

“SHOOT THEM!”[†] THE TRUMP ADMINISTRATION’S IMMIGRATION POLICY AND ITS EFFECT ON LGBTI MIGRANTS AND ASYLUM SEEKERS

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[†] In May 2019, President Trump laughed as a supporter yelled this statement at a rally in response to his question of how to deter migrants at the border. See Antonia Noori Farzan, ‘*Shoot Them!*’: Trump Laughs Off a Supporter’s Demand for Violence Against Migrants, The Wash. Post (May 9, 2019), https://www.washingtonpost.com/nation/2019/05/09/shoot-them-trump-laughs-off-supporters-demand-violence-against-migrants/?utm_term=.8e6796eb9516.

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I. INTRODUCTION

On May 25, 2018, Roxsana Hernandez Rodriguez, a transgender Honduran woman seeking asylum in the United States, died in custody of the Immigration and Customs Enforcement agency (ICE).¹ Her preliminary autopsy showed that she may have been physically abused before her death. Her death was likely due to a combination of dehydration and complications from H.I.V.² She crossed the border at the San Ysidro port of entry between San Diego and Tijuana on May 9th, 2018.³ Fellow detainees stated that Ms. Hernandez experienced symptoms of severe dehydration for many days with no medical evaluation or treatment and was not taken to the hospital until May 17th.⁴

The tragic irony about Roxsana Hernandez Rodriguez's case is that, while seeking asylum, she was subjected to the very harm she was seeking asylum for: freedom from violence, discrimination, and abuse on the basis of her trans identity. This is a common issue faced by LGBTI individuals who migrate or seek asylum. In November 2018, a group of about eighty Central Americans who identified as LGBTI from Guatemala, Honduras, Nicaragua, and El Salvador sought asylum in the United States based on their identity, fleeing gang violence, political persecution, and severe poverty. These asylum seekers encountered their own harassment as they traveled to the United States.⁵ LGBTI people seeking asylum in the United States face a myriad of challenges unique from those of other migrants. Although there are no exact numbers of how many LGBTI migrants seek asylum at the border each year, lawyers and activists have estimated the amount to be in the hundreds.⁶ Such a critical issue needs to be addressed, as the failure to act results in putting hundreds of LGBTI people's lives at stake.

To analyze what needs to be done to protect LGBTI asylum seekers and migrants, I will first examine why LGBTI people, particularly from the area known as the Northern Triangle, which includes Guatemala, El Salvador, and Honduras, and Mexico (where the current influx of asylum seekers primarily originate), are seeking asylum by summarizing the current political and societal conditions for LGBTI people in their home countries. Next, I will outline

1. Sandra E. Garcia, *Independent Autopsy of Transgender Asylum Seeker Who Died in ICE Custody Shows Signs of Abuse*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/us/trans-woman-roxsana-hernandez-ice-autopsy.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Amelia McDonell-Parry, *LGBTQ Asylum Seekers First Migrant Caravan Group to Arrive at U.S. Border*, ROLLING STONE (Nov. 14, 2018), <https://www.rollingstone.com/culture/culture-news/lgbtq-asylum-migrant-caravan-gay-trans-border-756233/>.

6. Jose A. Del Real, *"They Were Abusing Us the Whole Way": A Tough Path for Gay and Trans Migrants*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html?module=inline>.

particular challenges that LGBTI people face when they are seeking asylum or attempting to migrate in both their claims for asylum and with the challenges they face while migrating or being detained. Then I will look at how this Administration's policies have affected this process for LGBTI people. Lastly, I will look at what legal and policy solutions need to be proposed to protect LGBTI people's rights and suggest what needs to be changed to address the unique issues faced by LGBTI migrants and asylum seekers.

II. WHY LGBTI PEOPLE MIGRATE AND SEEK ASYLUM

There are a number of reasons why LGBTI people choose to migrate or seek asylum, but some may choose to migrate for the same reasons that everyone else would such as political instability and economic challenges. But it is important to note that even when migrating for these reasons, LGBTI face unique challenges because of their identity, especially when other social conditions exist which denigrate LGBTI people. Studies show that even in the United States anti-LGBTI laws can lead to higher poverty for LGBTI people.⁷ LGBTI people often face cultural prejudices which lead to unemployment or inability to get a job for fear of violence.⁸ Thus, any economic, political, or social issue that may cause others to leave a country may affect LGBTI people more because of these already existing hurdles.

A. *The Asylum-Seeking and Migrating Process*

There is a definitional difference between those who are seeking to migrate and those who are seeking asylum. A person from a foreign nation is granted asylum in the United States or at the border if they meet the international law definition of a "refugee."⁹ A refugee is defined as a person who is either unable or unwilling to return to their home country and cannot obtain protection in that country either due to past persecution or a well-founded fear of being persecuted on account of their race, religion, nationality, membership in a particular social group or political opinion.¹⁰ Since 1994, the United States has recognized persecution on account of sexual orientation under "membership in a particular social group" as long as they are able to prove credible fear.¹¹ Transgender and H.I.V. positive individuals have won asylum cases for their statuses under the "social group" category.¹² Until they

7. Movement Advancement Project and Center for American Progress, *Paying an Unfair Price: The Financial Penalty for Being LGBT in America* (Sept. 2014), <http://www.lgbtmap.org/unfair-price>.

8. Astrid Zwegnert, *Why is LGBT Poverty Ignored?*, World Economic Forum (Oct. 26, 2015), <https://www.weforum.org/agenda/2015/10/why-is-lgbt-poverty-ignored/>.

9. 8 U.S.C. § 1101 (a)(42) (2012); 8 U.S.C.A. § 1158 (b)(1)(B)(iii) (2009).

10. 8 U.S.C. § 1101 (a)(42) (2012).

11. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990).

