

LGBTQ ASYLUM AND REFUGEE PROTECTION: PROBLEMS AND PROSPECTS

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I. INTRODUCTION

Despite marked improvements in rights for LGBTQ persons around the world, significant problems remain.¹ In many countries, LGBTQ persons face significant discrimination, lack of protection from harm by non-state actors, and persecution from their own governments.² This article examines when and why protection under the UN Refugee Convention should be granted to those seeking asylum or refugee status because of maltreatment related to their LGBTQ status. To this end, Part II shows how LGBTQ asylum seekers straightforwardly fit into the definition of a “refugee” set out in the UN Refugee Convention. Subsequent Parts address how to overcome some potential complications arising out of the sorts of harms faced by LGBTQ applicants without significant modifications to the standard refugee definition. This article also shows how providing refugee

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¹ *For the First Time Ever, Human Rights Campaign Officially Declares ‘State of Emergency’ for LGBTQ+ Americans; Issues National Warning and Guidebook to Ensure Safety for LGBTQ+ Residents and Travelers*, HUM. RTS. CAMPAIGN (June 6, 2023), <https://www.hrc.org/press-releases/for-the-first-time-ever-human-rights-campaign-officially-declares-state-of-emergency-for-lgbtq-americans-issues-national-warning-and-guidebook-to-ensure-safety-for-lgbtq-residents-and-travelers> [https://perma.cc/5LWN-J8GF].

² Pamela Mercado Garcia, *The Effects of Title 42 and the New Asylum Ban on LGBTQ Migrants*, NAT’L CTR. FOR LESBIAN RTS., <https://www.nclrights.org/the-effects-of-title-42-and-the-new-asylum-ban-on-lgbtq-migrants/> [https://perma.cc/663T-88UC].

protection to LGBTQ applicants fits well with two competing approaches to providing refugee protection, one which I have elsewhere defended, and the ones offered by Mathew Price and, in a somewhat different way, David Owen.³ That LGBTQ asylum claims can fit with both approaches helps show the soundness of the general analysis. At the same time, the different implications that follow from providing asylum or refugee protection for LGBTQ applicants on these different approaches helps make explicit their distinct features, allowing for a clearer appraisal of them.

After this primary account, Part VI turns to two further areas of practical difficulty for LGBTQ asylum seekers and suggest approaches and reforms to deal with these problems. The first issue involves the interaction between considerations around the family and refugee and asylum law. While the legal protections of the rights of LGBTQ families have improved in many countries, difficulties remain, and even in cases where these rights have been granted by a state, there are often special difficulties faced by LGBTQ asylum seekers.⁴ Part VI therefore proposes and justifies certain reforms in this area. Finally, Part VI.A address questions and concerns about the type of evidence that may be demanded by those adjudicating asylum and refugee cases involving LGBTQ applicants.

II. LGBTQ PERSONS AND THE REFUGEE CONVENTION

The definition of “refugee,” as set out in the 1967 Protocol to the UN Refugee Convention, is a person who, “[o]wing 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.”⁵ I have elsewhere argued for the general correctness of this definition,⁶ and so will largely accept it in this article. That LGBTQ persons face a well-founded fear of harm that rises to

³ Matthew Lister, *Who are Refugees?*, 32 L. & PHIL. 645, 659–61 (2013); see also MATTHEW PRICE, *RETHINKING ASYLUM* (2009); DAVID OWEN, *WHAT DO WE OWE REFUGEES?* (2020).

⁴ SHARITA GRUBERG, U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS, *DIGNITY DENIED: LGBT IMMIGRANTS IN U.S. IMMIGRATION DETENTION 1* (2013), available at <https://cdn.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf> [<https://perma.cc/42WS-EA9E>].

⁵ U.N. Conf. of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Convention Relating to the Status of Refugees*, art. 1(A)(2) (1951) [hereinafter *Convention*].

⁶ Lister, *supra* note 3.

the level of persecution⁷ in many states is, unfortunately, not difficult to establish. However, critically, sexual orientation and gender identity or presentation are not explicitly listed as a protected ground.⁸ This suggests that, if members of these groups are to be protected, it will have to be because they constitute a “particular social group.”⁹

For a group to qualify as a “particular social group” in relation to asylum and refugee protection, it must meet several criteria.¹⁰ The group must have a shared feature that sets them apart from the rest of the society in a relevant sense.¹¹ This feature must be such that it is, in the appropriate way, “visible” to, noticeable, or “cognizable” by the wider society.¹² Finally, the trait or traits must be such that the people in the group cannot or should not have to change the trait, at least not in the relevant sense.¹³ As demonstrated below, LGBTQ asylum applicants can meet these requirements.

LGBTQ asylum applicants share a trait that sets them apart from the rest of society, thereby meeting the first requirement for being a particular social group.¹⁴ In the case of lesbian, gay, and bisexual applicants, it is

⁷ See U.N. Refugee Agency: Off. of the U.N. High Comm’n for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 51, U.N.

Doc. HCR/1P/4/ENG/REV.4 (1992). While “[t]here is no universally accepted definition of ‘persecution,’” state practice provides some guidelines. *Id.* For example, in Australia, persecution is taken to consist of “serious harm to the person” and/or “systematic and discriminatory conduct” where these include (but are not limited to) “threat[s] to the person’s life or liberty; significant physical harassment; significant physical ill-treatment;” and other actions which “threaten[] the person’s capacity to subsist.” *Migration Act 1958* (Cth.) pt 1 s 5J sub-div (4)–(5) (Austl.). In the U.S., it typically involves “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive” and/or deprivation of economic opportunity. *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); see *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

⁸ *Applicant A v Minister for Immig & Ethnic Affs* (1997) 190 CLR 225, 142 ALR 331, 335 (Austl.).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 341.

¹² *Id.* at 341, 395.

¹³ This idea is set out in the important U.S. case—*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)—discussed further below.

