

**INADEQUATE PROTECTIONS AND NEW RISKS FOR
LGBT VICTIMS OF INTIMATE PARTNER VIOLENCE
SEEKING ASYLUM IN THE UNITED STATES**

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ABSTRACT

At the time of writing this Abstract, the United States is experiencing the longest partial government shutdown in our nation’s history. The primary reason for this shutdown is President Trump’s demand for funding of a “wall” along the U.S.-Mexico border. President Trump frequently touted such a wall on the campaign trail for the 2016 presidential election. It remains to be seen what the outcome of this shutdown will be. However, it is apparent that President Trump and his administration will be remembered for their virulent anti-immigrant policies. One immigration avenue— asylum—is continually narrowed by the Trump administration. This Comment analyzes the U.S. asylum system and focuses on the particular disadvantages that LGBT asylum-seekers face in their quest to achieve asylum and how the process has worsened under President Trump. More specifically, this Comment highlights the unique circumstances of LGBT asylum-seekers who become victims of intimate partner violence and are ultimately unsuccessful in their asylum claim. Current avenues of protection, the Violence Against Women Act and the U Visa, do not go far enough to adequately protect this vulnerable group of individuals. This Comment proposes methods for improving the asylum system for this population by guaranteeing attorneys for indigent asylum applicants, modifying requirements of VAWA and the U Visa, and increasing financial resources for immigration court management.

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I. INTRODUCTION

Asylum—a protection given by a state to refugees—is one avenue of relief for those who have suffered persecution in their native country because of their race, religion, nationality, membership in a particular social group, or political opinion.¹ In 2016, the United States granted asylum to 20,455 people.² Although not explicitly

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1. See 8 U.S.C. §§ 1158(a)–(b) (2014); § 1101(a)(42)(A) (2014).

2. See NADWA MOSSAAD & RYAN BAUGH, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2016 1 (2018) (showing that of those 20,455 who were granted asylum, 11,729 were granted affirmative asylum by the Department of Homeland Security and 8,726 were granted defensive asylum by the Department of Justice). 5,669 more people were

codified in statute, U.S. case law recognizes that those fleeing persecution based on their sexual orientation³ may fall within the protections offered by asylum law.⁴ Unfortunately, many people around the world are in fact persecuted because of their sexual orientation. For example, more than seventy countries currently criminalize individuals based on their sexual orientation or gender identity⁵ and expression.⁶

Until very recently, asylum applicants waited several years to formally receive asylum in the United States.⁷ While awaiting the outcome of their asylum claim or appealing a decision by an immigration court, some asylum-seekers fall victim to violent crime.⁸ These crimes often take place in the context of an intimate partner

granted asylum in 2015 than in 2016. *Compare id. with* NADWA MOSSAAD, U.S. DEP'T OF HOMELAND SECURITY, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2015 1 (Jan. 2017).

3. Sexual orientation is defined as “an inherent or immutable enduring emotional, romantic or sexual attraction to other people.” *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Oct. 25, 2018).

4. *See, e.g.*, *Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (holding that sexual orientation may be a protected “particular social group” under the applicable asylum statute).

5. “Gender identity” for purposes of this Comment is defined as “one’s innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves,” and “gender expression” as the “external appearance of one’s gender identity . . . which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.” *Sexual Orientation and Gender Identity Definitions*, *supra* note 3.

6. *See Sexual Orientation Laws in the World – Overview*, INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOC. (May 2017), http://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Overview_2017.pdf (displaying that seventy-two countries currently criminalize homosexuality with descriptions of the penalties in each country); *see also Fact Sheet: Criminalization*, U.N. FREE & EQUAL, [https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf) (last visited Oct. 7, 2018) (describing some of the impacts of criminalization based on sexual orientation and how individuals and states can act to change this practice).

7. *See* B. SHAW DRAKE, HUMAN RIGHTS FIRST, IN THE BALANCE: BACKLOGS DELAY PROTECTION IN THE U.S. ASYLUM AND IMMIGRATION COURT SYSTEMS, HUMAN RIGHTS FIRST 3–6 (Apr. 2016) (showing data indicating that it typically takes two to three years after filing for affirmative asylum for U.S. Citizen and Immigration Services to interview an applicant). In fiscal year 2016, 83% of affirmative asylum cases were granted by immigration courts, while immigration authorities only granted 31% of defensive asylum cases. EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP’T OF JUSTICE, FY 2016 STATISTICS YEARBOOK K3 fig.17–18 (Mar. 2017). *But see Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling> (last visited July 31, 2018) (outlining recent measures to expedite asylum application process).

8. *See Number of Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2009-2017*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr4.pdf (last visited Oct. 7, 2018) [hereinafter *Number of Form I-918*] (displaying that in 2016, 35,044 non-citizens applied for a U Visa, which is granted to certain crime victims); *see also Crime in the United States: by Volume and Rate per 100,000 Inhabitants, 1997-2016*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (last

relationship, resulting in what is known as intimate partner violence (IPV).⁹ Obviously, both heterosexual and same-sex partners perpetrate IPV.¹⁰ However, statistics indicate that lesbian, gay, bisexual, and transgender (LGBT)¹¹ individuals are more likely than heterosexual cisgender¹² people to fall victim to IPV.¹³

The demographic data on IPV victims shows the increased likelihood of IPV that LGBT individuals face. One in four women in the United States have experienced “contact sexual violence,” physical violence, and/or stalking by an intimate partner in their lifetime¹⁴—a statistic which includes four in ten lesbian women, six in ten bisexual women, and one in three heterosexual women.¹⁵ One in nine men have experienced contact sexual violence, physical violence, and/or stalking by an intimate partner in their lifetime,¹⁶ including “[a]pproximately 1 in 4 gay men . . . 4 in 10 bisexual men . . . and more than 1 in 4 heterosexual men[.]”¹⁷ Bearing in mind the LGBT population’s increased threat of IPV, this Comment analyzes the protections currently in place for LGBT asylum-seekers who fall victim to IPV while in the United States.¹⁸

Non-citizens, including asylum-seekers, who are victims of certain violent

visited Aug. 30, 2018) (showing that in 2016, an estimated 1,248,185 violent crimes occurred in the United States).

9. IPV is defined as “physical, sexual, or psychological harm by a current or former partner or spouse.” *Intimate Partner Violence*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html> (last visited Oct. 22, 2018).

10. *Id.*

11. This Comment includes an analysis of transgender asylum-seekers because of the reality that transgender individuals are very often victims of IPV in the United States. NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 198 (2016) (“More than half (54%) of respondents experienced some form of intimate partner violence.”). This Comment does not include the “Q” for queer that is commonly used in analyses based on sexual orientation and gender identity because there has not yet been a precedential case involving a queer-identifying asylum-seeker.

12. “Cisgender” is defined as “of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.” *Definition of Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Oct. 12, 2018).

13. See NAT’L CTR. FOR INJ. PREVENTION AND CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 18 (2013) [hereinafter 2010 FINDINGS ON VICTIMIZATION] (providing national statistics on the lifetime prevalence of sexual violence against LGBT individuals). An “IPV-related impact” can include “injury, fear, concern for safety, and needing services.” NAT’L CTR. FOR INJ. PREVENTION AND CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010–2012 STATE REPORT 2 (2017) [hereinafter 2010–2012 STATE REPORT]. These studies do not include a breakdown based on immigration status for LGBT victims.

14. 2010–2012 STATE REPORT, *supra* note 13, at 2. “Contact sexual violence” includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact. *Id.* at 17.

15. 2010 FINDINGS ON VICTIMIZATION, *supra* note 13, at 18.

16. 2010–2012 STATE REPORT, *supra* note 13, at 2.

17. 2010 FINDINGS ON VICTIMIZATION, *supra* note 13, at 19.

18. This Comment proceeds under the assumption that immigration status would not lower the rate of IPV victimization.

crimes have two avenues for relief: self-petition¹⁹ under the Violence Against Women Act (VAWA)²⁰ or apply for a U Visa.²¹ Self-petitioning under VAWA is available to “battered” spouses, children or parents of U.S. citizens or permanent residents.²² The U Visa protects non-citizens, regardless of their sexual orientation and gender identity, who are victims of sexual assault, domestic violence, and other crimes.²³ To be eligible, victims must be willing to help law enforcement authorities in the investigation or prosecution of the crimes committed against them.²⁴ Eligible crimes often revolve around intimate partner relationships.²⁵ Although the VAWA and U Visa programs provide some relief for LGBT asylum-seekers who have endured IPV, this Comment argues that both fall short of providing an adequate remedy for such individuals.

While its analysis focuses on the unique needs of LGBT asylum-seekers, this Comment acknowledges that all immigrants face the possibility of IPV victimhood. In assessing necessary protections for LGBT asylum-seekers, this Comment specifically focuses on those who are pursuing an appeal and those whose asylum claim ultimately fails. There are two reasons for narrowing the focus of this Comment. First, LGBT individuals who are granted asylum after suffering IPV have access to several benefits and remedies not available to all asylum-seekers.²⁶ For this reason, successful LGBT asylees²⁷ are not the focus of this analysis. Second, the methods of control used by abusers of LGBT individuals and immigrants are similar and especially traumatic when combined.²⁸

19. See *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/battered-spouse-children-parents> (last visited Oct. 17, 2018) [hereinafter *Battered Spouse*] (noting that “self-petitioning” protects victims of domestic abuse by allowing them to file green card petitions without abusers’ involvement).

20. Violence Against Women Act (VAWA), Pub. L. No. 103–322, tit. IV, § 40701, 108 Stat. 1902, 1953–55 (1994) (codified in 8 U.S.C. §1154 (a)(1)).

21. 8 U.S.C. §1101(a)(15)(U)(2014); 8 C.F.R. §§ 214.14(a), (b) (2018). See also *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited Feb. 17, 2018) [hereinafter *U Nonimmigrant Status*] (detailing the eligibility requirements and process of applying for a U Visa).

22. VAWA § 40701. This Comment will focus its VAWA analysis on the protections available to abused LGBT spouses.

23. See *U Nonimmigrant Status*, *supra* note 21 (implying that LGBT victims are not barred from applying for U Visa protection).

24. 8 C.F.R. §§ 214.14(a), (b)(3).

25. See 8 C.F.R. § 214.14(a)(9); 2010–2012 STATE REPORT, *supra* note 13, at 2.

26. See *infra* Part II for a discussion on current benefits awarded to successful asylees.

27. “Asylee” is often used when referring to both asylum applicants and those awarded asylum. See, e.g., *Definition of Asylee*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/asylee> (last visited Sept. 13, 2018). However, for ease of reading, this Comment only uses the term “asylee” to refer to those that have been granted asylum.

28. See *LGBTQ Relationship Violence*, NAT’L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/lgbt-abuse/> (last visited Oct. 11, 2018) [hereinafter *LGBTQ Relationship Violence*] (describing the unique power tactics employed by abusive partners in LGBT

As a control tactic, abusers frequently threaten to “out” a partner’s sexual orientation or gender identity to family members, employers, and the community.²⁹ An abuser might also attempt to justify the abuse with the idea that a partner is not “really” LGBT,³⁰ which could potentially hurt an LGBT asylum-seeker’s claim in front of an asylum officer or immigration judge.³¹ Similarly, an abuser may threaten their immigrant partner with “deportation or the withdrawal of petitions for legal status.”³² This can include “outing” immigration status to employers, a control tactic similar to those used by abusers against their LGBT partners.³³ Thus, individuals who are both LGBT and seeking asylum face a double risk of being “outed” as both LGBT and as undocumented immigrants.

This Comment proceeds in four parts. After this Introduction, Part II will provide the historical background of asylum law and describe the asylum process for LGBT applicants. Part III includes an analysis of the current threats that asylum-seekers face while awaiting the adjudication of their claims. Part IV describes the protections offered under VAWA and the U Visa for LGBT victims of IPV. In Part V, this Comment will argue that these current protections are insufficient for LGBT asylum-seekers who are victims of IPV while in the United States and proposes remedies for solving this problem.

II. THE ASYLUM PROCESS FOR LGBT APPLICANTS

Asylum law in the United States derives from the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention).³⁴ The United Nations (U.N.) enacted the Refugee Convention in response to the post-World War II refugee crisis. As it was initially a response to the war, the U.N. initially limited the Refugee Convention to protecting persons within Europe fleeing persecution before 1951.³⁵ The U.N. extended the reach of the Refugee Convention by formulating the Protocol Relating to the Status of Refugees (Refugee Protocol) in

relationships, such as threatening to divulge the victim’s sexual orientation); *see also Immigrants in the U.S. Have the Right to Live Life Free of Abuse*, NAT’L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/abuse-and-immigrants/> (last visited Jan. 11, 2018) [hereinafter *Live Life Free of Abuse*] (listing the unique issues that immigrants or refugees may face in an abusive relationship on account of their immigration status).

29. *LGBTQ Relationship Violence*, *supra* note 28.

30. *See id.* (explaining that some victims maintain relationships with their abusers or express a gender identity that their abusers do not understand).

31. *See* Mica Rosenberg et al., *They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts*, REUTERS (Oct. 17, 2017), <https://www.reuters.com/investigates/special-report/usa-immigration-asylum/> (showing how small differences in arguments and defenses can result in very different outcomes for asylum-seekers).

32. *Live Life Free of Abuse*, *supra* note 28.

33. *Id.*

34. Convention Relating to the Status of Refugees art. 1, Geneva, July 28, 1951, 189 U.N.T.S. 137, (entered into force Apr. 22, 1954) [hereinafter *Refugee Convention*]; *see also* 8 U.S.C.A. § 1101(a)(42)(A) (2014).

35. OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, *Introductory Note to CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2* (Dec. 2010) [hereinafter *Introductory Note*].

