Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity

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I. INTRODUCTION

In the past fifteen years, there have been great advances in the laws protecting lesbian, gay, bisexual, and transgender (LGBT) immigrants seeking asylum in the United States. Asylum law has increasingly recognized LGBT individuals as a social group deserving of protection based on persecution abroad.[1] The United States Supreme Court's 2003 decision in *Lawrence v. Texas* heralded similar advances in U.S. constitutional law.[2] The Court in *Lawrence* found a Texas statute criminalizing consensual same-sex sodomy unconstitutional on due process grounds.[3] *Lawrence* explicitly overturned *Bowers v. Hardwick*, a much-criticized decision upholding a similar Georgia statute, which had

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1. *See In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 820-24 (B.I.A. 1990) (recognizing that a gay man targeted because of his identity was persecuted based on membership in a particular social group); Hernandez-Montiel v. INS, 225 F.3d 1084, 1087, 1091-99 (9th Cir. 2000) (recognizing that a gay man targeted because of his female sexual identity was persecuted based on membership in a particular social group).

2. *See* 539 U.S. 558, 558-79 (2003).

3. *See id.* at 573-79.

been used to justify decades of blatant discrimination against the LGBT community.[4] *Lawrence* also gave LGBT advocates hope that many statutes that discriminated against gays and lesbians would now be held unconstitutional.[5] Immigrant rights advocates could also expect that asylum protections could continue to advance and offer protection to LGBT asylum seekers persecuted in countries with similar statutory schemes as those struck down by the Court in *Lawrence*.

However, after *Lawrence*, U.S. courts have continued to uphold statutes that discriminate against gays and lesbians, particularly statutes that specifically target homosexual sodomy.[6] In one of the most stunning decisions distinguishing *Lawrence*, the Kansas Court of Appeals, in January 2004, upheld the criminal sodomy conviction of Matthew Limon, a mentally disabled eighteen-year-old man.[7] Limon had performed oral sex on a fourteen-year-old boy while both were living at a school for mentally disabled youth.[8] Limon was convicted of sodomy and received a sentence of seventeen years in prison, a sentence fifteen times longer than it would have been had he performed the same act on a girl of the same age.[9]

Limon's vastly disproportionate sentence is strikingly similar to and emblematic of persecution suffered by gays and lesbians in some foreign countries, presenting the ironic possibility that Limon might be eligible for asylum in the United States had his conviction occurred in another country.[10] In this light, developments in U.S. constitutional jurisprudence appear to lag behind those in asylum law. A closer look, however, reveals that limitations in constitutional law are also reflected in the asylum laws.

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4. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

5. *See* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1400-01 (2004) (referencing Lambda Legal and ACLU press releases); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1104 (2004) ("In my view, the *Lawrence* opinion is in perfect tune with its times, articulating a new principle of equal liberty and resonating with a neoliberal political vision of civil rights.").

6. *See infra* Part IV.

7. *See* State v. Limon, 83 P.3d 229, 232-33 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22, 40-41 (Kan. 2005).

8. *See id.* at 369-70.

9. *See id.* at 390 (Pierron, J., dissenting).

10. *See* HEATHER MCCLURE, CHRISTOPHER NUGENT & LAVI SOLOWAY, MIDWEST HUMAN RIGHTS P'SHIP FOR SEXUAL ORIENTATION & LESBIAN & GAY IMMIGRATION RIGHTS TASK FORCE, PREPARING SEXUAL ORIENTATION-BASED ASYLUM CLAIMS: A HANDBOOK FOR ADVOCATES AND ASYLUM SEEKERS 29 (2d ed. 2000) [hereinafter HANDBOOK], *available at* http://www.immigrationequality.org/uploadedfiles/handbookpart1.pdf.

Commentators opposed to gay rights are concerned about this relationship between asylum law and constitutional law—particularly given the rapid expansion of protections granted to LGBT asylum seekers. Michael Scaperlanda has written that immigration law, because of its administrative setting in the "'backwaters' of American jurisprudence," allows gay rights advocates to build "a body of precedent accepting and protective of the homosexual lifestyle," with no answer from the other "side of the debate."[11] Scaperlanda argues that the asylum arena, "with its combination of sympathetic facts and expansive possibilities for statutory interpretation" and with no "party or amicus assigned to represent 'millennia of moral teaching'" permits gay rights attorneys to launch a "peripheral and indirect assault on this nation's family-oriented immigration policy, which favors heterosexual couples that enter into marriage."[12]

This Article disputes Scaperlanda's theory that asylum law is sympathetic to all LGBT asylum applicants, and also addresses the fear that drives his article—the assumption that advancements in asylum law will inevitably affect constitutional law. An analysis of the current state of asylum protections for LGBT applicants, juxtaposed against *Lawrence* and recent post-*Lawrence* cases, reveals that the persistence of U.S. regulatory schemes that discriminate against homosexuals based on conduct could limit the protections granted in the asylum context. Instead of asylum law influencing constitutional law, as Scaperlanda suggests, this Article argues the inverse relationship is more likely, and that the limits of *Lawrence* could slow advances in asylum law unless the Supreme Court acts to correct lower courts' current interpretation of the case.

Part II of this Article reviews the current state of the asylum law for LGBT immigrants. Part III then compares Scaperlanda's theories about asylum law to this reality. Part IV analyzes the Supreme Court's holding in *Lawrence* and recent cases interpreting and applying that decision. Part V suggests that both the asylum law and the constitutional law are limited by courts' insistence that governments should be allowed to regulate sexual conduct, regardless of the discriminatory impact of that regulation on the LGBT community. This Part places the analysis in the context of other commentators' reviews of the rhetorical and legal conflation of homosexual conduct and identity. In conclusion, this Article posits that while Scaperlanda's theory is largely based on an

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11. Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 483, 500, 513 (2002) (citation omitted).

12. *Id.* at 493, 500.

inaccurate view of the immigration system and its potential influence on constitutional law, his article does reveal a possible strategy for LGBT advocates seeking to expand rights here and abroad.

II. CURRENT STATE OF ASYLUM LAW FOR LGBT ASYLUM SEEKERS

A. Background on Asylum Law

Until 1990, lesbian and gay immigrants were banned from immigrating to the United States.[13] Congress repealed the ban, located in section 212(a)(4) of the Immigration and Nationality Act (INA) with the Immigration Act of 1990.[14] The ban had previously been a part of the Immigration Act of 1917, which excluded the immigration of people with mental illness.[15] In 1965 Congress explicitly added "sexual deviation" to the list of excludable immigrants,[16] and in 1967 the Supreme Court upheld the ban as applied to gay and lesbian immigrants.[17] But in 1979, the U.S. Public Health Service indicated that the agency would no longer certify homosexuals as "psychopathic personalities."[18] This development paved the way for the eventual repeal of the ban in the Immigration Act of 1990.[19]

Immigrants seeking asylum in the United States based on persecution or torture in their home country apply for asylum status

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13. 8 U.S.C.A. § 1182(a)(4) (1990), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990).

14. *See id.*; Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 619 n.79 (1993); Alan G. Bennett, Note, *The "Cure" that Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279, 279-80, 282 (1999); Jin S. Park, Comment, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1118-19 (1995).

15. *See* Bennett, *supra* note 14, at 279-80; Park, *supra* note 14, at 1118. Even before 1917, homosexuals were excluded as "public charges"—people unlikely to be able to care for themselves. *See* William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1047 (1997). However, in 1917, the Solicitor of Labor, the official in charge of immigration regulation at the time, ruled that "moral perverts" were not "public charges" unless they were paupers. *Id.* at 1047-48. Congress responded by excluding people with "constitutional psychopathic inferiority" in the Immigration Act of 1917, which was interpreted to include sexual deviates. *See id.* at 1046 (citing the Immigration Act of 1917, § 3, 39 Stat. 874, 875-78 (1917)).

16. *See* Immigration and Nationality Act, amendments, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965); Park, *supra* note 14, at 1118-19.

17. *See* Boutilier v. INS, 387 U.S. 118, 118-23 (1967); Goldberg, *supra* note 14, at 619 n.79; Park, *supra* note 14, at 1118-19.

18. *See* Rhonda Rivers, *Sexual Orientation and the Law*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 81, 88 (John C. Gonsiorek & James D. Weinrich eds., 1991); Park, *supra* note 14, at 118-19.

