

NOTES

THE SIXTH GROUND: WHY ADDING GENDER/ SEXUALITY TO THE GROUNDS FOR ASYLUM WOULD BETTER SERVE THE NEEDS OF LGBT ASYLUM SEEKERS

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ABSTRACT

Asylum law in the United States, especially the Particular Social Group (PSG) ground for asylum, has several problems that pose significant risks for LGBT asylees. The nature of the PSG designation leaves it ill-defined, provides too many elements of analysis to adequately meet these asylum seekers' needs, and provides too many opportunities for their claims to be denied based on minor procedural quirks of the PSG ground. This Note argues that the best method for meeting the needs of LGBT asylees is not through the PSG ground but through a new ground for asylum that covers gender-based persecution. Much of the existing literature on LGBT asylum focuses on contextualizing the PSG ground in a way that better protects asylees but tends to stick with the traditional "five grounds." Rather than forcing an unworkable standard to fit an asylee's needs, this Note argues that lawmakers should add a sixth ground for asylum that would bypass the issues with the PSG analysis.

By adding a sixth ground for asylum, the PSG ground would be unnecessary for LGBT asylees who claim their gender/sexual identity as their primary reason for persecution. A sixth ground would address gaps in existing case law about LGBT asylum, provide a more workable system for analyzing claims, and be less prone to executive meddling. Furthermore, a sixth ground

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for asylum would reinforce the United States' commitment to being a leader in LGBT rights.

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INTRODUCTION

On February 4, 2021, President Biden issued a memorandum affirming the United States’ support for the LGBT community and issued a series of directives to the executive branch to support the interests of LGBT people around the world.¹ One of the provisions of this memorandum directed the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to use their respective powers in asylum law to support LGBT asylees seeking refuge in the United States.² Despite these recent efforts by the Biden administration, however, there is still a significant amount of work needed, and the current asylum system set out by the 1951 Convention on Refugees is inadequate for the job. LGBT asylum seekers, as well as asylum seekers facing discrimination for gender-based violence, face unique problems in applying for refuge. Individuals in these groups are not protected from persecution in much of the world due to global norms of homophobia and sexism—even in locations that are considered secure and that are not common countries of origin for refugees.³ These problems exist, in no small part, because the global asylum system was developed to address specific problems arising well before our modern understanding of gender and sexuality during WWII and the Cold War.

This Note argues that the existing protected grounds for asylum recognized by international law are insufficient for LGBT asylum seekers, and adding a sixth ground for asylum, based on gender/sexual orientation, better serves their needs. While asylum claims based on gender and sexuality remain funneled into the “Particular Social Group” (PSG) framework, LGBT asylum seekers are forced to make their claims under a framework not designed for their needs.⁴ Furthermore, homophobia in the asylum process leads immigration officials to interpret the ambiguous existing laws in ways that cut against LGBT asylees. In light of these problems, a new ground for asylum that is better tailored to meet their needs must be created.

1. Memorandum For The Heads Of Executive Departments and Agencies, THE WHITE HOUSE (Feb. 4, 2021), <https://perma.cc/9QPE-YF9E>.

2. *Id.*

3. U.N. High Comm’r for Refugees, LGBTIQ+ Persons In Forced Displacement And Statelessness: Protection And Solutions, 3 (June 4, 2021).

4. Michael Kareff, *Constructing Sexuality and Gender Identity for Asylum through a Western Gaze: The Oversimplification of Global Sexual and Gender Variation and Its Practical Effect on LGBT Asylum Determinations*, 35 GEO. IMMIGR. L.J. 615, 618 (2021) (arguing that the PSG grounds show a fundamental misunderstanding of LGBT culture and queer theory, forcing asylees to conform to a particular vision of queerness to seek asylum and minimizing the lived experiences of asylees); *id.* at 618–19.

Part I demonstrates that the PSG ground is insufficient for protecting LGBT asylees due to its ambiguous inception, especially given how American courts have interpreted the standard. Part II delves deeper and argues that LGBT asylees continue to face significant legal barriers because of the PSG ground. As a result, a sixth ground for asylum would better address many of those concerns. Part III takes a humanitarian perspective to show how a sixth ground would support fairness for asylees undergoing the asylum process and reduce their suffering and stress through the process. Finally, Part IV explains how a sixth ground would bring the United States more in line with the practical application of refugee law in the rest of the world.

I. GLOBAL ASYLUM LAW AND PARTICULAR SOCIAL GROUP AS GROUNDS FOR ASYLUM

LGBT individuals seeking asylum in the United States today are forced to make their case using a legal standard that was developed over seventy years ago and that has been stripped down by United States courts. Following World War II in 1967, the United Nations (UN) codified the current global norms for refugees through the Convention Relating to the Status of Refugees.⁵ This multilateral treaty formed the basis of international asylum law and enshrined five specific grounds for asylum. One addition, the PSG, became somewhat of a catch-all for groups of asylees that did not conform to the other groups.

Though this flexibility can sometimes be helpful for asylum seekers, the PSG category was defined in a vague manner that led to serious questions over who should be considered a refugee. Over the past decades, the United States has tackled this problem through numerous common law decisions by the Bureau of Immigration Affairs (BIA) and Article III courts. On top of this vague UN standard, the United States has ultimately built a comparatively restrictive definition of PSG that insufficiently protects LGBT asylees.