¹⁴ *Applicant A*, 142 ALR at 336–37.

their same-sex attraction that sets them apart.¹⁵ In the case of trans applicants, it is their non-standard gender identity.¹⁶ The next question, however, is whether this trait is, in the appropriate way, “visible” to the larger population.¹⁷ If the trait is such that others in the wider society could not easily know about it, then it is unlikely to mark those who have it as a member of a particular social group under the legal definition.¹⁸ This is due to the fact that the persecution or maltreatment feared must be imposed because the members of the group have the trait that marks them as distinct.¹⁹ If the trait could not be noticed by others, it would be unlikely to make them a target for persecution.²⁰ An example of a trait that is not appropriately visible might be blood type. In certain societies, a surprising amount of importance is placed on a person’s blood type.²¹ Even if certain blood types were widely disfavored, having this blood type would not be visible to the wider society in any normal case.

LGBTQ status, however, is appropriately “visible” to the wider society. Of course, it is common for LGBTQ persons, especially in societies where such traits are persecuted, to hide these traits.²² The relevant issue is not whether the trait can be hidden, but whether, when it is active in a normal way, it is noticeable to the larger society.²³ This would seem to be so of LGBTQ applicants.²⁴ The issue is somewhat more complicated for trans persons, many of whom have a strong desire to not

¹⁵ *Id.*

¹⁶ *The Precarious Position of Transgender Immigrants and Asylum Seekers*, HUM. RTS. CAMPAIGN (Jan. 4, 2019), <https://www.hrc.org/news/the-precious-position-of-transgender-immigrants-and-asylum-seekers> [<https://perma.cc/57TP-L3UT>].

¹⁷ *Applicant A*, 142 ALR at 395.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ This is common in Japan and certain other Asian countries. See Matt Davis, *What Is the Japanese Blood Type Theory of Personality?*, BIG THINK, <https://bigthink.com/the-present/blood-type-personality/> [<https://perma.cc/ST8W-5S2S>] (Apr. 4, 2022) (“In these [Japanese and South Korean] cultures, blood type is believed to influence personality much in the same way that zodiac signs work in Western cultures.”).

²² *No Support: Russia’s “Gay Propaganda” Law Imperils LGBT Youth*, HUM. RTS. WATCH (Dec. 11, 2018), <https://www.hrw.org/report/2018/12/12/no-support/russias-gay-propaganda-law-imperils-lgbt-youth> [<https://perma.cc/AUL5-KTYL>].

²³ *Applicant A* at 394.

²⁴ See *Bostock v. Clayton Cnty.*, 140 S. Ct 1731, 1737 (2020).

have their status as trans be public.²⁵ There is significant reason to think that, at least in the majority of cases, one's status as "trans" is properly thought of as private.²⁶ We might wonder if "private" information like this can be "visible" enough to count as being part of a particular social group. However, even if trans persons have the right to keep their status private, they also have the right to not keep the information private. And, even if a particular person hopes or intends to keep the information private, it is of the sort that can be exposed and shared without the person's consent, making him or her "visible."²⁷ Therefore, there is good reason to take LGBTQ status to be "visible" in the relevant sense for forming a particular social group. Furthermore, even if LGBTQ persons were able to consistently avoid attention by being "discreet" about their status, the need to hide this status to avoid harm would itself be a form of persecution, not a way to avoid it.²⁸

It is also worth noting that *which* relevant social group any particular applicant for asylum or refugee protection is a member of cannot be determined in a vacuum. It will be fact-sensitive, in part depending on the nature of the harm they face and the society that they are in.²⁹ So, in some instances, an applicant may face harm for being a lesbian, and in another for being gender non-conforming.³⁰ This is often important for legal

²⁵ Anna Brown et al., *The Experiences, Challenges, and Hopes of Transgender and Nonbinary U.S. Adults*, PEW RSCH. CTR. (June 7, 2022), <https://www.pewresearch.org/social-trends/2022/06/07/the-experiences-challenges-and-hopes-of-transgender-and-nonbinary-u-s-adults/> [<https://perma.cc/EX9W-QY2E>].

²⁶ See Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2172/2012*, ¶ 7.2, U.N. Doc. CCPR/C/119/D/2172/2012 (June 28, 2017) (advisory opinion relating to Trans status and marriage, where the Committee held that one's status as Trans is properly considered private). For helpful discussion of the relevant notion of privacy in this area, see ANITA L. ALLEN, *UNEASY ACCESS* 50–51 (1988); GERALD GAUS, *THE ORDER OF PUBLIC REASON* 381–85 (2011).

²⁷ See Florence Ashley, *Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities*, 41 DALHOUSIE L.J. 339, 340–41 (2018) (discussing legal obligations in England and Israel to disclose one's transgender identity prior to consensual sexual acts).

²⁸ See generally *Appellant S395/2002 v Minister for Immigr & Multicultural Affs* (2003) 216 CLR 473 (Austl.).

²⁹ *Id.*

³⁰ See *id.*

practitioners crafting asylum applications, but is of less philosophical or theoretical importance, except insofar as it reminds us that the “social groups” in question are context sensitive and often relative to a particular society, and need not be thought of as picking out “natural kinds” or anything like that.

A related aspect of “particular social group” determination is that the trait in question is one the applicant “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”³¹ Some traits that bring social or legal sanction are ones the applicant can change, such as membership in gangs, criminal behavior, and so on.³² Other traits are ones that cannot be changed by the applicant (at least not at will).³³ These include many physical traits, classification based on past behavior (such as having held a particular profession), and certain relational traits (such as being the son or daughter of a particular person).³⁴ Finally, there are traits that could be changed, but that we think the person should not have to change, at least not if they do not choose to do so free of coercion.³⁵ Getting married, or remaining unmarried, are examples.³⁶ Contrast these traits with ones which, while not intrinsically or obviously wrongful, a particular society might regulate, and which it would not necessarily be unreasonable to expect people to conform to.³⁷ Consider a society that has decided, for whatever reason, to ban meat eating. Now

³¹ *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). The social group jurisprudence of many other countries has been greatly influenced by the *Acosta* formulation. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 562 (1993).

³² See *id.* at 234.

³³ U.S. CITIZENSHIP & IMMIGR. SERVS., NEXUS – PARTICULAR SOCIAL GROUP 12 (2021), available at https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf [<https://perma.cc/LY72-K987>].

³⁴ *Id.* at 12, 23.

³⁵ *Acosta*, 19 I&N Dec. at 233–34 (“[S]omething . . . that is so fundamental to his identity or conscience that it ought not be required to be changed.”).