12. Immigration Equality, *Applying for Asylum*, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum/#.XKpMqZhKg2w>.

are granted such legal recognition or status, however, they are considered an asylum seeker.¹³

Migrants, on the other hand, include refugees as well as people who choose to move from their home for any variety of reasons including to improve their lives by finding work or education but not necessarily because of a direct threat or persecution of death.¹⁴ These reasons can include an inability to obtain work that may result because of cultural prejudices towards LGBTI people.

B. *Reasons for Migrating or Seeking Asylum*

LGBTI people have unique reasons to apply for asylum or to migrate. Many are seeking a place to express their true identity without fear of violence or persecution. It is easy to see why so many may seek asylum for this reason when looking at the laws that exist worldwide targeting LGBTI people's existence and identity. In Nigeria, one can be sentenced to fourteen years of prison for being gay or lesbian; in Uganda, the punishment is seven years.¹⁵ In 2017, there were government sponsored purges of suspected gays and lesbians in Tajikistan, Egypt, Azerbaijan, Tanzania, Indonesia, and Chechnya, mostly in the form of mass incarceration, torture, and humiliation.¹⁶ Brunei recently enacted legislation that would make homosexual sex punishable by death by stoning which was only upended by international pressures.¹⁷ These laws and actions only begin to touch on the persecution that LGBTI people face globally.

More specifically, in the Northern Triangle and Mexico, LGBTI people face levels of violence that have led them to seek migrant or refugee status. A 2016 study by the United Nations High Commission for Refugees (UNHCR) found that eighty-eight percent of LGBTI asylum seekers and refugees reported suffering sexual and gender-based violence in their home countries in Central America.¹⁸ In Latin America as a whole, there is an LGBT-related homicide every day.¹⁹ As a result, the region has the highest rates of violence against LGBTI people in the world.²⁰ Seventy-nine percent of the world's transgender murder victims were killed in Latin America.²¹ In particular, El

13. HIAS, Definitions: Refugee, Asylum Seeker, IDP, Migrant, http://www.hias.org/sites/default/files/definitions_of_refugee2c_asylum_seeker2c_idp2c_and_migrant.pdf.

14. *Id.*

15. Bobby Steggart, *A World Report on the LGBT Immigrant Experience*, The Queer Detainee Empowerment Project at 14, https://www.uua.org/sites/live-new.uua.org/files/world_report_lgbt_immigrant_experience.pdf.

16. Steggart, *supra* note 15, at 19.

17. Justin Wise, *Brunei Reverses on Death By Stoning for Gay Sex After International Outcry*, THE HILL (May 5, 2019), <https://thehill.com/policy/international/442195-brunei-reverses-on-death-by-stoning-for-gay-sex-after-international>.

18. *No Safe Place*, United Nations High Commissioner For Refugees, at 7 (AMNESTY INT'L, 2017).

19. Steggart, *supra* note 15, at 27.

20. *Id.*

21. *Id.* at 34.

Salvador, Guatemala, and Honduras, which have high levels of violence and political instability in general, have a more hostile environment to LGBT individuals compared to their Latin American neighbors, partially due to the heavy influence of evangelical Christianity.²² In the Northern Triangle specifically, there is currently “unprecedented levels of violence outside a war zone” and these countries rank in the top ten in the world for homicide.²³ In addition, even though Mexico is known for its more liberal policies,²⁴ tension still exists leading to increased instability for LGBTQ asylum seekers and migrants crossing into Mexico from other countries.²⁵ It is important to analyze in depth the particular situation facing LGBTI asylum seekers in each country to understand the reasons why they seek asylum or migrate to the United States and why policies that make this possibility less tenable can be so dangerous. Below are some of the particular issues faced by LGBTI people from these countries.

1. *El Salvador*

Salvadoran LGBT rights organizations have estimated over six hundred LGBTI Salvadoran individuals have been killed since 1994.²⁶ Murders of LGBT people in El Salvador are often characterized by signs of torture including severe beating, dismemberment, multiple stab wounds or gunshots which indicate the hate that motivates these crimes.²⁷ The Association for Communication and Training Trans Women in El Salvador reported a total of twenty-eight serious attacks perpetrated against LGBTI people between January and September 2017.²⁸ Despite what appears to be a low number of incidents, seventy-two percent of trans women who have been attacked chose not to report the incident due to fear of reprisals from attackers as well as lack of support from the criminal justice system.²⁹

LGBT Salvadorans also encounter discrimination in accessing healthcare, education, and employment.³⁰ LGBT Salvadorans report that once their gender identity or sexual orientation is known they often are forced to wait for

22. *Id.* at 27.

23. Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis*, at 4 (June 14, 2017); UNODC, *Global Study on Homicide 2013: Trends, Contexts*, at 126 (Apr. 10, 2014), https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

24. Caroline Beer and Victor Cruz-Aceves, *Mexico's LGBT Rights are Stronger than U.S.'s. Here's Why.*, World Economic Forum (Apr. 26, 2018), <https://www.weforum.org/agenda/2018/04/religion-the-state-and-the-states-explain-why-mexico-has-stronger-lgbt-rights-than-the-us>.

25. Michelle Hoffman and Alex St. Denis, *Forced to Flee Her Home Trans Activist Calls for Tolerance*, UNHCR, (May 17, 2018), <https://www.unhcr.org/news/stories/2018/5/5afbf0aa4/forced-flee-home-trans-activist-calls-tolerance.html>.

26. *El Salvador Events of 2018*, Human Rights Watch (2018), <https://www.hrw.org/world-report/2019/country-chapters/el-salvador>.

27. Georgetown Law Human Rights Institute, *Uninformed Justice: State Violence Against LGBT People in El Salvador*, 30 (Apr. 21, 2017), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2017-HRI-Report-Uninformed-Injustice.pdf>.

28. AMNESTY INT'L, *supra* note 18, at 9.

29. *Id.* at 12.

