Berg, Laurie; Millbank, Jenni, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Seekers", n.d., accessed 1/17/19, <http://classic.austlii.edu.au/au/journals/UTSLRS/2009/5.html>.

Chapter 4:

The Limits of LGBTQI Protections of International Refugee and Asylum Law

Successfully proving a valid fear of persecution based on sexual orientation claims require proving not only that there is a *well-founded fear of persecution* for membership of a social group, but requires defining how an individual proves their membership to this social group, whether they exhausted every option to live safely in their own country and varies widely depending on which country the applicant flees to.¹³⁹ Because it is considered “normal” to explicitly criminalize homosexual relations in many countries, particularly for men, successfully proving an asylum claim can rest on demonstrating that normal behavior in the country of origin, relating to the protection of LGBTQI populations, is abnormal in the receiving country.¹⁴⁰ However, proving abnormal behavior surrounding protections of LGBTQI rights can be challenging in the asylum process. One of the first questions adjudicators focus on delineating is whether the claimant’s story tells one of discrimination or of persecution. Persecution can arise following the buildup of discriminatory acts and threats, but the ultimate distinguishing factor between them is the severity of the harm.¹⁴¹ As countries become more tolerant of sexual minorities, the impacts of repeated discrimination became less meaningful or indicative of persecution for some countries adjudicating the claim.¹⁴² When applying for asylum, applicants may also face issues with the jurisprudence of asylum law for LGBTQI individuals, including facing challenges with adjudicators ruling applicants must be “out” or alternatively “discrete”, must come from countries with criminalized homosexuality or not, or must be questioned about sexual acts over

¹³⁹ Bohmer, Carol, and Amy Shuman. *Rejecting Refugees: Political Asylum in the 21st Century*. Routledge, 2010, pp. 237

¹⁴⁰ *Ibid.*

¹⁴¹ Nicole LaViolette (2009) Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process, *The International Journal of Human Rights*, accessed March 8, 2019.

¹⁴² *Ibid.*

identity.¹⁴³ Adjudicators may stereotype the gay asylee to look and act a certain way, may request evidence and then dismiss it, or may be in disbelief overall.

Adjudicators, who have limited information about the state of LGBTQI rights in a given country, face the dilemma of determining how to weigh the applicant's narrative in relation to information given on the status of protections in place. To aid relevant decision makers, NGOs often compile independent country reports describing documented SOGI-based human rights violations, the climate of acceptance towards LGBTQI people, and the level of protection the State provides for vulnerable communities. The significance of these reports cannot be understated. Country reports must be comprehensive and inclusive of lesbians, bisexuals, transgender and intersex individuals, providing adequate information on the criminal law provisions and legal protections of LGBTQIs in that country.¹⁴⁴ Evidence of widespread persecution by non-State actors, government apathy or participation in the face of discrimination or violence of the LGBTQI individual may be challenging for an individual to present, and thus often times relies on the credibility of local NGOs who specialize in documenting human rights violations.¹⁴⁵

Proving an asylum claim for sexual minorities used to be much more challenging than it is today. In the 1990s, neither governments nor NGOs were actively documenting human rights violations against LGBTQI individuals and in the process of doing so, failed to validate the necessity of protecting their rights. The failure of mainstream human rights NGOs to document these abuses combined with adjudicators believing mainstream NGOs would cite abuses "if" they were happening adversely affected many cases, even when those cases had documentation from smaller "less credible" queer right organizations, who put resources towards documenting such abuses. In fact, documentation of human rights abuses from smaller sexual minority rights organizations was often ruled by adjudicators to be "understandably highlighted and possibly exaggerated".¹⁴⁶ Without independent country information on documentary evidence of risks of persecution, asylum

¹⁴³ Türk, Volker, "Ensuring protection for LGBTI Persons of Concern," 2013. Forced Migration Review, accessed November 26, 2018. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/sogi/tuerk.pdf>.

¹⁴⁴ Spijkerboer, Thomas and Jansen, Sabine, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (September 6, 2011). *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU*, Coc Nederland/Vu University Amsterdam 2011, accessed October 21, 2018. <https://ssrn.com/abstract=2097783>

¹⁴⁵ Nicole LaViolette (2009) Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process, *The International Journal of Human Rights*,.

¹⁴⁶ *Ibid.*

seekers' claims may be seen less credibly in the eyes of adjudicators because individual narratives may be perceived to be discrimination, but evidence of widespread discrimination in a country may show signs of persecution to adjudicators. The lack of updated and relevant country information affected at least two Canadian asylum claims in 2007 – one Turkish, one Mongolian – when the research body responsible for providing information on human rights abuses in those countries admitted they did not have complete or more recent evidence.¹⁴⁷ Following the widespread failure of mainstream human rights organizations to document the serious human rights violations against sexual minorities in the 1990s and the effects it had on cases signaled to the United Nations that a change had to be made. Thankfully, this shift led to an increase in granted asylum and refugee claims from around the world.

In many countries, homosexuality or practicing same-sex relations must be criminalized in the country of origin in order for asylum seekers to be granted refugee status. However, while the illegality of homosexuality or gender-variant behavior does invalidate the state's ability to protect LGBTQI populations, adjudicators are reluctant to believe that the sheer existence of homophobic laws have the ability to tell the whole story.¹⁴⁸ According to the European Union's Qualification Directive, which guides the union's refugee policies, if gender-variant or same-sex relations are criminalized in a country, then LGBTQI asylum seekers have a well-founded fear of persecution on the basis of their sexual orientation or gender identity.¹⁴⁹ In tandem, disproportionate punishments relating to laws criminalizing sexual minorities are considered persecution for the purposes of adjudicating asylum and refugee claims.¹⁵⁰ In some countries, participating in same-sex relations may be a criminal offense, but one which is rarely enforced. In 2009, a Pakistani lesbian was denied asylum because the Irish Tribunal found that homosexuality was rarely prosecuted and therefore, was not grounds for asylum.¹⁵¹ Likewise, there are many "safe" countries where acceptance of LGBTQI populations has not increased, despite the passage of laws that decriminalize and protect them

¹⁴⁷ Ibid.

¹⁴⁸ Türk, Volker, "Ensuring protection for LGBTI Persons of Concern," 2013. Forced Migration Review, accessed November 26, 2018.

