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# SHORING UP JUDICIAL AWARENESS: LGBT REFUGEES AND THE RECOGNITION OF SOCIAL CATEGORIES

AARON PONCE<sup>\*</sup>

## I. INTRODUCTION

The advancement of lesbian, gay, bisexual, and transgender (LGBT) rights has generally been more extensive in the European Union and its member states than the development of similar rights in the United States. This comment argues that asylum laws and jurisprudence affecting LGBT refugees in the United Kingdom reflect that country's recognition of certain sociological categories involved in LGBT cases that corresponding U.S. cases have not considered. The sociological categories significant in LGBT cases include distinctions between sexual conduct and sexual identity as well as those between biological sex and gender. Depending on the level of sociological awareness, asylum laws can either reflect the true social realities of LGBT individuals or serve as legal mechanisms that perpetuate discrimination—possibly causing discrimination instead of preventing it. This comment predicts that the advancement of laws favorable to LGBT individuals has and will continue to progress at a greater rate in the U.K. than analogous laws in the U.S. because of a more comprehensive awareness of the sociological complexities inherent in LGBT issues. This in turn will lead to increased judicial consistency and predictability of the law.

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As LGBT individuals have gained an increasingly visible presence worldwide, the LGBT movement has gradually become an international one.<sup>1</sup> The globalization of the LGBT movement has corresponded with the mobility of LGBT individuals, specifically in instances where they flee persecution in their less progressive home countries to seek refuge in countries with more progressive and tolerant societies. Asylum laws play a key role in determining the likelihood of whether such LGBT individuals will be able to legally reside in the country of refuge. The nature of asylum law is, therefore, of the utmost importance to LGBT refugees.

Social categories are those classifications that segment and order the social environment, thus helping an individual define his or her own place in society.<sup>2</sup> In the case of LGBT individuals, there are several social categories that constitute a complex and intricate backdrop to their lives as members of society. For example, the social categories of biological sex, gender, sexuality, and identity all play significant roles in the formation of an individual's social reality.<sup>3</sup> Courts may rely on social categories to determine their rulings and a petitioner's future.<sup>4</sup> Unfortunately, many laws conflate these social categories in a way that misunderstands and understates the sociological complexities associated with each category.<sup>5</sup> For instance, courts often focus on sexual conduct when determining a petitioner's sexuality and neglect gender or identity.<sup>6</sup> This renders uninformed decisions that may ultimately compromise a refugee's future, and in asylum cases, possibly his or her life. Because asylum laws determine whether refugees can effectively flee their home countries and find refuge from persecution, future analysis of asylum laws would benefit from attention to the

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<sup>1</sup> See Carl F. Stychin, *The Globalization of Sexual Identities: Universality, Tradition, and the (Post)Colonial Encounter in BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES* 275-87 (David T. Goldberg, Michael Musheno & Lisa C. Bower eds., 2001).

<sup>2</sup> Henri Tajfel & John C. Turner, *The Social Identity Theory of Inter-Group Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 16 (Stephen Worchel & William G. Austin eds., 1986).

<sup>3</sup> An example of the complexities involved in social categories is the distinction between sex and gender. "Sex" refers to biological sex, i.e., the biological/anatomical sex an individual is born with, whereas "gender" refers to one's social identity as related, or not related, to one's biological sex. See generally Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 191-92 (2005).

<sup>4</sup> See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender).

<sup>5</sup> See Mary Anne C. Case, *Disaggregating Gender from Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2-4 (1995).

<sup>6</sup> See, e.g., *Nemetz v. INS*, 647 F.2d 432, 433-34 (4th Cir.1981).

sociological complexities of the LGBT refugee experience.

This comment argues that the presence of such sociological awareness is indicative of a progressive trend toward expanded LGBT rights and that a lack of awareness shows a general aversion to the expansion of such rights. In the comparative analysis that follows, asylum laws in the U.S. and the U.K. represent two ways of considering the sociological complexities inherent in LGBT cases. This comment argues that the U.K. should be used as a model for asylum law and jurisprudence because of its relative progressiveness in terms of sociological awareness. Part I explores the development of asylum law in the U.K. and concludes that the country has begun to consider the sociological complexities of LGBT asylum cases. Part II contrasts this to U.S. asylum law and jurisprudence, which is lacking in sociological awareness in LGBT asylum cases. In conclusion, this comment argues that the U.K. approach to LGBT asylum cases should be taken as a model because British courts have recognized the complexities involved in such cases. This leads to judicial consistency and predictability of the law, in turn benefiting LGBT refugees.

#### A. A Note on the Straight-Gay Binary and Heteronormativity

The cases analyzed below offer various insights essential for a true understanding of the sociological phenomena implicated in LGBT asylum cases. Two concepts that are helpful for this awareness include the concept of binary social configurations, which I have termed the *straight-gay* binary in the LGBT asylum context, and that of *heteronormativity*. The cases below reveal the interaction between these two sociological concepts and how they act to institutionalize social norms by means of court action.

As an underlying matter, this article works toward a theory of the *straight-gay* binary configuration. Such a theory posits that the *straight-gay* binary arranges sexuality within a simplistic configuration that conflates a number of sociologically relevant categories such as biological sex, gender, sexuality, and sexual identity. In essence, the *straight-gay* binary sets up a one-to-one correspondence between these sociological variables to draw conclusions as to one's individual existence. For example, when assessing an individual's sexuality, the binary generates the following assumptions: to be born a member of one biological sex, say a male, one is endowed with the anatomy of a male; one will be expected to conform to the social role associated with a male member of society grounded in all of its typical characteristics and symbols; should thus be desirous both sexually and romantically of members of the opposite sex. This places one at the *straight* end of the binary and in alignment with a heteronormative paradigm. Moreover, all of these indices of identity are categorized under the rubric of *masculinity*.