30. Georgetown Law Human Rights Institute, *supra* note 27, at 30.

long periods before receiving care or are denied care altogether.³¹ Some lesbian women have even experienced sexual abuse when trying to access healthcare.³² Many LGBTI people have been formally or constructively prevented from obtaining education, such as when they are discriminated by teachers and administration or receiving abuse from peers, thus leading them to discontinue their education.³³ Employment prospects are equally bleak. Due to their lack of access to education, many LGBTI people are forced to support themselves through informal means like sex work or street vending.³⁴ This in turn often exposes them to more abuse from gangs and other perpetrators of violence.³⁵

In addition, many LGBTI people suffer harassment and physical, verbal, and sexual abuse at the hands of Salvadoran law enforcement, which the government has largely ignored.³⁶ As a result, LGBTI people face high barriers to access justice, particularly when these crimes are committed by police. This fosters a sense of impunity, discourages the reporting of crimes, and increases LGBTI peoples' mistrust in the justice system.³⁷ At least 136 LGBT people in El Salvador have fled the country since 2012 as a result.³⁸

2. Guatemala

LGBTI people face major roadblocks in accessing justice in Guatemala after experiencing violence or abuse on the basis of their identity. A 2016 study found that, out of the 85% of LGTBI victims of violence and discrimination who filed a report for assaults, only 26% received a response from authorities.³⁹ Transgender Europe, a non-governmental organization, reported that forty trans people alone were murdered in Guatemala during 2016.⁴⁰ Harmful legislation has also been proposed, including legislation that would prohibit teaching about gender and sexual diversity in schools, reaffirm marriage as the exclusive right of heterosexual couples, and remove the criminal charge of discrimination when it is directed at LGBTI persons.⁴¹ In addition, many LGBTI Guatemalans have no access to health care or employment due to their sexual orientation or gender identity.⁴²

31. *Id.*

32. *Id.*

33. *Id.* at 31.

34. *Id.*

35. *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, Inter-American Commission on Human Rights, at 160 (2015).

36. *Id.* at 55.

37. Georgetown Law Human Rights Institute, *supra* note 27, at 55.

38. Anastasia Moloney, 'Terrorized at home' Central America's LGBT people to flee for their lives: report REUTERS (Nov. 27, 2017), <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR280>.

39. *Situation of Human Rights in Guatemala*, Inter-American Commission on Human Rights, at 66 (Dec. 31, 2017), <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf>.

40. AMNESTY INT'L *supra* note 18, at 9.

41. Inter-American Commission on Human Rights, *supra* note 39, at 67.

42. Michael K. Lavers, *Two Gay Men Run for Guatemala Congress*, WATERMARK ONLINE (Mar. 12, 2019), <http://www.watermarkonline.com/2019/03/12/two-gay-men-run-for-guatemala-congress/>.

3. *Honduras*

According to Cattrachas Lesbian Network, there were 264 murders of LGBTI people in Honduras reported between 2009 and 2017.⁴³ Civil society organizations have stated that the violence is due to the traditional social environment that exists in Honduras which leads to prejudice and violence.⁴⁴

Legislation targeting LGBT people, most notably trans people, is also an issue. For example, the 2001 Police and Social Coexistence Act gives the police power to arrest anyone who violates “modesty, decency and public morals.” This puts transgender women, in particular, at risk of being subjected to abuse or arbitrary arrest by the police.⁴⁵ In addition, LGBTI Honduran killings tend to go unpunished: between 2010 and 2014, out of the 141 reported violent deaths of LGBTI people, only thirty cases were prosecuted and only nine resulted in convictions.⁴⁶ The judicial system does not provide effective protection for witnesses in cases involving violence against LGBTI people.⁴⁷ Thus, LGBTI individuals suffer violence and even death from their fellow citizens, as well as at the hands of the government. This leads many to seek refugee status in other countries.

4. *Mexico*

In 2016, after then-Mexican president Enrique Peña Nieto proposed legislation that would legalize same-sex marriage for the entire country, there was a dramatic rise in violence and hate crimes in Mexico, including twenty-six murders of LGBT individuals in a single year.⁴⁸ An estimated 1,310 killings of LGBT persons motivated by homophobia were committed in Mexico between 1995 and 2016, although the true number could be much more.⁴⁹ Mexico is currently the country with the second largest number of murders based on gender identity or expression of gender in the world.⁵⁰ Among these deaths about 80% of victims suffered various forms of aggression before being killed.⁵¹ Trans women in particular experience widespread discrimination in their lives including violence as children from their families for expressing their identity, lack of access to education, high dropout rates in school, harassment and ridicule in public, and being forced to work in

43. AMNESTY INT’L, *supra* note 18, at 9.

44. *Situation of Human Rights in Honduras*, Inter-American Commission on Human Rights, at 6, <http://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf>.

45. *Id.*

46. *Id.*

47. *Id.*

48. Stegert, *supra* note 15, at 27.

49. Austrian Centre for Country of Origin & Asylum Research and Documentation, *Mexico: Sexual Orientation and Gender Identity*, at 31 (May 2017), <https://www.justice.gov/eoir/page/file/972466/download>.

50. *Situation of Human Rights in Mexico*, Inter-American Commission on Human Rights, at 122 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Mexico2016-en.pdf>.

51. *Id.* (citing *Registry Documenting Acts of Violence against LGBTI Persons in the Americas on Attacks on their Life and Integrity*, Inter-American Commission on Human Rights (Dec. 17, 2014)).

informal economies, all of which makes them more vulnerable to violence and attacks on their physical integrity.⁵²

In addition, two-thirds of LGBTI asylum seekers interviewed in 2016 coming from El Salvador, Honduras, or Guatemala reported suffering sexual and gender-based violence in Mexico.⁵³ When waiting for a decision on whether they can enter the United States, migrants and asylum seekers are often forced to wait in detention centers in Mexico where LGBTI people have suffered discrimination, sexual harassment, and aggression from other detainees and center staff.⁵⁴

These examples serve to illustrate only a few of the issues that cause LGBTI people to migrate. Whether they suffer a credible fear of persecution or simply are looking for a better life, being LGBTI can be a major factor as to why migrants and asylum seekers leave their home countries for a new chance in the United States.