1967.³⁶ Thereafter, the United States became party to the Refugee Protocol, which removed the “geographic and temporal limits” from the definition of “refugee.”³⁷

After joining in 1968, the United States enacted the Refugee Act of 1980 (U.S. Refugee Act)³⁸ to codify its obligations under the Refugee Protocol.³⁹ However, because of the last-in-time rule, the United States’ obligations under the Refugee Protocol may be superseded if Congress passes a statute that conflicts with it.⁴⁰ As the law currently stands, an individual applying for asylum must prove that they meet the definition of “refugee.”⁴¹ The U.S. Refugee Act defines “refugee” as follows:

any person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion⁴²

Receiving asylum provides many benefits. Once granted asylum, a person generally may not be removed to their country of nationality,⁴³ may receive authorization to work in the United States, and may request permission to travel overseas.⁴⁴ An asylee may also petition to bring family members to the United States.⁴⁵ Additionally, asylees may be eligible for federal benefits, such as Medicaid

36. Protocol Relating to the Status of Refugees, art. I, ¶ 2, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol]; see also *Introductory Note*, *supra* note 35.

37. *Introductory Note*, *supra* note 35; Office of the U.N. High Comm’r for Refugees, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

38. Refugee Act of 1980, Pub. L. No. 96–212, § 201, 94 Stat. 102, 102–03 (1980) (codified in 8 U.S.C.A. § 1101(a)(42)(A)).

39. Protocol, *supra* note 36, at 267.

40. Per the last-in-time doctrine, conflicts between federal statutes and treaties are resolved by determining which one is more recent. Julian Ku, *Treaties as Laws: A Defense of the Last in Time Rule for Treaties and Federal Statutes*, 80 IND. L. J. 319, 325 (2004).

41. 8 U.S.C.A. § 1101(a)(42)(A) (2014); 8 U.S.C. §§ 1158 (a), (b) (2014).

42. *Id.*

43. Since the writing of this Comment, the Trump administration has started to remove immigrants even in lawful status. See Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You’re Not*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html> (“[USCIS] is . . . opening a new office to investigate thousands of potential denaturalization cases involving identity fraud[.]”).

44. 8 U.S.C. § 1158(c)(1).

45. *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees> (last visited Oct. 17, 2018). *But see* DRAKE, *supra* note 7, at 10 (describing the human impact of the asylum backlog on family members of asylees who are sometimes forced into hiding or tortured).

and Temporary Assistance for Needy Families.⁴⁶ Asylees may also be eligible for certain state benefits.⁴⁷ After one year, an asylee becomes eligible to apply for lawful permanent resident status.⁴⁸ Finally, once asylees become lawful permanent residents, most of them may apply for citizenship after five years.⁴⁹

A. Overview of U.S. History of Discrimination Towards LGBT Citizens and Immigrants

Throughout its history, the United States has overtly discriminated against individuals based on their sexual orientation and immigration status in many ways.⁵⁰ For example, under the Immigration Act of 1917,⁵¹ “mentally or physically defective” people were prohibited from entering the country.⁵² LGBT immigrants fell under this category.⁵³ In 1952, *the Diagnostic and Statistical Manual of Mental Disorders* (DSM) officially recognized homosexuality as a mental disorder.⁵⁴ That same year, the 1952 Immigration and Nationality Act (INA) barred “aliens afflicted with psychopathic personality, epilepsy, or mental defect.”⁵⁵ This category also included LGBT immigrants.⁵⁶ The exclusion of LGBT immigrants continued in 1965 with a more explicit amendment that barred “sexually deviant” foreign

46. See Lindsay M. Harris, *From Surviving to Thriving?: An Investigation of Asylee Integration in the United States*, 40 N.Y.U. REV. L. & SOC. CHANGE 29, app. at 119–124 (2016) (listing the federal benefits available to asylees and refugees).

47. See, e.g. CMTY. LEGAL SERV., IMMIGRANTS’ RIGHTS TO PUBLIC BENEFITS IN PENNSYLVANIA (2013) (providing information on what public benefits may be available to immigrants, including successful asylees, in Pennsylvania).

48. *Green Card for Asylees*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/greencard/asylees> (last updated July 10, 2017) (listing the one-year requirement and several other requirements for adjustment of status).

49. 8 U.S.C. § 1427(a) (2014).

50. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that state laws banning homosexual sex are constitutional), *overruled by* *Lawrence v. Texas* 539 U.S. 558 (2003).

51. Immigration Act, Pub L. No. 301, § 3, 39 Stat. 874, 875 (1917).

52. *Id.*; see Swetha Sridharan, *The Difficulties of U.S. Asylum Claims Based on Sexual Orientation*, Migration Policy Inst. (Oct. 29, 2008), <https://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation> (providing a history of LGBT barriers to entry in the United States).

53. See Hannah Harris Green, *The Ongoing Legal Plight of LGBTQ Refugees*, JSTOR DAILY (June 22, 2016), <https://daily.jstor.org/very-real-plight-lgbtq-refugees/> (describing the history of barriers that LGBT immigrants faced when attempting to come to the United States).

54. See Mark Messih, *Psychiatry and LGBT Patients: Reflecting on the Past to Provide Better Psychiatric Care to LGBT Patients in the Future*, AM. J. OF PSYCHIATRY RESIDENTS’ J., May 1, 2017, at 2 (noting the advancements in psychiatric treatment as opinions have changed regarding LGBT patients). The DSM is published by the APA and used by many professions outside the medical field, including insurance companies, researchers, and policy makers. See *DSM History*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm> (last visited Oct. 12, 2018) (summarizing each DSM edition and the benefits that the DSM provides).

55. Sridharan, *supra* note 52 (quoting Immigration and Nationality Act, Pub. L. No. 414, §212(a)(4), 66 Stat. 163, 166 (1952)).

56. *Id.*

nationals from entering the United States.⁵⁷

Notably, the American Psychiatric Association (APA) removed homosexuality as a mental disorder from the DSM in 1973.⁵⁸ However, the APA later included those “in conflict with” their sexual orientation as having a mental disorder of “sexual orientation disturbance.”⁵⁹ In 1987, homosexuality—including “sexual orientation disturbance”—was completely removed from the DSM.⁶⁰ Three years later, with the passage of the Immigration Act of 1990, Congress overturned the ban on LGBT immigrants entering the United States.⁶¹

Supreme Court jurisprudence provides further evidence of the ways in which the United States has historically discriminated against LGBT individuals’ constitutional rights. In 1986, the U.S. Supreme Court held in *Bowers v. Hardwick* that the U.S. Constitution does not provide a fundamental right to engage in homosexual sodomy.⁶² However, four years later, in *Matter of Toboso-Alfonso*, the Board of Immigration Appeals (BIA)⁶³ recognized that sexual orientation could be the basis of a particular social group and granted asylum to a gay man from Cuba.⁶⁴ This pivotal case was decided the same year that Congress overturned the ban on LGBT immigrants entering the United States.⁶⁵

However, in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁶⁶ The IIRIRA amended the INA by restricting access to asylum protection by establishing requirements such as the one-

57. *Id.*

58. See Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, Psychology Today (Sept. 18, 2015), <https://www.psychologytoday.com/blog/hidden-and-look/201509/when-homosexuality-stopped-being-mental-disorder> (explaining how the APA voted to remove general homosexuality as a mental disorder).

59. *Id.* “Sexual origination disturbance” was the term that replaced homosexuality, referring to persons who were “disturbed by, in conflict with, or wished to change their sexual orientation from homosexual to heterosexual.” Jacob J. Van Den Berg, *Heterosexist Bias in the DSM*, in Sage Encyclopedia of Psychology and Gender 851 (Kevin L. Nadal ed. 2017).

60. Burton, *supra* note 58. See generally Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 J. OF BEHAVIORAL SCI. 565 (Dec. 2015).

61. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (1990).

62. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that state laws banning homosexual sex are constitutional), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

63. See *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Sept. 28, 2018) (defining the role and functions of the BIA).

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

65. Sharita Gruberg, et al., *Serving LGBTQ Immigrants and Building Welcoming Communities*, CTR. FOR AM. PROGRESS (Jan. 24, 2018, 9:03 A.M.), <https://www.americanprogress.org/issues/lgbt/reports/2018/01/24/445308/serving-lgbtq-immigrants-building-welcoming-communities/> (describing history of U.S. law for LGBTQ immigrants).

66. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) (codified in various sections of Title 8 of the U.S. Code). Judging from the legislative history, the one-year filing deadline was not aimed specifically at LGBTQ applicants, but it has had unintended consequences for them.

year filing deadline for asylum applicants.⁶⁷ This amendment has made the asylum process even more difficult to navigate for those who are unable to meet the one-year filing requirement—especially LGBT asylum-seekers.⁶⁸ *Bowers* was overturned in 2003 and, since then, the Supreme Court has decided multiple cases recognizing the rights of LGBT individuals in the United States.⁶⁹ However, this past term, the Supreme Court potentially opened the door to increased litigation aiming to chip away at these newly recognized LGBT rights through *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.⁷⁰

Although protection for LGBT individuals only recently started to make progress in the United States, such progress occurred prior to similar advancements in international law.⁷¹ The Office of the United Nations High Commissioner for Refugees (UNHCR)⁷² first issued its Guidance Note on Refugee Claims Relating to

67. 8 U.S.C.A. § 1158(a)(2)(B) (2014); see Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 CUNY L. REV. 233, 265 (2005) (arguing that LGBT foreign nationals often miss the one-year filing deadline because they are unaware that their sexual orientation is a basis for seeking asylum, and many are severely disadvantaged if they miss the filing deadline). See *infra* Part II.C for a discussion of the one-year filing deadline and its exceptions.

68. A 2010 study analyzed more than 3,742 BIA asylum cases with the purpose of “evaluat[ing] the BIA’s application and interpretation of the filing deadline[.]” The researchers found that “[t]he BIA denies asylum to a large number of refugees fleeing persecution on the basis of the asylum deadline alone.” Although many refugees in the study met the persecution threshold of asylum, at least half of the applicants surveyed were denied asylum strictly due to the delayed filing deadline and were instead granted “withholding of removal,” which provides less benefits to refugees. PENN STATE L. IMMIGRANTS’ RIGHTS CLINIC, HUMAN RIGHTS FIRST, AND NAT’L IMMIGRANT JUSTICE CTR., *THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS* (2010), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1008&context=irc_pubs [hereinafter *THE ONE-YEAR ASYLUM DEADLINE AND THE BIA*].

69. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick* and holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause); see, e.g., *U.S. v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, No. 135-2584 (U.S. 2015).

70. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1722 (2018) (holding that the Colorado Civil Rights Commission violated the First Amendment’s free exercise clause when it found a bakery discriminated against a same-sex couple); see also Sarah Posner, *The ‘Masterpiece Cakeshop’ Decision is Not as Harmless as You Think*, *Nation* (June 4, 2018), <https://www.thenation.com/article/masterpiece-cakeshop-decision-not-harmless-think/> (noting that Justice Kennedy drafted the majority opinion in both *Obergefell v. Hodges* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and that Christian-right activists were up in arms over the Court’s decision in *Obergefell*); see also Mark Joseph Stern, *Anthony Kennedy Just Destroyed His Legacy as a Gay Rights Hero*, *Slate* (June 27, 2018, 3:36 PM), <https://slate.com/news-and-politics/2018/06/anthony-kennedy-destroyed-his-gay-rights-legacy-by-retiring-under-trump.html> (arguing that Justice Kennedy’s retirement might mean the end of nationwide marriage equality).

71. See Sharita Gruberg & Rachel West, *Humanitarian Diplomacy: The U.S. Asylum System’s Role in Protecting Global LGBT Rights*, *CTR. FOR AM. PROGRESS* 8–9 (June 2015), <https://www.americanprogress.org/issues/lgbt/reports/2015/06/18/115370/humanitarian-diplomacy/> (detailing the progress of LGBT rights internationally).

72. *What We Do*, UNHCR, <http://www.unhcr.org/en-us/what-we-do> (last visited Sept. 30,

Sexual Orientation and Gender Identity (UNHCR Guidance) in 2008.⁷³ The UNHCR Guidance clarified that sexual orientation and gender identity are both included within “membership of a particular social group”—one of the five grounds for claiming asylum under the Refugee Convention.⁷⁴ In 2012, UNHCR issued legal guidance to governments, legal practitioners, adjudicators, and UNHCR staff on adjudicating claims based on sexual orientation and/or gender identity.⁷⁵ The issuance of this guidance coincided with a U.S. Citizenship and Immigration Services (USCIS)⁷⁶ training course for asylum officers to improve the adjudication and handling of LGBT asylum claims.⁷⁷ The training course is part of the mandated special training in international human rights law, non-adversarial interview techniques, and other relevant refugee laws and principles that asylum officers must receive from USCIS.⁷⁸ Asylum officers, those who interview asylum applicants, have the power to grant asylum, deny asylum, or refer the case to an immigration judge for further review.⁷⁹ There are only eight asylum offices within the United States and more than 500 asylum officers.⁸⁰

Although the U.S. government has made significant strides in improving the adjudication process for LGBT asylum-seekers over the years, because the government does not collect sexual orientation and gender identity data in the

2018) (“[UNHCR] strive[s] to ensure that everyone has the right to seek asylum and find safe refuge in another State, with the option to eventually return home, integrate or resettle.”).

73. See generally Office of the U.N. High Comm’r for Refugees, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (Nov. 21, 2008).

74. *Id.* at 6.

75. Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UNHCR Doc. HRC/GIP/09, (Oct. 23, 2012).

76. See *About Us*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/aboutus> (last updated Mar. 6, 2018) (defining USCIS as the government agency that oversees lawful immigration to the United States).

77. See U.S. CITIZENSHIP AND IMMIGR. SERVS., GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 11 (Dec. 28, 2011) (providing a step-by-step guide and special considerations for asylum officials reviewing LGBT asylum applicants).

