Richmond Public Interest Law Review

Volume 15 | Issue 2 Article 4

1-1-2011

From Closet to Court Room: Asylum as a Judicial Step Towards Full Equality between Sexual Orientations

Rory Riley

FROM CLOSET TO COURT ROOM: ASYLUM AS A JUDICIAL STEP TOWARDS FULL EQUALITY BETWEEN SEXUAL ORIENTATIONS

Rory Riley

I. INTRODUCTION

Margaret Thatcher once said of the political process, "You don't make a decision until you have to."[1] Although the Supreme Court is the least political branch of government, it appears to have adopted Thatcher's policy of not making a decision until necessary, particularly when it comes to controversial social issues. Some of the most controversial social issues facing the United States today are those relating to gay rights, most notable among them the question of gay marriage.[2] However, numerous other gay rights issues are also on the national agenda.[3]

Despite the proliferation of questions pertaining to gay rights, the Supreme Court has recently denied review in several gay rights-

---

[1] *Decision Making Quotes*, CHATNA, http://chatna.com/theme/decision_making.htm (last visited Sept. 3, 2011).

[2] *See generally, e.g.,* Michael A. Lindenberger, *After Maine, the Battle Lines Over Gay Marriage Harden*, TIME, Nov. 10, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1936746,00.html?iid=tsmodulehttp://www.time.com/time/nation article/0,8599,1936746,00.html; Oren Dorell, *State Ballots Tackle Controversial Issues Tuesday*, USA TODAY, Nov. 1, 2009, *available at* http://www.usatoday.com/news/nation/2009-11-01-referendums-state_N.html; Sean Prophet, *Why Gay Marriage Is Such a Big Deal*, THE AMERICAN CHRONICLE, Nov. 8, 2009, *available at* http://www.americanchronicle.com/articles/view/127609.

[3] *See, e.g.,* Peter J. Smith, *Parents to Supreme Court: Allow Civil Rights Lawsuit over School's Homosexual Indoctrination of Children*, June 5, 2008, http://www.lifesitenews.com/ldn/2008/jun/08060513.html; *Massachusetts: Asylum Denied*, N.Y. TIMES, Oct. 26, 2009, *available at* http://www.nytimes.com/2009/10/27/us/27brfs-ASYLUMISDENI_BRF.html; *(Transgender, Bisexual, and) Gay Renters to Get Some Discrimination Protection*, Trans Talk, http://destranstalk.blogspot.com/ (Oct. 30, 2009, 11:52 EST).

related cases.[4] Nonetheless, as gay rights issues continue to be a prominent cultural and media concern, the Supreme Court is approaching the moment where it must make a decision on some of them. Indeed, the Supreme Court has not made a significant ruling in the gay rights arena since it decided *Lawrence v. Texas* nearly seven years ago.[5]

However, gay rights issues are not the only controversial topic the Supreme Court has recently evaded. Immigration issues like asylum claims are another divisive social problem currently facing the United States.[6] Although the Supreme Court has been more willing to decide certain immigration cases than it has gay rights matters, it has yet to confront a number of difficult asylum issues as well.[7]

---

[4] *See, e.g.,* Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (The Court denied certiorari in parental rights case over whether parents have the right to opt-out of public school classes on homosexual issues. The case was appealed from the First Circuit, which held that the parents "failed to demonstrate a constitutionally significant burden on their free exercise or parental due process rights" and "on their children's free exercise rights."); Hudson Area Schools v. Patterson, 551 F.3d 438 (6th Cir. 2008), *cert denied,* 130 S. Ct. 299 (2009) (The Court denied certiorari on appeal from the Sixth circuit, where a Michigan school district sought to dismiss a lawsuit filed by the parents of a student who was allegedly being repeatedly harassed, and called "queer" and "faggot." The Sixth Circuit held that the case should proceed to trial, and because the Supreme Court refused to hear the school's appeal, the parents' lawsuit will now be heard in a federal district court in Detroit.); Rector of Saint James Parish v. Protestant Episcopal Church Diocese of Los Angeles, 198 P.3d 66 (2009), *cert denied* 130 S. Ct. 179 (2009) (The Court denied certiorari where the Episcopal Church in Los Angeles sought to break away from the national denomination because the denomination allowed the consecration of a gay bishop. The California Supreme Court's ruling that the church could not take church property after breaking away from the denomination was upheld).

[5] Lawrence v. Texas, 539 U.S. 558 (2003) (overturning Bowers v. Hardwick, 478 U.S. 186 (1986). *But see* Christian Legal Society v. Martinez, 130 S. Ct. 2971, 2995 (2010) (holding that public university sponsored school group could not discriminate based on sexual orientation).

[6] *See, e.g.* Sandra Sanchez-Naert, *Anti-Immigrant Leaders Exploit Fears*, IOWA IMMIGRATION EDUCATION COALITION, (Nov. 11, 2009), http://www.iowaimmigrationeducation.org/index.cfm?nodeID=19036&action=display&newsID=505; *These Two Debates Don't Mix*, THE SAN DIEGO UNION TRIBUNE, Nov. 10, 2009, available at http://news.google.com/news/search?aq=f&pz=1&cf=all&ned=us&hl=en&q=immigration+reform.

[7] *Cf.* Neguise v. Holder, 555 U.S. 511 (2008) (holding the "persecutor exception" does not prohibit asylum for refugee who is compelled against his will to participate in acts of persecution), *with* Kim v. Holder, 560 S. Ct. 393 (2009) (Supreme Court declined to decide whether 8 U.S.C. 1256(a)'s five-year limitation on the government's authority to rescind the grant of an adjustment to permanent resident status also precludes the initiation of removal proceedings under 8 U.S.C. 1229(a) based on the unlawfulness of that adjustment).

The world of gay rights and immigration collide with respect to whether sexual orientation or sexual identity[8] should be regarded as a particular social group or its own distinct category for purposes of obtaining asylum in the United States. [9] Although seeking asylum on such grounds has become increasingly common in the last several years,[10] the Supreme Court has yet to issue any meaningful guidance with respect to this issue. The Supreme Court's avoidance is particularly problematic because there is a split among the circuit courts addressing such cases.[11] This has led to forum shopping and inconsistency in asylum decisions.[12] This article takes the position that despite the tension surrounding controversial social issues, it is imperative that the Supreme Court clarify asylum based on sexual identity claims in a timely manner. Doing so, this article maintains, will preserve the integrity of the federal appellate system, keep public opinion on gay rights issues moving in a more tolerant direction, and conform to the American tradition and trajectory of expanding legal equality.

Part I of this article provides a history of the federal appellate system, noting the detrimental impact circuit splits can have on the resolution of a particular legal issue. Part II sets out the history and the current state of asylum and sexual identity claims in the United States. Part III provides an analysis of when the Supreme Court has historically intervened in previous social controversies, such as segregation, interracial marriage, and gay rights in the context of substantive due process. Part IV discusses the importance of timely Supreme Court intervention in asylum sexual identity matters, particularly as issues surrounding gay marriage continue to loom over the horizon.[13]

---

[8] In accordance with other legal scholars addressing this issue, for the purposes of this article, I will use the term "sexual identity" to encompass both sexual identity and sexual orientation, as it is broader and more encompassing.

[9] *See* Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court,* 52 N.Y. L. SCH. L. REV. 185, 186 fn.1 (2008).

[10] *Id.* at 186.

[11] *Compare* Ornelas-Chavez v. Gonzalez, 458 F.3d 1052, 1060 (9th Cir. 2006) (in which the Ninth Circuit displays sympathy for such claims), *with* Kimumwe v. Gonzalez, 431 F.3d 319, 323 (8th Cir. 2005) (in which the Eighth Circuit denied such a claim).

[12] *See supra*, note 11.

[13] *See*, *e.g.*, Perry v. Schwarzenegger, 702 F.Supp.2d 1132,1138 (N.D. Cal. 2010).

II. HISTORY OF THE UNITED STATES FEDERAL APPELLATE SYSTEM

The United States Circuit Courts of Appeal have an extensive history that dates back to the country's founding.[14] The circuit courts' formation derives from the United States Constitution,[15] which provides: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[16] However, the Constitution did not make any provisions for the organization or procedures of the Supreme Court or any inferior Courts, leaving Congress to decide them.[17] Thus, Congress was given "the absolute and complete authority" to "create courts as it deemed necessary to assist in the administration of the federal court system."[18]

With the passage of the Judiciary Act on September 24, 1789, Congress established the groundwork for the nation's federal judiciary.[19] The Act provided that the Supreme Court should "consist of a chief justice and five associate justices" and that the Court should hold two sessions annually.[20] The Act also provided that the nation should be divided into thirteen districts (one for each of the original colonies), and that those districts should be divided into three circuits –the eastern, the middle and the southern.[21] However, these three circuits were quite different from circuit courts today. The circuit courts did not have judges of their own; the Act provided that two Supreme Court justices and one district court judge would preside over the courts in each circuit.[22] Further, the circuit courts functioned primarily as trial, rather than appellate courts.[23] The Act also established the circuit courts' jurisdiction, providing for original jurisdiction over civil cases involving diversity jurisdiction of at least $500 or where the United States was a plaintiff, and serious criminal offenses, as well as appellate jurisdiction over the district courts.[24]

The structure of the Federal judiciary as outlined above remained in place for approximately the next century.[25] However, during this period, the United States grew substantially in terms of both

---

[14] HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 4 (1984).
[15] *Id.*
[16] U.S. CONST. art. III, § I; *see also* art. I, § 8 (allowing Congress to establish tribunals inferior to the Supreme Court).
[17] *Id.*
[18] Crystal Marchesoni, "*United We Stand, Divided We Fall?": The Controversy Surrounding a Possible Division of the United States Court of Appeals for the Ninth Circuit*, 37 TEX. TECH L. REV. 1263, 1266 (2005).

population and ideology.[26] As the nation evolved, so did the federal judiciary.[27] By the turn of the century, the federal courts had become "a highly professional organization, necessitating a more formal and tiered review process."[28] Accordingly, Congress responded by expanding the United States circuit court system from three to nine circuits, enlarging the Supreme Court from six to nine justices, [29] and providing the circuit courts with their own judges. [30]

Despite these modifications, the United States Circuit Courts continued to serve as courts of "mixed appellate-trial jurisdiction."[31] This finally changed in 1891, when Congress passed the Evarts Act, commonly referred to as the Circuit Court of Appeals Act.[32] This Act essentially annulled the judicial structure established by the Judiciary Act of 1789, and established the modern framework for the U.S. Circuit Courts of Appeals as they exist today.[33] Specifically, this Act formally created nine "circuit courts of appeals," each consisting of "three judges, of whom shall two should constitute a quorum."[34] In essence, the newly created circuit courts of appeals replaced the operating structure of the former United States circuit courts, which were soon abolished.[35] As a result of this restructuring, the circuit

---

[19] Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (concerning the establishment of the judicial courts of the United States).
[20] *Id.* at § 1.
[21] *Id.* at §§ 2, 4.
[22] *Id.* at § 4.
[23] Marchesoni, *supra* note 18, at 1267.
[24] Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (1789).
[25] Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751,762 (2009).
[26] COUCH, *supra* note 14, at 17.
[27] Denton, *supra* note 25, at 762.
[28] *Id.*
[29] Judiciary Act of 1837, ch. 34, § 1, 5 Stat. 176, 176–77 (1837).