19. *See* Pub. L. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990); Bennett, *supra* note 14, at 280.

under section 208 of the INA.[20] The asylum applicant must show that she has a well-founded fear of persecution in her country of origin, based on past persecution or the risk of future persecution.[21] There are both subjective and objective elements to the determination of a well-founded fear.[22]

To qualify as a "refugee," the applicant must also show her persecution is based on membership in a social group.[23] This showing makes the applicant's identity as gay, lesbian, bisexual, or transgender relevant. There is no statutory definition for membership in a social group.[24] Courts have relied on the *Handbook on Procedures and Criteria for Determining Refugee Status*, produced by the United Nations, as a guide.[25] The Handbook provides that a "'particular social group' 'normally comprises persons of similar background habits or social status.'"[26] As this definition does not provide much direction, the federal courts have developed different tests for membership in a particular social group for the purposes of asylum eligibility.[27] The Board of Immigration Appeals (BIA) first developed a test based on an applicant's immutable characteristics[28] and later held that this "immutability test" was a necessary, but not a sufficient condition, and that other factors must be considered.[29] The United States Court of Appeals for the Ninth

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20. *See* INA § 208(a), 8 U.S.C.A. § 1158(a) (2005).

21. *See* INA § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

22. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987) (holding that a demonstration of "well-founded fear" did not require an asylum seeker to show it was more likely than not she would be persecuted, but that evidence of subjective state of mind could also be presented); HANDBOOK, *supra* note 10, at 26-27.

23. *See* 8 U.S.C.A. § 1101(a)(42)(A). Asylum eligibility may also be based on "race, religion, nationality . . . or political opinion." *Id.* Persecution on account of membership in a social group is most applicable to LGBT asylum seekers. *See id.* § 1158(b)(1)(B).

24. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575-76 (9th Cir. 1986).

25. *See id.* at 1576.

26. *Id.*

27. *See* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

28. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (holding that being a taxi driver in El Salvador who had refused to participate in guerrilla-sponsored work stoppages did not constitute membership in a particular social group). The Board stated:

> [W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id.

29. *See In re* R-A., 22 I. & N. Dec. 906, 907, 912-28 (B.I.A. 1999) (holding that Guatemalan women who are abused by their partners do not constitute a social group). This case was subsequently vacated by the Attorney General and was stayed pending consideration of

Circuit articulated another test based on association.[30] In 2000, the Department of Justice (DOJ) issued a proposed rule that employed both of these tests as factors for consideration.[31] The United States Court of Appeals for the Second Circuit has held that a body characterized as a social group must share characteristics that are recognizable to persecutors and others.[32]

B. LGBT as Social Group

After Congress lifted the ban on gay and lesbian immigrants, commentators pointed out that LGBT individuals theoretically met the various tests used to establish membership in a social group.[33] A person who is gay, lesbian, bisexual, or transgender certainly has "a common characteristic or impulse fundamental to identity."[34] In addition, "out" gays and lesbians can probably demonstrate the "association" necessary to meet the Ninth Circuit's alternative test as "their identities become known publicly as a result of close and voluntary association with other lesbians or gay men, or by self-identification necessary to meet other lesbians or gay men."[35]

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proposed regulations that would state that gender can be the basis of membership in a particular social group. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588-98 (Dec. 7, 2000) (codified at 8 C.F.R. pt. 208); *see also* Aguirre-Cervantes v. INS, 242 F.3d 1169, 1172 (9th Cir. 2001), *vacated for rehearing en banc*, 270 F.3d 794 (9th Cir. 2001) (holding that a family could be considered a particular social group where a woman had been abused by her father, who had abused other members of the family).

30. *See Sanchez-Trujillo*, 801 F.2d at 1576 (holding that a class of young, working class, urban males of military age was not a particular social group). The court stated:

> [T]he phrase '*particular social* group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

Id. This case initiated a split between the associational and immutable characteristics tests, but in 2000, the Ninth Circuit decided the associational test was an alternative to, not a rejection of, the immutable characteristic test. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

31. *See* Asylum and Withholding Definitions, 65 Fed. Reg. at 76,593-95, 76,598.

32. *See* Gomez v. INS, 947 F.2d 660, 664-65 (2d Cir. 1991) (holding that a woman who had been battered and raped by Salvadoran guerillas was not a member of a particular social group because she could not demonstrate recognizable characteristics common to other women with similar experiences); Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 240 (2d Cir. 1992) (denying asylum to a Yemeni Muslim man with a conviction for homicide who would face a death sentence and stating that the characteristics of being an expatriate or poor Yemeni Muslim were insufficient to establish membership in a social group).

33. *See* Goldberg, *supra* note 14, at 611-12.

34. *Id.* at 612.

35. *Id.*

However, the associational test, the Second Circuit's requirement of a recognizable characteristic, and the DOJ's proposed rule incorporating these factors, could pose potential problems for gays and lesbians who are not "out" publicly but have nonetheless been persecuted on the basis of their homosexual conduct. In addition, as discussed below, the persistence of discrimination based on homosexual conduct in the United States could make asylum claims difficult for people immigrating from countries with criminal sanctions for conduct, but not identity.

Despite these potential problems, since 1990 U.S. asylum law has recognized LGBT individuals as members of a social group. Soon after Congress passed the Immigration Act of 1990, LGBT immigrants began to present asylum claims.[36] *Pitcherskaia v. INS* involved a Russian lesbian who endured police-enforced psychiatric treatment because of her sexual identity.[37] The BIA denied her asylum application, noting that the Russian government had not persecuted her because the government's intent in administering the "treatment" was to "cure" and not to "harm."[38] Furthermore, because Russia had repealed its antisodomy law since Pitcherskaia had left the country, the BIA found she was unlikely to be subjected to such treatment in the future.[39]

The Ninth Circuit held that the BIA had imposed an erroneous requirement of subjective government intent to persecute, stating that "[t]he fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or indeed, remove the conduct from the statutory definition of persecution."[40] The court held that the definition of persecution is objective, constituting "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive," and remanded the case to the BIA for reconsideration.[41]

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36. *See* Park, *supra* note 14, at 1119 n.18. In 1990, Lambda Legal Defense and Education Fund initiated three cases on behalf of Alla Pitcherskaia from Russia, A.T. from Iran, and Jacobo Rivas from Nicaragua. *See id.*

37. *See* 118 F.3d 641, 644 (9th Cir. 1997); Bennett, *supra* note 14, at 296-96.

38. *See Pitcherskaia*, 118 F.3d at 645; Bennett, *supra* note 14, at 298-99.

39. *See* Bennett, *supra* note 14, at 299.

40. *Pitcherskaia*, 118 F.3d at 648.

41. *Id.* at 647, 648 (quoting Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997)). While *Pitcherskaia* establishes an objective standard for persecution in the Ninth Circuit, cases in the United States Court of Appeals for the Fifth and Seventh Circuits impose a requirement of punitive intent. *See* Robert C. Leitner, Comment, *A Flawed System Exposed: The Immigration System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 690 (2004); *see also* Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994) (denying asylum to a Palestinian from Saudi Arabia and stating that "[w]hile the INA does not provide a precise definition of persecution, we have construed the term as requiring 'a showing by the alien that harm or suffering will be inflicted upon [her] in order to punish [her] for possessing a belief or characteristic a persecutor sought to

The BIA first recognized homosexuality as "membership in a social group" for the purposes of an asylum claim in the case of *In re Toboso-Alfonso*.[42] Toboso-Alfonso, a Cuban, had been forced to register as a homosexual and appear for regular hearings in court because of his identity.[43] He had also been detained and sent to a forced labor camp for sixty days as punishment for being homosexual.[44] The BIA noted that "[t]he government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual."[45] Toboso-Alfonso was eventually told he should leave Cuba or he would be incarcerated for four years for being a homosexual.[46] The BIA affirmed the immigration judge's decision that Toboso-Alfonso's persecution was due to his membership in a particular social group: homosexuals.[47] In 1994, Attorney General Janet Reno issued a directive to immigration judges to adopt *Toboso-Alfonso* as precedent.[48] The issuance of this order was an important step toward establishing that LGBT immigrants can meet the "membership in a social group" requirement, but the precedent is not binding on circuit courts that have not yet decided the issue.[49]

In 2000, the Ninth Circuit expanded the social group definition to include transgender immigrants in *Hernandez-Montiel v. INS*.[50] Hernandez-Montiel was a gay man from Mexico who began dressing and behaving as a woman at age twelve.[51] He was repeatedly detained, strip-searched, and sexually assaulted by the police and received no protection when attacked by strangers.[52] His family attempted to "cure" him of his

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overcome'"); Sivaainkaran v. INS, 972 F.2d 161, 164 n.2 (7th Cir. 1992) (denying asylum to a Tamil Hindu and stating that "'[p]ersecution' is not defined in the Act, but we have described it as 'punishment' or 'the infliction of harm' for political, religious, or other reasons that are offensive").