78. Aliens and Nationality, 8 CFR § 208.1(b) (2011); see Gruberg & West, *supra* note 71, at 22–23 (arguing that LGBT asylum-seekers are more successful in their asylum claim when represented by an attorney).

79. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last visited Feb. 17, 2018); see also *Executive Office of Immigration Review: About the Office*, U.S. DEP’T OF JUSTICE (Oct. 24, 2018), <https://www.justice.gov/eoir/about-office>.

80. *Refugee, Asylum and International Operations Directorate*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate> (last updated Aug. 11, 2018); see also Meeting Agenda from the USCIS Asylum Division Quarterly Stakeholder Meeting 11 (Aug. 11, 2017), <https://www.aila.org/infonet/uscis-asylum-division-quarterly-stakeholder-mtng> (detailing that the Asylum Division is authorized 625 field asylum officers but has 516 onboard as of July 10, 2017).

asylum system, it is unclear how effective these measures have been.⁸¹ In fact, the government does not collect reliable information about the grounds for any type of asylum claim.⁸² Asylum-seekers can benefit from knowing “how many LGBT people seek protection in the United States, what countries they come from, the outcomes of their cases,” or whether the asylum officer training is effective.⁸³ This data would likely enable easier assessing of case outcomes and hypothesizing whether differences across groups—such as LGBT asylum-seekers—are due to differential treatment in the immigration court system.⁸⁴ The United States must collect and analyze this type of data, especially LGBT asylee data, in order to continue the progress of phasing out discrimination against LGBT asylum-seekers.

B. Burden of Proof in Asylum Claims

The burden of proof falls on an asylum applicant to prove that they have a well-founded fear of persecution based on one or more of the following five grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁸⁵ To succeed, an applicant must be unwilling or unable to return to his or her home country because of this fear of persecution.⁸⁶ Persecution is not defined in the INA.⁸⁷ Some courts, however, have held that “a threat to life or freedom” on account of one of the five protected grounds listed above will always be considered persecution.⁸⁸ UNHCR has endorsed a similar standard.⁸⁹ For LGBT asylum-seekers, attempts to “cure” homosexuality through electroshock therapy have been found to be a form of persecution.⁹⁰ Although persecution is usually physical, it may also be emotional or psychological.⁹¹ If the trier of fact determines that the testimony is credible, persuasive, and sufficiently demonstrates that the applicant is a refugee,

81. Gruberg & West, *supra* note 71, at 4.

82. See MOSSAAD & BAUGH, *supra* note 2, at 8 (showing that DHS compiles information on an asylee’s country of origin, age, sex, and marital status, which is significantly more than what they collect on asylum-seekers).

83. Gruberg & West, *supra* note 71, at 4.

84. *Id.* at 11 (“Given a larger sample size, researchers could [better] determine . . . whether true differences in outcomes underlie the differences observed in the data and could characterize the severity of these differences.”).

85. 8 U.S.C. § 1101(a)(42)(A) (2005); see also Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

86. INA § 101(a)(42)(A) (1990); 8 U.S.C. § 1101(a)(42)(A).

87. *Id.*

88. Laipenieks, 18 I&N 433, 457 (BIA Dec. 1983) (interim decision) (quoting U.N. High Commissioner for Refugees).

89. UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 13 (reissued Geneva Dec. 2011) (“From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.”).

90. *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

91. See *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (stating how the applicant’s emotional trauma, viewed cumulatively, could constitute persecution); see also *Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) (finding that the applicant’s past persecution included mental abuse).

then the applicant's testimony may alone satisfy the burden of proof without the need to provide another validating source.⁹² In *INS v. Cardoza-Fonseca*, the Supreme Court clarified the well-founded fear standard by holding that an asylum-seeker need not prove that persecution is more likely than not.⁹³ Satisfying the burden of proof, however, is only the first step in the asylum-seeker's process.

C. *The Application Process for LGBT Asylum-Seekers*

An asylum-seeker can file two types of asylum applications in the United States: affirmative asylum and defensive asylum.⁹⁴ All asylum applicants must apply within one year of arriving and must be physically present in the country.⁹⁵ In the United States, asylum is a discretionary form of relief, meaning that even if an applicant proves that they meet the definition of "refugee" under the INA, they are not automatically entitled to asylum.⁹⁶

Affirmative asylum-seekers apply before being placed in removal proceedings.⁹⁷ After submitting the application, an asylum officer will interview the applicant.⁹⁸ During this interview, applicants will testify to the persecution they faced, or the persecution they fear, as a result of their LGBT status,⁹⁹ and they must convince the asylum officer that their LGBT status is valid.¹⁰⁰ Practitioners recommend applicants be prepared to give detailed testimonies about such matters as the initial moment they realized they were LGBT, their experience of "coming out," and significant romantic relationships they may have had.¹⁰¹ Because this interview process requires individuals to show emotions and convince the asylum officer, LGBT people who are willing to share their experiences may have a greater

92. 8 U.S.C.S. § 1158(b)(1)(B)(ii) (2014).

93. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

94. See *Obtaining Asylum in the United States*, *supra* note 79 (describing the necessary materials for each kind of asylum application); see also MOSSAAD & BAUGH, *supra* note 2, at 7 ("An estimated 115,399 affirmative asylum applications were filed with USCIS in 2016, 39 percent more than the year before and more than 100 percent increase since 2014. . . . Total defensive asylum applications before EOIR also increased to 65,218 in 2016, up from 45,770 applications in 2015."). This Comment's analysis of protections provided for LGBT asylum-seekers, who are also victims of IPV, applies to both affirmative and defensive asylum applicants.

95. *Obtaining Asylum in the United States*, *supra* note 79.

96. See Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J. L. REFORM 595, 606 (2012) ("Asylum was understood from its inception to be a non-mandatory form of relief.").

97. 8 U.S.C. § 1158(a)(1)–(2) (2014).

98. 8 U.S.C.S. § 1158(d)(5)(A)(ii); see *Affirmative Asylum Interview Scheduling*, *supra* note 7 (containing a chart of the interview schedule for affirmative asylum applicants based on asylum office location). Before processing changes took effect in January 29, 2018, it typically took about two years from the time of filing before an officer interviewed an applicant.

99. See *Asylum Manual: Affirmative Application Process*, IMMIGR. EQUAL., <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/affirmative-application-process/> (last visited Oct. 8, 2017) ("It is crucial to the claim that the applicant's emotions come through during this testimony.").

100. *Id.*

101. *Id.*

chance of success than those who are unable or unwilling to discuss their sexual orientation or gender identity.¹⁰² In addition, LGBT applicants may have difficulty locating supplementary documentation on their conditions of life in their native countries because of social invisibility, dangers of openly expressing sexual orientation, or government censorship.¹⁰³

After conducting the interview, the asylum officer decides the following: whether the individual is eligible to apply for asylum; whether the applicant meets the definition of a refugee; and whether the applicant is barred from receiving asylum under the INA.¹⁰⁴ Although the government permits an attorney to represent asylum applicants, the government “does not provide attorneys in immigration proceedings, even for indigent people seeking protection.”¹⁰⁵ Similarly, applicants may bring an interpreter but at their own expense.¹⁰⁶ If the officer does not grant asylum, and the applicant is not in lawful status, they will receive a notice to appear in immigration court approximately two weeks after the asylum interview.¹⁰⁷ After such notice, a type of defensive application process begins because the applicant is claiming asylum as a defense to removal.¹⁰⁸ The defensive process also begins when a person is apprehended in violation of lawful status.¹⁰⁹

USCIS places applicants seeking defensive asylum in immigration court operating under the Executive Office for Immigration Review (EOIR) for removal proceedings.¹¹⁰ Unlike the asylum interview, removal proceedings are adversarial, with an attorney from Immigration and Customs Enforcement (ICE) opposing the

102. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY: REV. 135, 141 (2006) (noting LGBT asylum-seekers may be afraid of adverse reactions to revealing their sexual orientation).

103. *Id.*

104. 8 U.S.C. § 1158(b)(1)(B) (2014).

105. See U.S. CITIZENSHIP AND IMMIGR. SERVS., REFUGEE, ASYLUM, AND INT'L OPERATIONS DIRECTORATE, AFFIRMATIVE ASYLUM PROCEDURES MANUAL 15 (May 2016) (listing the qualifications required for legal representatives of applicants); Gruberg & West, *supra* note 71, at 13.

106. *Preparing for Your Asylum Interview*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 12, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/preparing-your-asylum-interview>.

107. See *Asylum Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/faq-page/asylum-decisions#t12836n40035> (last visited Oct. 23, 2018) (stating that applicants generally receive a decision two weeks after their asylum interview); see also *Types of Asylum Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> (last visited Oct. 23, 2018) (explaining the process of having one's case referred to an immigration court).

108. *Obtaining Asylum in the United States*, *supra* note 79.

109. *Id.*

110. *Id.* (“[Individuals] are placed in removal proceedings [if] they [are] apprehended in the United States or at a U.S. port of entry without proper legal documents . . . [or] were caught by U.S. Customs and Border Protection trying to enter the United States without proper documentation, were placed in the expedited removal process, and were found to have a credible fear of persecution or torture by an asylum officer.”); see also *Executive Office of Immigration Review: About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018) (describing the role of the EOIR).

applicant's claim.¹¹¹ Significantly, similar to the affirmative asylum interview stage, the federal government does not appoint counsel to asylum-seekers in these proceedings.¹¹² If the immigration judge denies the asylum claim, an applicant may appeal the immigration court's denial with the BIA.¹¹³ If the BIA denies the appeal, the next step is to file an appeal with a federal court of appeals.¹¹⁴ The last available avenue of relief is petitioning the Supreme Court—but the Court has yet to hear an LGBT asylum case.¹¹⁵

Failure to apply for asylum within one year generally bars an individual from undergoing the above-described application process.¹¹⁶ As a result of the one-year filing requirement, eligible asylum-seekers may be denied asylum if they do not “file the correct paperwork within one year of arriving in the United States, even though they still may be at risk in their home country.”¹¹⁷ Applicants can avoid this barrier to asylum if they can prove that they missed the deadline to file because of “changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances.”¹¹⁸ If unable to prove this, applying for withholding of removal or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are the only available remedies for such applicants who are outside of the one-year deadline.¹¹⁹ The one-year deadline has had a particular impact on LGBT asylum-seekers who may require additional time to learn about asylum protections based on their sexual orientation

111. *Asylum Manual: Immigration Court Proceedings*, IMMIGR. EQUAL., <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-court-proceedings/> (last visited Oct. 8, 2017).

112. *Id.* But see *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. OF JUSTICE (Apr. 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation> (“[D]etained New Yorkers in all upstate immigration courts will now be eligible to receive legal counsel during deportation proceedings.”).

113. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Sept. 28, 2018).

114. *Asylum Manual: Asylum Law Basics: Sources of Law*, IMMIGR. EQUAL., <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-sources-of-law/> (last visited Oct. 8, 2017).

115. *Id.*

116. Gruberg & West, *supra* note 71, at 25–26.

117. *See id.* (providing an example of two transgender asylum-seekers that needed several years before they were capable of discussing their identity and applying for asylum on that basis); *see also* THE ONE-YEAR ASYLUM DEADLINE AND THE BIA, *supra* note 68, at 6 (one in five of the appeals the BIA receives are from asylum-seekers who have missed, or claim to have missed, the deadline).

118. INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D) (2014); *see* Neilson & Morris, *supra* note 67, at 262 (stressing the importance of knowing when an asylum-seeker may request an exception to the one-year filing deadline as the success of the asylee's claim depends on deadlines).

119. 8 U.S.C. § 1231(b)(3); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; 8 C.F.R. § 208.16(c); 8 C.F.R. § 208.16(a).

or gender identity as a protected class or who need time to feel comfortable addressing their identity with themselves and their communities.¹²⁰

Applicants who fail to file within one year and who are ineligible for an exception to the one-year filing deadline, as well as applicants who have been convicted of certain “serious” crimes, are ineligible for asylum.¹²¹ However, they may be eligible for withholding of removal or relief under CAT.¹²² Under withholding of removal, an applicant must meet all of the criteria for asylum and demonstrate that persecution is more likely than not if deported.¹²³ Unlike asylum, withholding of removal does not come with benefits such as eventual eligibility for a green card or the ability to sponsor relatives or a spouse for immigration.¹²⁴ Perhaps the only “benefit” that can be construed from withholding of removal is that the individual no longer faces deportation, once a “more likely than not” burden of proof is met.¹²⁵ Furthermore, applicants can only receive a withholding of removal when they fear persecution from their home countries.¹²⁶ Despite receiving withholding of removal, applicants may still be removed to third countries where they do not fear persecution.¹²⁷ Accordingly, it does not guarantee permanent residence in the United States.¹²⁸ An individual granted withholding of removal may be eligible to work but is subject to parole.¹²⁹ If the circumstances in the home country change, the grant of withholding of removal may be revoked and the individual may be deported.¹³⁰

Applying for relief under the CAT is another alternative.¹³¹ This application can only be filed with an immigration court after an individual is placed in removal proceedings.¹³² The United States ratified the CAT in 1994, nearly seven years after

120. See Neilson & Morris, *supra* note 67, at 265 (explaining how LGBT applicants’ only contact with an immigration attorney is often an individual who is from the same country as the applicant and thus, the applicant in those situations may be fearful of disclosing their sexual orientation to their attorney based on prior experiences in their home country); see also Madeline Moitozo, *What It’s Like Being a Gay Russian Asylum Seeker in America*, VICE (May 11, 2017, 3:30 PM), https://impact.vice.com/en_us/article/mgm9v8/what-its-like-being-a-gay-russian-asylum-seeker-in-america.

121. 8 U.S.C.S. § 1158(b)(2).

122. 8 C.F.R. § 208.18(b).