¹⁴⁹ Spijkerboer, Thomas and Jansen, Sabine, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (September 6, 2011), p.7.

¹⁵⁰ Ibid, p.22.

¹⁵¹ Ibid, p.21.

and their rights. Brazil has one of the highest murder rates of LGBTQI individuals in the world, reaching devastating new records in 2017 that surged up 30% from the year prior.¹⁵² The country is also home to one of the world's largest gay pride parades.¹⁵³ An LGBTQI individual's safety may be dependent on their race, religion, social class, or ability to 'pass' as straight or cis-gender.¹⁵⁴

By no means are sexual minorities guaranteed to live freely and openly in countries where homosexuality or gender-variant behavior is decriminalized. LGBTQI individuals are more likely to be targets of violence from homophobic non-State actors, like mobs, and less likely to succeed in receiving state protection from those non-state actors. State protection from homophobic or transphobic violence may be inadequate or nonexistent. In some countries, it may be that national or local authorities are homophobic or transphobic themselves and are either unwilling to provide meaningful assistance or pose a direct and increased risk for victims of homophobic/transphobic violence.¹⁵⁵ According to a report from El Salvador in 2015, 72% of transgender women chose not to report their attacks out of distrust of the judicial system or fear of retaliation from national authorities.¹⁵⁶ Local activists in El Salvador describe the targeted discrimination, arbitrary detentions and arrests, and unjustified search and seizures by police that trans people face; in fact, in 2014, nearly 67% of Salvadoran police officers believed that LGBTQI people did not have the same rights and protections as other groups under the law.¹⁵⁷ The UN High Commissioner for Human Rights Louise Arbour made note of the challenges LGBTQI individuals faced in reporting violence to authorities, citing that violence is "frequently unreported, undocumented, and goes ultimately unpunished."¹⁵⁸ A local NGO that documents violence against LGBTQI individuals

¹⁵² Sam Cowie, "Violent Deaths of LGBT People in Brazil Hit All-Time High", accessed March, 2019, <https://www.theguardian.com/world/2018/jan/22/brazil-lgbt-violence-deaths-all-time-high-new-research>.

¹⁵³ Türk, Volker, "Ensuring protection for LGBTI Persons of Concern," 2013. Forced Migration Review, accessed November 26, 2018.

¹⁵⁴ Spijkerboer, Thomas and Jansen, Sabine, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (September 6, 2011), p.13.

¹⁵⁵ *Ibid* p. 31.

¹⁵⁶ Human Rights Ombudsman of El Salvador and UNDP, *Informe sobre la situación de los derechos humanos de las mujeres trans en El Salvador* (Report on the Human Rights Situation of Trans Women in El Salvador), 2015, para. 38. [in Spanish only]

¹⁵⁷ "No Safe Place," November 2017. Amnesty International, accessed March 2019. <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>

¹⁵⁸ Louise Arbour, 'Presentation of the Office of the United Nations High Commissioner for Human Rights', presentation to the International Conference on LGBT (Lesbian, Gays, Bisexual and Transgender) Human Rights, Montreal, 26 July 2006), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument>

in the Northern Triangle, Cattrachas, reported that “of the 225 violent deaths of LGBTI people recorded during the period 2008 to 2015, only 13 had resulted in a conviction.”¹⁵⁹ When state protection is lacking, asylum applicants may feel as though they have no one to turn to for protection within their own state and will make attempts to seek refuge elsewhere.¹⁶⁰

Despite this, many, but not all, European countries require the applicant to report homophobic or transphobic acts to local authorities before seeking asylum in another country, even if homosexuality or gender-deviant behavior is illegal in that country.¹⁶¹ This presents a clear dilemma for LGBTQI victims who must choose whether to potentially “out” themselves or not report at all. For example, a Ukrainian gay man sought asylum in Austria after he was repeatedly and violently targeted by a homophobic mob first in his hometown and then again, once he internally relocated to a nearby city.¹⁶² His initial asylum claim was rejected because of his failure to contact the police.¹⁶³ In cases of local authorities being homophobic, countries, like Canada, have taken measures to provide victims of SOGI-based violence an individual complaint mechanism that directly contacts a local human rights commission instead. An alternative in this situation is the possibility for an applicant to claim the State “tolerated discriminatory practices or harm” or was “unable to effectively protect them from harm.”¹⁶⁴ Not all victims of non-state actor-sanctioned violence are the result of mobs. Lesbians may face violence from family members that is challenging to categorize or report, such as forced marriage, corrective rape, or deprivation of contact with their children. In response to increasing awareness about the underreporting of LGBTQI-sanctioned violence, many countries have taken steps to update their policies to no longer require that individuals contact the police.

Sexuality, as opposed to gender or race, has the potential to be a more disguisable identity than the latter two. Because of this, some countries and legal systems have argued that asylum seekers could remain discreet about their

¹⁵⁹ Cattrachas Lesbian Network, Informe sobre muertes violentas de la comunidad LGBTI. Énfasis en impunidad (Report into violent deaths in the LGBTI Community. Emphasis on Impunity), 2016. Available at: www.cattrachas.org/gestionciu.php [in Spanish only]

¹⁶⁰ Spijkerboer, Thomas and Jansen, Sabine, Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU (September 6, 2011). p.8.

¹⁶¹ Ibid, 31.

¹⁶² Ibid, 27.

¹⁶³ Ibid, 27.

