

The Persecution of LGBT Individuals Fleeing to America from Muslim-Majority Nations: Has the Door to Refuge Been Closed?

Fernanda Hipskind*

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I. INTRODUCTION

Abraham Lincoln once referred to the United States as the “. . . last, best hope of earth.”¹ The phrase conveyed the urgency Lincoln felt about resolving one of the most historically significant conflicts in this

* © 2018 Fernanda Hipskind. Fernanda Secco Hipskind currently works for Lydecker Diaz, a financial litigation firm in New York. She received a B.A degree in Legal Studies from the University of Central Florida in 2013 and recently graduated from St. Thomas Law School, cum laude.

1. Abraham Lincoln, Second Annual Message (Dec. 1, 1862), *in* Gerhard Peters & John T. Woolley, *Abraham Lincoln*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29503> (last visited Mar. 19, 2018).

country's history: the Civil War.² With this phrase, Lincoln stated his belief that the United States, at the time, was the "last hope" of democracy in the world. For Lincoln, proof that the "American democratic experiment" was worth fighting for could be found in the thousands of immigrants who continued migrating to the United States and enlisting in the war.³ Lincoln's vision of an America that gives fair opportunity to anyone who believes in our democratic values unfortunately has yet to be fulfilled as current policy excludes a significant group of refugees.

Historically, immigration policies targeting refugees have fluctuated. The first time Congress passed a comprehensive immigration act was the Refugee Act of 1980.⁴ The Act sought to provide a permanent procedure for refugees seeking admission to the United States and to provide a uniform provision for resettlement. Since the Act's enactment, about three million refugees have been resettled in the United States.⁵ This number represents many families and individuals who have successfully fled persecution in their home countries because of their religion, their opposition to unfair governments, or, as will be thoroughly discussed in this Article, for being part of the lesbian, gay, bisexual, or transsexual (LGBT) community.

On January 27, 2017, this solace for many fleeing terrorism and oppression by their governments came to an abrupt halt. President Donald J. Trump signed an executive order banning refugees and immigrants from seven Muslim-majority countries.⁶ These included Iraq, Iran, Libya, Somalia, Sudan, Yemen, and Syria, which is one of the countries with the greatest number of atrocities directed toward LGBT individuals. For most of the countries, the ban was effective for ninety days, but for those fleeing from war-torn Syria, the ban was indefinite.⁷ The order was subsequently halted by the federal courts and a revised

2. *Id.*

3. *Id.*

4. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (stating the intent of the act is "[t]o establish a more uniform basis for the provision of assistance to refugees").

5. *History of the U.S. Refugee Resettlement Program*, REFUGEE COUNCIL USA, <http://www.rcusa.org/history/> (last visited Mar. 26, 2017).

6. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Since its passage, this order has been blocked by a federal judge in Washington state. President Trump has in response signed a second executive order. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar., 6, 2017). The second order lists six countries banned from entry: Iran, Somalia, Sudan, Yemen, Syria, and Libya. Iraq has been removed.

7. *Trump Signs Executive Order Banning Refugees*, AL JAZEERA (Jan. 28, 2017), <http://www.aljazeera.com/news/2017/01/trump-signs-executive-order-banning-syrian-refugees-170128033811131.html>.

order in March removed Iraq from the list; it also removed the indefinite portion of the order as it related to Syria.⁸ In December, the Supreme Court allowed the revised order to take partial effect, stating that the order was not to be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.⁹

This Article investigates the immediate and long-term consequences of these orders on individuals who seek entrance into the United States as a refuge from the inhumane treatment they have received in their respective countries, with a focus on Syrian refugees. Part II examines the history of American sentiment toward immigration. Although many see the United States as a country that will welcome any person willing to work hard for the American dream, the reality is that Americans have a strained relationship with outsiders seeking to join the nation. This portion will examine what has changed, and what has not, as the United States continues to weave its story in this chapter of history.

Part III examines how the American Judicial, Legislative, and Administrative systems have attempted to create a process for admitting refugees fleeing based on sexual orientation persecution. American courts have long struggled to define homosexuality and understand all the aspects of what makes an individual transgender.¹⁰ Although this may seem clear to some, the ability of courts to define these terms is vital for LGBT individuals obtaining asylum in the United States.

Part IV analyzes instances where the Islamic State of Iraq and Levant (ISIL) has targeted LGBT individuals. Since ISIL has gained significant amounts of territory in the Middle East, it has reached many of the Muslim-majority countries impacted by the aforementioned executive orders. Part four serves to illustrate the realities of the many LGBT individuals fleeing their native countries due to the increasing threat that ISIL poses on a daily basis.

Part V analyzes the persecution of transgender individuals in Muslim-majority nations. Due to the fact that transgender individuals face difficulty blending into society, individuals in this community have become increasingly easy targets, making them highly vulnerable. This portion shows that not only are members of the LGBT community,

8. Ariene De Vogue, *US President Donald Trump Signs New Travel Ban, Exempts Iraq*, CNN.COM (Mar. 7, 2017), <https://www.cnn.com/2017/03/06/politics/trump-travel-ban-iraq/index.html>.

9. *Trump Travel Ban: Questions About the Revised Executive Order*, BBC.COM (Dec. 4, 2017), <http://www.bbc.com/news/world-us-canada-39044403>.

10. See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000) (describing the transgender plaintiff as a homosexual dressing in women's clothing).

specifically transgender individuals, vulnerable to extremist groups, but also that they are in peril due to their own governments. In many of these countries, laws that punish transgender individuals with death still exist.

