EXPANDING ASYLUM LAW'S PATTERN-OR-PRACTICE-OF-PERSECUTION FRAMEWORK TO BETTER PROTECT LGBT REFUGEES

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In 2009, the Ninth Circuit issued the only published opinion to date finding an asylum applicant eligible for protection based in part on the native country's pattern or practice of persecution against gay men. This Article posits the infrequently used pattern-or-practice-of-persecution framework as uniquely compatible with assessing persecution on account of an applicant's membership in an LGBT-based social group. To illustrate this compatibility and the need to expand the framework, this Article discusses the pattern or practice of persecution the Ninth Circuit identified in Jamaica and uses Jamaica as a case study to support specific proposed guidelines and legal presumptions in favor of asylum eligibility.

INTRODUCTION

United States law regarding the eligibility of non-citizens for asylum or withholding[1] is markedly different from not only the many areas of U.S. law that insist on rigid application of doctrine and precedent, but also the areas that purport to adopt fact-specific or independent-judgment approaches generally considered to be hallmarks of asylum law. For example, in *INS v. Cardoza-Fonseca*,[2] one of only a handful of Supreme Court decisions wrestling with issues specific to asylum or withholding,[3] the Court made clear that the high stakes for asylum applicants justified both the flexible approach established by Congress and the Court's decision to "increase[] that flexibility" by rejecting the executive branch's attempt to constrain the class of applicants eligible for discretionary asylum.[4] This flexible approach by immigration judges (IJs)

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[1] The term "withholding" refers to the statutory prohibition on "remov[ing] an alien to a country if . . . the alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act (INA), 8 U.S.C. § 1231(b)(3) (2006).

[2] INS v. Cardoza-Fonseca, 480 U.S. 421, 449–50 (1987).

[3] For one example of the lack of Supreme Court guidance on asylum issues, *see generally Forced Migration: Law and Policy*, a casebook citing only seven Supreme Court cases dealing specifically with refugees seeking asylum or withholding. DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY (2007) (citing Gonzales v. Thomas, 547 U.S. 183 (2006); INS v. Abudu, 485 U.S. 94 (1988); INS v. Stevic, 467 U.S. 407 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Leng May Ma v. Barber, 357 U.S. 185 (1958); Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971); INS v. Elias-Zacarias, 502 U.S. 478 (1992)). Other Supreme Court cases cited are more general and concern principles like administrative agency deference (*e.g.*, INS v. Ventura, 537 U.S. 12 (2002) and separation of powers (*e.g.,* Shaughnessy v. Knauff, 338 U.S. 537 (1950).

[4] *Cardoza*, 480 U.S. at 449–50 ("In enacting the Refugee Act of 1980 Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the

and asylum officers,[5] combined with broad deference to the legislative and executive branches in immigration matters,[6] has resulted in relatively few judicially-created standards for refugees.

For the refugees considered in this Article—those seeking protection from persecution on grounds related to their perceived LGBT identity[7]—the largely unconstrained nature of the relevant law has made it incapable of easy or general characterization. While one commentator might find "U.S. asylum law [to be] one of the most hospitable legal arenas for lesbian, gay, bisexual, and transgender . . . litigants,"[8] another might observe "that immigration officials and judges make decisions based on . . . sexual stereotypes and culturally-specific notions of homosexuality, thus discriminating against those who do not conform."[9] Less disputed is the notion that, for refugees generally and LGBT refugees specifically, the disposition of an application for asylum is highly unpredictable, an issue underlying this Article's proposal.

This article contributes to the wealth of scholarship around LGBT refugee issues that has emerged since *Matter of Toboso-Alfonso*,[10] in which the Board of Immigration Appeals (BIA) held that sexual orientation could qualify persons for "membership in a particular social group," one of the five statutory grounds for persecution that can constitute refugee status.[11] I expand on this scholarship, however, by analyzing the unique nexus[12] between membership in a LGBT-

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world.' . . . [I]t is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported.").

[5] Asylum officers and IJs act under the authority of the executive branch, with asylum officers under the purview of the Department of Homeland Security (DHS) and IJs under the purview of the Executive Office for Immigration Review. *See* MARTIN ET AL., *supra* note 3, at 79–82. IJs provide the initial evaluation for asylum and withholding applications when removal proceedings are underway and provide a second evaluation of applications when there is no removal proceeding and the case is referred to them by asylum officers. *Id*. at 81. The decision can then be appealed to the Board of Immigration Appeals (BIA), and then to a federal appellate court, which will apply a deferential review and only reverse and remand an asylum decision if it is "manifestly contrary to law." 8 U.S.C. § 1252(b)(4)(D). All asylum decisions, except for a number of congressionally created mandatory bars to asylum eligibility, are ultimately at the discretion of the Attorney General. *See* MARTIN ET AL., *supra* note 3, at 169–71; REAL ID Act of 2005, INA § 208(b)(1) (establishing several mandatory bars to asylum protection).

[6] This deference is commonly attributed to the plenary power doctrine, under which courts, beginning in the late nineteenth century, routinely deferred to the broad powers of the federal legislative and executive branches to regulate immigration. For a representative example of this judicial deference, *see* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

[7] The term LGBT—lesbian, gay, bisexual, and transgender—is used in this Article to describe a spectrum of non-heteronormative sexualities and gender identities, with the recognition that the identities and conceptions of identity falling within this spectrum differ among and within cultures and states.

[8] Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 237 (2005).

[9] Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 137 (2006).

[10] Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990); *See infra* Part I.B.

[11] 8 U.S.C § 1231(b)(3), *infra* Part I.A (discussing the law related to social group membership).

[12] "Nexus" is the term most associated with the statutory requirement that the persecution be "on account of" one of the five protected grounds. That is, "nexus" refers to the showing that must be made by an applicant regarding the connection "among the persecutor, the individual being persecuted, and the reason for the persecution." MARTIN ET

based social group (whether actual or imputed by the persecutor) and a well-founded fear of persecution, and argue that such a nexus is distinctly amenable to viewing persecution in light of the pattern or practice of persecution in certain countries.[13] Further, because of the distinctive characteristics of this nexus, I argue that (1) the pattern-or-practice framework should be applied when specific factors of a country are present and (2) these factors should trigger a presumption of the likelihood for future persecution, as well as a presumption that past or future persecution was or would be on account of the applicant's actual or imputed LGBT identity. In doing so, this article's proposal expands and promulgates factors for employing this framework in LGBT cases, something that has only been done in one published, precedential opinion, the Ninth Circuit's 2008 decision in *Bromfield v. Mukasey*.[14]

In Part I, I briefly review the U.S. law currently governing protection of refugees and discuss the cases that have most influenced the definition of "membership in a particular social group,"[15] use of LGBT identity as a basis for membership in a particular social group,[16] and recognition of imputed membership in an LGBT-based social group.[17] In Part II, I discuss several recent cases that demonstrate the distinctive themes found in asylum applications from LGBT-perceived applicants. The two primary cases I examine both concern LGBT applicants from Jamaica, the country at issue in *Bromfield*, and that which I employ as a case study in Part III to demonstrate the unique nexus in such cases. Specifically, Part III submits certain factors—and illustrates how they operate in Jamaica—that should indicate a country's pattern or practice of LGBT-based persecution and trigger presumptions of asylum eligibility both on the persecution-side of the nexus and the on-account-of side. Finally, I conclude by taking a macro-level view of the political nature of asylum and by arguing that applicants perceived as LGBT present distinct issues and challenges that justify the addition of a broad, factor-based rule to the otherwise flexible and case-specific standards of asylum law.

I. U.S. REFUGEE LAW (AND WHY ASYLUM IS DIFFERENT)

The law related to refugees in the United States has developed both in accordance with and independent of the 1951 United Nations Convention Relating to the Status of Refugees.[18] The most significant connection between U.S. law and the Convention concerns the definition of "refugee." Modeled on the Convention's language, Congress statutorily defined a refugee as a person outside the country of their nationality "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in

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AL., *supra* note 3, at 107.

[13] *See* 8 C.F.R. § 208.13(b)(2)(iii) (providing an exception to the requirement that asylum applicants prove that they would be "singled out individually for persecution" if returned to their native country by instead allowing applicants to show that there is a pattern or practice of persecution against similarly situated groups and that the applicant is a member of such a group).

[14] 543 F.3d 1071 (9th Cir. 2008).

[15] The principal case discussed is Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

[16] The principal case discussed is Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990).