123. 8 U.S.C. § 1231(b)(3); *INS v. Stevic*, 467 U.S. 407 (1984).

124. *Withholding of Removal and CAT*, IMMIGRATION EQUAL., <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.W7LPMhKg2w> (last visited Oct. 1, 2018); see INA § 241(b)(3)(B).

125. 8 U.S.C. § 1231(b)(3); see *INS v. Cardoza-Fonesca*, 480 U.S. 421, 440 (1987) (defining the “clear probability” standard as “more likely than not”).

126. 8 C.F.R. § 208.16(b)(1).

127. 8 C.F.R. § 208.16(f).

128. 8 C.F.R. § 208.17(b)(1)(i).

129. See Barbara D. Bleisch, *Protection for Victims of Persecution: Asylum, Withholding of Removal, and Protection Under the U.N. Convention Against Torture*, 51 ST. LOUIS B. J. 18, 22 (2005) (explaining that a recipient of withholding of removal must report periodically to immigration officials and will never obtain lawful permanent status).

130. *Id.*

131. 8 C.F.R. § 208.18(e).

132. 8 C.F.R. § 208.16(c).

it entered into force.¹³³ The CAT prohibits the removal of any individual who proves that, more likely than not, they will suffer torture at the hands, or with the consent or acquiescence of, the government of their home country.¹³⁴ The CAT provides relief regardless of the reason for the torture, so there is no requirement to prove that the torture relates to one of the five protected grounds under asylum law.¹³⁵ Also unlike asylum, relief is mandatory if the claim is proven.¹³⁶

The standard of proof under the CAT is high.¹³⁷ The applicant must prove that it is more likely than not that they would suffer torture.¹³⁸ “Torture” is limited to “severe pain or suffering, whether physical or mental, . . . intentionally inflicted on a person.”¹³⁹ The applicant must also prove that they would suffer torture at the hands of the government itself or with the consent or acquiescence of a government official.¹⁴⁰ Similarly to the withholding of removal standard, relief under the CAT only prevents removal to the country where the applicant fears persecution; it does not result in permanent residency, and the individual may still be removed to a third country.¹⁴¹ If circumstances change in the individual’s home country, the

133. *Implementing CAT: Working to Eliminate Torture*, U.S. HUMAN RIGHTS NETWORK, <https://www.ushrnetwork.org/our-work/project/cat-convention-against-torture> (last visited Sept. 28, 2018). *See generally* Convention Against Torture, *supra* note 119.

134. 8 C.F.R. § 208.16(c); 8 C.F.R. § 208.18(a)(1).

135. *See* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 8 (2009) (“[C]ourts [have] recognized that an alien’s inability to establish a . . . general claim for asylum, which is based on a well-founded fear . . . on account of belonging to one of five designated . . . groups, does not necessarily preclude a separate claim of relief under CAT.”); *see also* 8 U.S.C. § 1101(a)(42)(A) (naming the five grounds for asylum relief: race, religion, nationality, membership in a particular social group, or political opinion).

136. 8 C.F.R. § 208.16(c)(4); *see also* 8 C.F.R. § 208.13 (detailing what is necessary to establish eligibility for asylum which may or may not result in relief).

137. *See Withholding of Removal and CAT*, IMMIGRATION EQUAL., <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.W65LnBNKh-X> (last visited Sept. 28, 2018) (“[A]n applicant must demonstrate a clear probability (more than a 50% chance) that they will be tortured This is an extremely difficult legal showing to make . . .”).

138. 8 C.F.R. § 208.16(c)(2).

139. 8 C.F.R. § 208.18(a)(1). To fit the definition, the torture must be “for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.*

140. *Id.*

141. *Asylum Manual: 7. Immigration Basics: Relief Under CAT*, IMMIGR. EQUAL., <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-relief-under-cat/#.W65UmhNKh-V> (last visited Sept. 28, 2018) (“Like regular withholding of removal . . . [a]n individual who is successful under a CAT claim cannot be removed from the [U.S.] to the country from which they fled persecution, but they can be removed to a third country An individual granted CAT cannot adjust their status to legal permanent resident.”); 8 C.F.R. § 208.16(f).

government may revoke protections and deport the applicant.¹⁴²

These two last resort alternatives are only helpful for LGBT asylum-seekers who can meet a burden of proof that is higher than their initial asylum case.¹⁴³ Many countries hide the persecution they inflict on LGBT citizens, compounding the already high standard that this avenue of relief requires.¹⁴⁴ This example demonstrates the potential hurdles that individuals might have to grapple with during the withholding of removal and CAT inquiry.¹⁴⁵ Given that it is already difficult to receive asylum as an LGBT individual, the withholding of removal and CAT process likely requires qualified legal counsel and unwavering perseverance on the part of the applicant.

D. Unique Challenges for LGBT Asylum-Seekers

LGBT asylum-seekers face several unique challenges. First, “[u]nlike resettled refugees,¹⁴⁶ asylum applicants are not eligible for government financial assistance or benefits while their cases are pending.”¹⁴⁷ Due to the current backlog, asylum-seekers that are entitled to work authorization 180 days after applying for asylum are unable to access such assistance for long periods of time.¹⁴⁸ This delay also deprives asylum-seekers “of having their cases fairly adjudicated in a timely manner, leaving their status in limbo.”¹⁴⁹ LGBT asylum-seekers, who face higher rates of discrimination, may encounter additional barriers to accessing and maintaining housing and employment.¹⁵⁰

142. 8 C.F.R. § 208.18(c).

143. See 8 U.S.C. § 1158(b)(1)(B) (detailing the lower burden of proof required for asylum applicants).

144. See generally HUMAN RIGHTS WATCH, WORLD REPORT (2017) (providing an analysis of how a large number of countries treat their LGBT citizens).

145. See HEARTLAND ALLIANCE, RAINBOW WELCOME INITIATIVE: AN ASSESSMENT AND RECOMMENDATIONS REPORT ON LGBT REFUGEE RESETTLEMENT IN THE U.S. 25 (2012) (discussing applicant difficulties in disclosing sexual orientation or gender identity out of concern for their safety due to having lived in environments where it was dangerous or even illegal to be open).

146. See MOSSAAD & BAUGH, *supra* note 2, at 1 (noting that asylum applicants differ from refugee applicants because refugees apply for relief while outside of the United States).

147. Gruberg & West, *supra* note 71, at 28; see BRIAN JACEK & KRISTINA HON, AT LEAST LET THEM WORK: THE DENIAL OF WORK AUTHORIZATION AND ASSISTANCE FOR ASYLUM SEEKERS IN THE UNITED STATES 15 (Human Rights Watch, 2013) (discussing that asylum-seeker applicants only become eligible for social or medical benefits once they receive work authorization).

148. See EXEC. OFFICE FOR IMMIG. REV. & U.S. CITIZENSHIP AND IMMIG. SERVS., *The 180-Day Asylum EAD Clock Notice*, U.S. CITIZENSHIP AND IMMIG. SERVS., https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf (last updated May 9, 2017) (describing how the 180-day clock works with various asylum procedures); see also Gruberg & West, *supra* note 71, at 28 (discussing the extent and effects of the immigration court backlog).

149. Gruberg & West, *supra* note 71, at 28.

150. See JACEK & HON, *supra* note 147, at 31 (noting that asylum-seekers are often barred from work authorization and thereby struggle to find housing, often settling with shared accommodations with strangers or resorting to homelessness).

Second, predicting the success of a claim for an LGBT applicant is very difficult. Case outcome prediction is uniquely difficult within asylum law because the vast majority of decisions are unpublished or decided without any written opinion.¹⁵¹ For LGBT asylum cases, precedent only dates back to 1990.¹⁵² In *Matter of Toboso-Alfonso*, the BIA first recognized that sexual orientation could be used to establish “membership in a particular social group” and serve as a basis for asylum.¹⁵³ Since this decision, LGBT-identifying applicants typically file under the “membership in a particular social group” category because it is the most open to interpretation.¹⁵⁴ When an applicant selects this category, additional inquiries are made to identify the characteristics that form the particular social group.¹⁵⁵ The BIA has since elaborated that an applicant who is seeking asylum based on membership in a particular social group must establish that the group is: “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”¹⁵⁶ Although the BIA recently issued this decision, various U.S. circuit courts disagree on the controlling standard.¹⁵⁷

Third, LGBT asylum-seekers often struggle to meet their burden of proof because providing evidence of sexual orientation can be an especially arduous

151. *Asylum Manual: Precedential LGBTQ/H Asylum Cases*, IMMIGR. EQUAL., <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/precedential-lgbth-asylum-cases/> (last visited Oct. 4, 2017).

152. *See* *Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (holding that sexual orientation could serve as the basis for classification within a “particular social group”); *see also* *Precedent Decisions*, U.S. DEP’T OF HOMELAND SECURITY (last updated Sept. 10, 2013), <http://www.uscis.gov/laws/precedent-decisions> (explaining that “precedent decisions” are administrative decisions made by the Administrative Appeals Office, the Board of Immigration Appeals, or the attorney general and are legally binding in all proceedings involving the same issue or issues).

153. *Toboso-Alfonso*, 20 I&N Dec. at 822 (BIA 1990). In 1994, Attorney General Janet Reno declared the case precedent in all proceedings involving the same issue(s). *See* 1895 Op. Att’y Gen. 94 (1994).¹⁵¹_{SEP}

154. PRACTICE ADVISORY: SEEKING ASYLUM FOR LGBT CHILDREN AND YOUTH, VERA INST. OF JUSTICE DUCS LEGAL ACCESS PROJECT 2 (Feb. 2011), http://www.immigrationequality.org/wp-content/uploads/2011/09/Microsoft-Word-2412_Practice_Advisory_on_LGBT_Minor_Asyum_Applicants_February_2011.pdf.

155. PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF M-E-V-G AND MATTER OF W-G-R, NAT’L. IMMIGR. JUSTICE CTR. 2 (2016), <https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf> [hereinafter PARTICULAR SOCIAL GROUP PRACTICE] (discussing the new requirements and necessary inquiries the BIA added to the Particular Social Group (PSG) test after these two decisions).

156. M-E-V-G-, 26 I&N Dec. 227, 237 (BIA 2014); *see also* W-G-R-, 26 I&N Dec. 208, 216 (BIA 2014). These two decisions modified but affirmed S-E-G-, 24 I&N Dec. 579 (BIA 2008) and E-A-G-, 24 I&N Dec. 591 (BIA 2008)—two cases involving gang-based asylum claims that were highly criticized by the circuit courts.

157. *See* PARTICULAR SOCIAL GROUP PRACTICE, *supra* note 155, at 9 (“[T]he two circuits that most strongly criticized the social visibility/distinction and particularity tests—the Third and the Seventh—have yet to recognize the decisions as binding[.]”).

task.¹⁵⁸ For example, “[i]mmigration officials are required to ask all detainees if they fear persecution or torture in their country of origin or if they are afraid of returning.”¹⁵⁹ Detainees may be discouraged and uncomfortable asserting their sexual orientation or fear of returning to their country of origin in the presence of others.¹⁶⁰ As a result, they might never be referred to an asylum officer—“who can ask them to detail their experiences and determine if they qualify for asylum.”¹⁶¹ To make matters worse, evidence of sexual orientation is also not always readily apparent to the fact finder, who might have preconceptions of sexual orientation and its meaning.¹⁶² The flexible nature of fact-finding in asylum law can be problematic because the trier of fact makes decisions informed from their own biases, along with evidence and testimony from the applicant.¹⁶³ Equally problematic is that some immigration judges still rely on stereotypes and biases when deciding which standards to apply to a particular applicant.¹⁶⁴

Lastly, LGBT asylum-seekers are harmed when they do not have legal counsel during the asylum process.¹⁶⁵ As an example, in *Barragan-Ojeda v. Sessions*,¹⁶⁶ the Seventh Circuit recently denied a petition for review from a Mexican national who applied for asylum *pro se* based on a fear of persecution from government-connected gangs.¹⁶⁷ Although the applicant testified that he had been discriminated against because he was perceived as effeminate, when questioned by the immigration judge, the applicant denied that he was gay.¹⁶⁸ The judge denied his application for asylum.¹⁶⁹

After acquiring counsel, the applicant appealed to the BIA and asserted a fear

158. See Morgan, *supra* note 102, at 141 (asserting that proving LGBT status often depends upon a discretionary determination by an immigration official).

159. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE 79 (Feb. 2016) (describing why LGBT immigrants especially need counsel during asylum proceedings).

160. *Id.* at 79–80.

161. *Id.*

162. See Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER & L. 1, 26 (2017) (critiquing the “social visibility” requirement and detailing that this presents a problem for applicants who defy stereotypes of what it means to be homosexual).

163. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2015) (discussing how the trier of fact may consider subjective characteristics such as demeanor and candor).

164. See Bowmani, *supra* note 162, at 15–16 (arguing that the way in which applicants must establish their claim presupposes a heterosexual, cisgender, male, European, political dissident—the quintessential post-World War II refugee).

165. *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 13, 2016), <http://trac.syr.edu/immigration/reports/448/>.

166. *Barragan-Ojeda v. Sessions*, 853 F.3d 374 (7th Cir. 2017).

167. *Id.* at 375–76.

168. *Id.*

169. *Id.* at 376. On appeal, the BIA adopted and affirmed the denial of asylum, finding that being mistreated by gangs was not connected to a protected ground under the law, and then finding that the applicant had not sufficiently demonstrated a fear of persecution based on an imputed sexual orientation claim. *Id.* at 376–78.

of persecution based on his sexual orientation as a protected class for the first time.¹⁷⁰ The applicant argued that he had not disclosed his sexual orientation previously because of his young age, *pro se* representation, and fear of admitting his sexual orientation in court.¹⁷¹ The BIA construed the new claim as a motion to remand, and then denied the motion, finding that the applicant had provided insufficient evidence to demonstrate why his sexual orientation claim was not previously available.¹⁷² On review by the Seventh Circuit, the court denied the petition for review.¹⁷³ Had the applicant had an attorney at his initial hearing who would have known the importance of the applicant pleading his sexual orientation, the outcome likely would have been in his favor.¹⁷⁴ Thus, this example shows that it is more difficult for LGBT asylum-seekers to succeed without a lawyer.

