

12-2011

## **Confounding Identities: The Paradox of LGBT Children under Asylum Law**

Susan Hazeldean

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# Confounding Identities: The Paradox of LGBT Children Under Asylum Law

Susan Hazeldean\*

*The U.S. government has unfairly refused to grant asylum to lesbian, gay, bisexual, and transgender (LGBT) children and young adults who fled their countries to escape persecution based on their sexual identities. These asylum denials are a conundrum: young people ought to be particularly sympathetic claimants, and those seeking asylum based on their sexual orientation have a twenty-year-old precedent for such claims. This Article offers a novel theory to explain why this seemingly sympathetic subset of individuals eligible for legal relief has been refused it. Specifically, it contends that asylum adjudicators are in the grip of "Popular Freudianism," whereby a person who is LGBT cannot be a child, and a child cannot be LGBT. As such, the idea of an "LGBT child" is treated as a paradox. This confounding nature of LGBT identity and childhood leads immigration judges to unfairly deny LGBT children asylum relief.*

*Asylum law was initially ahead of constitutional jurisprudence in recognizing gay men as a persecuted minority in need of protection, but it has since fallen behind evolving constitutional norms on the rights of LGBT young people. After exploring the gulf between contemporary constitutional jurisprudence and asylum law, the Article elucidates the barriers confronting young LGBT asylum-seekers and makes recommendations to improve the asylum adjudication system on their behalf.*

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\* Copyright © 2011 Susan Hazeldean. Assistant Clinical Professor of Law, Cornell Law School. I am grateful to Muneer Ahmad, Heather Betz, Courtney Cahill, Denny Curtis, Doug Kysar, Hope Metcalf, Jason Parkin, Jean Koh Peters, Jeff Selbin, Sydney Tarzwell, Mike Wishnie, and Kenji Yoshino for their thoughtful comments on early drafts. I would also like to thank Amanda Gutierrez and Amy Hsu for excellent research assistance.

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#### INTRODUCTION

Kimumwe had presented no objective evidence to confirm his homosexuality . . . [and his incarceration] . . . was based not on [his] homosexual status, but on allegations of sexual misconduct . . . . [He] failed to satisfy the burden of proof on his asylum claim.<sup>1</sup>

Over twenty years ago, the Board of Immigration Appeals (“BIA”) held that a gay man who faced homophobic persecution in his native Cuba qualified for asylum in the U.S.<sup>2</sup> This recognition of anti-gay persecution as a valid basis for asylum stood in stark contrast to contemporary constitutional jurisprudence on the rights of lesbian, gay, bisexual, and transgender (“LGBT”) people. Only four years earlier, the Supreme Court had upheld the validity of sodomy laws that subjected LGBT people to criminal prosecution and imprisonment.<sup>3</sup> Since then, the case law on LGBT rights has evolved rapidly. Courts recognized a constitutional right not only to engage in private same-sex sexual activity,<sup>4</sup> but also to be free from anti-gay

<sup>1</sup> Kimumwe v. Ashcroft, 431 F.3d 319, 321-23 (8th Cir. 2005).

<sup>2</sup> See Toboso-Alfonso 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990).

<sup>3</sup> See Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

<sup>4</sup> See Lawrence v. Texas, 539 U.S. 558, 578 (2003).

discrimination in a number of other areas.<sup>5</sup> While asylum law was initially ahead of the curve in recognizing the rights of LGBT people, it has fallen behind evolving legal norms on the treatment of sexual minorities.

Nowhere is this clearer than in the adjudication of asylum claims filed by LGBT children and young adults, who have not been able to obtain relief even when they had legitimate asylum claims.<sup>6</sup> This is a

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<sup>5</sup> For example, several courts have ruled that marriage cannot be restricted only to opposite-sex couples. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (N.D. Cal. 2010) (holding that Proposition 8, a ballot measure limiting marriage to heterosexual couples, fails to advance any rational basis, prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, and is unconstitutional); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa. 2009) (barring same-sex couples from marriage violates the equal protection provisions of the Iowa Constitution); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (limiting marriage to opposite-sex couples is invalid under the equal protection clause of the California Constitution), *superseded by constitutional amendment*, CAL CONST. of 2009 art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48, 77 (Cal. 2009) (reversing *In re Marriage Cases* through California Proposition 8, codified as Marriage Protection Act); *Kerrigan v. Comm. Publ. Health*, 957 A.2d 407 (Conn. 2008) (holding that statutory scheme limiting marriage to opposite-sex couples “impermissibly discriminates against gay persons on the basis of their sexual orientation”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that denial of marriage licenses to same-sex couples violated provisions of the state constitution guaranteeing individual liberty and equality, and was not rationally related to a legitimate state interest), *appeal dismissed*, 827 N.E.2d 1255 (Mass. 2005). *See generally infra* notes 128-160 and accompanying text (providing additional examples of decisions upholding the rights of LGBT people to be free of discrimination).

<sup>6</sup> *See infra* notes 37-61 and accompanying text; *see also* *Todorovic v. U.S. Attorney Gen.*, 621 F.3d 1318, 1323 (11th Cir. 2010) (remanding case of young gay man denied asylum and withholding of removal by the IJ and BIA because the IJ determined that he “bears no effeminate traits . . . that would mark him as a homosexual”); *Barrios-Aguilar v. Holder*, 387 F. App’x 587, 588-91 (9th Cir. 2010) (remanding case of young man denied asylum by the IJ and BIA who entered the U.S. at age 15 after being beaten, sexually assaulted and threatened for being gay); *De Paula v. U.S. Attorney Gen.*, 386 F. App’x 587, 588-91 (11th Cir. 2010) (affirming denial of asylum because the anti-gay harassment the applicant suffered as a child “does not meet the extreme concept of persecution”) (citations omitted); *Illescas-Dutan v. Mukasey*, 271 F. App’x 109, 110-11 (2d Cir. 2008) (remanding case of young gay man who fled to the U.S. as a teenager and was denied asylum by the IJ and BIA despite evidence of arrest and detention of gay individuals in his home country); *Liu v. Attorney General*, 278 F. App’x 212, 213 (3d Cir. 2008) (denying asylum to gay man who had been beaten by his father and neighbors and expelled from school because of his sexual orientation); *Nabuwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (remanding case of young lesbian woman denied asylum by the IJ and BIA whose family arranged for her to be raped in a bid to change her sexual orientation); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1027-29 (8th Cir. 2007) (remanding case of 22 year old gay man denied asylum by the IJ and BIA because his mannerisms did not indicate that he was gay); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 652-53 (8th Cir.

conundrum because young people would appear to be particularly sympathetic claimants.<sup>7</sup> Young people seeking asylum based on their sexual orientation ought to be on sound legal ground given the twenty-year-old precedent for such claims. Why would eligible and seemingly sympathetic individuals be denied legal relief?<sup>8</sup> The answer lies in the asylum system's failure to keep up with evolving legal norms. Asylum law was initially ahead of constitutional jurisprudence in recognizing gay men as a persecuted minority in need of protection, but it has failed to keep pace with evolving understandings of sexual identity and the rights of LGBT young people. Instead, asylum adjudicators evince outmoded thinking about sexuality, LGBT rights, and young people.<sup>9</sup> Young LGBT asylum-seekers must also navigate an asylum system that does not afford them procedural due process.<sup>10</sup>

This Article explores the difference between asylum law and contemporary constitutional law regarding the rights of LGBT people, elucidating the barriers confronting young LGBT asylum-seekers and making proposals to improve the system of adjudication on their behalf. Part I explains the application process for asylum based on sexual orientation or gender identity, and how LGBT youth seeking asylum are treated under that system. Part II describes the failure of asylum adjudicators to recognize that young people who endure abuse because of their behavior are victims of anti-gay persecution, contradicting the emerging constitutional norm that discrimination based on "homosexual conduct" is directed at LGBT "status." Part III

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2007) (affirming the denial of asylum to a gay man who entered the country at age 17 after being abused by his family for his sexual orientation); *Matter of \_\_\_\_\_*, (B.I.A. 2004) (unpublished, on file with author) (affirming denial of asylum to young gay man who had been sexually assaulted because of his sexual orientation).

<sup>7</sup> Cf. SUSAN SCHMIDT & JACQUELINE BHABHA, *KAFKA'S KIDS: CHILDREN IN U.S. IMMIGRATION PROCEEDINGS PART II: BEYOND AND BESIDES ASYLUM*, IMMIGRATION BRIEFINGS(2007) (noting the "paradoxical fact that unaccompanied and separated children, a particularly vulnerable population who one would expect to be recipients of more generous and compassionate attention, instead attract particularly harsh, even punitive, responses.").

<sup>8</sup> LGBT children are subject to at least two overlapping forms of oppression: homophobia (or transphobia) and anti-child bias. Kimberle Crenshaw's theory of intersectionality explains how racism and sexism combine to impose a unique disadvantage on women of color, which can deprive them of equal access to relief even when the intention is to facilitate access to a remedy. Similarly, the intersectional subordination of LGBT young people frustrates their ability to win asylum. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244, 1248-49 (1991); see also *infra* notes 184-191 and accompanying text.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part IV.

explores why credible testimony by LGBT youths in asylum proceedings is not accepted as adequate proof of their sexual identity and argues that asylum adjudicators treat the very notion of an LGBT child as a paradox. Part IV explains how the current asylum system denies young LGBT asylum-seekers due process. Part V makes recommendations to improve the adjudication of asylum claims filed by LGBT children and young adults.