42. *See* 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

43. *See id.* at 820-21.

44. *See id.* at 821.

45. *Id.*

46. *See id.*

47. *See id.* at 822.

48. *See* Park, *supra* note 14, at 1120-21. The Attorney General declared the case "precedent in all proceedings involving the same issue or issues." Att'y Gen. Order No. 1895-94 (June 19, 1994).

49. *See* HANDBOOK, *supra* note 10, at 37. *Compare In re Tenorio*, No. A72-093-558 (Immigration Ct. July 26, 1993), *cited in* 70 Interpreter Releases 1100-01 (1993) (following *Toboso-Alfonso*) *with* Pitcherskaia v. INS, 118 F.3d 641, 647-48 (9th Cir. 1997) (refusing to follow *Toboso-Alfonso*).

50. *See* 225 F.3d 1084, 1099 (9th Cir. 2000).

51. *See id.* at 1087.

52. *See id.* at 1088.

sexual orientation by enrolling him in a counseling program.[53] He sought asylum in the United States, but an immigration judge denied Hernandez-Montiel's application, stating that he had not established that his persecution was "on account of [membership in] a particular social group," defining the potential group as homosexual males who dress as women.[54] Because the immigration judge viewed dressing as a woman as a choice, he ruled that the quality upon which Hernandez-Montiel's persecution was based was not "immutable," as the law required.[55] The BIA agreed and dismissed the board appeal.[56]

On appeal, the Ninth Circuit reviewed the circuit split on the definition of membership in a social group.[57] The court acknowledged itself as the "only circuit to suggest a 'voluntary associational relationship' requirement," a requirement conflicting with the "immutability" requirement accepted by the majority of other circuits.[58] The court then revised the definition of social group, defining it as "[a group] united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[59]

The court then went on to apply this definition to Hernandez-Montiel's case.[60] First, the court acknowledged that sexual identity had been recognized as a particular social group for the purposes of asylum claims, citing *Toboso-Alfonso* and *In re Tenorio*.[61] Specifying Hernandez-Montiel's social group as "gay men with female sexual identities in Mexico," the court held that the BIA erred in its definition of the social group by emphasizing that persecution of individuals like Hernandez-Montiel in Mexico was based on their choice of dress.[62] Instead, the court stated that "this case is about sexual identity, not fashion."[63] Hernandez-Montiel, the court held, was a member of a

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53. *See id.*
54. *Id.* at 1089.
55. *See id.*
56. *See id.* at 1089-90.
57. *See id.* at 1091-93; Michael G. Daugherty, Note, *The Ninth Circuit, the BIA, and the INS: The Shifting State of the Particular Social Group Definition in the Ninth Circuit and Its Impact on Pending and Future Cases*, 41 BRANDEIS L.J. 631, 650 (2003).
58. *Hernandez-Montiel*, 225 F.3d at 1092 (referencing the court's holding in Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)). *But see In re* Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).
59. *Hernandez-Montiel*, 225 F.3d at 1093.
60. *See id.* at 1093-99.
61. *See id.* at 1094.
62. *Id.* at 1094, 1095-96.
63. *Id.* at 1096.

particular social group within the definition of the asylum law, and he had established that he was persecuted on account of that membership.[64] The Ninth Circuit's holding resulted in a more consistent case law definition of "membership in a social group" across the country and established that transgender immigrants could demonstrate membership in a social group.[65] In addition, the decision "removed a barrier to future social group claims that lack a voluntary associational relationship."[66]

From 1996 to 2003, over sixty LGBT asylum seekers were granted asylum.[67] HIV-positive immigrants have also begun to receive asylum protection.[68] Some recent cases indicate that the evolution of the law in this area has expanded the asylum possibilities for LGBT immigrants. For example, in *Amanfi v. Ashcroft*, the United States Court of Appeals for the Third Circuit indicated that an immigrant could demonstrate persecution based on membership in a social group because of his or her *imputed* status as homosexual.[69] The concept of imputed political opinion has been recognized by both the BIA and the Attorney General as a ground for group membership.[70] A proposed rule would officially incorporate this theory, adding that, in demonstrating that a persecutor acted on account of membership in a particular social group, an asylum applicant can also show persecution "on account of what the persecutor

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64. *See id.* at 1096-99.

65. *See* Fatima Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?*, 12 HASTINGS WOMEN'S L.J. 387, 404-10 (2001) (describing cases brought on behalf of transgendered asylum seekers from Pakistan, Iraq, Egypt, and Nicaragua).

66. Daugherty, *supra* note 57, at 650.

67. *See* Leitner, *supra* note 41, at 687 (listing countries of origin: Brazil, Chile, China, Colombia, Eritrea, Ethiopia, Iran, Lebanon, Mexico, Pakistan, Romania, Russia, Singapore, Togo, Turkey, Venezuela, and others).

68. There is a statutory ban excluding HIV-positive immigrants. *See* 8 U.S.C. § 1182(a)(1)(A)(i); HANDBOOK, *supra* note 10, at 37-38. *But see* Dannae Delgado Stempniak, Comment, *Seeking Asylum for HIV-Positive Aliens Based on Membership in a Persecuted Social Group: An Alternative to Overturning the United States' Exclusion of HIV-Positive Aliens from Immigration*, 24 S. ILL. U. L.J. 121, n.2 (1999) (arguing that the asylum process can be used to circumvent the ban and listing cases recognizing HIV-positive asylum seekers as members of persecuted social groups from Brazil, Malawi, and Togo).

69. *See* 328 F.3d 719, 721-22 (3d Cir. 2003).

70. *See id.* at 729; Bolanos-Hernandez v. INS, 767 F.2d 1277, 1280-88 (9th Cir. 1984) (holding that an applicant's refusal to collaborate with Salvadoran guerillas demonstrated political opinion). *But see* INS v. Elias-Zacarias, 502 U.S. 478, 482-84 (1992) (holding that a Guatemalan man who had refused to fight with the guerillas because he wanted to remain neutral had not established that he would be persecuted based on his political opinion). *But cf.* Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 584 & nn.166-67 (1996) (arguing that *Elias-Zacarias* left open the doctrine of imputed political opinion).

perceives to be the applicant's . . . membership in a particular social group."[71]

Amanfi argued that this theory should apply to his case because he was persecuted by Ghanaian government officials who thought he was homosexual.[72] The BIA denied his application, stating that Amanfi's theory of imputed membership in a social group was without legal precedent.[73] The Third Circuit disagreed and noted that the BIA had issued at least two decisions contradicting its rulings in Amanfi's case, establishing that "[p]ersecution for 'imputed grounds' . . . can satisfy the 'refugee' definition."[74] The court therefore held that "persecution 'on account of' membership in a social group . . . includes what the persecutor perceives to be the applicant's membership in a social group."[75] This ruling provides the possibility of protection for individuals persecuted because of their *perceived* homosexual identity.

A recent Ninth Circuit case also expands protections for LGBT immigrants seeking asylum. In *Reyes-Reyes v. Ashcroft*, the court overturned the removal order of a transgender asylum applicant from El Salvador.[76] Reyes-Reyes had filed his asylum application after the expiration of the one-year deadline and was therefore held ineligible for that form of relief.[77] However, the time constraint did not bar Reyes-Reyes from relief under two other statutes for asylum applicants: (1) withholding of removal under the Convention Against Torture and (2) withholding of removal under 8 U.S.C. § 1231(b)(3)(A).[78] The court remanded the BIA's denial of these latter forms of relief, holding that the immigration judge had applied an overly stringent test for state sponsorship of persecution against homosexuals, and that the BIA had erroneously accepted his ruling.[79] The court held that a previous Ninth Circuit decision established that an asylum seeker need not show that the

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71. *Amanfi*, 328 F.3d at 728 (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,597-98 (Dec. 7, 2000) (proposed rule 8 C.F.R. § 208.15(b)).

72. *See id.* at 724, 726.

73. *See id.* at 724.

74. *Id.* at 729.

75. *Id.* at 730. The court remanded the case for reconsideration by the BIA. *See id.*

76. 384 F.3d 782, 785, 789 (9th Cir. 2004).

77. *See id.* at 786-87.