[30] Judiciary Act of 1869, ch. 22, §1–2 16 Stat. 44–45 (1869); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 833 (1986).
[31] Denton, *supra* note 25, at 762–63, (quoting Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 603 (1989)).
[32] *See generally* Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891).
[33] Denton, *supra* note 25, at 763.
[34] Judiciary Act of 1891, ch. 517 §§ 2–3, 26 Stat. 826, 826 (1891).
[35] COUCH, *supra* note 14, at 18 (noting that the circuit courts as they existed prior to 1891 were phased out in 1911). *See* Act of Mar. 11, 1911, Pub. L. No. 61-475, 36 Stat. 1087 (1911).

courts of appeals dealt exclusively with appeals from district courts, and the trials conducted by the former circuit courts were delegated down to the district courts.[36] The structure of the nation's federal judicial system as we know it today, consisting of "a three-tier federal judiciary, with the district court exercising trial jurisdiction and the other two focused solely on reviewing those decisions" was thus established.[37]

The three-tiered structure established by the Circuit Court Act of 1891 has served the nation rather well, as evidenced by the fact that it is still in place today. Although the structure has expanded considerably since its initial inception, Congress has proved willing to permit such expansions in order to keep up with burgeoning caseloads and to promote the efficiency of the federal appellate system.[38] Currently, the United States is divided into 94 judicial districts, which are organized into twelve regional circuits and one federal circuit.[39] Each of the twelve regional circuits has a court of appeals, designated by a number.[40] In addition, the United States Court of Appeals for the Federal Circuit has national jurisdiction to hear certain specialized cases.[41] Each circuit court hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies.[42] At present, there are 179 active circuit court judges.[43] Given the heavy caseload of the circuit courts and the vast number of active circuit court judges, divisions between the circuits are inevitable. The main problem with circuit court splits is that residents of the United States may be "assured different constitutional and statutory rights based upon their location within an ad hoc system of twelve geographic subdivisions."[44]

---

[36] Judiciary Act of 1891, ch. 517 § 4, 26 Stat. 826, 827; COUCH, *supra* note 14, at 18, n.48.
[37] Denton, *supra* note 25, at 763.
[38] *See U.S. Court Of Appeals - Judicial Caseload Profile*, UNITED STATES COURTS, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (last visited Sept. 6, 2011).
[39] COURTS OF APPEALS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtsofAppeals.aspx (last visited Sept. 6, 2011).
[40] *Id.*
[41] *Id.* The Federal Circuit's specialized jurisdiction includes cases such as those involving patent laws, veterans law, and cases decided by the Court of International Trade and the Court of Federal Claims.
[42] *Id.*
[43] 28 U.S.C. § 44 (2006).
[44] Mark A. Hill, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 353 (2009).

When the circuit courts are divided as to a particular issue, the Supreme Court may intervene, particularly if Congress fails to do so.[45] Generally, for the Supreme Court to hear a case, a petitioner who receives an adverse decision from a federal appellate court must file a writ of certiorari with the Supreme Court, detailing why the Supreme Court should hear the case.[46] The certiorari process as it is known today originated in the 1925 Judges' Bill.[47] The Bill provided the Supreme Court with a discretionary docket in order to lighten the highest Court's workload, which at that point in time, had increased dramatically over the past several decades due to "the array of legal issues [which] multiplied with the growing scale and complexity of federal law in American life."[48]

Since the Bill's passage, the Supreme Court has exercised significant discretion in choosing which cases it will decide.[49] As outlined by Supreme Court Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important

---

[45] Benjamin K. Raybin, *"Objection: Your Honor is being Unreasonable!" – Law and Policy Opposing the Federal Sentencing Order Objection Requirement,"* 63 VAND. L. REV. 235, 265 (2010).

[46] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR MILLER, CIVIL PROCEDURE 6–7 (4th ed. 2005).

[47] Judiciary Act of Feb. 13, 1925, ch. 229,43 Stat. 936; *see generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges ' Bill*, 100 COLUM. L. REV. 1643 (2000).

[48] Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 392 (2004).

[49] Hartnett, *supra* note 47, at 1644

> question of federal law that has not been, but should be, settled b this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[50]

[50] SUP. CT. R. 10.

In addition to the broad discretion awarded to the Justices pursuant to Supreme Court Rule 10, the certiorari process is confidential and conducted in isolation, i.e., the Justices vote individually without discussion of the case, their votes are not published, and typically, no reasoning is provided as to why certiorari was granted or denied.[51]

The Justices' individual views on certain issues, particularly divisive social issues, inevitably influence their decision on whether a writ of certiorari presents an "important" question.[52] For instance, "a Justice's views on whether the Court should serve as an engine of social change will influence how eagerly (or hesitantly) that Justice reaches out for culturally or politically sensitive cases."[53] However, "the main purpose of [the Supreme Court's] certiorari jurisdiction [is] to eliminate circuit splits."[54] The Supreme Court nonetheless finds some circuit splits immaterial, or that a split is "weak or illusory, which could mean that there appears to be a split in authority, but one of the lower court cases forming the split might have been resolved by alternative means."[55] In other words, even a circuit split does not guarantee that the Supreme Court will grant certiorari as to a particular issue.[56] Rather, the Supreme Court must find that the issue is important, likely to recur, and unlikely to be resolved by other means.[57] If a case meets these criteria, and at least four Justices vote to hear the case, certiorari is granted.[58] In reviewing petitions for certiorari, the Justices certainly recognize that certain cases involve more divisive and ideologically charged issues than others.[59] Particularly in cases that involve controversial social issues, "the Court's very deci-

---

[51] Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 316–17 (2009).
[52] *Id.* at 320.
[53] Cordray & Cordray, *supra* note 51, at 320, n 25 (citing KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 164 (1993) (noting that Justice Brennan took "an active leadership role in trying to find cases that would promote his reforms" and noting Justice Harlan's conflicting viewpoint in Reynolds v. Sims, 377 U.S. 533, 624–25 (1964) (Harlan, J. Dissenting) ("The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.")).
[54] Nunez v. United States, 554 U.S. 911, 913 (2008) (Scalia, J., dissenting).
[55] Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 941 (2009).
[56] *Id.*
[57] *Id.*
[58] *Id.* at 942.
[59] Cordray & Cordray, *supra* note 51, at 314.

sion to grant review 'increase[s] the political salience of the issues decided—regardless of which way the Court decides the issues."[60]

As is further discussed later in this article, the Supreme Court can be slow to grant certiorari as to some divisive issues.[61] Despite its reluctance, the Supreme Court nonetheless has an obligation to settle circuit splits and decide important constitutional issues, regardless of the controversial nature of the issue.[62] When an important issue consistently results in split decisions by the circuit courts, denying certiorari can be "an abdication of responsibility."[63]

III. HISTORY OF ASYLUM AND SEXUAL IDENTITY CLAIMS IN THE UNITED STATES

A. History of Asylum in the United States

The idea of the United States as a sanctuary for the oppressed goes back to the earliest days of the nation's history.[64] Asylum is an old concept, but it was not given official status in United States immigration law until after World War II.[65] In the nineteenth century, the notion of asylum was a status reserved for intellectual rebels who dared to defy established power, whether by writing or rebellion.[66] This included participants in the 1848 Revolution in Germany or the

---

[60] *Id.* at 315.

[61] *See, e.g.* Margaret Talbot, *A Risky Proposal,* NEW YORKER, Jan. 18, 2010, at A1 (stating that the "Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states"); *see also* Naim v. Naim, 90 S.E.2d 849 (Va.), *appeal dismissed*, 350 U.S. 985 (1956), (involving the validity of the Virginia miscegenation statute, which the Court eventually invalidated in Loving v. Virginia, 388 U.S. 1, 12 (1967)).

[62] Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 326 (1998).

[63] *Id.* (quoting Stuart Taylor Jr., *Closing Argument: Maybe the Supremes Did the Right Thing,* TEX. LAWYER, 27 (July 15, 1996) (concluding that although denying certiorari is problematic, it was probably justified in that particular case)).

[64] Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 109 (2007).

[65] *See* Gervase Coles, *Approaching the Refugee Problem Today, in* REFUGEES AND INTERNATIONAL RELATIONS 373, 374 (Gil Loescher & Laila Monahan eds., 1989) (stating that the persecution requirement for asylum in the United States was "specifically devised for a particular geographic problem at a particular time–namely the post– World War II European refugee problem").

[66] Otto Kirchheimer, *Asylum,* 53 AMERICAN POLITICAL SCIENCE REVIEW 983, 986 (December 1959).

Paris commune.[67] After World War II, it became apparent that asylum needed to redefinition for the Twentieth Century. Asylum-seekers were now fleeing from who they were, which was quite different from Nineteenth Century asylum-seekers, who were fleeing from what they had done.[68] As a result, in December 1948, the United Nations held a conference setting up guidelines for this purpose, establishing the Universal Declaration of Human Rights, which declared that people from all over the world had the right to seek asylum.[69]

The Declaration of Human Rights was followed in July of 1951 by the UN Convention Relating to the Status of Refugees.[70] The Convention set fourth certain responsibilities and expectations for signatories to see the fair treatment and processing of refugees, including asylum-seekers.[71] Article 31 bound signatories not to penalize asylum-seekers who "enter or are present in their territory without authorized documents provided that they present themselves without delay to authorities."[72] The Convention also provided the world with a definition of "refugee"—a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion."[73]

In 1967, the basic provisions of the 1951 Convention were incorporated into the Protocol to the United Nations Convention Relating to the Status of Refugees, including the above-noted definition of refugee.[74] Shortly thereafter, in 1968, the United States adopted the 1967 Protocol.[75] In the United States, Congress did not ratify its own Refugee Act until 1980, when it codified the 1967 Protocol at section § 1101(a)(42) of the Immigration and Nationality Act.[76]

---

[67] *Id.* at 986.

[68] English, *supra* note 64, at 113–114.

[69] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) *available at* http://www.un.org/Overview/rights.html.

[70] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention].

[71] 1951 Convention, *supra* note 70, at 6259.

[72] *Id.* at 6275.

[73] *Id.* at 6261.

[74] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223,6225, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

[75] DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 2 (3d ed. 1999).

[76] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); *see* ANKER, *supra* note 76, at 3.

Pursuant to current U.S. laws and regulations:

> The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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 opinion.[77]

In essence, the four fundamental elements of a claim for asylum in the United States are "(1) a well-founded fear, (2) of persecution, (3) on account of, (4) a protected ground." [78]

Although asylum, or more simply freedom from oppression, has undoubtedly been a central value throughout American history, notions of American freedom have been a cruel mockery for some trying to become American citizens.[79] Therefore, consistent and coherent asylum laws are necessary to preserve the integrity of the nation's ideals of freedom, justice and equality.

B. Procedure

In order to begin the process of applying for asylum, applicants must first file a Form I-589 with their local Citizenship and Immigration Services (CIS) office.[80] Each asylum request is also automatically considered to be a claim for withholding of removal.[81] The main difference between an asylum claim and a claim for withholding of removal is that the Attorney General has the discretion to

---

[77] 8 U.S.C. § 1101(a)(42); *see* Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 353 (2009).

[78] O'Dwyer, *supra* note 9, at 191.

[79] *See* Maureen O'Connor Hurley, *The Asylum Process: Past, Present and Future*, 26 NEW ENG. L. REV. 995 (1992); *cf.* DAVID NGARURI KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA 314–315 (Univ. of California Press 2008); Erin Craddock, *Note, Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions "Cure" the Due Process Deficiencies in U.S. Removal Proceedings?*, 93 CORNELL L. REV. 621, 644–45 (2008) ("[W]hen the alien faces removal to a country that engages in torture and, after removal, the alien is in fact tortured, the cost of error is very high.").

[80] 8 C.F.R. § 1208.3(a); *see also* O'Dwyer, *supra* note 9, at 192.

[81] 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 1208.3 (b); *see* Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 240 (2005).

grant asylum, whereas withholding of removal, once proven, is mandatory and non-discretionary.[82] In addition, one year after being granted asylum, an asylee may become eligible for permanent residency in the United States.[83]

The next step in the process is for the local CIS office to schedule the applicant for an interview.[84] Subsequent to the interview, the application will either be approved or, if not approved, will either be denied by the asylum Service officer or referred to the Immigration Court, depending on whether the applicant has valid immigration status in the United States.[85] If the application is denied, "the officer shall explain in writing the specific reasons for denial," notify the applicant of their appellate rights "and shall furnish the appropriate appeal form."[86] If a case is referred to the Immigration Court, the application will be sent a notice to appear in Court and placed into removal proceedings.[87]

Once the case is before the Immigration Court, the applicant presents their case before an Immigration Judge (IJ).[88] This provides the applicant with the opportunity "to be heard in 'the more formal setting of the immigration court where witnesses may be examined and cross examined by the applicant's counsel and the Department of Homeland Security's (DHS) counsel."[89] Proceedings before the Im-

---

[82] 8 U.S.C. §§1101(a)(42)(A), 1158(a), 1231(b)(3); *see* Kvartenko v. Ashcroft, 33 Fed. Appx. 262, 264 (2002); *see also* Michael McGarry, *Note: A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 B.C. L. REV. 209, 214 (2010) (noting that withholding of removal "applies a higher standard [than asylum], requiring that the alien show a 'clear probability of persecution,' but when this higher standard is met, the requested relief is mandatory rather than discretionary").

[83] 8 U.S.C. § 1159(a)(1)(B).

[84] O'Dwyer *supra* note 9, at 192 n. 37 (stating that "[t]here are seven asylum offices in the country: Texas, Los Angeles, Chicago, Virginia, Miami, Newark and New York. Some of the offices have a large geographical jurisdiction and conduct asylum interviews in different circuit court jurisdictions.").

[85] 8 C.F.R. §§ 1003.1(a)(1)–(a)(2) (2011); *see* DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 79 (2007).

[86] 8 C.F.R. § 103.3 (a) (iii) (2011).