Part VI consists of a brief proposal for a better immigration path to resettlement in the United States for LGBT individuals fleeing persecution. Such a pathway need not compromise national security but rather could take it into consideration while still providing a procedure by which threatened LGBT individuals may apply for and be granted asylum from overseas. Additionally, this Part attempts to find a way in which to accelerate the process of resettlement for the most vulnerable individuals.

Part VII examines stories of LGBT individuals from Muslim-majority countries whose status is “in limbo.” Individuals who were previously on track to come to the United States must now wait as their future is threatened by uncertainty and instability. These stories shed light on the types of discrimination and persecution they face, their hopes in being granted entry to the United States, and their subsequent concern resulting from recent administration decisions.

Part VIII of this Article briefly examines the current legal standing of the executive order on immigration. Since President Trump signed it, multiple states such as Washington, Hawaii, and Maryland have challenged the government in federal courts aiming to overturn the ban instituted by the President on constitutionality grounds.¹¹ The Part also examines the Supreme Court’s most recent ruling on the order and where it currently stands.

II. HISTORY OF AMERICAN REFUGEE RESETTLEMENT: A CONSTANT ANTI-IMMIGRATION SENTIMENT?

“Refugee” is defined as a person “who is unable or unwilling to return to . . . (his or her home) country because of persecution or a ‘well-founded fear of persecution on account of race, religion, nationality, membership in a particular group or political opinion.’”¹² The standard for determining the status of asylum, as indicated by the Supreme Court, is a well-founded fear of persecution.¹³ Thus, an applicant for asylum

11. Associated Press, *New Maryland Lawsuit Challenges Trump Travel Ban*, WASH. TIMES (Feb. 7, 2017), <http://www.washingtontimes.com/news/2017/feb/7/new-maryland-lawsuit-challenges-trump-travel-ban/>.

12. *What Is a Refugee?*, USA FOR UNHCR, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> (last visited Mar. 14, 2018).

13. Immigration and Nationality Act, § 101(a)42(A), 8 U.S.C.A. § 1101 (2014).

must establish a well-founded fear by showing that a reasonable person in similar circumstances would fear the persecution alleged.¹⁴

A. The Chinese Exclusion Act of 1882

The United States has a complicated history with immigration. On one hand, the narrative that it exports to the rest of the world is one of welcoming immigrants.¹⁵ On the other hand, Americans have historically been quick to blame outsiders for their own economic hardships. One early example of this is the Chinese Exclusion Act of 1882.¹⁶ The Act restricted Chinese immigration strictly on the basis of race and prohibited those already in the United States from becoming citizens.¹⁷

Economic motives prompted the Act's passage. Prior to the Act's passage, Chinese immigrants came to America in hopes of being a part of the Gold Rush of 1848-1855.¹⁸ However, once the gold became scarcer and competition increased, Chinese immigrants began dealing with increasing hostility from other miners and were the first to be forced out of mining.¹⁹ In the 1870s, when an economic decline followed the Civil War, California Governor John Bigler went so far as to publicly blame the Chinese for the bad economy.²⁰ This led to unrest and a rise in tension between immigrants and nonimmigrants.²¹ Then, in 1879, California adopted a new constitution that authorized the state government to exclude these individuals from residence in the state.²² Finally, in 1882 the Chinese Exclusion Act banned Chinese laborers from entering the country for ten years.²³

B. The Jews

America's response to admitting refugees from the Holocaust is another example of negative American sentiment toward outsiders.

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

15. DUNCAN CLARKE, *A NEW WORLD: THE HISTORY OF IMMIGRATION TO THE UNITED STATES* (2010).

16. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

17. Yuning Wu, *Chinese Exclusion Act*, BRITANNICA.COM (Nov. 13, 2013), <https://www.britannica.com/topic/Chinese-Exclusion-Act>.

18. *Id.*

19. *Id.*

20. HENRY K. NORTON, *THE STORY OF CALIFORNIA FROM THE EARLIEST DAYS TO THE PRESENT* (1924).

21. *Id.*

22. Norman Asing, "*Sir: I Am a Chinaman, a Republican, and a Lover of Free Institutions*," WYES, http://www.pbs.org/becomingamerican/ce_witness1.html (last visited Mar. 26, 2017).

23. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

Many scholars who study the American response to the Jewish refugee crisis attribute it to feelings of anti-immigration caused in part by economic instability in America, where at the time unemployment was in the double digits.²⁴ In 1939, Gustav Schröder, the captain of the M.S. *St. Louis*, attempted to find homes for 900 Jewish refugees fleeing Nazi Germany.²⁵ First Cuba and then the United States prohibited entry. Cordell Hull, then Secretary of State, ordered U.S. Coast Guard vessels to shadow the trips in order to block Captain Schröder from approaching close enough to the Florida coast to allow the refugees onboard to disembark.²⁶ Finally, through negotiations, the United Kingdom, along with France, Belgium, and the Netherlands agreed to take the refugees.²⁷ Unfortunately, as a result of the subsequent occupation of France, Belgium, and the Netherlands by the Nazi Germans, a quarter of these passengers died in concentration camps.²⁸

C. Fast Forward: Continuous Anti-Immigration Sentiment in the United States

On May 11, 2001, Congress passed the REAL ID Act, the first anti-terrorism legislation that targeted asylum seekers.²⁹ The purpose of the Act—to prevent terrorists from taking advantage of the asylum process to infiltrate the United States—was unfortunately highly at odds with its result, which undermined the legitimate asylum system.³⁰ Although the purpose was to strengthen security, the Act ignored the other avenues by which noncitizens could gain access to America, such as nonimmigrant visas, which were used by some of the September 11 terrorists.³¹ Instead, the Act affected not only a few suspected individuals but the entire pool of asylum seekers, including those fleeing political persecution, genocide, and sexual orientation persecution.³²

24. Naomi S. Stern, *Evian's Legacy: The Holocaust, The United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO. IMMIGR. L.J. 313, 314 (2004).