A. *The 1951 Refugee Convention Created the Particular Social Group Grounds as a Flexible but Ambiguous Tool for Refugees*

Many of the issues in asylum law today stem from the limited scope and original purpose of the Refugee Convention of 1951. In the years following the Holocaust and other refugee crises of WWII, the Allied powers agreed to provide a system of safety and refuge for those facing discrimination in their home countries.⁶ The newly formed United Nations took charge of the initiative to create the asylum system, culminating in the Convention Relating to

5. U.N. High Comm'r for Refugees, The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 1 (Sept. 2011).

6. *Id.* at 1–2.

the Status of Refugees in 1951.⁷ This convention sought to create a unified, international approach to the global asylum process.⁸

Although it was a crucial step in establishing international norms about the treatment of refugees, the Refugee Convention was limited by the historical context of its creation. The convention defined a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁹

The first clause above proved to be a major weakness of the system as new, pressing humanitarian crises surfaced in the Cold War era. Recognizing that the Refugee Convention was created and ratified with the explicit intention of handling the global crisis created by World War II¹⁰ and to address future crises, the 1967 Protocol amended the treaty by removing the first clause to form the current global refugee regime.¹¹ Countries around the world have adopted this framework, and many nations have domestic legal standards that conform to the language of the Refugee Convention.¹²

However, defining the edges of the PSG designation has proven to be another problem since its creation. Discrimination based on race, religion, nationality, and political opinion is often more straightforward to identify, but claims that do not conform to these grounds present grave dangers to potential asylees. Because the needs of asylees often do not fit into one of the four neat boxes provided by the treaty, PSG evolves in ways that tend to cover new problems in contrast to the more directly enumerated grounds, which are far more static.¹³ The standards for a PSG are ill-defined, and many radically different groups have claimed asylum under these grounds. These groups include former gang members,¹⁴ members of

7. *Id.* at 1.

8. *Id.* at 2.

9. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

10. See U.N. High Comm'r for Refugees, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 1 (Sept. 2011), <https://perma.cc/EJ2K-D448>.

11. *Supra* note 5 at 1.

12. See, e.g., Immigration and Refugee Board of Canada, *Claim Refugee Status From Inside Canada: Who Can Apply* (Mar. 28, 2023), <https://perma.cc/HLS7-YNKS>; UK Parliament, *Refugees and Asylum-Seekers: UK Policy* (Dec 1, 2022), <https://perma.cc/9MHT-GEX4>; French Office of Protection of Refugees and Displaced People, GLOSSAIRE, <https://perma.cc/S2JG-B6H3> (last visited Oct. 8, 2023).

13. See Dep't of Homeland Security, *Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm* (Sept. 10, 2020), <https://perma.cc/RN53-PXYR> (including discussions by government attorneys on some of the problems related to using the PSG grounds).

14. See, e.g., *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).

clan groups,¹⁵ and people who have suffered from domestic abuse.¹⁶ PSG is also the standard ground for which LGBT applicants from around the world apply for asylum.¹⁷

Despite the breadth of application, the PSG ground remains ill-defined and malleable due to its inclusion as an afterthought in the Refugee Convention. Initial drafts of the UN Convention on Refugees contained only the first four grounds for asylum: race, religion, national origin, and political opinion.¹⁸ At the suggestion of the Swedish representative to the convention, the committee added PSG as the fifth ground for asylum.¹⁹ The record is unclear on what the drafters intended when they included this ground as there was no debate on its inclusion, and the committee agreed upon the amendment unanimously.²⁰ Furthermore, the amendment lacks drafter's notes or comments on its inclusion. Thus, scholars can only hypothesize the original intent of the provision,²¹ leaving much up for interpretation by the courts and other entities responsible for interpreting immigration policy.

Given the context of the Holocaust, it is reasonable to assume that the framers of the convention intended the PSG ground as a catch-all for the other groups that were persecuted by the Nazis, such as Romani, prisoners of war, and the mentally and physically disabled.²² Indeed, given the Nazis' persecution of members of the LGBT community, considering members of the LGBT community a PSG appears to be consistent with the original meaning of the PSG designation.²³ However, without drafter's notes, comments, or recorded debate, the intention behind the text of the Convention remains ambiguous. As a result, courts in the United States have been able to interpret the PSG grounds more narrowly.

B. *Because of the Ambiguity of the PSG Status, Common Law in the United States has Interpreted the Ground in a Restrictive Manner*

United States courts have interpreted the PSG ground in a limited manner based on the requirements of immutability and visibility. The PSG ground is primarily understood through the judicial decision in *Matter of Acosta*,²⁴ as

15. See, e.g., *In Re H-*, 21 I. & N. Dec. 337, 337 (B.I.A. 1996).

16. See, e.g., *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

17. See U.N. High Comm'r for Refugees, Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 2, 7, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

18. Natalie Nanasi, *Death of the Particular Social Group*, 45 N.Y.U. REV. L. & SOC. CHANGE 260, 266 (2021).

19. *Id.*

20. *Id.*

21. *Id.*

22. See United States Holocaust Memorial Museum, *Who Were The Victims?*, <https://perma.cc/Y6LE-7V87> (last visited Oct. 20, 2023).

23. See United States Holocaust Memorial Museum, *Nazi Persecution of Homosexuals*, <https://perma.cc/V9VQ-EXD3> (last visited Sept. 27, 2023) (detailing just some of the persecution that members of the LGBT community faced in the Nazi regime).

24. *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985).

no statute or legislative guideline lays out a PSG's confines.²⁵ In *Acosta*, the BIA held that "persecution on account of membership in a particular social group [means] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."²⁶ Furthermore, the court held that membership in the group is something that the asylee cannot or should not change—thus setting the standard for immutability.²⁷ The contours of the law depend on the circuit where the asylee is applying for relief since rulings in different circuits can often have profound impacts on whether or not someone is granted asylum.

One of the key questions from the *Acosta* standard concerns the definition of an "immutable characteristic." The case itself sheds some light on the idea. The BIA denied asylum to a Salvadoran man who was a member of a taxi service collective being targeted by the government; the BIA found his occupation was not immutable because his job title was within his power to change.²⁸ Fringe cases regarding issues such as domestic violence and gang membership show significant unresolved circuit splits about the edges of the standard.²⁹ While a few areas have well-defined boundaries (family groups are usually considered immutable,³⁰ whereas employment is not³¹), there is significant room for interpretation when deciding "immutability."