III. CHALLENGES LGBTI PEOPLE FACE WHEN SEEKING ASYLUM OR MIGRATING

In general, there are two ways a person may apply for asylum in the United States: the affirmative process or the defensive process. A person who is not in removal proceedings may affirmatively apply for asylum through the U.S. Citizenship and Immigration Service (USCIS).⁵⁵ On the other hand, a person who is in removal proceedings may apply for defensive asylum by filing an application with an immigration judge at the Executive Office for Immigration Review in the Department of Justice. Asylum seekers who arrive at a U.S. port of entry generally must apply through the defensive process. They then have the burden of proving that they meet the definition of a refugee.⁵⁶ To do so they must prove that they are unwilling or unable to return to their country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵⁷

The first struggle that all asylum seekers face is getting their case heard. Currently, the backlog of cases has amounted to 830,000 pending cases.⁵⁸ The average wait for a hearing is 721 days.⁵⁹ In prior administrations,

52. *Id.* at 123.

53. AMNESTY INT'L, *supra* note 18, at 20.

54. *Id.* at 21.

55. Affirmative Asylum Procedures Manual (AAPM), U.S. Citizenship and Immigration Services (USCIS) (2016), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf>.

56. 8 U.S.C. § 1158(b) (2012); USCIS, *Obtaining Asylum in the United States* (2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

57. 8 U.S.C. § 1101 (a)(42) (2012).

58. Molly O'Toole, *Trump Plan Fails to Cut Immigration Court Backlog, as Caseload Soars More than 26%*, LOS ANGELES TIMES (Feb. 21, 2019), <https://www.latimes.com/politics/la-na-pol-immigration-court-backlog-worsens-20190221-story.html>.

59. Zuzana Cepla, *Fact Sheet: U.S. Asylum Process*, NATIONAL IMMIGRATION FORUM (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>.

individuals were released at a much higher rate before their hearings.⁶⁰ However, under the current Administration, President Trump has issued a policy to release as few asylum seekers as possible.⁶¹ Attorney General William Barr issued an order in April 2019 which forbids migrants from seeking release on bond which could lead to individuals with pending asylum claims being postponed for months or even years.⁶² This is particularly bad for LGBTI people, especially trans people, because they are often targeted for abuse in detention centers.⁶³

Another struggle is being able to prove that an applicant qualifies for asylum. There are two main ways that an LGBTI person can qualify for asylum on the basis of their identity. The first is by showing that the LGBTI community in their home country is sufficiently visible, meaning whether or not the culture in that country sufficiently considers LGBTI people to be a separate group, which can be proved by showing that the government has discriminatory attitudes or practices directed at people who are LGBTI.⁶⁴ The United States has rejected claims of LGBTI asylum seekers from Mexico on the grounds that the LGBTI community is insufficiently visible.⁶⁵

The second way is to show that they have been persecuted, or face persecution, on account of their sexual orientation or identity. For example, evidence that a country makes it criminal for an LGBTI person to have sex, prohibits them from employment, or persecutes them for having a quality that characterizes them as LGBT, such as H.I.V. or AIDS, would qualify under this claim.⁶⁶ Despite the fact that people fleeing persecution for reasons of their sexual orientation or gender identity can qualify as refugees under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, many choose not to disclose their sexual orientation for fear of discrimination due to their experiences in their home country.⁶⁷

LGBTI minors encounter a number of issues when trying to obtain asylum on the basis of their identity. First, many of them may be fleeing from family-

60. Maria Sacchetti, *ACLU Sues Trump Administration Over Detaining Asylum Seekers*, THE WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/local/immigration/aclu-sues-trump-administration-over-detaining-asylum-seekers/2018/03/15/aea245e2-27a2-11e8-bc72-077aa4dab9ef_story.html?utm_term=.b9fef1918314.

61. Sacchetti, *supra* note 60.

62. Editorial Board, *William Barr's Immigration Order is the Latest Example of Trump's Punitive Policy*, THE WASH. POST (Apr. 21, 2019), https://www.washingtonpost.com/opinions/william-barrs-immigration-order-is-the-latest-example-of-trumps-punitive-policy/2019/04/21/1e1d9dc8-6149-11e9-9412-daf3d2e67c6d_story.html?utm_term=.bf7cfab565fa; U.S. Dep't of Justice: Off. of the Att'y Gen., 27 I&N Dec. 509 (A.G. 2019), <https://www.justice.gov/eoir/file/1154747/download>.

63. Human Rights Watch, *'Do You See How Much I'm Suffering Here?'* Abuse Against Transgender Women in US Immigration Detention, (*hereinafter* Transgender Women) at 1 (Mar. 2016), https://www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf.

64. Political Asylum USA, *LGBT*, <https://www.politicalasylumusa.com/application-for-asylum/gay-lgbt/>.

65. *Id.*

66. *Id.*; UNHCR, Guidelines on International Protection No. 9 (Oct. 23, 2012), <https://www.unhcr.org/509136ca9.pdf>.