¹⁶⁴ Ibid.

sexuality to avoid persecution. However, more recently, both the United Nations and adjudicators have ruled that expecting LGBTQI people to conceal their sexuality or gender identity is a denial of their fundamental human rights. Both the Qualification Directive that guides EU refugee policy and the UNHCR's Guidance Note on Sexual Orientation and Gender Identity affirm that sexual minorities should not be singled out and expected to hide a characteristic so fundamental to their identity for the rest of their lives, especially because those fleeing due to political beliefs are not expected to do the same.¹⁶⁵ Adjudicators have ruled that desiring to live safely and openly as an LGBTQI is a legitimate reason to seek asylum in another country.¹⁶⁶ In addition, being forced to remain in the closet is dangerous as it risks the possibility of having one's sexual orientation or gender identity exposed without their consent.¹⁶⁷ Even if an individual does live discreetly, being "outed" as opposed to choosing to "come out", is still a dangerous possibility that could legitimately threaten that LGBTQI person's physical and emotional safety. At the same time that countries deny asylum claims for not living discreetly, other countries will automatically deny asylum to LGBTQI applicants if they were not "out" in their country first. The lack of congruity in these standards can be extremely confusing and frustrating for LGBTQI asylum seekers who take long dangerous journeys traveling to the border, only to be denied for or for not being "out". Despite progressions in the validity of the "discretion requirement", many legal systems still practice this reasoning on a case-by-case basis.¹⁶⁸

Adjudicators also check that asylum seekers have attempted internal flight from where they feared persecution before making an asylum claim. If an asylum seeker has not relocated or fled from the area, adjudicators may be more skeptical of the credibility of that individual's story. Because rural areas tend to be more socially conservative, national authorities and courts have urged applicants to move to larger cities, even in countries where homosexuality is criminalized.¹⁶⁹ For countries with higher social acceptance of LGBTQI individuals, relocating to a larger city may provide community, resources, and progress, especially when the threat of persecution arises from non-State actors. However, it may be challenging for

¹⁶⁵ Ibid, 38.

¹⁶⁶ Ibid, 38.

¹⁶⁷ Ibid, 33.

¹⁶⁸ Ibid, 34.

¹⁶⁹ Ibid, 43.

adjudicators to be aware of where asylum claimants can and cannot safely relocate. Independent country information, which is made available to relevant decision-makers, often fails to address the reality of how effective measures that ensure state protection are when an individual relocates.

Despite how challenging assessing all of the parts of an asylum seeker's claim can be, there is no task more sensitive, complex, and crucial for adjudicators than attempting to determine the credibility of the claimant's sexual orientation or gender identity. The question surrounding determining credibility is simultaneously individualistic and incredibly broad – were you persecuted and does the state permit that persecution on a broader scale? Attempting to discern between fact and fiction about an applicant's narrative regarding intimacy and personal relationships can border on tense and verge on inappropriate.¹⁷⁰ The illegitimate and inappropriate use of medical, psychiatric, or psychological expert opinions to determine the validity of LGBTI identities is still commonly used in countries like Austria, Bulgaria, the Czech Republic, Germany, Hungary, Poland, and Slovakia.¹⁷¹ Since the World Health Organization declassified homosexuality as a mental illness in 1990, the opinions of medical, psychiatric, and psychological experts are no longer needed or relevant.¹⁷² Adjudicators often also allow their preconceived perceptions and stereotypes of sexual minorities to affect their judgements on an applicant's credibility. Numbers of applicants have been denied asylum as a result of prejudice and expectations of how and LGBTQI individuals should act, dress, and know. In at least one case in Austria, officials asked questions about what the orange stripe on the LGBT Rainbow flag was, but failed to ask other relevant questions regarding the individual's life or interview significant others.¹⁷³ Even more strangely, before the European Court of Justice banned them, Hungarian and Bulgarian officials used “arousal tests” and “rorschach tests” until 2014 and 2018, respectively, to determine whether or not an individual was an LGBTQI.¹⁷⁴ Discerning the credibility of an applicant's identity claim is invasive and overwhelming enough for the applicant.

¹⁷⁰ Nicole LaViolette (2009.) Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process, *The International Journal of Human Rights*.

¹⁷¹ Spijkerboer, Thomas and Jansen, Sabine, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (September 6, 2011). P. 9; 49.

¹⁷² *Ibid*, p.49.

¹⁷³ “How Europe determines whether asylum seekers are gay,” 2017. *Economist*, accessed October 2018, <https://www.economist.com/europe/2018/09/13/how-europe-determines-whether-asylum-seekers-are-gay>.

¹⁷⁴ *Ibid*.

Coupled with adjudicators' regressive stereotypes of sexual minorities with asylum seekers being timid to divulge intimate details of their lives, describing a narrative that adheres to each part of the definition of a refugee and "member of a social group" can make or break the success of the asylum claim.

These challenges only intensify when asylum seekers do not disclose their sexuality or gender identity near the beginning of the asylum proceedings and instead wait until further along to disclose it to officials. Applicants may have completely valid reasoning in why they fail to disclose early on – internalized homophobia, fear of disclosure, and lack of awareness about their own sexuality or how it could be relevant to the asylum process. Despite this, asylum seekers may be met with skepticism from adjudicators, who may assume that the applicant is faking being queer to gain asylum. Adjudicators may enforce *res judicata*, which gives them the power to disqualify information which could have been presented at an earlier time, including an applicant's LGBTQI identity.¹⁷⁵ Coming to terms with one's sexual orientation or gender identity is a complex and introverted process that cannot be rushed or forced in any way. If adjudicators fail to grasp this key piece of context, LGBTQI individuals may be denied asylum and key protections of their livelihoods. Late disclosure should not decrease credibility among applicants, but should be taken into account.

¹⁷⁵ Spijkerboer, Thomas and Jansen, Sabine, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (September 6, 2011).

Chapter 5: Hypothesis & Research Design

Hypotheses

The literature provides cause for concern when it comes to whether the U.S. lives up to its obligations to provide protection from persecution to LGBTQI individuals. I thus hypothesize that asylum seekers from countries that persecute LGBTQI individuals will not be significantly more likely to find refuge in the U.S. than asylum seekers from other countries. I note here that the analysis that follows will examine the relationship between country-level LGBTQI acceptance scores (e.g., LGBTQI Civil Insecurity score for El Salvador) and country-level asylum adjudication rates (i.e., percentage of asylum seekers from El Salvador who receive asylum in the U.S.). I am unable to analyze the case outcomes for LGBTQI asylum seekers because such individual-level data are not publicly available. Thus, it is possible that any relationship I detect between LGBTQI Civil Insecurity scores and adjudication rates may be due to factors not related to the presence or absence of LGBTQI protections. Nevertheless, this research provides an important first step toward adding new insights into the burgeoning refugee and asylum literature.