The *Acosta* standard alone defined PSG until 2006, when the BIA added "social distinction" to the PSG analysis and thus created the visibility requirement in *In Re C-A*.³² In addition to the *Acosta* factors, an asylee must be a member of a community that is "recognizable" as a discrete group by others in the society and which must have well-defined boundaries.³³ Yet many of the groups that asylees identify with are concealed from society due to persecution—persecution being the very reason why they may be seeking asylum. Writing for the Seventh Circuit, Judge Posner concluded that the "social visibility requirement makes no sense" and rejected it as an element for PSGs.³⁴ He reasoned that "a homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for

25. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. (The Refugee Act of 1980 is the primary legislative source for refugee law, but it does not dive into the definition of the Particular Social Group, despite naming it as one of the grounds for asylum).

26. *Acosta*, 19 I. & N. Dec. at 233.

27. *Id.* at 233–34.

28. *Id.* at 234.

29. Compare *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95–96 (1st Cir. 2020), with *Gonzales-Veliz v. Barr*, 938 F.3d 219, 228–35 (5th Cir. 2019). (both cases were issued during Att'y Gen. Sessions's injunction on domestic violence-based asylum claims. In the First Circuit, they disregarded the Attorney General's decisions and set a near per se rule allowing gender-based claims. On the other hand, the Fifth Circuit rigidly applied *Matter of A-B-*, a decision that will be discussed at some length later in the Note.

30. See, e.g., *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009). But see *Matter of L-E-A-*, 28 I. & N. Dec. 304 (Att'y Gen. 2021) ("*L-E-A- III*") (holding that family was not considered sufficient grounds, showing that even the exemplar of the PSG category can be insufficient).

31. See *Acosta*, 19 I. & N. Dec. at 233–34.

32. *In Re C-A-*, 23 I. & N. Dec. 951, 951 (B.I.A. 2006).

33. *Id.* at 959.

34. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible.”³⁵ While the BIA later clarified that groups do not need to meet the requirements for ocular visibility, the standard still requires that the community as a whole recognize the social group as separate from the rest of society.³⁶ In practice, immigration lawyers suggest that clients highlight experiences where they have actually been endangered in their community to ensure immigration judges can recognize their LGBT status.³⁷ The United States’ additional requirements for the PSG ground have made immigration difficult for many groups, but United States case law is troubling for LGBT asylees in particular for the reasons expanded on below.

II. LGBT ASYLUM SEEKERS FACE A MULTITUDE OF LEGAL BARRIERS TO RELIEF WHICH COULD BE MITIGATED OR REMOVED THROUGH THE ADDITION OF ANOTHER GROUND FOR ASYLUM

LGBT asylum seekers face problems that differ from those faced by other refugees.³⁸ Some of these difficulties come from requiring members of the LGBT community to fit their claims into the PSG analysis, whereas others are compounded by homophobia in American society at large.³⁹ Not only is the basis of LGBT asylum law shaky at best, but developments in the PSG designation independent of LGBT claims have also made life more difficult for asylees. In addition, recent decisions by the Trump Administration have set dangerous precedents for LGBT claimants.⁴⁰ While adopting a sixth ground for asylum would not solve all these problems, it could go a long way toward ensuring that immigration judges and advocates would have the tools to handle these challenges.

A. *The PSG Analysis is Flawed as a Basis for LGBT Claims Because Matter of Toboso-Alfonso as a Precedent is Outdated and Insufficient*

In the United States, those who are gay, lesbian, and bisexual have been considered a cognizable group in PSG claims since *Matter of Toboso-Alfonso*.⁴¹ In this 1990 decision, the BIA reviewed the withholding of removal claim of a man who had escaped Cuba following persecution by the Union of Communist Youth after he was identified as a homosexual.⁴² The

35. *Id.*

36. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

37. *See Challenging Asylum Cases*, Immigration Equality, <https://perma.cc/XQM8-T99Y> (last visited Apr. 2, 2023) (describing practitioner suggestions that tackle the problem of LGBT asylees who do not meet traditional stereotypes and suggesting ways practitioners can demonstrate to judges that they are LGBT and will be recognized as such if they return to their community).

38. *See* ARI SHAW, WINSTON LUHUR, INGRID EAGLY & KERITH J. CONRON, *LGBT ASYLUM CLAIMS IN THE UNITED STATES 2* (WILLIAMS INSTITUTE 2021).

39. *See infra* pp. 13–15.

40. *See* SHAW ET AL., *supra* note 38, at 4.

41. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

42. *See id.* at 819–20.

BIA affirmed the lower court's decision granting a withholding of removal based on the finding that homosexual identity represented a cognizable social group and was therefore proper grounds for asylum.⁴³ The Ninth Circuit held in 2000 that transgender status similarly constituted a PSG, and this rule has broadly been followed outside of that circuit.⁴⁴

While this was a landmark case for LGBT asylum seekers, the holding is rooted in the landscape of LGBT rights in the United States at the time and serves as a problematic ground for relief because of its reliance on the conduct/identity distinction.⁴⁵ Since Cuba was persecuting homosexuals on the basis of their *identity*, rather than enforcing a law that was based on health measures banning sodomy or same-sex *conduct*, Cuba's treatment of the asylee was deemed impermissible.⁴⁶ At the time, *Bowers v. Hardwick*, which explicitly condoned anti-sodomy laws focused on homosexual conduct in the United States, was controlling. This decision by the BIA thus avoided challenging *Bowers* by playing into the conduct/identity distinction.⁴⁷

However, the decision now leaves a significant gap in reasoning with the potential for abuse by homophobic immigration judges. All but one of the top six countries of origin for LGBT asylum seekers currently have laws that explicitly ban homosexual conduct.⁴⁸ Many of these countries have no corresponding laws regarding expression of sexual orientation.⁴⁹ Under a rigid interpretation of *Matter of Toboso-Alfonso*, a gay man seeking asylum from Nigeria would be unable to find relief in the United States because Nigerian law punishes same-sex *conduct* and not expression.⁵⁰

It is important to keep in mind that the discretionary nature of immigration decisions means judges often do not apply the rules rigidly, and *Toboso-Alfonso* is generally read more favorably for LGBT asylees. Every asylum determination is fact-dependent and depends heavily on the judge.⁵¹ In fact, an LGBT asylum seeker will not usually face the problems highlighted above. Dicta in other cases indicate that the blackletter law from *Matter of Toboso-Alfonso* is that members of the LGBT community are considered a PSG when seeking asylum.⁵² However, the weaknesses of *Matter of Toboso-*

43. *Id.* at 823.

44. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000); *see also Doe v. Att'y Gen. of the U.S.*, 956 F.3d 135, 142 (3d Cir. 2020); *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 947 (11th Cir. 2010).

45. *Toboso-Alfonso*, 20 I. & N. Dec. 819 at 821 (1990).

46. *Id.*

47. *See Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986) (reasoning that there is no fundamental right to engage in homosexual sodomy thus affirming state bans on homosexual activity); *but see Toboso-Alfonso*, 20 I. & N. Dec. 819 at 821 (1990) (focusing on actions considered First Amendment issues, namely the expression of sexual identity, to avoid challenging previous Supreme Court decisions on homosexual activity).

48. *Asylum claims on the basis of sexual orientation 2021*, HOME OFFICE, <https://perma.cc/6VED-GCC7> (Sept. 23, 2022); #OUTLAWED “*The Love that Dare Not Speak its Name*,” HUM. RTS. WATCH, <https://perma.cc/PDK7-9HVC> (last visited Apr. 2, 2023).

49. #OUTLAWED “*The Love that Dare Not Speak its Name*,” *supra* note 48.

50. Criminal Code Act (1990) Cap. (21), § 214 (Nigeria).

51. 8 C.F.R. § 1003.10(b)(9) (2022).

52. *See, e.g., Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006).

Alfonso remain important because it is the final authority on sexuality in asylum cases. While circuits have their respective laws on the matter, the BIA is still bound by this 1990 decision distinguishing identity from conduct despite its limitations. Therefore, adopting a legislative solution, such as adding a sixth ground for asylum, would address the weaknesses of *Toboso-Alfonso* and give more explicit and unequivocal instruction to immigration judges.

B. *Social Visibility and Immutability Requirements Cause Significant Problems for Closeted LGBT Asylees, as They Often Cannot Demonstrate Their Social Visibility*

While creative interpretation of precedent poses only a potential risk, social visibility requirements pose a very real and present risk to LGBT asylees. Social visibility, paired with the requirement that asylees have already faced persecution in their home country, means that it is effectively impossible to claim asylum as a member of the LGBT community unless the person has been outed, meaning the community in their home country knew of their true gender or sexuality.⁵³ In many countries, same-sex intimacy carries a death penalty, and there is widespread violence against people who merely identify as LGBT.⁵⁴ Uganda, for example, has recently banned LGBT identification in any form. This ban includes promoting and abetting homosexuality as well as conspiracy to engage in homosexuality.⁵⁵ Simply applying for asylum outside of Uganda as a member of the LGBT community means that an applicant will have already violated Ugandan law and could be subject to imprisonment upon their return to the country.⁵⁶ Refugees who are completely closeted will have a difficult time proving that they are recognized as a separate group by society.

Sempagala v. Holder highlights the problems closeted asylees face by showing that being closeted in one's home country can lead to consequences in an asylum hearing.⁵⁷ A bisexual man from Uganda applied for asylum in the United States due to the significant persecution faced by LGBT individuals in Uganda.⁵⁸ He freely admitted to the court that he could not provide evidence that people in Uganda knew of his sexuality because he had purposefully kept it secret from his community.⁵⁹ The immigration judge determined that he had no well-founded fear of future persecution, and his denial was upheld—he was thus eligible for deportation to Uganda.⁶⁰

53. See *Sempagala v. Holder*, 318 F. App'x 418, 420 (6th Cir. 2009).

54. #OUTLAWED "The Love that Dare Not Speak its Name," *supra* note 48.

55. Larry Madowo, *Uganda Parliament Passes Bill Criminalizing Identifying as LGBTQ, Imposes Death Penalty for Some Offenses*, CNN NEWS (Mar. 22, 2023), <https://perma.cc/ARN4-H26P>.

56. Charity Ahumuza Onyoin, *A grim return: post-deportation risks in Uganda*, FORCED MIGRATION REV. 54 (2017).

57. See generally *Sempagala*, 318 F. App'x 418 (2009).

58. *Id.* at 421.

59. *Id.*

60. *Id.* at 423.

Unfortunately, the process creates a catch-22 for LGBT asylum seekers because they are required to out themselves in immigration courts in order to receive any kind of relief. This predicament puts them at risk if their case is denied, especially if they are deported back to their home country. Thus, while it is possible for LGBT refugees to meet the well-founded fear of future persecution element of the law, it is difficult for them to prove they meet the visibility requirements in the PSG analysis.⁶¹ For this reason, a separate ground for asylum, removing the social visibility requirement, is critical for LGBT asylees who are closeted in their home countries.

The immutability and social visibility requirements also cause significant problems for bisexual individuals and people who form relationships with partners of multiple gender identities. In *Fuller v. Lynch*,⁶² the court determined that an asylum seeker was lying about his sexual orientation as a bisexual man and dismissed letters from three different ex-lovers that were presented as evidence, in part because the man was married to a woman.⁶³ The dissent stated that the trial judge “does not know the meaning of bisexuality.”⁶⁴ As recently as 2022, an immigration judge issued an opinion finding that a Jamaican man was falsifying claims about his bisexuality and, therefore, not a member of a cognizable PSG; the Third Circuit overturned this decision, saying that the lower court should have gone farther in examining all the evidence before issuing an adverse decision.⁶⁵ This relatively recent case demonstrates how immigration judges apply the PSG standard differently for bisexual individuals.