To be at the other end of this binary, for example a gay male,

would place one in opposition to a heteronormative orthodoxy. It would also consign one to the opposite end of the binary in terms of gender, sexuality, and sexual identity. Thus, to be a gay male is to exhibit those characteristics associated with the female gender role and female sexuality, namely to be feminine, passive, and to be attracted to men who exhibit an evident masculinity. A gay identity, in turn, corresponds with a display of specific traits marking one as distinctly *gay*; to not display these traits would mark one as *not gay*. This mapping of static characteristics to each end of the *straight-gay* binary obscures a number of complexities inherent in the sexual identities and lives of LGBT refugees (queer individuals in general). Outside of these binary arrangements and assumed identities that they generate, there is no room to find oneself.

In this article, heteronormativity is defined as the predominance and privileging of a definitively heterosexual-based ideology and social structure that acts as the exclusive interpreter of itself and of all other sexualities in relation to it.<sup>7</sup> Heteronormativity results from social actors' investment in this ideology and the social structures that are produced by such a complete reliance on the idea of heteronormativity. This comment argues that in so initiating a process of institutionalization during the course of a legal proceeding, courts have the unique opportunity to circumscribe the acceptable boundaries of both nationality and sexuality within their social domains.

The following pages will show how courts in LGBT asylum cases have reduced the sociological complexities of LGBT realities in their decisions. The courts, as institutions, operate on numerous assumptions regarding biological sex, gender, sexuality, and identity that they then deploy to configure a social order that privileges heteronormativity and marginalizes queer realities. In the asylum process, this means that LGBT refugees bear the added burden of being *othered* in terms of their sexuality within such a heteronormative structure. This is where the process of institutionalization finds its pinnacle, at the intersection of being classified as the *other* both in terms of one's nationality as well as one's sexuality. As such, courts have succeeded in *othering* the LGBT refugee in a way that does not account for his or her multifaceted sexual identity and which facilitates the institutionalization of heteronormativity.

## II. LGBT ASYLUM CASES IN THE U.K.

### A. The Beginnings of LGBT Recognition in U.K. Asylum Law

Asylum law in the U.K. has drawn on international norms such as

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<sup>7</sup> MICHAEL WARNER, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (1993).

the Geneva Convention on the Status of Refugees, which is binding on British courts.<sup>8</sup> Up until the late 1990s, courts in the U.K. had not decided whether LGBT refugees fell under the Convention's protection with regard to asylum. Finally, in 1999, the British House of Lords interpreted the Convention in the case of *Shah and Islam v. Secretary of State for the Home Department*.<sup>9</sup> This case marked a watershed moment in U.K. asylum law because it was the first time British courts recognized that gender constituted "membership in a particular social group" as one of the plausible bases for asylum under the Convention on the Status of Refugees.<sup>10</sup> Although gender is not specifically enumerated in the Convention, the *Shah* case made it possible to claim asylum based on sex or gender.<sup>11</sup> In an interesting turn of events, the British House of Lords also spoke to the status of homosexuals as members of a particular social group, even though neither woman in the case was a lesbian. Thus, *Shah* represented a considerable advancement in U.K. asylum law as it provided two useful definitions of "particular social group."

In *Shah*, the petitioners for asylum were two Pakistani women whose husbands had forced them to leave home due to false accusations of adultery.<sup>12</sup> Both Ms. Shah and Ms. Islam were frequently beaten by their husbands and eventually left their homes in Pakistan for the U.K.<sup>13</sup> They each claimed asylum under Article 1(A)(2) of the Convention on the Status of Refugees, which allows asylum based on a well-founded fear of persecution for reasons of "membership in a particular social group."<sup>14</sup>

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<sup>8</sup> United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

<sup>9</sup> *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629 (H.L.) (U.K.).

<sup>10</sup> United Nations Convention Relating to the Status of Refugees, *supra* note 8, at art. 1(A)(2).

<sup>11</sup> It is notable that the British House of Lords did not distinguish between *sex* and *gender* in this case, and in fact used the two categories interchangeably. For an interesting discussion of the positive and negative aspects of aggregating these two categories in American labor law, see Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 495-96 (2001).

<sup>12</sup> *Islam*, [1999] 2 A.C. 629 (H.L.) at 1.

<sup>13</sup> *Id.*

<sup>14</sup> United Nations Convention Relating to the Status of Refugees, *supra* note 8, at art. 1(A)(2) ("As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.").

The British House of Lords analyzed the case by considering two public aspects of persecution. The first was the Pakistani state's failure to protect the women from the claimed persecution.<sup>15</sup> The second public aspect went beyond the first, showing that the state not only failed to protect the women from persecution, but that the state was actually the persecutor.<sup>16</sup> The court found that for the purpose of asylum, the failure to protect was the deciding factor that established the women's case for persecution.<sup>17</sup> In terms of their status as women, the British House of Lords held that women do indeed form a particular social group in Pakistan because they are discriminated against as a group and are unprotected by the state.<sup>18</sup> In so holding, the court designated gender as a particular social group status under asylum law.

In addition to designating gender as a particular social group, the court in *Shah* also addressed whether homosexuals could qualify as a particular social group.<sup>19</sup> Although the facts of *Shah* had nothing to do with LGBT rights, the court analogized the plight of women refugees from Pakistan to that of homosexuals seeking asylum.<sup>20</sup> The court in *Shah* held that homosexuals as a group did not necessarily exhibit considerable cohesiveness and applied this same logic to women in Pakistan.<sup>21</sup> The court used the analogy to show that diverse sub-groups could exist within a larger social group, i.e., that not all women in Pakistan had to share the same characteristics, and that cohesiveness was not necessary for defining membership in a particular social group.<sup>22</sup> By using this analogy, the court acknowledged that homosexuals do in fact form a particular social group as defined by the Convention, regardless of the group's cohesiveness.<sup>23</sup> The end result of *Shah*, therefore, was the House of Lord's delineation of two social groups that could qualify for asylum within the meaning of the Convention and U.K. asylum law: women and homosexuals.<sup>24</sup>

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<sup>15</sup> *Islam*, [1999] 2 A.C. 629 (H.L.) at 19.