67. See Guidelines on International Protection No. 9, *supra* note 66; Del Real *supra* note 6.

based harm, and, thus, may enter the United States without their family's support, resulting in them being labeled as "unaccompanied minors" even if they are traveling with a trusted non-related adult.⁶⁸ Those who do travel with their families may be doing so while remaining "in the closet," and, thus, are unwilling to make a claim that they are fleeing persecution because of their identity, which can lessen their chances of being granted asylum.⁶⁹ Whether they are closeted or not, many LGBTI minors still struggle to prove their LGBTI identity, as many of them are still questioning what that is.⁷⁰ Trans youth, in particular, may not have been able to live according to their authentic gender. As a result, it may be extremely difficult to corroborate a minor's sexual orientation which is often proven by identifying previous relationships, which many LGBTI youth may not have experienced.⁷¹ In addition, because of either being closeted or simply because of the nature of their youth, many of them have not faced actual persecution on the basis of their LGBTI identity.⁷² Their claims thus must rest upon fear of *future* persecution, a claim much more difficult to prove.⁷³

LGBTI people also suffer violence and abuse from other migrants seeking asylum, both on their travels from their home country to where they are seeking asylum and once they are in detention centers.⁷⁴ This includes violence and threats from gang members, especially for those who await being granted asylum while in detention centers in Mexico.⁷⁵ For example, a trans Honduran woman who was attacked by a man with a machete in her hometown, stated that she had been harassed and sexually assaulted several times by men while in custody at the Otay Mesa Detention Center in San Diego.⁷⁶

In addition, LGBTI people face physical, sexual, and verbal abuse from detention center guards. There were eleven allegations of sexual abuse or assault filed by transgender ICE detainees in 2017, but many stated that they are not taken seriously when they report attacks.⁷⁷ Trans women have reported being humiliated by guards.⁷⁸ Furthermore, guards often do nothing when LGBTI people report abuse, or they threaten to place those reporting the abuse in solitary confinement.⁷⁹ Many detention centers use solitary

68. Immigration Equality, *Practice Advisory: Seeking Asylum for LGBT Children and Youth*, Vera Institute for Justice DUCS Legal Access Project, at 4, (Feb. 2011), http://www.immigrationequality.org/wp-content/uploads/2011/09/Microsoft-Word-2412_Practice_Advisory_on_LGBT_Minor_Asylum_Applicants_February_20111.pdf.

69. Immigration Equality, *supra* note 68.

70. *Id.* at 7.

71. *Id.*

72. *Id.* at 8.

73. See Immigration Equality, *supra* note 68.

74. AMNESTY INT'L, *supra* note 18, at 22.

75. *Id.* at 5.

76. Del Real, *supra* note 6.

77. *Id.*

78. *Id.*

79. *Id.*; *Transgender Women*, *supra* note 64, at iii-iv, 25.

confinement for transgender detainees “for their protection,” but the result is increased psychological harm.⁸⁰

In addition, many LGBTI people do not receive access to necessary medical care, including hormone replacement therapy and HIV-related care, as evident from Roxsana’s story.⁸¹ Thus, the many unique challenges LGBTI people face when seeking asylum is exacerbated due to the current Administration’s policies.

IV. CURRENT POLICY AND ITS EFFECT ON LGBTI PEOPLE

The current Administration has made its views on migrants and asylum seekers, especially those coming from Central and South America, very clear. In January of 2018, President Trump referred to immigrants involved in the Temporary Protected Status program (TPS), which includes El Salvador and Honduras, as coming from “shithole countries.”⁸² He has repeatedly urged more “toughness” at the border, lamenting that American troops cannot get “a little rough with migrants,” and has laughed at the suggestion of shooting migrants at the border.⁸³ This attitude is reflected in a number of policies which the Administration has issued in order to curb immigration.

One of these includes the Migrant Protection Protocols (MPP) which returns foreign individuals who are seeking admission to Mexico for the duration of their immigration proceedings.⁸⁴ This includes asylum seekers who are not from Mexico including people from El Salvador, Guatemala and Honduras.⁸⁵ The program can have disastrous effects for many LGBTI people as they are forced to stay in Mexico, which is currently experiencing historic levels of violence.⁸⁶ Many are then stuck in encampments and shelters where they are exposed to violence from gangs.⁸⁷ Furthermore, LGBTQ asylum seekers and refugees in Mexico have already received death threats,

80. *Transgender Women*, *supra* note 63, at 32-33.

81. *Id.* at 43.

82. Josh Dawsey, *Trump Derides Protections for Immigrants From “Shithole” Countries*, THE WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.18b2e1aae68b.

83. Nick Miroff, Maria Sacchetti, and Josh Dawsey, *Trump Wants ‘Toughness’ to Deter Migration, But Physical Measures Keep Failing*, THE WASH. POST (May 4, 2019), https://www.washingtonpost.com/immigration/trump-wants-toughness-to-deter-migration-but-physical-measures-keep-failing/2019/05/04/a14495a2-6d16-11e9-8f44-e8d8bb1df986_story.html?utm_term=.806b6f4231d2; Farzan, *supra* note 7.

84. Department of Homeland Security, *Migrant Protection Protocols* (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

85. Paulina Villegas and Kirk Semple, *Trump Administration’s Asylum-Seeker Policy Takes Effect*, THE N.Y. TIMES (Jan. 29, 2019) <https://www.nytimes.com/2019/01/29/world/americas/asylum-seekers.html>.