## I. THE TREATMENT OF ASYLUM CLAIMS BY LGBT YOUTHS

Although LGBT people have succeeded in achieving a measure of acceptance and safety in some communities, homophobic and anti-transgender violence remains a fact of life in every country in the world.<sup>11</sup> LGBT people regularly face discrimination, harassment, rape, torture, and even execution because of their sexual orientation or gender identity.<sup>12</sup> Not surprisingly, this pervasive hostility and fear has prompted thousands of LGBT people to flee their countries of origin in search of a safe haven abroad.<sup>13</sup> Although the precise number is unknown, many LGBT people seeking asylum in the United States are children and young adults.<sup>14</sup> Many of these young people have faced

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<sup>11</sup> See generally *Crimes of Hate, Conspiracy of Silence: Torture and Ill-treatment Based on Sexual Identity*, AMNESTY INT'L PUBLICATION (2001), <http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/bb63ae8f-d961-11dd-a057-592cb671dd8b/act400162001en.pdf>. The U.S. is no exception; LGBT people regularly suffer violent assaults at the hands of government officials and private parties in this country. See *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* AMNESTY INT'L PUBLICATION (2005), <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>; Michelle A. Marzullo and Alyn J. Libman *Hate Crimes and Violence Against Lesbian, Gay, Bisexual and Transgender People*, HUMAN RIGHTS CAMPAIGN FOUNDATION PUBLICATION (2009), [http://www.hrc.org/documents/ResearchOverview\\_HateCrimes.pdf](http://www.hrc.org/documents/ResearchOverview_HateCrimes.pdf). Remaining aware of the homophobic and anti-transgender nature of American society is important in any discussion of asylum for LGBT people to avoid "allow[ing] a judgment of 'barbarism' to be fixed on the sending country, almost always Third World, and produc[ing] a sense of moral superiority or complacency in the receiving country." Alice M. Miller, *Seeking the Grant of Asylum and Protecting Global Sexual Diversity*, in *PASSING LINES: SEXUALITY AND IMMIGRATION* 135, 166 (Brad Epps et al. eds., 2005).

<sup>12</sup> See generally *Crimes of Hate, Conspiracy of Silence: Torture and Ill-treatment Based on Sexual Identity*, AMNESTY INT'L PUBLICATION (2001), <http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/bb63ae8f-d961-11dd-a057-592cb671dd8b/act400162001en.pdf>.

<sup>13</sup> *Id.* at 26.

<sup>14</sup> The number of LGBT youth who apply for political asylum each year is unknown. The administrative bodies responsible for adjudicating asylum applications, the Department of Homeland Security and the Executive Office of Immigration Review (EOIR) within the Department of Justice, do not keep statistics on the number of asylum claims filed on the basis of sexual orientation or gender identity. See Krista Gesaman, *Desperately Seeking Freedom: Are the Number of Immigrants Seeking Asylum*

anti-gay violence from a young age, including rape, family rejection, school exclusion, police detention, and physical abuse. They come to the United States in search of a safe haven where they can live openly and without fear of homophobic abuse.<sup>15</sup>

To win asylum in the United States, applicants must demonstrate that they meet the definition of a “refugee” under the Immigration and Nationality Act (“INA”).<sup>16</sup> To do so, claimants must establish that they have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>17</sup> The first step in meeting this standard is to prove that any mistreatment the applicant faces is on account of one of the protected grounds described in the INA. For LGBT youth who fear persecution based on their sexual orientation or gender identity, this means showing that they belong to a “particular social group” that qualifies under the Act.

#### A. Defining the Social Group at Issue

The INA does not define “particular social group,” therefore, the Board of Immigration Appeals (“BIA”) has defined the term. The BIA first explained the characteristics of “particular social groups” in *Matter of Acosta*.<sup>18</sup> Using the principle of *ejusdem generis* to determine how the particular social group category related to the other four grounds for asylum, the BIA reasoned that a “particular social group” is “a group of persons all of whom share a common, immutable characteristic.”<sup>19</sup> The characteristic at issue must therefore be something “the members of the group either cannot change, or should not be required to change because it is fundamental to their individual

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over Sexual Orientation Discrimination Increasing?, NEWSWEEK, November 30, 2009, <http://www.newsweek.com/2009/11/29/desperately-seeking-freedom.html>. Indeed, the EOIR does not even track the birth dates of respondents in immigration court, so there is no accurate count of the number of asylum applications made by children generally. See JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE UNITED STATES 15 (Univ. Committee on Human Rights Studies, Harvard Univ. ed., 2006), available at [www.humanrights.harvard.edu/images/pdf\\_files/Seeking\\_Asymum\\_Along\\_US\\_Report.pdf](http://www.humanrights.harvard.edu/images/pdf_files/Seeking_Asymum_Along_US_Report.pdf).

<sup>15</sup> See *infra* notes 37-61 and accompanying text.

<sup>16</sup> Immigration and Nationality Act § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2011).

<sup>17</sup> Immigration and Nationality Act § 101(a)(42) (A), 8 U.S.C. § 1101(a)(42)(A) (2011).

<sup>18</sup> *Acosta*, 19 I. & N. Dec. 211, 232-34 (B.I.A. 1985).

<sup>19</sup> *Id.* at 233.



identities or consciences.”<sup>20</sup> The BIA subsequently stated that a group must have “social visibility” and adequate “particularity” to constitute a protected social group.<sup>21</sup>

The BIA first recognized a gay man as a member of a particular social group in 1990, ruling in *In Re Toboso-Alfonso* that “homosexuals” in Cuba constitute a particular social group.<sup>22</sup> In 1994, the Attorney General designated the *Toboso-Alfonso* decision as “precedent in all proceedings involving the same issue or issues.”<sup>23</sup> Since then, several courts of appeals similarly recognized “homosexuals” as a particular social group.<sup>24</sup> In 2005, the Ninth Circuit unequivocally held that “all alien homosexuals are members of a ‘particular social group.’”<sup>25</sup>

In contrast, the BIA has not recognized children as a particular social group under the INA.<sup>26</sup> In denying asylum to an applicant who claimed he had been singled out for persecution because he was a child, the BIA noted that “the only defining characteristic [children share] is age,” and found that “all persons under the age of 18” could not constitute a particular social group.<sup>27</sup> The Third Circuit agreed,

<sup>20</sup> *Id.* at 233.

<sup>21</sup> *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 75-76 (BIA 2007). Three Courts of Appeal have upheld the standard announced by the B.I.A., see *Contreras-Martinez v. Holder*, 346 Fed. Appx. 956, 958 (4th Cir. 2009), *cert. denied*, U.S. LEXIS 3983 (2010); *Ramos-Lopez v. Holder*, 563 F.3d 855, 860-62 (9th Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72-73 (2d Cir. 2007). But the 7th 6th and 3rd Circuits have rejected it. See *Urbina-Mejia v. Holder*, 597 F.3d 360, 366-67 (6th Cir. 2010); *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009), *Valdiviezo-Galdamez v. U.S. Att’y Gen.*, No. 08-4564, 2011 WL 5345436 (3rd Cir. Nov. 8, 2011). Some scholars argue that the new “social visibility” and “particularity” requirements are inconsistent with *Acosta* and amount to an entirely new and far more restrictive standard. See Fatma Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 63, 67 n.96 (2008). A full exploration of the controversy around the B.I.A.’s new focus on “social visibility” and “particularity” is beyond the scope of this article, but I will discuss its implications in the context of asylum claims brought by bisexual youth, below.

<sup>22</sup> *Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990).

<sup>23</sup> Att’y Gen. Ord. No. 1895-94 (June 19, 1994).

<sup>24</sup> See, e.g., *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (stating that “homosexuals” constitute a social group); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (same); see also *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998) (noting that “gay men and lesbians in Cuba” constitute a particular social group).

<sup>25</sup> *Karouni v. Gonzalez*, 399 F.3d 1163, 1172 (9th Cir. 2005).

<sup>26</sup> See *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003) (reviewing the BIA’s denial of asylum to a former child soldier and noting that the the B.I.A. “seemed to question whether a group based on age may qualify as a ‘particular social group.’”).

<sup>27</sup> *Id.* at 166.

opining that age plays a lesser role in personal identity because it changes over time, "unlike innate characteristics, such as sex or color."<sup>28</sup> The court also noted that "children as a class represent an extremely large and diverse group . . . [with] a wide degree of varying experiences, interests, and traits."<sup>29</sup> Given that diversity, the court ruled that children could not constitute a "particular social group" for asylum purposes.<sup>30</sup>

The logic of this ruling is questionable. It is certainly true that every person's age does change over time, but no one can alter their age of their own volition. *Acosta* requires only that the trait uniting a particular social group be immutable in that it is something that is "beyond the power of an individual to change."<sup>31</sup> A person who faces persecution because she is a child cannot simply choose to be an adult in order to avoid mistreatment. Her status as a child is "immutable" under the *Acosta* analysis. It also defies common sense to claim that a person's status as a child does not play a fundamental role in her personal identity, given that being a child completely defines one's legal rights and role in society.<sup>32</sup> For their own protection, children are forbidden from working, subject to mandatory school attendance laws, obligated to live with their families, and treated as dependents rather than full citizens.<sup>33</sup>

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<sup>28</sup> *Id.* at 171. The Supreme Court relied on similar logic in concluding that age-based discrimination is not subject to strict scrutiny under the Equal Protection clause of the Fourteenth Amendment. The Court noted that elderly people are not a discrete and insular minority because old age "marks a stage that each of us will reach if we live out our normal span." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976).

<sup>29</sup> *Lukwago*, 329 F.3d at 171-72.

<sup>30</sup> *See id.* at 173; *see also* *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2nd Cir. 1991) (noting in dicta that "[l]ike the traits which distinguish the other four enumerated categories — race, religion, nationality and political opinion — the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.").

<sup>31</sup> *Acosta*, 19 I. & N. Dec. at 233-34.

<sup>32</sup> *See* Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 5-10 1577, U.N.T.S. 3 (Nov. 20, 1989) ("Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'").