<sup>16</sup> *Id.* at 3 ("For what may be a small minority, who are convicted of sexual immorality, there is the specter of 100 lashes in public or stoning to death in public.").

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.* at 8-10, 26.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 19.

<sup>24</sup> One should note that the court in *Shah* used the term "homosexual," which ostensibly excludes particular social groups otherwise included under the rubric LGBT, namely bisexual or transgender individuals.

### B. Additional Constraints on Granting Asylum—Concealment

Although *Shah* represented progress for gay and lesbian refugees seeking asylum, subsequent jurisprudence showed a regression in sociological awareness. In two cases, *Z v. Secretary of State for the Home Department*<sup>25</sup> and *Amare v. Secretary of State for the Home Department*,<sup>26</sup> the British Court of Appeals based asylum decisions on whether the petitioners led public or private homosexual lives in their home countries, i.e., whether they were open about their sexuality or whether they concealed their gay identities from the public. Essentially, the courts held that if a gay asylum-seeker kept his sexuality private, there was no well-founded fear of future persecution.<sup>27</sup> Conversely, petitioners who were persecuted because their homosexuality was not concealed had a well-founded fear that the persecution would continue.<sup>28</sup> This holding essentially imposed upon the petitioner a duty to avoid persecution by concealing his or her homosexual identity, i.e., by leading a “private” gay life.

#### 1. *Z v. Secretary of State for the Home Department*

In *Z v. Secretary of State*, a gay man from the Republic of Zimbabwe petitioned the British Court of Appeals to grant him asylum because he feared persecution, most immediately from his stepfather.<sup>29</sup> Mr. Z had told his stepfather that he wanted to “marry” his male partner and live permanently with him in Zimbabwe.<sup>30</sup> The stepfather responded by throwing Mr. Z out of the family home.<sup>31</sup> The stepfather also threatened to let activists from the Zimbabwe African National Union (ZANU) know about his stepson’s sexual identity if Mr. Z. did not change his position.<sup>32</sup> Mr. Z left Zimbabwe within six months of his stepfather’s ultimatum because he feared anti-gay persecution.<sup>33</sup>

The British Court of Appeals assessed Mr. Z’s claims in light of how covert his relationship was with his partner in Zimbabwe and viewed his potential fear of persecution as a function of this secrecy.<sup>34</sup> Mr. Z testified that he and his partner “did not live together, ... [but instead met] at

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<sup>25</sup> *Z v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 1578 (Eng.).

<sup>26</sup> *Amare v. Sec’y of State for the Home Dep’t*, [2005] EWCA (Civ) 1600 (Eng.).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* [2].

<sup>30</sup> *Id.*

<sup>31</sup> *Z*, [2004] EWCA (Civ) at 1578.

<sup>32</sup> *Amare*, [2005] EWCA (Civ) at 1600.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* [6].

work or in town,” and did not frequent “gay bars or other places.”<sup>35</sup> Mr. Z claimed that he and his partner lived secretly because of the possibility of persecution, even though he was willing to risk this by living with his partner.<sup>36</sup> The Court of Appeals determined that since the two men would not be “emphasizing their homosexuality” there was not sufficient evidence to show that even if they were to live together upon Mr. Z’s return to Zimbabwe, that they would be persecuted.<sup>37</sup> In addition, the court said the alleged persecution was not so intense that Mr. Z could not reasonably be expected to tolerate it.<sup>38</sup> The court did not accept Mr. Z’s contention that if he were required to keep his homosexuality secret to avoid persecution, that action in itself would be a persecutory action.<sup>39</sup> Such an expectation was reasonable as there was no evidence that future persecution would occur.<sup>40</sup> Mr. Z’s fear was likewise held not to rise to the level required for persecution.<sup>41</sup>

## 2. *Amare v. Secretary of State* for the Home Department

The U.K. Court of Appeals continued to limit asylum law with the case of *Amare v. Secretary of State*.<sup>42</sup> In that case, a lesbian from Ethiopia petitioned the court for asylum on the basis that homosexuality was illegal in Ethiopia and regarded as a “disease,” a sin, and socially unacceptable.<sup>43</sup> Unlike the decision in *Z*, here the Court of Appeals recognized a number of Ms. Amare’s claims. The court accepted that homosexuality was illegal in Ethiopia, that the petitioner was a member of a particular social group, and that she had a subjective fear of persecution on return.<sup>44</sup> However, the *subjective* component of Ms. Amare’s fear was not sufficient for asylum. The court also required an *objective* component that the fear be well founded.<sup>45</sup>

In considering Ms. Amare’s fear of persecution, the court focused on the private nature of her life as a lesbian in Ethiopia.<sup>46</sup> The court held that because Amare managed to have a homosexual relationship in Ethiopia for a year without discovery or incident, and because there was no evidence

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<sup>35</sup> *Id.* [2].

<sup>36</sup> *Z*, [2004] EWCA (Civ) at 1578.

<sup>37</sup> *Id.* [22].

<sup>38</sup> *Id.* [15], [21].

<sup>39</sup> *Id.* [8].

<sup>40</sup> *Id.* [21].

<sup>41</sup> *Id.*

<sup>42</sup> *Amare v. Sec’y of State for the Home Dep’t*, [2005] EWCA (Civ) 1600 (Eng.).