Research Design

My quantitative analysis of the impact of a country's LGBTQI Civil Insecurity Score on the United States' grant rate for that country is limited to the years of 2012 - 2016. While analyzing such a limited set of years can offer only limited results, the conclusions drawn from this analysis are still meaningful and informative in answering the question – does the United States adhere to its obligations to provide protection from persecution to LGBTQI individuals?

The two central parts of my dataset are the asylum grant rate and the LGBTQI Civil Insecurity Index. The dependent variable, the asylum grant rate, is the number of asylum applications from one country that are granted divided by the sum of applications granted and applications denied from that same country. I use

the sum of applications granted and denied instead of applications received because in the dataset I utilize applications received is not consistently equivalent to the sum of applications both granted or denied and thus, does not provide any insightful information about the grant rate. By dividing by the sum of both granted and denied applications, we find the grant rate out of applications adjudicated, meaning those which have been definitively decided by either through the affirmative or defensive process, instead of over-counting those which may be still processing or backlogged. To compile the data for the asylum grant rate, I utilized annual asylum statistics reports for 2012 through 2016 from the Executive Office for Immigration Review under the Department of Justice.

To create the LGBTQI Civil Insecurity Index (CII), I first referenced the International Lesbian, Gay, Bisexual, Trans, and Intersex Association's (ILGA) 2017 Annual Report¹⁷⁶ to discover the legally codified status of human rights protections for LGBTQI individuals within each major country across the world. The ILGA is an internationally-recognized advocacy organization that tracks global and regional progress in the protections and social conditions for LGBTQI people each year and seeks to inform researchers, human rights defenders, agencies, organisations, institutions and allies through the creation of credible reference sources and reports.¹⁷⁷ In addition, I cross-referenced this report with Equaldex¹⁷⁸, a crowdsourced LGBTQI rights tracker that monitors the status of country-level legal protections for LGBTQI people, to make sure my index was as current as possible. The LGBTQI Civil Insecurity Index is comprised of seven LGBTQI rights and protections coded as binary variables, which give it a minimum value of zero and maximum value of seven. A "1" indicates the queer rights binary variable increases the insecurity of queer individuals and fails to protect their human or civil rights. A "0" indicates that the variable decreases the insecurity of queer individuals and stands as a protection of queer human and civil rights. The higher the score on the LGBTQI Civil Insecurity Index, the more insecure LGBTQI civil rights are in that country. That is,

¹⁷⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A. and Mendos, L.R., *State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva; ILGA, May 2017).

¹⁷⁷ "What We Do | ILGA", n.d., accessed March, 2019, <https://ilga.org/what-we-do>.

¹⁷⁸ "Equaldex: The Collaborative LGBT Rights Knowledge Base", n.d., accessed January, 2019, <https://www.equaldex.com/>.

the higher the score, the less civil and human right and protections that country has in place.

Before describing the variables, it is important to recognize that many countries are becoming more accepting of LGBTQI individuals. In the past decade, many countries have overturned homophobic laws and introduced protections on LGBTQI civil and human rights and as such, these changes must be reflected in my binary variables in my 2012-2016 data. If a country passed a legal protection, overruled a previous legal decision, or otherwise changed their LGBTQI legal protections from 2012-2016, that change will be reflected in the following year. For example, in 2013, Bermuda pass the *Human Rights Act*, which made discrimination on the grounds of sexual orientation illegal.¹⁷⁹ For the purposes of this paper, for 2012 and 2013, Bermuda's variables concerning discrimination are coded with a "1" and starting in 2014, after the *Human Right Act* was fully in effect, the variables concerning discrimination will be coded "0". I account for time trends in the analysis using year fixed effects.

In order for LGBTQI individuals to live freely and openly, homosexuality or gender-variance must not be criminalized, must be protected from discrimination, and must be fully recognized by not only the government, but general society as well. Unfortunately, even countries considered progressive in this realm are still arriving towards total acceptance; legislation and public opinion do not always work hand in hand. A country's set of de justo LGBTQI rights legislation or lack of any explicit legislation relating to same-sex or gender-variant behavior, may not accurately reflect how protected LGBTQI individuals feel. For example, although Egypt does not explicitly criminalize same-sex relationships, it is widely considered to be among the most dangerous countries for LGBTQI people. Many countries may have legal protections in place, but rampant discrimination and threats of persecution by non-governemtnal actors towards LGBTQI people.

Finally, it must be recognized that many relevant and potentially influential variables are not included in the Civil Insecurity Index, such as: levels of social acceptance, existence of anti-LGBT propaganda laws, whether pro-LGBT NGOs are

¹⁷⁹ Johnson, Ayo. "MPs Approve Historic Human Rights Act Changes | The Royal Gazette:Bermuda Politics." The Royal Gazette, 15 June 2013, www.royalgazette.com/article/20130615/NEWS01/706149906.

legal, whether gay marriage is fully recognized, and whether LGBT-motivated assaults can be prosecuted as hate crimes.

The first binary variable is “Death Penalty”, where I code for whether the country has a death penalty in their penal code or the death penalty is otherwise applied under Shari’a law or by non-state actors. Coding for the death penalty is complex because although there are 13 countries that they “apply” the death penalty, the ILGA only found eight states or territories where it was enforced.¹⁸⁰ Four countries apply the death penalty under Shari’a law countrywide (Iran, Saudi Arabia, Sudan, and Yemen), two apply Shari’a provincially (Somalia and Nigeria), two are implemented by non-state actors (Iraq and northern Syria), and five have death penalty codified into their penal code, but do not actively enforce it (Afghanistan, Pakistan, Qatar, UAE, and Mauritania).¹⁸¹ In addition, some states, such as Brunei, have implemented the death penalty just this year, which will not be reflected in my 2012-2016 dataset, but makes a case to show that despite many countries making progress towards acceptance and protections for LGBTQI people, several countries are moving backwards.¹⁸² The thirteen states that either allow or have the death penalty codified in their penal code will be coded as “1”. All others will be coded as “0”.

The second variable looks at whether the country explicitly offers protection to sexual minorities in their constitutions. The ILGA, paired with Raub’s Yale study from 2017¹⁸³, find nine countries which do so – four which protection both sexual orientation and gender identity (Bolivia, Ecuador, Fiji, and the UK) and six which protect only sexual orientation (Mexico, New Zealand, Portugal, South Africa, Nepal, and Sweden).¹⁸⁴ British territories, such as which the British Virgin Islands and Turks and Caicos, fall under the same categorization of the UK. However, coding

¹⁸⁰ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., *State Sponsored Homophobia 2017*, p. 8.