<sup>33</sup> *See, e.g.*, Minimum Age Convention, International Labor Organisation (No. 138) (June 17, 1973) (setting a minimum age for undertaking work that jeopardizes health, safety, or morals of young people); Convention on Consent to Marriage Art. 2 (Nov. 7, 1962) (calling all State Parties to specify a minimum age for marriage); Optional Protocol to the Convention on the Rights of the Child on the Involvement of

The fact that sexual orientation is recognized as a basis for asylum under the INA, but childhood is not, influences the way LGBT youths present their asylum claims. It creates a strong incentive for asylum-seekers to focus on their sexual orientation and de-emphasize their age in their asylum applications. Young LGBT asylum-seekers have presented themselves simply as “homosexuals” and argued that they have experienced or will face persecution on that basis.<sup>34</sup> Indeed, asylum rulings regarding LGBT children and young adults frequently omit the applicant’s age. Perhaps because of this de-emphasis on the age of the applicant, the reported cases regarding LGBT young people seldom indicate that the applicant received any special solicitude due to his or her immaturity or vulnerability as a youth.<sup>35</sup> Instead, adjudicators have generally held applicants to an adult standard and found no past persecution even when applicants endured serious

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Children in armed conflict Art. 3, U.N. Doc. A/RES/54/263 (May 25, 2000) (setting a minimum age for voluntary recruitment into national armed forces).

<sup>34</sup> See, e.g., *Barrios-Aguilar v. Holder*, No. 06-70010, 2010 U.S. App. LEXIS 13674 (9th Cir. July 2, 2010) (remanding case of young man denied asylum by the IJ and BIA who entered the U.S. at age 15 after being beaten, sexually assaulted and threatened for being gay); *De Paula v. U.S. Attorney Gen.*, No. 09-15960, 2010 U.S. App. LEXIS 11239 (11th Cir. June 2 2010) (affirming denial of asylum because the anti-gay harassment the applicant suffered as a child “does not meet the extreme concept of persecution”) (citations omitted); *Todorovic v. U.S. Attorney Gen.*, 621 F.3d 1318, 1318, 1323 (11th Cir. 2010) (remanding case of young gay man denied asylum and withholding of removal by the IJ and BIA because the IJ determined that he “bears no effeminate traits . . . that would mark him as a homosexual”); *Janem v. Mukasey*, 295 Fed. Appx. 89 (7th Cir. 2008) (denying petition for judicial review of BIA order denying application of asylum for man claiming persecution because of his homosexuality); *Illescas-Dutan v. Mukasey*, 271 F.App’x 109 (2d Cir. 2008) (remanding case of young gay man who fled to the U.S. as a teenager and was denied asylum by the IJ and BIA despite evidence of arrest and detention of gay individuals in his home country); *Liu v. Attorney Gen.*, 278 F.App’x 212 (3d Cir. 2008) (denying asylum to gay man who had been beaten by his father and neighbors and expelled from school because of his sexual orientation); *Nabuwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (remanding case of young lesbian woman denied asylum by the IJ and BIA whose family arranged for her to be raped in a bid to change her sexual orientation); *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007) (remanding case of 22 year old gay man denied asylum by the IJ and BIA because his mannerisms did not indicate that he was gay); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) (affirming the denial of asylum to a gay man who entered the country at age 17 after being abused by his family for his sexual orientation); *Kimumwe v. Gonzales*, 431 F.3d 319, 323-24 (8th Cir. 2005) (denying petition for review for gay man and finding that his expulsion from secondary school and arrest in college did not qualify as persecution based on homosexuality); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000) (remanding case of gay man who suffered past persecution and had a well-founded fear of future persecution).

<sup>35</sup> See cases cited *supra* note 34.

mistreatment that would likely cause extreme distress in a child. In fact, immigration judges have arguably held young applicants to a higher standard than adults. As the examples below illustrate, adjudicators are frequently unwilling to accept that young applicants are in fact “homosexual,”<sup>36</sup> even when the evidence creates no reason to question their sexual orientation.

Omar Janem applied for asylum on the basis that he was gay and faced persecution in his native country, Jordan, because of his sexual orientation. The immigration judge (“IJ”) noted that Janem had “maintained in this proceeding that he is a homosexual,” and concluded that his statements were sincere.<sup>37</sup> The INA allows IJs to grant asylum applications solely based on the applicant’s testimony.<sup>38</sup> Nevertheless, the IJ faulted Janem for failing to produce testimony from family members indicating he was gay. Janem testified that he had never told his parents that he was gay because he was afraid they would abuse or reject him if he did so. It was clear that Janem did not have and could not “reasonably obtain” the corroborating evidence the IJ sought.<sup>39</sup> The IJ found that Janem’s failure to produce statements from his family members attesting to his sexuality was “not excusable” and denied his asylum application.<sup>40</sup>

In another case, an asylum officer refused asylum to “Albion”<sup>41</sup> because the applicant “could not convincingly show that [his] sexual orientation is toward men.”<sup>42</sup> The applicant alleged he had suffered anti-gay abuse in his native country, Albania, but the officer found that “you could not give any explanation as to how anyone would know that you [are] a homosexual except that you like men. You have

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<sup>36</sup> Courts typically refer to gay and transgender asylum seekers as “homosexual,” despite the fact that the term is outmoded and pejorative (and, in the case of transgender people, inapposite). See, e.g., *Karouni v. Gonzalez*, 399 F.3d 1163, 1172 (9th Cir. 2005) (referring to gay immigrants as “alien homosexuals.”). I placed the term in quotes because it is so antiquated and problematic.

<sup>37</sup> Brief and Required Short Appendix for Petitioner at 9, *Janem v. Mukasey*, 295 Fed. Appx. 89 (7th Cir. 2008) (No. 07-3141), 2008 WL 1840927 at 9.

<sup>38</sup> Immigration and Nationality Act § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2011).

<sup>39</sup> An applicant is required to produce corroborating evidence only if it is available to him or if he can “reasonably obtain” it. 8 U.S.C. § 1158(b)(1)(B)(ii) (2011).

<sup>40</sup> Brief and Required Short Appendix for Petitioner at 9, *Janem v. Mukasey*, 295 Fed. Appx. 89 (7th Cir. 2008) (No. 07-3141), 2008 WL 1840927 at \*9.

<sup>41</sup> A pseudonym is used to refer to this young man, whose case was not publicly reported.

<sup>42</sup> Referral Notice from Patricia A. Jackson, Director, New York Asylum Office (Mar. 8, 2007) (on file with author) (declining to grant asylum and referring the applicant to immigration court for removal proceedings).

not had a relationship with a man.”<sup>43</sup> Of course, many young people have not yet had sexual relationships with anyone of either sex. Few would argue that a young person must have a sexual relationship before he can be sure that he is heterosexual, but Albion’s asylum officer was certain that Albion could not be gay without having had sex with a man.<sup>44</sup>

In a third case, even a documented history of same-sex sexual activity and a statement from an adult guardian was insufficient to prove that a young applicant was gay. William Kimumwe testified that he was openly gay and submitted a letter from the director of his orphanage attesting to his sexual orientation.<sup>45</sup> William produced proof of his expulsion from school at the age of twelve for having sex with another boy.<sup>46</sup> He also submitted evidence that when he was sixteen years old, he was arrested and served a two-month detention without charge because he had sex with another male student at his college.<sup>47</sup> Despite this wealth of evidence, the IJ found that William did not establish that he was gay because he had “presented no objective evidence to confirm his homosexuality.”<sup>48</sup>

Proving membership in a particular social group is even more challenging for young people who identify as transgender or bisexual. Many people assume that these identities are mutable and alterable at will.<sup>49</sup> For example, Geovanni Hernandez-Montiel applied for asylum at the age of sixteen,<sup>50</sup> claiming he was a member of the social group of

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<sup>43</sup> *Id.* at 1.

<sup>44</sup> Cf. Shira Maguen et al. *Developmental Milestones and Disclosure of Sexual Orientation Among Gay, Lesbian, and Bisexual Youths*, 23 J. APPLIED DEV. PSYCHOL. 219, 226-227 (2002) (noting that 81% of lesbian, gay, bisexual, and transgender youth became aware of their same-sex attraction at one age but did not have their first same-sex contact until an older age).

<sup>45</sup> *Kimumwe v. Gonzales*, 431 F.3d 319, 323-24 (8th Cir. 2005) (Heaney, J., dissenting).

<sup>46</sup> *Id.* at 320-21.

<sup>47</sup> *Id.* at 321.

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

<sup>49</sup> See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 528 (1994) (noting that bisexuals are assumed to be “capable of satisfactory sexual encounters with members of the so-called ‘opposite’ sex” and thereby conforming to a heterosexual norm); Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 279-80 (1997) (describing how “juridical discourse seeks to categorize transsexualism as play” and views the transsexual as deserving of social censure because she disrupts the social order through “willful alteration of her body”).

<sup>50</sup> *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1089 (9th Cir. 2000).

“gay men with female sexual identities” in Mexico.<sup>51</sup> Geovanni testified that he “realized that [he] was attracted to people of [his] same sex” at age eight and began “dressing and behaving as a woman” at the age of twelve.<sup>52</sup> He also testified that he faced violent abuse in his native Mexico, including death threats, expulsion from school, being thrown out of his home, police detention and arrest, sexual assault, rape, and a knife attack on account of his sexual orientation.<sup>53</sup> The IJ found Geovanni’s testimony “‘credible,’ ‘sincere,’ ‘forthright,’ ‘rational,’ and ‘coherent.’”<sup>54</sup> Despite the quality of his testimony, the IJ found that Geovanni did not establish his membership in a particular social group. The IJ characterized Geovanni’s social group as “homosexual males who wish to dress as a woman [sic]” and ruled that it did not qualify as a particular social group under the Act.<sup>55</sup> In particular, the IJ found that Geovanni’s gender identity was neither immutable nor so fundamental to his identity that he should not be required to change it. The BIA also ruled that Geovanni claimed “he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual,” and that he had failed to show that “his decision to dress as a female was an immutable characteristic.”<sup>56</sup>

Declaring that “[t]his case is about sexual identity, not fashion,” the Ninth Circuit overturned the BIA on appeal.<sup>57</sup> The court concluded that Geovanni’s feminine dress reflected his sexual orientation: “[G]ay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails.”<sup>58</sup> Further, the court held that “[s]exual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required

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<sup>51</sup> The opinion in *Hernandez-Montiel*’s case appears to suggest that *Hernandez-Montiel* identifies as female, stating that Geovanni “began dressing and behaving as a woman” at the age of 12 and took female hormones. *Hernandez-Montiel*, 225 F.3d at 1087, 1088. Nevertheless, the opinion uses male pronouns and a male name for *Hernandez-Montiel*, noting that the court is referring to Petitioner “[a]s does petitioner in his own briefs.” *Id.* at 1087 n.1. For that reason, I also use the same male name and male pronouns to refer to *Hernandez-Montiel*.