<sup>43</sup> *Id.* [3].

<sup>44</sup> *Id.* [4].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* [8].

that she should want to adopt “an overt style of homosexual behavior,” her fear of persecution was not well founded.<sup>47</sup> Additionally, the court assumed that adopting such “an overt style” of being openly gay would not be “essential to her identity” as a lesbian.<sup>48</sup> Here, the court imposed its own view of the social boundaries involving acceptable sexuality and identity by employing a purely *subjective* means to determine the *objective* aspect of a well-founded fear.

The court in *Amare* further defined the boundaries of asylum law by holding that in order for fear of persecution to be well-founded, the petitioner must show he or she had already suffered persecution by living an openly gay life in his or her home country.<sup>49</sup> This placed an additional burden on LGBT refugees, who escaped the very persecution they feared only through concealment of their sexual identity. Moreover, this increased the burden on LGBT individuals to conceal their sexuality if and when they were forced to return to their home countries.

### C. Toward a More Nuanced Analysis of LGBT Asylum Case

Although the decisions in *Z v. Secretary of State* and *Amare v. Secretary of State* signaled a regression in the jurisprudence regarding LGBT refugees' cases in the U.K., a recent case exemplifies a more sociologically aware consideration of LGBT individuals' realities. In *J v. Secretary of State for the Home Department*, the Court of Appeals questioned the logic of previous decisions that focused on discretion and concealment as a way to avoid persecution.<sup>50</sup> The court considered the reasonableness of making an LGBT refugee conceal his or her sexual orientation in order to escape the severe persecution that occurs in Iran,<sup>51</sup> a consideration that could apply in many countries. In its analysis, the court demonstrated an awareness and recognition of the severe realities facing gay individuals in countries where such an identity is cause for persecution.<sup>52</sup>

In *J v. Secretary of State*, a gay Iranian man sought asylum to remain in the U.K. with his same-sex partner even though he had experienced no previous persecution in Iran.<sup>53</sup> In support of his claim, Mr. J presented evidence of the treatment of gays in Iran, where a sodomy conviction can result in significant prison sentences, lashing, or even the death penalty.<sup>54</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *J v. Sec'y of State for the Home Dep't*, [2006] EWCA (Civ) 1238 (Eng.).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* [2].

<sup>54</sup> *Id.* [2].

The immigration court hearing the case held that since Mr. J had never been persecuted in Iran, and since he engaged in only "discreet homosexual activity," future persecution was not likely.<sup>55</sup> Mr. J's credibility also was called into question because the immigration court rejected much of the evidence he submitted.<sup>56</sup>

The Court of Appeals, however, questioned the immigration court's assumptions. The appellate judge asked "whether 'discretion' is something that the Appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to 'matters' following from, and relevant to, 'sexual identity' in the wider sense."<sup>57</sup> Here the court recognized the distinction between sexual activity and sexual identity and chose to treat them as sociologically distinct categories for its analysis. The court also alluded to the broad territory that sexual identity encompasses. This sociological awareness takes into account the various aspects that make up a LGBT refugee's life in his or her home country in a way that prior decisions in U.K. immigration courts never did. The court added, "The avoidance of condign punishment will require suppression in respect of many aspects of life that are 'related to or informed by their sexuality.'"<sup>58</sup> This avoidance would require LGBT refugees to suppress parts of their lives that are related to their sexuality in general, thus working a significant injustice.<sup>59</sup>

Recognition of the influence that one's sexuality has on other facets of his or her life is key to analyzing the potential persecution that an LGBT individual might face because of his or her sexual identity. Equally important is a complete understanding of how a LGBT refugee might be forced to suppress his or her sexuality if forced to live in a repressive environment. Placing the burden on a refugee to conceal his or her sexual identity misunderstands the motivations behind such concealment. In reality, if the atmosphere in the refugee's native country reaches a certain level of repression, the only feasible option would be to conceal one's sexuality for fear of severe persecution or even death. If a refugee then conceals his or her identity long enough to leave the country and seek asylum somewhere else, he or she then may then be ineligible for asylum due to the very concealment that allowed him or her to arrive in another country. In these cases, there is virtually no possibility for asylum unless the court understands that past concealment is not only probable, it is virtually necessary for survival. The appellate court in *J v. Secretary of State* acknowledged the social

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* [16].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

complexities involved in such situations and commenced a new jurisprudence with respect to LGBT asylum seekers in the U.K.

Although the initial development of asylum law in the U.K. did not take into account the complexities of LGBT asylum cases, the court's decision in *J v. Secretary of State* finally recognized the intricacy of social categories. It also marked a turning point in how courts thought about the lives of LGBT individuals. After the *Shah* case, the Court of Appeals restricted the granting of asylum. The Court of Appeals reasoned that if concealment of one's sexuality served to avoid persecution in the past then it would work again in the future. Moreover, the courts placed a burden on the refugee to return to his or her country and actively conceal his or her sexuality in a way that would force the refugee to live a closeted and marginalized life. Fortunately, the Court of Appeals in *J v. Secretary of State* agreed that placing this burden on the refugee was neither reasonable nor desirable. Although the court recognized that working through the issues involved in LGBT asylum cases would be "difficult and complex," this change in jurisprudence was a step in the right direction, allowing LGBT refugees proper recognition of the persecution they faced in their home countries. This change also brought British domestic immigration law more in line with the essence of international human rights norms.

In the next section, this comment will consider the development of U.S. asylum laws with respect to LGBT refugees. The development of U.S. asylum law has differed considerably from the development of asylum law in the U.K. As a result, U.S. asylum law reflects a jurisprudence that still lacks full awareness of LGBT social realities. This affects the very LGBT individuals who appeal to asylum law as refugees.