25. *Voyage of the St. Louis*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last visited Mar. 27, 2017).

26. *Id.*

27. *Id.*

28. *Id.*

29. The Real ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005).

30. See Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 105 (2006).

31. *Id.* at 103.

32. *Id.*

Following the September 11, 2001, terror attacks, American anti-immigration sentiment has focused primarily on Muslim populations. Those attacks were orchestrated by an extremist group who considered themselves Muslims (although many in the Muslim community have rejected their self-proclaimed Muslim status) and killed a total of 2996 people.³³ Osama Bin Laden claimed responsibility for leading these attacks, and images of Al Qaeda and Bin Laden were everywhere in American television. The media, the government, and the general public heard the words “Islamic terrorist group” repeatedly in relation to the attacks, creating an immediate link in the minds of Americans between Islam and terrorism.³⁴

In 2001 American troops with the aid of NATO and the United Kingdom began their attempts at dismantling the Taliban, first in Afghanistan, and subsequently in Iraq. Initially upon the invasion of Afghanistan and the addition of troops from forty-three countries composing the International Security Assistance Force (ISAF), the Taliban was successfully weakened and thereafter forced to be reorganized by Mullah Omar.³⁵ This led to the launching of an insurgency against the government taking full advantage of its newly exposed weaknesses.³⁶ While this was unfolding, more troops were sent in, and as the United States began approaching their goal in dismantling the Taliban, the troops began their exit strategy, leaving the continuing fight against extremism in the hands of the people in increasingly unstable governments. ISIL took advantage of this instability, and in 2014 successfully drove Iraqi government forces, who were poorly trained and under-equipped, out of key cities such as Mosul.³⁷

During the presidential race of 2016, now-President Donald J. Trump repeatedly used rhetoric that conveyed fear and xenophobic sentiment toward the Muslim community, stating in his campaign that he would put a “total and complete shutdown” on Muslims entering the

33. Peter L. Bergen, *September 11 Attacks*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/September-11-attacks> (last updated Feb. 21, 2018).

34. Clare Foran, *Donald Trump and the Rise of Anti-Muslim Violence*, ATLANTIC (Sept. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-muslims-islamophobia-hate-crime/500840/>.

35. Eben Kaplan, *The Taliban Resurgence in Afghanistan*, COUNCIL ON FOREIGN REL. (May. 30, 2006), <https://web.archive.org/web/20060927101915/http://www.cfr.org/publication/10551/>.

36. *Id.*

37. Dilly Hussain, *ISIL: The “Unintended Consequences” of the US-Led War on Iraq*, FOREIGN POL’Y J. (Mar. 23, 2015), <https://www.foreignpolicyjournal.com/2015/03/23/isis-the-unintended-consequences-of-the-us-led-war-on-iraq/>

country as a response to growing concerns regarding ISIL.³⁸ In his first week as President, he signed an executive order banning immigrants and refugees from seven Muslim-majority countries from entering the United States,³⁹ even though a large number of the refugees and immigrants affected would likely face persecution in their home countries, including for being members of the LGBT community.

III. DEFINING HOMOSEXUALITY AND TRANSGENDER FOR ASYLUM PURPOSES

Is a male who has sex with another male gay? Is a female gay if she does the same with another woman? Or does it go beyond one instance of homosexual behavior before an individual's sexual identity is classified as homosexual? United States courts have attempted to define homosexuality multiple times, in various decisions. Two prominent decisions attempting to define homosexuality for the purposes of asylum are *Amanfi v. Ashcroft* and *Kimumwe v. Gonzalez*.⁴⁰

In *Amanfi v. Ashcroft*, Amanfi claimed that he was persecuted in Ghana for his imputed homosexual status because, although he did not himself identify as a homosexual, on one occasion he had sex with another man.⁴¹ The instance of homosexual conduct occurred when Amanfi was captured and held for what he believed was sacrifice, based on the teachings of his grandfather and the openly practiced ritual in Ghana at the time.⁴² His grandfather had taught him that homosexuals are not worthy of sacrifice, and as a result, when another man was captured, Amanfi proposed intercourse to exempt the two from sacrifice.⁴³ The court in this case found Amanfi met the criteria for homosexuality, although he did not identify as homosexual, and admitted to having intercourse only to rid himself of certain death.⁴⁴

38. Press Release, Donald J. Trump Statement of Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (source deleted); see, *Trump's Deleted "Preventing Muslim Immigration" Statement*, MEMORY HOLE (May 10, 2017), <http://thememoryhole2.org/blog/trump-muslim-immigration>.

39. See Protecting the Nation from Foreign Terrorist Entry into the United States, , Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

40. *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005); *Amanfi v. Ashcroft*, 328 F.3d 719 (3rd Cir. 2003).

41. *Amanfi*, 328 F.3d at 721.

42. *Id.* at 722.

43. *Id.* at 723.

44. *Id.* at 730.

Much like Amanfi, Kimumwe's case also attempted to define homosexuality for the purposes of asylum, although Kimumwe did in fact identify as such. Kimumwe alleged that he was a homosexual and that he left Zimbabwe on account of the government's intolerance of homosexuality.⁴⁵ Kimumwe informed the court that he had various past sexual encounters with males.⁴⁶ The first instance resulted in him being expelled from school, and the second incident resulted in his arrest. However, the court ignored Kimumwe's self-identification as a gay man and instead determined that the persecution he had suffered was based on specific homosexual conduct and not on his identity as a homosexual man.⁴⁷ The two cases illustrated a distinction made by the courts between being a self-identified homosexual and being labelled a homosexual as a result of partaking in homosexual acts.