86. *Id.*

87. Azam Ahmed, et al., *Mexico Protests U.S. Decision to Return Asylum Seekers*, THE N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/world/americas/mexico-asylum-seekers.html?module=inline>.

physical abuse, and verbal harassment on a daily basis.⁸⁸

In July 2018, the Administration, through USCIS, amended the “credible fear” criteria making it much more difficult to prove.⁸⁹ Then-Attorney General Jeff Sessions changed the requirements, limiting “credible fear” asylum claims for victims of domestic abusers or gang violence to applicants able to show that their home country was unwilling or unable to protect them.⁹⁰ This is notable, as the top countries for people referred for credible fear interviews are from El Salvador, Honduras and Guatemala which, as noted, have high rates of LGBTI violence and gang participation.⁹¹ In addition, many LGBTI people are targeted by gang violence because of their identity.⁹² A report on Central American migrants who returned home after failing to gain asylum found that many asylum seekers were told before their credible fear interviews that their fear was not credible and that they would not be reunited with their families.⁹³ In addition, the percentage of cases in which credible fear was found by asylum officers dropped from 78% in February 2017 to 68% in June 2017.⁹⁴

The Trump Administration has also attempted to end the Deferred Action for Childhood Arrivals (DACA) program. DACA provides an opportunity for undocumented individuals who were brought to the country as children to receive a renewable two-year period of deferred action from deportation and to become eligible for a work permit.⁹⁵ However, the rescission of the program was prevented by the Ninth Circuit.⁹⁶ The Trump Administration has also called for ending TPS for certain countries, including El Salvador and Honduras; TPS allows immigrants from a particular country to stay and work in the United States legally when a war or natural disaster strikes their home country.⁹⁷ The Trump Administration additionally ended the Central American Minor (CAM) program which provided minors in El Salvador, Guatemala, and Honduras the opportunity to be

88. AMNESTY INT’L, *supra* note 18, at 8; Katie Sgarro, *LGBTQ Asylum Seekers Cannot Wait Safely in Mexico*, Advocate (Jan. 4, 2019), <https://www.advocate.com/commentary/2019/1/04/lgbtq-asylum-seekers-cannot-wait-safely-mexico>.

89. USCIS, PM-602-0162 (July 11, 2018).

90. Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

91. Will Weissert and Emily Schmall, “Credible Fear” for U.S. Asylum Harder to Prove Under Trump, CHI. TRIB. (July 16, 2018), <https://www.chicagotribune.com/news/nationworld/ct-credible-fear-asylum-20180716-story.html>.

92. McDonnell-Parry, *supra* note 5.

93. Center for Migration Studies and Cristosal, *Point of No Return: The Fear and Criminalization of Central American Refugees* (June 2017), <https://doi.org/10.14240/cmsrpt0617n2>.

94. Anneliese Hermann, *Asylum in the Trump Era*, Ctr. for Am. Progress (June 13, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/06/13/452025/asylum-trump-era/#fn-452025-10>.

95. Undocumented Student Program, *DACA Information*, Univ. of Cal. Berkeley (Apr. 10, 2019), <https://undocu.berkeley.edu/legal-support-overview/what-is-daca/>.

96. Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec., 908 F.3d 476 (9th Cir. 2018).

97. Dara Lind, *Trump Administration Puts End of TPS on Hold for Honduras and Nepal*, VOX (Mar. 12, 2019), <https://www.vox.com/policy-and-politics/2019/3/12/18262314/tps-honduras-nepal-lawsuit-news-status>.

considered for refugee resettlement while still in their home country.⁹⁸ Those who did not qualify were considered by USCIS to possibly enter the United States under parole status, where those who would have otherwise been automatically inadmissible due to a period of unlawful presence, would not be if they were granted advance parole.⁹⁹

One effect of the Trump Administration's attempt to rescind DACA and terminate TPS and CAM is the re-exposure of LGBTQ people to dangers that forced them to flee.¹⁰⁰ Ten percent of all DACA recipients interviewed in 2017 identify as LGBT.¹⁰¹ This especially affects Central American countries where 620,000 DACA recipients are from Mexico, El Salvador, Honduras and Guatemala.¹⁰² These policies will force many LGBTI immigrants to be turned away, deported, or coerced into involuntary return or departure. LGBTI people, in turn, could face persecution and gender-based violence upon returning to their home countries: one transgender woman's claim for asylum in the United States was denied in 2017, and when she returned to El Salvador, she was immediately subjected to extortion and gang beatings.¹⁰³ Another transgender woman, Johanna Vazquez, was kidnapped by a group of armed men at the airport after being deported back to El Salvador where she was subsequently assaulted, gang raped, and abandoned on the side of the road.¹⁰⁴ Furthermore, once deported, there is often a lack of governmental support and protection for the migrants.¹⁰⁵

Moreover, the Trump Administration issued an order denying migrants in detention centers the ability to get out on bail, leaving them stuck in indefinite detention.¹⁰⁶ This is especially concerning given the overflow of asylum seekers already being detained. Currently, detention centers run by the Immigration and Customs Enforcement are holding 50,000 migrants, which is more than Congress has authorized.¹⁰⁷ Over 100,000 migrants were

98. David Nakamura, *Trump Administration Ends Obama-Era Protection Program for Central American Minors*, THE WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/politics/trump-administration-ends-obama-era-protection-program-for-central-american-minors/2017/08/16/8101507e-82b6-11e7-ab27-1a21a8e006ab_story.html?utm_term=.a3c13117e122.

99. *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors-CAM)*, USCIS (Nov. 15, 2017), <https://www.uscis.gov/CAM>.

100. Binh X. Ngo, *Women and LGBTQ Deportees Face Compounded Dangers Upon Return*, Ctr. for Am. Progress (Aug. 10, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/08/10/454637/women-lgbtq-deportees-face-compounded-dangers-upon-return/>.

101. Binh X. Ngo, *supra* note 100.

102. *Id.*

103. Nelson Renteria, *Trans asylum-seeker killed after U.S. deportation back to El Salvador*, REUTERS (Feb. 22, 2019), <https://www.reuters.com/article/us-usa-immigration-violence/trans-asylum-seeker-killed-after-u-s-deportation-back-to-el-salvador-idUSKCN1QC03L>.