³⁶ See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 33, at 30 (discussing precedent on marriage as an immutable trait, especially in the sensitive context of domestic violence).

³⁷ See, e.g., Ctrs. for Disease Control & Prevention, *State Smoke-Free Laws for Worksites, Restaurants, and Bars — United States, 2000–2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 472, 472 (2011), available at <https://www.cdc.gov/mmwr/PDF/wk/mm6015.pdf> [<https://perma.cc/V8JW-VZXW>] (reporting on the increase in smoking regulations throughout the United States).

suppose that I have the trait of eating meat—I am a meat eater. Nonetheless, for most people, they are able to make the choice to not eat meat, and while not eating what they want may make their life subjectively less good, it is unlikely that eating meat will be so central to the person’s personality that he or she will be able to plausibly claim to be subjected to persecution if they are not allowed to eat meat.³⁸ If this is so, then being a “meat eater” will not qualify as a particular social group in such a society (although it may well count as one in a different context).

On almost any understanding of what it is to be an LGBTQ person, such persons will fall under the standard set out in *Acosta*.³⁹ It is plausible that sexual orientation and/or gender identity are immutable traits.⁴⁰ Certainly, they are traits that many people find to be involuntary and not changeable via an act of will, such as one’s profession or dietary choices.⁴¹ Even if, in some cases, these traits are subject to change via an act of will, they are typically experienced as ones that are “fundamental” to the person’s sense of identity.⁴² As such, it would be unreasonable to expect an individual to change these traits, even if it would be possible to do so.⁴³

On this analysis, it seems straightforward that LGBTQ people qualify as being members of particular social groups. The persecution faced will be on the basis of a shared trait—sexual orientation or gender identity/presentation— – that is, in the relevant sense, “visible” to those who would persecute the people. Moreover, the trait is one that either cannot or should not have to be changed, in the relevant senses. Accordingly, providing refugee or asylum protection to LGBTQ people who have a well-founded fear of persecution should be an easy case.

³⁸ Here, I ignore any possible cases where someone might have a strong medical or significant religious reason to eat meat, if such cases exist.

³⁹ See, e.g., *Matter of C-G-T-*, 28 I&N Dec. 740, 745 (BIA 2023).

⁴⁰ See *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990).

⁴¹ Michael Lipka, *Half of Americans Say Sexual Orientation Cannot Be Changed*, PEW RSCH. CTR. (Aug. 20, 2013), <https://www.pewresearch.org/short-reads/2013/08/20/half-of-americans-say-sexual-orientation-cannot-be-changed/> [<https://perma.cc/JZQ9-AP5R>].

⁴² *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”).

⁴³ It is of course conceivable that, for some people, same-sex sexual preference may be a “mere” preference, like a preference for tall people or bearded men. Perhaps such people ought not be thought of as fitting the *Acosta* definition. However, as this does not seem to be the experience of most LGBTQ people, I leave the mere possibility aside.

Before this conclusion is fully established, however, two possible complications or difficulties should be considered. The first difficulty is that, in many cases, the danger faced by LGBTQ people comes not from the government, but from the wider society.⁴⁴ The second difficulty comes from the claim that it is not LGBTQ “identity” that is the target of persecution, but rather certain “behavior” on the part of LGBTQ persons, and that the threat of persecution can therefore be sufficiently reduced either by simply refraining from the behavior in question or by keeping the behavior private.⁴⁵ Each are addressed in turn.

III. NON-STATE ACTOR ISSUES

Unfortunately, many LGBTQ people face persecution by their own governments.⁴⁶ Given the analysis above, when this is so, a claim for asylum or refugee protection should be straightforward and unproblematic. However, in a large number of cases, the most immediate or largest danger LGBTQ persons face comes not from the government, but from other citizens.⁴⁷ Threats of harm amounting to persecution by non-state actors can ground asylum or refugee claims, but only when certain conditions are met.⁴⁸ The purpose of this Part is to see under what conditions threats by non-state actors towards LGBTQ persons would plausibly ground an asylum or refugee claim.

In earlier work, I argued that the extension of refugee protection to people who fear harm from non-state actors was straightforward in at least

⁴⁴ See Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/> (Jan. 12, 2023) [<https://perma.cc/N8N4-PYV2>].

⁴⁵ See *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (detailing the Attorney General’s attempted distinction between one’s homosexual status and engagement in homosexual acts).

⁴⁶ *Map of Countries that Criminalise LGBT People*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> [<https://perma.cc/XL2L-XGJY>].

⁴⁷ See, e.g., Neela Ghoshal & Cristian González Cabrera, “Every Day I Live in Fear”: Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States, HUM. RTS. WATCH (Oct. 7, 2020), <https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador> [<https://perma.cc/BP65-7LXQ>].

⁴⁸ See *infra* notes 54, 57, & 58.

two types of cases.⁴⁹ The first is where a non-state group has “usurped” the power and de facto authority of the state.⁵⁰ Examples here would include when a state or part of it is controlled by a rebel group, or, arguably, when criminal gangs have statewide power that the de jure government cannot overcome, which seems to be the case in some Central American countries now.⁵¹ The second scenario is one where we might see the state “delegating” authority over some sub-population of the state to other members of the state, allowing these members to act with impunity against the relevant sub-population, at least in relation to certain aspects of life or activities.⁵² Examples would include the power of parents to subject their daughters to female genital cutting in many parts of the world, and the power of husbands and fathers to “discipline” wives or daughters through violence.⁵³ In these cases, a necessary feature is that the actions in question are not prevented by the state because the state sees, at least implicitly, the people imposing the harm as acting within their own proper sphere of authority.⁵⁴

Neither of these approaches seems to clearly fit the most common sorts of dangers LGBTQ people may face from non-state actors that could give rise to a claim of persecution. First, it is worth noting that not all types of private violence, even if fairly common, are sufficient to give rise to an asylum claim.⁵⁵ For non-state action to be of the type giving rise to a claim to asylum or refugee protection, we must be able to characterize it as action that the state in question is “unable or unwilling” to prevent.⁵⁶ Importantly, for a state to be “unable” to protect the person fearing harm in the relevant sense, it is not required that the state be able to guarantee protection in all cases.⁵⁷ As the Australian High Court put the matter, “No country can guarantee that its citizens will at all times, and in all circumstances, be safe

⁴⁹ Matthew Lister, *The Place of Persecution and Non-State Action in Refugee Protection*, in *THE ETHICS AND THE POLITICS OF IMMIGRATION: CORE ISSUES AND EMERGING TRENDS* 45, 46 (Alex Sager ed., 2016).