[17] The principal case discussed is Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

[18] 189 U.N.T.S. 150 (1951). Though the United States was not a signatory to the 1951 Convention, it did sign on to the 1967 Protocol Relating to the Status of Refugees, which incorporated most of the terms of the 1951 Convention. Jan. 31, 1967, 19 U.S.T. 6223, 303 U.N.T.S. 268.

a particular social group, or political opinion."[19] With some limited exceptions barring eligibility, a person meeting the definition of refugee is eligible for U.S. asylum at the Attorney General's discretion. In the Refugee Act of 1980, Congress clarified the procedures and standards for asylum eligibility, adding a degree of stability to refugee law and more firmly committing the U.S. to the terms of the 1951 Convention. In particular, Congress codified the Convention's Article 33 doctrine of "nonrefoulement" (or withholding), which prohibits states from returning noncitizens to a country where they are likely to face persecution.[20] Under this statutory provision, the Attorney General cannot "remove an alien to a country if . . . the alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[21] Thus, as of 1980, several standards based on the Supreme Court's interpretation of the statute govern the discretionary granting of asylum and the mandatory granting of withholding.

As a procedural matter, because a person applying for asylum is typically automatically considered for withholding, the distinctions between asylum and withholding likely have little bearing on applicants.[22] And though the Supreme Court has interpreted Congress' statutory language as creating a higher bar for eligibility of mandatory withholding than discretionary asylum in terms of showing the likelihood of future persecution, an applicant would tend to put forth the strongest claims available to meet the higher withholding standard.[23] Thus, as a practical matter, my argument in this Article applies equally to both eligibility of asylum and withholding. The

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[19] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

[20] Noncitizens can also seek nonrefoulement under the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. Under Article 3 of CAT, signatory states are barred from removing noncitizens to states when there are "substantial grounds for believing" they would be subjected to torture in that state. *Id*. at 3. Because protection under CAT is not contingent on legally defined persecution or the protected grounds contained in the refugee definition, it is less relevant to this analysis, though it remains a critical means of protection for applicants failing to meet the refugee definition necessary for either asylum or withholding. *See infra* note 23.

[21] INA § 241(b)(3), 8 U.S.C.A. § 1231(b)(3).

[22] *See* 8 C.F.R. § 208.3(b) (2012).

[23] In INS. v. Stevic, 467 U.S. 407 (1984), the Court held that the Refugee Act of 1980 established that, to be entitled to withholding, an applicant must demonstrate that "it is more likely than not that the [applicant] would be subject to persecution" on one of the specified grounds if deported to the country from which the applicant migrated. 467 U.S. 407, 424 (1984) (interpreting the Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253 (1983) (current version at 8 U.S.C. § 1231(b)(3)(A) (2006)), which provides that the "Attorney General shall not deport or return any alien … to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion). This objective more-likely-than-not standard for withholding is a higher burden than the more flexible asylum standard of showing a "well-founded fear of persecution." *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 427-32 (1987) (analyzing how Congress intended the "well-founded fear" standard for asylum to be lower than the "more-likely-than-not" standard for withholding). The substantive difference between the two standards is disputed, with some courts finding a "slight[] differen[ce]," Amanfi v. Ashcroft, 328 F.3d 719, 726 (3d Cir. 2003), and others finding the standards "significantly different," *Cardoza*, 480 U.S. at 434 (summing up several Board of Immigration Appeals decisions). The distinction is one of degree, not substance, as courts have found that failure to prove eligibility for asylum necessarily precludes eligibility for withholding. *See, e.g*., Mansour v. Ashcroft, 390 F.3d 667, 673 (9th Cir. 2004). Because of the substantively similar analysis used for asylum and withholding, CAT can be an essential source of protection for an applicant who fails to meet the asylum and withholding standards due to insufficient evidence of the required nexus. *See also supra* note 20 (further discussing CAT).

presumption I propose would be triggered by factors that demonstrate a nexus between persecution and membership in a particular social group that should meet the withholding standard, and thus necessarily the lower asylum standard as well.

However, I refer primarily to asylum in this Article because asylum is not only protection from persecution, but a source of substantive rights related to "membership" and a path to citizenship in the state granting asylum.[24] In the United States, for instance, one year after the Attorney General grants asylum, the asylee can petition to become a legal permanent resident.[25] For people persecuted because they are or perceived to be LGBT in countries with the characteristics described in Part III, affording such membership has a moral and expressive dimension that can particularly be understood to "communicate condemnation of the asylum seeker's state of origin."[26] However, this proposition is far from universally accepted, and the United Nations contrarily declares asylum to be "a peaceful and humanitarian act . . . [that] cannot be regarded as unfriendly by any other state."[27] In light of this disagreement, it is difficult to interpret what seem to be varying requirements for levels of persecution as "politically neutral;"[28] such varying requirements would seem to indicate that persecution on some grounds is more morally reprehensible than persecution on other grounds. In fact, as discussed in the following section, the common definition of "particular social group," which includes recognition of a person's characteristics that a state *ought* not require to be changed, can be seen as a normative, moral judgment that is prior to any determination of whether persecution exists.[29] In Jamaica and other countries discussed in Parts II and III, people perceived as LGBT are de facto excluded from membership, their very existence criminalized. Asylum thus functions as a critical potential path to membership in the granting state for those who have been forced figuratively – and now physically – outside their country's borders.[30]

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[24] *See* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 431 (2006) ("Asylum confers a *political* good—*membership*. Recipients of asylum . . . are generally encouraged to integrate socially, economically, and politically, and are given rights and benefits to facilitate this process.") (emphasis in original).

[25] 8 U.S.C. § 1159(b)(2) (2006).

[26] Price*, supra* note 24, at 425 ("[Asylum] reflects a judgment that the asylum seeker was being *abused* [by the state], not merely that she was suffering.") (emphasis in original).

[27] *Declaration on Territorial Asylum*, G.A. Res. 2312 (XXII), U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6716, at 81 (Dec. 14, 1967).

[28] *See* Price*, supra* note 24, at 423–24 (citing multiple authorities that posit asylum as a neutral act of protection not entailing moral judgment of the asylees' country of origin).

[29] *See infra* note 36 and accompanying text (discussing precedents stating that a state ought not require its citizens to change certain characteristics integral to one's identity).

[30] For an exploration of the conception of membership and figurative borders in Jamaica, discussed in Parts II and III, and Caribbean countries with similarly pervasive anti-gay sentiment, *see* Camille A. Nelson, *Lyrical Assault: Dancehall Versus the Cultural Imperialism of the North-West*, 17 S. CAL. INTERDISC. L.J. 231, 239 (2008) ("[H]omosexuality is conceptualized in Jamaica as something residing outside the borders of the physical nation-state and is excluded from the constructed notion of the nation.") and M. Jacqui Alexander, *Not Just (Any)*Body *Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas*, 48 FEMINIST REV. 5, 7 (1994) ("Citizenship . . . continues to be premised within heterosexuality and principally within heteromasculinity.").

A. Membership in a Particular Social Group

Of the five statutory grounds on account of which a refugee might be persecuted, "membership in a particular social group" is the most open to interpretation and therefore the most appealing[31] for applicants whose persecution was not clearly on account of race, religion, nationality, or political opinion.[32] Although Congress has neither defined this category nor promulgated standards for inclusion within it, the category's meaning has developed through BIA and federal appellate case law. The most influential early case interpreting this category was *Matter of Acosta*[33] in 1985, which, applying the interpretive canon of *ejusdem generis*,[34] defined "particular social group" as "a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one . . . or in some circumstances it might be a shared past experience."[35] The court clarified that an "immutable characteristic" could be defined normatively as one that members of the group "should not be required to change because it is fundamental to their individual identities or consciences."[36] The BIA's definition in *Acosta* has been adopted (or, as the decision of an administrative agency, deferred to) by multiple circuits.[37]

Deviating in some respects from *Acosta*, the Ninth Circuit has adopted another influential approach to defining membership in a particular social group. This approach initially emphasized cohesion and close, voluntary affiliation of social groups, the purported members of which must be "actuated by some common impulse or interest."[38] The Ninth Circuit subsequently added to its "voluntary association" principle the *Acosta* standard of recognizing social groups based on "an innate characteristic that is so fundamental to the identities or consciences of its members that members cannot or should not be required to change it."[39]

B. LGBT Status as a Basis for Membership in a Particular Social Group

LGBT people might seem like a fairly clear social group under current prevailing stand-

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[31] *See* MARTIN ET AL., *supra* note 3, at 255 ("During the past decade the number of attempts to give meaning to [the phrase 'membership in a particular social group'] seems to have increased geometrically.").

[32] *See* 8 U.S.C § 241(b)(3) (2006) (quoting the statutory language defining "refugee" and listing the five enumerated grounds for persecution that can make one eligible for asylum or withholding).

[33] 19 I. & N. Dec. 211 (BIA 1985).

[34] *See id*. at 233 ("The doctrine of *ejusdem generis* … holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.").

[35] *Id*.