The visibility requirement is a feature exclusive to the PSG analysis. Curiously, other grounds for asylum have no such requirements beyond the burden of proof for past persecution or a well-founded fear of future persecution. Even the political opinion ground does not require that the holder of the opinion form some cognizable “group” within their home country.⁶⁶ Thus, adopting a new ground for asylum would remove a significant impediment to LGBT claims by allowing people to rest their claims more heavily on the “well-founded fear of future persecution” element of asylum, rather than proving that individuals in their community would recognize them.

61. See *Sempagala*, 318 F. App’x 418, 421 (2009) (providing information about the court’s understanding in PSG claims because nowhere in the decision do they say that the applicant’s testimony was not credible and instead are establishing a higher standard for a PSG based claim than claims made under other grounds); see also 8 C.F.R. § 208.13(a). It is firmly established that testimony alone can be sufficient to allow for an asylum claim.

62. See generally *Fuller v. Lynch*, 833 F.3d 866 (7th Cir. 2016).

63. *Id.* at 869.

64. *Fuller v. Lynch*, 833 F.3d 866, 874 (7th Cir. 2016) (Posner, J., dissenting).

65. *K.S. v. Att’y Gen. of United States*, No. 20-3368, 2022 WL 39868 (3d Cir. 2022).

66. Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 119 (4th ed. 2021).

C. *Matter of A-B-*, a Recent Decision by the Trump Administration, Could Potentially be Used to Target LGBT Asylees and Show How Asylum Law is Vulnerable to Executive Meddling

The Trump Administration highlighted the flaws in the asylum system by testing the limits of accepted law with *Matter of A-B-*, one of the most controversial BIA decisions in decades.⁶⁷ Until 2017, asylees could seek refuge in the United States by claiming they were escaping domestic abuse in their home country.⁶⁸ *Matter of A-R-C-G-* ruled that “Guatemalan women who were not able to leave their husbands” was a sufficient PSG to stand as grounds for asylum.⁶⁹ If they could demonstrate that the government was unwilling or unable to prosecute their abusers, they had a valid claim for asylum under the PSG designation.⁷⁰ Following the ruling in *Matter of A-R-C-G-*, representatives of domestic violence victims from around the world began working on ways to use this legal theory to seek asylum in the United States.⁷¹

The law changed in 2017 when then-Attorney General Jeff Sessions issued the decision in *Matter of A-B-* where he held that the group of “Guatemalan women who were not able to leave their husbands” was not sufficient to be a PSG.⁷² Furthermore, the lack of state action was a major factor in the determination.⁷³ The decision in the case was unusual because Attorney General Sessions directed the BIA decision rather than having the BIA issue the decision themselves.⁷⁴

Attorney General Merrick Garland overturned *Matter of A-B-* in 2021, but the controversy surrounding the case has not died, leaving the issue far from settled.⁷⁵ A number of circuits have ignored the Biden Administration’s new directions and have continued to deny asylum for women with domestic violence claims.⁷⁶ On the other hand, some courts have moved in the other direction and have come close to recognizing victims of gender-based violence as

67. See Joel Rose, *The Justice Department Overturns Policy That Limited Asylum for Survivors Of Violence*, NPR (June 16, 2021), <https://perma.cc/6F2X-HGY5>.

68. See *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

69. *Id.*

70. *Id.*

71. Recent Adjudication, *Asylum Law—Membership in A Particular Social Group—Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement: Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), 128 HARV. L. REV. 2090 (2015).

72. *Matter of A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018).

73. *Id.* at 337–38.

74. 20 Am. Jur. 2d Courts § 129 (2023) (explaining the situations in which Att’y Gen. opinions are binding).

75. *Matter of L-E-A- III*, 28 I. & N. Dec. 304 (Att’y Gen. 2021).

76. See *Murillo-Oliva v. Garland*, No. 21-3062, 2022 WL 14729879 (6th Cir. Oct. 26, 2022) (holding that claims that were denied during the *A-B-* regime did not apply *L-E-A* on appeal); see also *Penalzoza-Megana v. Garland*, No. 21-60363, 2022 WL 2315884 (5th Cir. June 28, 2022) (refusing to reevaluate a case based on *A-B-*).

a per se PSG.⁷⁷ Immigration practitioners are currently scrambling to determine what is and is not the law in their jurisdiction, and immigration lawyers, government attorneys, and immigration judges are often unsure of what the applicable law is. This uncertainty has led to an uneven and unequal application of asylum law throughout the country, and it demonstrates how vulnerable the PSG category is to changing executive administrations.

Domestic violence and immigration advocates widely panned Attorney General Sessions's decision in *Matter of A-B*, but LGBT advocates were similarly disturbed about the possible implications for their community.⁷⁸ Just as *Matter of A-B* was made binding by Attorney General Sessions, *Matter of Toboso-Alfonso* was made binding by Attorney General Reno in 1994: The decision could be removed immediately at the whim of the next Attorney General,⁷⁹ leaving LGBT asylum seekers at the mercy of whoever happens to be in the White House at that point in time. Attorney General Sessions took a far more active role in determining BIA policy than previous administrations.⁸⁰ Under his supervision, Attorney General Sessions used his appointment power to write more BIA decisions in 2018 than in the last ten years combined.⁸¹ With the political right taking a more active role in dictating immigration policy through executive action, members of the LGBT community are rightfully concerned about what these developments could mean.

D. *The Private/Public Distinction Laid Out in Matter of A-B- Creates Another Challenge for LGBT Asylum Seekers Targeted by Non-State Actors*

Another troubling feature of *Matter of A-B-* is the emphasis on private versus public violence. While refugee law was initially targeted at state actors, this distinction proved impractical and insufficient to meet the needs of asylum seekers who were being oppressed by other groups.⁸² United States asylum law provides that if the government of the asylee's home country is "unwilling or unable" to protect them, they may claim asylum.⁸³ While the law clearly provides this protection, as a practical matter it is significantly

77. See De Pena-Paniagua v. Barr, 957 F.3d 88, 93–94 (1st Cir. 2020); see also Comment, *Asylum Law-Particular Social Group-First Circuit Indicates Receptiveness to Gender Per Se Social Groups - De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020), 134 HARV. L. REV. 2574, 2576–77, 2581 (2021).