Similarly, the courts have also struggled with defining what it means to be transgender and the persecution for one's identification as such. Ten years after the Board of Immigration declared that homosexuals may seek asylum because of their sexual identity,⁴⁸ the Ninth Circuit overturned a Board of Immigration Appeals decision denying asylum to a transgender woman in *Hernandez-Montiel v. INS*.⁴⁹ Hernandez-Montiel was a transgender individual who began dressing in female clothes and behaving as a woman at the age of twelve.⁵⁰ Although the Court acknowledged these facts, they evaded the word "transgender," instead describing him as a gay man with a female sexual identity.⁵¹ It was not until 2007 that a court recognized an applicant for asylum as a "transsexual" woman and used female pronouns throughout the decision.⁵²

In response to decisions like these, in July 1994, Attorney General Janet Reno released Order 1895-94.⁵³ This order, made pursuant to the *Toboso-Alfonso* decision, provided that, "an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the

45. See *Kimumwe*, 431 F.3d at 320.

46. *Id.* at 320-21.

47. *Id.* at 322.

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

49. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000).

50. *Id.* at 1087.

51. *Id.*

52. Adena L. Wayne, *Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum*, 102 CORNELL L. REV. 241, 249-50 (2016).

53. *Matter of Toboso-Alfonso* (A23220664), 1994 WL 16515318, at *1 (O.L.C. June 16, 1994).

basis of persecution because of membership in a social group.”⁵⁴ Since then, there have been hundreds of asylum applications granted because of persecution of LGBT individuals.

IV. ISIL’S TARGETING OF LGBT INDIVIDUALS

Although there is an existing history of governments discriminating against LGBT individuals, ISIL expanded the violence directed toward those individuals in the areas that it occupies: large parts of northern Syria and Iraq. Although many mistakenly associate ISIL with practicing traditional Islam, the group is actually condemned by the international Muslim community that views traditional Islam as a peaceful religion.⁵⁵ Large groups like the members of Britain’s largest Mosque have spoken out against ISIL, calling them “Un-Islamic.” Dar Al-Ifta, one of the most influential Muslim schools in the world, called on ISIL to remove Islam from its name.⁵⁶

Under Sharia law, which ISIL aims to spread, instances of homosexuality are punishable by death. OutRight Action International has documented various occasions of alleged killings by ISIL members for sodomy and what they refer to as “morality based offenses.”⁵⁷ The methods utilized by ISIL to punish homosexual acts are brutal and inhumane. On one occasion, ISIL released pictures of a young man who was tied to a chair and thrown off a building.⁵⁸ On yet another instance, ISIL released pictures of a man on the ground bleeding to death with stones and rocks surrounding him.⁵⁹ The captions of the photos often read: “The imposition of Sharia punishment on a person who committed the acts of the people of [Prophet] Lot.”⁶⁰ The basis for OutRight’s reporting has been ISIL itself, which publishes, through the increasing use of and access to social media, these horrific scenes.⁶¹ ISIL has

54. Att’y Gen. Order No. 1895-94 (June 19, 1994).

55. Willa Fej, *How 70,000 Muslim Clerics Are Standing Up to Terrorism*, HUFFINGTON POST (Dec. 11, 2015), http://www.huffingtonpost.com/entry/muslim-clerics-condemn-terrorism_us_566adfa1e4b009377b249dea.

56. Shounaz Meki, *Egypt’s Dar al-Ifta: ISIL Extremists Not ‘Islamic State,’* AL ARABIYA ENG. (Aug. 24, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/08/24/Islamic-authority-Extremists-no-Islamic-State-.html>.

57. *Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias*, OUTRIGHT ACTION INT’L (June 30, 2016), <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

publicly claimed responsibility for thirty-nine sodomy-related executions.⁶²

In a 2015 Human Rights General Assembly Report, United Nations Experts expressed their alarm at the violence directed toward individuals based on their sexual orientation or gender identity.⁶³ The examples included instances of lesbians being raped and tortured and men being kidnapped, beaten, and humiliated.⁶⁴ In places such as Syria, not only are the individuals persecuted but so are their protectors.⁶⁵ In the Syrian Arab Republic there has been serious concern expressed about the violence and the strong opposition human rights workers face when attempting to uphold the rights of LGBT individuals.⁶⁶

ISIL's far-reaching propaganda has furthered its threat not only in its controlled territories but also within the borders of the United States. Through their propaganda, ISIL has often promoted targeting homosexual individuals in the United States and abroad for the purpose of reviving the supposedly neglected Islamic penal code.⁶⁷ On June 12, 2016, a man by the name of Omar Miq Seddique Mateen opened fire inside the Pulse nightclub, a gay nightclub in Orlando Florida, killing forty-nine people and wounding fifty-three others.⁶⁸ Prior to and during the attack, Mateen pledged his allegiance to ISIL and the Al-Nursa Front, a group accused of barbaric treatment and torture of homosexuals in Syria.⁶⁹

One example of Al-Nursa Front's relentless persecution of members of the LGBT community is Al-Nursa's capture of al-Raqqa, a city in the northern Syrian desert.⁷⁰ Upon their occupation, Al-Nursa quickly utilized the widespread fear of exposure prevalent among many LGBT

62. *Id.*; Michael K. Lavers, *John Kerry: Islamic State Committing Genocide*, WASH. BLADE (Mar. 19, 2016), <http://www.washingtonblade.com/2016/03/19/john-kerry-islamic-state-committing-genocide/>.

63. Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity; Rep. of the Office of the United Nations High Comm'r for Human Rights on its Nineteenth Session, U.N. Doc. A/HRC/29/23 (May 4, 2015).