¹⁸¹ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., *State Sponsored Homophobia 2017*, p. 40.

¹⁸² Emily Tamkin, “Brunei makes gay sex and adultery punishable by death by stoning,” 28 March, 2019. Washington Post, accessed 29 March, 2019.

https://www.washingtonpost.com/world/2019/03/28/brunei-makes-homosexual-sex-adultery-punishable-by-death-by-stoning/?noredirect=on&utm_term=.117d9bd9607a

¹⁸³ Raub, Amy; Cassola, Adele; Latz, Isabel; and Heymann, Jody (2017) "Protections of Equal Rights across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions," *Yale Journal of Law & Feminism*: Vol. 28 : Iss. 1 , Article 4.

Available at: <https://digitalcommons.law.yale.edu/yjlf/vol28/iss1/4>

¹⁸⁴ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., *State Sponsored Homophobia 2017*, p. 46.

these protections is also not a clear cut task. In Thailand, the constitution's protection from discrimination on the basis of sex is commonly interpreted to include sexual orientation and gender identity, but because it is not explicit in the constitution for the purposes of this paper, will not be considered to have constitutional protection. Alternatively, because the United Kingdom and New Zealand do not have official written constitutions, Raub instead analyzes laws "considered to have constitutional status".¹⁸⁵ If the country does have explicit protections, this variable is coded as a "0". If it does not, it is coded as a "1".

The third variable looks at whether the country offers protection from employment discrimination on the grounds of sexual orientation and gender identity, which allows LGBTQI people to earn a sustainable income and have a fulfilling career. If the country does offer protection, the variable is coded as a "0". If the country does not protect LGBTQI individuals from employment discrimination, this variable is coded as a "1". The fourth variable looks at whether the country has various non-discrimination legislation, which the ILGA defines to include bans on blood donation, domestic violence protections for same-sex couples, protections against discrimination in healthcare, anti-bullying laws, and protecting the right to confidentiality of one's SOGI status.¹⁸⁶ If a country does have various non-discrimination legislation, it will be coded as a "0". If no such legislation exists, it will be coded as a "1". The fifth variable looks at whether or not same-sex relations are criminalised in that country. As of 2017, the ILGA found that there were 74 countries where same-sex relations were explicitly criminalized.¹⁸⁷ Same-sex relationships between men are often more explicitly or more harshly punished than same-sex relationships between women. However, despite this fact, of those 74 countries, 45 countries explicitly criminalize same-sex relationships between women as well.¹⁸⁸ If same-sex relations are not criminalised, the variable will be coded as a "0". If same-sex relations are criminalised, the variable will be coded as a "1".

The sixth variable assesses whether a state has banned "conversion therapy", a pseudoscience aimed at converting a homosexual or transgender person "back" to

¹⁸⁵ Raub, Amy; Cassola, Adele; Latz, Isabel; and Heymann, Jody (2017) "Protections of Equal Rights across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions."

¹⁸⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., State Sponsored Homophobia 2017, p. 9.

¹⁸⁷ Ibid, p. 8.

¹⁸⁸ Ibid, p. 8.

being heterosexual or cisgendered. Conversion therapy can consist of electroshock therapy, aversive conditioning treatments, or hypnosis used in an attempt to condition an individual to be attracted to the opposite sex or act in more in line with their assigned sex at birth.¹⁸⁹ Physicians are now outspoken about the fact that conversion therapy has no scientific significance and is traumatizing to patients, who are often young. There is no ban on conversion therapy in 35 states in the United States.¹⁹⁰ The ILGA found only three countries that ban conversion therapy. For these countries, the variable will be coded as a “1”. Those which do not ban conversion therapy will be coded as a “0”.

The final variable looks at whether same-sex marriage or civil partnerships are legal. For some countries, these marriages are legal federally in every part of the country; in others, such as Mexico and Brazil, same-sex marriage is possible in nearly every principality, but not all.¹⁹¹ The alternative to marriage for many gay couples is a civil partnership, which is better than a total lack of recognition, but rarely grants the full rights and privileges as a legally recognized marriage does. If same-sex marriages or civil partnerships are fully or mostly recognized in a country, the variable will be coded as “1”. If not, the variable will be coded as “0”.

Because the analysis focuses on the country level, there are other potential confounding factors to address. For example, countries that persecute LGBTQI individuals which do not have state-sanctioned protections in place for LGBT applicants may also lack other critical human rights protections that lead to an increased number of migrants fleeing from persecution. I may find that even if my data affirms my belief that receiving countries do accept more applicants, it may have no relation to their sexuality or gender identity. Instead, countries which have lower protections for LGBTQI individuals, may also have lower protections for other persecuted social groups. In addition, countries with more LGBTQI-related violence and hate crimes may have more violence in general, which leads migrants to flee. Against this backdrop, I thus attempt to control for relevant and potentially confounding variables.

¹⁸⁹ “Born Perfect: The Facts About Conversion Therapy,” National Center for Lesbian Rights, accessed March, 2019. <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/>

¹⁹⁰ Movement Advancement Project. “Equality Maps: Conversion Therapy Laws,” accessed March 2019. <http://www.lgbtmap.org/equality-maps/conversion-therapy>.

¹⁹¹ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., State Sponsored Homophobia 2017, p. 9.

Because it is impossible to disaggregate the data based on what protected identity asylum seekers filed their fear of persecution claim off of, it is imperative to control for other potential reasons why an individual would flee their country out of fear of persecution. The two control variables I include in my data analysis are the Polity2 score and the Fragile States Index. The Polity IV Project documents the status of a state's regime and its "authority characteristics", whether that be more authoritarian-leaning or more democratic-leaning. The Polity IV Project's Polity2 score, which is my first control variable, is one of the most popular and widely used measures used by political scientists to assess a state's political regime. The Polity2 score is calculated by subtracting a country's level of autocracy score from its level of democracy score; the score ranges from +10 (strongly democratic) to -10 (strongly autocratic). I chose this variable because I anticipate that the United States will be much less likely to grant asylum to applicants from democratic and strongly democratic countries and will be much more likely to grant asylum to applicants fleeing strongly autocratic regimes. My second control variable is the Fragile States Index from the Fund for Peace, a non-profit focused on providing tools to inform on and reduce international conflict. The Fragile States Index informs researchers and political scientists on state vulnerability and likelihood of state collapse in a given year, creating possibilities for longitudinal analysis. The index is calculated through the aggregation of 12 indicators: 3 economic, 3 social, 3 political, and 3 societal cohesion. The combination of these two control variables covers a broad scope of possibilities for why a person may fear persecution and flee their country.