### III. LGBT ASYLUM CASES IN THE U.S.

U.S. asylum law has developed differently than asylum law in the U.K. In general, U.S. courts have given less consideration to the complexities of sociological phenomena when deciding cases involving LGBT individuals.<sup>60</sup> Furthermore, U.S. appellate courts have not abandoned their uninformed sociological analyses for a more comprehensive understanding of social categories, as have appellate courts in the U.K. Thus, LGBT refugees remain the victims of an inconsistent and unpredictable jurisprudence with respect to U.S. asylum law.

An example of the differences between the U.S. and the U.K. is the way the U.S. incorporates international law, e.g., conventions and treaties. In 1968, the U.S. acceded to the 1967 Protocol Relating to the Status of

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<sup>60</sup> See Francine Tilewicz Bazluke & Jeffrey J. Nolan, "Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity, 32 J.C. & U.L. 361, 366-67 (2006).

Refugees<sup>61</sup>, and in doing so became bound by the 1951 Convention Relating to the Status of Refugees, the same Convention that bound the U.K. courts in the decisions discussed above.<sup>62</sup> However, because the U.S. uses domestic law to internally allocate the responsibility for implementing its international obligations, legislators wield considerable discretion in determining which international laws have consequences.<sup>63</sup> Domestic law establishes which international obligations are "self-executing," and which are not.<sup>64</sup> U.S. courts generally have viewed the 1967 Protocol as non-self-executing.<sup>65</sup> This means that the 1951 Convention, and the 1967 Protocol that altered it, are per se unenforceable in U.S. courts of law. This lack of enforcement has led to an interesting development of jurisprudence with respect to LGBT refugees in the U.S.

#### A. The Beginnings of LGBT Recognition in U.S. Asylum Law

The development of asylum law involving LGBT refugees started with the landmark case *Matter of Toboso-Alfonso*.<sup>66</sup> That was the first instance in which the Board of Immigration Appeals recognized gay individuals as members of a particular social group. Toboso-Alfonso was a gay man from Cuba who suffered various abuses at the hands of his government, including forced participation in a labor camp.<sup>67</sup> Toboso-Alfonso claimed that the Cuban government registered and maintained files on all gay individuals on the island, and as a result, government officials frequently called these gay Cubans to hearings, forced physical examinations, and questioned them extensively as to their private sex lives.<sup>68</sup> Toboso-Alfonso claimed that the government's repressive actions toward him were

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<sup>61</sup> Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 (the Protocol removed certain limitations relating to the definition of "refugee").

<sup>62</sup> STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 938 (4th ed. 2005).

<sup>63</sup> Although British members of Parliament also determine which international laws have effect in the domestic realm, China Miéville suggests that international law plays a large role in British jurisprudence because of the U.K.'s already existing participation in international legal regimes which involve influences from international human rights law, European Union law, etc. See China Miéville, *Anxiety and the Sidekick State: British International Law After Iraq*, 46 HARV. INT'L L.J. 451, 441-58 (2005).

<sup>64</sup> LEGOMSKY, *supra* note 62, at 940 ("A self-executing agreement is one that creates binding *internal* law without the need for any subsequent implementing legislation. A treaty that is not self-executing still creates binding *international* legal obligations for all the states parties, but those obligations will not be enforceable in the United States courts until Congress enacts the necessary implementing legislation.").

<sup>65</sup> *Id.* at 941.

<sup>66</sup> *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

<sup>67</sup> *Id.* at 821.

<sup>68</sup> *Id.* at 821-22.

solely on account of his status as a gay male, i.e., that had he not been a homosexual he would not have been so punished.<sup>69</sup>

In response to his claims, the Board of Immigration Appeals (BIA) decided that his sexual orientation qualified him as a member of “a particular social group,” a decision that paved the way for asylum based on sexual orientation.<sup>70</sup> The BIA reasoned that LGBT individuals are united by an “immutable characteristic” by means of their shared sexuality and that the Cuban government targeted these individuals because of this characteristic.<sup>71</sup> Even though this decision seemed monumental at the time, the BIA’s decision was not published, so it could not be cited as precedent.<sup>72</sup> This changed, however, in 1994 when Attorney General Janet Reno ordered the BIA to publish the opinion, which made the decision binding on courts and administrative offices.<sup>73</sup>

Although this represented considerable progress for LGBT asylum-seekers, designating sexual orientation as a basis on which to grant asylum created problems in defining what exactly constitutes sexual orientation. Is sexual orientation determined merely by sexual conduct? Is it a corollary of identity? These questions have come to the fore in a number of cases, but generally have been left unanswered. Although finding an answer to these questions may prove complex, the serious nature of asylum cases based on persecution underscores the need for a just and reasonable solution. In the following section, this comment will consider how U.S. courts have dealt with these sociological complexities.

#### B. Contradictions in U.S. Asylum Law Jurisprudence

In attempting to clarify what defines someone as homosexual for asylum purposes, U.S. courts have sometimes come to conflicting conclusions. A notable example involves two cases in which courts decided on two different definitions of what it means to be gay. In one case, *Amanfi v. Ashcroft*, the court imputed homosexual status to the petitioner because he had sex with another man, although he did not identify as gay.<sup>74</sup> On the other hand, in the case of *Kimumwe v. Gonzalez*, the court ignored evidence of Kimumwe’s self-identification as a gay man. It denied him relief because the persecution that he faced was based on his past sexual conduct with another male student and not based on his sexual orientation or identity.<sup>75</sup>

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<sup>69</sup> *Id.* at 821.

<sup>70</sup> *Id.* at 822-23.

<sup>71</sup> *Id.* at 822.