64. *Id.*

65. *Id.*

66. *Id.*

67. Aaron Y. Zelin & Jacob Olidort, *The Islamic State's View on Homosexuality*, WASH. INST. (June 14, 2016), <http://www.washingtoninstitute.org/policy-analysis/view/the-islamic-states-views-on-homosexuality>.

68. Ishaan Tharoor, *The Islamic State's Shocking War on Gays*, WASH. POST. (June 13, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/the-islamic-states-shocking-war-on-homosexuals/?utm_term=.2394309a1b9c.

69. Zelin & Olidort, *supra* note 67.

70. Hannah Lucinda Smith, *How Jihadists Are Blackmailing, Torturing, and Killing Gay Syrians*, VICE (Apr. 12, 2017), https://www.vice.com/en_us/article/gay-syrians-are-being-blackmailed-by-jihadists.

Syrians. Al-Nursa was accused of obtaining pictures of individuals engaging in homosexual activity and blackmailing them into paying large sums of money in exchange for the group's nondisclosure of the information to their families.⁷¹ Refusal to pay would often lead to death. Unfortunately, as the next Part will outline, homosexuals are not the only nonbinary class to be persecuted in the manners described above.

V. PERSECUTION OF TRANSGENDER INDIVIDUALS

The countries banned by President Trump have some of the worst histories of persecuting LGBT individuals, specially transgender individuals. For example, in Sudan, a country on President Trump's list, same-sex sexual activity is illegal.⁷² The punishment for these "crimes" is death, while the mere act of dressing differently than what is socially acceptable is punishable by torture. Article 152 of the Criminal Act of 1991 reads:

Whoever commits, in a public place, an act, or conducts himself in an indecent manner, or a manner contrary to public morality, or wears an indecent, or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both.

In addition to Sudan, other countries banned by President Trump's initial and subsequent executive orders, such as Yemen and Iran, also impose the death penalty for homosexual activity.⁷³ A recent study conducted by the International Gay and Lesbian Human Rights Commission came to the conclusion that gay, lesbian, and transgender individuals are at imminent risk of death in countries such as Iraq, which, much like the countries banned by President Trump's second executive order, persecute homosexuality.⁷⁴ Before, members of the LGBT community could flee to neighboring territories for refuge, but now they are stranded due to ISIL's occupation of these territories. Government assistance is nonexistent, completely ineffective, or at times complicit in the torture and murder of LGBT minorities.⁷⁵

71. *Id.*

72. Max Bearak & Darla Cameron, *Here Are the 10 Countries Where Homosexuality May Be Punished by Death*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.de0e9ec3b0f8.

73. *Id.*

74. *Id.*

75. *Id.*

Following the Arab Spring, the implementation of strict Sharia law was swift, targeting gays, lesbians, and also transgender individuals who often cannot hide in plain sight. As a result, violence against transgender individuals and others in the LGBT community increased exponentially, making transgender individuals highly vulnerable.⁷⁶

In 2015, facing an increasing number of reports on the treatment of LGBT people in Syria, the Obama administration made this group a priority for asylum purposes.⁷⁷ Then-White House spokesperson Josh Earnest told the *Blade* newspaper that the administration would prioritize those refugees who are most vulnerable, including LGBT individuals.⁷⁸

VI. A COMPREHENSIVE PATH TO RESETTLEMENT FOR LGBT INDIVIDUALS FLEEING PERSECUTION

The process for obtaining asylum currently in the United States exists with the intent of assisting those in need; however, at times the process can be antiquated in its understanding of various nonbinary identifications and the resulting persecution for being non-conformative. As it stands, the procedure for acquiring asylum requires an applicant to be within the borders of the United States when applying.⁷⁹ Additionally, the United States Citizenship and Immigration Services requires an applicant to file for asylum within one year of entry into the country.⁸⁰ As previously mentioned, during the process the applicant must prove that he or she fled their country of origin due to persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁸¹

In order to obtain asylum pursuant to these requirements, an applicant may present evidence of being the victim of past persecution or demonstrate evidence of a well-founded fear of future persecution.⁸² If the applicant can prove severe past persecution, they may have a fighting chance of obtaining asylum. However, as the law currently stands, the asylum office or the judge presiding over the hearing may rebut this by

76. *Id.*

77. Dawn Ennis, *White House Explains Why LGBT Syrian Refugees Are a Priority*, ADVOCATE (Dec 9, 2015), <http://www.advocate.com/politics/2015/12/09/white-house-explains-why-lgbt-syrian-refugees-are-priority>.

78. *Id.*

79. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last visited Apr. 13, 2017).

80. *Id.*

81. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

82. *Id.*

showing that there have been fundamental changes in circumstances in the applicant's home state, adding an additional hurdle to the already difficult process.⁸³

Another method of acquiring asylum is to file a claim under the Convention Against Torture (CAT).⁸⁴ Filing a claim under CAT is a process by which applicants may attain asylum in the United States if they are threatened with torture upon return to their respective country.⁸⁵ Under the extremely high standards of the CAT requirements, however, an applicant must additionally demonstrate that torture will not just be likely, but rather *certain*, if they are deported.⁸⁶

The final pathway currently available for asylum seekers is through an application for withholding of removal.⁸⁷ Withholding of removal prohibits the United States from removing a person to a country where their life or freedom is threatened due to a protected status.⁸⁸ Although there is a highly beneficial aspect of acquiring withholding, the odds of arriving at this result are extremely slight. This is because in order to meet the stringent test for withholding, the applicant must demonstrate that there is a clear probability of future persecution.⁸⁹ Oftentimes, applicants are forced to scavenge records and proof of future persecution to demonstrate the likelihood that persecution will occur upon return to their country of origin, but such proof is frequently not obtainable.