⁵⁰ *See id.* at 52.

⁵¹ *Id.* at 52–54.

⁵² *Id.* at 54.

⁵³ *Id.* at 55.

⁵⁴ *See id.* at 54–56 for discussion of this point.

⁵⁵ *See* GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 69 (2d ed. 1996); *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

⁵⁶ GOODWIN-GILL, *supra* note 55, at 72; *Kasinga*, 21 I&N at 365.

⁵⁷ *See* GOODWIN-GILL, *supra* note 55, at 73–74; *Kasinga*, 21 I&N at 367.

from violence.”⁵⁸ Therefore, for private violence to rise to the level sufficient to justify asylum or refugee protection for LGBTQ applicants, it must be significantly beyond that faced by most citizens, and that protection by the state is not forthcoming to a significant degree.⁵⁹ In the cases of “usurped” or “delegated” authority, it is easy to see why the needed standard is met.⁶⁰ When power has been wrested away from the state, it is no longer able to provide meaningful protection to any group.⁶¹ And, when the state can be seen as having delegated authority over a sub-population, it is signaling that it will not provide the “general” level of protection it provides to others to members of the group in question.⁶² But, it is not clear these scenarios fit with the paradigm examples of danger faced by LGBTQ persons.⁶³

The paradigm example of harm faced by LGBTQ applicants from non-state agents is the threat of violence by random members of the community or acquaintances.⁶⁴ The immediate cause of the violence may be various, but it is tied to the LGBTQ status of the victim.⁶⁵ Given that such violence does not fit into the categories set out above, when might it justify granting refugee or asylum protection? As discussed below, such protection may be justified in two principal scenarios: first, when the government has largely or completely withdrawn its protection from the relevant population, making it susceptible to violence at the hands of any person; and second, when the reason for withdrawing the protection is antipathy towards the people in question, as opposed to when the government is simply too weak,

⁵⁸ *Minister for Immigr & Multicultural Affs v Respondents S152/2003*, (2004) 222 CLR 1, 205 ALR 487, ¶ 26 (Austl.).

⁵⁹ *Id.* ¶ 27.

⁶⁰ See Lister, *supra* note 49, at 52.

⁶¹ *Id.* at 54.

⁶² *Id.* at 55.

⁶³ It is plausible that the danger faced by children can be greatly increased in cases where the child is, or is suspected to be, LGBTQ. Such cases may fall into the “delegation” account I have elsewhere argued for. But, such cases seem to me to be best seen as a sub-set of the “delegation” account rather than as specifically a matter facing LGBTQ applicants.

⁶⁴ CHRISTY MALLORY ET AL., *THE WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY* 6 (2015), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf> [<https://perma.cc/EEW6-DSSN>].

⁶⁵ See *id.*

exposing the entire population to generalized violence.⁶⁶ We might see such scenarios as ones where a particular sub-population of the society is returned to the state of nature in relation to the larger population.⁶⁷ Such a situation is not one where violence happens constantly, but it is one where the person in question must constantly be in fear of violence and without the possibility to turn to the state for protection.⁶⁸

Many clear historical examples of persecution fit this model. Many pogroms against Jews in the Russian Empire in the nineteenth and early twentieth century, for example, were typically not undertaken by government officials, but rather by local residents who knew that the officials would not stop them.⁶⁹ In these cases, those who are not afforded protection by the state may be made the prey of others who would harm them.⁷⁰ In at least some societies, LGBTQ persons who cannot depend on the protection of the police face such a situation.⁷¹ While the danger may not be as intense or focused as that directed towards Jews in a pogrom, the threat is consistent.⁷² For someone who the state has largely or completely withdrawn its protection, the danger of death or serious harm can never be fully discounted, even if it is not imminent.⁷³ If this account is accurate, then it seems plausible to extend refugee or asylum protection to LGBTQ persons who fear harm from non-state actors at least in cases where this situation obtains.

⁶⁶ When a government is too weak to protect its population against generalized violence, those who flee danger should, in a just system, be eligible for so-called “complementary protection.” A discussion of this matter would take me too far afield in this paper. See JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* 5 (2007); Matthew Lister, *Philosophical Foundations for Complementary Protection*, in *THE POLITICAL PHILOSOPHY OF REFUGEE* 211, 216–20 (David Miller & Christine Strachle eds., 2020).

⁶⁷ MCADAM, *supra* note 66, at 114–15 (2007); see also Lister, *supra* note 66, at 219.

⁶⁸ As Hobbes notes, to be in the state of nature is not to be constantly fighting, but rather to be subjected to a regular threat of violence. It is not too much of a stretch to see those whom the state has withdrawn protection from as being in this state. See THOMAS HOBBS, *LEVIATHAN* 64–65 (Prometheus Books 1988) (1651).

⁶⁹ See Irena Grosfeld et al., *Middleman Minorities and Ethnic Violence: Anti-Jewish Pogroms in the Russian Empire*, 87 *REV. ECON. STUDS.* 289, 334 (2019).

⁷⁰ *Id.* at 289.

⁷¹ MALLORY ET AL., *supra* note 64, at 1.

⁷² See *id.* at 6.

⁷³ Lister, *supra* note 66, at 219.