<sup>52</sup> *Hernandez-Montiel*, 225 F.3d at 1087.

<sup>53</sup> *Id.* at 1088.

<sup>54</sup> *Id.* at 1089.

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

<sup>56</sup> *Id.* at 1089-90.

<sup>57</sup> *Id.* at 1096.

<sup>58</sup> *Id.* at 1094.

to abandon them.”<sup>59</sup> Geovanni was a member of “that group in Mexico made up of gay men with female sexual identities,” which constituted a “particular social group” under the Act.<sup>60</sup> The court also noted that Geovanni identified as a transsexual, but declined to decide whether “transsexuals” constituted a particular social group.<sup>61</sup>

The *Hernandez-Montiel* decision has drawn praise and criticism for the way it characterized the social group at issue.<sup>62</sup> Some commentators argue that the case correctly allowed the asylum applicant to describe his “particular social group” in a way that reflected his personal experience and was specific to the cultural context from which he came.<sup>63</sup> In determining that “gay men with female sexual identities” constituted a particular social group in Mexico, the Ninth Circuit relied on expert testimony regarding the social context for gay men in Latin America. The expert opined that Mexican society did not regard men who took an “active” role in sex with other men as “homosexuals.”<sup>64</sup> Rather, he testified that only the “passive” partner in sex between men was stigmatized as a “homosexual” and singled out for violent mistreatment.<sup>65</sup> Such “gay men with female sexual identities” were said to reflect their identity through feminine clothing and grooming.<sup>66</sup> The court’s reference to the expert’s testimony that masculine-appearing men who had sex with men were not at risk for persecution has been criticized for implying that masculine gay men are ineligible for asylum.<sup>67</sup>

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<sup>59</sup> *Id.* at 1093.

<sup>60</sup> *Id.* at 1091.

<sup>61</sup> *Id.* at 1095 n.7.

<sup>62</sup> See, e.g., Fadi Hanna, Case Comment, *Punishing Masculinity in Gay Asylum Cases*, 114 YALE L.J. 913, 915 (2005) (criticizing *Hernandez-Montiel* for incorrectly assuming that masculine gay men are less vulnerable to persecution); Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 251-52 (2005) (praising *Hernandez-Montiel* for discussing the connection between identity and behavior); Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 31-32 (2003) (complimenting the Ninth Circuit for recognizing that *Hernandez-Montiel*’s “identity practice . . . is worth protecting, not because it cannot be changed, but because it is a meaningful and worthy part of being that particular person”).

<sup>63</sup> See Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 393-94 (2010).

<sup>64</sup> See *Hernandez-Montiel*, 225 F.3d at 1089.

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

<sup>66</sup> *Id.* at 1094.

<sup>67</sup> See Hanna, *supra* note 62, at 915-916 (suggesting that *Hernandez-Montiel* requires asylum applicants to “reverse cover” or behave in accordance with

Commentators point out that lesbians and gay men whose behavior or appearance does not comport with judges' stereotypes about gay people could be unfairly denied asylum under this logic.<sup>68</sup>

The more serious flaw in the decision, however, is that it conflates sexual orientation and gender identity. The court effectively held that people who are designated male at birth but identify as female and are attracted to men are "gay men" as opposed to "(straight) women" or "(straight) transgender women."<sup>69</sup> Of course, the expert testimony in the case indicated that such a description comported with Mexican cultural norms and that people who were designated male at birth and attracted to men were regarded as "gay men with female sexual identities" in Mexico.<sup>70</sup> Whether Geovanni identified as a "gay man with a female sexual identity" is difficult to ascertain.<sup>71</sup> In the briefing, the petitioner was referred to as an "effeminate gay man,"<sup>72</sup> but the court also noted that Geovanni had lived as a woman since the age of twelve, took female hormones, and identified as "a transsexual."<sup>73</sup> It, therefore, seems likely that "gay man with a female sexual identity" was a label affixed to Geovanni by others but not the one Geovanni would have voluntarily chosen. Rather, Geovanni might well have identified as female, despite being designated male at birth. If so, a more appropriate description for Geovanni would be a transgender woman and not a gay man.<sup>74</sup>

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stereotypes about gay people in order to win their asylum claims); *see also* Shahinaj v. Gonzalez, 481 F.3d 1027, 1028 (8th Cir. 2007) (granting a petition for review filed by a young gay man whose asylum claim was denied because, according to the IJ, "[n]either [Shahinaj]'s dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual").

<sup>68</sup> *See* Hanna, *supra* note 62, at 916.

<sup>69</sup> *Hernandez-Montiel*, 225 F.3d at 1094, 1096 (describing Geovanni as part of a group of gay men with female sexual identities. These men "outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails").

<sup>70</sup> *Id.* at 1089.

<sup>71</sup> *Hernandez-Montiel's* attorneys referred to him that way in their briefing, no doubt doing so in part because "homosexuals" were already established as a particular social group, while transgender people or transsexuals were not. *See id.* at 1087 n.1.

<sup>72</sup> Brief of Amici Curiae, American Civ. Liberties Union of S. California et al. at 1, *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000) (No. 98-70582) ("Geovanni Hernandez-Montiel is an effeminate gay man.").

<sup>73</sup> *See Hernandez-Montiel*, 225 F.3d at 1087, 1088, 1095 n.7.

<sup>74</sup> *See generally* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731,733 n.12 (2008) (noting that "[t]ransgender" is a term that emerged in the 1990s to describe people who experience discrimination or bias because they identify or express gender differently than what is traditionally associated with the sex they were assigned at birth.").



Many people might wrongly assume that a transgender woman who is attracted to men is gay, because they would see her as a man who is sexually attracted to men. But she might actually identify as straight, because she is a woman who is sexually attracted to men, notwithstanding the fact that she was designated male at birth.

Transgender young people are particularly likely to have their gender identity denigrated and ignored.<sup>75</sup> Legal recognition of a transgender person's true gender — the gender with which they identify, as opposed to the gender designated at birth — is frequently conditioned on the production of medical evidence, such as proof of surgical intervention to “change” his or her sex.<sup>76</sup> The focus on so-called “sex change” surgeries is problematic for all transgender people, but particularly for youth who are especially unlikely to have access to those medical interventions.<sup>77</sup> Surgical intervention is out of reach to all but the most affluent transgender adults, and completely off-limits to children.<sup>78</sup> The international guidelines for doctors performing transgender healthcare mandate that patients be at least eighteen before undergoing sex reassignment surgery.<sup>79</sup> Many doctors will not even prescribe cross-gender hormones to a child without parental consent.<sup>80</sup> Yet, the reality is that “[i]n almost every trans-related

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<sup>75</sup> See Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 788-89, 801 (2006) (describing how “the transgender girl may make us — even us lesbians and gay men — uncomfortable, because we want to protect her from herself. Doesn't she know that kids will pick on her for wearing dresses? And why does she think she is a girl?”).

<sup>76</sup> See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 15-16 (2003) (“Everywhere that trans people appear in the law, a heavy reliance on medical evidence to establish gender identity is noticeable.”).

<sup>77</sup> Many transgender people do not have access to surgery or other medical treatments, which can be prohibitively expensive and are often excluded from health insurance or Medicaid coverage. Other transgender people do not want medical intervention or feel that it is unnecessary for them to realize their true gender identity. See Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3132, 3141 (2009).

<sup>78</sup> See *id.* at 3143; W.J. Meyer III, et.al., 2001 Harry Benjamin International Gender Dysphoria Association's *The Standards of Care for Gender Identity Disorders*, 6th Version, 5 INT'L J. TRANSGENDERISM 1, 11, 20 (2001).

<sup>79</sup> See Meyer, *supra* note 78, at 11 (stating that for patients desiring sex reassignment surgery, being 18 years of age or older “should be seen as an eligibility criterion”).

<sup>80</sup> See Hembree, *supra* note 77, at 3139-43 (noting that “[o]ver the past decade, clinicians have progressively acknowledged the suffering of young transsexual adolescents that is caused by their pubertal development . . . [and so] various clinics have decided to start treating young adolescents . . . with puberty-suppressing

case . . . medical evidence will be the cornerstone of the determination of hir<sup>81</sup> rights.”<sup>82</sup>

A transgender youth applying for asylum in the wake of *Hernandez-Montiel* has a difficult decision to make. She could define her social group as “transgender people” and risk denial of her claim because no precedential decision recognizes transgender people as a particular social group under the INA.<sup>83</sup> Alternatively, if she were designated male at birth and is attracted to men, she could call herself a “gay man with a female sexual identity,” and thereby fall into a previously recognized social group. The applicant might be able to avoid deportation and persecution by making this representation on her asylum application, but it means stifling her gender identity and contributing to the erasure and invisibility of transgender people.<sup>84</sup>

Similarly, no precedent establishes that bisexuals constitute a particular social group eligible for asylum. The eligibility of “homosexuals” for asylum is premised on the immutable and personally fundamental nature of sexual orientation, which would suggest that bisexuals also ought to constitute a particular social group.<sup>85</sup> However, many people assume bisexuals can simply choose to have relationships with members of the opposite sex, and thus

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medication.”). The article recommends that “pubertal development of the desired, opposite sex be initiated at the age of sixteen years, using a gradually increasing dose schedule of cross-sex steroids,” but notes that parental consent will be required except in countries where 16-year-olds are considered legal adults. *Id.* at 3142.

<sup>81</sup> Hir (pronounced “here”) is a gender-neutral pronoun used to “resist the need to categorize all subjects neatly into male and female categories.” Spade, *supra* note 76, at 17 n.7.

<sup>82</sup> Spade, *supra* note 76, at 17-18.