Although all asylum-seekers face challenges, LGBT individuals are particularly vulnerable because of their reluctance to disclose their sexual orientation and failure to understand its relevance.¹⁷⁵ Additionally, they may face higher rates of discrimination for housing and employment.¹⁷⁶ For these reasons, members of the LGBT community require special attention and protections in the asylum process.

III. RECENT THREATS BY THE TRUMP ADMINISTRATION TO THE U.S. ASYLUM SYSTEM AND IMMIGRATION FRAMEWORK

President Donald Trump and his administration present a severe threat to the recent progress that has been made in immigration law and LGBT rights.¹⁷⁷ Despite the unlikelihood that the current administration will succeed in overturning existing protections for LGBT asylum-seekers, President Trump's policies still substantially hinder the experiences of all immigrants.¹⁷⁸

170. *Id.* at 376.

171. *Id.* at 379. The applicant was eighteen years old at the time. *Id.*

172. Barragan-Ojeda, 853 F.3d at 376.

173. *Id.*

174. For an example of an organization that provides free, quality legal representation for LGBT asylum-seekers, see *LGBT Persecution and Asylum in the United States*, LGBT ASYLUM PROJECT, <http://www.lgbt asylumproject.org/the-facts.html> (last visited Oct. 16, 2018) (boasting a 100% client success rate); see also *About Us*, IMMIGR. EQUAL., <https://www.immigrationequality.org/about-us/#.WodJbZM-dZ0> (last visited Feb. 16, 2018) (explaining that their organization maintains a 99% success rate).

175. See *supra* Part II.D for a discussion about the specific challenges LGBT asylum-seekers face.

176. *Id.*

177. See Sarah Kate Ellis, *President Trump is Trying to Erase the LBGTQ Community*, TIME (Jan. 16, 2018), <http://time.com/5104657/donald-trump-lgbt-rights/> (discussing how President Trump has targeted LBGTQ communities with his policies); see *The Deported: Immigrants Uprooted from the Country They Call Home*, HUMAN RIGHTS WATCH (Dec. 2017), <https://www.hrw.org/report/2017/12/05/deported/immigrants-uprooted-country-they-call-home> (documenting forty-three cases in which immigrants, many of them long-term residents with strong U.S. ties, were deported after the election of President Trump).

178. See Michael Arria, *Asylum-Seeker Says He's Being Deported Because ICE Mishandled Evidence of Anti-Gay Attack*, Intercept (Sept. 19, 2017), <https://theintercept.com/2017/09/19/gay->

A. *Trump's Harmful and Impulsive Immigration Policies*

President Trump's Executive Order 13769—banning travel from seven predominantly Muslim countries soon after his inauguration¹⁷⁹—has raised serious concerns for LGBT Muslim refugees and asylum-seekers, “as four of the targeted countries have laws against homosexuality.”¹⁸⁰ The Supreme Court ultimately ruled in favor of President Trump's third version of the Executive Order 13769 in *Trump v. Hawaii*.¹⁸¹ President Trump has also called for ending several popular and highly beneficial visa programs for hundreds of thousands of immigrants.¹⁸² After a terrorist attack in New York City by an individual who came to the United States with a diversity visa, President Trump called for the Diversity Immigrant Visa

ghana-asylum-us-immigration-ice-deportation/ (referencing Trump's travel ban from predominantly Muslim countries and the administration's interest in expanding the use of privately-run immigration detention centers); see also Miriam Jordan, *A Migrant Boy Rejoins His Mother, but He's Not the Same*, N.Y. Times (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/migrant-children-separation-anxiety.html> (describing the experience of a five-year-old boy separated from his mother at the southwest border for 50 days and the many ways he has dramatically changed).

179. Exec. Order No. 13769, 82 Fed. Reg. 20 (Feb. 1, 2017). The initial executive order aimed to prohibit travel to and from the following countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. See *Trump's Executive Order: Who Does Travel Ban Affect?*, BBC (Feb. 10, 2017), <http://www.bbc.com/news/world-us-canada-38781302> (providing a timeline of events after the executive order was issued and providing the legal arguments surrounding the ban); see also Lawrence Hurley, *Supreme Court Lets Trump's Latest Travel Ban Go into Full Effect*, REUTERS (Dec. 4, 2017, 4:23 PM), <https://www.reuters.com/article/us-usa-court-immigration/supreme-court-lets-trumps-latest-travel-ban-go-into-full-effect-idUSKBN1DY2NY> (profiling the U.S. Supreme Court's decision to allow Trump's revised travel ban that impacts three additional countries). The new proclamation indefinitely restricts travel from Iran, Libya, Syria, Yemen, Somalia, Chad, North Korea, and government officials from Venezuela. *Id.*

180. Arria, *supra* note 178; see Max Bearak & Darla Cameron, *Here Are the 10 Countries Where Homosexuality May Be Punished by Death*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.d7cdf1c7e4b2 (providing that homosexuality may be punishable by death in Iran, Somalia, Sudan, and Yemen, among others, and that homosexual acts are illegal in Libya and Syria).

181. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (holding that Trump lawfully barred the entry of aliens into the United States under 8 U.S.C. § 1182(f) and that respondents had not sufficiently established their claim that the executive order violates the establishment clause).

182. See Scott Clement & David Nakamura, *Survey Finds Strong Support for 'Dreamers'*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/politics/survey-finds-strong-support-for-dreamers/2017/09/24/df3c885c-a16f-11e7-b14f-f41773cd5a14_story.html?utm_term=.414069539e03 (focusing on a survey that found 86% of Americans support “dreamers” who had been eligible to receive work permits under DACA to remain in the country); see also William Finnegan, *Is Ending DACA the Worst Decision Trump Has Made?*, NEW YORKER (Sept. 18, 2017), <https://www.newyorker.com/magazine/2017/09/18/is-ending-daca-the-worst-decision-trump-has-made> (arguing that Trump's decision will cause immense human suffering and will be detrimental to the economy).

Program¹⁸³ to be dissolved.¹⁸⁴ President Trump has also rescinded the Deferred Action for Childhood Arrivals (DACA)¹⁸⁵ program for six months with the final determination of its status still pending.¹⁸⁶ President Trump has also made racist remarks and shown clear preferences for welcoming immigrants from certain countries over others.¹⁸⁷ President Trump's disparaging statements towards certain countries impact LGBT asylum-seekers because the majority of them originate from those very areas of the world he has publicly denounced.¹⁸⁸ President Trump's impulsive actions after unusual events are harmful for LGBT asylum-seekers because they result in immigration policies based in bigotry instead of facts.¹⁸⁹

B. Dangerous Officials in the Trump Administration Harming LGBT

183. See *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Jan. 11, 2018), <https://www.uscis.gov/greencard/diversity-visa> (explaining that up to 50,000 immigrants a year receive visas under the Diversity Immigrant Visa Program, which draws randomly from a pool of individuals who have arrived from countries that have low rates of immigration to the United States).

184. Tessa Berenson, *President Trump Calls for Ending Diversity Visa Lottery Program*, TIME (Nov. 1, 2017), <http://time.com/5005647/diversity-visa-lottery-donald-trump/> (describing Trump's call on Congress to end a green card lottery program twenty-four hours after a New York City attack was carried out by a recipient of such a visa).

185. Tal Kopan, *What is DACA and Why Is It Ending?*, CNN (Jan. 2, 2018), <https://www.cnn.com/2018/01/02/politics/daca-explained/index.html>.

186. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> (describing Trump's order to end DACA, a program that protects young undocumented immigrants from getting deported, and his instructions to Congress to enact a replacement before DACA protections end in six months); see Miriam Jordan, *U.S. Must Keep DACA and Accept New Applications, Federal Judge Rules*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/daca-dreamers-trump.html> (reporting that a federal judge in Washington D.C. ruled that the government cannot repeal DACA protections and must continue to accept new applications if, in ninety days, it is unable to show good reason as to why the program was cancelled).

187. See Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html?mtrref=www.google.com&auth=login-email> (recounting a meeting regarding a proposed immigration deal that would include protections for people from Haiti and some nations in Africa, during which President Trump demanded to know why immigrants from "shithole countries" should be accepted rather than from places like Norway).

188. From 2010 to 2014, Jamaica has had the greatest amount of people seeking refuge in the United States. Russia followed with the second-highest number in 2010 and 2011, and the third-highest from 2012 through 2014. Mexico had the second-highest in 2012 and 2014 while Honduras had the second-highest in 2013. This data was obtained from Immigration Equality and was based on 793 asylum cases closed from 2010 through 2014. Gruberg & West, *supra* note 71, at 11–12.

189. See, e.g., Andrew Solomon, *Fear and Loathing in Trump's America*, New Yorker (Feb. 3, 2017), <https://www.newyorker.com/culture/cultural-comment/fear-and-loathing-in-trumps-america> (describing President Trump's views on LGBT people, the powerful anti-LGBT proponents that he surrounds himself with, and the impact they have on LGBT people in the United States).

Immigrants

In July 2017, President Trump nominated Kansas Governor Sam Brownback—an open opponent of gay rights—to serve as Ambassador at Large for International Religious Freedom.¹⁹⁰ After six months, Congress narrowly confirmed Governor Brownback.¹⁹¹ Governor Brownback now has the ability to decide what encompasses “religious freedom” in the United States which may negatively impact LGBT asylum-seekers.¹⁹²

Attorney General Jeff Sessions is one of the most harmful and imminent threats for all immigrants in the Trump administration.¹⁹³ This can be seen in his recent unilateral decision in *Matter of A-B*¹⁹⁴ where he employed a rarely-used, self-referral power in order to effect revisions to U.S. asylum law.¹⁹⁵ In the decision, Sessions made it more difficult for asylum-seekers making claims based on the actions of non-governmental parties by requiring proof of more egregious government action or inaction.¹⁹⁶ Now, under this new standard, victims must “establish that the government protection from such harm in their home country is so lacking that their persecutors’ actions can be attributed to the government.”¹⁹⁷

190. Arria, *supra* note 178; *see also Religious Freedom*, U.S. DEPT. OF STATE, <https://www.state.gov/j/drl/irf/> (last visited Oct. 20, 2018) (explaining that the mission of the Office of Religious Freedom is to promote religious freedom worldwide—a core proponent of U.S. foreign policy).

191. Mitch Smith, *After Long Wait in Kansas, Gov. Sam Brownback Gets Ambassadorship*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/sam-brownback-kansas-ambassador.html>.

192. *See* Jay Michaelson, *Trump’s New Ambassador Sam Brownback Could Weaponize ‘Religious Freedom’ Around the World*, DAILY BEAST (Jan. 26, 2018, 5:17 AM), <https://www.thedailybeast.com/trumps-new-ambassador-sam-brownback-could-weaponize-religious-freedom-around-the-world> (describing major changes that Governor Brownback can invoke in his new position such as censoring countries that forbid discrimination against LGBT people for violating religious freedom).

193. *See* Bea Bischoff, *Jeff Sessions is Hijacking Immigration Law*, SLATE (June 13, 2018, 2:27 PM), <https://slate.com/news-and-politics/2018/06/in-matter-of-a-b-jeff-sessions-hijacked-immigration-law-by-abusing-a-rarely-used-provision.html> (arguing that Sessions’ case selection as well as his determination to overcome procedural adversity shows that his goal is to ensure that fewer people are authorized to remain in the United States). At Trump’s request, Jeff Sessions resigned as Attorney General on November 7, 2018. *See* Devlin Barrett et al., *Jeff Sessions Forced Out as Attorney General*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html?noredirect=on&utm_term=.991ea9a4fd06.

194. A-B-, Respondent, 27 I&N Dec. 316 (A.G. 2018) (interim decision), *overruling* A-R-C-G-, 26 I&N Dec. 338 (BIA 2014).

195. Bischoff, *supra* note 193.

196. A-B-, 27 I&N Dec. at 337–38; *see* Cody Wofsy & Katrina Eiland, *Jeff Sessions’ Illegal Attacks on Asylum Seekers*, ACLU (Aug. 7, 2018, 4:30 PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/jeff-sessions-illegal-attacks-asylum-seekers> (announcing that the ACLU, on behalf of a group of asylum-seekers—largely Central American women and children—challenged *Matter of A-B* in a lawsuit entitled *Grace v. Sessions*).

197. A-B-, 27 I&N Dec. at 317.

One critic argues that Sessions is circumventing Congress by using this power to enact his own vision of asylum laws.¹⁹⁸ The Trump administration's actions in *Matter of A-B* open the door for direct control of immigration laws by the Attorney General's Office, which could put the U Visas and VAWA self-petition process in jeopardy and cause further harm to IPV victims.¹⁹⁹

In April 2018, Attorney General Sessions "ordered prosecutors along the border to 'adopt immediately a zero-tolerance policy' for illegal border crossings," which led to the separation of over 2,000 children from their parents.²⁰⁰ After a few months of international outrage and nationwide protests, President Trump signed an executive order ending the policy in June 2018.²⁰¹ Nonetheless, as of August 31, 2018, over one month past the court-mandated deadline requiring the U.S. government to reunite children and their families, nearly 500 children remain apart from their families in government shelters.²⁰²

Trump's actions suggest that his cabinet will chip away at the current asylum framework from another angle—by indirectly calling on Congress to propose reforms.²⁰³ For example, in an October 12, 2017 speech to the Executive Office of Immigration Review (EOIR),²⁰⁴ Sessions claimed "fraud and abuse" in the asylum system as one of the reasons for the over eleven million undocumented immigrants

198. See, e.g., Bischoff, *supra* note 193 (arguing that Sessions is disregarding procedural rules in order to issue precedential decisions that limit the amount of immigrants granted legal status to stay in the United States).