78. Press Release, Off. of Dianne Feinstein and Kamala D. Harris, Feinstein, Harris, *Colleagues Call on Sessions to Uphold Protections for LGBTQ Asylum Seekers Fleeing Persecution* (May 23, 2018); Florence Project, *Our Statement on the Attorney General's Decision in the Matter of A-B-*, FLORENCE PROJECT (Jan. 18, 2019), <https://perma.cc/Y729-H286/>.

79. Nora Snyder, *Matter Of A-B-, LGBTQ Asylum Claims, and the Rule Of Law In The U.S. Asylum System*, 114 NW. UNIV. L. REV. 809, 823–24 (2019).

80. *Id.* at 833–34.

81. *Id.*

82. Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 442 (2021).

83. *Id.*; see also 8 U.S.C. § 1101(a)(42)(A).

more difficult to prove persecution by non-state actors.⁸⁴ This forms a significant problem, as many members of the global LGBT community face discrimination not from their governments but from non-state actors that the government does not wish to control.⁸⁵ For example, Iraq is one of the major countries of origin for LGBT asylees arriving in the UK,⁸⁶ even though homosexuality is not technically illegal in Iraq.⁸⁷ Despite this de jure legality, LGBT Iraqis face violence at the hands of armed groups and many non-state actors. Armed Islamist groups such as ISIS and Hezbollah specifically target those who are gay and lesbian, as members of state security forces often ignore abuses against the LGBT community.⁸⁸ If *Matter of A-B-* ignores action by non-state actors, then members of the LGBT community across the world are at risk.

Although the private/public actor distinction exists for other grounds beyond PSG, courts tend to be less deferential regarding PSG claims. Case law about the exact standard for government inaction varies wildly based on the circuit,⁸⁹ and the repeal of *Matter of A-B-* did not determine appropriate standards as Attorney General Garland's opinion simply vacated the previous ruling.⁹⁰ In *A-B-*, the court conformed with the incredibly high *Galina v. INS* definition of persecution, requiring the foreign government to be "completely helpless" in assisting someone for its actions to amount to persecution.⁹¹ In contrast, in *Mashiri v. Ashcroft*, a nationality-based claim, the court found in favor of an Afghani family in Germany who had been targeted by Neo-Nazi groups.⁹² This case did not meet the Ninth Circuit's standard for state violence, that violence "completely untethered to a governmental system does not afford a basis for asylum," but relief was granted anyway without a discussion of the standard.⁹³ Nothing close to the "completely helpless" PSG requirement was applied.

Thus, courts appear to be more hesitant about granting relief for violence by non-state actors in PSG claims compared to other claims (like nationality in *Mashiri*). One plausible reason is that because PSG is so ill-defined as a category, judges are stricter in their reading of requirements to avoid setting

84. Ellison & Gupta, *supra* note 82, at 441.

85. *Iraq: Impunity for Violence Against LGBT People*, HUM. RTS. WATCH 2022, <https://perma.cc/GM8C-U4YF> (last visited Oct. 4, 2023).

86. *Asylum claims on the basis of sexual orientation 2021*, HOME OFFICE (Sept. 23, 2023), <https://perma.cc/7548-VHYB>.

87. *Foreign travel advice Iraq*, HOME OFFICE 2 (Sept. 26, 2023), <https://perma.cc/G5NN-FYZW>.

88. *Id.*

89. See *Matter of A-B-*, 28 I. & N. Dec. 199, 201 (Att'y Gen. 2021) (discussing the wide diversity of opinions which discuss the relevant standard and citing *Guillen-Hernandez v. Holder*, 592 F.3d 883, 886–87 (8th Cir. 2010); *Kere v. Gonzales*, 252 F. App'x 708, 712 (6th Cir. 2007); *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006); *Hor v. Gonzales*, 421 F.3d 497, 501–02 (7th Cir. 2005); *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007), thus showing the different standards for evaluating persecution by non-state actors).

90. *Matter of L-E-A- III*, 28 I. & N. Dec. 304 (Att'y Gen. 2021).

91. *Id.*; *Matter of A-B-*, *supra* note 89, at 202.

92. See *Mashiri v. Ashcroft*, 383 F.3d 1112, 1123 (9th Cir. 2004).

93. See *id.* at 1119–23.

broad precedents. Therefore, the very ambiguity of the PSG definition leads judges to be stricter in application. While there is no guarantee that LGBT victims of private violence would fare better under a sixth ground of gender-based analysis than under the PSG analysis, it is possible that judges would feel more comfortable granting relief under a legal standard that is better defined.

III. EVEN BEYOND DIRECT LEGAL BENEFITS, PRACTICAL PROBLEMS OF ADMINISTRABILITY AND FAIRNESS TO LGBT ASYLEES, SUCH AS EASE OF LITIGATION AND IMPLICIT BIAS, WOULD BE IMPROVED THROUGH A SIXTH GROUND FOR ASYLUM

The complications created by the current PSG standard serve as an impediment for both immigration practitioners and pro se litigants in immigration courts.⁹⁴ Beyond the legal challenges discussed above, adding gender as a sixth ground would have the added humanitarian benefit of sparing applicants the pain of needing to understand one of the most complicated areas of asylum law: the PSG determination.⁹⁵ PSG case law represents a significant issue for pro se litigants, and this complication is an undue burden which would not be present in cases based on the more straightforward grounds. A sixth ground would help LGBT petitioners craft claims as well as facilitate judicial throughput, making the appeals process easier and more transparent.