These avenues, although drafted with the intent of providing assistance for asylum claims, have proven to be defective in some ways, at times even hindering assistance rather than providing it. A clear example is that of a man called Mohammad. Mohammad (a pseudonym for the asylum seeker used in interviews about his immigration situation) is a homosexual male born and raised in Iran.⁹⁰ In his twenties,

83. Michael A. Rosenhouse, Annotation, *Sufficiency of Evidence to Establish Alien's Well-Founded Fear of Persecution Entitling Alien to Status of Refugee Under § 101(a)(42)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1101(a)(42)(A))—Alleged Persecution in European and Asian Nations*, 182 A.L.R. Fed. 147 (2002).

84. Dree K. Collopy, *Crisil at the Border, Part II: Demonstrating a Credible Fear of Persecution or Torture*, 16-04 IMMIGR. BRIEFINGS 1 (2016).

85. *Id.*

86. *Id.*

87. Kurtis A. Kemper, Annotation, *Necessity and Sufficiency of Evidence Corroborating Alien's Testimony to Establish Basis for Asylum or Withholding of Removal*, 179 A.L.R. Fed. 357 (2002).

88. *Id.*

89. *Id.*

90. Mike Hudson, *Escaping Abuse Overseas*, ADVOCATE, May 24, 2017.

Mohammad was abused by a guard who later went on to expose Mohammad for homosexuality, which is punishable by death in Iran.⁹¹

Mohammad's home was searched by the government who subsequently informed Mohammad's family that their son was homosexual.⁹² After he was beaten by his father and thrown out of his home, Mohammad met an Iranian-American man and was able to flee to the United States to be with him.⁹³ Upon arrival, Mohammad promptly filed for asylum.⁹⁴

The requirement of proof of past or fear of future persecution is often a difficult hurdle for applicants, particularly LGBT individuals like Mohammad, because countries with a history of discriminating against LGBT individuals often do not keep records of such discrimination and persecution.⁹⁵ Obtaining proof of such incidents is at times dangerous, if not impossible. Furthermore, for many, being a member of the LGBT community has always been something to be kept secret. In countries that discriminate based on sexuality, having a status as a homosexual or transgender individual is a source of embarrassment, punishment, and degradation. The asylum process ignores the psychological trauma these individuals suffer as a result of this stigma.

The lack of adequate training of sexual orientation asylum judges is clear when reading Mohammad's story. Mohammad was forced to delve deep into his history to prove to the asylum judge that he was indeed a homosexual in a country known for persecution of this social group.⁹⁶ In his hearing, the judge asked Mohammad how she was supposed to believe he was gay when he was not feminine in any way.⁹⁷ Ultimately, Mohammad was denied asylum due to the fact that the judge found he would be capable of hiding his sexuality well enough to evade persecution.⁹⁸

The lack of understanding of homosexuality in the judiciary had the result of requiring Mohammad to prove his "level" of homosexuality to the asylum judge. Thankfully, attorneys with the Gay, Lesbian, Bisexual, and Transgender Workgroup of Holland & Knight, L.L.P. took Mohammad's case pro bono and appealed for the government to reopen

91. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY 135, 144-45 (2006).

92. *Id.* at 145.

93. *Id.*

94. *Id.*

95. *Id.* at 144-45.

96. *See id.*

97. *Id.*

98. *Id.* at 146.

the case.⁹⁹ After a year of negotiations, Mohammad was able to obtain evidence, including affidavits from friends, organizations, and his boyfriend, to satisfy the Department of Homeland Security's concern regarding the certainty of his homosexuality.¹⁰⁰

In order to begin correcting the downfalls in the procedure for granting asylum to LGBT individuals, the ignorance of many in the justice system about what it means to be part of the LGBT community first needs to be addressed. Mohammad's case only highlights the stereotypes many members of the LGBT community face when applying for asylum. In addition to proving persecution, or fear of future persecution, individuals seeking asylum in the United States must also prove how gay or lesbian they really are.

To provide better recourse for LGBT individuals feeling persecution, the process of obtaining asylum should not be limited to applications coming solely from within the United States. I propose a system that utilizes the capabilities of the Internet, whereby individuals who are threatened daily for their LGBT status in their own countries may apply for asylum while still overseas. Simultaneously, when someone applies for asylum from overseas through this method, a member of the United States Citizenship and Immigration Services, or perhaps a nonprofit organization, could then begin investigating whether an application merited further steps toward granting the applicant legal status, which could end in allowing them to reach United States soil.

Of course, this would be no easy task. Congress would have to change the laws to allow for this to happen and to approve a higher budget, which in today's political climate is, unfortunately, improbable. Additionally, today's growing anti-immigration sentiment and xenophobia, principally toward those fleeing Muslim-majority nations, makes much needed reform extremely difficult to achieve.

It is my hope, however, that the pendulum will once again swing in the direction of tolerance and acceptance and toward standing up for those being persecuted overseas for their religion, their gender, or their membership in the LGBT community. Only then will Abraham Lincoln's vision of America be fulfilled.

99. *Id.*

100. *Id.* at 146-47.