[36] *Id*. at 233–34. This definition entails a surprisingly value-laden judgment that appears at odds with a conception of asylum as being politically neutral. *See infra* Conclusion; *cf. supra* notes 27, 28. While the other four factors can be considered truly immutable, here, the BIA is effectively stating that it is wrong for a state to do anything that requires a person to change certain changeable characteristics about themselves. That is, the *Acosta* definition can be seen to assert that it is the nature of a given characteristic (i.e., it being fundamental to one's conscience) that makes it normatively improper to try to change, regardless of whether the means to effect that change are persecutory for the purpose of asylum eligibility.

[37] For one example, the Fourth Circuit recently relied on *Acosta* to find that "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" constituted a particular social group. Crespin-Valladares v. Holder, 632 F.3d 117, 120-21 (4th Cir. 2011).

[38] Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

[39] Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

ards, but such recognition by the United States was unlikely before 1990, when Congress refused to let gay people immigrate,[40] imposing on the Justice Department "a legal obligation to exclude homosexuals from entering the United States" as part of the statutory ban on "sexual deviation."[41] In 1990, the year this statutory provision was repealed, the BIA for the first time recognized a particular social group based on its members' sexual orientation. In *Matter of Toboso-Alfonso*, a gay Cuban refugee was found eligible for asylum as someone persecuted on account of his membership in the social group of homosexuals where the Cuban government classifies homosexuality as a crime, "registers and maintains files on all homosexuals," and submits gay Cubans to "human rights violations, including incarceration . . . and physical beatings."[42] The government had detained Toboso-Alfonso on multiple occasions for days at a time for forced "health examinations," had singled him out for sixty days of hard labor for missing one day of work, and had told him that he could choose to either be imprisoned for four years for being a homosexual or to leave Cuba.[43] Additionally, Toboso-Alfonso was harassed by an anti-gay mob at the factory where he worked, was pelted with eggs by his neighbors after they learned he was gay, and had to depart Cuba in the middle of the night because authorities feared mob violence.[44]

Toboso-Alfonso is a rare case in that the IJ granted Toboso-Alfonso's withholding application[45] and the government appealed[46] to the BIA to argue that Toboso-Alfonso should be sent back to Cuba, arguing that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act."[47] After the BIA dismissed the appeal, the case remained unpublished (and thus non-precedential) until 1994, when Attorney General Janet Reno ordered its publication and directed all IJs and agency officials to adopt it as binding precedent.[48] This procedural history, combined with the BIA's emphasis that its holding was based on Toboso-Alfonso's public identity as a homosexual and did not apply to persecution based on "homosexual acts [or] assertion of 'gay rights,'"[49] foreshadowed the disagreement that has been raised by some commentators and judges over whether it is an applicant's LGBT *status* or an applicant's *engaging in acts* integral to LGBT status that is determinative of asylum eligibil-

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[40] 8 U.S.C.A. §1182(a)(4) (1990), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, §601, 104 Stat. 4978, 5067-77 (1990)).

[41] *See* Press Release, Dep't of Justice, Guidelines and Procedures for the Inspection of Aliens who are Suspected of Being Homosexual (Sept. 9, 1980).

[42] 20 I. & N. Dec. 819, 820-21 (BIA 1990).

[43] *Id*. at 821.

[44] *Id*.

[45] Though the IJ found Toboso-Alfonso eligible for withholding, the IJ exercised his discretion and denied the asylum application due to Toboso-Alfonso's criminal record in the United States. *Id*. at 822.

[46] *Compare id*., *with* Dep't of Justice, *Attorney General and BIA Precedent Decisions*, *Virtual Law Library*, JUSTICE.GOV, http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html (last visited Apr. 22, 2012) (listing all precedential BIA decisions, the vast majority of which reached the BIA through an appeal by the applicant, not the government).

[47] *Toboso-Alfonso*, 20 I. & N. Dec. at 822 (internal quotation marks omitted).

[48] *See* MARTIN ET AL., *supra* note 3, at 264; Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 LAW & SEXUALITY 59, 66 (2006). This precedent, however, is not binding on circuit courts that have not yet addressed the issue.

[49] *See Toboso-Alfonso*, 20 I. & N. Dec. at 822-23 ("[R]ather than a penalty for misconduct, this action resulted from the government's desire that all homosexuals be forced to leave their homeland. This is not simply a case involving the enforcement of laws against particular homosexual acts, nor is this simply a case of assertion of 'gay rights.').

ity.[50]

Since *Toboso-Alfonso* was published as a precedential opinion, many courts and agency officials have found noncitizens eligible for asylum based on their membership in a social group defined in relation to LGBT status or gender identity.[51] Increasingly, judges are departing from *Toboso-Alfonso*'s language, indicating that the persecution must be based on the applicant's identity rather than on conduct,[52] an emphasis likely influenced by the Supreme Court's holding four years earlier stating that "sodomy statutes" aimed at gay men were constitutional.[53] The identity/conduct dichotomy, which has been the subject of much criticism,[54] has evolved into a standard under which asylum eligibility is essentially based on the judge's or asylum officer's framing of how conduct, such as gay intercourse or men wearing feminine clothing, relates to identity, such as a man self-identifying as gay or feminine.[55] For example, a judge or officer presented with a biologically male applicant who dresses in feminine clothing will likely have wide discretion to decide if the persecution was merely on account of how he dressed (conduct) or, in the Ninth Circuit's language, on account of how he "manifest[ed] his sexual orientation by adopting gendered traits characteristically associated with women"[56] (identity).

C. Imputed Membership in a LBGT-Based Particular Social Group

This Article argues that, in certain circumstances, there should be a presumption favoring an LGBT asylum applicant or one perceived as LBGT, with no distinction between those two categories. In *Amanfi v. Ashcroft*, the most significant case recognizing someone inaccurately perceived as LGBT as a member of a particular social group, the Third Circuit stated that "persecution 'on account of' membership in a social group . . . includes what the persecutor *perceives* to

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[50] *See, e.g.*, Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 477 (2002) (arguing that the sexual revolution, about thirty to forty years ago, is responsible "uncoupl[ing] sex from the heterosexual norm, legitimizing the gay, lesbian, bi-sexual, transgendered, and transsexual lifestyles" and making it possible to separate homosexual identity from homosexual behavior); Pfitsch, *supra* note 48, at 73 (statement of Victoria Neilson, Legal Director of Immigration Equality) (explaining that judgment of LGBT asylum claims can be very subjective: "[s]ometimes the officers or judges are just not accepting of gay claims").

[51] *See* Pfitsch, *supra* note 48, at 61 (describing the "rapid expansion of protections granted to LGBT asylum seekers").

[52] *See Toboso-Alfonso*, 20 I. & N. Dec. at 821 (emphasizing that the "government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual"); *id*. at 823 (quoting similar language from *Toboso-Alfonso*).

[53] *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[54] *See, e.g.*, Pfitsch, *supra* note 48, at 69–71 (arguing against this dichotomy and citing multiple scholars who have done the same).

[55] In the influential case *Hernandez-Montiel v. INS*, the Ninth Circuit parsed this conceptually tenuous distinction, correcting the lower court's identification of gay men in Mexico who dress in female clothing as a particular social group and instead defining the social group as "men with female sexual *identities* in Mexico." Hernandez-Montiel v. INS, 225 F.3d 1084, 1096 (9th Cir. 2000) (emphasis added). *See also* Landau, *supra* note 8, at 238 (explaining that in cases finding a social group defined with reference to gendered traits, like clothing choice, "the court honors such expression as a true and honest depiction of identity and self-determination, extending protection to litigants because the traits they exhibit are integral to their identities").

[56] *Hernandez-Montiel*, 225 F.3d at 1096 (also clarifying that "[t]his case is about sexual identity, not fashion").

be the applicant's membership in a social group."[57] The decision overturned the BIA's adverse decision[58] and reasoning, which can be seen as presaged by the BIA's narrow language in *Toboso-Alfonso*.[59]

Amanfi fled to the United States from Ghana, where his family had initially been targeted by a cult because of their Christian beliefs and his father's preaching against the cult's practice of human sacrifice.[60] Members of the cult first abducted Amanfi's father. After Amanfi made inquiries to the police, to no avail, the cult members abducted Amanfi and detained him in a room with another captured man. Based on his grandfather's teachings, Amanfi recognized that the ritual his captors were performing preceded human sacrifice.[61] To save himself, Amanfi persuaded the other captive to "engage . . . in a homosexual act" with him, knowing that the cult members considered homosexuals unacceptable for sacrifice.[62] His plan worked, and instead of being sacrificed, Amanfi was beaten by the cult members and taken to the police, who further beat him and announced to the public that he was a homosexual. Amanfi knew his life was in peril; he had previously witnessed "public torture of homosexuals."[63] Even in the capital city, where Amanfi fled to seek refuge with his cousin, his reputation as a homosexual was well known and put him and his cousin at risk.[64]

The Third Circuit reversed the BIA's legal conclusion rejecting imputed membership in a particular social group (homosexuals in Ghana) as a valid statutory ground for asylum and remanded[65] the case to the BIA to assess the evidence on the merits, which it had not done after denying Amanfi's application on legal grounds.[66] Thus, just as imputed political opinion ("*i.e.*, when the persecutor believes the applicant has a certain political opinion even though the applicant does not"[67]) can be a ground for asylum eligibility, the court found that Amanfi's imputed status as a homosexual could also be a ground for asylum.