78. *Id.* at 787-89. Withholding of removal occurs pursuant to INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). The provision is based on Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, which creates a mandatory prohibition against returning someone to a country in which his "life or freedom would be threatened." IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 355 (9th ed. 2004) (citing the Protocol). A grant of withholding requires a showing of a probability of harm upon return to one's home country. *See id.*

79. *See Reyes-Reyes*, 384 F.3d at 787-89.

government accepted or even knew about the torture; a showing of "willful blindness" was sufficient.[80] The decision affirmed an expansive definition of the level of state-sponsored discrimination that a prospective LGBT asylum seeker must show in order to qualify for asylum.[81]

C. Conduct vs. Identity

While protections for LGBT immigrants under the asylum law have clearly advanced well beyond the outright exclusion of gays and lesbians from immigration to the United States, some significant gaps remain. As noted, the test for "particular social group" remains unclear and could exclude some LGBT immigrants who cannot demonstrate the requisite "association" with other gays and lesbians because they have not come out publicly. As the BIA expressed in the ground-breaking case of *In re Alfonso-Toboso*, the requirement of particular membership in a particular social group focuses on identity to the exclusion of conduct. "The government's actions against [Alfonso-Toboso] were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual."[82] Currently, it is persecution based on identity, not conduct, that merits protection. As the law currently stands, an LGBT immigrant persecuted on the basis of her homosexual conduct may not be granted asylum if she does not sufficiently identify as LGBT or if her persecution is rooted in laws regulating sexual activity rather than focusing on sexual identity.[83]

In addition, the relevance of discriminatory regulation of sexual activity in the United States minimizes the possibility that immigrants persecuted under similar regulatory schemes abroad will receive refuge

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80. *Id.* at 787 (quoting Zheng v. Ashcroft, 332 F.3d 1186, 1194-95 (9th Cir. 2003)). In traditional asylum claims, the government is the persecutor, but persecution by groups the government is unable or unwilling to control is also recognized. *See* HANDBOOK, *supra* note 10, at 10, 18, 26, 32-33. If the persecutor is nongovernmental, the asylum seeker must also show that he or she cannot resettle to another region in the country. *See id.* at 34-35.

81. *See Reyes-Reyes*, 384 F.3d at 787.

82. 20 I. & N. Dec. 819, 821 (B.I.A. 1990).

83. *See* Leitner, *supra* note 41, at 693 ("The overruling of *Bowers v. Hardwick* by the decision in *Lawrence v. Texas* obliterates the argument that a gay applicant could not base an asylum claim on a prosecution for sodomy in another country because the United States itself permits the criminalization of sodomy. . . . As for the ability of an alien to secure asylum who does not identify as lesbian and lives very discreetly, much would depend on her ability to cast herself as a member of a particular social group, homosexual or otherwise, that is subjected to persecution. Given the lack of consistency among the various circuit courts and the BIA, the outcome of her claim would be uncertain." (footnotes omitted)).

here. After the Supreme Court upheld criminal sodomy laws in *Bowers v. Hardwick*, advocates developed arguments in anticipation of the possibility that LGBT asylum applicants persecuted overseas based on homosexual conduct would be denied asylum because the United States had similar discriminatory laws.[84] Arguments such as these limited *Bowers* to the narrow holding that consensual homosexual sex is not covered by the due process right to privacy, a holding "largely irrelevant to the discussion of whether lesbians and gay men are eligible for asylum."[85] Relying on the Supreme Court's holding in *Romer v. Evans*,[86] some have argued that "*Romer* may be invoked to distinguish *Hardwick* as more of a gay rights privacy case and [to] show that sodomy statutes targeting homosexuals as a class chill[] not only sexual conduct but, more importantly, their identity and political participation, thereby substantiating a claim of prosecution as persecution."[87] In line with the asylum law's focus on association and identity, this argument depends on an applicant's ability to demonstrate visible, public membership in a gay and lesbian community. A person persecuted because of conduct, not identity, may have no claim.[88] This distinction echoes the treatment of LGBT individuals under constitutional law, as discussed in Parts III and IV of this Article.

III. *KULTURKAMPF IN THE BACKWATERS*

Despite these current limitations, some commentators view recent advances in asylum protections for gays and lesbians as a threat. Michael A. Scaperlanda's article, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, presents the concern that immigration cases won on behalf of gay and lesbian immigrants, particularly asylum applicants, may constitute "a body of precedent accepting and protective of the homosexual lifestyle," thereby threatening the "social, political, and moral fabric of the country."[89] In his analysis, Scaperlanda casts the government trial attorney and the immigration judge as neutral actors, with no "official role in the larger cultural context

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84. *See* Goldberg, *supra* note 14, at 620-21; HANDBOOK, *supra* note 10, at 30.

85. Goldberg, *supra* note 14, at 620.

86. *See* 517 U.S. 620, 635-36 (1996). The holding invalidated an amendment to the Colorado Constitution which would have "preclude[d] all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'" *Id.* at 620.

87. HANDBOOK, *supra* note 10, at 30.

88. *See* Leitner, *supra* note 41, at 693.

89. Scaperlanda, *supra* note 11, at 484, 513.

within which the case is adjudicated."[90] The immigrant's attorney, Scaperlanda says, can "litigate at two levels."[91] The advocate can argue that his client is eligible for asylum, and simultaneously advance "the long-term case":

> [H]e will argue that foreign laws allowing for the punishment of homosexual activity and foreign-government attempts to "cure" homosexuals are homophobic, and their prosecutions and treatments are tantamount to persecution. He will advance the argument that this "homophobia" manifested in the laws of his client's home country are as morally repugnant as racial discrimination. He will blur the distinction between sexual orientation and sexual activity.[92]

The unwitting immigration judge, then, will allow these arguments to "creep into the findings of fact and conclusions of law. . . . undermining Tradition [sic] without the benefit of being subject to [] criticism that comes from having a worthy adversary."[93]

Scaperlanda's argument depends on a distorted vision of the administrative immigration law system. He views the deportation hearing as a neutral zone. Outside of this zone is the raging culture war: the debate about gay rights and "moral" traditions. While Scaperlanda and his cohorts are left stranded outside, gay rights advocates, masquerading as immigration attorneys, are able to enter this neutral zone and infuse it with their arguments against homophobia, which, it appears to Scaperlanda at the very least, are dangerously compelling.[94]

It is true that gay, lesbian, and transgender asylum applicants have increasingly won their cases, given the advances outlined above. As Victoria Neilson, Legal Director of Immigration Equality, an advocacy organization for gay and lesbian immigrants, explained:

> Compared to other areas immigration of law, I'm shocked that LGBT asylum even exists. This is the only positive change in immigration law in many years. Sometimes, I take a step back, and I can see that this is an amazingly progressive area of the law simply because of the fact that people can stay here because they are gay.[95]

However, she went on to demonstrate the tough reality inherent in presenting LGBT asylum claims:

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90. *Id.* at 499.
91. *Id.* at 500.
92. *Id.*
93. *Id.*
94. *See id.*
95. Telephone Interview with Victoria Neilson, Legal Dir., Immigration Equal. (Nov. 29, 2004).

> But it really depends on the asylum officer and the immigration judge. You can tell from the moment you sit down. Sometimes the officers or judges are just not accepting of gay claims. On the other hand, I've had cases where the officer gives the [asylum seeker] a hug at the end of the interview.[96]

As Neilson's experience demonstrates, Scaperlanda ignores the power of institutionalized heterosexism and homophobia, which has been codified into the criminal law, the civil law, and the immigration law.[97] Government trial attorneys and immigration judges are not neutral decision-makers, but enforcers of the very brand of morality Scaperlanda discusses.[98] Rather than taking advantage of a one-sided system for political gain, immigration attorneys for LGBT asylum applicants are classic Davids, taking on the Goliath anti-immigrant, antigay U.S. government, in a last-ditch effort for a client who will likely be tortured and killed if deported.