199. *Id.*

200. See Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> (outlining the timeline of events after Sessions' announcement including Trump's reversal of his policy of separating families).

201. See John Wagner et al., *Trump Reverses Course, Signs Order Ending His Policy of Separating Families at the Border*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/powerpost/gop-leaders-voice-hope-that-bill-addressing-family-separations-will-pass-thursday/2018/06/20/cc79db9a-7480-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.49540f03444f (describing the zero-tolerance policy and how thousands of children ended up in detention centers during the summer of 2018).

202. See Maria Sacchetti, *Still Separated: Nearly 500 Migrant Children Taken from Their Parents Remain in U.S. Custody*, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/local/immigration/still-separated-nearly-500-separated-migrant-children-remain-in-us-custody/2018/08/30/6dbd8278-aa09-11e8-8a0c-70b618c98d3c_story.html?noredirect=on&utm_term=.e744463ed610.

203. See Jeff Sessions, Att'y Gen. Jeff Sessions, U.S. Dept of Justice, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> (containing Sessions' remarks to the EOIR urging Congress to pass the legislative priorities that Trump recently announced, which included significant asylum reform, swift border returns, and enhanced interior enforcement).

204. See generally *Executive Office of Immigration Review: About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last updated Aug. 24, 2017).

in the United States.²⁰⁵ During the speech, Sessions cited “dirty immigration lawyers” as part of the problem for allegedly encouraging clients to make false asylum claims and providing asylum-seekers with the “magic words needed to trigger the credible fear process.”²⁰⁶ The Trump administration is also considering changing the policy for immigrants receiving public benefits.²⁰⁷ Some advocates fear that this policy change could serve as a de facto ban on HIV immigrants who rely on public benefits to manage their illness from receiving permanent resident status.²⁰⁸ This policy change would likely disproportionately impact LGBT asylum-seekers with HIV.²⁰⁹

C. Harmful Changes to the Guidance for Asylum Officers Processing LGBT Claims

The Trump administration’s recent update of the lesson plan for asylum officers conducting credible fear determinations will also impact LGBT asylum-seekers.²¹⁰ This process differs from the asylum interview.²¹¹ In credible fear determinations, those arrested while seeking safe haven in the United States and subjected to expedited removal must meet the “credible fear standard.”²¹² Those who indicate an intent to apply for asylum, express a fear of persecution or torture, or express a fear of returning to their home country, may interview with an asylum officer.²¹³ If the asylum officer determines that the applicant has demonstrated a “credible fear,” the applicant will be referred to an immigration judge for a full assessment of the

205. Sessions, *supra* note 203.

206. *Id.*

207. See Joel Rose, *Trump Administration Moves to Penalize Immigrants for Using Government Benefits*, NPR (Aug. 20, 2018, 2:15 PM), <https://www.npr.org/2018/08/20/640262463/trump-administration-moves-to-penalize-immigrants-for-using-government-benefits> (explaining that the Trump administration plans to limit immigration relief for those who use various types of public benefits).

208. See Amanda Lugg, *Newly Proposed ‘Public Charge’ Rule Could Be Devastating to HIV-Positive Immigrants*, BODY (May 16, 2018), <http://www.thebody.com/content/81028/public-charge-rule-devastating-hiv-immigrants.html> (arguing that the proposed rule is a backdoor mechanism to ultimately barring HIV-positive individuals from acquiring permanent residence in the United States given that it would be necessary for them to provide proof of unsubsidized health insurance).

209. See generally *Asylum Manual: Asylum Law Basics: A Brief History*, IMMIGR. EQUAL., <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-law-basics-a-brief-history/> (last visited Aug. 21, 2018) (providing an overview of the asylum system and describing past HIV asylum claims). See also *id.* (describing how the policy change would be detrimental to HIV applicants).

210. See John Lafferty, *Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans 7*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Feb. 13, 2017) (noting that the lesson plan’s purpose is to explain how to determine whether an individual seeking admission to the United States has a credible fear of persecution or torture based on the INA and IIRIRA).

211. See discussion *supra* Part II.C on the different processes for asylum-seekers.

212. *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last updated Sept. 15, 2015).

213. *Id.*

asylum, withholding of removal, or CAT claim.²¹⁴

The new guidance removed a passage from the previous version that stated if an asylum officer has reasonable doubt about a person's credibility, then the officer should find credible fear and allow an immigration judge to hear the question at a full hearing.²¹⁵ The revised lesson plan now guides officers to ask questions "to determine whether an alien . . . has a credible fear of persecution or torture."²¹⁶ Normally, immigration judges make this type of assessment during the final adjudicative stage when asylum applicants have the benefit of legal representation and supporting evidence.²¹⁷

The USCIS 2017 lesson plan also altered a passage regarding an individual's "demeanor, candor, and responsiveness" as a factor in their credibility.²¹⁸ Both versions of the lesson plan point out that cultural factors such as being detained in a foreign country, not speaking the language, and sustaining trauma at home or during their journey could affect the interviewee's demeanor.²¹⁹ However, the 2017 version has been edited so that asylum officers may consider signs of stress as a reason to doubt someone's credibility.²²⁰

Taking stress into account will arguably impact LGBT asylum-seekers because many are uncomfortable and fearful about disclosing their sexual orientation.²²¹ Stephen Legomsky,²²² former Chief Counsel to the USCIS under President Barack Obama, opposed this change arguing, "[t]hese are very quick determinations made

214. *Id.* See *supra* Part II.C for a discussion on withholding of removal and Convention Against Torture claims.

215. See Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the US*, CNN (Mar. 8, 2017, 11:29 AM), <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html> ("In fiscal year 2016, nearly 80% of credible fear cases nationwide were granted, letting more than 73,000 asylum-seekers pursue their cases in the US"); see also, U.S. CITIZENSHIP AND IMMIGR. SERVS., LESSON PLAN OVERVIEW ASYLUM DIVISION OFFICER TRAINING COURSE ON CREDIBLE FEAR 16 (Feb. 28, 2014) [hereinafter CREDIBLE FEAR] ("As long as there is a significant possibility that the applicant could establish in a full hearing that the claim is credible, unresolved questions regarding an applicant's credibility should not be the basis of a negative credible fear determination.").

216. CREDIBLE FEAR, *supra* note 215.

217. See *Summary of February 13, 2017 Asylum Division Lesson Plan Implementing Executive Orders*, TAHIRIH JUSTICE CTR. 3 (Mar. 6, 2017), <https://www.tahirih.org/wp-content/uploads/2017/03/Tahirih-Summary-of-CFI-RFI-Changes-3.6.17.pdf> (arguing that the asylum officer can now make a final, as opposed to threshold, determination, which may negatively impact the applicant).

218. CREDIBLE FEAR, *supra* note 215, at 17–20.

219. Kopan, *supra* note 215.

220. U.S. CITIZENSHIP AND IMMIGR. SERVS., ASYLUM DIVISION OFFICER TRAINING COURSE: LESSON PLAN OVERVIEW ON CREDIBLE FEAR OF PROSECUTION AND TORTURE DETERMINATIONS 19 (Feb. 13, 2017); see also Kopan, *supra* note 215.

221. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE 79–80, (2016); Morgan, *supra* note 102, at 14.

222. Stephen H. Legomsky, WASH. UNIV. LAW, <http://law.wustl.edu/faculty/pages.aspx?id=274> (last visited Oct. 21, 2018).

without any counsel by people who have just arrived and are exhausted, still traumatized and often not fluent in the language.”²²³ Legomsky acknowledged that changes to the present asylum system are needed, but he believes that “a better solution would be to increase the capacity of the immigration courts to hear cases more quickly.”²²⁴ Although such changes might indeed provide an alternative route for improving the asylum system, the actual revised lesson plan unfortunately has the effect of discriminating against LGBT asylum-seekers.

Given the Trump administration’s comments and policies, there are a plethora of reasons why all immigrants, including LGBT asylum-seekers, continue to be at great risk of losing many protections. Due to these broader political concerns and because the current asylum framework still fails many LGBT asylum-seekers, additional safeguards must be put in place to protect current and future LGBT asylum-seekers. While the history of LGBT asylum-seekers alone demonstrates the importance of such safeguards, the changes being made to the application process today even further emphasize the need for greater protections.

IV. EXAMINING CURRENT PROTECTIONS FOR LGBT ASYLUM-SEEKERS WHO ARE VICTIMS OF IPV

There are two avenues of relief for LGBT asylum-seekers who become victims of IPV: self-petition under VAWA or apply for a U Visa. An in-depth analysis of the protections these options provide is helpful for understanding how both lack the ability to fully address the needs of LGBT asylum-seekers who become victims of IPV.

A. *VAWA Protections for LGBT Asylum-Seekers*

One option for LGBT victims of IPV awaiting the outcome of their asylum claim is to self-petition under VAWA.²²⁵ Before VAWA, citizens or permanent resident spouses controlled their victims’ ability to gain legal status.²²⁶ Enacted in 1994, VAWA allows an abused spouse, child of a U.S. citizen or lawful permanent resident, or an abused parent of a U.S. citizen to petition for lawful status in the United States.²²⁷ The self-petitioner must prove that they are a spouse who was physically battered or subjected to “extreme cruelty.”²²⁸ Thus, applying under VAWA is dependent on the abuser’s immigration status.²²⁹

223. Kopan, *supra* note 215.

224. *Id.*

225. 8 U.S.C. § 1154(a) (1994); see *Battered Spouse*, *supra* note 19.

226. Mark Shmueli, *Protecting Immigrant Women: Benefits for Abuse Victims*, 41 MD. B.J. 20, 21 (Oct. 2008).

227. See *Battered Spouse*, *supra* note 19 (focusing exclusively on the protections afforded to spouses); see Monica N. Modi et al., *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 J. WOMEN’S HEALTH 253, 254 (2014), <http://online.liebertpub.com/doi/pdf/10.1089/jwh.2013.4387> (“The 1994 act provided \$1.6 billion over 6 years toward investigation and prosecution of violent crimes against women and imposed automatic and mandatory restitution for those convicted.”).

228. 8 C.F.R. § 204.2(c)(H)(vi) (1995).

229. *Battered Spouse*, *supra* note 19.

VAWA has several excellent benefits and advantages for self-petitioners. Unlike the U Visa, VAWA does not cap the number of individuals that may apply each year.²³⁰ If the VAWA application is approved, individuals can receive employment authorization and access public benefits while the self-petition is pending.²³¹ These advantages are incredibly helpful for asylum-seekers who must wait several years before receiving benefits and work authorization through the asylum process.²³² Significantly, VAWA immediately designates the applicant as a permanent resident once they are approved.²³³

Each re-authorization of VAWA has expanded the relief available for victims of IPV.²³⁴ In 2000, VAWA expanded relief to undocumented immigrants by creating the U Visa for victims of crime.²³⁵ In 2013, after much debate, protections were expanded to include LGBT victims of abuse.²³⁶ This win was pivotal because many services that VAWA created for IPV victims had been previously inaccessible to LGBT individuals.²³⁷ The 2013 reauthorization came the same year the Supreme Court struck down the Defense of Marriage Act (DOMA),²³⁸ which defined marriage as a union between one man and one woman.²³⁹ The fall of DOMA, along with the decision in *Obergefell v. Hodges*,²⁴⁰ made it possible for VAWA to cover same-sex married victims of IPV.

Although self-petitioning under VAWA provides some protection for LGBT victims of IPV, it also poses a few problems for LGBT asylum-seekers. First, abused spouses must prove that the marriage was entered into in good faith, that the abuse occurred during the marriage, and that the marriage is still valid or was terminated less than two years prior to self-petitioning.²⁴¹ The self-petitioner must also provide evidence of their “good moral character.”²⁴² Certain arrests or transgressions may

230. Emily McCabe & Leslye E. Orloff, *Comparison Chart of VAWA and U Visa Immigration Relief*, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT (June 20, 2014), http://library.niwap.org/wp-content/uploads/2015/IMM-Chart-VAWA-UVisa6_20.14.pdf.

231. *Id.*

232. See JACEK & HON, *supra* note 147, at 15 (discussing the effects of the asylum application backlog and the lack of social and medical benefits available to asylum-seekers).

233. 8 C.F.R. § 204.2(h)(1).

234. VAWA was reauthorized in 2000, 2005, and 2013. Violence Against Women Reauthorization Act of 2013, 42 U.S.C. §§ 13925–14045d (2013), <https://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf>.

235. Violence Against Women Reauthorization Act of 2000, S. 2787 106th Cong., Title V. (2000).

236. Violence Against Women Reauthorization Act of 2013, 42 U.S.C. §§ 13925–14045d (2013), S. 47–13.

237. Modi et al., *supra* note 227, at 255.

238. *U.S. v. Windsor*, 570 U.S. 744 (2013).

239. Defense of Marriage Act, Pub. L. No. 104-199, H.R. 3396, 104th Cong. (1996).

240. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing the constitutional right to same-sex marriage).

241. 8 U.S.C. § 1154(a)(1)(A)(iii)(II) (1994).

242. *Id.* This usually refers to a review of the self-petitioner's criminal record or other immigration transgressions. See *Violence Against Women Act (VAWA)*, IMMIGR. CTR. FOR WOMEN

be waived if the self-petitioner can show such actions were connected to the abuse they suffered.²⁴³ However, this standard is problematic because studies have found that LGBT individuals are more likely to have negative interactions with police.²⁴⁴ These interactions lead to an increased likelihood for arrest or detention.²⁴⁵ For IPV victims who cannot waive their arrests or other transgressions through official exemptions, they are barred from this incredibly helpful form of relief.