<sup>72</sup> LEGOMSKY, *supra* note 62, at 980.

<sup>73</sup> Att’y Gen. Order No. 1895-94 (June 19, 1994).

<sup>74</sup> *Amanfi v. Ashcroft*, 328 F.3d 719 (3rd Cir. 2003).

<sup>75</sup> *Kimumwe v. Gonzalez*, 431 F.3d 319 (8th Cir. 2006).

In that decision, the court concluded that Kimumwe's persecution was merely the result of his having sex with another man, an aspect of his life as a gay man that did not deserve protection.<sup>76</sup>

1. *Amanfi v. Ashcroft*

Mr. Amanfi was a member of the Ashanti ethnic group in Ghana, a group that practiced ritual sacrifice.<sup>77</sup> Although Amanfi's grandfather and other relatives practiced Ashanti traditions, his father was a teacher and minister of a Christian group that spoke out against ritual sacrifice.<sup>78</sup> As a result, his father was murdered by members of an Ashanti group who later captured Amanfi and imprisoned him in preparation for sacrifice.<sup>79</sup> The petitioner knew that, according to Ashanti traditions, gay individuals would not be sacrificed because they were seen as unacceptable in society.<sup>80</sup> To escape sacrifice, Amanfi engaged in a same-sex act with his co-detainee and was caught by his captors.<sup>81</sup> His captors took him and the co-detainee outside and beat them severely before taking them to the police station.<sup>82</sup> The co-detainee died of his injuries at the police station.<sup>83</sup> The police told the public that Amanfi was gay.<sup>84</sup> Having witnessed prior public torture of LGBT individuals, Amanfi feared for his life.<sup>85</sup> After more than two months in police custody, Amanfi managed to escape and subsequently sought asylum in the U.S. based on his protected status as an imputed member of a particular social group, that is, as someone who was thought to be gay in Ghana.<sup>86</sup>

The U.S. Court of Appeals for the Third Circuit held that Amanfi could be persecuted in Ghana based on this past sexual act even though he was not a homosexual. The court reasoned that persecution on account of membership in a particular social group includes what the persecutor perceives to be the claimant's membership in a social group.<sup>87</sup> Although this led to the recognition of imputed social status for those refugees who were thought to be gay, this decision also caused conflict because of its sole re-

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<sup>76</sup> *Id.* at 321.

<sup>77</sup> *Amanfi*, 328 F.3d at 722.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 723.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 723-24.

<sup>87</sup> *Id.* at 730.

liance on sexual conduct and not sexual identity as the determining factor for asylum. The next case illustrates this conflict.

## 2. *Kimumwe v. Gonzalez*

In *Kimumwe v. Gonzalez*, a gay man from Zimbabwe sought asylum based on membership in a particular social group and a well-founded fear of persecution.<sup>88</sup> While Kimumwe was a college student in Zimbabwe, he had sex with another male student in his dorm room while both of them were drunk.<sup>89</sup> The male student reported the incident to the college authorities, who then reported it to the police.<sup>90</sup> The police detained Kimumwe for two months without charging him with any criminal offense.<sup>91</sup> When Kimumwe was released from jail he remained unharmed by the police or other authorities, even though the President of Zimbabwe, Robert Mugabe, declared that homosexuality was illegal and commenced a hate-filled tirade against LGBT individuals in 1998.<sup>92</sup> Soon afterward, Kimumwe left the country with the help of the Gays and Lesbians of Zimbabwe Organization, and he eventually applied for asylum in the U.S.<sup>93</sup>

The Immigration Judge considered Kimumwe's evidence and concluded "Kimumwe's problems with the authorities in Zimbabwe 'were not based simply on his sexual orientation, but instead resulted [from] his engaging in prohibited sexual conduct.'"<sup>94</sup> In reviewing the case, the U.S. Court of Appeals for the Eighth Circuit found that "'persecution is an extreme concept,' typically requiring the infliction or threat of death, torture, or injury to one's person or freedom."<sup>95</sup> Although it is difficult to imagine how one might bring an asylum claim after "the infliction... of death," the court in this case opted for a rather stringent standard to establish persecution. According to the court's opinion, the persecution that Kimumwe faced did not rise to this level, thus rendering his fear unfounded.<sup>96</sup> Instead of focusing on Kimumwe's identity as a gay man, the Court of Appeals chose to emphasize his past sexual conduct, which did not establish a well-founded fear of persecution by the Zimbabwean authorities. By neglecting to consider his sexual identity, the court essentially denied Kimumwe's status as an LGBT individual, denying him a chance at asylum in the U.S.

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<sup>88</sup> *Kimumwe*, 431 F.3d at 320.

<sup>89</sup> *Id.* at 321.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 323 (quoting *Salkeld v. Gonzales*, 420 F.3d 804, 809 (8th Cir. 2005)).

<sup>96</sup> *Id.* at 323.

*Amanfi* and *Kimumwe* show the inherent inconsistencies involved in focusing on the sexual acts associated with a particular sexual identity. Because a sexual act may or may not correspond with one's identity, the courts' reliance on conduct leads to a false metric by which to assess asylum claims based on sexual identity.<sup>97</sup> Moreover, by focusing solely on sexual conduct, the courts are essentially reinforcing a heteronormative paradigm by requiring proof of a sexual act in determining the sexuality of the *other*; while heterosexuality is assumed, i.e., proof of "straightness" need not be demonstrated. While the Third Circuit chose to focus on sexual conduct to determine qualification for asylum, the Eighth Circuit contradicted the first court by focusing on sexual identity.