In response to Scaperlanda's suggestion that asylum law treats LGBT applicants more favorably than does the constitutional law, Neilson responds: "Asylum law is not more generous than the constitutional law. The cases depend heavily on the facts, but the result is more random. It really depends on the adjudicator. This can be frustrating and difficult. Two different [asylum seekers] with a similar fact pattern could get vastly different results."[99] As Neilson makes clear, despite recent advances, there is no growing body of absolutely binding case law favorable to LGBT immigrants; a circuit court could explicitly reject *Toboso-Alfonso* and avoid its application in that circuit.[100]

While he ignores the reality of the practice of immigration law, Scaperlanda's main point is that, in the immigration context, courts are ignoring what he sees as a necessary distinction between homosexual identity and homosexual conduct in the law.[101] In Scaperlanda's ideal legal world, regulation based on sexual conduct should be allowed, regardless of its manifestation as discrimination based on identity.[102] Scaperlanda also questions the nature of the relationship between constitutional and asylum law.[103] His fears about immigration law's potential to become a ready weapon for LGBT advocates in the "culture

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96. *Id.*
97. *See id.*; Scaperlanda, *supra* note 11, at 500.
98. *See* Scaperlanda, *supra* note 11, at 500.
99. Telephone Interview with Victoria Neilson, *supra* note 95.
100. *See* HANDBOOK, *supra* note 10, at 37.
101. *See* Scaperlanda, *supra* note 11, at 500.
102. *See id.*
103. *See id.* at 484, 500, 513.

wars," are fueled by his "moral" commitment to the regulation and criminalization of homosexual conduct, which he believes is reflected and adequately protected in the current constitutional law, but could be eroded in the immigration context.[104]

Scaperlanda uses asylum law as an example, and criticizes the law's progression from the decision in *Toboso-Alfonso*, which recognized that a gay man targeted because of his identity was persecuted based on membership in a particular social group, to the decision *Hernandez-Montiel*, which recognized that a gay man targeted because of his *female* sexual identity was persecuted based on membership in a particular social group.[105] Scaperlanda argues that the development of the law between these two cases "blur[s] the distinction between orientation and behavior, *being* and *doing* . . . suggesting that foreign laws prohibiting homosexual behavior and foreign-government attempts to 'treat' homosexuality as a disorder are tantamount to persecution."[106] He concludes that the logical extension of the *Hernandez-Montiel* decision would be to provide asylum to "a particular social group comprised of 'men with sexual appetites for prepubescent boys.'"[107] Just as a transgendered individual is protected based on sexual identity, an immutable, fundamental characteristic, Scaperlanda says, pedophilia could be viewed as similarly immutable and "a distinct sexual orientation."[108]

Scaperlanda's slippery slope argument ignores key elements of the opinion in *Hernandez-Montiel*, in which the Ninth Circuit concluded that "[t]his case [was] about sexual identity, not fashion. [Applicant] Geovanni [was] not simply a transvestite 'who dresse[d] in clothing of the opposite sex for psychological reasons.' Rather, [he] manifest[ed] his sexual orientation by adopting gendered traits characteristically associated with women."[109] The Ninth Circuit also noted that, "[t]here [was] no evidence that Geovanni was a male prostitute."[110] These statements evidence the court's focus on protecting Hernandez-Montiel strictly because of his identity and the court's attempt to avoid what Scaperlanda fears: expanding protection of a social group to include those who may be persecuted or discriminated against because of sexual

104. *See id.*
105. *See id.* at 501-510.
106. *Id.* at 506.
107. *Id.* at 510.
108. *Id.*
109. Hernandez-Montiel v. INS, 225 F.3d 1084, 1096 (9th Cir. 2000) (citation omitted).
110. *Id.* at 1095.

conduct.[111] The distinction between identity and conduct may be tenuous, but there is no evidence that courts reviewing asylum cases are leaping to provide protections to individuals who have been persecuted because they engage in sexual conduct that is criminalized.[112]

Lessons from the field of practice are instructive. Victoria Neilson explained what actually happens when bringing a case for an asylum applicant from a country with a statutory scheme criminalizing homosexual conduct similar to those that still exist in the United States:

> It is important what the laws of a country say, but asylum officers want to see how they are actually enforced. I had a case for an asylum applicant from Morocco. There's a law on the books there saying that gay sexual conduct is illegal. But the officer wanted proof the law was enforced.[113]

Neilson's experience demonstrates that asylum officers have not yet fully accepted the arguments advocates have presented as possible answers to *Bowers*, as discussed in Part II of this Article. The mere existence of criminal sodomy laws is not enough evidence of persecution because such statutes exist here. Neilson went on to discuss how asylum claims are limited for people persecuted based on having engaged in conduct that is criminalized:

> If someone was persecuted because of sexual conduct, for example, under a public lewdness statute, you'd want to show they got a more severe sentence than a heterosexual person. Even before filing the case, you'd ask, could this happen in the [United States]? If the answer is yes, there's no asylum claim. If you could show that the police behaved inappropriately or violently while making the arrest, it may be easier to show persecution.[114]

Belying Scaperlanda's concerns, even in the asylum context, regulation of homosexual sex is still considered valid, even while such statutes discriminate against the LGBT community here or even foster persecution abroad.

IV. THE AFTERMATH OF *LAWRENCE V. TEXAS*

Scaperlanda's article preceded the Supreme Court's decision in *Lawrence v. Texas*.[115] Theoretically, *Lawrence* could help dismantle U.S. statutes regulating sexual activity that discriminate against the LGBT

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111. *See id.*

112. This is perhaps the point Scaperlanda meant to make. I discuss the legal and rhetorical conflation and separation of identity and conduct more thoroughly in Part V.

113. Telephone Interview with Victoria Neilson, *supra* note 95.

114. *Id.*

115. *See* 539 U.S. 558, 578 (2003).

community, paving the way for LGBT immigrants subject to similar statutory schemes in other countries to obtain asylum in the United States, regardless of their identities. However, subsequent cases in the lower courts demonstrate that the judiciary is unwilling to strike down statutes that regulate sexual activity, even homosexual sodomy, despite the discriminatory effect of those statutes on the LGBT community.

Lawrence held a Texas statute criminalizing consensual same-sex sodomy unconstitutional, overturning the Court's earlier and controlling decision in *Bowers v. Hardwick*, which had upheld a similar Georgia statute.[116] *Lawrence* gave hope to the LGBT-rights movement, as the decision appeared to hold that statutes discriminating against gays and lesbians, particularly those statutes based on a bare desire to regulate homosexual sexual activity, would now be found unconstitutional.[117]

Lawrence's majority opinion, authored by Justice Kennedy, did not directly address an equal protection argument, but held the statute unconstitutional on due process grounds.[118] The Court also did not articulate that any fundamental right was at issue, and did not clearly state that the right to privacy protected consensual homosexual sodomy.[119] However, the Court relied on a long line of privacy cases, and cited the liberty interest of the due process clause as its source of authority for the proposition that persons of the same sex could engage in private, consenting sexual behavior.[120] As Nan Hunter summarized the case, "the *Lawrence* opinion extends the scope of liberty under the Due Process Clause to encompass the individual's agency rights to make decisions about which avenues of sexual expression to pursue, *at least* in private between two adults not married to someone else."[121]

It is this "at least" language that signals the limits of the holding.[122] Katherine Franke has characterized *Lawrence* as relying on a "narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly

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116. *See id.* at 578-79; 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S at 578-79.

117. *See* Franke, *supra* note 5, at 1400 (citing Lambda Legal and ACLU press releases); Hunter, *supra* note 5, at 1112 ("Fornication laws are clearly now impermissible.").

118. *See Lawrence*, 539 U.S. at 574-75, 578-79. Justice O'Connor's concurrence, on the other hand, relied on the Equal Protection Clause and found the statute unconstitutional under the rational basis standards employed in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), and *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). *See id.* at 579-85 (O'Connor, J., concurring).

119. *See* Franke, *supra* note 5, at 1403-04; Hunter, *supra* note 5, at 1105-06.

120. *Lawrence*, 539 U.S. at 563-66, 578.

121. Hunter, *supra* note 5, at 1113 (emphasis added).

122. *See id.*

assumed."[123] The freedom of sexual activity protected by *Lawrence*, she writes, is "tethered to the domestic private," and therefore "leaves a wide range of homosexual and heterosexual behaviors and 'lifestyles' subject to criminalization."[124] Justice Kennedy, she argues, assumed that the sexual activity at issue in the case took place in a relationship.[125] The result, Franke argues, is that "*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo- and hetero-sex/intimacy, while at the same time rendering all other zones more dangerous for nonnormative sex."[126] She points out that *Lawrence*, rather than establishing a broad freedom to engage in consensual sexual activity, actually reinforces "different legal treatment" for people whose sexual activity may take place outside the "domestic" realm.[127]

More obvious limits of the case are explicitly articulated in the opinion. In a "disclaimer" paragraph, the Court specified:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[128]

This "disclaimer," combined with the fact that the majority declined to perform an equal protection analysis, significantly limits the power of the decision.[129] To the extent that Justice Kennedy recognized the impact of criminal sodomy laws on gays and lesbians,[130] he emphasized the stigma associated with criminal sanctions,[131] not the "mere existence of sodomy laws" and other discriminatory statutes.[132] Katherine Franke noted: "Justice Kennedy foregrounds privacy, backgrounds dignity, and rejects

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123. Franke, *supra* note 5, at 1400.

124. *Id.* at 1403, 1407 (citation omitted).

125. *See id.* at 1407 (citing *Lawrence* and attributing this analysis to Kendall Thomas, Remarks for AALS Panel on *Lawrence v. Texas* (Jan. 4, 2004)).

126. *Id.* at 1415.

127. *Id.* at 1415-16.

128. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

129. *See id.* at 575. "Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Id.*

130. *See id.* "The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent *demeans* the lives of homosexual persons." *Id.* (emphasis added). As Ruthann Robson has written, while *Lawrence* explicitly overrules *Bowers* and states that decision was wrong, the case lacks any apology for seventeen years of tragic impact on the gay and lesbian community. *See* Ruthann Robson, *The Missing Word in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 397 (2004).

131. *See Lawrence*, 539 U.S. at 575.

132. Franke, *supra* note 5, at 1405.

the equality argument altogether. With a change of emphasis, Justice Kennedy could have made *Lawrence* turn on a recognition of how sodomy laws inflict a badge of inferiority, indeed a *badge of the closet*, on gay men and lesbians."[133]

Lawrence may also be limited by the fact that Kennedy's decision does not strictly adhere to the Court's traditional due process analysis.[134] The Court did not first articulate a fundamental right and then determine whether the state's interest in infringing on that right was compelling.[135] Instead, as Nan Hunter points out, the Court looked at the state interest first: "By asking the question of whether the governmental action had a legitimate basis first, and concluding that it did not, the Court did not need to then ask whether the individual was seeking to exercise a fundamental right, such that the state's action would have [] to satisfy a compelling interest test."[136] While Hunter sees possibilities in this new form of due process analysis, she recognizes it makes the case easier to distinguish, as "the Court can always return to an approach that gives much greater deference to state laws, as the typical rational-basis test does, without stepping outside of precedent."[137]

The case is heralded as a significant step towards the elimination or regulation of sexual activity based on a "morality" which excludes acceptance of homosexual activity.[138] But as Hunter explains: "By finding that morality alone cannot justify a prohibition, the Court did not seal the fate of all the various statutes thought of as morals laws. Rather, a state must now demonstrate some other rationale for such laws, presumably some form of objectively harmful effects."[139] The weaknesses in Kennedy's opinion—specifically, his refusal to specify a fundamental right and his avoidance of an equal protection analysis—mean that the courts may more easily accept whatever rationales states provide for other morals laws, even if they have a disparate impact on gays and lesbians or regulate sexual activity.

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133. *Id.* at 1406 (footnote omitted).

134. *See* Hunter, *supra* note 5, at 1113-17.

135. *See* Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

136. Hunter, *supra* note 5, at 1116-17.

137. *Id.* at 1114. "Using a rational-basis test, if that is what it is, makes the Court's conclusion in *Lawrence* even more powerful in certain respects—the interests proffered by Texas are found to be not even rational, much less compelling. It also lowers the stakes for describing the individual's right[s]." *Id.*

138. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1243-44 (2004). "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." Lawrence v. Texas, 539 U.S. 558, 571 (2003).

139. Hunter, *supra* note 5, at 1112.

Lawrence's explicit caveats and the more subtle limits recognized by commentators have important implications for the constitutionality of a range of U.S. statutes regulating sexual activity. The case is easily distinguished and may fail to aid efforts to challenge the prosecutions of LGBT individuals under public sex or prostitution statutes, or to ameliorate the disparate treatment of gays and lesbians based on sexual conduct, especially when children are involved.

A. The Disclaimer at Work

Relying on the limits and disclaimers of the *Lawrence* opinion, the lower courts have repeatedly found ways to distinguish the case and uphold statutes that might logically appear to fall under *Lawrence*'s holding. For example, the United States Court of Appeals for the Eleventh Circuit upheld Florida's ban on gay adoptions in *Lofton v. Secretary of the Department of Children & Family Services*.[140] Distinguishing the adoption context from the criminal law context of *Lawrence*, the *Lofton* court stated that because the welfare of the child was of paramount concern, classifications and restrictions were acceptable in the area of adoption that might be "constitutionally suspect" in other areas.[141] The court also removed the case from *Lawrence*'s private/domestic realm by stating that "[t]he decision to adopt a child is not a private one, but a *public* act."[142] Relying on the fact that the *Lawrence* decision did not declare a fundamental right to private sexual intimacy and did not adhere to the traditional due process analysis, the court refused to infer that the case established a right to adopt children regardless of sexual orientation.[143] The court used Justice Kennedy's "disclaimer" to put Florida's gay adoption ban outside of the limits of the case; because minors were involved and the petitioners sought recognition to participate in a state-created relationship, *Lawrence* did not control.[144]

In another example of a case distinguishing *Lawrence*, the United States Court of Appeals for the Armed Forces refused to set aside a conviction for consensual same-sex sodomy in *United States v.*

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140. *See* 358 F.3d 804, 827 (11th Cir. 2004).

141. *Id.* at 810.

142. *Id.* (emphasis added).

143. *See id.* at 815-16 "We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis." *Id.* at 816.

144. *See id.* at 817 "[T]he asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition." *Id.*

Marcum.[145] The court distinguished *Lawrence* by relying on Justice Kennedy's "disclaimer" paragraph, specifically, the language indicating *Lawrence* did not apply to "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."[146] Because "the military has consistently regulated relationships between servicemembers [sic] based on certain differences in grade," and the sexual conduct at issue took place between a superior and inferior officer, the officer's conviction fell outside of the protection of *Lawrence*.[147]

B. The Impact of Limon

In one of the most stunning decisions distinguishing *Lawrence*, the Kansas Court of Appeals upheld the criminal sodomy conviction of Matthew Limon, a mentally disabled eighteen year old.[148] Limon had performed oral sex on a fourteen-year-old boy while both were living at a school for mentally disabled youth.[149] Limon received a sentence of seventeen years in prison.[150] If he had performed the same act on a *girl* of the same age, he would have been able to take advantage of Kansas' "Romeo and Juliet" law, and his sentence would have been fifteen times less: thirteen to fifteen months.[151] The law governing Limon's case, a criminal sodomy law with a disproportionate impact on gays and lesbians, appears to fall clearly within the class of laws rendered unconstitutional after *Lawrence*.

However, the Kansas Court of Appeals distinguished *Lawrence* in a number of ways. First, the Kansas court took advantage of Justice Kennedy's "disclaimer," stating that "children are excluded from the proposition."[152] Because Limon's case involved a fourteen-year-old "victim," the facts fell outside of the focus of *Lawrence*. Next, the court noted that *Limon's* focus was an equal protection challenge, not a due process one.[153]

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145. *See* 60 M.J. 198, 205-08 (C.A.A.F. 2004), *available at* http://www.armfor.uscourts.gov/opinions/2004Term/02-0944.pdf.

146. *Id.* at 203 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

147. *Id.* at 207-08.

148. *See* State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22, 40-41 (Kan. 2005).

149. *See id.* at 232.

150. *See id.* at 243 (Pierron, J. dissenting).

151. *See id.*

152. *Id.* at 234.

153. *See id.* at 235.

The court then determined whether the exclusion of gay teenagers from the "Romeo and Juliet" statute was supported by a rational state interest.[154] "The question [the court held] . . . is whether the legislature can punish those adults who engage in heterosexual sodomy with a child less severely than those adults who engage in homosexual sodomy with a child."[155] Despite *Lawrence*'s admonitions against laws based on a morality of the majority, the Kansas Court of Appeals, without referencing *Lawrence*, determined:

> [T]he legislature could have reasonably determined that to prevent the gradual deterioration of the sexual morality approved by a majority of Kansans, it would encourage and preserve the traditional sexual mores of society. . . . [T]he legislature could well have concluded that homosexual sodomy between children and young adults could disturb traditional the sexual development of children.[156]

The court went on to employ the same morality-based analysis to find the state interests of promotion of marriage, procreation, parental responsibility, and the prevention of sexually transmitted disease, to be rational and acceptable justifications for excluding gay teenagers from the "Romeo and Juliet" law, all without referencing the decision in *Lawrence*.[157]

In its equal protection analysis, the Kansas court relied on the fact that "the *Lawrence* Court refused to hold that homosexuality was . . . deserving of a strict scrutiny review," and that even in *Romer v. Evans*, the Supreme Court applied a rational basis test to legislation targeting a group based on sexual orientation.[158] *Romer* was not controlling in Limon's case, the court held, because the criminal sodomy statute regulated conduct, not "the offender's sexual orientation or gender."[159]

The Kansas Court of Appeals clearly took advantage of every opening left in Justice Kennedy's opinion in *Lawrence* to distinguish Limon's case. *Limon*, *Lofton*, and *Marcum* make clear that the courts are still clinging to morality-based arguments, disregarding their impact on gays and lesbians. As Katherine Franke writes:

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154. *See id.* at 235-36.

155. *Id.* at 235.

156. *Id.* at 236. The court then felt it necessary to remark: "Although the record reveals that M.A.R., the victim, had only one same-sex encounter with Limon, Limon labels M.A.R. as either homosexual or bisexual in his brief. Labeling M.A.R. in this way is unfair." *Id.*

157. *See id.* at 237.