<sup>83</sup> See Landau, *supra* note 62, at 246 (“The B.I.A. has not formally recognized transgender status as a particular social group and no federal circuit has yet squarely considered the issue.”); Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 *FORDHAM URB. L.J.* 265, 274 (2005) (“Unlike sexual orientation claims, there has yet to be a precedential decision establishing transgender individuals as members of a particular social group.”).

<sup>84</sup> Cf. Muneer I. Ahmad, *The Ethics of Narrative*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 117, 120-22 (2002) (pointing out the ethical concerns for attorneys who advance arguments that are advantageous to a client but “reinforce subordinating racist, sexist, or homophobic stereotypes”).

<sup>85</sup> It is important to note that establishing membership in a particular social group does not automatically entitle an applicant to asylum. She still has to demonstrate that she has a well-founded fear of persecution on that basis. Immigration and Nationality Act § 1101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2011). Whether or not a bisexual person would be at risk of mistreatment goes to the latter issue which should not affect qualification as a particular social group for asylum purposes.

appear heterosexual.<sup>86</sup> For this reason, bisexuals are thought to be less visible than gay men, lesbians, or transgender people.<sup>87</sup> Two recent BIA cases make establishing bisexuals as a qualifying social group more challenging because they emphasize the importance of “social visibility” in determining whether a particular social group is cognizable for asylum purposes. In *C-A-*, the BIA found that “noncriminal drug informants working against the Cali drug cartel” did not constitute a particular social group because they were insufficiently socially visible.<sup>88</sup> In doing so, the BIA stressed that such informants “intend[] to remain unknown and undiscovered,” and “visibility is limited to those informants who are discovered.”<sup>89</sup> The BIA’s analysis “suggests that under the ‘social visibility’ test, the group members must be recognizable by the general public; it is not enough for the group itself to be recognized.”<sup>90</sup> Similarly, in *A-M-E-*, the BIA held that a particular social group must meet “the requirement that the shared characteristic of the group . . . generally be recognizable by others in the community.”<sup>91</sup>

Establishing that bisexual people are “generally recognizable by others in the community” is extremely challenging. Both gay and straight people have a stake in suppressing the existence of bisexual people in order to shore up the certainty of their own sexual orientation.<sup>92</sup> Consequently, many people question whether bisexuality really exists. Bisexual youths who fear persecution in their native countries because of their sexual orientation are thus likely to struggle in asserting asylum claims.

### B. *Establishing a Well-Founded Fear of Persecution*

Once an asylum applicant establishes that she is a member of a particular social group cognizable under the Act, she must show that she has a well-founded fear of persecution on the basis of her

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<sup>86</sup> Halley, *supra* note 49 at 528 (noting that bisexuals are seen as capable of relationships with members of the so-called ‘opposite’ sex and are therefore expected to conform to the heterosexual norm).

<sup>87</sup> See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 361 (2000).

<sup>88</sup> *In re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006), *affd*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007).

<sup>89</sup> *Id.* at 960.

<sup>90</sup> Marouf, *supra* note 21, at 64.

<sup>91</sup> *In re A-M-E & JG-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007), *affd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72-73 (2d Cir. 2007).

<sup>92</sup> Yoshino, *supra* note 87, at 362.

protected characteristic.<sup>93</sup> However, persecution is not defined in the INA. The Ninth Circuit has defined the term as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.”<sup>94</sup> The Eighth Circuit has similarly defined persecution as “the infliction or threat of death, torture, or injury to one’s person or freedom, on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>95</sup> What constitutes persecution will depend on the circumstances of the individual applicant; courts have noted that the general definition “must be refined further in the context of a particular alien’s situation.”<sup>96</sup> Private, as well as government actors, can inflict persecution; however, the applicant must demonstrate that the private individuals are people that “the government is unable or unwilling to control.”<sup>97</sup>

If an applicant successfully demonstrates past persecution, then there is a presumption that she has a well-founded fear of future persecution.<sup>98</sup> The burden then shifts to the government to show either that circumstances have changed so as to negate that fear, or that the applicant could reasonably relocate within her home country so as to avoid persecution.<sup>99</sup> An applicant who has not suffered persecution in the past can still qualify for asylum by demonstrating a “good reason to fear future persecution.” To do so, the applicant must “adduc[e] credible, direct, and specific evidence . . . that would support a reasonable fear of persecution.”<sup>100</sup> The applicant’s fear must be both subjectively genuine and objectively reasonable.<sup>101</sup> Even a ten percent chance of persecution has been deemed sufficient to meet the requirement for an “objectively reasonable” well-founded fear.<sup>102</sup>

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<sup>93</sup> Immigration and Nationality Act of 1952 § 1101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2011).

<sup>94</sup> *Prasad v. I.N.S.*, 47 F.3d 336, 339 (9th Cir. 1995) (quoting *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988)).

<sup>95</sup> *Regalado-Garcia v. I.N.S.*, 305 F.3d 784, 787 (8th Cir. 2002).

<sup>96</sup> *Ngure v. Ashcroft*, 367 F.3d 975, 990 (8th Cir. 2004), *reh’g denied*, 2004 U.S. App. LEXIS 18608 (8th Cir. 2004).

<sup>97</sup> *Singh v. I.N.S.*, 134 F.3d 962, 967 n.9 (9th Cir. 1998) (citing *Sangha v. I.N.S.*, 103 F.3d 1482, 1487 (9th Cir. 1997)).

<sup>98</sup> 8 C.F.R. §208.13(b)(1) (2011) (“An applicant who has been found to have established . . . past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted . . .”).

<sup>99</sup> 8 C.F.R. §208.13(b)(1)(i) (2011); 8 C.F.R. §208.13(b)(1)(ii)(2011).

<sup>100</sup> *Nagoulko v. I.N.S.*, 333 F.3d 1012, 1016 (9th Cir. 2003) (citing *Duarte De Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999)).

<sup>101</sup> *Id.*

<sup>102</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *Sael v. Ashcroft*, 386 F.3d

Finally, an applicant who cannot demonstrate that she will be personally singled out can establish a well-founded fear of persecution by showing that there is a pattern or practice of persecution against a group of which she is a member.

Children are subject to the same legal standard in applying for asylum as are adults.<sup>103</sup> “[T]he child applicant must establish that he or she meets the definition of a refugee contained at Section 101(a)(42)(A) of the Immigration and Nationality Act (INA). Regardless of how sympathetic the child’s claim may be, he or she cannot be granted asylum if this standard is not met.”<sup>104</sup> Thus, in order to win asylum, a child must demonstrate a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

However, the U.S. Government has taken the position that harm to a child may qualify as persecution even when it would not rise to that level for an adult.<sup>105</sup> The Asylum Office Guidelines on Children’s Asylum Claims state, “[T]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution.”<sup>106</sup> While the Asylum Office Guidelines suggest that adjudicators will show heightened regard to harms suffered by children, a review of reported cases involving violence inflicted on LGBT children does not indicate that they are afforded such solicitude.<sup>107</sup>

William Kimumwe was denied asylum although he had suffered numerous harms because of his sexual orientation. He was expelled from school at the age of twelve for having sex with a fellow student; local authorities verbally abused him with anti-gay remarks and chased him; neighbors spat on him, kicked him, and threw stones at him; and “on one occasion, he was beaten by villagers and shocked with an electrical wire” because he was gay.<sup>108</sup> At age sixteen, William

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922, 925 (9th Cir. 2004).

<sup>103</sup> See JEFF WEIS, U.S. DEP’T OF JUSTICE, OFFICE OF INT’L AFFAIRS, FILE NO. 120/11.26, GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS (1998), available at <http://www.uscis.gov/files/pressrelease/ChildrensGuidelines121098.pdf>.

<sup>104</sup> *Id.*, at 17-19; see also *Cruz-Diaz v. U.S. I.N.S.*, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam) (“In the absence of statutory intent to apply a different standard for a juvenile, and in light of the reasonable interpretation by the INS that the standard as stated takes into consideration the petitioner’s age, we are not at liberty to substitute a different interpretation.”).

<sup>105</sup> WEIS, *supra* note 103, at 19.

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

<sup>107</sup> See *supra* Part I.A.

<sup>108</sup> *Kimumwe v. Gonzales*, 431 F.3d 319, 322-23. The court determined that this

was imprisoned for two months after having sex with a fellow sixteen-year-old boy.<sup>109</sup> The Eighth Circuit upheld the denial of asylum, concluding that “the government’s action in this instance was based not on Kimumwe’s homosexual status, but on allegations of sexual misconduct[.]”<sup>110</sup>

Similarly, the IJ and the BIA found that Geovanni Hernandez-Montiel had not suffered past persecution even though a police officer sexually assaulted him, another officer raped him, and a group of unknown assailants attacked him with a knife when he was only fourteen years old.<sup>111</sup> The BIA found that “[his] mistreatment arose from his conduct . . . thus the rape by the policemen, and the attack by a mob of gay bashers are not necessarily persecution.”<sup>112</sup> The BIA essentially found that fourteen-year-old Geovanni invited the mistreatment because he was gay, female-identified, and wore dresses.<sup>113</sup>

In *Calle v. United States*, the Eleventh Circuit held that a police officer’s rape of a sixteen-year-old boy was not persecution.<sup>114</sup> The court instead equated the rape with an act of “[m]ere harassment.”<sup>115</sup> The Second Circuit similarly discounted a police officer’s rape of a seventeen-year-old boy in *Joaquin-Porras v. Gonzalez*.<sup>116</sup> The court dismissed the rape as an “isolated act of random violence” that did not qualify as past persecution.<sup>117</sup> But the police officer’s rape of Joaquin-Porras was not “random” because the perpetrator was motivated by the victim’s sexual orientation.<sup>118</sup> A violent act committed against

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abuse did not constitute persecution because “[a]ctions by private parties are not attributable to the government, absent a showing that . . . the government is unwilling or unable to control [the abusers].” *Id.*

<sup>109</sup> *Id.* at 321.

<sup>110</sup> *Id.* at 322.