104. Binh X. Ngo, *supra* note 100.

105. Ctr. for Migration Studies & Cristosal, *supra* note 93.

106. Editorial Board, *supra* note 62.

107. *Id.* Congress has authorized only 45,274 beds through appropriations with the intent of reducing the detention population to 40,520 by the end of the fiscal year. See Ted Hesson, *Funding Bill Includes New Limits on Trump's Immigration Crackdown*, POLITICO (Feb. 14, 2019), <https://www.politico.com/story/2019/02/14/funding-bill-limits-trump-immigration-1175455>.

detained in April of 2019.¹⁰⁸ The centers are over capacity, and the Department of Homeland Security has stated they are running out of space to jail single adult migrants.¹⁰⁹

In April 2019, President Trump released a memo which proposed charging asylum-seekers fees for an asylum application and a fee for an application for employment authorization while an asylum claim is pending.¹¹⁰ This will particularly affect LGBTI asylum seekers who may have been refused employment because of their identity in their home country or are impoverished in other ways because of their identity. They will already be arriving economically disadvantaged because of this refusal of employment so it will be far more difficult for them to apply for asylum if they are further required to pay for an application.¹¹¹

President Trump also desired to cut aid to El Salvador, Guatemala, and Honduras in response to the influx of migrants and asylum seekers.¹¹² Reducing the aid to these already economically and politically struggling countries will most likely increase the number of migrants and asylum seekers as conditions at home will worsen.¹¹³ In general, President Trump's policies have led to unsafe and unsustainable conditions at the border. These policies ignore the particular challenges that LGBTI people face and have done nothing to speed up the application process for those seeking asylum

V. LEGAL SOLUTIONS TO PROTECT MIGRANTS' AND ASYLUM SEEKERS' RIGHTS

Clearly the Trump Administration's immigration policies need to be overturned because of the increasing dangers LGBTI people face from being excessively detained or returned to Mexico or their home countries when they are seeking asylum. No effort has been made to expedite these cases by, for example, funding more immigration law judges. In the meantime, migrants and asylum seekers are essentially being denied due process. Due process for asylum seekers includes being granted an interview to establish whether they have credible fear.¹¹⁴

However, there are a number of ways that the rights of LGBTI immigrants can be protected while seeking asylum. Challenges must be brought against

108. Nick Miroff, *From the Border, More Frustrating Immigration Numbers for President Trump*, THE WASH. POST (May 8, 2019), https://www.washingtonpost.com/immigration/from-the-border-more-frustrating-immigration-numbers-for-president-trump/2019/05/08/ad6ac140-71a7-11e9-9eb4-0828f5389013_story.html?utm_term=.cd1e1b5cdfc0.

109. Miroff, *supra* note 108; Editorial Board, *supra* note 62.

110. Donald J. Trump, *Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System*, WHITE HOUSE (Apr. 29, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>.

111. AMNESTY INT'L *supra* note 18, at 9 (LGBTQ people find discrimination in the workplace).

112. Samantha Raphelson, *U.S. Decision to Cut Central America Aid Could Worsen Migrant Crisis, Experts Say*, NPR (Apr. 2, 2019), <https://www.npr.org/2019/04/02/709089322/u-s-decision-to-cut-central-american-aid-could-worsen-migrant-crisis-experts-say>.

113. *Id.*

114. 8 U.S.C. §1225 (b)(1)(A)(ii) (2012).

these unsound policies on the grounds that they are unconstitutional. Once that has been done, there are a number of practical solutions that can be put into place to improve the quality of conditions at the border and address the unique challenges faced by LGBTI migrants.

A. *Ongoing Court Cases and Complaints*

A number of cases have already been filed fighting the Trump Administration's immigration policies. For instance, the Transgender Law Center and the Law Office of Andrew R. Free have filed a Notice of Wrongful Death Tort Claim in New Mexico in response to the death of Roxsana Hernandez Rodriguez in an effort to hold ICE guards accountable for Roxsana's treatment in U.S. custody.¹¹⁵ Although the New Mexico Office of the Medical Investigator released an autopsy report stating she did not suffer abuse, the Transgender Law Center and the Law Office of Andrew R. Free have maintained that ICE shirked responsibility for Roxsana's care until her death.¹¹⁶

In addition, the Migrant Protection Protocols were temporarily halted in California by a lawsuit brought by the American Civil Liberties Union and other advocacy groups who found that the Department of Homeland Security was not authorized to enact the MPP under U.S. Law.¹¹⁷ Unfortunately, a recent decision by the Ninth Circuit overturned that ruling and held that the policy could remain in place because although the plaintiffs "fear[ed] substantial injury upon return to Mexico, [...] the likelihood of harm is reduced somewhat by the Mexican government's commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals returned."¹¹⁸ This clearly disregards the actual situation in Mexico at the moment. However, there is hope that the policy will ultimately be put to a halt on another legal basis, as Judge Fletcher wrote in his concurrence: "the government is wrong [...] [n]ot just arguably wrong, but clearly and flagrantly wrong" in stating that applicants for asylum can be returned to a contiguous territory under 8. U.S.C. §1225(b)(2)(C), further calling the government's argument "baseless" and "in support of an illegal policy."¹¹⁹

The Ninth Circuit decision follows another case brought before the U.S. District Court for the District of Columbia where a preliminary injunction was granted for five of ICE's Field Offices' continued detention of individuals found to have a "credible fear" of persecution.¹²⁰ The court found that

115. Transgender Law Ctr., *Roxsana Hernandez Case Summary*, <https://transgenderlawcenter.org/legal/immigration/roxsana>.

116. *Id.*

117. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019).

118. Miriam Jordan, *Trump Administration Can Keep Sending Asylum Seekers to Mexico, Court Rules*, THE N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/asylum-seekers-trump-mexico.html>.

119. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 512 (9th Cir. 2019).