158. *Id.* at 239. The court also rejected an argument that the statute discriminated on the basis of gender. *See id.* at 238-40.

159. *Id.* at 240.

> *Limon* makes clear how some lower courts may understand *Lawrence* to impose absolutely no check on the legal enforcement of heteronormative preferences. *Lawrence* has no application to sex unrelated to childbearing, sex that might lead to childrearing obligations, and sex that involves a minor (even if that sex would be treated far less harshly if it had taken place between persons of different sexes).[160]

The courts also seem committed to maintaining legislation regulating homosexual sex, despite *Lawrence*'s indication that such statutes are no longer constitutional. In place of either a clear right anchored in due process or equal protection, *Lawrence* connected the criminalization of homosexual sex to LGBT identity with the weaker notion of "stigma."[161] *Limon*, *Lofton*, and *Marcum* indicate that "stigma" cannot win when weighed against state interests based on the morality of the majority.[162] The desire to regulate sexual conduct is not limited by *Lawrence*'s admonition that the stigma of criminal sanction should be avoided.[163]

These cases demonstrate that persecution and prosecution based on homosexual conduct remains legal. This persecution is problematic not only for the treatment of gays and lesbians in the United States, but also has implications for the question of whether gays and lesbians persecuted abroad can seek refuge here. *Romer* and *Lawrence* indicate that discrimination based on sexual identity is suspect in the United States.[164] Similarly, in the area of asylum law, persecution based on gay or lesbian identity is a required component of a successful LGBT asylum application.[165] However, if Limon's conviction took place in another country, and he fled to seek asylum in the United States, he might be turned away. Limon's disproportionate sentence, classic evidence for an asylum claim, is based on homosexual conduct, not gay or lesbian identity, according to the Kansas Court of Appeals.[166] The persistence of the criminalization of homosexual sex and the regulation of sexual conduct with a disparate impact on the LGBT community in the United

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160. Franke, *supra* note 5, at 1413; *see also* Goldberg, *supra* note 138, at 1308-09 (discussing the court's normative preference).

161. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003); Franke, *supra* note 5, at 1406.

162. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 810-17 (11th Cir. 2004); United States v. Marcum, 60 M.J. 198, 207-08 (C.A.A.F. 2004); *Limon*, 83 P.3d at 236-37.

163. *See Lawrence*, 539 U.S. at 575.

164. *See id.* at 577-78; Romer v. Evans, 517 U.S. 620, 631-36 (1996).

165. *See, e.g.*, *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (noting that homosexuals constitute a social group for purposes of asylum law, but that membership in any such group must be established through evidence).

166. *See* HANDBOOK, *supra* note 10, at 29.

States, even after *Lawrence*, thus limits the reach of asylum protections for people persecuted in other countries with similar regulatory schemes.

V. IDENTITY AND CONDUCT

The post-*Lawrence* constitutional rulings show that, while courts purport to avoid discrimination based on homosexual identity, they are committed to upholding discriminatory schemes regulating homosexual conduct.[167] Similarly, the asylum law also separates conduct and identity, limiting protection to those who have been persecuted based on their identity, carefully avoiding the extension of protections to those whose persecution targets conduct rather than identity.[168] The result is the same—courts conflate identity and conduct, or separate them, as necessary to maintain regulatory schemes that target homosexual sex. As this Part outlines, for decades, when reviewing constitutional challenges to statutes that discriminate against homosexuals, courts have negotiated the conflated categories of identity and conduct.[169] Increasingly, discrimination against individuals based on identity is perceived as unconstitutional.[170] However, the courts' reluctance to let go of the morality-driven desire to regulate sexual conduct allows discrimination against the LGBT community to continue because discrimination based on conduct cannot be separated from discrimination based on identity.

As many commentators have noted when reviewing the identity/conduct phenomenon, Michel Foucault is credited with first naming the time in which the homosexual identity began.[171] The usual interpretation of Foucault's work is that in the late nineteenth century, sodomy—sexual conduct now primarily considered to be homosexual sexual conduct—became subsumed within a broader understanding of homosexual identity.[172] Janet Halley points out that an alternative understanding is that "the rhetoric of acts has not been evaporated or transformed; it has merely been displaced, set to one side and made

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167. *See, e.g.*, *Lofton*, 358 F.3d at 814-17 (denying the extension of *Lawrence* to create new rights for LGBT parents; *Limon*, 84 P.3d at 236-37 (denying the extension of *Lawrence* to overturn a sodomy conviction).

168. *See* Leitner, *supra* note 41, at 693.

169. *See infra* notes 197-203 and accompanying text.

170. *See infra* note 191.

171. Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98, 101-02 & n.6 (1995) (citing MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME 1: AN INTRODUCTION 43 (Robert Hurley trans., 1980)); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1738-39 (1993).

172. *See* Halley, *supra* note 171, at 1739.

slightly more difficult to discern by the rhetoric of identity."[173] This interpretation allows for the sexual acts at issue to be understood on their own or attached to a specific identity, rather than consistently attributed to one sole (homosexual) identity.[174] Halley argues that viewing acts and identity in this fashion allows "the bankruptcy of the term [sodomy], and what has been done in its name, [to] be uncovered."[175]

Underlying Halley's analysis is the fact that since the emergence of the notion of homosexual identity, "[s]odomy is assumed to be exclusively a homosexual act."[176] This is true despite the fact that criminal sodomy laws often ban oral and anal sex when performed by heterosexual couples as well as same-sex couples.[177] Even same-sex sexual activity, regardless of the act at issue, is not necessarily attached to homosexual identity. As researchers studying sexual activity have repeatedly found, people who self-identify as heterosexual have had homosexual experiences.[178] Despite the reality of sexual identity, the regulation of sexual conduct has focused on acts assumed to be primarily conducted by homosexuals, and such statutes have been used as a tool of repression of homosexual identity.

As Nan Hunter has outlined, beginning in the 1950s, the U.S. government repressed LGBT by "impos[ing] identity as a public classification onto private acts."[179] Gays and lesbians were deemed unfit for public service via Executive Order, and Congress expressly excluded homosexuals under the immigration laws.[180] State governments also relied on regulation of sexual conduct as an excuse to raid gay and lesbian bars and expose bar customers as homosexual.[181]

Sodomy statutes on their face regulate conduct and not identity, but even when unenforced as criminal sanctions, criminal sodomy laws have been used to justify discrimination against the LGBT persons in many contexts.[182] As Christopher Leslie points out, the argument that

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173. *Id.* at 1740.

174. *See id.*

175. *Id.* (quoting Jonathan Goldberg, *Sodomy in the New World: Anthologies Old and New*, *in* 29 SOCIAL TEXT 46 (1991)).

176. *See* Mezey, *supra* note 171, at 102.

177. *Id.* at 102-03.

178. *See id.* at 104-112.

179. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1697 (1993).

180. *See id.* at 1697-98.

181. *See id.* at 1699.

182. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 112, 116-21 (2000) (arguing that pre-*Lawrence* regulations created a class of presumptive criminals).

unenforced sodomy laws are harmless is a myth.[183] After *Bowers v. Hardwick*, sodomy laws created a class of criminals—homosexuals.[184] Likening the consequences of the decision in *Bowers* to Jim Crow laws, Leslie outlines how sodomy laws create an inferior class of people whose separation from the rest of the society is justified by the existence of these laws.[185] Leslie lists various forms of abuse and discrimination occurring against LGBT people based on the existence of these criminal sanctions, including: physical violence, police harassment, employment discrimination, separation of children and parents, free speech restrictions, and immigration exclusion.[186]

Litigators have attempted to separate conduct and identity when attacking discriminatory statutes. Nan Hunter points out that in the 1960s, LGBT-rights advocates successfully employed privacy arguments and succeeded in repealing criminal sodomy laws in some states.[187] Similar arguments won limitations on the rules barring gays and lesbians from public employment.[188] These wins represented significant advancements in rights for LGBT persons, but as Hunter explains: "[t]hese reforms provided the legal shelter for conduct but not identity. . . . [H]omosexual conduct became increasingly lawful, while the *extreme stigma* associated with the person of the homosexual remained."[189] LGBT advocacy strategies then began to focus on expressive speech, either sexual or political, and litigation claims raised "an explicit combination of speech and due process grounds."[190] With these arguments, advocates have begun to establish protection for homosexual identity as: "[s]elf-identifying speech [that] does not merely reflect or communicate one's identity [but acts as] a major factor in constructing identity. Identity cannot exist without it."[191]

Despite the advances Hunter points out in the area of free speech, regulation, and even criminalization, of homosexual conduct persists, and courts have repeatedly conflated conduct and identity when confronted with constitutional challenges to discriminatory statutes or state actions

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183. *See id.* at 105-06.