This contradiction also characterizes the conflict in U.S. courts as to what elements are required for LGBT refugees to obtain asylum. The lack of sociological awareness that causes this conflict also produces inconsistent jurisprudence and judicial unpredictability. When the law is not predictable, the victims are those who turn to the law for a remedy—remedies upon which their lives often depend. Although U.S. asylum law is often touted as progressive with respect to LGBT individuals, the above cases demonstrate the need for increased LGBT sociological awareness and consistent jurisprudence.

### C. Additional Causes for Concern

In addition to cases involving gay males, the courts have often simplified issues involving other LGBT individuals. Lesbian refugees' claims frequently undergo additional scrutiny due to the multitude of expectations required of women as a result of assigned gender roles in society.<sup>98</sup> These expectations include reproduction of "the collective's members through childbearing and mothering," as well as recreating the "racial, ethnic, and/or national collective by having sex with men who are deemed ra-

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<sup>97</sup> Although it is important to recognize imputed sexual identity, this might also be achieved through a jurisprudential recognition of imputed sexuality *per se*, without reliance on sexual conduct as proof. This shift in focus could prove more valuable for individuals who have an imputed sexual identity but who have not actually had sexual contact with members of the same sex. Other courts have addressed this scenario by imputing sexual identity to individuals who are HIV-positive, for example, due to the social associations between the disease and homosexuality. *See, e.g., Jean-Pierre v. Attorney Gen. of the U.S.*, 192 Fed.Appx. 92 (3rd Cir. 2006).

<sup>98</sup> Eithne Luibhéid refers to these roles as part of women's positions within a *heteropatriarchy*. In Luibhéid's section on the reproduction of the nation-state through gendered sexual regulation, she states "women who fail to subordinate their sexuality to heteropatriarchy—including single mothers, lesbians, sex workers, and others—find themselves marginalized within the nation-state." *See generally* Eithne Luibhéid, *Sexual Regimes and Migration Controls: Reproducing the Irish Nation-State in Transnational Contexts*, 83 FEMINIST REV. 60-78 (2006).

cially and ethnically appropriate.”<sup>99</sup> Women are consequently envisioned within the domains of these expectations and are often confined to the limitations that such expectations generate. This often translates to an expectation for straight women to be wives and mothers while gay women are perceived as young, unmarried, childless, and independent from their families.<sup>100</sup> These expectations and identities are likewise arranged along a perceived binary and are mutually exclusive—only married straight women have children while lesbians remain estranged from any family ties.

In the case of lesbian refugees, courts often maintain stereotypical lesbian characterizations and express doubt when lesbian refugees from other cultures assert their sexuality, despite being socially pressured to marry and have children.<sup>101</sup> In short, immigration judges do not believe they are really lesbians.<sup>102</sup>

#### 1. *Mockeviciene v. U.S.*

In *Mockeviciene v. U.S.*, a lesbian who was married in Lithuania fled to the U.S. after facing persecution from both her husband and the Lithuanian police.<sup>103</sup> During the six years before she left the country, the police searched her apartment without a warrant, had her fired from her job, evicted her from her apartment, and twice detained and beat her on account of her sexuality.<sup>104</sup> In addition to the persecution she faced from officials, Mockeviciene was beaten and raped by her husband while his friends held her down after he found out that she was a lesbian.<sup>105</sup> Although Mockeviciene submitted numerous documents in support of her asylum application, the immigration judge found that she was not credible—therefore her petition for asylum was denied.<sup>106</sup>

The immigration court provided a number of reasons why Mockeviciene’s sexuality was questionable including generalizations that illustrate the social expectations imposed on lesbians. In the court’s opinion, the judge revealed certain assumptions regarding what constituted “proof”

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<sup>99</sup> *Id.*

<sup>100</sup> For a detailed outline of the traits associated with lesbian identities, as well as an enumeration of the challenges lesbian refugees face in their asylum claims, see *The Challenge to Successful Lesbian Asylum Claims*, NAT’L CTR. FOR LESBIAN RTS., [http://www.nclrights.org/site/DocServer/challenges\\_lesbian\\_asylum\\_cases.pdf?docID=1142](http://www.nclrights.org/site/DocServer/challenges_lesbian_asylum_cases.pdf?docID=1142).

<sup>101</sup> *Mockeviciene v. U.S. Attorney Gen.*, No. 06-12334, 237 Fed.Appx. 569, 572 (11th Cir. 2007).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 571-72.

<sup>104</sup> *Id.* at 570.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 572.

of Mockeviciene's sexuality. The judge assumed that Mockeviciene was supposed to be in a lesbian relationship and that she would inevitably join "a group... that involve[d] lesbian activities."<sup>107</sup> These assumptions reveal the tension between Mockeviciene's status as a married mother and her status as a lesbian woman, and the immigration judge's attempt to resolve this discrepancy by requiring her to take a stereotypical lesbian role. By failing to be in a lesbian relationship or a "lesbian group," Mockeviciene upset the social expectations surrounding her status as a lesbian—a failure that was met with disbelief from the judge and an ultimate denial of her petition for asylum.

Unsurprisingly, the immigration judge also focused on the sexual act associated with the asylum-seeker's sexuality. This focus on the sexual act along with the judge's disbelief as to Mockeviciene's sexuality led the judge to proclaim that she was "[a]t best... a *non-practicing* lesbian" (emphasis added).<sup>108</sup> The insistence on sexual conduct as proof of sexual identity is a recurrent theme in many asylum proceedings, as demonstrated in *Amanfi* and *Kimumwe* above. By focusing on a sexual act as opposed to sexual identity, the court risks conflating the two concepts, not realizing that they are in fact different matters.<sup>109</sup> This places disproportionate attention on the sexual practices of the asylum seeker who could or could not correspond to a social identity.