II. THE LGBT–PERSECUTION NEXUS: SIMILAR THEMES, CONTRASTING INTERPRETATIONS

While *Toboso-Alfonso* and *Amanfi* are important because of their influential legal analyses, their underlying facts demonstrate certain similarities that pervade LGBT-based asylum ap-

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57 328 F.3d 719, 730 (3d Cir. 2003) (emphasis added).

58 *Id*. at 721 ("[T]he BIA was unwilling to extend the concept underlying the theory of imputed political opinion – that what matters is the beliefs of the persecutor rather than the persecuted – to Amanfi's theory of imputed membership in a social group (homosexuals) because it deemed such an extension to be without legal precedent.").

59 *See Toboso-Alfonso*, 20 I. & N. Dec. at 821, 823 (quoting the BIA's dicta regarding the narrowness of its holding recognizing self-identified homosexuals as members of a particular social group).

60 *Amanfi*, 328 F.3d at 722.

61 *Id*. at 723.

62 *Id*.

63 *Id*.

64 *Id*.

65 Courts of Appeals, upon reversing a BIA asylum decision, are instructed to remand the case rather than granting asylum. *See* INS v. Ventura, 537 U.S. 353, 354 (2002).

66 *Amanfi*, 328 F.3d at 730.

67 *Id*. at 721. *See also* INS. v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (establishing legal standards for imputed political opinion as a ground for asylum or withholding).

plications and that are at the core of this article's analysis. In this part, I explore these factual similarities and examine two circuit cases that reviewed the BIA's denial of petitions from gay Jamaican men. One of these cases, *Bromfield v. Mukasey*,[68] is unique in its focus on closely analyzing the facts generalized to the applicant's country of origin rather than those specific to the applicant. As I elaborate in Part III, using Jamaica as a case study demonstrates the need for circuit courts and the BIA to further employ this approach to promulgate legal standards for LGBT applicants, particularly given the substantial variation and unpredictability in asylum dispositions from one judge or jurisdiction to another.[69]

In *Bromfield*, the Ninth Circuit reversed and remanded a BIA application denial, reasoning that Jamaica had a pattern or practice of anti-gay persecution, thus issuing the only published opinion to use the pattern-or-practice framework[70] to find that an LGBT applicant had a well-founded fear of persecution, making him eligible for asylum.[71] The Ninth Circuit criticized the IJ and BIA for their bases rejecting the application, including in their findings that the Jamaican government had not shown any interest in persecuting Bromfield; that before he came out as gay, Bromfield had twice visited Jamaica after migrating to the United States; that Bromfield was not politically active; that the homophobic discrimination in Jamaica constituted "random acts of violence" rather than persecution; and that Bromfield's father continued to have contact with him rather than disowning him.[72] Rejecting either the substance or relevance of these findings, the Ninth Circuit instead emphasized that Bromfield had feared returning to Jamaica since coming out as gay; that "Jamaican law criminalizes homosexual conduct, making it punishable by up to ten-years imprisonment," something the BIA failed to even mention;[73] and, most importantly for this analysis, that the State Department Country Report described "'a culture of severe [anti-LGBT] discrimination' from both the public and state police and described 'brutality against homosexuals as 'widespread,'"[74] findings that "compel[] the conclusion that there exists in Jamaica a pattern or practice of persecution of gay men."[75]

Shortly after its opinion in *Amanfi*, the Third Circuit in *Parker v. Ashcroft*[76]—a case presenting similar issues to *Bromfield* but reaching the opposite conclusion—issued an unpublished

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[68] 543 F.3d 1071 (9th Cir. 2008).

[69] *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) (detailing the data that suggests that there is remarkable variation in asylum adjudication in the United States).

[70] *See* Immigration Equality, *Asylum Decisions*, http://www.immigrationequality.org/issues/law-library/asylum-decisions (last visited Nov. 1, 2012) ("[Bromfeld v. Mukasey] is the only published gay case to find a pattern and practice of persecution against gay people.").

[71] The court found that Bromfield would be eligible for asylum but for his criminal record, which the BIA found to exclude him from asylum eligibility, a finding that Bromfield did not appeal. Bromfield v. Mukasey, 543 F.3d at 1074, 1078. Thus, the court remanded the case for consideration of whether the applicant also met the higher, more-likely-than-not persecution standard for mandatory withholding as well as eligibility for protection under CAT. *Id*. at 1072, 1079 (citing 8 C.F.R. § 1208.16(c)).

[72] *Id*. at 1074.

[73] *Id*.

[74] *Id*. at 1076 (specifying further that violence against men perceived as LBGT included "mob attacks, stabbings, and targeted shootings").

[75] *Id*. at 1078.

[76] Parker v. Ashcroft, No. A95-521-657 (3d Cir., Nov. 18, 2004). [Parker v. Ashcroft, 112 F. App'x. 860 (3rd Cir. Nov. 18, 2004).]

opinion written by future DHS Secretary Michael Chertoff affirming the BIA's reversal of the IJ's finding of asylum and withholding eligibility. The facts of *Parker* are more severe than *Bromfield*, as Parker was publicly identified as gay "in an inflammatory newspaper article," thus provoking a gang attack, threats, and demands to first leave his home community and then nearby communities when he made multiple attempts to relocate.[77] Yet, despite upholding the IJ's finding of credibility regarding Parker's testimony that he was "subjected to widespread hatred and some acts of violence by prejudiced individuals" and "that the police were unable to control the violence or afford protection,"[78] the BIA reversed, finding that Parker's testimony and evidence were insufficient to "'establish the government's inability to respond to persecutorial harm where motivated to do so'" and that "some of the gang animus against Parker may stem from" Parker's cooperation with a police investigation into his cousin's murder, rather than being solely on account of his LGBT status.[79] The Third Circuit recognized, but found unpersuasive, that there was "virulent prejudice against homosexuals" and a "culture of anti-homosexual violence that is deeply ingrained" in Jamaica, including "misbehavior against gays in police custody," failure by the police to respond to homophobic violence, and prevalent expressions by both political parties of "their strong personal distaste for homosexuals."[80]

In *Bromfield* and *Parker*, as well as in *Toboso-Alfonso* and *Amanfi*, several themes regarding the applicant's native country emerge that pervade applications from asylum-seekers perceived as LGBT. These themes, I argue in Part III, should be considered as specific factors for finding a pattern or practice of persecution because they indicate an ingrained culture of homophobia, including (1) laws against being LGBT or laws against sodomy that are only enforced against those perceived to be LGBT, (2) an entrenched homophobic culture, (3) violence and threats by groups of non-state actors, (4) police complicity in or active police participation in direct mistreatment, (5) public accusations that an individual is LGBT, and (6) the appearance of alternative or mixed motives for the persecutors' acts.[81] Other recurrent themes and issues that would be better addressed upon recognizing a pattern or practice of persecution include discrimination against LGBT or imputed-LGBT people with HIV,[82] difficulty of corroborating past persecution due to its unofficial nature or the fear of potential corroborators who remain in the native country,[83] reluctance of IJs and asylum officers to recognize sexual assault of LGBT people as

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77 *Id*. at *2–3.

78 *Id*. at *2.

79 *Id*. at *3–4.

80 *Id*. at *5.

81 *See supra* note 79 and accompanying text (discussing the appearance of mixed motives in *Parker v. Ashcroft*). Another theme that is discussed in the Conclusion, *infra*, is the presence of geopolitical pressures that historically and presently influence state officials to denounce LGBT people or acquiesce to their mistreatment. *See infra* notes 140–143 (describing the historical imposition by colonial powers of still-remaining anti-gay laws and the present attitude of some countries that view recognizing the rights of LGBT people as unacceptably bowing to western influence).

82 *See, e.g.*, Castro-Martinez v. Holder, 641 F.3d 1103, 1109 (9th Cir. 2011) (affirming the BIA's asylum denial of an HIV positive man in Mexico in part on the ground that any deprivation of HIV treatment would not be on account of the applicant having been identified as gay); Ayala v. U.S. Att'y Gen., 605 F.3d 941, 944 (11th Cir. 2010) (noting that the appellant described the mistreatment in Venezuela stemming from his employers' knowing he was gay and a widespread policy of testing applicants for HIV and refusing to hire those who test positive).