[87] 8 C.F.R. §§ 103.3(c), 1003.1(i) (2011); *see also* MARTIN, *supra* note 85, at 79.

[88] 8 C.F.R. § 1208.4(b)(3)(i) (2011); *see* MARTIN, *supra* note 85, at 80.

[89] Leonard Birdsong, "*Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe the Free of Sexual Persecution . . .*": *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357, 365 (2008). On March 1, 2003, the functions of the former Immigration and Naturalization Service "INS" were transferred to the newly created Department of Homeland Security. *See* Homeland Security Act (HSA) Pub. L. 107-296, 116 Stat. 2135, 2205 (2002) (current version at 6 U.S.C § 291 (2002).

migration Court are conducted *de novo*.[90] At the proceeding, applicants must present evidence to support their asylum claims.[91]

If parties, whether the applicant or the government, are dissatisfied with the outcome of the Immigration Court proceedings, they may file an appeal with the Board of Immigration Appeals (BIA).[92] The BIA is "an administrative appeals tribunal that is part of the Executive Office for Immigration Review in the Department of Justice (EOIR)."[93] The BIA has never been officially recognized by statute; however, it is governed by the Attorney General's regulations, and the Attorney General also appoints its members.[94] The BIA can (1) affirm the decision of the IJ without issuing an opinion, (2) adopt and modify the IJ's opinion, (3) issue its own decision either granting or denying asylum directly, or (4) remand the case back to the IJ for further development.[95] BIA decisions can be either precedential or non-precedential.[96] A decision is precedential if it is either selected for publication by the BIA itself, or if the Attorney General designates the decision as such.[97] Even though the BIA handles a high volume of claims, very few opinions are designated as precedential decisions.[98]

BIA decisions may be appealed to the Federal circuit court of appeals that has jurisdiction over the area from which the immigration court proceeding was held.[99] Circuit court decisions "are [only] binding on Immigration Courts in that circuit, and on the BIA's deci-

---

[90] 8 C.F.R. § 1003.42(d) (2011).

[91] Alan G. Bennett, *Note, The "Cure" That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279, 284 (1999). It should also be noted that in presenting evidence at Immigration Court proceedings, neither the state nor federal rules of evidence apply; all that is required is that the evidence "be relevant and conform to requirements of constitutional due process." *Id.*

[92] 8 C.F.R. § 1003.1(d)(1) (2011).

[93] MARTIN, *supra* note 85, at 83.

[94] *Id.*

[95] 8 C.F.R. § 1003.1(d)(2011); *see* Bennett, *supra* note 91, at 285.

[96] 8 C.F.R. § 1003.1(d)(1)(2011).

[97] 8 C.F.R. § 1003.1(d) (2011).

[98] MARTIN, *supra* note 85 at 83; *see e.g.*, *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 n. 1 (B.I.A. 1990) ("[T]his case was decided by the Board on March 12, 1990. By Attorney General Order No. 1895-94, dated June 19, 1994, the Attorney General ordered: 'I hereby designate the decision of the Board of Immigration Appeals in *In re: Fidel Toboso-Alfonso* (A-23220644) (March 12, 1990) as precedent in all proceedings involving the same issue or issues.'").

[99] Immigration Nationality Act § 235(b)(1), 8 U.S.C. §1252(b)(2) (2006); *see* Bennett, *supra* note 92, at 285.

sions reviewing Immigration Court proceedings originating in that circuit."[100] Accordingly, circuit splits often occur because of conflicting rulings among the circuit courts as to certain issues, because of to a particular issue being adjudicated in one circuit but not another.[101]

C. Immigration Exclusions of Sexual and Gender Minorities in the United States

Despite the fact that in 1783, George Washington proclaimed the United States to be a land "open to receive the persecuted and oppressed of all nations,"[102] the United States has frequently experienced periods marked by sharp hostility towards immigrants and efforts to restrict their entry.[103] Thus, within the philosophy of American asylum is an inherent paradox: while the United States is proud of its tradition of accepting the world's oppressed, it has also encountered periods of opposition to this tradition on a regular basis.[104]

Throughout the nineteenth century, large numbers of immigrants flooded both the East and West coasts of the United States.[105] By 1870, nearly half of the residents in several major cities, including New York City and Chicago were immigrants.[106] Accordingly, in 1875, the United States federal government began to regulate immigration.[107] From that point on, the federal government sought to identify and exclude aliens whose activities would interfere with the eco-

---

[100] O'Dwyer, *supra* note 9, at 193 (citing IMMIGRATION EQUALITY, IMMIGRATION BASICS: SOURCES OF LAW, *available at* http://immigrationequality.org/manual_template.php?id=1065#D_2 (last visited Oct. 5, 2011).

[101] O'Dwyer, *supra* note 9, at 193; Birdsong, *supra* note 90, at 366 (quoting Bennett, *supra* note 92, at 285).

[102] GIL LOESCHER & JOHN A. SCANLON, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR , 1945 TO THE PRESENT, xiii (Free Press 1986)

[103] *See generally* Kevin R. Johnson, "*The Anti-Terrorism Act, the Immigration Reform Act and Ideological Regulation in Immigration Laws: Important Lessons for Citizens and Non-Citizens*," 28 ST. MARY'S L. J. 834 (1997) (discussing the attempts of the United States to limit immigration).

[104] *Id.* at 834.

[105] Kerry Abrams, *The Hidden Dimension of Nineteenth Century Immigration Law*, 62 VAND. L. REV. 1353, 1354 (2009).

[106] *Id.* at 1359 (citing HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 19 (Oxford University Press 2006)).

[107] Page Law Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (Prior to the passage of this Act, immigration laws did exist, but were promulgated by the states); *see* Abrams, *supra* note 105, at 1355–56.

nomic and physical health of the nation and corrupt the morals of its people.[108] For example, in 1912, Nicholas P., a young Greek immigrant was deported to Argentina as a "public charge" after confessing to the Immigration Service that he had engaged in "unnatural intercourse with men."[109] This case reflects the prevailing attitude in the United States at that time that sexual nonconformists were physically as well as mentally degenerate, and thus were excludable from entry into the United States.[110]

In 1917, the government passed a new immigration act that provided for a new method of exclusion of homosexuals; under the new act, an individual would be denied entry into the United States if certified by an examining physician as being "mentally defective" or afflicted with a "constitutional psychopathic inferiority."[111] This Act reflected then-prevailing medical views that homosexuality was the product of a serious and permanent psychological defect.[112] As a result of this view, homosexuals were banned from entering the United States under this provision until it was finally repealed in 1990.[113]

After World War II, the nation was overcome by "McCarthyism,"[114] and at the height of the McCarthy era, Congress revised the nation's immigration laws.[115] One focus of these revisions was the exclusion of sexual minorities.[116] Many who believed in the hype of McCarthyism believed that homosexuals "shared with Communists the qualities of being gregarious yet secretive, concealing their true

---

[108] *See* William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy,* 82 IOWA L. REV. 1007, 1045 (1997); *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (discussing how the Page Law was designed to prevent Chinese women from migrating to the United States in the late nineteenth century).

[109] WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 1361 (2d ed. 2004) (noting that in 1885, Congress excluded any "convict, lunatic, idiot or person unable to take care of himself or herself" as a public charge).

[110] *Id.* at 1361.

[111] The Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917); *see* Laurie Martha Cochran, *Recent Development: The Changing Tide of Immigration Law: Equality for All?,* 26 GA. J. INT'L & COMP. L. 673, 676-677 (1997).

[112] ESKRIDGE, *supra* note 110, at 1361.

[113] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[114] Susan Brooks Thistlewaite, *Is Fear of Islam the New McCarthyism?*, WASH. POST, Aug. 1, 2010, *available at* http:// newsweek.washingtonpost.com/onfaith/undergod/2010/08 (defining the term as "making charges of disloyalty or even subversion without regard for adequate evidence").

[115] *See* Immigration and Nationality Act of 1952, ch. 477, § 249, 66 Stat. 163, 219 (codified as amended at 8 U.S.C. § 1259 (2009)).

[116] *Id.*

selves and loyalties, creating coteries and collectives that evaded surveillance."[117] Senator Patrick McCarran who headed the subcommittee on immigration reform stated:

> The subcommittee believes . . . that the purpose of the [1917 Act's] provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts.[118]

Similarly, Senator Kenneth Wherry commented, "[y]ou can't hardly separate homosexuals from subversives . . . A man of low morality is a menace in the government, and they are all teamed up together."[119]

The Public Health Service (PHS) revised the Senator's proposal, and the McCarron-Walter Act adopted the PHS's suggested terminology, which was to exclude persons "afflicted with a mental disorder, epilepsy, or psychopathic personality."[120] However, as the Senate Judiciary Committee made clear:

> [T]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.[121]

The provision of the McCarran-Walter Act pertaining to "psychopathic personalities" was challenged by three cases in the 1950's.[122] In *Quiroz v. Neely*, one of the three cases from the 1950's, the Fifth Circuit reviewed the case of a Mexican lesbian who was ordered deported from the United States for being afflicted with a psychopathic personality pursuant to § 212(a)(4) of the McCarran-Walter Act.[123] The Court looked to the Act's legislative history, cited above,

---

[117] HUMAN RIGHTS WATCH, IMMIGRATION EQUALITY, FAMILY, UNDERVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 24 (2006).

[118] *Id.* at 1362 (quoting S. REP. NO. 81-1515, at 345 (1950)).

[119] *Id.* at 24 n. 48 (quoting Max Lerner, "The Senator and the Purge," N. Y. POST, (July 17, 1950), quoted in JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 95 (New York: Harper Colophon, 1976).

[120] ESKRIDGE, *supra* note 109, at 1363.

[121] HUMAN RIGHTS WATCH, supra note 117, at 25 n. 53 (quoting (S. REP. NO. 1137, at 9 (1952))).

[122] Robert J. Foss, *The Demise of the Homosexual Exclusion: The New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L.L. REV. 439, 454 (1994) (discussing the history of homosexuality as a "psychopathic personality" disorder in immigration law).

[123] Quiroz v. Neelly, 291 F.2d 906, 907 (5th Cir. 1961).

for a clearer meaning of the phrase "psychopathic personality," and held that Congress intended the phrase to include homosexuals.[124]

One year later, in *Fleuti v. Rosenberg*, the Ninth Circuit found that the phrase "psychopathic personality" was too vague to apply to homosexuality in general, thus making the statute void for ambiguity.[125] In 1963, a divided Supreme Court affirmed the decision, but none of the Justices were comfortable protecting homosexuals from exclusion.[126] In response, in 1965, Congress further clarified the phrase "psychopathic personality" by adding the term "sexual deviation" to the list of reasons for exclusion.[127]

Two years after Congress amended the Immigration and Nationality Act, in 1967, the Supreme Court reiterated its position that homosexuals fit into the category of persons "afflicted with psychopathic personality" and could therefore be excluded from admission into United States.[128] In *Boutilier v. I.N.S.,* an alien who had had homosexual relations about three or four times a year for over five years immediately preceding entry into the United States was ordered deported on the ground that he was afflicted with a psychopathic personality.[129] Boutilier challenged the constitutionality of the phrase "psychopathic personality" on vagueness grounds; however, the Supreme Court disagreed, holding that the term "sexual deviation" was not unconstitutionally vague, and was therefore a valid means to exclude homosexuals from the United States.[130] This decision, in combination with the 1965 amendment, left no doubt that the borders of the United States were closed to homosexuals at that time.

However, it is important to note that when the Court decided *Boutilier* only a small percentage of people in the United States were

---

[124] *Id.* (citing H.R. REP. NO. 82–1137, at 9 (1955)).

[125] Fleuti v. Rosenberg, 302 F.2d 652, 658 (9th Cir. 1962), *aff'd on other grounds*, 374 U.S. 449 (1963).

[126] Rosenberg v. Fleuti, 374 U.S. 449, 451 (1963) ("we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether s 212(a)(4) is constitutional as applied to respondent."); *see* ESKRIDGE & HUNTER, *supra* note 109, at 1363.

[127] Immigration and Nationality Act, Pub. L. No. 89–236, § 15(b), 79 Stat. 911, 919 (1965) (repealed 1990); *see* Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1118–1119 (1995).

[128] Boutilier v. INS., 387 U.S. 118, 121 (1967).

[129] *Id.* at 119.