<sup>111</sup> *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1088 (9th Cir. 2000). Hernandez-Montiel had also been forced into abusive psychotherapy intended to change his gender identity and expelled from school. Moreover, he was thrown out of his home, detained and strip-searched by the police on “numerous occasions,” and arrested twice without charge because the police said it was “illegal for homosexuals to walk down the street and for men to dress like women.” *Id.*

<sup>112</sup> *Id.* at 1098.

<sup>113</sup> *Id.*

<sup>114</sup> *Calle v. U.S. Att’y Gen.*, 264 F App’x. 882, 884 (11th Cir. 2008).

<sup>115</sup> *Id.* (quoting *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005)).

<sup>116</sup> *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 175 (2d Cir. 2006).

<sup>117</sup> *Id.* at 177. The court emphasized the fact that the applicant had suffered no further harm in the seven years following the attack.

<sup>118</sup> Joaquin-Porras testified that the police officer “asked him if he liked men”

someone because of his race, religion, nationality, membership in a particular social group, or political opinion is persecution, not “random” violence.<sup>119</sup>

While courts may say that “[w]hen a petitioner’s claim for relief from removal is based on harms suffered while the petitioner was a child, our definition of what constitutes persecution should be reflective of children’s unique vulnerability,”<sup>120</sup> no such solicitude is present in these cases. The mistreatment that William Kimumwe and Geovanni Hernandez-Montiel experienced would likely rise to the level of persecution if inflicted upon adults. That the IJs who heard their cases did not view the mistreatment inflicted on these applicants as persecution, given that it took place when they were minor children, is striking. Geovanni was still a minor when he filed his asylum application.<sup>121</sup> Even when confronted with a child whose testimony they deemed credible, the IJ and the BIA did not evaluate the harm Geovanni endured according to a child-specific standard. Rather than granting him special solicitude, the IJ and BIA dismissed the harm Geovanni suffered and refused to recognize the abuse both state and private actors inflicted on him because of his gender identity as persecution.

## II. HOW ASYLUM ADJUDICATORS PERPETUATE AN OUTMODED STATUS/CONDUCT DISTINCTION IN EVALUATING LGBT YOUTHS’ ASYLUM CLAIMS

Asylum adjudicators continue to deny young LGBT people’s asylum claims on the basis that the mistreatment they suffered was not because of their LGBT status but because of willful conduct in which they voluntarily engaged. An IJ denied William Kimumwe’s application for asylum because he determined the abuse he experienced was “not based on [his] sexual orientation but rather on

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before the attack, which was clearly a reference to his sexual orientation. *Id.* at 175.

<sup>119</sup> *Bromfield v. Mukasey*, 543 F.3d 1071, 1076-77 (9th Cir. 2008) (noting that “[w]hether particular conduct constitutes persecution or ‘random’ violence turns on the perpetrator’s motive. If the perpetrator is motivated by his victim’s protected status—including sexual orientation—he is engaging in persecution, not random violence”) (citation omitted).

<sup>120</sup> *Mansour v. Ashcroft*, 390 F.3d 667, 681-82 (9th Cir. 2004) (Pregerson, J., concurring in part and dissenting in part).

<sup>121</sup> *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 n.1 (9th Cir. 2000). Kimumwe, Joaquin-Porras, and Calle were over eighteen by the time they filed their asylum applications. See *Calle v. U.S. Att’y Gen.*, 264 Fed. Appx. 883 (11th Cir. 2008); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 174 (2d Cir. 2006); *Kimumwe v. Gonzales*, 431 F.3d 319, 320 (8th Cir. 2005).

[his] involvement in prohibited sexual conduct.”<sup>122</sup> Similarly, an IJ and the BIA denied Geovanni Hernandez-Montiel’s asylum claim because they found that “[his] mistreatment arose from his conduct . . . thus the rape by the policemen, and the attack by a mob of gay bashers are not necessarily persecution.”<sup>123</sup> The “conduct” that precipitated his abuse was that he wore female clothing, which the BIA characterized as “dress[ing] as a male prostitute.”<sup>124</sup>

Both decisions imply that the children could have avoided persecution based on their sexual orientation or gender identity by refraining from expressing their identities. In *Kimumwe*, the court found that William was mistreated not because he was gay, but because he had sex with another boy at his school.<sup>125</sup> Similarly, the IJ and BIA concluded that Geovanni Hernandez-Montiel was singled out because he wore clothing not traditionally associated with the sex he was designated at birth, rather than because of his sexual identity.<sup>126</sup> The courts suggest that harm the young people suffered was not on account of their sexual orientation or gender identity, but because of their behavior. This supposed distinction between LGBT “status” and “conduct” has been and continues to be assailed in the constitutional jurisprudence on LGBT rights.<sup>127</sup> In clinging to this distinction, asylum law has failed to keep pace with the evolving conception of LGBT rights in the constitutional context.

The constitutional jurisprudence on the rights of sexual minorities to be free from discrimination based on their sexual orientation and gender identity has evolved significantly over the past twenty years. In 1996, the Supreme Court overturned a voter-enacted amendment to the Colorado Constitution that forbade the enactment of statutes outlawing anti-gay discrimination.<sup>128</sup> Finding that the amendment had been enacted with “the purpose of disadvantaging the group burdened by the law,”<sup>129</sup> the Court held that animus toward gay people does not constitute even a rational basis for the enactment of legislation. Colorado could not, therefore, “classif[y] homosexuals . . . [solely to] make them unequal to everyone else.”<sup>130</sup> In 2003, the Supreme Court

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<sup>122</sup> *Kimumwe*, 431 F.3d at 322.

<sup>123</sup> *Hernandez-Montiel*, 225 F.3d at 1098.

<sup>124</sup> *Id.* at 1095.

<sup>125</sup> *Kimumwe*, 431 F.3d at 322.

<sup>126</sup> *Hernandez-Montiel*, 225 F.3d at 1098.

<sup>127</sup> See *infra* notes 128-160 and accompanying text.

<sup>128</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>129</sup> *Id.* at 633-35.

<sup>130</sup> *Id.* at 635.



concluded that state laws criminalizing sodomy are unconstitutional, reversing itself less than twenty years after upholding the validity of those statutes.<sup>131</sup> The Court found that the privacy protections of the Fourteenth Amendment's due process clause encompass a right to engage in gay sex. Under *Lawrence v. Texas*, adults "may choose to enter upon [a same-sex sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."<sup>132</sup>

Relying on *Lawrence*, lower courts held that the Don't Ask Don't Tell Act ("DADT"), which allowed "homosexuals" to serve in the military so long as they did not engage in any "homosexual conduct", violated service members' Fifth Amendment rights.<sup>133</sup> DADT officially allowed lesbian, gay, and bisexual ("LGB") people to serve in the armed forces, but mandated the discharge of any service member who engaged in "a homosexual act," "stated that he or she is a homosexual or bisexual, or words to that effect," or "married or attempted to marry a person known to be of the same biological sex."<sup>134</sup> Transgender people face military exclusion on medical grounds; even the repeal of DADT will not allow transgender people to serve openly.<sup>135</sup> DADT was supposed to represent an advance from an earlier military policy that simply excluded gay people from military service.<sup>136</sup> It purported to

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<sup>131</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that *Bowers v. Hardwick*, which upheld the constitutionality of sodomy laws in 1986 "ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled").

<sup>132</sup> *Id.* at 567.

<sup>133</sup> See *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP (Ex), 2010 WL 3526272, at \*36 (C.D. Cal. Oct. 12, 2010); *Witt v. Dep't of Air Force*, 739 F. Supp. 2d 1308, 1313 (W. D. Wash., 2010). See Lisa Leff, *Transgender Veterans Seek Recognition*, BOSTON GLOBE, Jan. 30, 2011, [http://www.boston.com/news/nation/articles/2011/01/30/transgender\\_veterans\\_seek\\_recognition](http://www.boston.com/news/nation/articles/2011/01/30/transgender_veterans_seek_recognition).

<sup>134</sup> 10 U.S.C.S. § 654(b) (2011) (repealed by Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010)). DADT was officially repealed on September 20, 2011, 60 days after the President, Secretary, and Chairman of the Joint Chiefs of Staff certified to the congressional defense committees that implementing the policies and regulations necessary to repeal DADT was consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention. See Elisabeth Bumiller, *A Final Phase for Ending Don't Ask Don't Tell*, N.Y. TIMES, July 22, 2011 at A13; Thom Shanker, *Pentagon Leaders Commend End of 'Don't Ask' Policy*, N.Y. TIMES, Sept. 20, 2011, [http://www.nytimes.com/2011/09/21/us/pentagon-leaders-commend-end-of-dont-ask-policy.html?\\_r=1&ref=dontaskdonttell](http://www.nytimes.com/2011/09/21/us/pentagon-leaders-commend-end-of-dont-ask-policy.html?_r=1&ref=dontaskdonttell).

<sup>135</sup> See Leff, *supra* note 133.

<sup>136</sup> See JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 1 (1999); Gays in the Military: *Sensible Compromise?*, L.A. TIMES, May 26, 1993, at B6 (characterizing the "don't ask, don't tell" policy as an opportunity for "real progress" for gays in the military).

make LGB people eligible for service in the armed forces, but did so based on an incredibly narrow vision of what it means to be LGB; namely, DADT assumed that one can be lesbian, gay, or bisexual without ever saying what one is, even privately, in confidential correspondence.<sup>137</sup> Similarly, to construe DADT as a policy that allowed LGB people to serve in the military requires accepting the proposition that one can still be LGB if one is never allowed to commit a “homosexual act,” which would mean remaining completely celibate and avoiding any sexual or romantic involvement with a person of the same sex.