83 *See, e.g.*, Omondi v. Holder, 674 F.3d 793, 796-797 (8th Cir. 2012) (remanding on procedural grounds the BIA's asylum denial of a gay Kenyan man who was unable to procure corroborating evidence from his then-boyfriend that police detained, beat, and sexually abused them).

persecution,[84] unique obstacles facing LGBT applicants that often lead to adverse credibility findings,[85] and state officials couching anti-LGBT abuse in the language of treatment.[86]

III. THE DISTINCTIVE NEXUS OF LGBT PERSECUTION AND THE NEED TO EXPAND THE PATTERN-OR-PRACTICE FRAMEWORK

The common themes and facts that pervade LGBT asylum claims point to certain attributes that distinguish the nexus of persecution on account of membership in a LGBT-based social groups from the nexus in other frequently seen asylum application circumstances. This is not to say that the average LGBT-based asylum application is more deserving than those based on other grounds, only that such applications are distinctly likely to contain claims and raise issues that are generalizable across the social group as compared to other protected groups. For example, claims of religious persecution might entail some common themes, but the social and political meaning attributed to, for instance, being a Christian will vary significantly depending on the country or the region within the country, as Christians may be the group most likely to be persecuted, most likely to be the persecutors, or unaffected by persecution in either direction. By contrast, attitudes and mistreatment specifically against LGBT people exist across the globe.[87] It is illegal to be gay in approximately eighty countries, with several making the crime punishable by death or life imprisonment,[88] and majorities in dozens of countries believe that "homosexuality should be rejected," with a recent study finding this belief in at least 95 percent of the population in nine out of the forty-seven countries surveyed.[89]

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[84] *See, e.g.*, *Ayala*, 605 F.3d at 949 (stating that the BIA did not find mistreatment to rise to the level of persecution where Venezuela police officers violently forced the applicant to perform oral sex on one of the officers, and stating that the Eleventh Circuit had never held that sexual assault rose to the level of persecution).

[85] *See, e.g.*, Martinez v. Holder, 557 F.3d 1059, 1065 (9th Cir. 2009) (Pregerson, J., dissenting) ("[I]t is not hard to see why a gay man who suffered persecution on account of his sexual orientation would want to hide that fact from immigration authorities. When Martinez filed his asylum application in 1992, the INS had not yet recognized that persecution on account of sexual orientation provided a valid basis for an asylum claim."). Further, significant media and scholarly attention has recently been given to the number of IJs and asylum officers whose ignorance or prejudice regarding LGBT people has led to adverse credibility findings because the applicant did not seem "gay enough." *See also* Morgan, *supra* note 9; Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES (Jan. 28, 2011), http://www.nytimes.com/2011/01/29/nyregion/29asylum.html?_r=1&pagewanted=all (stating that some asylum applicants are being "penalized for not outwardly expressing their sexuality" and "risk being dismissed as not being gay enough").

[86] *See, e.g.*, Pitcherskaia v. INS, 118 F.3d 641, 644-46 (9th Cir. 1997) (reversing the BIA's finding that it was not persecution where Russian officials subjected a gay woman to months of "forced institutionalization, electroshock treatments, and drug injections" and "pressed [her] to identify gay and lesbian friends" because, according to the BIA, such acts were "intended to treat or cure the supposed illness, not to punish").

[87] *See, e.g.*, Kate Kelland, *Gay Persecution Seen Rising Around the World*, REUTERS, July 5, 2004, *available at* http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines04/0705-03.htm. ("[H]omophobia is growing across the world with increasing numbers of countries making it punishable by death."); Rachael Crook, *The Sources of Global Homophobia*, OPENDEMOCRACY, Mar. 30, 2012, http://www.opendemocracy.net/5050/rachael-crook/sources-of-global-homophobia (suggesting that homophobia throughout the world stems from a variety of complex causes).

[88] *See* Peter Tatchell, *Gay Rights Go Global*, GLOBALPOST, Nov. 11, 2009, http://www.globalpost.com/dispatch/worldview/091110/opinion-gay-rights-gone-global ("About 80 countries continue to outlaw homosexuality, with penalties ranging from one year's jail to life imprisonment.").

[89] *See* PEW GLOBAL ATTITUDES PROJECT, WORLD PUBLICS WELCOME GLOBAL TRADE - BUT NOT IMMIGRATION 35 (2007), *available at* http:/pewglobal.org/files/pdf/258.pdf. These nine countries are Egypt, Indonesia,

Thus, the threat of persecution for people perceived as LGBT has a distinctive universality among the specified grounds for asylum. This universality, combined with the common characteristics of LGBT-based asylum applications and of countries from which the applicants have sought refuge, justifies establishing certain factors that demonstrate a pattern or practice of LGBT-based persecution that should give rise to a presumption in favor of asylum eligibility. This presumption would apply to either side of the nexus, supporting not just a finding of a well-founded fear of persecution (similar to the presumption raised by past persecution[90] or effectively by a pattern-or-practice determination as currently construed[91]), but also a finding that the persecution was or would be on account of the applicant's actual or imputed membership in an LGBT-based social group.

Briefly, it should be noted that a recurring tenet in asylum jurisprudence is the case-specific and flexible nature of inquiries into elements like well-founded fear,[92] inclusion in a particular social group,[93] or the probativeness of the evidence,[94] a tenet which would seem to militate against establishing specific factors in a specific category of cases, as I do below, even if weighing and assessing the totality of those factors is at the judge's discretion. However, as elaborated below, LGBT-based persecution demands such guidelines for finding a pattern or practice of persecution because of the unique ways in which homophobia permeates life in a significant number of countries, affecting the way that LGBT-perceived asylum-seekers fleeing these countries conduct themselves and the nature of the evidence they will include in their applications. For example, an IJ may interpret an applicant's masculine demeanor (see A.5 *infra*) or the persecutor's mixed motives (see A.6 *infra*) as evidence against finding a sufficient nexus for asylum eligibility, when the distinctive operation of homophobia in countries like Jamaica might actually demonstrate that such evidence supports the opposite finding, or is at least canceled out as nonprobative. Further, Congress has increasingly backtracked from case-specific inquiries and flexibility, instead imposing various mandatory bars to protection that take the asylum decision out of the Attorney General's discretion.[95] Thus, enumerating factors to establish a pattern or practice of persecution and raise a presumption of asylum eligibility is justified by, first, the compelling and distinct nature of LGBT-based persecution when the below factors are present and, second, by Congress's drift away from wide flexibility.

A. Factors for Finding a Pattern or Practice of Persecution on Account of Membership in an LGBT-Based Social Group: A Jamaican Case Study

The following are specific factors that tend to be present in countries where pervasive and ingrained homophobia makes it more likely than not (and therefore also give rise to a well-

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Tanzania, Kenya, Uganda, Senegal, Ethiopia, Nigeria, Mali. Jamaica was not part of the survey.

90 *See* Immigration and Nationality Act, 8 C.F.R. § 208.13(b)(1)(i–ii) (2006). The government can rebut the presumption of a well-founded fear raised by a finding of past persecution by either demonstrating fundamentally changed circumstances that make fear of return no longer well founded or the ability of the applicant to avoid persecution by internal relocation. *Id*. at § 208.13(b)(1)(i). As described in this Part, the factors that would give rise to the proposed presumption effectively include the absence of those grounds for rebuttal.

91 *See* 8 C.F.R. § 208.13(b)(2)(iii); *supra* note 13 and accompanying text.

92 *See, e.g.*, Kllokoqi v. Gonzales, 439 F.3d 336, 345 (7th Cir. 2005); *see supra* notes 5–6.

93 *See, e.g.*, Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

94 *See, e.g.*, Omondi v. Holder, 674 F.3d 793, 797 (8th Cir. 2012).

95 *See* MARTIN ET AL., *supra* note 3, at 171.

founded fear) that the asylum applicant will be persecuted on account of perceived LBGT status if returned. For each factor, I use Jamaica, the only country to which the pattern-or-practice framework has been applied in a published opinion by a U.S. court regarding LGBT-based social groups,[96] as an example of how such factors contribute to an atmosphere in which persecution is particularly likely to occur.