This shows the way to deal with an additional complication that arises in many non-state actor cases: the need to consider internal relocation as a means to seek protection before seeking international protection.⁷⁴ Internal protection is presumptively not available when the harm feared is from the government.⁷⁵ It will therefore typically not be necessary to consider when the persecution feared by an LGBTQ applicant comes from the government. However, when the harm feared is from a private actor, it will often be possible to avoid this harm by moving to a different part of the same country.⁷⁶ The ability to relocate to avoid a harm is most plausible when the harm feared is due to a locally powerful bad actor, such as a localized criminal group, a particular person, or even local governmental officials.⁷⁷ In such cases, moving to another location in the country will often greatly reduce or minimize the risk faced.⁷⁸ In the scenario described above, however, it is much less likely that relocation within the country will suffice. If the reason that LGBTQ persons have a well-founded fear of persecution from private actors is that the government has withdrawn its protection from them, then this danger will plausibly be nationwide.⁷⁹ Furthermore, in this scenario, it is not a particular person or group who is feared, but a wide range of often unknown people, any one of whom may be able to harm the LGBTQ person with impunity.⁸⁰ If this description is accurate, then internal relocation will not be an adequate remedy for most.⁸¹

⁷⁴ See GOODWIN-GILL, *supra* note 55, at 74–75 (discussing and providing examples of relevant case law from multiple jurisdictions).

⁷⁵ See Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 103 (1999).

⁷⁶ Cf. *id.* at 95 n.31.

⁷⁷ *Id.* at 103 n.60.

⁷⁸ *Id.*

⁷⁹ *Id.* at 110.

⁸⁰ *Id.* at 112.

⁸¹ *Id.* at 103 n.60. This is not to deny that, in many states, there are areas that are more welcoming and safer for LGBTQ persons than others. On occasion, internal relocation to such an area may even provide sufficient protection, perhaps especially when local law enforcement officials are committed to protecting the rights of LGBTQ persons. But, even if (say) a certain city is, on average, safer for LGBTQ applicants than others are, if the danger of violence without recourse to state protection is still real, this increased safety will not be sufficient.

IV. “MERE” BEHAVIOR?

Another potential problem faced by LGBTQ asylum or refugee claims is the suggestion that it is not LGBTQ status that is the focus of the persecution by state or non-state actors, but rather certain behavior that is typical of the group—same-sex sexual behavior or gender non-conforming behavior.⁸² The idea behind this claim is that while sexual orientation or gender identity may be something a person “cannot or should not” have to change, the same is not true of same-sex sexual or gender non-conforming behavior.⁸³ This might be so either because it could be reasonable to expect the person in question to simply refrain from the behavior altogether, or to keep the behavior hidden so as to not attract attention from those who might cause harm.⁸⁴

Both of these potential objections to providing asylum or refugee protection to LGBTQ applicants can be overcome. First, it is not plausible to expect that people with same-sex sexual attraction or non-standard gender identity will completely refrain from actions associated with these statuses.⁸⁵ It is widely (even if not universally) accepted that sexuality is an important part of a happy and fulfilling life, and to involuntarily refrain from sexual activity, when one has willing partners, is a harm.⁸⁶ Furthermore, for many people sexual behavior is not just one behavior among another.⁸⁷ It is not, say, like attending baseball games or drinking beer, even for baseball fans and beer aficionados. Rather, it is a central part to living a good life and its absence would cut to a core aspect of their personality.⁸⁸

The second worry suggests that LGBTQ applicants for asylum or refugee protection do not need international protection because they could keep themselves safe by being discreet about their status.⁸⁹ Even if the

⁸² See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

⁸³ See *id.* at 1092, 1095–96.

⁸⁴ *Id.* at 1093.

⁸⁵ AM. PSYCH. ASS’N, APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 17 (2009), available at <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> [<https://perma.cc/BHQ9-P2R6>].

⁸⁶ *Id.* at 12.

⁸⁷ *Id.* at 30.

⁸⁸ *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (articulating and rejecting the “Hobson’s choice” between engaging in homosexual activity and celibacy as a homosexual asylum applicant).

⁸⁹ *Id.* at 1169.

applicants do not totally refrain from same-sex sexual behaviour or gender non-conforming behavior, this behavior could be kept “private” so as to not attract attention, negating the danger of persecution (by either state or non-state actors) and eliminating the need for international protection.⁹⁰ There is, however, good reason to reject this “answer” to the problem faced by LGBTQ asylum applicants. As Australian courts have noted, it is unreasonable to expect applicants to hide fundamental aspects of their personality, whether it be religious belief, political opinion, or sexual orientation.⁹¹ While the Australian High Court put the point in the somewhat unusual way of saying that applicants are not expected to take even “reasonable steps” to avoid persecution,⁹² the more straightforward way of putting the point would be that applicants should not have to take steps to avoid persecution that would infringe their right to live with dignity and respect in any significant way. Even if taking such steps might be prudentially wise and not intrinsically difficult, they cannot reasonably be required.⁹³ A comparison with religious belief can help draw out this point. If a society prohibited practicing any religion other than a favored one, adherents of a minority religion might avoid persecution by keeping their religious beliefs private and not practicing them in a way that would draw any attention.⁹⁴ However, even apart from any potential conflict with religious tenets that call for public displays, this would be a sign of persecution, not a way to avoid it. This is because it would mark out a specific religion as unacceptable, and would suggest punishment should follow if the religion were practiced by a citizen. A similar conclusion follows in the case of same-sex sexual behavior and gender non-conforming behavior. For this reason, a requirement that applicants for asylum or refugee protection keep their same-sex sexual behavior or

⁹⁰ *Id.* at 1168.

⁹¹ *Minister for Immigr & Border Prot v SZSCA* (2013) 222 FCR 192, 308 ALR 18, ¶¶ 5–9 (Austl.); see also Maria O’Sullivan, *Before the High Court: Minister for Migration and Border Protection v SZSCA: Should Asylum Seekers Modify their Conduct to Avoid Persecution?*, 36 SYDNEY L. REV. 541 (2014) (discussing principles central to this case and how courts in the UK, the EU, and other jurisdictions have followed the general holding of this case).

⁹² *Appellant S395/2002 v Minister for Immigr & Multicultural Affs* (2003) 216 CLR 473, 203 ALR 112, ¶ 50 (Austl.).

⁹³ *Id.* ¶ 43.

⁹⁴ *Id.* ¶ 40.

gender non-conforming behavior “discreet” is not an acceptable alternative to providing international protection for those fearing persecution.