DADT purported to be a passing regime; that is, it claimed to demand simply that LGB people hide their identity in order to serve. But one might question whether the statute actually demanded conversion: a service member risked discharge under the policy for saying anything, even privately, that might indicate she was a lesbian; she could not have sex with another woman even hundreds of miles away from her base or publicly commit to a female partner.<sup>138</sup> If the service member complied with those requirements, she would not just hide her lesbian identity, she would abandon it.<sup>139</sup>

Not surprisingly, courts questioned the logic of DADT. Noting that *Lawrence* guaranteed a substantive due process right “to engage in adult consensual sexual acts,”<sup>140</sup> the Ninth Circuit found that DADT intruded “upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*,” and is subject to heightened scrutiny.<sup>141</sup> For DADT to pass constitutional muster, the court held that “the government must advance an important government interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further

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<sup>137</sup> *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010) (noting that the Act denies LGBT people in the military “the right to speak about their loved ones while serving their country in uniform; it punishes them with discharge for writing a personal letter, in a foreign language, to a person of the same sex with whom they shared an intimate relationship before entering military service; it discharges them for including information in a personal communication from which an unauthorized reader might discern their homosexuality”).

<sup>138</sup> See *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008), *reh’g denied*, 548 F.3d 1264 (9th Cir. 2008).

<sup>139</sup> See Kenji Yoshino, *Covering*, 111 YALE L.J., 769, 833-34 (2002) (noting that “acts of coming out can be sufficiently performative that one cannot burden acts of self-identification without simultaneously burdening the underlying status. The underlying identity does not exist inertly beneath the speech that describes it, but is partially fashioned by that speech.”).

<sup>140</sup> *Witt*, 527 F.3d at 813.

<sup>141</sup> *Id.* at 819.

that interest.”<sup>142</sup> In the case of Margaret Witt, who brought an as-applied challenge to DADT, the court found that her discharge would be unconstitutional unless it significantly furthered the government’s important interest in military readiness or unit cohesion and the interest could not be achieved through less intrusive means.<sup>143</sup> On remand, the district court found the government had failed to provide such a justification for Witt’s discharge and ordered her reinstatement.<sup>144</sup>

Similarly, in *Log Cabin Republicans v. United States*, a district court ruled that LGBT people have a substantive due process right under the Fifth Amendment to “enjoy ‘intimate conduct’ in their personal relationships . . . [and] to speak about their loved ones,”<sup>145</sup> both of which were violated by DADT. The Act prevented LGBT service members from “discussing their personal lives” or complaining about homophobic harassment and hazing, thus violating the First Amendment’s guarantees of freedom of speech and petition.<sup>146</sup> The court found DADT facially unconstitutional and ruled that the plaintiffs were entitled to a permanent injunction barring its enforcement.<sup>147</sup>

The logic of *Lawrence* extends not just to LGBT adults, but to teenagers as well. In *State v. Limon*, the Supreme Court of Kansas found “the demeaning and stigmatizing effect [of anti-gay criminal laws] upon which the *Lawrence* Court focused is at least equally applicable to teenagers . . . and, according to some, the impact is greater on a teen.”<sup>148</sup> The court also noted that under *Lawrence* and *Romer*, “moral disapproval of [LGBT people] cannot be a legitimate government interest.”<sup>149</sup> On that basis, the court invalidated a provision of the state’s “Romeo and Juliet” law that provided reduced criminal penalties for violations of the state’s statutory rape law involving voluntary sex between teenagers of the opposite sex who were less than four years apart in age. Matthew Limon was an eighteen-year-old young man with a cognitive disability who lived in a

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 821. The Court then remanded Margaret Witt’s claim back to the district court for a ruling on her as-applied challenge to DADT.

<sup>144</sup> Witt v. Dep’t of Air Force, 739 F. Supp. 2d 1308, 1316 (W.D. Wash., 2010).

<sup>145</sup> *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010).

<sup>146</sup> *Id.* at 927.

<sup>147</sup> *Id.* at 929, (stay granted, *Log Cabin Republicans v. U.S.*, No. 10-56634, 2010 WL 4136210 (9th Cir 2010)).

<sup>148</sup> *State v. Limon*, 122 P.3d 22, 29 (Kan. 2005) (per curiam).

<sup>149</sup> *Id.* at 35.

home for developmentally disabled teenagers. He was arrested after engaging in voluntary oral sex with a fourteen-year-old fellow resident of the facility. Limon did not qualify for relief under the Romeo and Juliet statute because his sexual partner was male. He received a seventeen-year, two-month prison sentence for criminal sodomy.<sup>150</sup>

The Kansas Court of Appeals upheld Limon's conviction because it found that he suffered no discrimination based on his sexual orientation.<sup>151</sup> The court found that Limon's punishment was for his "conduct of engaging in sodomy with a child."<sup>152</sup> The lower court also held that excluding gay teenagers from the Romeo and Juliet law was justified since "homosexual sodomy between children and young adults could disturb the traditional sexual development of children."<sup>153</sup> The lower court also found that the law was "rationally related to the purpose of protecting and preserving the traditional sexual mores of society and the historical sexual development of children."<sup>154</sup>

The Kansas Supreme Court squarely rejected this "teenage development exception" to *Lawrence* and *Romer*, pointing out that neither the lower court nor the State cited "any scientific research or other evidence justifying the position that homosexual sexual activity is more harmful to minors than adults."<sup>155</sup> The court also noted that a number of studies indicate that "sexual orientation is already settled by the time a child turns 14, that sexual orientation is not affected by the sexual experiences teenagers have, and that efforts to pressure

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<sup>150</sup> Limon was also subject to 60 months of post release supervision and was required to register as a persistent sexual offender. He had two prior juvenile adjudications for aggravated criminal sodomy. Even accounting for his prior juvenile record, however, had he qualified for downward departure under the Romeo and Juliet statute, Limon would have faced a maximum of 15 months of incarceration. *Id.* at 25.

<sup>151</sup> The Kansas Court of Appeals had upheld Limon's conviction twice. Limon appealed after he was convicted; the Kansas Court of Appeals affirmed and the state Supreme Court denied his petition for review. *State v. Limon*, No. 85,898, 2002 Kan. App. LEXIS 104, at \*1 (Kan. Ct. App. Feb. 1, 2002), *rev. denied*, 274 Kan. 1116 (2002). Limon appealed to the United States Supreme Court, which vacated his conviction and remanded the case to the Court of Appeals for a decision consistent with the Court's decision in *Lawrence v. Texas*, 539 U.S. 558, (2003). *Limon v. Kansas*, 539 U.S. 955 (2003). On remand, the Court of Appeals again affirmed Limon's conviction. *State v. Limon*, 83 P.3d 229 (2004), *rev'd* 122 P.3d 22 (2005). Limon appealed to the Kansas Supreme Court, which reversed the Court of Appeals. *State v. Limon*, 122 P.3d 22, 37-42 (Kan. 2005).

<sup>152</sup> *State v. Limon*, 83 P.3d 229, 239 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22, 29 (Kan. 2005) (per curiam).

<sup>153</sup> *Id.* at 236.

<sup>154</sup> *Id.* at 236-37.

<sup>155</sup> *Limon*, 122 P.3d at 35.

teens into changing their sexual orientation are not effective.”<sup>156</sup> As such, the statute at issue did not advance the state’s alleged interest in encouraging teenagers to follow the “traditional sexual development of children” and to be heterosexual. Finally, the alleged state interest was not valid under *Lawrence* because “moral disapproval of a group cannot be a legitimate government interest.”<sup>157</sup> Concluding that the provision restricting the Romeo and Juliet law’s coverage to teenagers who had sex with members of the opposite sex violated the guarantee of equal protection under the U.S. and Kansas Constitutions, the court struck it from the statute.<sup>158</sup>

The U.S. Supreme Court also recently stated that discrimination on the basis of sexual orientation encompasses not just discrimination on the basis of LGBT “status,” but also discrimination on the basis of LGBT “conduct” such as same-sex sexual activity.<sup>159</sup> In rejecting a group’s contention that it did not discriminate on the basis of sexual orientation when it refused to admit people who engage in what the group called “unrepentant homosexual conduct,” the Court noted that its “decisions have declined to distinguish between status and conduct in this context.”<sup>160</sup>

In evaluating LGBT people’s claims for protection from anti-gay discrimination under the constitution, courts have increasingly rejected the notion that LGBT people can be penalized for expressing their sexual orientation through certain conduct, such as having same-sex sexual relationships or openly stating their sexual identity. To hold that an asylum-seeker jailed for having gay sex was not persecuted on the basis of his sexual orientation is to cling to an outmoded understanding of sexual identity. The rape and knife attack of a transgender person is also no less persecution because the victim expressed his gender identity by wearing dresses. In the constitutional context, courts accept that engaging in gay sex or otherwise expressing one’s sexual identity is a vital part of being LGBT and that to forbid such expression is to discriminate on the basis of sexual orientation or gender identity.<sup>161</sup> Asylum adjudicators will remain behind the curve if they persist in the belief that attacks on young

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 40.

<sup>159</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 130 S.Ct. 2971, 2990 (2010).

<sup>160</sup> *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

<sup>161</sup> See *supra* notes 128-160 and accompanying text.

LGBT people for their sexual expression do not constitute persecution on the basis of their sexual orientation.<sup>162</sup>

### III. THE CONFOUNDING NATURE OF YOUTH AND SEXUAL IDENTITY AND WHY “LGBT YOUTH” IS TREATED AS A PARADOX

In a landmark decision for children’s rights, *Graham v. Florida*, the Supreme Court recently held that a young person under the age of eighteen could not be sentenced to life in prison without the possibility of parole for a nonhomicide offense.<sup>163</sup> *Graham* followed a 2005 decision, *Roper v. Simmons*, in which the Court ruled that minors could not receive the death penalty, even for a premeditated murder conviction.<sup>164</sup> In ruling that the sentences at issue in both cases were cruel and unusual punishment when applied to children, the Court found that “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”<sup>165</sup> The Court held that children deserve special solicitude, even when they commit heinous crimes. The Court based this conclusion in part upon “developments in psychology and brain science” that “show fundamental differences between juvenile and adult minds.”<sup>166</sup>

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<sup>162</sup> See *Maldonado v. U.S. Att’y Gen.* 188 Fed. Appx. 101, 104 (3d Cir. 2006) (stating that while “the government alleges that the persecution was not ‘on account’ of [the applicant’s sexual orientation] . . . but occurred instead because he engaged in an activity (leaving gay discos late at night) that he was free to modify. This is a distinction without a difference. The fact that Maldonado was targeted by the police only while engaged in an elective activity does not foreclose the possibility that he was persecuted on account of his membership in a particular social group”); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (holding that an asylum seeker could not be required to remain celibate in order to avoid persecution because there is “no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts”). Note the distinction between the approach in these two cases, both involving adults, and *Kimumwe v. Gonzalez*, 431 F.3d 319, 320 (8th Cir., 2005) (holding that a 16-year-old gay boy’s incarceration for having sex with another boy was not persecution but punishment for engaging in prohibited conduct) (citation omitted).