1. Anti-LGBT Laws

Laws criminalizing LGBT status or conduct, while varying significantly in penalty (ranging from the lowest level penalties to a death sentence)[97] and consistency of enforcement,[98] at a minimum indicate nonrecognition of LGBT people as equal citizens. Though severe penalties and consistent enforcement may alone demonstrate a pattern or practice of persecution, less extreme examples still cast a significant stigma, with any enforcement typically accompanied by "all the imports for the dignity of the person charged," as the U.S. Supreme Court has stated.[99] For this reason, all judges and officials should adopt the Ninth Circuit's finding in *Bromfield* that, "[b]ecause the [anti-gay law] is directly related to a protected ground—membership in the particular social group of homosexual men—prosecution under the law will always constitute persecution. This is true even though the statute criminalizes conduct, not sexual orientation *per se*."[100]

In Jamaica, the Offences Against the Person Act states that "the abominable crime of buggery" carries a penalty of imprisonment and hard labor for up to ten years.[101] In addition to the harshness of the penalty, the law's broad language targeting "unnatural offences" and "outrages on decency," including those that are only "attempted," provide a legal ground for a wide range of police practices that harass and victimize those perceived as LGBT, thus emphasizing the importance of the imputed-membership ground the Third Circuit recognized in *Amanfi*. In Jamaica, the anti-gay law is compounded by the pervasively homophobic culture and "the widespread, targeted violence against homosexuals, [thereby putting] all gay men . . . at risk."[102] The actual penalty imposed by the law may be less severe than the effects of the accused having their names published, a common practice of the Jamaican press.[103] According to Jamaican legal scholar Camille A. Nelson, "[t]his attempt at cultural heterosexist shaming perpetuates a climate of sanctioned harassment that carries the force of law . . . In the worst case scenario, such sanctioned harassment produces incidences of violence against gays and lesbians, escalating to acts of murder."[104]

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96 *See supra* Part II (discussing Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008)).

97 Tatchell, *supra* note 88.

98 For example, U.S. states with laws against "homosexual conduct," prior to their being found unconstitutional in Lawrence v. Texas, 539 U.S. 558 (2003), had a "pattern of nonenforcement." *Id*. at 559.

99 *Id*. at 560.

100 Bromfield v. Mukasey, 543 F.3d 1071, 1077 (9th Cir. 2008).

101 Offences Against the Person Act, § 76, L.N. 111/2005, *available at* http://www.moj.gov.jm/laws/statutes/Offences%20Against%C20the%C20Person% 20Act.pdf.

102 *Bromfield*, 543 F.3d at 1079.

103 *See* Nelson, *supra* note 30, at 260.

104 *Id*.

2. Anti-LGBT Culture

I use the term "culture" here specifically to refer to the presence of anti-LGBT attitudes and the acceptability of anti-LGBT rhetoric in media that reach a large audience. Whereas the presence of anti-LGBT laws indicates official condemnation, the "culture" factor highlights the extent to which such condemnation has permeated cultural output to become a societal norm, as opposed to something that is only normalized within specific subgroups but considered unacceptable as part the mainstream. Cultural output, particularly in the forms of music, film, and television, reflects the attitudes of and represents the messaging most likely to reach non-state actors, especially youth. Such cultural output, in combination with official and legal condemnation of LGBT people, is thus an indicator of a pattern or practice of persecution that would support an asylum claim. Attention to this factor becomes more critical if a country scales back its official condemnation by, for example, repealing its anti-LGBT law. In an asylum case from such a country, the U.S. government is likely to argue against granting asylum, claiming that the repeal indicates a "fundamental change in the circumstances such that the applicant no longer has a well-founded fear of persecution."[105] A strong presence of the cultural output factor makes it unlikely that legal or political changes will result in immediately changed conditions; applicants still have reason to fear persecution and violence from private citizens and police complicity through action or inaction.

Jamaica represents the extreme end of the spectrum of the cultural output factor. Jamaica is unrivaled in its promulgation of anti-gay popular music, an industry that commentators note "far outweighs the combination of church, politics, and the educational system in power and influence" in Jamaica.[106] "Dancehall," the genre of music most associated with today's Jamaican youth culture, is largely defined by its promotion of violence against gay men or any male perceived to not meet the "hyper-masculine posture" idealized in modern Jamaican society.[107] The connection between dancehall and anti-gay persecution is sharply illustrated by one incident documented in a Human Rights Watch report: After Brian Williamson, a prominent gay Jamaican activist, was brutally murdered in 2004 (an act repeated the following year against another gay activist),[108] a crowd quickly gathered outside the crime scene to "celebrate" the murder, which included singing a hit dancehall song calling for the murder and torture of gay men.[109]

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[105] Immigration and Nationality Act, 8 C.F.R. § 208.13(b)(1)(i)(a) (2006).

[106] NORMAN C. STOLZOFF, WAKE THE TOWN & TELL THE PEOPLE: DANCEHALL CULTURE IN JAMAICA 5 (2000) (quoting Jean Fairweather, *Why Dancehall Is Such Powerful Stuff*, THE GLEANER (Apr. 24, 1994)); *see also* Nelson, *supra* note 30, at 239 ("The dancehall [is] a zone for the cultural creation of Jamaican masculinity, replacing the church, the political sphere, and traditional systems of education in the framing of what it means to be a man in Jamaica and a Jamaican man in the world.").

[107] Nelson, *supra* note 30, at 240. For two representative examples of Dancehall lyrics from two of the genre's most successful performers, see *id*. at 275 ("Damn" by Beenie Man: "I'm dreaming of a new Jamaica, come to execute all the gays.") and *id*. at 233 n.7-8 ("Boom Bye Bye" by Buju Banton: "Boom bye bye / Inna battyboy head / Rude boy no promote no nasty man / Dem heffi dead."). "Battyboy" and "nasty man," along with terms including "chi chi man" and "guy," are common anti-gay slurs in Dancehall lyrics. *See, e.g*., *id*. at 233 n.8 (printing dancehall lyrics using multiple anti-gay slurs).

[108] *See* Doug Ireland, *Jamaica, Island of Hate*, GAY CITY NEWS (Oct. 5, 2006), http://204.2.109.187/gcn_540/jamaicaislandof.html (describing the abduction and murder of Jamaican gay rights activist Steve Harvey in 2005).

[109] HUMAN RIGHTS WATCH, HATED TO DEATH: HOMOPHOBIA, VIOLENCE, AND JAMAICA'S HIV/AIDS EPIDEMIC 2 (2004). The song the crowd sang was Buju Banton's "Boom Bye Bye," a sampling of lyrics for which are quoted in Nelson, *supra* note 107.

3. Mob Violence

Violence inflicted by non-state actors is a form of persecution well recognized by U.S. courts for asylum purposes.[110] Mob violence, in particular, has been recognized as presenting the gravest threat of harm to groups facing widespread hostility due to its inherently public nature and indications that the Jamaican government is either "unwilling or unable to protect [victims] from harm."[111] Indeed, many of the cases cited in this article, including *Toboso-Alfonso* and *Amanfi*, feature acts of mob violence or threats. The threat of mob violence is particularly dangerous because highly emotional responses and group outrage can be sparked by false information or accusations. For example, false rumors of a gay marriage in Kenya,[112] "whipped up mob violence . . . unleashing a house-to-house witch hunt by anti-gay vigilantes, street attacks targeting gay men, the sacking of an AIDS-fighting medical center, and a widening wave of ultra-homophobic national media coverage."[113]

This type of mob violence is not just targeted at the direct victim, but rather at anyone perceived to be a member of the subjugated social group. For this reason, mob attacks against people perceived as LGBT are likely to be especially brutal;[114] the weapon of choice for Jamaican mobs tends to be the machete.[115] In Jamaica, gay men commonly "fear that mob murder is inevitable and imminent,"[116] and "mob attacks" were cited by the *Bromfield* court as evidence of a pattern or practice of persecution.[117] Thus, along with continuing to recognize persecution by non-state actors, judges and officials should view LGBT-targeted mob violence as a uniquely terroristic phenomenon in that it is specifically *intended* to give others in the same social group as the victim a well-founded fear of persecution.

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[110] *See* MARTIN ET AL., *supra* note 3, at 117–19 (describing both federal court and BIA decisions recognizing persecution by non-state actors, but also noting that some European countries have limited asylum to only those persecuted by state officials).

[111] Parker v. Ashcroft, 112 F. App'x. 860, 861-62 (3d Cir. 2004) (finding that although an IJ determined that an applicant proved sufficient threat of persecution due to the police's inability to control a violent gang, and also finding the question of the applicant's well-founded fear to be a close one, the Board's contrary finding on appeal that "pervasive animus towards homosexuals in Jamaica" is insufficient to establish that the "government is unwilling or unable to protect [the victim] from harm" could not be overturned by a court because the standard of review is too deferential to the Board's ultimate determination to deny asylum).

[112] A recent asylum case emerging from Kenya, Omondi v. Holder, 674 F.3d 793 (8th Cir. 2012), is briefly discussed *supra* note 83.