[130] *Id.* at 120. In this decision, the Court also reaffirmed Congress's plenary power to make rules for the admission of aliens and to exclude those who possess certain characteristics. *Id.* at 124.

openly gay or lesbian.[131] This changed almost overnight as a result of the police raid of the Stonewall Inn on June 26, 1969.[132] During the raid, a number of homosexuals fought back against the police, marking the beginning of the gay rights movement.[133] Soon after in 1970, gay activists protested at the American Psychiatric Association's (APA) annual convention in San Francisco to have homosexuality removed as a disorder from the APA's diagnostic manual, the DSM-II.[134]

In response to continuous pressure from gay activists as well as from psychologists inside the profession, the AAP removed homosexuality from the list of psychopathologies in 1973.[135] In 1979, the Surgeon General of the United States "ordered [his] personnel not to issue Class A certificates excluding aliens solely because those aliens were suspected of being homosexual."[136]

As a result of these changes, the I.N.S. developed a new procedure whereby aliens arriving in the United States were no longer questioned about their sexual orientation.[137] In *Hill v. U.S.I.N.S.*, the Ninth Circuit stated that

> On September 9, 1980, the INS adopted 'Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual', which provide that an arriving alien will not be asked any questions regarding his or her sexual preference. If an alien 'makes an unambiguous oral or written admission of homosexuality' or if a third person who is also presenting himself or herself for inspection 'voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time . . . is a homosexual,' the alien may be examined privately by an immigration official and asked to sign a statement declaring he or she is homosexual. A hearing is held before an

---

[131] William N. Eskridge, Jr. *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981,* 25 HOFSTRA L. REV. 817, 958 (1997).

[132] Jackie Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 VT. L. REV. 291, 300 n.67 (2009) (noting that "The 1969 Stonewall Riots mark the advent of the modern gay liberation movement.").

[133] *Id.*

[134] *See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 103–05 (1981); Gary Alinder, *Gay Liberation Meets the Shrinks*, *in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 141, 141, 143 (Karla Jay & Allen Young eds., 1972).

[135] Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?,* 7 YALE L. & POL'Y REV. 201, 212–13 (1989).

[136] *Id.* at 212–13 (noting that "[t]he American Psychiatric Association adopted a resolution on December 15, 1973, declaring that 'homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'"); D. KNUTSON, HOMOSEXUALITY AND THE LAW 21 n.42 (1980).

[137] Hill v. INS, 714 F.2d 1470, 1473 (1983).

Immigration Judge and the alien is excluded based on his admissions.[138]

Initially, therefore, the procedure allowed the entry of an alien so long as he did not volunteer information that he was homosexual or a third party arriving simultaneously did not identify the alien as homosexual.[139] However, the Ninth Circuit ultimately held that the INS could not exclude a self-declared homosexual alien without medical certification from the PHS.[140]

In 1990, Congress finally decided to revise the provisions of the Walter-McCarran Act.[141] Openly-gay Congressman Barney Frank and several others voiced strong opposition to the psychopathic personality exclusion altogether.[142] Consequently, the exclusion was finally completely eliminated by the Immigration Act of 1990.[143] The 1990 Act carried with it significant implications for homosexual refugees seeking entry into the United States, for it offered the novel possibility of attaining political asylum.[144] Since asylees and refugees must first be admissible as immigrants into the United States, the repeal of the phrase "psychopathic personality," which served to exclude homosexuals for decades, granted homosexuals the opportunity to apply for asylum for the first time under the Refugee Act of 1980.[145]

---

[138] *Id.*
[139] *Id.*
[140] *Id.* at 1481; *but see In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983) (holding the I.N.S. may enforce exclusion of homosexuals without the cooperation of the Public Health Service).
[141] *See* Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990).
[142] *See* Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 771–72, n. 5 (1993) (noting that "Frank had introduced bills revising the grounds for exclusion and deportation since 1983"). *See also Exclusion and Deportation Amendments of 1983: Hearing Before the Subcomm. On Immigration, Refugees, and International Law of the Comm. on the Judiciary*, 98th Cong. 193 (1983); H.R. Rep. No. 100-882, at 23-24 (noting that others who attempted to repeal the provision included Representative Julian Dixon (H.R. 2815, 98th Cong., 1st Sess. (1984)); Senator Alan Cranston (S. 1086, 98th Cong., 1st Sess. (1984)); and Representative Edward Roybal (H.R. 4909, 98th Cong., 2d Sess. (1984))); Peter Fowler & Leonard Graff, *Gay Aliens and Immigration: Resolving the Conflict Between Hill and Longstaff*, 10 U. DAYTON L. REV. 621, 639–40 (1985) (summarizing legislative attempts to repeal the provision through 1985).
[143] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).
[144] Foss, *supra* note 122 at 469.
[145] *Id.* at 469.

D. Inconsistencies in Adjudicating Sexual Orientation and Identity Asylum Claims

One of the main sources of inconsistency in applying asylum law in the various circuit courts is the lack of definitions for certain statutory terms.[146]

1. Particular Social Group

A number of cases in the 1990s found that sexual identity could provide the basis for a legitimate asylum claim based upon homosexuals as members of a particular social group.[147] The first of these cases is *In re Toboso-Alfonso.*[148] In that case, a 40-year-old native citizen of Cuba, who came to the United States in June of 1980 as part of the Mariel boat lift, applied for asylum on the basis that he was a "homosexual who [had] been persecuted in Cuba and would be persecuted again on account of that status" should he be forced to return there.[149] This case was the "first known instance in United States immigration law where a homosexual was cast as a member of a particular social group [Cuban gays] and permitted to successfully allege persecution on that basis."[150]

Toboso-Alfonso was followed by *In re Tenorio* in 1993.[151] In that case, a Brazilian gay man who feared persecution at the hands of paramilitary groups after suffering a beating in Rio de Janeiro as part of a "gay bashing" incident was granted asylum.[152] Soon after, in 1994, Attorney General Janet Reno published a "directive mandating that the Immigration system adopt *Toboso-Alfonso* as precedent."[153] It thus became clear that sexual minorities could base asylum claims on their membership in a particular social group, if they still met the other general asylum requirements.[154] Thus, although sexual identity has been recognized as falling within the "particular social group"

---

[146] Birdsong, *supra* note 89, at 368.
[147] *See, e.g., In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990); *In re* Tenorio, No. A72 093 558 (EOIR Immigr. Ct. July 26, 1993).
[148] *Toboso-Alfonso*, 20 I. & N. Dec. 819.
[149] *Id.* at 820.
[150] Robert C. Leitner, Note, *A Flawed System Exposed: The Immigration Ajudicatory System and Asylum for Sexual Minorities,* 58 U. MIAMI L. REV. 679, 686 (2004).
[151] *Tenorio*, No. A72 093 558.
[152] *Id.*
[153] Leitner, *supra* note 150, at 687.
[154] *Id.*

category since *In re Toboso-Alfonso* was designated as a precedential opinion in 1994, this precedent has been inconsistently applied.[155]

2. Homosexual Acts Versus Homosexual Identity

Sexual identity is not one of the enumerated categories found in the definition of asylum.[156] Accordingly, based on the holding of *In re Toboso-Alfonso*, most refugees seeking asylum in the United States on account of their sexual identity do so based on their membership in a particular social group.[157] Currently, however, there is no universally accepted definition of "particular social group."[158] The Ninth Circuit has most frequently held that "alien homosexuals" constitute a particular social group for asylum purposes;[159] however, case law regarding the definition of a "particular social group" is not wholly consistent, even amongst that circuit.[160]

Although the adoption of *Toboso-Alfonso* as precedent greatly facilitated the path of individuals seeking asylum on the basis of persecution based on their sexual identity, it remains unclear who exactly falls within this decision.[161] For example, in some circuits, a homosexual who has lived an openly gay or lesbian lifestyle, and who has been identified as homosexual or harassed or threatened because of his or her status as a gay man or lesbian typically falls within the ruling.[162] However, it remains unclear whether or not an individual

---

[155] *See In re* Toboso-Alfonso, 20 I. & N. Dec 819–22 (B.I.A. 1990). *Compare In re* Tenorio, No. A72 093 558, *1101 (EOIR Immigr. Ct. July 26, 1993), *and* Karouni v. Gonzales, 399 F. 3d 1163, 1172 (9th Cir. 2005), *with* Arrieta v. INS, 117 F.3d 429, 430 (9th Cir. 1996).

[156] 8 U.S.C. § 1101 (a) (42) (A) 2006.

[157] Leitner, *supra* note 150, at 687.

[158] Hernandez-Montiel v. INS, 225 F.3d 1084, 1091 (9th Cir. 2000).

[159] *See, e.g.*, Karouni v. Gonzales, 399 F.3d at 1172.

[160] *Compare In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (This case held that "'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of all persons all of who share a common, immutable characteristic." Thus, a group of taxi drivers did not meet the immutable characteristic requirement because an occupation can change. Thus, driving a taxi is not fundamental to a person's identity), *with* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member, constitutes a social group).

[161] *See e.g.* Pitcherskaia v. INS, 118 F.3d 641, 643–45 n. 5 (1997). *See generally* Stephen Howard, *Gay Asylum Seekers Win Appeal to Stay*, THE INDEPENDENT, July 7, 2010, *available at* http://www.independent.co.uk/news/uk/home-news/gay-asylum-seekers-win-appeal-to-stay-2020354.html?service=Print.

[162] *See e.g.* Pitcherskaia v. INS, 118 F.3d 641, 643–45 n.5 (1997) (concerning a Russian lesbian who was arrested, beaten and imprisoned for participating in a demonstration by a les-

who merely identifies himself or herself as homosexual, but does not frequently engage in homosexual acts and has lived discreetly as a homosexual, would qualify.[163] In this regard, in *In re Toboso-Alfonso*, the BIA drew a clear distinction between persecution based on homosexual acts and homosexual identity.[164] However, as it pertains to asylum law generally, this distinction appears to be arbitrary.[165] For example, those persons claiming persecution on account of their religion do so on grounds of belonging to a particular religion, as opposed to engaging in religious acts such as praying, attending services, or observing certain religious holidays.[166] Nonetheless, in asylum cases based on sexual orientation or identity, "judges still fall back on this artificial distinction in order to justify denials of relief to lesbian, gay, bisexual and transgender ("LGBT") applicants."[167]

The Ninth Circuit, which is typically regarded as the most sympathetic toward sexual orientation and identity asylum claims, has acknowledged that the social group category is "a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion."[168] In *Hernandez-Montiel v. INS,* for example, the Ninth Circuit held "that a 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should to be required to change it."[169] Applying that standard to appellant Hernandez-Montiel, who claimed persecution on account of his homosexuality

---

bian youth organization of which she was a member; appellant was subsequently forced to undergo treatment at a clinic to cure her lesbianism. Appellant was allowed to pursue her asylum claim as a member of the persecuted social group "Russian lesbians" under Toboso-Alfonso).

[163] As is discussed later in this article, the previous standard applied in the United Kingdom was that one who was homosexual but discreetly concealed his or her sexual identity was not subject to persecution, and therefore not eligible for asylum. This standard was recently overturned. *See* Howard, *supra* note 161.

[164] *In re* Toboso-Alfonso, 20 I. & E. Dec. at 823; *see also* O'Dwyer, *supra* note 9, at 196 (stating that "[t]he language of the decision certainly suggests that the BIA would have been less sympathetic to a claim of persecution on account of those homosexual acts rather than homosexual status").

[165] O'Dwyer, *supra* note 9, at 196.

[166] *Id.*

[167] *Id.*

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

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

and his female sexual identity, the Ninth Circuit found that his female sexual identity was such a part of him that "[he] should not be required to change [it]."[170]

More recently, in *Ayala v. U.S. Attorney General*, the U.S. Court of Appeals for the Eleventh Circuit held that a Venezuelan man who identified as a homosexual and who had been diagnosed with the human immunodeficiency virus (HIV) was a member of a particular social group: "that of HIV-positive homosexual men."[171] The BIA determined that Ayala had not proven persecution because of his membership in this particular social group. However, the Eleventh Circuit vacated the BIA decision and remanded Mr. Ayala's petition to reconsider his testimony and other facts that lent credibility to his assertions that he was in fact persecuted because of his sexual identity.[172]

The Eleventh Circuit's ruling in *Ayala* is important because it reflects another recent trend in homosexual asylum claims. Although circuit courts are increasingly willing to accept *In re Toboso-Alfonso's* mandate that sexual identity is sufficient to meet the requirements of membership in a particular social group, many lower court decisions still reflect a reluctance to grant asylum for those persecuted because of their homosexuality.[173] The BIA's decision in *Ayala* demonstrates that even though an applicant may be accepted as a member of a particular social group, immigration decisions are now often finding that an applicant was not persecuted because of that status.[174]

---

[170] *Id.* at 1094; *see also* Ornelas-Chavez v. Gonzalez, 458 F.3d 1052, 1054, 1056 n.3 (9th Cir. 2006).
[171] Ayala v. U.S. Att'y Gen., 605 F.3d 941, 946–47 (11th Cir. 2010).
[172] *Id.* at 946–51.
[173] *Id.* at 949 (citing *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (BIA 1990)).