V. WHOSE BUSINESS IS THIS?

One final worry about extending asylum and refugee protection to LGBTQ applicants is whether extending protection in this instance is an unreasonable interference into the internal affairs of other states.⁹⁵ We may think states can reasonably differ on rules relating to public morality,⁹⁶ and hold that, while it is good and appropriate for “liberal” societies to grant equal rights to LGBTQ people, it is a sort of cultural imperialism to expect that all states do the same. If that is so, there may be concern that granting asylum or refugee status to LGBTQ applicants is a sort of derivative cultural imperialism.⁹⁷

On the account of refugee protection that I have elsewhere defended, this argument has no purchase.⁹⁸ On my account, refugee protection is owed to persons who are outside of their state, who face harms of a certain sort and for certain reasons (especially, but not only, those captured by the refugee convention definition – one shown above to apply to LGBTQ applicants) who do not have adequate protection from their own society.⁹⁹ On this account, providing refugee protection or asylum need not be seen as a commentary on the underlying beliefs or actions at all.¹⁰⁰ For example, on my account it would be appropriate for a secular democracy to grant asylum to someone who faced persecution for advocating, in his home country, for the establishment of a religiously based government that would prevent members of other religions from holding power.¹⁰¹ Granting asylum in this instance would not be approving of the message, or

⁹⁵ See Lister, *supra* note 3, at 655.

⁹⁶ See, e.g., Matthew Lister, *Contract, Treaty, and Sovereignty*, in SOVEREIGNTY AND THE NEW EXECUTIVE AUTHORITY 283, 299 (Claire Finkelstein & Michael Skerker eds., 2019) (focusing on issues that arise in relation to international trade); LUCIA M. RAFANELLI, PROMOTING JUSTICE ACROSS BORDERS: THE ETHICS OF REFORM INTERVENTION 20 (2021) (discussing toleration in international relations).

⁹⁷ See Lister, *supra* note 3, at 653. I should add immediately that I do not hold this view. I think that a failure to grant equal treatment to LGBTQ people is a moral failing in any state. I consider this argument, however, for completeness.

⁹⁸ *Id.* at 648.

⁹⁹ *Convention*, *supra* note 5.

¹⁰⁰ *Id.*

¹⁰¹ See PRICE, *supra* note 3, at 85.

suggesting the other state was wrong to disapprove of the message. Rather, it would recognize an obligation to provide protection to people when they are subjected to harm amounting to persecution for expressing or holding the view.¹⁰² On this account, we are able to justify granting asylum or refugee protection to LGBTQ applicants without having to make any sort of official statement about the action in question or the country from which the applicant has fled, as this is not an inherent part of meaning of asylum.¹⁰³

On other prominent justifications for refugee protection, however, the issue may be somewhat less clear. Both Matthew Price and David Owen have put forward accounts of asylum where an essential purpose of granting asylum is to serve as a political “rebuke” to the country the refugee is fleeing from.¹⁰⁴ Such an account must more directly deal with the question of political and moral disagreement.¹⁰⁵ If, following Owen and Price, a grant of asylum is viewed as “expressing condemnation of the persecuting state,”¹⁰⁶ then it would require, at least in many cases, taking a stand on the substance of the moral issue. Many will see this as a virtue of the account, and in this instance, the attraction is obvious. However, even in cases like this one, where most readers of this essay will have sympathy with the idea of delivering a political rebuke to the persecuting state, there are potential drawbacks. First, citizens of the state granting asylum who themselves do not approve of same-sex sexual behavior or gender non-conforming behavior may be less willing to support granting asylum to LGBTQ persons in need of protection, for fear that this will be seen as signaling approval of the behavior or orientation in question.¹⁰⁷ Secondly, if a state that would otherwise grant asylum to a LGBTQ applicant who is seeking protection values its political or economic ties with the persecuting state, it may hesitate to grant protection if this is widely recognized as

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See PRICE, *supra* note 3, at 69–70; OWEN, *supra* note 3, at 54–56. Owen also distinguishes “refuge” and “sanctuary” from “asylum” and holds that political rebuke is essentially tied only to the latter case. OWEN, *supra* note 3, at 63–65. However, because the sorts of cases relevant to this essay will all fall under Owen’s “asylum” category, it is not necessary to go into detail about the ways that his account differs from and improves on Price’s.

¹⁰⁵ See PRICE, *supra* note 3, at 69–70; OWEN, *supra* note 3, at 54–56.

¹⁰⁶ PRICE, *supra* note 3, at 70; OWEN, *supra* note 3, at 55.

¹⁰⁷ PRICE, *supra* note 3, at 71.

providing a political rebuke to the other state.¹⁰⁸ In either case, there is some reason to think that this approach may lead to lesser protection. Therefore, while the approaches to asylum suggested by Price and Owen may explain and justify granting asylum to LGBTQ applicants, they do so with the potential price of increasing the domestic and international contentiousness of the grant.¹⁰⁹ Both approaches, then, justify granting asylum to LGBTQ applicants who otherwise meet the requirements for asylum.¹¹⁰ Which approach is preferable will turn, at least in part, on whether a political rebuke—and the costs that come with making this a core element of the notion of asylum—is itself an important enough value.¹¹¹ This article does not answer this question, but instead draws attention to the contrast.

VI. PRACTICAL PROBLEMS AND FUTURE DEVELOPMENTS FOR LGBTQ ASYLUM CLAIMS

Having established that asylum or refugee protection for LGBTQ persons who face persecution on the basis of their status is fundamentally well grounded, this Section addresses two further problems in this area: issues related to the intersection of family law and family migration with refugee protection, and issues related to questions about proof in LGBTQ asylum and refugee claims.

A. *LGBTQ Refugee & Asylum Claims and the Family*

Although refugees and asylum-seekers often travel and make their initial applications alone, it is very common for them to have family members.¹¹² In many cases, these family members will face persecution too, either because they share traits with the primary applicant, or else as a way to oppress and further persecute the primary applicant.¹¹³ Even when this is not the case, the distress and harm that comes from being involuntarily separated from one's family is all too common for refugees

¹⁰⁸ *Id.* at 72.

¹⁰⁹ *Id.* at 71–72.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 69–70.

¹¹² Matthew Lister, *The Rights of Families and Children at the Border*, in *PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW* 153, 168 (Elizabeth Brake & Lucinda Ferguson eds., 2018).