[113] Doug Ireland, *False Gay Marriage Rumor Sparks Kenyan Riots*, GAY CITY NEWS (Feb. 18, 2010), www.chelseanow.com/articles/2010/02/20/gay_city_news/news/doc4b7d854836076514227246.txt.

[114] Whether conducted by a mob or an individual, studies show that murders motivated by homophobia "are typically very brutal and involve much more violence than is required simply to kill the victim." David C. Plummer, *The Quest for Modern Manhood*, 24 J. OF ADOLESCENCE 15, 15 (2001).

[115] *See, e.g.*, Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 511 (2009) (discussing the case of a Jamaican man granted asylum in the United States after he was attacked with a machete by a "violent anti-homosexual mob"); *see* Bill Andriette, *Horror in Jamaica: 16 Men Burned and Stabbed to Death in Anti-Gay Prison Riots*, GAY TODAY (Oct. 9, 1997), www.gaytoday.com/garchive/world/100997wo.htm (describing the use of "improvised machetes" by inmates during a violent riot).

[116] Fiyu Pikni, *The Gleaner on 'The Jamaican Gay Issue'*, THE UNSPEAKABLE TRUTH (Nov. 3, 2009, 6:39 AM), www.revaluushan.blogspot.com/2009/11/gleaner-on-jamaican-gay-issue.html.

[117] Bromfield v. Mukasey, 543 F.3d 1071, 1076 (9th Cir. 2008).

4. Police Complicity

Because police are the primary conduit between a state and its citizenry, the vast majority of asylum cases involving acts of persecution implicate some form of police action or inaction. This Article, however, will refer to police complicity in anti-LGBT abuse as that which, like in Jamaica, is so pervasive as to "create an atmosphere of fear sending a message to other [LGBT] people that they are without any protection from violence."[118] In considering whether to raise the proposed presumption favoring asylum, the salience of police complicity may be illustrated by contrasting how the issue was considered by the Ninth Circuit in *Bromfield* and the Third Circuit in *Parker*.

In the Ninth Circuit case, though Bromfield had not testified as to any personal abuse from Jamaican police, the court emphasized that Bromfield was eligible for asylum in part because, in Jamaica, "violence against homosexuals is widespread, and is perpetrated by both private individuals and . . . police officers;" "the police generally do not investigate complaints of human rights abuses suffered by gay men;" and "police officers and prison wardens are directly responsible for a portion of these abuses [against gay men]."[119]

In *Parker*, however, the BIA and Third Circuit reversed the IJ to deny asylum because they were not convinced that Jamaican *police* were unwilling or unable to protect Parker. This conclusion was reached largely on the basis of a letter to the IJ from a Jamaican police officer corroborating the mistreatment Parker suffered from non-state actors on account of his homosexual identity but also stating that "[t]he police [are] offering protection and have tried to get on top of the situation but Parker does not feel comfortable."[120] The Third Circuit did not find the letter to be as "strongly probative of the authorities' willingness or ability to curb threats" as the BIA did, but nonetheless found the letter—combined with reports of an incident in which students were expelled for engaging in "gay violence," the public defender's criticism of "violence targeted against homosexuals," and government efforts intended "to educate police to respect citizen's rights"—to constitute sufficient evidence that Parker did not have a founded fear of persecution.[121]

Unlike the Ninth Circuit's reasoning in *Bromfield*, the Third *Circuit's Parker* analysis is flawed. The evidence—a vague sentence in a letter written by a police have a well officer whom Parker was assisting in a murder investigation, an expulsion of students for committing violent anti-LGBT acts, the statement of a lawyer, and general guidance issued to police to "respect citizen's rights"—is overwhelmed by the voluminous documentation of pervasive police abuse of and unwillingness to protect gay men. Pervasive police complicity should be made a salient factor in establishing a pattern or practice of persecution, with a special caution toward situations where police protection of the applicant (which is normally evidence weighing against granting asylum) is contingent on the applicant's continued cooperation with police on an unrelated matter. Courts will be guided by the level of police complicity to recognize the dangerous reality of an applicant's likelihood of future persecution if returned.[122]

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118 HUMAN RIGHTS WATCH, *supra* note 109, at 19.

119 *Bromfield*, 543 F.3d at 1074, 1079.

120 Parker v. Ashcroft, 112 F. App'x. 860, 862 (3d Cir. 2004).

121 *Id*.

122 The Third Circuit should have treated the BIA's crediting of the nonprobative evidence weighing against granting asylum in *Parker* in the same way the Ninth Circuit treated the BIA's crediting of the fact that Bromfield had voluntarily visited family in Jamaica prior to coming out as gay and that he maintained a relationship with his father:

5. The Use of "Outing" as a Weapon

One reason U.S. judges or officers might deny asylum eligibility is because they doubt the applicant's credibility regarding membership in a LGBT-based social group or the legitimacy of fear of persecution, based on a finding that the applicant does not seem "gay enough" to attract mistreatment.[123] The BIA, for example, affirmed an IJ's asylum denial where the IJ "didn't see anything in [the applicant's] appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays."[124] In countries like Jamaica (or perhaps Mexico, from where the applicant described above had fled), LGBT people are unlikely to distinguish between the fear of being persecuted and the fear of being outed, as the two go hand-in-hand within cultures largely defined by norms of masculinity and heterosexism.[125] Thus, where, like in Jamaica, "[t]here is a very narrow range of behaviors considered acceptably masculine" and children from a young age are conditioned and policed "until [behavior] conforms to the prevailing masculine gender norms," the event precipitating persecution is unlikely to be nonconforming sexual or gender performance, but rather accusation and public outing by others.[126] When outing is commonly used as a weapon in a country, the public identification of a member of an LGBT-based social group is likely to produce a well-founded fear of persecution, regardless of that individual's external expression or personal sexual identification.

Public outing is a factor most salient for cases involving (1) an imputed LGBT identity (e.g., *Amanfi*) and (2) government action that may not be persecution in and of itself, but which dramatically increases the likelihood of persecution by non-state actors or police. Regarding instances of erroneous public outing (imputed identity) in Jamaica, a vast array of behaviors can put one at risk of being falsely outed and accused. These behaviors surprisingly, and perhaps counter intuitively, include wearing tight clothing, performing oral sex on a woman,[127] and, for prison in-

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"[T]he IJ's . . . conjecture," according to the *Bromfield* court, "about how a Jamaican man would treat his homosexual son and whether a teenager who had not yet identified himself as gay does not constitute substantial evidence to support the IJ's decision. These facts are entirely irrelevant to a determination of whether Bromfield will be persecuted in Jamaica today." *Bromfield*, 543 F.3d at 1078.

123 *See* Bilefsky, *supra* note 85 (stating that some asylum applicants are "penalized for not outwardly expressing their sexuality" and "risk being dismissed as not being gay enough"); Fadi Hanna, Note, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 913 (2005) (analyzing the increasing need for homosexual asylum seekers to prove that they are "'gay enough' to win protection from a U.S. court."); Morgan, *supra* note 9, at 159 n.137 (discussing cases in which "applicants are judged to be not 'gay enough' to deserve asylum.").

124 *See* Hanna, *supra* note 123, at 914 (citing *In re Soto Vega*, No. A-95880786 (B.I.A. Jan. 27, 2004) (quoting *In re Soto Vega*, No. A-95880786, at 3 (Immigration Ct. Jan. 21, 2003))).

125 Regarding masculinity norms in Mexico, *see generally* ROBERT MCKEE IRWIN, MEXICAN MASCULINITIES (2003); *see also supra* Part I.C (discussing the persecution noted in *Amanfi* that arose from the asylum seeker being publicly and inaccurately outed as gay).

126 Angela Allyn, Homophobia in Jamaica 23-24 (June 30, 2012) (unpublished manuscript) (on file with author); *see also* JEAN JACKSON ET AL., THE JAMAICA ADOLESCENT STUDY: FINAL REPORT 19 (1998), *available at* http://pdf.usaid.gov/pdf_docs/PNACC998.pdf (reporting findings on adolescent sexuality in Jamaica and stating that young boys are encouraged or bullied by peers and relatives to become heterosexually active in order to feel "like a big man").

127 *See* Nelson, *supra* note 30, at 240 ("[I]n the Jamaican dancehall context, ["bowing"] is a term of art for cunnilingus, which is supposedly abhorred by 'real men' as a form of subservience to women.").

mates, masturbating.[128] Regarding the second set of cases, even seemingly neutral governmental action can create an increased risk of harm to actual or perceived members of an LGBT-social group where outing is used as a weapon. For example, the facially neutral policy in an all-male Jamaican prison of distributing condoms to prevent the spread of HIV resulted in riots and the murder of sixteen inmates accused of being gay, violence that may have only been stoked by the prison's subsequent policy of singling out and isolating suspected gay inmates in the "Special" prison unit.[129] Thus, countries in which public outing is used as a weapon are more likely to have a pattern or practice of persecution, with even benign government action that has the potential to identify an individual as LGBT capable of inciting a well-founded fear.