From the point of view of physicians, adding gender as a sixth ground would be one of several reforms Congress should consider for the benefit of asylees and their mental health.⁹⁶ A faster and less painful process for seeking asylum would limit the amount of questioning needed and would help alleviate some of the trauma inherent in the asylum process.⁹⁷ Most often, people seek asylum as the last resort. Denial of claims is a psychologically damaging event, and refugees who are denied asylum often face significant risks upon returning to their country of origin.⁹⁸ The risk of outing oneself in the immigration process further increases the potential danger back home.⁹⁹ By publicly declaring their gender identity at trial, applicants thus open themselves up to significant risk—both legal and psychological.

In the interest of fairness to asylees, a sixth ground could reduce implicit bias in the asylum system. Immigration proceedings in the United States give strong deference to the immigration judges who are hearing the cases. This means that applications for asylum and their results can vary wildly based on

94. See *Adding “Gender” as a Sixth Ground of Asylum Frequently Asked Questions*, TAHIRIH JUST. CTR. 222 (Apr. 2021), <https://perma.cc/BE2N-ASBG>.

95. See *id.*

96. Physicians for Human Rights, *Medical Evidence Highlights Urgency to Restore and Expand Legal Protections for Survivors of Domestic and Gang Violence who Seek Asylum in the United States*, PHYSICIANS FOR HUM. RTS. (June 9, 2021), <https://perma.cc/U4HS-NG8X>.

97. See *id.*

98. See *id.*

99. See *supra* note 54.

the judge in question. The difference is so extreme that some judges have over 90% grant rates for asylum claims, while others hover around 5%.¹⁰⁰ This problem can rear its head for asylum seekers who face homophobic judges who abuse their discretion. For instance, in two separate occasions, the Second Circuit overturned decisions by one judge regarding claims by gay and bisexual men.¹⁰¹ In the first instance, the court largely rooted its decision in a response to the issues of law upon which the judge based his denial.¹⁰² In the second case, the court pointed its criticism towards the judge's candor in the courtroom and treatment of the opponent in cross-examination.¹⁰³ The judge made numerous disparaging remarks about the appellant's sexuality and went so far as to make demeaning remarks about his genitalia and sexual performance.¹⁰⁴ The Second Circuit recommended that the judge be taken off future cases with LGBT applicants, arguing that allowing him to continue hearing these cases would not be in the interest of justice or the law.¹⁰⁵

While it is commendable that the Second Circuit reprimanded this specific immigration judge for his continued egregious behavior, it is not possible for the circuit courts to review all claims for potential bias. There are over six hundred immigration judges across sixty-eight immigration courts.¹⁰⁶ Furthermore, many people who apply for asylum are represented pro se.¹⁰⁷ Asylees who lack the means to obtain counsel likely lack the knowledge and capacity to take an appeal all the way to a court of appeals. Thus, it is important to tackle bias at the immigration judge level.

Implicit bias plays a role in immigration proceedings, just as it does in other areas of law.¹⁰⁸ However, this is particularly problematic in asylum, as immigration judges play a more active role in investigating the case than in more traditional courtroom settings, as they have the power to interrogate, examine, and cross-examine witnesses.¹⁰⁹ The power of immigration judges to cross-examine means they often serve as a second government attorney against the applicant, and judicial cross-examination is often the primary method of determination for their cases. A sixth ground for asylum would not eliminate prejudice against LGBT asylum seekers but would require the judges to be aware that members of the LGBT community must be

100. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022*, TRAC (Oct. 26, 2022), <https://perma.cc/QJ2Y-SZF2>.

101. *Id.*

102. *See generally* Walker v. Lynch, 657 F. App'x 45 (2d Cir. 2016).

103. Brown v. Lynch, 665 F. App'x 19, 21 (2d Cir. 2016).

104. *Id.*

105. *Id.* at 21.

106. OFF. CHIEF IMMGR. JUDGE, DEPT. OF JUST., <https://perma.cc/XU32-5VRC> (last visited Apr. 2, 2023).

107. Cong. Rsch. Serv., *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs* (Jul. 6, 2022), <https://perma.cc/5CKC-DK4G>.

108. *See generally* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey & Justin Levinson, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

109. *See* 8 C.F.R. § 1003.10 (2020) (detailing the investigatory powers of immigration judges).

considered in determining who counts as a refugee. Hearing “or gender/sexuality” every time an applicant or their counsel read the standards for asylum would reinforce the idea in their mind, as research has shown that repeated exposure to exemplars of behavior can strengthen ideals and weaken bias.¹¹⁰ Judges who are repeatedly reminded that gender-based claims are exemplars in the law may go a long way toward reducing implicit bias, which could result in better outcomes for LGBT asylees.

One of the greatest benefits of reconceptualizing gender and sexuality-based claims comes from visibility. Framing claims in terms of problems that are facing LGBT individuals is more humanizing than approaching them from the point of view of problems that people face because they are members of a distinguishable group of people. Beyond the practical legal reasons for adding a sixth ground, there is value in the legal system recognizing that the government understands individuals’ problems. Writing about the problems women face while applying for asylum, immigration law scholar Talia Inlender argued that a sixth ground would empower women to seek redress for what has happened to them based more directly on who they are.¹¹¹ It would recognize the universality of harms that occur against women and signal the government’s drive to fix and eliminate these harms.¹¹² Similarly, adding gender/sexuality as a sixth ground would signal to the world that the United States is looking to be a leader in protecting the rights of the LGBT community.

IV. ADDING GENDER/SEXUALITY WOULD PROTECT THE INTENT OF THE REFUGEE PROTOCOLS

One of the principal benefits of adopting a sixth ground for asylum would be to bring United States protections for LGBT people in line with the protections required by international law. Most other countries are not as strict as the United States in their application of the PSG determination. They take a broader approach to allowing individuals relief on PSG grounds. The United Nations High Commissioner for Refugees held a conference in 2002 to better define the PSG determinations, as the UN noted that there were wide discrepancies in how protocol parties performed their duties to refugees applying under PSG grounds.¹¹³ This committee resulted in a series of guidelines and

110. Félice van Nunspeet, Naomi Ellemers & Belle Derks, *Reducing Implicit Bias: How Moral Motivation Helps People Refrain from Making “Automatic” Prejudiced Associations*, TRANSNAT’L ISSUES PSYCH. SCI. 1, 383 (2015).