[174] *See* Razkane v. Holder, 562 F.3d 1283, 1284–85 (10th Cir. 2009) ("The IJ determined that Razkane had not made the necessary showing that it was more likely than not he would be persecuted on account of his membership in a particular social group, homosexuals, upon return to Morocco. Razkane appealed the IJ's decision to the Board of Immigration Appeals. The BIA issued a brief order adopting and affirming the IJ's decision." The Court reversed, requiring the BIA to consider Razkane's persecution resulting from his status as a homosexual. 562 F.3d at 1289.); Kadri v. Mukasey, 543 F.3d 16, 18 (1st Cir. 2008) (noting that appellant "filed a petition for asylum on the ground that he was persecuted in Indonesia because of his sexual orientation. He asserted that he was ostracized in the workplace and prevented from earning a livelihood as a medical doctor; and that he fears that if returned to Indonesia, he would face continued persecution. An Immigration Judge found him credible, found that he belonged to a particular social group, and granted him asylum. The Depart-

Despite this uncertainty, it appears that the liberal Ninth Circuit is paving the way towards a policy of allowing sexual identity to constitute a particular social group for asylum purposes.[175] As noted earlier in this section, in *Hernandez-Montiel v. INS,* the Court allowed the asylum claim of Mexican homosexual with a female sexual identity.[176] Although Hernandez-Montiel engaged in homosexual acts also, the Court phrased its holding in terms of his sexual identity.[177] The Court stated "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them,"[178] and acknowledged that "homosexuality encompasses far more than people's sexual proclivities. Too often homosexuals have been viewed simply with reference to their sexual interests and activity. Usually, the social context and psychological correlates of homosexual experience are largely ignored."[179]

Similarly, in 2005, the Ninth Circuit allowed the asylum claim of Jose Patricio Boer-Sedano, a Mexican homosexual with AIDS.[180] Boer-Sedano testified that "he could not live a 'gay life openly in Mexico' because of how he would be treated if his sexuality were known."[181] "Despite his attempts to conceal his sexual identity, others could perceive [his homosexuality] and Boer-Sedano was ostracized by his family, friends and coworkers on this basis."[182] In addition, he was harassed and beaten by a high-ranking police officer.[183] By allowing Boer-Sedano's claim, the Court has acknowledged that homosexuals may still suffer persecution on account of their sexual identity, even if attempts were made to conceal this identity.[184]

---

ment of Homeland Security appealed to the BIA and the BIA reversed the decision of the IJ." The Court reversed, instructing the BIA to determine if Kadri suffered past persecution because of his membership in a particular social group. 543 F.3d at 22).

[175] *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000); Boer-Sedano v. Gonzalez, 418 F. 3d 1082, 1087–88 (9th Cir. 2005); Karouni v. Gonzalez, 399 F. 3d 1163, 1171–72 (9th Cir. 2005).

[176] *Hernandez-Montiel*, at 1087.

[177] *Id.* at 1096.

[178] *Id.* at 1093.

[179] *Id.* (quoting Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 35 (D.C. 1987)).

[180] Boer-Sedano v. Gonzalez, 418 F.3d 1082, 1085 (9th Cir. 2005).

[181] *Id.*

[182] *Id.* at 1085–86.

[183] *Id.* at 1086.

[184] *See id.* at 1085–86.

Likewise, in *Karouni v. Gonzalez*, the Ninth Circuit rejected the distinction between homosexual acts and homosexual identity in allowing the asylum application of a gay man from Lebanon.[185] In that case, the Court held:

> [W]e see no appreciable difference between an individual, such as Karouni, being persecuted for being a homosexual and being persecuted for engaging in homosexual acts. The persecution Karouni fears, regardless of how it is characterized by the Attorney General, qualifies as persecution on account of . . . Karouni's membership in the particular social group of homosexuals.[186]

More recently, in *Razkane v. Holder*, the Tenth Circuit reversed and remanded the claim of a Moroccan gay man because of comments made by the IJ who denied the application impermissibly relied on preconceived assumptions about homosexuals, resulting in appearance of bias or hostility that precluded meaningful review by Court of Appeals.[187] Adapting the reasoning used in the Ninth Circuit, the Court criticized the IJ's analysis, which involved noting a distinction between homosexual status and homosexual conduct in a country like Morocco, which criminalizes homosexual conduct.[188] The IJ then determined whether Mr. Razkane would be identified as a homosexual in Morocco, but in so doing, "relied on his own views of what would identify an individual as a homosexual rather than any evidence presented."[189] More specifically, the IJ determined that Mr. Razkane would not be identified as a homosexual because "there was nothing in Razkane's appearance that would designate him as being gay because he did not 'dress in an effeminate manner or affect any effeminate mannerisms.'"[190] In a footnote, the Court cautioned that

> The [immigration judge] ended his fact-finding at this predicate stage because he found that Razkane would not be identified as a homosexual and thus necessarily not persecuted as such. The [immigration judge]'s finding that Razkane would not be identified as a homosexual was not premised on Razkane's ability to suppress indicia of homosexuality, a notion which has been severely criticized. *See Karouni v. Gonzales,* 399 F.3d 1163, 1173 (9th Cir. 2005); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 & n.6 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales,* 409 F.3d 1177, 1187 (9th Cir. 2005). Were the [immigration judge] to have found that Razkane would be identified as a homosexual, but nonetheless denied relief because Moroccan law criminalizes homosexual conduct and not homosexual status, the status/conduct dis-

---

[185] Karouni v. Gonzalez, 399 F.3d 1163, 1172–73 (9th Cir. 2005)
[186] *Id.* at 1173.
[187] Razkane v. Holder, 562 F.3d 1283,1288–89 (10th Cir. 2009).
[188] *Id.* at 1287.
[189] *Id.* at 1287-88.
[190] *Id.* at 1288.

tinction drawn by the [immigration judge] would merit careful scrutiny.[191]

Thus, although it has not expressly held that sexual identity alone may constitute a particular social group under the asylum statute, the Ninth Circuit has laid the groundwork for such a claim by rejecting the distinction between homosexual acts and homosexual identity.[192] However, not all circuit courts agree with the Ninth Circuit in this regard.[193] For example, in *Kimumwe v. Gonzalez,* the Eighth Circuit applied the artificial distinction between homosexual acts and homosexual identity to deny asylum.[194] In that case, the Court held that Kimumwe's past imprisonment was the result of a homosexual act—luring another boy into a same-sex encounter—and not simply because of his status as a homosexual in Zimbabwe.[195] Therefore, the Eighth Circuit denied asylum purely because of Kimumwe's homosexual acts.[196]

Similarly, in an unpublished decision, the Fifth Circuit denied asylum for a homosexual Tunisian man in part because there was no evidence that he was persecuted for engaging in homosexual acts.[197] In *Yacoubi v. Holder*, the Court acknowledged that Yacoubi had suffered beatings and name calling because of his status as a homosexual, but ultimately relied on the fact that "there is no evidence that Yacoubi was ever arrested, charged, or convicted of any crime for any homosexual conduct."[198]

3. A Look to the Future: Insight from the United Kingdom

Thus far, the Supreme Court has not addressed this difference between homosexual acts and homosexual identity in the context of

---

[191] *Id.* at 1288 n.3 (emphasis added).
[192] Karouni v. Gonzales, 399 F. 3d 1163, 1172 (9th Cir. 2005).
[193] *See* O'Dwyer, *supra* note 9, at 186. (stating "there has been little or no meaningful guidance on what constitutes persecution on account of sexual identity for purposes of protection under immigration laws. The few published federal courts of appeals decisions that have addressed this issue have varied widely according to the judicial district where the case is decided. These courts continue to hold an artificial distinction between persecution on account of homosexual status or identity which some circuits hold warrants protection, and punishment for homosexual acts, which some circuits hold does not warrant such protection.")
[194] Kimumwe v. Gonzlaez, 431 F.3d 319, 322 (8th Cir. 2005).
[195] *Id.* at 323.
[196] *Id.*
[197] *Yacoubi v. Holder*, 334 Fed. Appx. 660, 662 (5th Cir., 2009).
[198] *Id.*

asylum.[199] However, case law from the United Kingdom, another common law country, is particularly instructive as to how the U.S. Supreme Court may react when confronted with this issue.[200]

In March of 1999, the British House of Lords established that those persecuted for their sexual identity (as opposed to their sexual conduct), would constitute members of a particular social group and thus be eligible for asylum in the United Kingdom.[201] Nonetheless, the distinction between homosexual acts and homosexual identity persisted in British law and practice for many years.[202]

The first case of a homosexual seeking asylum in the United Kingdom, *Regina v. Binasbi*, considered the distinction between homosexual acts and homosexual identity.[203] Consequently, the Court rejected the asylum claim of a gay resident of the Turkish Republic of North Cyprus.[204] The Court stated, "in Cyprus there is no discrimination against homosexuals who are not active."[205] A Cypriot law criminalizing sodomy did exist, but the Court stated that Binasbi could escape persecution as long as he did not engage in homosexual activity.[206] The Court further stated that Binasbi was not at risk for persecution because of his homosexual identity; though his identity might cause him to be the subject of ridicule, it did not amount to the level of persecution.[207]

Although a number of homosexuals have successfully sought asylum in the United Kingdom since this decision, a 2002 decision by the Court of Appeal regarding the asylum applications of three homosexual Zimbabweans suggested that the sentiments behind *Binasbi* remained alive and well.[208] According to Outrage!, a British gay rights organization, the three men's asylum claim was rejected by the Court, which held that criminalization of sodomy does not amount to

---

[199] *See* Christian Legal Society v. Martinez, 130 S. Ct. 2971, 2990 (2010)("Our decisions have declined to distinguish between status and conduct in this context." (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

[200] *See* Leitner, *supra* note 150, at 691.

[201] *See* Sonia Purnell, *Gay Asylum Charter Lords Ruling Could Trigger a Flood of Claims for Refuge by Women and Homosexuals*, DAILY MAIL, Mar. 26, 1999, at 17.

[202] Leitner, *supra* note 150, at 691.

[203] R. v. Binbasi, [1989] Q.B. 593 at 595 (Eng).

[204] *Id.* at 601.

[205] *Id.* at 598.

[206] *Id.* at 596–97.

[207] *Id.* at 597, 600.

[208] *Id.* at 692.

a well-founded fear or persecution.[209] In effect, this decision meant that homosexuals could not base their asylum claims simply upon their sexual identity, even though this directly conflicted with the House of Lord's dicta in 1999.[210]

More recently, however, the British Supreme Court was confronted with the issue of whether a homosexual applicant "could be refused asylum on the grounds that he could avoid ill-treatment by concealing his sexuality."[211] The case involved the asylum claims of two men, one from Cameroon and one from Iran.[212] The man from Cameroon, known as "T," appealed a decision that he could return to his native country, even though he was previously "attacked by a mob after he was seen kissing a male partner" by refraining from such behavior.[213] The Iranian man, known as "J," was told that he could avoid persecution in his home country by concealing his homosexuality.[214] In Iran, "punishment for homosexual acts ranges from public flogging to execution", and in Cameroon, punishment consists of jail sentences that "range from six months to five years."[215]

In its decision, the British Supreme Court did away with the *Binasbi* framework, and unanimously held that the two homosexual asylum seekers would not to be deported from the United Kingdom because they would be persecuted on account of their sexual identity if they returned to their home countries.[216] Although both T and J had previously been denied asylum in the United Kingdom "because officials [found that] they could hide their [homosexuality] by behaving discreetly," the Court decided to end the Home Office's[217] controversial policy of refusing asylum to homosexual refugees on the grounds

---

[209] *Id.*
[210] Purnell, *supra* note 201, at 17.
[211] Stephen Howard, *Gay Asylum Seekers Win Appeal to Stay*, THE INDEPENDENT (July 7, 2010), *available at* http://www.independent.co.uk/news/uk/home-news/gayasylum-seekers-win-appeal-to-stay-2020354.html. (Although this case is discussed in a variety of news articles, the case is not cited by name or citation).
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] James Meikle, *Gay Asylum Seekers Win Protection from Deportation*, THE GUARDIAN (July 7, 2010) http://www.guardian.co.uk/uk/2010/jul/07/gay-asylum-seekers-rights-deportation.
[217] *See About Us*, THE HOME OFFICE, *available at* http://www.homeoffice.gov.uk/about-us/ (last visited October 10, 2011) ("The Home Office is the lead government department for immigration and passports, drugs policy, crime, counter-terrorism and police.").