### III. CONCLUSION

The persecution faced by LGBT refugees often remains ignored, misunderstood, or doubted. Given the stakes involved in LGBT asylum cases, this trend is disconcerting. The U.S. and the U.K. are both developed and wealthy countries that attract refugees from all over the world. Many of these refugees identify as LGBT and find the U.S. and the U.K. significantly more accepting of their non-heterosexual identities than the home countries from which they flee. As such, both countries have a responsibility to recognize the sociological complexities inherent in the lives of LGBT people in order to become better informed when deciding asylum cases.

LGBT asylum cases are also a prime locus for examining the dynamics involved in the imposition and reinforcement of binary social configurations, the disregard for and marginalization of identities that do not fall within this configuration, and ultimately, the institutionalization heteronormativity. Courts handling immigration cases have historically deployed a *same-other* binary in their jurisprudence, in accordance with immi-

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> One of the many differences is that the former is a temporally limited event while the latter is always in existence in one form or another.

gration law and policy, in order to define national identity in contrast to the *other* non-national. This use of the *same-other* binary has been extended in LGBT asylum cases to include not only what is good for the nation, but also to what is an acceptable individual sexuality. This extension culminates in a process that targets the very refugees who have some of the highest stakes in the asylum process. In doing so, LGBT refugees are marginalized in the process and frequently slated for exclusion merely because their sexual identities do not conform to institutionalized social norms. In essence, they are “doubly othered” and, as such, subject to a perpetual exclusion that denies them their identity and questions their very legitimacy as queer individuals.

International refugee law is meant to remedy the situations LGBT refugees face as a result of discrimination. Although the U.S. and the U.K. both recognize the importance of international refugee law as encompassed in the U.N. Convention Relating to the Status of Refugees, each has interpreted this agreement in a different way. As a result, the U.S. and the U.K. have taken very different views on the elements required for asylum based on sexual orientation. Courts in the U.K. determined that LGBT individuals qualified as a particular social group for asylum purposes in the case of *Shah v. Secretary of State*. This case proved fundamental in recognizing LGBT people as a frequently persecuted group. However, the development of jurisprudence in this area of U.K. law did not progress in a sociologically aware manner. Instead of realizing the complexities involved in LGBT asylum cases, for example the fact that concealment of one’s sexuality might be imperative in other countries and not just an option, the U.K. Court of Appeals proceeded to require LGBT refugees to continue concealing their sexual identities. The imposition of this burden on the refugee was demonstrated in the *Z v. Secretary of State* and the *Amare v. Secretary of State* cases.

Fortunately, in the case of *J v. Secretary of State*, the British Court of Appeals reversed this trend and in a very enlightened opinion held that a requirement for concealment was an imposition on the lives of LGBT individuals because their sexuality informed many aspects of who they were. The sociological awareness demonstrated by the Court of Appeals in this case sets a precedent for future LGBT asylum cases in the U.K.

Unlike their British counterparts, the courts in the U.S. seem less likely to consider certain sociological aspects when deciding cases involving LGBT refugees. Although the landmark case *Matter of Toboso-Alfonso* recognized LGBT individuals as a particular social group, subsequent jurisprudence has been disappointingly inconsistent and arbitrary. The cases of *Amanfi v. Ashcroft* and *Kimumwe v. Gonzalez* exemplify this inconsistency. While the Third Circuit in *Amanfi* focused on sexual conduct as the determinant for asylum, the Eighth Circuit in *Kimumwe* ignored sexual conduct

and held that persecution must be on account of sexual identity. This tension between the requirements necessary for LGBT refugees to qualify for asylum has generated a jurisprudence that is inconsistent and ultimately unpredictable. Those who suffer are the refugees themselves, as many of them are deported back to the persecution they were escaping in the first place.

In addition, U.S. courts have failed to address the complexities involved in the intersection of gender and sexuality, and instead have relied on expectations and stereotypes of gender identity. In *Mockeviciene v. U.S.*, a lesbian claiming persecution based on her sexuality was met with doubt and dismissal when the judge found that she had a child and was married. In a rather candid opinion, the immigration judge relegated Moskeviciene's status as an LGBT individual to mere whim and uncertainty. This hesitation to believe someone who challenges both sexuality and gender norms essentially perpetuates the same sociologically uninformed attitudes that were initially responsible for the persecution.

As U.K. courts have already begun to recognize that sexual orientation involves sociological complexities that have been glossed over or completely ignored in past decisions, they are in a better position to decide asylum cases. In the case of U.S. courts, these aspects have been one-dimensional and simplistic. Therefore, the U.S. courts would do well to look to the U.K. as a model for a more sociologically informed analysis of LGBT asylum cases.

## THE TENTH ANNIVERSARY OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court (ICC) was entered into force on July 1, 2002. The ten years since have seen both triumphs and disappointments in the advancement of this permanent court that exists solely to fight crimes against humanity, war crimes, and genocide.

On March 16, 2012, the *New England Journal of International and Comparative Law* hosted a symposium dedicated to the tenth anniversary of the ICC. The speakers' expertise ranged from effective victim representation to the court's recognition in the international community. With the first decision of the ICC handed down that same week, the symposium was topical, timely, and informative, as each of the speakers was able to discuss what that decision meant for the countries that have signed the Rome Statute and what it means for the future of the court.

In order to fully explore this important area of international law, *NEJICL* issued a call for papers on the subject of the ICC to form a subsection of Volume 18.1. We wished to enlighten our readership by exposing them to even more than our symposium did by having authors delve into complicated issues. These articles examine the relationship between the United States and the ICC, confidential truth commissions, human rights crimes, the role of victims, the coexistence of the ICC and the United Nations Security Council, and potential Rome Statute amendments.

We hope you find the following section as noteworthy and thought provoking as we did. Thank you for your interest, and thank you for reading.

Sincerely,  
The *New England Journal of International and Comparative Law*