6. Mixed-Motive Persecution

Courts and Congress have recognized that an applicant persecuted partially on account of a protected ground and partially on account of an unprotected ground can still establish eligibility for asylum.[130] However, the presence of mixed motives places a difficult burden on the applicant to establish the persecutor's primary motivations;[131] a burden that will frequently be placed on LGBT applicants who have fled states with ingrained cultures of homophobia. This is so because of the complex nature of anti-LGBT hostility and the vast and constantly changing social meaning given to LGBT identity.

In Jamaica, where "[e]very kind of evil is conflated with homosexuality," the subjective motivation of someone abusing a gay man might be the perception that the gay man is a pedophile, a predator who preys on the poor, the cause of natural disasters and God's wrath, or a tool of neo-colonial power.[132] It is not a coincidence that violently homophobic dancehall music increased in popularity at the same time that Jamaica's economy declined, and the "threat of social chaos" loomed.[133] Dancehall lyrics frequently tie the notion of killing homosexuals to "bringing about a social and spiritual rebirth."[134] In addition, attacks on gay men in Jamaica "are often accompanied by robberies."[135] LGBT status is not just a "central reason for persecuting the applicant,"[136] it is a central reason why Jamaican society does a wide array of things, from the way

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[128] Katherine Andrinopoulos et al., *Homophobia, Stigma and HIV in Jamaican Prisons*, 13 CULTURE, HEALTH & SEXUALITY 187, 193-94 (2010) (describing masturbation by inmates as "abhorrent behaviour[]" [sic] considered "outside of a normal sexual repertoire for a heterosexual man").

[129] *Id*. at 192; *see also, e.g*., Andriette, *supra* note 115.

[130] *See* Gafoor v. INS, 231 F.3d 645, 652 (9th Cir. 2002) (finding that because the plaintiff was persecuted partially on account of his decision to arrest an army officer as well as on account of his ethnic background, he was eligible for asylum); REAL ID Act of 2005, INA § 208(b)(1) (clarifying the refugee definition as requiring that one of the five protected grounds "was or will be at least one central reason for persecuting the applicant").

[131] *See, e.g*., INS v. Elias-Zacarias, 502 U.S. 478, 483-484 (1992) (stating that the INA "makes motive critical" and holding that the applicant failed to proffer sufficient evidence of his persecutor's motives); Sangha v. INS, 103 F.3d 1482, 1490 (9th Cir. 1997) (denying applicant's petition where, of the persecutors' mixed motives, the court found the evidence supporting the motive of applicant's political opinion to be insufficient).

[132] *See* Allyn, *supra* note 126, at 11.

[133] NORMAN C. STOLZOFF, WAKE THE TOWN & TELL THE PEOPLE: DANCEHALL CULTURE IN JAMAICA 6 (2000).

[134] *See* Allyn, *supra* note 126, at 1.

[135] *Id*. at 5.

[136] REAL ID Act of 2005, INA § 208(b)(1).

music is produced and consumed to the way churches teach and politicians garner support. Thus, in a country like Jamaica, the presence of mixed motives may actually militate in *favor* of establishing the required nexus. This factor, when it is found in applications from a given country, usually indicates a pattern or practice of persecution. This indicates that where future applications present mixed motives, the presumption should be in favor of finding the persecution to be primarily on account of the applicant's membership in an LGBT-based social group.

IV. CONCLUSION: RETURNING TO THE POLITICAL MEANING OF ASYLUM

I began in Part I with the disputed notion that granting asylum is an inherently political act. This "political conception of asylum"[137] is particularly apparent in the factors and presumptions I propose. According to Matthew Price, asylum is meant to protect people unacceptably exposed to harm by the state's action or inaction "and to call the persecuting state to task by expressing condemnation. The political conception does not focus on the mere *fact* of an asylum seeker's need for protection; instead, it focuses on the *legitimacy* of, and the *state's culpability* in, the asylum seeker's exposure to harm."[138] To this I would add one further macro-level justification for the political conception underlying my proposed framework: the culpability, not just of the persecuting state, but also of the United States and European nations, for bringing about the conditions of pervasive homophobia described under the enumerated factors.

Recognition of this type is not new; the emergence of international refugee law and the 1951 U.N. Convention were in part the result of "nations still bruised by post-Holocaust guilt, conscious of having denied entry to pre-Holocaust Jews."[139] No ground for persecution under asylum law has been more directly exacerbated by western influence than persecution on the ground of LGBT identity. In fact, Jamaica's anti-gay law is virtually copied from the first law against sodomy imposed by England when it colonized Jamaica.[140] Additionally, economically hostile U.S. action has prompted Jamaica to flaunt its anti-LGBT laws and culture as an act of resistance and a refusal to "bow" to U.S. pressure.[141] Further, hostility against LGBT people throughout the Caribbean and Africa, among other regions, was largely nonexistent prior to colonial contact[142] and is directly perpetuated today by U.S. religious influence.[143] Thus, while culpa-

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[137] Price, *supra* note 24, at 418 (arguing in favor of this conception rather than a "humanitarian conception," which holds that "the refugee definition should be widened to include not only persecuted people, but also those who need protection from serious harm more generally, regardless of the source of the harm").

[138] *Id*.

[139] PETER SHOWLER, REFUGEE SANDWICH: STORIES OF EXILE AND ASYLUM 212 (2006).

[140] *See* Nelson, *supra* note 30, at 259-60 (describing "the long neo-colonial legacy" of homophobia in Jamaica).

[141] *See id*. at 240. Unsurprising, the same term, "bowing," used to describe unacceptably nonmasculine sexual acts is frequently employed in the context of resisting the influence of the United States, which is viewed as "an originary home of gay identity and attendant human rights." Neville Hoad, *Between the White Man's Burden and the White Man's Disease: Tracking Lesbian and Gay Human Rights in Southern Africa*, 5 GLQ: A J. OF LESBIAN AND GAY STUDIES, 559, 576 (1999).

[142] *See* Allyn, *supra* note 126, at 14; STEPHEN O. MURRAY & WILL ROSCOE, BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES 1–10, 27 (1998).

[143] *E.g.,* Press Release, Ctr. for Constitutional Rights (May 14, 2012), Ugandan LGBT Activists File Case Against Anti-Gay U.S. Evangelical in Federal Court, http://ccrjustice.org/newsroom/press-releases/ugandan-lgbt-activists-file-case-against-anti-gay-u.s.-evangelical-federal-court (stating that just one U.S. evangelical leader has traveled to over

bility on the part of the United States and European nations is not a reason to grant asylum in any specific case, it is a component of homophobia's uniquely global pervasiveness and therefore a reason to establish a framework that recognizes the persecution-inducing effects of such influence.

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One reason that some frame asylum law as one of the most LGBT-friendly areas of U.S. law[144] is because the emphasis is on a fact-specific assessment of the applicant's claim of persecution, rather than on, say, creating precedents or granting substantive rights in one area that would then necessarily extend to others.[145] As a result, an IJ or asylum officer need not consider any ramifications of extending protection to an LGBT applicant other than those considerations present for all asylum-seekers.[146] Yet, the case-specific characteristic of asylum law that has resulted in "great advances . . . protecting [LGBT] immigrants seeking asylum"[147] can also result in asylum decision makers' failure to recognize the macro-level issues regarding specific social groups. These are issues I described in Part III as being uniquely prevalent in LGBT asylum cases, emerging from a large number of states. This inattention can be remedied by an expansion of the pattern-or-practice framework, a process undertaken by the Ninth Circuit in *Bromfield*. Ultimately, the presumptions and factor-test I have proposed would aid IJs and asylum officers in extending protection to deserving LGBT-perceived applicants who may otherwise be denied protection due to a lack of macro-level understanding of how persecution operates in countries marked by entrenched and pervasive homophobia.

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forty countries to encourage the passage of anti-LGBT legislation).

144 *See* Landau, *supra* note 8, at 237.

145 *See, e.g.*, Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Right*s, 30 OHIO N.U. L. REV. 189, 200 (2004) (stating that, in *Lawrence v. Texas*, the Court found a way to find an anti-gay law unconstitutional while "never directly discuss[ing] whether sexual orientation discrimination claims would merit heightened scrutiny, or how such claims would fall along the equal protection scale between suspect and non-suspect classifications").

146 *But see supra* Part I.B. (explaining that the BIA, Attorney General, or a circuit court should now consider the identity of an individual as LBGT in contrast to their conduct when issuing a precedential opinion).

147 Pfitsch, *supra* note 48, at 59.