that they could avoid persecution by merely pretending to be heterosexual.[218] In the decision, Lord Hope, deputy president of the British Supreme Court, explained that when the UN Convention on the Status of Refugees was drafted in 1951, persecution on account of one's sexual identity was not a recognized problem because many people did not live an openly homosexual lifestyle, and some countries denied the existence of homosexuality altogether.[219] Hope stated:

> This was manifest nonsense but at least it avoided the evil of persecution. More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that rightwing evangelical Christian churches indulge in throughout much of sub-Saharan Africa is another . . . . [Homosexuality] is one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem, but it seems likely to grow and to remain with us for many years.[220]

One of the most important holdings in the British Supreme Court case is the holding that forcing a homosexual "to pretend that their sexuality does not exist or can be suppressed was to deny him his fundamental right to be who he is."[221] In order to implement this new ruling, the Court established that in the future, immigration tribunals must first decide, based on the evidence, whether an applicant was homosexual, and second, if so, whether the applicant would face persecution by living an openly gay lifestyle in his own country.[222] In situations where an applicant would not be able to live an openly gay or lesbian lifestyle, the applicant would satisfy the criteria for having a "well-founded fear of persecution, even if [the applicant] could avoid the risk [of persecution] by living discreetly.[223] On the other hand, if the applicant chose to conceal their homosexuality because of social pressure, or, not wanting to upset family members or embarrass friends, then the tribunal should reject the application.[224] Accordingly, Theresa May, the Home Secretary for the United Kingdom,

---

[218] *Id.*
[219] Meikle, *supra* note 216, at 2.
[220] *Id.*
[221] Robert Verkaik & Fionn Shiner, *Why the Supreme Court Ruled Against the Deportation of Gay Asylum Seekers*, THE INDEPENDENT (July 8, 2010), *available at* http://independent.co.uk/news/uk/home-news/why-the-supreme-court-ruled-against-the-deportation-of-gay-asylum-seekers.
[222] Meikle, *supra* note 216.
[223] *Id.*
[224] *Id.*

stated that "[f]rom today, asylum decisions will be considered under the new rules and the judgment gives an immediate legal basis for us to reframe our guidance for assessing claims based on sexuality, taking into account relevant country guidance and the merits of each individual case."[225]

Although gay rights organizations welcomed the recent British decision, many others in the United Kingdom expressed their disapproval.[226] Those who objected to the decision voiced concerns over opening the floodgates to a large number of asylum claims that may be difficult to prove.[227] Nonetheless, the practical implications of this recent British ruling may prove influential if and when the U.S. Supreme Court directly addresses this issue in a sexual identity asylum claim.

How this distinction between homosexual identity and homosexual conduct will play out in American jurisprudence remains to be seen, as the Supreme Court has not made any direct rulings addressing sexual identity and asylum. The decision in *Lawrence v. Texas*[228] eliminates the argument that a homosexual asylum applicant could not base a claim on persecution based on homosexual acts, such as consensual sodomy in another country, because the United States no longer permits the criminalization of sodomy.[229] Thus, there is no doubt that sexual identity claims based upon homosexual acts may constitute a particular social group for asylum purposes. However, it remains uncertain whether applicants can secure asylum if they identify as homosexual, but do not openly engage in homosexual acts.

Whether U.S. courts will unilaterally adopt homosexuality as a social group classification remains to be seen, as different circuits have differing definitions of what constitutes a particular social group, and the Supreme Court has not addressed the matter. Indeed, in homosexual asylum claims, "adjudicators can and consistently do

---

[225] Verkaik and Shiner, *supra* note 221.

[226] *See, e.g.*, *PCC Receives Complaints over Media Coverage of Gay Asylum Case*, PINK NEWS, July 16, 2010, http://www.pinknews.co.uk/2010/07/15/pcc-receives-complaints-over-media-coverage-of-gay-asylum-case/.

[227] *See, e.g.*, Maureen Messent, *Seekers Have Gay Old Time*, BIRMINGHAM MAIL, July 16, 2010, *available at* http://www.birminghammail.net/birmingham-blogs-views/birmingham-mail-columnists/maureen-messent/2010/07/16/seekers-have-a-gay-old-time-97319-26861360/.

[228] Lawrence v. Texas, 539 U.S. 558, 573, 577–78 (2002) (holding Texas's same-sex sodomy law unconstitutional).

[229] *Id.*

reach opposite conclusions based on near-identical and conclusive evidence."[230] Based on an overall increased tolerance of homosexuality in the United States in recent years,[231] there is no reason why the Supreme Court should not allow homosexual identity to constitute a particular social group for asylum purposes, or add sexual orientation as one of the enumerated categories in the asylum statute.

IV. THE UNITED STATES SUPREME COURT'S PAST TREATMENT OF CONTROVERSIAL SOCIAL ISSUES

Historically, the United States Supreme Court has been reluctant to decide controversial social issues until it has become necessary.[232] This is not to say that the Supreme Court does not decide divisive social issues; on the contrary, its jurisprudence contains many decisions attempting to resolve difficult issues.[233] Rather, this article argues that the Supreme Court does not typically stray much further than where it views public opinion is currently aligned.[234] In making such a determination, the Supreme Court must first evaluate prevailing social norms regarding the issue at hand.[235] Although the Justices themselves are far removed from the everyday concerns of most Americans, they are fully aware which issues are at the forefront of the nation's social and political agenda, and indeed often have their own views on such issues.[236] Accordingly, the Justices tend to be aware of when shifts in social norms occur and the Court is more

---

[230] O'Dwyer, *supra* note 9, at 206 (noting the inconsistency in asylum decisions highlights the fact that homosexual asylum seekers are particularly vulnerable to the adjudicator's subjective views on issues of sexual identity generally).

[231] Audrey Barrack, *Gay Tolerance in U.S. Reaching Record Marks*, THE CHRISTIAN POST, May 29, 2007, *available at* www.christianpost.com/news/gay-tolerance-in-u-s-reaching-record-marks-27674.

[232] *See* WILLIAM STOREY, U.S. GOVERNMENT AND POLITICS 75 (2007).

[233] *See, e.g.,* Dred Scott v. Sandford, 60 U.S. 393, 393–94, 454 (1857) (holding that people of African descent brought into the United States and held as slaves were not protected by the Constitution and therefore could not be considered citizens); Brown v. Board of Education, 347 U.S. 483, 495 (1957) (holding the segregation of public schools based on race was unconstitutional); Roe v. Wade, 410 U.S. 113,164–65 (1973)(holding that a Texas criminal abortion statute was unconstitutional).

[234] *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 861 (2009) (analyzing "modernization" as an approach to judicial review, and stating that such an approach involves the courts "strik[ing] down a statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it").

[235] *See id.* ("Modernization tries to anticipate developments in the law, invalidating laws that would not be enacted today or that will soon lose popular support.").

[236] Cordray & Cordray, *supra* note 49, at 441.

likely to intervene after this shift has already taken place.[237] In this regard, the Supreme Court is seen as perfecting, rather than overstepping, the democratic process.[238] Usually, such a change occurs before the Court when there is "the right messenger with the right message in the right social context."[239] Indeed, as Justice Oliver Wendell Holmes observed, "the life of the law has not been logic; it has been experience."[240]

Typically, a normative shift regarding a controversial social issue occurs in increments.[241] Initially, when a controversial social issue first emerges society is reluctant to let go of its traditional viewpoint; therefore, initial legal challenges on the controversial social issue in question tend to have little to no effect on legal precedent.[242] Once societal perceptions begin to change and a controversial social issue reaches the mainstream, however, the Supreme Court will begin to acknowledge the shift in public perception by accepting cases that acknowledge the new norm in a fact-specific manner, setting the stage for an alteration of the previous norm.[243] In other words, what is considered "constitutional" often changes over

---

[237] *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1961–62 at n.12 (2006).

[238] *See* Strauss, *supra* note 234, at 893–94.

[239] Gardina, *supra* note 132, at 292; *see also* Cordray & Cordray, *supra* note 51, at 327("Rather than asking whether he or she will win on the merits, the Justice instead would ask whether it is necessary and expected that the United States Supreme Court should decide this case or this issue at this time.").

[240] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881). (The remainder of the passage reads

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. *Id.*)

[241] Goldberg, *supra* note 237, at 1975.

[242] *Compare e.g.*, Naim v. Naim, 350 U.S. 891, 891 (1995) (per curiam) *with* Loving v. Virginia, 388 U.S. 1, 12 (1967); *compare* Bowers v. Hardwick, 478 U.S. 186,194–45 (1986) *with* Lawrence v. Texas, 539 U.S. 558,578 (2003).

[243] For example, note that ten years after its decision in *Bowers*, the Supreme Court acknowledged the rights of homosexuals as a class of citizens in *Romer v. Evans*. 517 U.S. 620, 635 (1996). Although *Romer* stood in obvious tension with *Bowers*, it set the stage for *Lawrence v. Texas*, a decision the Court was not yet willing to make in 1996. *See* Goldberg, *supra* note 237, at 1975.

time.[244] As Justice Thurgood Marshall observed in *City of Cleburne v. City of Cleburne Living Center*:

> Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.[245]

For example, in *Plessy v. Ferguson*, the Court upheld the "separate but equal" doctrine as constitutional under the Fourteenth Amendment, defining race relations in the United States for the next fifty-eight years.[246] The Court decided *Plessy* in 1896, but the question of how to address race relations in the post-Civil War era was in dispute for approximately thirty years before the Supreme Court intervened.[247] Though the decision is appalling to most Americans today, the decision was well received at the time it was decided and reflected society's then-prevailing racist attitude.[248]

In the years following *Plessy*, American society increasingly accepted racial equality, particularly in the Northern and Midwestern states.[249] This shift culminated in the Court's 1954 decision in *Brown v. Board of Education*, decided in 1954.[250] In that case, the Supreme Court overturned *Plessy*, and held that, in the context of education, "separate but equal" deprived children of equal educational opportunities, in violation of the Equal Protection Clause of the Fourteenth Amendment.[251] The Court explained that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that racially segregated schooling causes harm] is

---

[244] Gardina, *supra* note 132, at 292.
[245] City of Cleburne v. Cleburne Living Center, 473 US. 432, 466 (1985) (Marshall, J., concurring in part, dissenting in part).
[246] Plessy v. Ferguson, 163 U.S. 537 (1896) *overruled by* Brown v. Board of Education, 347 U.S. 483 (1954).
[247] *Id.*

[248] *See*, RACE, LAW, AND CULTURE: REFLECTIONS ON *BROWN V. THE BOARD OF EDUCATION* 55 (Austin Sarat ed., Oxford Univ. Press 1997); *but see Plessy*, 163 U.S. at 1144, 1146 (Harlan, J. dissenting) ("In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.").
[249] *Racial Tensions in Omaha African American Migration*, NEBRASKA STUDIES, *available at* http://nebraskastudies.org/0700/frameset_reset.html (last visited Sept. 13, 2011).
[250] Brown v. Board of Education, 347 U.S. 483, 495 (1954).
[251] *Id.* at 494–95.

amply supported by modern authority."[252] Although the Supreme Court did not expressly state the shift in public perception regarding racial equality in its ruling, the decision makes clear that the decision was in line with recent societal shifts on the topic.[253] However, the case was fact-specific to the public school system; it did not reflect a complete rejection of racial inequality. [254]

Notably, at the time *Brown* was decided, seventeen of the forty-eight states required racial segregation in public schools, and sixteen states prohibited it.[255] Four more states had optional or limited statutes regarding segregation, in which 40% of children were enrolled in a segregated environment.[256] Thus, at the time *Brown* was decided, states adamantly clinging to segregation were in the minority.[257]

The line of interracial marriage cases also reflect this pattern.[258] In the 1955 case *Naim v. Naim*, the Supreme Court declined to invalidate Virginia's miscegenation statute.[259] At that time, half of the nation's forty-eight states banned interracial marriage.[260] Over the next several years, however, several states appealed their miscegenation statutes, reflecting a public opinion that was increasingly to-

---

[252] *Id.* at 494.
[253] *Id.*
[254] *See supra* text accompanying note 251.