Chapter 6: Findings and their Implications

Findings

Model 1

Before controlling for any potentially confounding variables, such as political regime or state vulnerability, I seek to establish that there is indeed a relationship between a state's LGBTQI Civil Insecurity Index and that state's asylum adjudication rate in the United States. To first analyze this relationship, I run a bivariate OLS regression. I find that there is a positive and statistically significant relationship between the CII index and asylum adjudication rates ($p < .001$). This is not consistent with my hypothesis, which predicted the United States would not have statistically significant differences between asylum grant rates from countries with fewer institutionalized protections for sexual minorities and gender-variant people. These data, while marginally relieving, are surprising and provide limited hope that the United States has, at least up until 2016, successfully adjudicated more asylum seekers from countries where LGBTQI people face more salient threats of persecution. However, despite my hypothesis being disproved for 2012-2016, I am keen to continue researching on whether or not the statistically significant relationship continues on into the Trump administration.

Model 1

	Estimate	Std. Error	t value	Pr(> t)
Intercept	0.148	0.046	3.248	0.00126**
LGBT Index	0.065	0.008	8.402	8.03E-16***
2013	-0.022	0.037	-0.597	0.551
2014	0.023	0.037	0.62	0.535
2015	0.064	0.038	1.687	0.092
2016	0.012	0.038	0.335	0.737
<hr/>				
R-Squared		0.243		
Adj. R-Squared		0.151		
Residual Std Error		0.2431 (df = 395)		
F Statistic		15.2 (df = 5; 395)		
P-value		1.14E-13		
<hr/>				
Note:		*p < 0.05	**p < 0.01	***p < 0.001

Model 2

Having established that there is indeed a relationship between a state's LGBTQI Civil Insecurity Index and the United State's asylum adjudication rate, I seek to distinguish whether this relationship could be explained by other factors that may influence a person's decision to flee persecution, such as the likelihood of the state to collapse (and in the process fail to protect persecuted minorities), status of rule of law or documented human rights protections, and existence of factionalization or strong group grievances. To do this, I include two control

variables, the Polity2 score and the State Fragility Index of each country. Once again, I find a positive and statistically significant relationship between my dependent variable, the asylum grant rate and my independent variable, the LGBTQI Civil Insecurity Index. The relationship is statistically significant at the 95% confidence level, reaffirming my hypothesis that the LGBTQI CII does influence the asylum adjudication rate. As expected, the Polity2 ($p < .001$) and State Fragility score ($p < .001$) are also statistically significant, suggesting that the political regime and government stability of a country may correlate highly with other conditions in a country that lend successful asylum claims.

The question of whether the United States is living up to the standards relating to asylum seekers and refugees as agreed upon by both Congress and the international community deserves to be thoroughly researched beyond that capacity that I was capable of achieving. This research could benefit by extending the years examined in order to contextualize the recent increasingly aggressive rhetoric and policy shifts that specifically targets asylum seekers and refugees, as well as provide meaningful insight on the impacts of the administration. In addition, while the LGBTQI Civil Insecurity Index does account for some of the most pervasive avenues for discrimination and persecution, it does not comprehensively account for many important and relevant factors that determine the status of protection for LGBTQI individuals in a given country. Furthermore, this research would benefit by doing more regionally-specific analysis, particularly Latin and Central America and the Caribbean, where LGBTQI people face extreme levels of violence. This regional analysis has the potential to inform and guide the analysis of contemporary asylum appeals and the decisions of the judges and the Board of Immigration Appeals under the Trump administration.

Model 2

	Estimate	Std. Error	t value	Pr(> t)
Intercept	0.143	0.065	2.194	0.029*
LGBT Index	0.022	0.01	2.281	0.023*
Polity2	-0.013	0.002	-6.064	3.14E-09***
Fragile States I	0.003	0.001	3.75	0.0002***
2013	-0.024	0.035	-0.697	0.486
2014	0.021	0.035	0.600	0.545
2015	0.059	0.036	1.648	0.1
2016	0.002	0.036	0.059	0.953
R-Squared		0.2694		
Adj. R-Squared		0.2563		
Residual Std Error		0.2272 (df = 389)		
F Statistic		20.49 (df = 7; 389)		
P-value		< 2.2E-16		
Note:	*p < 0.05	**p < 0.01	***p < 0.001	

Implications of Findings

As time passes, more and more countries are passing legislation to uphold the rights of LGBTQI people and protect them from discrimination and threats of persecution. While many countries are on this path towards increasing protections, there are many more countries where LGBTQI people continue to face rampant and widespread harassment, violence, and in some cases, even death. The death penalty continues to be enforced in at least eight states; Brunei's newly passed legislation punishing same-sex relations with the death penalty goes into effect on April 3, 2019 and increases that number to nine states punishing homosexuality. Such persecution makes existing as an LGBTQI a dangerous risk, thus preventing many from ever being able to "come out" to their friends and family and live freely as who they are. The United States has obliged itself to offer protection and refuge to those fleeing states unable or unwilling to protect sexual minorities and gender-variant individuals, codified under the responsibilities set out in the 1980 Refugee Act. However, given the United States' own tarnished history of discrimination against LGBTQI people and their systemic and institutionalized exclusion from immigrating into the country until 1990, I seek to scrutinize whether the United States has truly upheld the principles of the Refugee Act in relation to specifically protecting individuals fleeing SOGI-based violence.