184. *See id.* at 112-13.

185. *See id.* at 115.

186. *See id.* at 116.

187. *See* Hunter, *supra* note 179, at 1699-1700.

188. *See id.* at 1700 (citing Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969) and subsequent amendments to 5 U.S.C. § 2302(b)(10) (1988)).

189. *Id.* (emphasis added).

190. *Id.* at 1701, 1702-06 (highlighting cases challenging bans on gay student organizations and "no promo homo" initiatives allowing public schools to fire employees who "encouraged" or "promoted" homosexual activity).

191. *Id.* at 1718.

that are based on either actual sexual conduct or sexual conduct imputed to a person because of their identity.[192] The military provides a particularly stark example.[193] Reviewing challenges to the discharge of gay and lesbian military service members, courts have repeatedly performed legal contortions to uphold military policies excluding gays and lesbians from service.[194] Francisco Valdes has exhaustively outlined this trend, evaluating how courts have avoided holding that exclusion of gays and lesbians in the military violates the prohibition against punishment of status first established by a Supreme Court ruling in the context of drug addiction and public intoxication.[195] Arguably, because a state cannot punish a person on the basis of status, discrimination against gays and lesbians is unconstitutional, and even evidence of their conduct is impermissible.[196] While a few courts have agreed,[197] most avoid or misapply the analysis.[198] Valdes characterizes the resulting jurisprudential chaos as "judicial acquiescence" to an approach which "asserts that status is defined by conduct and equates that conduct with sodomy while also using status itself as evidence of sodomy."[199] Additionally, Valdes points out that courts also routinely commingle substantive due process, equal protection, and status/conduct analyses, "complicat[ing] principled adjudication of meritorious claims."[200] The result has been that courts have refused to find a fundamental interest under due process law, or a suspect class under equal protection law, while consistently ignoring the

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192. *See* Leslie, *supra* note 182, at 170.

193. *See generally* Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994) (discussing the status/conduct treatment of homosexuals by the constitutional law and the impact on LGBT service members).

194. *See, e.g.*, Valdes, *supra* note 193, at 400-26 (discussing Ben-Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989) (ordering reinstatement of lesbian servicewoman and stating that sexual minorities were a suspect class when defined by identity but not by conduct), *rev'd*, 881 F.2d 454 (7th Cir. 1989) (reversing the lower court and upholding the Army's regulations excluding plaintiff because of her admission that she was a lesbian)).

195. *See id.* at 391-95 (summarizing Robinson v. California, 370 U.S. 660 (1962), and Powell v. Texas, 392 U.S. 514 (1968)).

196. *See id.* at 396-98.

197. *See id.* (discussing Cyr v. Walls, 439 F. Supp. 697 (N.D. Tex. 1977) (enjoining police from monitoring gay and lesbian group meetings because they could be individuals who engaged in criminal sodomy)).

198. *See id.* at 403-24 (discussing Mathews v. Marsh, 755 F.2d 182 (1st Cir. 1985), which held that the army could "disenroll" a lesbian ROTC member based on her statement she had recently engaged in homosexual acts and Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987), *modified*, 943 F.2d 989 (9th Cir. 1991) which held that the discharge of a lesbian army pastor violated the Fourteenth Amendment because the termination was based on her status as a homosexual).

199. *Id.* at 445.

200. *Id.* at 430.

link between discrimination based on status and discrimination based on conduct.[201]

The two seminal Supreme Court decisions addressing LGBT conduct and identity since Valdes wrote his article, *Romer* and *Lawrence*, demonstrate this commingling.[202] Both cases establish some protection for the LGBT community under the Constitution, but only weakly address the issue of the relationship between discrimination based on identity/status and discrimination based on conduct, primarily using the lens of "stigma." In *Romer*, the Court refused to find that homosexuals were a suspect class such that classifications based on sexual orientation would merit strict scrutiny.[203] In *Lawrence*, the Court refused to establish a clear fundamental right to consensual homosexual sex.[204] The holdings of the cases appear to be driven by a concern about discrimination based on the identity/status construct, as Valdes would suggest a true status/conduct analysis would require.[205] But even while voicing strong concerns about the stigma of criminal sodomy laws targeting homosexuals and the exclusion of the LGBT community in the political process, the Court was reluctant to root those concerns in strong statements of law that might later be used to erode current regulations of sexual conduct.

The conflation of identity and conduct in the constitutional context and the separation occurring in the asylum context are driven by identical concerns. While increasingly recognizing that discrimination against gays and lesbians cannot withstand constitutional scrutiny and merits protection for those fleeing persecution abroad, courts appear to fear the slippery slope arguments Scaperlanda invokes.[206] As a result, both bodies of law toe the line and attempt to provide minimal protection for the LGBT community here and abroad, while avoiding a wholesale rewriting of our heterosexist, heteronormative legal system.

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201. *See id.* at 430-31 (discussing Bowers v. Harwick, 478 U.S. 186 (1986); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (upholding the FBI's refusal to hire a lesbian based on homosexual conduct, even while recognizing "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal"); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert denied*, 494 U.S. 1003 (1990) (holding gay Naval Reserve officer could be discharged based on homosexual conduct)).

202. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 634-36 (1996).

203. *See supra* notes 86-87 and accompanying text.

204. *See supra* notes 134-137 and accompanying text.

205. *See* Valdes, *supra* note 193, at 391-96, 403-24, 430-31, 445.

206. *See* Scaperlanda, *supra* note 11, at 482, 493, 500, 510.

VI. CONCLUSION

Scaperlanda's vision of the immigration system and its exploitation by LGBT-rights advocates is distorted, but perhaps presents a lesson for LGBT advocates. The agenda of the LGBT movement should be expansive enough to demand expanded protections for LGBT asylum applicants. In addition, connecting discrimination under U.S. law to persecution abroad is a powerful argument for change. The stories of LGBT asylum seekers would serve the movement well. The "sympathetic facts" of the LGBT asylum cases Scaperlanda refers to are usually extreme: torture, harassment, rape, beatings, social isolation, imprisonment.[207] The asylum law's incorporation of international law points out the hypocrisy of similar continuing discrimination against gays and lesbians in the United States. This rhetorical argument could be particularly useful if the Supreme Court reconsidered Limon's case.

A Supreme Court ruling on the case in *Limon* could set the record straight and clearly hold that discrimination against gays and lesbians, based on identity or on conduct, is unconstitutional. Overturning Limon's conviction could send a strong message about the Court's original intentions. A favorable decision would also minimize the power of the disclaimer paragraph in *Lawrence* and remind lower courts that the morality of the majority cannot trump the constitutional rights that protect the minority. Furthermore, the Court would be forced either to further develop what Nan Hunter sees as a new form of due process analysis,[208] make a strong statement about punishment based on status as Valdes would suggest,[209] or reconfigure the protections marked out in *Lawrence* to fit the traditional due process analysis.

William Eskridge has noted that a Supreme Court decision in *Limon* would have few political costs for the Court:

> *Lawrence* and its associated jurisprudence require that the sentencing disparity be overturned. . . . To limit the [Romeo and Juliet] rule to heterosexual sodomy is a core violation of the Fourteenth Amendment. . . . [T]his is a novel and still-rare discrimination against gay people. . . . Judicial invalidation is warranted and the jurisprudence of tolerance strongly suggests this would be a productive and parsimonious use of the Court's political capital. . . [It] is hard to imagine that even a fundamentalist Christian would find his identity implicated in maintaining this discrimination. . . . The Court would not be raising the stakes of

207. *See id.* at 493, 507.
208. *See supra* notes 112-115, 121 and accompanying text.
209. Valdes, *supra* note 193, at 475.

> politics in the least by striking down the discrimination in *Limon*, and it would confirm the message of *Lawrence* in the context of teen sexuality.[210]

In addition to making steps toward eliminating discriminatory statutes in the United States, reversing Limon's conviction could help expand protections for LGBT asylum seekers by clearly stating that discrimination based on homosexual conduct, regardless of morality, is unacceptable here and abroad. Asylum law may then expand "particular social group" to include LGBT individuals persecuted in other countries under statutory schemes targeting their sexual conduct, even if they cannot show the requisite association or identity with a broader LGBT community. This could eliminate the possibility that a young man like Matthew Limon would ever again face a sentence fifteen times longer than a similarly situated heterosexual man, and ensure that anyone like him who experienced such a disproportionate sentence in another country could seek asylum in the United States.

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210. William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review To Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1094-95 (2004).