[255] Robert L. Hayman, Jr. Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 665 (1993).
[256] Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1128-29 (1990).
[257] *Id.*
[258] *See* Gardina, *supra* note 132, at 292.
[259] Naim v. Naim, 350 U.S. 891, 891 (1955) (per curiam). In *Naim,* the Supreme Court was confronted with the issue of whether a Virginia miscegenation statute that had been upheld by the Virginia Supreme Court of Appeals was constitutional. *Id.* The Supreme Court vacated the lower court's decision and remanded the case for clarification of the record. *Id.* The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier holding and refused to clarify the record. Naim v. Naim, 90 S.E.2d 849, 850 (1956) (per curiam). Nevertheless, the Supreme Court declined to recall or amend the mandate, finding that the constitutional question had not been "properly presented." Naim v. Naim, 350 U.S. 985, 985 (1956) (per curiam). This allowed the Virginia Court's decision finding its miscegenation statute constitutional to remain in effect.
[260] *See* Peter WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 2 (Palgrave McMillian 2002) (stating that in 1958, all 17 southern states and 7 other states maintained miscegenation statutes).

lerant of interracial marriages.[261] During this time, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, drawing national attention to race relations and notions of racial equality.[262]

In 1967, the Supreme Court decided *Loving v. Virginia,* holding that statutes barring interracial marriage are unconstitutional.[263] At this time, only sixteen states still had miscegenation statutes on the books.[264] The Supreme Court's decision in *Loving,* decided only twelve years after *Naim*, clearly reflects the Court's reluctance to declare interracial marriage, a controversial social issue, unconstitutional when miscegenation statutes were in effect in 50% of the states.[265] Once public perception tipped and only one third of the states supported a ban on interracial marriage, the Supreme Court accepted the responsibility of shifting the law into accord with the majority opinion.[266]

Accordingly, the Supreme Court was reluctant to get involved in issues related to homosexuality for many years.[267] The 1969 Stonewall Riots are typically regarded as the foundation of the modern gay rights movement.[268] However, from 1969 to 1986, when Warren Burger was Chief Justice of the Supreme Court, "it managed to reject or duck, and never accept, the constitutional claims brought

---

[261] *Id.*

[262] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2010) (prohibiting discrimination based on race); Voting Rights Act of 1965, 42 U.S.C. § 1973 (2010) (outlawing discriminatory voting practices, which had prevented many African Americans from exercising their right to vote pursuant to the Fifteenth Amendment).

[263] Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

[264] *Id.* at 6.

[265] Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133,1138 (2010) (indicating the same Virginia miscegenation law was upheld in *Naim v. Naim*).

[266] *Loving*, 388 U.S. at 6, 11–12. Just over 40 years after the decision in Loving, Barack Obama, the son of a white mother and black father, was elected President of the United States. *See generally* Barbara Bennett Woodhouse & Kelly Reese, *Reflections on Loving and Children's Rights*, 20 U. FLA. J.L. & PUB. POL'Y 11, 11 (2009) (describing the effect of *Loving* on the Obama family story).

[267] *See* Gardina, *supra* note 132 at 300 (stating that, "the Supreme Court was much slower to extend constitutional protections to sexual conduct between consenting adults of the same sex.").

[268] *Police Again Rout 'Village' Youths: Outbreak by 400 Follows a Near-Riot over Raid*, N.Y. TIMES, Jun. 30, 1969, at 22 (describing the events of June 28, 1969, when New York City Police raided the Stonewall Inn in Greenwich Village, a popular gay bar. The raid was considered by many to be a senseless attack on the city's homosexual community, and accordingly, resulted in three days of riots in Sheridan Square).

to it by homosexuals."[269] When the Supreme Court was confronted with the constitutionality of an anti-sodomy law in *Bowers v. Hardwick* in 1986, it upheld the statute.[270] The Court stated that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[271] Viewed against the backdrop of American society in the 1980's, the Court's decision seems to reflect public sentiment.[272] At the time that case was decided, many in the United States had adopted a negative opinion of homosexuality due to the AIDS epidemic, which was often referred to as the "gay plague."[273] Furthermore, in the year *Bowers* was decided, twenty of the fifty states had laws prohibiting sodomy.[274]

In 1996, the Supreme Court decided *Romer v. Evans*.[275] In that case, the Court held that an amendment to the state of Colorado's constitution violated the Fourteenth Amendment when it provided for a ban on antidiscrimination protections based on sexual orientation.[276] By taking this stance, the Court had to depart from its previous position in *Bowers* that homosexuality was morally wrong.[277] Although

---

[269] William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1030 (2005). Eskridge goes on to state that, in his opinion, "the Justices were homo-ignorant and believed the legitimacy of the judiciary was at risk if they trumped anti-gay body politics with constitutional principle. Unfortunately, the Justices dodged gay rights in the clumsiest possible ways, and they ended up harming their own institution more than they harmed homosexuals." *Id.* at 1031.

[270] Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

[271] *Id.* at 197.

[272] Gardina, *supra* note 132, at 300–01.

[273] *Id. See also* Karen Moulding & National Lawyers Guild Lesbian, Gay, Bisexual & Transgender Committee, *Representing Clients with HIV/AIDS*, *in* 2 SEXUAL ORIENTATION AND THE LAW § 15:1, 15–5 (Roberta Achtenberg ed., West 2010) ("In the 1980s and early 1990s, the spread of HIV/AIDS was accompanied by media hysteria and a backlash against efforts for lesbian and gay rights. Fear of HIV/AIDS contributed to a rise in homophobia, which resulted in attacks on the civil rights of gay people; an increase in violent assaults of gay men; and prejudice against people with HIV/AIDS."); *see also* Matthew Carmody, *Mandatory HIV Partner Notification: Efficacy, Legality, and Notions of Traditional Public Health*, 4 TEX. F. ON C.L. & C.R. 107, 109 (1999) (noting that "AIDS was initially only prevalent among homosexual men, Haitians, heroin addicts, and hemophiliacs").

[274] Lawrence v. Texas, 539 U.S. 558, 573 (2003) ("The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

[275] Romer v. Evans, 517 U.S. 620, 635(1996).

[276] *Id.*

[277] Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986).

the majority opinion did not directly confront or attempt to overrule *Bowers*, instead basing its decision on the state's asserted interests, it nonetheless set the stage for the Court to do so at a later date as public opinion continued to evolve regarding issues of homosexuality.[278]

Seven years after *Romer*, the Supreme Court reversed *Bowers* in *Lawrence v. Texas*.[279] In that case, the Supreme Court held that "*Bowers'* deficiencies became even more apparent in the years following its announcement. The twenty-five States with laws prohibiting the conduct referenced in *Bowers* are reduced now to thirteen, of which four enforce their laws only against homosexual conduct."[280] Thus, only a very small majority of states twelve and a half percent, (12.5%), had laws expressly prohibiting homosexual conduct.[281] In the majority opinion, the Court specifically cited the shift in cultural attitudes toward homosexuality, both in the United States and abroad, as part of its justification for overturning *Bowers*.[282] In a concurring opinion, Justice O'Connor stated that "when a state makes homosexual *conduct* criminal . . . that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination . . . ."[283] Accordingly, *Lawrence* and this line of cases also reflects a shift in prevailing social norms, and the Supreme Court's initial reluctance to address the issue until a majority of the public was in agreement with the newly established social norm.[284] More importantly, however, the decisions in *Romer* and *Lawrence* reflect the Court's "growing comfort with including gay men and lesbians within constitutional protections previously afforded only to their heterosexual counter parts."[285]

---

[278] Although public opinion had evolved since *Bowers*, it still had a way to go before it was the majority view. *See, Romer,* 517 U.S. at 636 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." (citing *Bowers,* 478 U.S. at 195–96.)).

[279] *Lawrence*, 539 U.S. at 578.

[280] *Id.* at 573.

[281] *Id.*

[282] *Id.* at 576.

[283] *Id.* at 583 (O'Connor, J., concurring) (emphasis added) (internal quotations omitted).

[284] *Lawrence*, 539 U.S. at 578; Romer v. Evans, 517 U.S. 620, 635(1996); *see also* Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986).

[285] Gardina *supra* note 132, at 297.

Currently, there is much debate over whether the Supreme Court should grant certiorari in a case involving gay marriage.[286] However, as the cases above demonstrate, most legal scholars find that the time is not yet right to petition the Supreme Court on the issue.[287] At present, there are six states—Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont—that allow for gay marriage, as well as the District of Columbia.[288] In Rhode Island and Maryland, same sex marriages are recognized but not performed.[289] Several other states allow for civil unions and domestic partnerships.[290] However, there are twenty-four states that currently

---

[286] *See, e.g.,* Joan Biskupic, *Gay-Marriage Lawsuits Escalate*, USA TODAY, July 14, 2010, at A1; Margaret Talbot, *A Risky Proposal – Is It Too Soon to Petition the Supreme Court on Gay Marriage?* NEW YORKER, Jan. 18, 2010, *available at* http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot?currentPage=all.; David G. Savage, *Gay Marriage Supporters Fear Supreme Court's Ruling Was an Omen*, L.A. TIMES, Jan. 17, 2010, at A1.

[287] *See* Gardina, *supra* note 132, at 293, 308 (stating that in the context of Supreme Court decision making "timing is everything.") and ("if the Court were to consider the issue today, it is highly unlikely that the plaintiffs would succeed.").

[288] 2009 Conn. Pub. Acts No. 09-13; Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003); 2009 N.H. Laws 60; S. 5416, 234th Leg., Reg. Sess. (N.Y. 2011); 2009 Vt. Acts & Resolves 33; 55 D.C. Reg. 6758 (June 20, 2008); *see also Winning the Freedom to Marry: Progress in the States*, FREEDOMTOMARRY.ORG, http://www.freedomtomarry.org/states/ (last visited July 25, 2010); *see also* Gardina *supra* note 133, at 295.

[289] Letter from Patrick Lynch, Attorney General, to Jack. R. Warner, Commissioner of the Rhode Island Board of Governors for Higher Education, R.I. Op. Att'y Gen. (Feb. 20, 2007), *available at* http://www.webcitation.org/5f9CDGPXH; Marriage – Whether Out-of-State Same-Sex Marriage that is Valid in the State of Celebration May Be Recognized in Maryland, Md. Op. Att'y Gen. (Feb. 23, 2010), *available at* http://www.washingtonpost.com/wp-srv/metro/documents/95oag3.pdf; *see also Winning the Freedom to Marry: Progress in the States*, FREEDOMTOMARRY.ORG, http://www.freedomtomarry.org/states/ (last visited July 25, 2010).

[290] *See Winning the Freedom to Marry: Progress in the States*, FREEDOMTOMARRY.ORG, http://www.freedomtomarry.org/states/ (last visited July 25, 2010). These states are Maine, New Jersey, Delaware, Wisconsin, Colorado, California, Nevada, Oregon, Washington, and Hawaii. California briefly allowed gay marriage between June 16, 2008 and November 4, 2008, but voters passed Proposition 8, a controversial ballot initiative that amended the California Constitution to forbid gay marriage. Cal. Const. art. I, § 7.5. Proposition 8 was challenged in the California courts, where it was upheld, then challenged in the Ninth Circuit, which has sent the case back to the California Supreme Court to determine whether the third party-defendants in the case had standing to intervene. Strauss v. Horton 207 P.3d 48 (Ca. 2009); Perry v. Schwarzenegger, 602 F.3d 976 (9th Cir. 2010); Perry v. Schwarzenegger, No. 10-16696 (N.D. Cal. Jan. 4 2011). As of this article's publication, the California Supreme Court has heard oral arguments regarding the standing issue but has not yet released a

have an anti-gay marriage constitutional amendment or legislation, and nine states that although without an explicit ban, do not have any sort of official same-sex relationship recognition.[291]

Given the states' current positions on gay marriage, it is unlikely that the Supreme Court is ready to issue a ruling shifting the prevailing norm. As previously discussed, typically a judicial shifting of a cultural norm must have the support of approximately 50% of the states.[292] In other words, the Supreme Court typically reaches a tipping point as to a particular social issue when society has as well.[293] At present, a majority of states simply do not favor gay marriage, and legal scholars recognize that if the Supreme Court were to accept certiorari based on these statistics, it would most likely rule against the constitutionality of gay marriage.[294] Legal professor Andrew Koppelman acknowledged that "[t]he overwhelming majority of the states are still opposed to same-sex marriage . . . [and t]he Supreme Court is reluctant to take on the whole country."[295]

---

ruling. *See* Maura Dolan, *Gay Marriage Foes May Win Right to Defend Prop. 8 in Court*, L.A. TIMES, Sept. 7, 2011, *available at* http://articles.latimes.com/2011/sep/07/local/la-me-0907-prop8-20110907.