111. Talia Inlender, *Status Quo, or Sixth Ground: Adjudicating Gender Asylum Claims*, MIGRATIONS AND MOBILITIES: CITIZENSHIP BORDERS, AND GENDER, 366, 367 (Seyla Benhabib & Judith Resnik eds., N.Y.U. Press, 2009).

112. *Id.* at 366.

113. See U.N. High Comm’r for Refugees, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 10. U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

recommendations that would better help member states meet their obligations.¹¹⁴ One recommendation was for countries to adopt an either/or approach to the question of social visibility and immutability rather than requiring both, as the United States does.¹¹⁵ They emphasized the inclusive nature of the PSG designation, proposing no additional requirements for cohesiveness nor any requirements that all members of the same group must face danger.¹¹⁶ They put no limits on size—for instance, they have “women” as a potential PSG, so long as women in a particular society demonstrably face danger.¹¹⁷

Other peer nations and organizations find gender-based claims per se acceptable. The European Union (EU) Qualification Directive now provides in Article 10(1)(d) that “[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”¹¹⁸ This is an improvement from their previous standards, making it easier for people to launch gender-based claims in the EU.¹¹⁹ Similarly, New Zealand has, through common law, implemented a per se rule on gender-based claims and has recognized LGBT PSG status through a gender focused lens.¹²⁰ Mexico has gone a step further and explicitly enshrined gender as a sixth ground.¹²¹ These are just a few of the countries which have, in recent years, changed their law to facilitate gender-based asylum claims.

Opponents of the sixth ground say that this would bring the United States further away from international law (which only lists five enumerated grounds for asylum) and muddy the water of what constitutes a ground for relief.¹²² They claim that gender is already encompassed by the text and the original meaning of the PSG grounds and that countries should look to UN guidelines rather than creating new grounds.¹²³ While these concerns have some merit, from the point of view of practicality, the PSG ground is overly broad, and judges are faced with advocates arguing new PSGs every day. In a PSG-based scheme, every new understanding of gender must be tied back to the PSG definition and adjudicated, whereas in a scheme where gender and sexuality are explicitly protected, an immigration judge must simply tie the applicant’s sexuality or gender identity to “gender/sexuality” as a ground.

114. *Id.* ¶ 1.

115. *Id.* ¶ 12.

116. *See generally id.*

117. *Id.* ¶ 12.

118. Goodwin-Gill & McAdam, *supra* note 66, at 110.

119. *See id.*

120. *See* S-Y-, Refugee Status Appeals Authority N.Z. [RSAA] Refugee Appeal No. 915/92, 29 August 1994 at 9–10 (creating a per se rule allowing gender to be considered a PSG); Refugee Appeal No. 74665/03 RSAA No. 74665/03, ¶ 61, 7 July 2004.

121. UNHCR Mexico, *Who is Considered a Refugee?*, UNHCR MEX, <https://perma.cc/L35Z-8GB4> (last visited May 15, 2023).

122. Sabrineh Ardalan & Deborah Anker, *Re-setting Gender-Based Asylum Law*, HARV. L. REV. BLOG (Dec. 30, 2021), <https://perma.cc/MC8R-NEES>.

123. *See id.*

This would be more efficient and ensure that the United States is adjudicating gender and sexuality-based claims in the same general manner as other nations. Adding a sixth ground would also allow the United States to bypass the current legal and practical problems deeply rooted in the PSG ground.

CONCLUSION

Homophobia exists all over the world, and members of the LGBT community in some countries face existential threats to their lives and livelihoods. It is the responsibility of nations with the capacity to house these persecuted individuals take steps to protect them. The current asylum system in the United States leaves LGBT asylees in dangerous positions where they are unable to seek relief. Some of these problems stem from the difficulty of making an asylum claim under the PSG grounds, while others stem from homophobia in society and in the asylum system.

Legislators and the courts must continue to be vigilant to root out problems that arise from elsewhere in the immigration system. For instance, in recent years, the Biden Administration has continued to enforce numerous Trump-era policies that impose artificial barriers to asylum, including requiring those passing through intermediate countries in Latin America to first apply for asylum there before coming to the United States.¹²⁴ These practices are particularly problematic for LGBT asylum seekers who face homophobia from officials in these intermediate countries and are not protected by their respective laws.¹²⁵ A lack of oversight in immigrant detention facilities leads to further severe abuse for asylum seekers. Transgender asylees are often kept in isolation for lengthy periods of time.¹²⁶ As helpful as a sixth ground for asylum would be, it is not a panacea for all the issues that unduly burden LGBT asylees. This is an area ripe for future research.

Nonetheless, adding gender and sexuality as a sixth protected ground for asylum would be an essential first step. Not only would a sixth ground better protect members of the LGBT community, but it would also better protect all victims of gender-based violence. If the United States wants to be a leader in global LGBT rights, it must serve as a refuge for people who are facing discrimination based on their sexuality and gender identity. The interests of justice and better fulfilling the founding ideals of the 1951 Refugee Convention would be best served with a sixth ground.

124. Katrina Eiland & Jonathan Blazer, *Biden Must Reverse Plans to Revive Deadly Trump-era Asylum Bans*, ACLU (Jan. 26, 2023), <https://perma.cc/JU4G-FZ2H>.

125. Heather Cassell, *Immigration Advocates Urge Biden to Reconsider Asylum Policy*, GAY CITY NEWS (Feb. 28, 2023), <https://perma.cc/TE78-RVEX>.

126. Sam Levin, *A Trans Woman Detained by Ice for Two Years is Fighting for Freedom: 'I've Been Forgotten'*, THE GUARDIAN (June 9, 2021), <https://perma.cc/4RKZ-U9YX>.