VII. THE POSSIBLE EFFECTS OF THE EXECUTIVE ORDERS BANNING
REFUGEES FROM MUSLIM-MAJORITY COUNTRIES

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Policy and Purpose (a) . . . foreign—

. . . . Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program.¹⁰¹

President Trump's latest executive order goes on to ban all people from Syria, Iran, Libya, Venezuela, North Korea, Somalia, Sudan, and Yemen—a combined population of over 200 million people—from entering the United States.¹⁰² Although subsequently Iraq was removed and the indefinite ban as it relates to Syria was omitted, the orders' obvious effects are clear. It is also important to note that the title of the executive order did not include any country from which radicalized Muslims had actually killed Americans since September 11, 2001.¹⁰³

The orders also fail to include Muslim-majority nations that have business ties to president Trump. For example, Turkey has entered into a licensing deal with the President, allowing his name to be used on two luxury buildings, earning him approximately \$5 million.¹⁰⁴ In Indonesia and the United Arab Emirates, luxury villas, golf courses, and buildings sporting the Trump brand are currently in the midst of construction.¹⁰⁵ President Trump also possesses positions in Egyptian businesses, such as Trump Marks Egypt and Trump Marks Egypt LLC.¹⁰⁶ Because Indonesia

101. Exec. Order No. 13,780, 3 C.F.R. § 1 (2017).

102. Jeremy Diamond, *Trump's Latest Executive Order*, CNN, <http://edition.cnn.com/2017/01/27/politics/donald-trump-refugees-executive-order/> (Jan 29, 2017). This article reflected on the first executive order including Iraq in its ban, which has since been removed in the subsequent executive order. The number is now 185 in combined population of the countries banned.

103. Greg Myre, *Trump's Immigration Freeze Omits Those Linked to Deadly Attacks in the US*, NPR (Jan. 27, 2017), <https://www.npr.org/sections/parallels/2017/01/27/511861645/trumps-immigration-freeze-omits-those-linked-to-deadly-attacks-in-u-s>.

104. Chris Sommerfeldt, *President Trump's Muslim Ban Excludes Countries Linked to His Sprawling Business Empire*, DAILY NEWS (Feb. 1, 2017), <http://www.nydailynews.com/news/politics/trump-muslim-ban-excludes-countries-linked-businesses-article-1.2957956>.

105. *Id.*

106. *Id.*

is the world's largest Muslim-majority nation, and because the fifteen individuals implicated in the September 11th attacks were from Saudi Arabia, President Trump's anti-Muslim rhetoric against specific countries appears to be highly motivated by his business interests rather than a conscientious or coordinated attempt at preventing terrorism.¹⁰⁷

In December 2017, the Supreme Court issued a terse order allowing the travel ban to go into effect while legal challenges are still pending.¹⁰⁸ The administration argued the final version was different from the other two in that it included other countries that are not Muslim-majority nations and it is actually based on an "extensive worldwide review process" in attempts to broaden the order's scope and effect so as to not be exposed for what some may say is blatantly an Islamophobic-based exclusion.¹⁰⁹

This ruling followed an earlier decision from June 2017 where the Supreme Court granted the government's application for a stay of the preliminary injunction with respect to sections 6(a) and (b) of Executive Order 13,780.¹¹⁰ It agreed that the President had great leeway in determining who is allowed in the country but did limit the order in stating that it may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.¹¹¹

This order may do additional harm by negatively influencing societal sentiment toward Muslim refugees. Because this order came from the President of the United States in a time of political turmoil and when society is on high alert for terrorist acts, banning individuals from majority-Muslim countries may instill fear of the religion and of all the people who practice it in the minds of the American people. Furthermore, the order creates an excuse to practice intolerance of the Muslim community. Not only has the Muslim community been blamed for past acts of extremist groups, they are, again and again, attacked and directly punished for the acts of the terrorist group ISIL, which also targets them and is often the reason they are fleeing in the first place.¹¹²

107. *Id.*

108. Richard Gonzalez, *Supreme Court Oks Trump Travel Ban Pending Lower Court Rulings*, NAT'L PUB. RADIO (Dec. 4, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/04/568415772/supreme-court-oks-trump-travel-ban-pending-lower-court-rulings>.

109. *Id.*

110. *Id.*

111. *Id.*

112. Lauren Williams, *'This Is Not Islam': Refugees Describe Life Under ISIL in Raqqa, Syria*, AL JAZEERA (Aug. 1, 2015), <http://america.aljazeera.com/articles/2015/8/1/this-is-not-islam-refugees-describing-life-under-isil-in-raqqa-syria.html>.

VIII. INDIVIDUALS STRANDED/IN LIMBO. WHAT ARE THEY FACING AS A CONSEQUENCE OF THE ORDER? WHERE DO THEY GO NOW?

As a result of the uncertainty surrounding many aspects of the executive orders, some individuals who have already started the long process of relocating to the United States have found themselves in a type of purgatory. Unsure of their futures, they currently find themselves searching for hope while preparing for what could possibly be the end, at least for now, to their plans for a better life. One example is that of Alireza.

Alireza and his partner Saeed led a life together in Iran until Saeed's brother hacked his phone and attempted to blackmail him with a private video. In Iran, homosexuality is punishable by imprisonment, corporal punishment, or in some cases, execution.¹¹³ Alireza and Saeed decided the risk was too great, and that they should flee.¹¹⁴ They were able to register with the United Nations High Commissioner for Refugees and were referred to Canada.¹¹⁵ After waiting more than a year, they were told Canada was closed and they were now being referred to the United States.¹¹⁶ At first they were hopeful, but upon learning of President Trump's order, and the fact that Iran was one of the countries being barred, Saeed reported to BuzzFeed News his disappointment: "'We feel like unwanted guests,' said Saeed. 'Whatever I may do, however good a person I may be—a good citizen—the hosts still do not like me.'"¹¹⁷

Meanwhile, Ramtin Zigorat was arrested and sentenced to death in Iran in 2013 for failing to renounce his sexual orientation and LGBT activism.¹¹⁸ Zigorat was able to escape to Turkey, and once there, quickly registered with the United Nation's refugee agency, which referred him to the United States for resettlement.¹¹⁹ After the travel ban went into effect, Zigorat's second interview for a U.S. visa was canceled without a given

113. Anne Penketh, *Brutal Land Where Homosexuality Is Punishable by Death*, INDEPENDENT (Mar. 6, 2008), <https://www.independent.co.uk/news/world/middle-east/brutal-land-where-homosexuality-is-punishable-by-death-792057.html>.