Against this backdrop, I explore whether my LGBTQI Civil Insecurity Index, which assesses the status of SOGI-based human rights protections in a given country, is correlated with the asylum adjudication rate for that country in the United States. The implications of these findings – that the LGBTQI Civil Insecurity score and the asylum adjudication rate have a positive and statistically significant relationship – suggest that the lack of protection for sexual minorities may cause more LGBTQI people to flee SOGI-based persecution. In other words, the higher the score on the Civil Insecurity Index, the higher the rate of successfully adjudicated asylum claims. The high statistical significance suggests that, at the very least, countries without strong protections for LGBTQI people may be more likely to lack strong protections for other minorities, whether that be based on race, religion, nationality, political opinion, or a member of a particular social group,

which causes more people to fear persecution and flee to seek asylum. Though this is good news, I refrain from finding this conclusion comforting or otherwise indicated that the United States prioritizes the protection of LGBTQI asylum seekers.

In the same vein, it is imperative to understand the limitations of the findings and continue to assess where the analysis could be improved in order to construct a more thorough picture of the status of LGBTQI asylum claims in the United States. While there is a positive and statistically significant relationship between successful asylum adjudication rates and the CII at the 95% confidence level, even when controlling for other factors that impact a country's general stability and ability to protect minoritized groups, this relationship cannot explain the causation behind the positive correlation. The correlation between the two variables also fails to fully explain why two countries with the same LGBTQI CII score may have drastically different successful adjudication rates and vice versa. Logically, the relationship between the two variables seems intuitive. If a state fails to protect LGBTQI people, who are amongst the most persecuted of individuals falling under the particular social group protection, it may indicate that that state surely chooses to fail to protect the LGBTQI community by engaging in discrimination or persecution or does not have the state capacity to protect LGBTQI people from the discrimination and harassment from society at large. And while LGBTQI people are often explicitly targeted by gangs or non-state actors, the mere existence of unpoliced non-state actors may create fears of persecution for people outside of the LGBTQI community as well – particularly women.

Additionally, in an ideal world, uncomplicated by the complexities of international political and economic relations, asylum seekers fleeing credible fears of persecution from any country would be universally granted refuge in the United States. The reality, however, fares much differently. Upon close inspection of the highly limited data available, researchers have confirmed that asylum grant rates are often complicated by a number of factors, including but not limited to the deciding judge¹⁹², geographic location¹⁹³, U.S. foreign policy¹⁹⁴, domestic policy¹⁹⁵,

¹⁹² Keith, Linda & Holmes, Jennifer. (2009). A Rare Examination of Typically Unobservable Factors in US Asylum Decisions. *Journal of Refugee Studies*

¹⁹³ Ramji-Nogales, Jaya, Andrew Schoenholtz I., and Philip Schrag G. "Refugee Roulette: Disparities in Asylum Adjudication" 60, November 1, 2007.

¹⁹⁴ Gibney, M. (1988) 'A Well-Founded Fear of Persecution', *Human Rights Quarterly* 10(1): 109–121.

trade interests¹⁹⁶, and whether the asylum seeker originates from a country that is one of the “top ten sources of illegal immigration in the United States”.¹⁹⁷ Ramji-Nogales finds significant disparities in asylum grant rates when cross-analyzing across varying geographic regions, varying nationalities in specific geographic regions, and across varying judges in the same courthouses. These disparities make an Albanian 65% likely to be granted asylum in NYC, but only 17% likely to be granted asylum in Detroit.¹⁹⁸ The report also underscores the frightening impact a judge’s gender and prior DHS or INS experience have on grant rates, with female judges, especially those without DHS/INS experience granting asylum at significantly higher rates.¹⁹⁹ In addition, asylum applicants that resemble economic migrants, stereotypically considered to be migrants arriving from Central and Latin America or the Caribbean, also face harsher asylum grant rates. Adjudicators making assumptions about socioeconomic condition of the country of origin and the asylum seeker’s intention in fleeing has led to what some scholars have noted as complete disdain and skepticism towards “economic refugees,” who is suspected to be “fleeing poverty and poor prospects in search of a ‘better life’ rather than fleeing because of the fear of persecution.”²⁰⁰ The impact of these incidental variations cannot be overstated when a careless decision could send an applicant back into life-threatening violence.²⁰¹

Skepticism and contempt towards suspected economic migrants can be seen most saliently under the Trump administration, which definitively cut \$500 million in foreign aid to the Northern Triangle countries of Honduras, El Salvador, and Guatemala following the arrival of a migrant caravan in late 2018.²⁰² In late March 2019, President Donald Trump justified the cut by saying,

“We were paying them tremendous amounts of money and we're not paying them anymore because they haven't done a thing for us.

¹⁹⁵ Rosenblum, March, and Idean Salehyan, “Norms and Interests in US Asylum Enforcement,” March 2019. https://www.researchgate.net/publication/258155621_Norms_and_Interests_in_US_Asylum_Enforcement.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ramji-Nogales, Jaya, Andrew Schoenholtz I., and Philip Schrag G. “Refugee Roulette: Disparities in Asylum Adjudication” 60, November 1, 2007, p. 330.

¹⁹⁹ Ibid.

²⁰⁰ Keith, Linda & Holmes, Jennifer. (2009). A Rare Examination of Typically Unobservable Factors in US Asylum Decisions. *Journal of Refugee Studies*. 22. 10.1093/jrs/fep008.

²⁰¹ Ramji-Nogales, Jaya. “Refugee Roulette: Disparities in Asylum Adjudication” 60, November 1, 2007.

²⁰² Adams, David C., “Trump cuts off aid to Honduras, Guatemala, and El Salvador,” 29, March 2019. Accessed 30, March, 2019, <https://www.univision.com/univision-news/latin-america/trump-cuts-off-aid-to-honduras-guatemala-and-el-salvador>,

They set up these caravans in many cases, they put their worst people in the caravan. They're not going to put their best in. They get rid of their problems and they march up here."