¹¹³ *Id.*

and asylees.¹¹⁴ For these reasons, many states have established rules that allow the family members of people granted refugee or asylum protection to either be included in a single application, or to follow the original applicant so as to join them.¹¹⁵ There is nothing about LGBTQ people in need of asylum or refugee protection that would exclude them from the above description, but there are a few practical difficulties for such applicants that are worth working through.¹¹⁶

One problem that exists for any person with asylum or refugee protection who is seeking to get protection extended to his or her family, or seeking to have their family join them, is establishing the nature and validity of the family ties in question.¹¹⁷ This is a problem that exists in many areas of immigration law, but which is made worse in the case of refugees, given the frequent need to flee without taking relevant documents with them and, for obvious reasons, do not have access to government documentation of their relationships.¹¹⁸ These already significant problems are made even worse for many LGBTQ persons needing asylum and refugee protection because their de facto family relationships are often not recognized, especially in most states that actively persecute or allow the persecution of LGBTQ persons.¹¹⁹

I have elsewhere argued that, even when same-sex marriage is not legally recognized, it is reasonable and appropriate to extend family immigration benefits to same-sex couples who otherwise have family relations.¹²⁰ These same arguments would extend to family members in de facto same-sex families, including partners and children.¹²¹ Even if legal

¹¹⁴ *Id.* at 169.

¹¹⁵ For a brief discussion of the importance of family ties in cases of refugee protection, see *id.* at 168; Matthew Lister & Eilidh Beaton, *Refugees and Family Unification*, in HANDBOOK OF MIGRATION ETHICS (Johanna Gördemann et al. eds., forthcoming 2024); Eilidh Beaton, *The Right to Family Unification for Refugees*, 49 SOC. THEORY & PRAC. 1, 1, 5 (2023).

¹¹⁶ Lister, *supra* note 112, at 164.

¹¹⁷ See Beaton, *supra* note 115, at 4, 7–9.

¹¹⁸ *What Happens to Refugees and Stateless Persons Who Have No Passport?*, UNITING AVIATION (Jan. 22, 2019), <https://unitingaviation.com/news/general-interest/refugees-and-stateless-persons-without-passports/> [<https://perma.cc/W7LE-W498>].

¹¹⁹ See Matthew Lister, *A Rawlsian Argument for Extending Family Immigration Benefits to Same-Sex Couples*, 37 U. MEM. L. REV. 745, 763 (2007).

¹²⁰ *Id.* at 763, 768–70.

¹²¹ *Id.*

recognition of the relationship is lacking, when the material reality of the relationship suffices to establish a family relationship, this should suffice to justify granting family immigration benefits.¹²² Although this claim seems straightforward, it is worth reiterating in light of disturbing trends from the former Trump administration, which has moved to curtail or eliminate the family migration benefits normally extended to the families of diplomats when these diplomats are in same-sex relationships and come from states that do not legally recognize same-sex relationships.¹²³ If family migration benefits can be cut in the case of diplomats in same-sex relationships, then similar rights for refugees and asylees may certainly be in danger.¹²⁴ Given that the majority of states do not recognize same-sex relationships, the need to firmly establish these rights, even, or perhaps especially, when legal recognition of the relationship is impossible, is important.¹²⁵

Because granting derivative refugee or asylum status to family members is a significant step—and may make it more difficult for others to be resettled or be granted protection given limited resettlement programs and other admission quotas—it should not be done lightly.¹²⁶ Accordingly, it can make sense to limit this protection to established families and not grant it too widely.¹²⁷ This arguably suggests that the benefit should be limited to *de jure* families.¹²⁸ But, when it is impossible to form a *de jure*

¹²² *Id.* at 774.

¹²³ See Edward Wong & Michael Schwartz, *U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html> [https://perma.cc/V8T3-GCQM].

¹²⁴ *U.S. Ends Diplomatic Visas for UN Same-Sex Partners*, BBC (Oct. 2, 2018), <https://www.bbc.com/news/world-us-canada-45722400> [https://perma.cc/2VVK-KL5T].

¹²⁵ *Id.* I will briefly add that I do not think that *merely* failing to recognize same-sex marriage rights would be sufficient to ground an asylum claim, even though it is an injustice. Although I lack the space to fully defend the point here, this claim fits with the generally accepted idea that not all types of discrimination and injustice are grave enough to require international protection. This seems to me to be one such case.

¹²⁶ See SIOBHAN MCGUIRK ET AL., LGBT FREEDOM AND ASYLUM NETWORK, A GUIDE TO SUPPORTING LGBT ASYLUM SEEKERS 24 (2015), available at https://assets2.hrc.org/files/assets/resources/LGBT_Asyum_Seekers_FINAL.pdf [https://perma.cc/92BZ-NR46].

¹²⁷ See Samuel Ritholz & Rebecca Buxton, *Queer Kinship and the Rights of Refugee Families*, 9 MIGRATION STUD. 1075, 1081 (2021).

¹²⁸ See *id.*

family because of discriminatory laws, this approach would simply add another form of unfairness to that already faced by LGBTQ applicants. Therefore, it is necessary to allow for such applicants to have other ways to establish the bona fide nature of their relationship.¹²⁹ Exactly which types of evidence should suffice to show such a relationship is beyond the scope of this article, but it seems reasonable that, at the very least, anyone who could supply the sorts of information and evidence that would establish an opposite sex family as bona fide, other than a legal document saying such, should suffice.¹³⁰

Even though it would suffice, on any reasonable grounds, to show that there is a family relationship if the same-sex couple could provide such evidence as that they regularly held themselves out as a family, that they lived together, that they co-mingled their finances, or that they had and raised children together, it would be unreasonable to only accept such evidence, given that many of the relevant applicants will be coming from states where same-sex behavior (and sometimes gender non-conforming behavior) is either illegal, subject to significant social sanctions rising to persecution, or both.¹³¹ What types of evidence could suffice in such cases to establish that a genuine family relationship exists?