120. *Damus v. Nielsen*, 313 F. Supp. 3d 317, 343 (D.D.C. 2018)

these ICE offices were making determinations of credibility, not on an individual basis or by applying individual facts, leading to many who met the credible fear criteria to be forced to stay in detention.¹²¹ As an example of ICE's failure to consider credible fear on a case by case basis the plaintiffs included a case where a Honduran man was beaten and held at gunpoint for being openly gay.¹²²

Another immigration legal group has taken a different approach, filing a formal complaint with ICE's Enforcement and Removal Operations team accusing it of blocking detained immigrants from free legal services in response to the number of barriers that ICE has implemented.¹²³ These included not making space available for private meetings and eliminating a "walk-in" signup list to speak with counsel.¹²⁴ This demonstrates the inability of LGBTI and other migrants to access justice when their rights are being violated in detention or in relation to their asylum case in general. These efforts not only help to get justice for individuals but also draw attention to the unfair and dangerous policies that have been implemented.

B. *Policy Solutions*

Ideally, and perhaps under a different Administration, there could be a set of policies put into place that would improve LGBTI people's experience migrating and seeking asylum. The first would be to provide migrant and asylum seekers a "know-your-rights" briefing before their credible fear interview, as well as access to informed non-legal and legal assistance.¹²⁵ This is especially critical for LGBTI people who may not know they can claim asylum based on their identity as an LGBTI person. For instance, it could help them identify what sort of information they need to prove their identity or claim as well as assist minors who may have additional difficulties proving their identity in a claim.

An additional solution is to not require forced detentions, especially for those who have a credible fear of return.¹²⁶ The overcrowded detention centers are increasingly causing an unsafe place for LGBTI people, especially for trans people who are often held in solitary confinement and prevented from accessing needed legal and medical resources. Alternatives should be in place including letting those who are not a threat or flight risk into the country. Research shows that around sixty to seventy-five percent of

121. *Id.* at 341.

122. Sacchetti, *supra* note 60.

123. Letter from Andrea Meza, Dir., RAICES Family Det. Serv. Program, et al., to Deborah Achim Deputy Field Office Dir., & Melissa DeLeon, Assistant Field Office Dir., ICE Enf't & Removal Operations (May 7, 2019) (on file with author), <https://www.raicestexas.org/wp-content/uploads/2019/05/RAICES-Follow-Up-Letter-to-Achim-and-DeLeon-05-07-2019.pdf>.

124. *Id.*

125. Ctr. for Migration Studies & Cristosal, *supra* note 94.

126. *Id.*

undocumented immigrants show up for their prescribed court date.¹²⁷ The rate is even higher for asylum seekers.¹²⁸

Programs should also be put in place to make it easier for refugees to reach safety when seeking asylum by making it faster to go through application proceedings, not putting up additional barriers such as maintaining refugees and migrants to be detained in unsafe locations, and other solutions. Currently, all policies are formatted to make it as difficult as possible for a refugee to reach protection when trying to achieve asylum.¹²⁹ A concentrated approach by the United States, Mexico, and other countries in the region to make it easier for asylum seekers to reach areas of safety by expediting the application process, shortening the detention process, and aiding seekers in the transportation process itself would put less burden on those at the border who are tasked with dealing with both migrants and asylum seekers. This could be achieved through a variety of methods including not requiring payments for asylum applications which may prevent those who are in true danger from not leaving if they cannot afford it, providing humanitarian visas for those who are not eligible for refugee status but need protection, the expansion of programs such as the Protection Transfer Agreement, which includes a multi-country effort for resettlement for those who are in critical need of protection, or the reinstatement of the Central American Minors program.¹³⁰ There also should be multi-country financial and institutional assistance provided to those people who are returned to their home countries so they do not face violence and financial insecurity upon their return.¹³¹

Lastly, the United States needs to pay particular attention to vulnerable groups, especially LGBTI persons when implementing any immigration policies. The Administration should be proactively working to ensure that LGBTI people are free from abuse and assault, have access to due process, and are placed in the safest, but least restrictive situations.¹³² Organizations such as Doctors Without Borders have labeled this as a critical issue in the wider scheme of immigration issues and have urged administrations to treat LGBTI people with humanity despite their immigrant status.¹³³

VI. CONCLUSION

President Trump and his Administration have made their attitudes towards migrants and asylum seekers perfectly clear. Trump has repeatedly threatened to close the border, has called the current asylum system a “scam,” and

127. John Krusel, *Majority of Undocumented Immigrants Show Up for Court, Data Shows*, POLITIFACT (June 26, 2018), <https://www.politifact.com/punditfact/statements/2018/jun/26/wolf-blitzer/majority-undocumented-immigrants-show-court-data-s/>.

128. Krusel, *supra* note 127.

129. Ctr. for Migration Studies & Cristosal, *supra* note 93.

130. *Id.*

131. *Id.*

132. *Id.*

133. Doctors Without Borders, *supra* note 23, at 27.

has looked ways to prevent those from seeking asylum from staying in the United States.¹³⁴ These policies have catastrophic effects on LGBTI people who face physical violence and persecution from the governments in their home countries. These policies have forced LGBTI asylum seekers to make difficult choices as they decide whether they should risk the danger of traveling across the border (where they face violence and harassment from gang members and others migrants), being stuck indefinitely in detention (where they suffer further harassment and abuse), and facing higher barriers to being granted asylum, particularly if they are a minor.

Constitutional changes have already been brought on behalf of these migrants and asylum seekers. These challenges highlight the unique situation faced by LGBTI people and that there is still more to be done. Roxsana Hernandez Rodriguez died because she was forced to seek asylum because of her identity and because of the Administration's subsequent failure to protect her. It is crucial that steps are taken to make sure no other LGBTI individual suffers a similar fate.

134. John Fritze & Michael Collins, *Nielsen Resignation: What Does Trump's 'Tough Direction' Immigration Plan Look Like?*, USA Today (Apr. 9, 2019), <https://www.usatoday.com/story/news/politics/2019/04/09/donald-trump-vows-get-tougher-immigration-after-kirstjen-nielsen/3399488002/>.