Despite the Trump administration's narrative surrounding the Northern Triangle in Central America, asylum seekers from those countries, particularly LGBTQI asylum seekers, face high rates of violence, particularly from non-state actors. The Northern Triangle is among the most dangerous place for LGBTQI people in the world, particularly trans women, who face disturbingly high murder rates, without even taking into account the high likelihood that many murders go unreported.²⁰³ ²⁰⁴ In 2016, 40 Guatemalan trans people were reported murdered.²⁰⁵ Between 2009 and June 2017, there were over 264 reported murders of LGBTQI individuals in Honduras, consisting mainly of gay men and trans people, and with special targetting of activists and leaders in the LGBTQI community.²⁰⁶ In the first nine months of 2017, there were 28 violent attacks, mostly murders, against LGBTQI individuals in El Salvador.²⁰⁷ In spite of this, migrants from the Northern Triangle do face incredibly low asylum grant rates – another side effect of a Trump-era policy prohibiting gang or domestic violence from forming credible fears of persecution. In the first quarter of 2019, the asylum grant rate was 17% for El Salvador, 13.3% for Guatemala, and 13.1% for Honduras.²⁰⁸ For context, the asylum grant rate for China in the first quarter of 2019 was 27.5%, 25.8% for Indonesia, 59.8% for India, and 72.2% for Russia.²⁰⁹ Comparing these statistics to the grant rates of countries not perceived to displace “economic migrants” shows a disturbing sign of bias against the Northern Triangle. Ultimately, though the relationship between LGBTQI protections and successful asylum adjudication rates is positive and statistically significant from 2012-2016, the Trump administration's actions to target vulnerable asylum seekers from the Northern Triangle, and in the process LGBTQI asylum seekers, should raise concerns as to whether that relationship could be threatened.

²⁰³ Transrespect versus Transphobia, Vol. 15: TMM Annual Report 2016. Available at: transrespect.org/wp-content/uploads/2016/11/TvT-PS-Vol15-2016.pdf [in Spanish only].

²⁰⁴ “No Safe Place,” November 2017. Amnesty International, accessed March 2019.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ TRAC Immigration, “Asylum Decisions”, accessed March 2019, <https://trac.syr.edu/phptools/immigration/asylum/>.

²⁰⁹ *Ibid.*

Conclusion: Seeking Protection from Persecution

Many LGBTI individuals may feel compelled to flee to another country, driven by the desire to live safely and “out” as their true selves, free from discrimination and threats of persecution simply for existing as they are and living fully in their truth. Though all migrants fleeing their countries should be considered to have valid fears of violence and persecution, certain groups such as women, children, and LGBTI individuals are considered to be more vulnerable to these threats. Those seeking asylum must prove they have a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.²¹⁰ Neither the 1951 Refugee Convention nor the 1967 U.N. protocol explicitly name sexual orientation or gender identity as a protected category. Because membership of a particular social group is more open to interpretation, many LGBTI asylum applicants form their asylum claims on this basis. Membership of a particular social group is considered to be “a group of persons who share a common, immutable characteristic that the members of the group cannot or should not be required to change”.²¹¹

Despite these precedents, however, there is substantial room for human bias and harmful stereotypes to negatively impact an asylum seeker’s case. Both the United States and the European Union have comprehensive legal provisions in place meant to protect LGBTI asylum applicants, but ultimately, caseworkers, lawyers, judges, and the political climate and goals of a country can have more impact in the decision than what the laws on the books protect. Because the asylum process requires the applicant to divulge their traumas to a caseworker in a high-stakes credible fear interview, the applicant may not initially disclose their LGBTI status to the caseworker. Applicants may not have corroborating documents that prove their LGBTI status, since many are fearful of coming out to anyone, much less leaving

²¹⁰ Immigration Equality, *Applying for Asylum*. Sept 13, 2018. <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum/#.W7y1lpNKgW0>

²¹¹ *Matter of Acosta*, 19 Dec. 211, 233 (BIA 1985); Office of the United Nations High Commissioner for Refugees, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 313 (Erika Heller, Volker Tramp; Frances Nicholson eds.) (2003), available at www.unhcr.org/cgi-bin/texis/vtx/home

evidence of their queerness for community members to possibly find. Likewise, the caseworker may impose their stereotypes on the applicant, seek inappropriate medical and psychological advice to prove the applicant's sexual orientation/gender identity, or urge the applicant to remain "in the closet". Inconsistencies with jurisprudence can lead to caseworkers urging discretion, asking invasive questions, and acting in disbelief, all of which can further discourage applicants from being honest in their interviews.

Though there is a positive and statistically significant relationship between the lack of LGBTQI protections in a country and the successful asylum adjudication rate, this relationship should be thoroughly investigated and reevaluated under the current administration. For example, in 2017, former Attorney General Jeff Sessions issued an order stating that threats of gang violence or domestic abuse could no longer be used as grounds for asylum - an order which will make it more challenging for LGBTQI victims to be granted asylum, who are often specifically targeted by gangs and face higher rates of violence at the hands of their own families.²¹² More recently, the Trump administration has now stated it will universally deny all asylum applications if applicants do not arrive at an official port of entry, furthering the challenges all migrants face, particularly those from the Northern Triangle (El Salvador, Guatemala, and Honduras), where homophobia and transphobia is particularly violent.

The United States is allegedly a country of immigrants, but in its current administration, it is showing weak support for migrants forced to leave their countries. In 2017, for the first time in history, the United States resettled less than half the refugees than the rest of the world.²¹³ At 33,000 resettlements in 2017, this figure is nearly as low as refugee resettlement following the attacks on 9/11. Though, refugee resettlement and asylum adjudication rates are not the same, both sets of statistics may speak on the trends and social climate surrounding migrant acceptance in the United States under the Trump administration. I hope my research contributes to a broader conversation for potential areas of reform within

²¹² Benner, Katie, and Caitlin Dickerson. "Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum." *The New York Times*, The New York Times, 11 June 2018, www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html.

²¹³ Connor, Phillip, and Jens Manuel Krogstad. "US Resettled Fewer Refugees than Rest of World in 2017 for First Time." *Pew Research Center*, Pew Research Center, 5 July 2018, www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world/.

the complex asylum process and updates for the imperfect international standards outlined to grant asylum. Despite strong and seemingly comprehensive guidelines set out by the international community and precedents outlined within the United States judicial system, many of these guidelines become lost in practice or lose their nuances, falling more in line with suggestions than concrete set-in-stone standards that must be followed universally across the globe. I hope that my research can bring LGBTQI discrimination by the United States under scrutiny to put in place and enforce higher standards in asylum adjudication practices.

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