B. Proof in LGBTQ Asylum and Refugee Claims

Before an application for asylum or refugee protection is accepted, the applicant must establish that he or she has met the relevant criteria.¹³² This is to say, the applicant bears the burden of persuasion.¹³³ Sometimes this will be relatively straightforward. If, for example, members of a particular ethnic group are known to be subjected to persecution in a state, all that must be shown will be that the applicant is a member of the ethnic group and from the state.¹³⁴ Other cases will require more substantial documentation. For example, when an applicant claims to fear persecution

¹²⁹ See EM PUHL, IMMIGRANT LEGAL RES. CTR., CONSIDERATIONS WHEN DOCUMENTING A BONA FIDE MARRIAGE 1–4 (2020), available at https://www.ilrc.org/sites/default/files/resources/bona_fide_marriage_lgbtq_couples_final.pdf [<https://perma.cc/36CS-4RC6>].

¹³⁰ See *id.* at 6–7.

¹³¹ See *id.* at 6–8.

¹³² *Id.* at 6.

¹³³ GOODWIN-GILL, *supra* note 55, at 34–35; see also KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 202–204 (2d ed. 2002).

¹³⁴ See PUHL, *supra* note 129, at 3.

for his or her political opinion, it will often be reasonable to request some form of documentation of having actually held the opinion in question.¹³⁵

Sometimes demands for substantial evidence in asylum cases can be unreasonable. As noted, refugees and asylees must often flee quickly, and oppressive governments typically are not keen to provide documentary evidence.¹³⁶ Because of this, credible testimony, backed by evidence of the general nature of the claims, is often the best form of evidence available in asylum and refugee cases.¹³⁷ In this regard, cases arising out of the persecution of LGBTQ applicants are not inherently special, but may be expected to have this feature as or more often than other types of asylum cases due to the need to keep same-sex and gender non-conforming behavior hidden.¹³⁸ Here, even if we agree with the Australian High Court that there is no obligation for those facing persecution on the basis of their LGBTQ status to “be discreet,” being discreet will often be the most prudential option.¹³⁹ It would make no sense to punish them for being reasonable and careful. Given these facts, what sort of evidence is it reasonable to ask LGBTQ applicants to supply?

In many asylum and refugee cases, we should expect credible testimony, backed up by documentary evidence of general country conditions, to be sufficient evidence to establish a claim.¹⁴⁰ Of course, if further “concrete” evidence exists, this can further bolster a case. But, in situations, such as here, where engaging in the acts that would form the basis for further evidence would likely itself lead to persecution, it is unreasonable to demand more evidence.¹⁴¹ This same standard may be

¹³⁵ See Victoria Neilson et al., 15. *Preparing the I-589*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/application-process-preparing-the-i-589/> [https://perma.cc/B6SZ-8R9X].

¹³⁶ See *Refugees Are More Vulnerable Without Civil Registration and ID. How Can We Help?*, CTR. OF EXCELLENCE FOR CVRS SYS., <https://crvssystems.ca/blog/refugees-are-more-vulnerable-without-civil-registration-and-id-how-can-we-help> [https://perma.cc/68FL-5DAW].

¹³⁷ See Victoria Neilson et al., 3. *Elements of Asylum Law*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law/> [https://perma.cc/HR74-RKAZ].

¹³⁸ See *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

¹³⁹ See *Kabir v Minister for Immigr and Multicultural Affs* [2002] FCA 129 (20 February 2002) ¶¶ 19–22 (Austl.).

¹⁴⁰ See Neilson et al., *supra* note 137.

¹⁴¹ See CTR. FOR EXCELLENCE FOR CVRS SYS., *supra* note 136.

applied to establishing a family relationship.¹⁴² Of course, this does not mean that just any testimony will suffice, or that just anyone claiming LGBTQ status from a certain country should be granted asylum or refugee protection. The requirement that the testimony be credible is a real one, and implies that sufficiently internally contradictory or fanciful testimony need not be credited.¹⁴³ However, if testimony is credible, consistent with known country conditions, and not directly contradicted by other established evidence, it should typically suffice both to establish a claim for refugee or asylum protection or the existence of a sufficiently family-like relationship to justify derivative asylum protection.¹⁴⁴ In practice, the proposed approach here is often not followed by adjudicators, many of whom impose unreasonable burdens of production on applicants, or use their own stereotypes of how an LGBTQ person “should” act.¹⁴⁵ There is no surefire solution to this problem other than to clearly articulate the standard, to provide training to adjudicators, and to provide a meaningful opportunity for merits review of negative decisions, at both administrative and judicial levels.¹⁴⁶

¹⁴² See *id.*

¹⁴³ There is real danger here of cultural prejudices interfering in determinations of credibility. See Gabi de Bruïne et al., *Culture and Credibility: The Assessment of Asylum Seekers’ Statements*, PSYCH., CRIME, & L. (forthcoming) (manuscript at 4), <https://www.tandfonline.com/doi/epdf/10.1080/1068316X.2023.2279328?needAccess=true> [<https://perma.cc/933P-TXJF>] It is hard to know exactly what to do about this danger, if the credibility standard is to maintain some force, apart from encouraging adjudicators to be aware of the issue and try to avoid it. Providing corroborating testimony from country experts may be a significant help here, but this may not always be available, and it may therefore be unreasonable to expect it in every case.

¹⁴⁴ See Neilson et al., *supra* note 137.

¹⁴⁵ See, e.g., Kristie Brewer, *How Do I Convince the Home Office I’m a Lesbian?*, BBC (Feb. 25, 2020), <https://www.bbc.com/news/stories-51636642> [<https://perma.cc/GBK6-WFNR>].

¹⁴⁶ In Australia, for example, while negative decisions on an application for a protection visa may be appealed to the Administrative Appeals Tribunal for merits review, merits review of negative decisions by the AAT are virtually impossible, as review is limited, by statute, largely to cases of “jurisdictional error.” See *Migration Act 1958* s 474. As issues such as the credibility of testimony would not normally fit this standard, the ability to seek meaningful merits review is unduly curtailed in Australia.

VII. CONCLUSION

In many ways, it is a disappointing development that asylum and refugee protection for LGBTQ applicants has been accepted in many states, for it would be much better if no such protection were needed because no persecution was feared. However, given that LGBTQ people do face persecution in many states,¹⁴⁷ there is still a need to clearly establish the basis for LGBTQ asylum and refugee protection, to show why it is needed and reasonable, and to look at certain procedural requirements in light of the above conclusions. This article serves as a step towards doing so.

¹⁴⁷ See BBC, *supra* note 124.