[291] The states that currently have anti-gay constitutional amendments are Virginia, Ohio, Michigan, Kentucky, Tennessee, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arizona, Utah, Idaho, Montana, and Alaska. VA. CODE ANN. § 20-45.2 (2011); OHIO REV. CODE ANN. § 3101.01 (West); MICH. COMP. LAWS § 551.1 (2011); KY. REV. STAT. ANN. § 402.020 (West 2011); TENN. CODE ANN. § 36-3-104 (2011); S.C. CODE ANN. § 20-1-15 (2011); GA. CODE ANN. §19-3-3.1 (2011); FLA. STAT. ANN. § 741.212 (West 2011); ALA. CODE § 30-1-19 (2011); MISS. CONST. art. XIV, § 263A; LA. CIV. CODE ANN. art. 89; ARK. CODE ANN. § 9-11-208 (2007); MO. ANN. STAT. § 451.022 (2011); N.D. CENT. CODE ANN. § 14-03-01 (2011); S.D. CODIFIED LAWS § 25-1-38; NEB. CONST. art. I, § 29; KAN. STAT. ANN. § 23-101 (2011); OKLA. STAT. ANN. tit. 43, § 3 (West 2011); TEX. CONST. art. I, § 32; ARIZ. REV. STAT. ANN. § 25-101 (2011); UTAH CODE ANN. § 30-1-2 (West 2011); IDAHO CONST. art. III, § 28; MONT. CONST. art. XIII, § 7; ALASKA CONST. art. I, § 25. The states that do not have an anti-gay amendment or any protection for same sex couples are Wyoming, New Mexico, Minnesota, Illinois, Indiana, Pennsylvania, West Virginia, North Carolina, and Delaware. *See Winning the Freedom to Marry: Progress in the States*, FREEDOMTOMARRY.ORG, http://www.freedomtomarry.org/states/ (last visited July 25, 2010).

[292] *See* Strauss, *supra* note 234, at 863 ("No one thinks that a court should strike down a law if, for example, more than 50 percent . . . of those who responded to a public opinion poll disapproved of it.").

[293] *See* Gardina, *supra* note 132, at 293 (noting that "Justices are unwilling to enter the debate too early and short-circuit what Justice Breyer calls the 'national conversation'").

[294] *See* Talbot, *supra* note 61, at A1, stating that "a loss [at the Supreme Court] could be a major setback to the movement for marriage equality."

[295] *See* Biskupic, *supra* note 286, at A3.

Similarly, a number of gay rights organizations, including the American Civil Liberties Union, Human Rights Campaign, Lambda Legal, and the National Center for Lesbian Rights, issued a statement also acknowledging that the time was not right to pursue gay marriage at the Supreme Court.[296] These organizations determined that the likelihood of success on the merits was slim, because the "Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states."[297] These organizations noted that when the Supreme Court previously addressed gay rights ahead of a shift in public opinion, it took seventeen years for the Court to revisit the issue.[298] The organizations' statement provided that "[a] loss now may make it harder to go to court later . . . It will take us a lot longer to get a good Supreme Court decision if the Court has to overrule itself."[299] The statement continued that many gay-marriage supporters agreed that it would be wiser to wait until more states adopted gay marriage laws.[300] Based on the Court's history of waiting to address controversial social issues, such as gay marriage, until the issue is supported by a majority of the states, it appears that the organizations' statement is prudent policy.[301]

V. WHY THE U.S. SUPREME COURT SHOULD DECIDE A SEXUAL IDENTITY ASYLUM CLAIM

"Whether or not they affirm the status quo, courts deciding cases in which social norms are contested often go to great lengths to frame their decisions as following, rather than intervening in, the public debate."[302] Accordingly, although it is clearly premature for the Supreme Court to address gay marriage, (that is, assuming that the objective is a change from the traditionalist view of marriage), it is not premature for the Supreme Court to make an incremental decision that sets the stage for such a ruling. Given the circuit splits re-

---

[296] Talbot, *supra* note 61, at A1.
[297] *Id.*
[298] *Id.* Bowers v. Hardwick, 487 U.S. 186, 186; Lawrence v. Texas, 539 U.S. 558, 558.
[299] Talbot, *supra* note 61, at A1.
[300] *Id.*
[301] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT 14–15 (1st ed., Farrar, Straus, & Giroux, 2009) ("The Court will get ahead of the American people on some issues . . . On others, such as gay rights, it will lag behind.").
[302] Goldberg, *supra* note 237, at 1984.

garding sexual identity asylum claims, as well as the public's increasing tolerance of homosexuality and attention to immigration in general, it is the appropriate time for the Supreme Court to accept certiorari on this important issue.[303]

Regarding homosexual asylum claims, the issue is primarily ripe for the Supreme Court because of the existing circuit splits.[304] Most notably, the circuits remain split on how to define many key terms that are integral to deciding homosexual asylum claims, such as "persecution" and "particular social group."[305] Further, some circuits continue to draw an artificial distinction between persecution on account of homosexual status or identity, and punishment for homosexual acts.[306] These divisions amongst the circuits have persisted for many years, and because homosexual asylum claims have been steadily increasing in number over the past decade and do not show any signs of decreasing,[307] the Supreme Court should set standard definitions for all of the circuits to apply. Consistent definitions of these terms would ensure that homosexual asylum claims would be adjudicated uniformly and thus fairly.[308]

Although reasonable jurists will often disagree about complicated legal issues and it will inevitably take some time for such issues to reach the Supreme Court, litigation over immigration issues have arguably decreased in quantity over the last several years.[309] Though the Justice Department has been confronted with numerous homosexual asylum seekers who have not received equal treatment from the circuit courts, it has not sought Supreme Court review of any of these cases.[310] It is, in part, the Justice Department's duty to identify important federal law issues and present them for review to the Su-

---

[303] O'Dwyer, *supra* note 9, at 191.
[304] *See supra* text accompanying n. 11.
[305] Birdsong, *supra* note 89, at 389.
[306] O'Dwyer, *supra* note 9, at 186.
[307] *Id.*
[308] *See, e.g.*, Julia Preston, *Wide Disparities Found in Judging Asylum Claims*, N. Y. TIMES, May 31, 2007, at A1; Tod Robberson, *Asylum Seekers at the Mercy of Inconsistent Courts*, DALLAS MORNING NEWS, June 1, 2007, at A1.
[309] *See* Brent E. Newton, *Lopez v. Gonzalez: A Window on the Shortcomings of the Federal Appellate Process*, 9 J. APP. PRAC. & PROCESS 143, 172 (2007); *see generally* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y. L. SCH. L. REV. 13, 30 (2006-07); *see generally* Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1970–1990*, 45 STAN. L. REV. 115,177 (1992).
[310] *See* Newton, *supra* note 309, at 172–73.

preme Court.[311] Accordingly, in an effort to remedy the perceived problems in immigration claims, a sexual identity asylum claim should be presented to the Supreme Court immediately. Further, because one of the Supreme Court's primary duties is to resolve circuit splits, the Court should accept certiorari in such a case.[312] To keep up with our nation's notions of equality and fairness, the Supreme Court should also accept certiorari in a sexual identity asylum claim because such a case involves a pertinent social issue, albeit one that is not as fiercely debated or polarizing as gay marriage. Similarly, although there is currently much debate about illegal immigration in the United States, asylum is a far less controversial aspect of immigration law than other recent immigration developments that the Supreme Court seems poised to address.[313]

In a recent decision that did not pertain to immigration law and only indirectly involved gay rights, the Supreme Court itself seemed to set the stage for addressing such a sexual identity asylum claim.[314] In *Christian Legal Society v. Martinez*, the Supreme Court addressed whether "a public law school [could] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students."[315] The Supreme Court explained that the Christian Legal Society (CLS) advocated that sexual activity should not occur outside of marriage, and that marriage was only between a man and a woman, thus excluding from the organization "anyone who engages in unrepentant homosexual conduct."[316] CLS argued that it did not exclude individuals because of their sexual orientation, but rather on their beliefs that certain conduct

---

[311] *Id.* at 173.

[312] *See* Nunez v. U.S., 128 S. Ct. 2990, 2991 (2008) ("the main purpose of our certiorari jurisdiction was to eliminate circuit splits, not to create them.") (Scalia, J., dissenting); Hartman v. Moore, 547 U.S. 250, 256 (2006) ("We granted certiorari, to resolve the Circuit split.") (internal citations omitted); Concrete Works of Colorado, Inc., v. City and County of Denver, Colorado, 540 U.S. 1027,1033 (2003) ("the case is worthy of the Court's review because it presents a clear Circuit split").

[313] *See, e.g.,* Joe Garofoli, *Californians reevaluate Arizona boycott plans*, SAN FRANCISCO CHRONICLE, July 29, 2010, at A10 (noting that "The federal court ruling . . . that set aside key provisions of Arizona's controversial immigration law . . . is likely only the next step in a battle destined for the Supreme Court").

[314] O'Dwyer, *supra* note 9, at 186.

[315] *Martinez,* 130 S. Ct. 2971, 2979 (2010).

[316] *Id.* at 2981 (internal citations omitted).

was wrong.[317] The Supreme Court responded by stating that "[o]ur decisions have declined to distinguish between status and conduct in this context."[318]

Although the statement that the Supreme Court would not distinguish between status and conduct "was resolutely bland and nicely hidden in a long Supreme Court decision," many gay rights activists have recognized this statement as a "time bomb."[319] More specifically, this statement prepares the Supreme Court to more directly speak to a gay rights ruling, i.e., the logic of the statement that there is no distinction between status and conduct can be exploited in a later decision. The statement is also significant because it reflects a shift in the Supreme Court's opinion, in that it appears to continue toward the trend of being more gay-friendly.[320] In gay rights cases "the court has chosen its words with care over a long period of time . . . . If read properly, this decision should have an impact all over gay rights jurisprudence both because of the specific rejection of the status-conduct distinction and the shift in tone."[321] Accordingly, several scholars have stated that the opinion is positive for future gay rights cases.[322] Although most of the scholars who addressed the case discussed the status/conduct distinction in terms of gay marriage,[323] the analysis is also clearly applicable to homosexual asylum claims, where the status/conduct distinction is the direct cause of most of the circuit splits.[324]

Additionally, homosexual asylum claims are ripe for Supreme Court adjudication because of the recent ruling in the United Kingdom allowing two homosexual asylum claims, and rejecting the

---

[317] *Id.* at 2990.

[318] *Id.* (citing *Lawrence*, 539 U.S. at 575) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (emphasis added); *Lawrence,* 539 U.S. at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated to being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *cf.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.")).

[319] Adam Liptik, *Looking for Time Bombs and Tea Leaves on Gay Marriage*, N.Y. TIMES, July 19, 2010, at A11.

[320] *Id.* (noting that *Martinez* was the only case argued that term in which Justice Anthony Kennedy joined the Court's more liberal justices).

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] O'Dwyer, *supra* note 9, at 186.

Court's previous status versus conduct distinction.[325] Although the United States and the United Kingdom have separate legal systems, the Supreme Court will at times engage in "reason borrowing" when comparable issues are raised in a similarly situated foreign court.[326] As noted by former Justice Sandra Day O'Connor, "there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."[327] In the context of homosexual asylum claims in the United States, the recent developments in British law provide strong supporting authority for a similar decision to be made here.[328] Indeed, because many in the United States regard the nation as a leader on human rights issues, the country should at least adopt a policy on sexual identity asylum claims that is equivalent to the rights afforded to homosexual asylum seekers in the United Kingdom.[329]

VI. CONCLUSION

Thus, the time is ripe for the Supreme Court to accept a homosexual asylum claim. Although the Supreme Court must delicately balance popular opinion with the adverse effects of circuit court splits, the Supreme Court's recent ruling in *Christian Legal Society v. Martinez*, as well as the British Supreme Court's recent rulings, reflects that the balance has shifted in favor of addressing the issue. As explained above, abolishing the homosexual acts versus conduct distinction that some circuits still apply in sexual identity asylum claims

---

[325] *See Gay Asylum Seekers from Iran and Cameroon Win Appeal*, BBC NEWS (Jul. 7, 2010), *available at* http://www.bbc.co.uk/news/10180564.

[326] *See* John Parsi, *The (Mis)categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497, 1515–16 (2010) (quoting Justice Breyer, "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. . . . Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances . . . .").

[327] *Id.* at 16.

[328] Stacey L. Sobel, *The Mythology of a Human Rights Leader: How the United States has Failed Sexual Minorities at Home and Abroad*, 21 HARV. HUM. RTS. J. 197, 200 (2008) ("It is disappointing that the U.S. government and some of its judges are unwilling to acknowledge the human rights progress being made by other nations. Just because an idea does not originate in the United States does not make that idea a foreign fad without basis or merit.")

[329] *But see* Sobel, *supra* note 328, at 199–200 (2008) (Noting that although the United States prides itself as a human rights leader, when it comes to the rights of sexual minorities, the United States lags behind many European countries).

will not garner as much media attention as would a ruling on gay marriage or the state of Arizona's illegal immigration bill. However, it will keep the Supreme Court on course to further develop these important social issues, while not stepping out of line with public opinion. Although the Supreme Court prefers not to make a decision until it has to, for the reasons outlined above, it should now make a decision on sexual identity asylum claims.