114. J. Lester Feder, Soudéh Rad, & Bradley Secker, *These Are the LGBT Refugees Trapped by Donald Trump's Immigration Order*, BUZZFEED (Jan. 29, 2017), https://www.buzzfeed.com/lesterfeder/these-lgbt-refugees-may-be-trapped-by-donald-trumps-immigrat?utm_term=.wldzNWmVz#.ik9RByAVR.

115. *Id.*

116. *Id.*

117. *Id.*

118. Nina Dos Santos, *US Travel Ban Leaves LGBT Refugees in Limbo*, CNN (Mar. 7 2017), <http://edition.cnn.com/2017/03/07/world/trump-ban-blocks-gay-iranian-refugee/>.

119. *Id.*

reason. He remains in Turkey today. Zigorat has not lost hope and checks his immigration status daily.¹²⁰

These are just two of the many instances where individuals seeking shelter within the United States have been left to wonder about their fate. With the most recent Supreme Court decision, however, it seems as if for now the only certainty is that they just may have to continue to wait on the sidelines or risk their lives attempting to cross the sea with their faith put in smugglers.

IX. AN UPDATE: THE COURT BATTLE OVER THE EXECUTIVE ORDER ON IMMIGRATION

Three days after President Trump signed the first order, the State of Washington filed suit in the United States District Court for the Western District of Washington challenging its constitutionality.¹²¹ Washington claimed that the order unconstitutionally restrained its residents abroad, splitting families, restricting travel, and damaging the state's economy and public universities in violation of the First and Fifth Amendments, the Immigration and National Security Act, the Foreign Affairs Reform and Reconstructing Act, the Religious Freedom Restoration Act, and the Administrative Procedure Act.¹²² Washington concluded in its reasoning that the true intent of the order was not to protect the nation from terror attacks but to enact what was essentially a "Muslim Ban."¹²³

As a result, on February 3, 2017, Judge James L. Robart, a federal judge in the United States District Court for the Western District of Washington, issued a temporary halt to President Trump's executive order banning citizens of the seven Muslim-majority countries from entering the United States.¹²⁴ In a temporary restraining order, a judge need not actually rule on the legality of the order. A judge must however, find that (1) the plaintiffs were likely to succeed at a later date, (2) people from those states would suffer irreparable harm if the ban continued, and (3) blocking the order was in the public interest.¹²⁵

On February 4, 2017, one day after Judge Robart issued his decision, the Government filed a notice of appeal and sought an

120. *Id.*

121. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017).

122. *Id.* at *5.

123. *Id.* at *25.

124. *Id.* at *3.

125. Ted Robbins, *Who Is Judge James L. Robart and Why Did He Block Trump's Immigration Order?*, NPR (Feb. 4, 2017), <http://www.npr.org/2017/02/04/513446463/who-is-judge-james-l-robart-and-why-did-he-block-trumps-immigration-order>.

emergency stay in the United States Court of Appeals for the Ninth Circuit, asking for an immediate stay of the order. The court denied the emergency motion for a stay pending appeal.¹²⁶ The three-panel court then heard the arguments and issued a decision allowing President Trump's travel ban to remain blocked.¹²⁷ "The government has pointed to no evidence that any alien from any of the countries named in the order has perpetrated a terrorist attack in the United States," the judges wrote.¹²⁸ The court found that, although the public has an interest in national security, the public also has an interest in free travel, avoiding separation of families, and in freedom from discrimination.¹²⁹

Removing Iraq from the list in the second executive order did little for the Trump administration in United States courts. On March 8, 2017, Hawaii became the first state to challenge President Trump's revised executive order.¹³⁰ The court found that the order likely violates the Establishment Clause of the United States Constitution by disfavoring Muslims.¹³¹ Since then, Venezuela, Chad, and North Korea have been added to list of nations affected by the travel ban.¹³² Iraq remains omitted and so does the indefinite ban on Syria.¹³³ As mentioned previously, the Supreme Court has stayed the injunctions and allowed the final version of the executive order to remain in place.¹³⁴

However, not all hope is lost. There are two arguments against the order the Supreme Court has asked the parties to address.¹³⁵ The first rests on the First Amendment and its ban on policies respecting an establishment of religion. The court may find that through the ban and President Trump's remarks, the Government is discriminating against an entire religion in violation of the First Amendment. The second argument the Court has asked the parties to address is whether the order is not authorized under federal immigration laws.¹³⁶ This argument relies

126. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

127. *Id.* at 1169.

128. *Id.* at 1168.

129. *Id.* at 1169.

130. *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017).

131. *Id.* at 1134.

132. Kevin Lui, *President Trump Added Three New Countries to His Travel Ban. Here Is What We Know About Them*, TIME (Sept. 25, 2017), <http://time.com/4955280/donald-trump-new-travel-ban-what-to-know/>.

133. Adam Liptan, *Trump Administration Asks Supreme Court to Revive Travel Ban*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/us/politics/trump-travel-ban-supreme-court.html>.

134. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

135. S.M., *Donald Trump's Travel Ban Heads Back to the Supreme Court*, ECONOMIST (Jan. 23, 2018), <https://www.economist.com/blogs/democracyinamerica/2018/01/travelling-ban>.

136. *Id.*

on the position that while the President does have the authority to temporarily restrict some individuals, only Congress has the power to issue such broad restrictions as those outlined in the order.¹³⁷ While the Supreme Court is still set to decide on the lawfulness of the third order, it seems as though, at least for now, asylum and refugee seekers from the countries affected will have to wait a bit longer for their chance at the last, best place on earth.

137. *Id.*