Second, another substantial limitation to VAWA is that it only protects those who fall under a few select categories of relation to the defendant.²⁴⁶ VAWA thus centers around citizenship and marriage and fails to provide protection for those who are still victims of crimes committed by their abusive partner.²⁴⁷ This shortcoming greatly impacts LGBT asylum-seekers who are unable or unwilling to marry because of fears relating to being “out” in their communities and the discrimination that it may bring.²⁴⁸ This standard also does nothing to help victims of IPV who are in relationships with other non-citizens.²⁴⁹ The requirement of marriage to U.S. citizens or permanent residents likely explains the fact that far fewer VAWA self-petitions are filed each year compared to U Visa applications.²⁵⁰ For these reasons, the U Visa may be the only alternative for certain LGBT asylum-seekers. However, as

& CHILD., <https://www.icwclaw.org/violence-against-women-act-vaawa/> (last visited Oct. 2, 2018).

243. See U.S. Citizenship and Immigr. Servs., Interoffice Memorandum: Determinations of Good Moral Character in VAWA-Based Self-Petitions 3 (Jan. 19, 2005) (asserting that the evidence must establish that the abuse compelled or coerced the abused individual to commit the act or crime for which they were convicted).

244. See MAKE THE ROAD NEW YORK, TRANSGRESSIVE POLICING POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS 9, 17 (2012) (explaining how LGBTQ respondents reported higher rates of harassment and more frequent stops—33% of non-LGBTQ harassed when stopped compared to 51% LGBTQ).

245. See *Protected and Served?*, LAMBDA LEGAL (2014), <https://www.lambdalegal.org/protected-and-served/police> (last visited Oct. 8, 2017) (finding significant disparities between the LGBT population and the general population regarding false arrests).

246. *Battered Spouse*, *supra* note 19.

247. See *id.* (listing the limited categories of eligibility).

248. See Liam Stack, *The Challenges That Remain for L.G.B.T. People After Marriage Ruling*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/the-challenges-that-remain-for-lgbt-people-after-marriage-ruling.html> (describing how, despite the U.S. Supreme Court’s legalization of same-sex marriage, LGBT individuals are still concerned about discrimination, violence, health care, and immigrant rights).

249. See Leslye E. Orloff & Brittney Roberts, *Good Faith Marriage in VAWA Self-Petitioning Cases*, NAT’L IMMIGRANT WOMEN’S ADVOC. PROJECT 1 (Feb. 17, 2013), <http://library.niwap.org/wp-content/uploads/2015/Immigration-Law-and-VAWA-Good-faith-marriage-2.17.13.pdf> (“When Congress created VAWA self-petitioning in 1994 its goal was to offer help to immigrant spouse and child abuse victims who were trapped in good faith marriages to U.S. citizens and lawful permanent residents that had become abusive.”).

250. See *Number of Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, by Fiscal Year, Quarter, and Case Status 2017*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 19, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Citizenship/I360_VAWA_performancedata_fy2017_qtr4.pdf (displaying that 10,221 self-petitions were received in FY 2017 and that 3,563 petitions were approved).

discussed below, the U Visa requires much more of applicants than VAWA and comes with fewer protections.

B. U Visa Protections for LGBT Asylum-Seekers

In the 2000 reauthorization of VAWA, Congress created the U Visa.²⁵¹ The U Visa, also a self-petitioning visa, expanded protection to victims abused by citizens, permanent residents, or undocumented immigrants regardless of marital status.²⁵² LGBT asylum-seekers who have “suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity” can apply for lawful status through a U Visa with the Department of Homeland Security.²⁵³ This standard covers crimes of IPV.²⁵⁴

The U Visa protects individuals, regardless of their sexual orientation or gender identity, who are victims of sexual assault, domestic violence, and certain other crimes, and that are willing to help law enforcement authorities in the investigation or prosecution of criminal activity.²⁵⁵ The individual must also obtain certification from a federal, state, or local official involved in prosecuting the criminal activity, which states that they have or will assist in the investigation of that abusive criminal activity.²⁵⁶ Congress created the U Visa, in part, because it recognized that victims often do not come forward to seek law enforcement assistance out of fear of detention or deportation.²⁵⁷ Such protected status is vitally important because it provides victims with work authorization and four years to live in the United States without being deported.²⁵⁸

While the U Visa appears to be an adequate protection for some LGBT victims of IPV, it poses a number of problems for asylum-seekers.²⁵⁹ First, there is an annual

251. Violence Against Women Reauthorization Act of 2000, S. 2787 106th Cong., Title V. (2000).

252. *See generally* 8 C.F.R. § 214.14(a), (c) (2007).

253. *See id.* (employing the quoted text multiple times in these provisions). Given that there is no explicit bar on LGBT victims applying for U Visas, it is assumed that LGBT victims are also eligible to apply for U visas. *See Victims of Criminal Activity: U Nonimmigrant Status, supra* note 21.

254. *See id.*; *see also* 8 C.F.R. § 214.14(b)(1) (providing a non-exhaustive list of factors used to determine whether abuse is substantial).

255. *See Victims of Criminal Activity: U Nonimmigrant Status, supra* note 21 (displaying a chart of qualifying crimes). *See generally* 8 C.F.R. § 214.14(a), (b).

256. *Overview of Types of Immigration Status*, STATE JUSTICE INST. (Apr. 1, 2013), <http://www.sji.gov/wp-content/uploads/Immigration-Status-4-1-13.pdf>.

257. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007), <https://www.gpo.gov/fdsys/pkg/FR-2007-09-17/pdf/E7-17807.pdf>.

258. 8 U.S.C.S. § 1184(p)(6) (2000).

259. *See* Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html> (“The problem is that U visas are not simple applications—there’s a lot of legal strategy . . . [t]here aren’t enough lawyers, and there’s not enough funding for lawyers.”).

cap of 10,000 U Visa applications granted and wait lists often fill up after a few months into each new year.²⁶⁰ This very limited cap means that the process of applying for a U Visa and awaiting the decision can take several years.²⁶¹ Compiling the U Visa application itself takes several months, followed by an average of an additional two years before officers at USCIS read it, during which time the applicant is not granted work authorization.²⁶²

If a U Visa is approved, then most individuals wait an additional one to two years to reach the front of the line for one of the 10,000 U Visas available each year.²⁶³ During the second waiting period, USCIS grants applicants work authorization and the Department of Homeland Security freezes any deportation proceedings.²⁶⁴ Then, once an applicant is granted a U Visa, its benefits and protections last only four years.²⁶⁵ The expiration of protections is especially harmful for LGBT asylum-seekers who are not yet “out” about their identity and are concerned about concealing their sexual orientation or gender identity²⁶⁶ due to discrimination in the United States.²⁶⁷

Second, the U Visa requires victims to help law enforcement authorities in the investigation or prosecution of criminal activity.²⁶⁸ Because of police departments’ reputation and practice of discrimination and abuse against LGBT communities, the requirement is problematic for many victims of IPV, especially for immigrant LGBT victims.²⁶⁹ In a survey of 2,376 LGBT individuals and people living with HIV, “73%

260. *Id.*; see also *Number of Form I-918*, *supra* note 8 (showing that within the first three months of 2017, over 9,000 individuals had already applied for a U Visa).

261. See Nora Caplan-Bricker, “*I Wish I’d Never Called the Police*”, SLATE (Mar. 19, 2017, 8:12 PM), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html (recounting the story of Anabel, a mother of three who was awarded a U Visa after three years of working under-the-table in the United States).

262. The total number of pending cases was 21,138 in 2009 but grew to 150,604 as of 2016. Andres Pertierra, *We All Have a Role to Play in Improving U Visa Process for Immigrant Domestic Violence Victims*, REWIRE (Sept. 7, 2017), <https://rewire.news/article/2017/09/07/we-all-have-a-role-to-play-in-improving-u-visa-process-for-immigrant-domestic-violence-victims/>; see also Caplan-Bricker, *supra* note 261 (describing the risk that individuals face during this time where one may only have a single slip of paper acknowledging that the application has been received).

263. Caplan-Bricker, *supra* note 261.

264. *Id.*

265. 8 U.S.C.S. § 1184(p)(6) (2018).

266. KEVIN L. NADAL, SAGE ENCYCLOPEDIA OF PSYCHOLOGY AND GENDER 663 (2017).

267. See Lucy Westcott, *LGBT Refugees Share Hopes and Fears After Orlando Shooting*, NEWSWEEK (June 17, 2016, 3:18 PM), <http://www.newsweek.com/lgbt-refugee-asylum-seekers-orlando-471764> (describing the fears of several LGBT immigrants after the murder of forty-nine people at Pulse, a gay nightclub in Orlando, Florida).

268. 8 C.F.R. § 214.14(b)(3) (2018).

269. See CHRISTY MALLORY ET AL., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 1–2 (Williams Inst. 2015), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf> (describing that the “report presents research demonstrating that LGBT individuals and communities face profiling, discrimination and harassment at the hands of law enforcement officers.”).

of respondents had face-to-face contact with the police in the last five years.”²⁷⁰ Of those who were victims of IPV, 41% reported that the police failed to fully address their complaint.²⁷¹ Another study found that LGBT individuals are two times more likely to be in prison and jail than heterosexual individuals.²⁷² Undocumented immigrants who identify as LGBT are even more likely to be detained.²⁷³

Under the Trump administration, LGBT-identifying immigrants have increased contact with law enforcement.²⁷⁴ For example, in February 2017, an undocumented, transgender, Mexican woman was arrested by ICE at a courthouse after a judge granted her request for a protective order against her abuser.²⁷⁵ A few months later, an HIV-positive gay man from Russia with a pending asylum application was detained by ICE when he returned from vacation to his home in the United States.²⁷⁶ Recently, ICE began detaining U Visa petitioners awaiting the outcomes of their petitions for relief, using their required cooperation with law enforcement as a mechanism to locate and target them.²⁷⁷ The threat, both perceived and actual, of detention and deportation will only exacerbate the fear and distrust that dissuades marginalized LGBT people from reporting crimes, serving as witnesses, or helping law enforcement to conduct investigations.²⁷⁸

Third, requiring applicants to obtain a certification by law enforcement or another justice system official proves to be flawed²⁷⁹ because authorities have

270. *Protected and Served?*, *supra* note 245, at 1 (explaining that LGBT-identifying individuals and HIV-positive individuals were included in this study).

271. MALLORY ET AL., *supra* note 269, at 7.

272. See CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 159, at 3, 6–7 (showing that 7.9% of all individuals incarcerated in state and federal prisons as well as 7.1% of individuals in jails identified as LGBT, which is double the 3.8% of adult Americans who identify as LGBT).

273. *Id.* at 70.

274. See *supra* Part III.B for a discussion of how officials in Trump’s administration are harming LGBT immigrants.

275. Richard Gonzales, *ICE Detains Alleged Victim of Domestic Abuse at Texas Courthouse*, NPR (Feb. 17, 2017, 8:00 PM), <http://www.npr.org/sections/thetwo-way/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse>.

276. Arria, *supra* note 178.

277. See Alexandra Villarreal, *US Deporting Crime Victims While They Wait for U Visa*, CHICAGO SUN TIMES (August 28, 2018), <https://chicago.suntimes.com/immigration/us-deporting-crime-victims-u-visa-bernardo-reyes-rodriguez-donald-trump/> (describing how deportation practices break from prior practices and court rulings because they do not always consider a person’s pending U Visa petitions when determining whether or not to deport that applicant).

278. *One Month into the Trump Presidency, More Immigration Raids and Deportations*, LAMBDA LEGAL BLOG (Feb. 22, 2017), https://www.lambdalegal.org/blog/20170222_ice-raids (summarizing LGBT immigrant encounters with police in the first month of the Trump administration).

279. Dan Levine & Kristina Cooke, *Special Report: U.S. Visa Program for Crime Victims is Hit-or-Miss Prospect*, REUTERS (Oct. 21, 2014, 9:11 AM), <https://www.reuters.com/article/us-usa-immigration-uvisa-specialreport/special-report-u-s-visa-program-for-crime-victims-is-hit-or-miss-prospect-idUSKCN0IA1H420141021>.

discretion over whether to sign the certification.²⁸⁰ Law enforcement officials who do sign certifications simply enable the victim to meet one of the many eligibility requirements in the victim's application for citizenship.²⁸¹ While certifying is helpful in ensuring only meritorious claims move forward, it often negatively impacts victims who are at the mercy of a law enforcement agency with a tough stance on immigration.²⁸² For example, whether or not an applicant obtains a certification can come down to where the applicant lives.²⁸³ In some cities, police and prosecutors readily verify that an undocumented crime victim cooperated; in others, they arbitrarily stonewall the victim.²⁸⁴

Lastly, the U Visa requires the victim to face their abuser. Requiring victims to cooperate with prosecutors and police often means that they must testify against their abuser in criminal court.²⁸⁵ With crimes involving IPV, victims have several reasons for not wanting to appear in court or be associated with any court proceedings.²⁸⁶ For one, children may be involved,²⁸⁷ or the victim may still be in a relationship with their abuser despite wanting to leave.²⁸⁸ In other cases, victims may fear retribution if they cooperate with police or testify for the prosecution.²⁸⁹ Furthermore, immigrant victims have fears of being detained by ICE while they are at court, a

280. Sejal Zota, *Law Enforcement's Role in U Visa Certification*, 2 U.N.C. SCH. GOV'T. IMMIG. L. BULL. 1, 4 (2009) (providing information on the immense amount of power awarded to certifying officials); USCIS, *Instructions for I-918 Supplement B, U Nonimmigrant Status Certification 1-2* (2013), <https://www.uscis.gov/i-918>.

281. SAMEERA HAFIZ, ET AL., TOOL KIT FOR LAW ENFORCEMENT USE OF THE U-VISA, LEGAL MOMENTUM & VERA INST. OF JUSTICE 6 (2010).

282. Jessica Yanez, *From Asylum to Vawa: How U.S. Immigration Laws Can Protect Victims of Domestic Violence*, 5 ELON L. REV. 415, 423 (2013) (describing how the discretionary nature of the certifications permits officials to deny applications given their rigid stance on immigration).

283. Levine & Cooke, *supra* note 279.

284. *Id.* ("From 2009 through May 2014, law enforcement in New York City verified 1,151 crime victims, according to figures provided by federal immigration authorities in response to public records requests by Reuters. Meanwhile, police and prosecutors verified 4,585 crime victims in Los Angeles, a city with less than half of New York's population.").

285. *What to Expect at Criminal Trial*, RAPE ABUSE AND INCEST NAT'L NETWORK (last visited Oct. 20, 2018), <https://www.rainn.org/articles/what-expect-criminal-trial> (providing guidance on steps to make attending trial easier for victims of sexual abuse that similarly mirrors advice given to IPV victims).

286. *See, e.g.*, Andy Campbell, *Judge Jails Domestic Violence Victim for Failing to Testify*, HUFFINGTON POST (Oct. 8, 2015, 7:42 PM), http://www.huffingtonpost.com/entry/judge-jailed-domestic-violence-victim-for-failing-to-testify_us_5616d914e4b0dbb8000dc745 (reporting about a Florida judge that berated and held a victim of IPV in contempt of court for failing to appear at her case against the father of her child).

287. *See, e.g., id.*

288. *See* Rachel Gonzalez Settlage, *Uniquely Unhelpful: The U Visa's Disparate Treatment of Immigrant Victims of Domestic Violence*, 68 RUTGERS U.L. REV. 1747 (2016) (describing that leaving is the most dangerous thing a woman in a relationship can do) (citing *If She Doesn't Want to Prosecute, Why Should We?*, TEX. DISTRICT & COUNTY ATT'YS ASS'N (Sept-Oct. 2010), <https://www.tdcaa.com/node/7380>) (noting that of all of the women who are murdered by their partners, 70% are murdered while they are separated).

289. *See, e.g.*, Campbell, *supra* note 286 (describing how a victim's attacker threatened her following her report to the police).

phenomenon that is becoming increasingly more common under the Trump administration.²⁹⁰ All of these obstacles go against the stated purpose of the U Visa at the time of its enactment—a protection for immigrant victims.²⁹¹ For all of the aforementioned reasons, the U Visa falls short of meeting the needs of LGBT asylum-seekers and immigrants in general.

V. PROPOSED REMEDIES TO IMPROVE THE ASYLUM SYSTEM FOR LGBT ASYLUM-SEEKERS WHO ARE VICTIMS OF IPV

A. *Guaranteed Attorneys for Indigent Asylum Applicants*

Providing guaranteed representation to all asylum applicants is beneficial for all parties involved in the process. Asylum applicants that are represented by attorneys are more likely to be successful.²⁹² In 2016, 90% of the 4,515 asylum-seekers without counsel were denied asylum, compared with 48% of those with representation.²⁹³ However, asylum-seekers, often incredibly poor, lack the network and resources to raise the money to hire an attorney.²⁹⁴ In fact, outside of New York, pro bono legal services are not available for asylum-seekers due to limited funding for immigration attorneys.²⁹⁵ Providing legal representation for all asylum-seekers in removal proceedings would greatly benefit LGBT asylum-seekers,²⁹⁶ but it is not likely to happen at the federal level under the Trump administration.²⁹⁷

The New York Immigrant Family Unity Project (NYIFUP), which provides public defenders to detained immigrants facing deportation, makes New York a great model for this proposal.²⁹⁸ For non-detained asylum-seekers in New York,

290. See Caplan-Bricker, *supra* note 261 (providing stories of many immigrants who fear ICE officers while they are awaiting the decision of a U Visa application).

291. When the U Visa was created, its intent was: (1) to bolster the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence and other crimes; and (2) to offer protection to victims of such crimes in accordance with the humanitarian interests of the U.S. New Classification for Victims of Criminal Activity. Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 179, 53014 (Sept. 17, 2007), <https://www.gpo.gov/fdsys/pkg/FR-2007-09-17/pdf/E7-17807.pdf>. See generally *Tool Kit for Law Enforcement Use of the U-Visa*, LEGAL MOMENTUM & VERA INST. OF JUSTICE 6 (2010), [https://victimsofcrime.org/docs/Toolkit%20Bulletins/u-visa-toolkit-final-\(2\).pdf?sfvrsn=0](https://victimsofcrime.org/docs/Toolkit%20Bulletins/u-visa-toolkit-final-(2).pdf?sfvrsn=0).

292. *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 387 (2011).

293. *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, *supra* note 165.

294. See JACEK & HON, *supra* note 147, at 24 (arguing that denying asylum-seekers the ability to work during the processing of their claim is a human rights violation).

295. See *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, *supra* note 112 (explaining that New York is the only state to provide free legal services for detained immigrants and that several cities are hoping to model policies after the state).

296. See Gruberg & West, *supra* note 71, at 23.

297. See *supra* Part III for a discussion of the anti-immigrant and anti-LGBT policies of the Trump administration.

298. See *New York State Becomes First in the Nation to Provide Lawyers for All*

nonprofits like Catholic Charities and the New Sanctuary Coalition provide both legal and emotional support for immigrants in court proceedings.²⁹⁹ NYIFUP provides free counsel for detained immigrants in immigration court and recently expanded outside New York City.³⁰⁰ Analyzing the cases already completed and using advanced statistical modeling that indicates the likely outcomes of pending cases, it is projected that 48% of cases will end successfully for NYIFUP clients compared to the 4% success rate for unrepresented cases in one New York City immigration court before the project began.³⁰¹

One major issue with using NYIFUP as a model is that it requires significant funding.³⁰² However, there is currently a program that is funding other cities to help enact the NYIFUP model.³⁰³ Using New York's work in immigration as a guide, local communities, organizations, and legislatures should come together to propose legislation and funding to protect vulnerable populations including LGBT asylum-seekers. Attorney representation is an essential step to ensuring that all meritorious applications are approved, and where an asylum applicant lives should not diminish the application's likelihood of success.³⁰⁴ Representation is uniquely imperative for

Immigrants Detained and Facing Deportation, *supra* note 112. New York has made strides overall in offering free legal counsel for essential services. See Ashley DeJean, *New York Becomes First City to Guarantee Lawyers to Tenants Facing Eviction*, MOTHER JONES (Aug. 11, 2017, 2:37 PM), <http://www.motherjones.com/politics/2017/08/new-york-becomes-first-city-to-guarantee-lawyers-to-tenants-facing-eviction/>.

299. See *Immigration Court Help Desk*, VERA INST. OF JUSTICE, <https://www.vera.org/projects/immigration-court-helpdesk/overview> (last visited July 31, 2018) (explaining that Vera works with five legal nonprofit service providers to provide information to non-detained immigrants in removal proceedings about the court process); see also *Accompaniment Program*, NEW SANCTUARY COALITION, <http://www.newsanctuarynyc.org/accompaniment-program-2/> (last visited Aug. 13, 2018) (describing the program that pairs immigrants going to immigration courts and ICE check-ins with U.S. citizens).

300. *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, *supra* note 112.

301. JENNIFER STAVE, ET AL., VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY, 6 (2017), available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf.

302. See generally *The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings Under Intro 214-A*, STOUT RISIUS ROSS, INC. 5 (Mar. 16, 2016), https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf.

303. See Dara Lind, *A New York Courtroom Gave Every Detained Immigrant a Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017, 9:10 AM), <https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer> (listing the twelve cities and counties chosen by Vera to receive funding as part of the "Safe Cities Network"—Atlanta; Austin; Baltimore; Chicago; Columbus, Dane County, Wisconsin; the city of Oakland and Alameda County in California; Prince George's County, Maryland; Sacramento; and Santa Ana, California).

304. See *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, *supra* note 112 (emphasizing how funding this program to help immigrant families receive due process is fair and just for all New Yorkers).

IPV victims who often face additional trauma and might need other resources.³⁰⁵ As shown by the success of NYIFUP, legal representation for immigrants in removal proceedings would greatly benefit thousands of asylum-seekers and may possibly save money for communities and local governments.³⁰⁶

B. Modification to the U Visa and VAWA Self-Petition Process

In addition to universal representation, several changes must be made to the U Visa and VAWA avenues of relief for LGBT asylum-seekers who become victims of IPV. First, the VAWA self-petition is inadequate as it relates to LGBT asylum-seekers because it emphasizes being married to an abuser who is a U.S. citizen or permanent resident.³⁰⁷ Since the 2013 reauthorization of VAWA, marriage equality became law and LGBT partners may marry.³⁰⁸ Despite this significant progress, VAWA fails to reflect that not all LGBT asylum-seekers in intimate relationships are married or want to be married to U.S. citizens or permanent residents.³⁰⁹ The U Visa is not an adequate alternative to the VAWA self-petition as the U Visa is more difficult to attain and has its own host of problems.³¹⁰ Therefore, the VAWA self-petition process should be expanded to accommodate applicants who are not married to U.S. citizens or permanent residents.

Secondly, the current U Visa backlog is incredibly problematic for asylum-seekers who fear persecution in their native country.³¹¹ Although the statute requires a decision within 180 days, the current U Visa backlog has over 200,000 applications awaiting decisions.³¹² At the bare minimum, the backlog could be reduced by increasing the U Visa cap from 10,000 per year to 20,000 per year.³¹³ An increase to the cap is not a new concept—this change was attempted in 2013 but failed in Congress.³¹⁴ In 2016, over 35,000 individuals applied for U Visa relief.³¹⁵ Although raising the cap to 20,000 would not fully address the current backlog, it is an attainable goal for Congress to pursue. Of course, the best solution is to eliminate the U Visa cap entirely.³¹⁶

305. 2010–2012 STATE REPORT, *supra* note 13, at 9.

306. STAVE, ET AL., *supra* note 301, at 6.

307. Orloff and Roberts, *supra* note 249, at 1.

308. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

309. See, e.g., Stack, *supra* note 248 (discussing continuing problems for LGBT community despite the right to marry).

310. See *supra* Part VI.B for a discussion of U Visa protections for LGBT asylum-seekers.

311. Caplan-Bricker, *supra* note 261.

312. Gruberg & West, *supra* note 71, at 28; see also *Number of Form I-918*, *supra* note 8.

313. See Sara Ramey, *Eliminating the U Visa Cap Will Help Catch Criminals*, HILL (Feb. 14, 2018, 11:45 AM) (arguing that there should not be a U Visa cap).

314. *Id.*

315. *Number of Form I-918*, *supra* note 8.

316. See Ramey, *supra* note 313 (arguing that the best way to achieve President Trump's goal of deporting immigrant criminals is to encourage immigrants to come forward and report crimes to

C. Increased Resources for Immigration Courts

Lastly, Congress should increase funding for immigration courts to expedite the asylum process. This would especially benefit vulnerable LGBT asylum-seekers who are victims of IPV.³¹⁷ Over 700,000 asylum cases are currently pending in the immigration court, a waitlist that has become increasingly more extreme over the last several years.³¹⁸ Human Rights First calculates that 524 immigration judges are needed to eliminate the backlog by 2029, not to mention the support staff the judges would need.³¹⁹ The backlog has worsened under the Trump administration's massive increase in enforcement resources for ICE.³²⁰ While waiting the several years it takes to be seen in immigration court, many LGBT asylum-seekers are at risk of physical danger, ICE detention, and continuing financial difficulty.³²¹ This is unacceptable for immigrant victims of IPV who often must rely on their abuser until their case is decided.³²² The immigration court backlog deprives asylum-seekers of humane treatment and Congress must act to curb this growing epidemic.

VI. CONCLUSION

Applying for asylum is a complex and expensive process that usually drags on for several years. Due to the unfortunate prevalence of IPV, it is inevitable that many LGBT asylum-seekers become victims of such crimes while they await the outcome of their decision or appeal. VAWA and U Visas remedies for victims of IPV address a major need in the immigrant community, particularly for victims of IPV. However, these two avenues of relief are inadequate to meet the needs of all who could benefit from them. Because the current administration already made significant changes in policy and law that negatively impacts immigrants, the prospect of success will likely diminish further for LGBT asylum-seekers under the current administration. In the meantime, Congress must exercise the power of the purse and increase funding to the immigration court system. In addition, local communities and organizations need to continue to mobilize to create better outcomes for asylum-seekers locally and around the country.

Through providing free lawyers for indigent asylum-seekers, making changes

law enforcement).

317. DRAKE, *supra* note 7, at v.

318. *Immigration Court Backlog Tool*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (last visited Jul. 18, 2018), http://trac.syr.edu/phptools/immigration/court_backlog; see also *New Guidelines for Asylum Processing Will Harm Refugees Stuck in the Backlog*, HUMAN RIGHTS FIRST (Jan. 31, 2018), <https://www.humanrightsfirst.org/press-release/new-guidelines-asylum-processing-will-harm-refugees-stuck-backlog> (arguing that the January 29, 2018 policy change to process new asylum applicants first is even more harmful to the already massive backlog).

319. HUMAN RIGHTS FIRST, *TILTED JUSTICE: BACKLOGS GROW WHILE FAIRNESS SHRINKS IN U.S. IMMIGRATION COURTS*, 10 (2017), available at <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf>.

320. *Id.* at 5–7.

321. *Id.* at 6.

322. See *Immigrants in the U.S. Have the Right to Live Life Free of Abuse*, *supra* note 28 (discussing power abusers can assert); see also HUMAN RIGHTS FIRST, *supra* note 319, at 13.

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to existing visa processes, and increasing funding for immigration courts, LGBT asylum-seekers will have a less harrowing asylum process and will be more successful in their claims. By denying these applicants legal protections and a chance at a new life, our immigration system contradicts the very values upon which this nation was built.