<sup>163</sup> See *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010); Mark Hansen, *What’s the Matter With Kids Today*, 96 A.B.A.J. 50, 51 (2010) (claiming that *Graham* “may be comparable to the *Brown v. Board of Education* case in juvenile justice”).

<sup>164</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>165</sup> *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010) (quoting *Roper*, 543 U.S. at 569-70).

<sup>166</sup> *Id.*

It is important to note that the science the Court relied on in *Roper* and *Graham* does not cast doubt on whether children can reliably identify themselves as LGBT. The psychological literature at issue related to adolescents' impulsivity and tendency to act without considering the consequences of their actions.<sup>167</sup> The Court found that because the areas of the brain associated with behavior continue to develop throughout adolescence, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."<sup>168</sup> Simply put, an adolescent might have committed a heinous crime because he acted without thinking, not because he is utterly evil and depraved.<sup>169</sup> While children are not mature enough to resist acting impulsively, the scientific literature suggests adolescents are capable of forming a sincere sexual identity that is stable over time. Indeed, a number of studies indicate that by the time a child turns 14, her sexual orientation is already settled and will not change depending on the sexual experiences she has or whether she is pressured to change her sexual orientation.<sup>170</sup>

The Court's decisions in *Roper* and *Graham* are particularly groundbreaking because they diverge from a longstanding trend in state law in choosing to treat children differently from adults based on scientific information about children's mental capacity. Most states have moved away from treating children accused of certain kinds of criminal activity differently from adults.<sup>171</sup> These states conclude that young people accused of certain crimes are no longer "children."<sup>172</sup> Such youth are, therefore, processed, tried, and sentenced in criminal

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (quoting *Roper*, 543 U.S. at 573).

<sup>169</sup> *Id.*

<sup>170</sup> *State v. Limon*, 122 P.3d 22, 29 (Kan. 2005) (per curiam).

<sup>171</sup> KAREEM L. JORDAN, VIOLENT YOUTH IN ADULT COURT: THE DECERTIFICATION OF TRANSFERRED OFFENDERS 20 (2006) (stating that between the mid 1980s and the mid 1990s "all but six states either expanded or implemented laws that sought to increase the number of juvenile offenders waived to adult criminal court."); see Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495, 521 (2004) (noting that "between the years 1992 and 2000, almost half the states took steps to facilitate the transfer of juveniles accused to criminal court.").

<sup>172</sup> George Butler & Royce R. Till, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1178 (2005) (noting that state statutes that exclude children accused of enumerated crimes from juvenile court jurisdiction "effectively create[] an irrebuttable presumption that children of a certain age who are charged with certain crimes are not really children").

cases in the same way an adult would be.<sup>173</sup> *Roper* and *Graham*, however, rejected this behavior-based conception of childhood, holding that a person under eighteen is still entitled to special solicitude even if the minor has committed adult-like acts.

*Roper* and *Graham* are also notable because they hold that children are categorically ineligible for the death penalty following a premeditated murder conviction and life without the possibility of parole for crimes other than intentional murder.<sup>174</sup> After these rulings, a defendant's youth is not just a mitigating factor that must be considered by a jury; he is *per se* ineligible for these penalties because of his age.<sup>175</sup> In *Roper*, the Court entertained the possibility that there may be some minor children convicted of murder who are sufficiently mature (and sufficiently depraved) to warrant the imposition of the death penalty.<sup>176</sup> Nevertheless, the Court held that no child could be sentenced to death, notwithstanding the fact that there may be some children who deserve such a punishment. In effect, the Supreme Court held that juries cannot be trusted to properly weigh a child defendant's eligibility for the death penalty.<sup>177</sup> Despite the fact that being a child should render a defendant less culpable and more deserving of mercy, the Court indicated that juries might actually feel more vengeful towards a defendant because he is a minor.<sup>178</sup> The Court suggested that, while we think children should be treated better than adults, we might actually treat children worse.<sup>179</sup>

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<sup>173</sup> Thirty-seven states and the District of Columbia have legislative waiver statutes that categorically exclude certain juveniles or offenses from juvenile court jurisdiction. Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 *FORDHAM L. REV.* 2425, 2443 (1996). Ten states empower prosecutors to choose the forum in which to try juvenile offenders when both the juvenile and criminal courts have jurisdiction over a juvenile suspect by virtue of her age and the nature of her alleged crime. *Id.* at 2439. Forty-seven states and the District of Columbia use a judicial waiver procedure to transfer juveniles to criminal district court for prosecution as an adult. *Id.* at 2436.

<sup>174</sup> *Graham*, 130 S. Ct. 2011; *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>175</sup> *Roper*, 543 U.S. at 569-70.

<sup>176</sup> *Id.* at 572 ("Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death.").

<sup>177</sup> *Id.* at 572-73.

<sup>178</sup> See *id.* (noting that "a defendant's youth may even be counted against him").

<sup>179</sup> Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 *SUP. CT. REV.* 51, 53 (2006); see also Tamar R. Birckhead, *Graham v. Florida: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 *DUKE J. OF CONSTITUTIONAL L. & PUBLIC POLICY* 66, 73 (2010).



While in certain situations children may be viewed as vulnerable members of society deserving of sympathy, there is a parallel view of adolescents as threatening, socially disruptive individuals who are irresponsible, unreliable and "out of control."<sup>180</sup> Under this view, rather than sympathizing with society instead perceives them as conniving, drains on resources who must be treated harshly lest they take advantage of the system.<sup>181</sup> This might be called the "predatory teenager" conception of children. It is presumably this notion of childhood that leads the Supreme Court to distrust the ability of a jury to fairly evaluate a child defendant's eligibility for the death penalty. Rather than looking at a child defendant with sympathy because he is a minor, the Court worries that a jury will see a "predatory teenager" and view him as more deserving of the ultimate penalty than an adult convicted of the same crime. In holding that all minors must be exempt from the harshest punishments, the Court rejects the predatory teenager stereotype, finding instead that all children are worthy of special solicitude.

Unfortunately, asylum adjudicators evaluating young LGBT asylum applicants' claims have not accepted the Court's sympathetic view of young people. The asylum system's failure to absorb the lessons of

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<sup>180</sup> See Robin Templeton, *Superscapegoating: Teen 'Superpredators' Hype Set Stage for Draconian Legislation*, FAIRNESS & ACCURACY IN REPORTING (January/February 1998), <http://www.fair.org/index.php?page=1414> (explaining that more than two-thirds of local news stories on violence concerned young people under age 25 even though 57% of violent crime is committed by people age 25 and over, and more than half of local news stories on youth involved violence); Jerome Miller, *Riding the Crime Wave*, NIEMAN REPORTS (Winter 1998), <http://www.nieman.harvard.edu/reports/article/102294/Riding-the-Crime-Wave.aspx> (noting that "[f]rom Plato to William Golding, the young always seem to be vested with a potential for dissolution and violence"); One extreme example of this viewpoint is the notion of the "superpredator" popularized by John J. DiIulio, Jr. in the mid-1990s. DiIulio warned that a new, more dangerous type of youthful offender was emerging who would commit much more serious violent crime than teenagers in the past. See John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23 ("On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators . . . They fear neither the stigma of arrest nor the pain of imprisonment."). His ideas were widely reported in the popular press and spawned federal and state legislation increasing the penalties for juvenile crime, even though offense rates for homicide and serious crime generally were dropping for youth offenders. See Linda S. Beres & Thomas D. Griffith, *The Rampart Scandal: Policing the Criminal Justice System*, 34 LOY. L.A. L. REV. 747, 753-56 (2001).

<sup>181</sup> See Beres & Griffith, *supra* note 180, at 747 ("Youth in general, and young minority males in particular, often are demonized by legislators, the media, scholars, and the public at large.").

*Roper* and *Graham* causes its decisions to further diverge from contemporary constitutional norms.

A. *The Confounding Burden Facing Young LGBT Asylum Applicants*

A number of forms of subordination burden young LGBT asylum-seekers and limit their ability to be heard in immigration proceedings. Heterosexism and stereotypes about children shape adjudicators' views of LGBT youths' claims.<sup>182</sup> This suggests young LGBT people will be less able than LGBT adults or heterosexual children to obtain asylum, even when they legitimately qualify for relief. Adjudicators who fail to attend to the interacting forms of oppression young LGBT asylum-seekers confront may deprive these youth of equal access to relief from persecution even when their intention is to facilitate access to relief for deserving applicants.<sup>183</sup> "Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden with preexisting vulnerabilities to create yet another dimension of disempowerment."<sup>184</sup> An exploration of the specific burdens confronting young LGBT asylum-seekers is necessary to discover how adjudicators may inadvertently exclude them from protection.

A strain of feminist and critical race theory called intersectionality initially recognized how different forms of subordination interact to produce particular harm to women of color.<sup>185</sup> Kimberle Crenshaw notes that "the narratives of gender are based on the experience of white, middle-class women, and the narratives of race are based on the experiences of Black men."<sup>186</sup> Thus, an anti-racist analysis capturing only the situation of men of color, and a feminist analysis accounting only for experiences of white women, would not reflect the reality for women of color.

Race and sexuality scholars expanded this theory to note that many communities experience multidimensional subordination, confronting not just sexism and racism, but also heterosexism and a lack of class privilege.<sup>187</sup> Thus, it is important to look at the ways different forms of oppression interact with and reinforce one another. For example,

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<sup>182</sup> See *infra* Part III.

<sup>183</sup> See Crenshaw, *supra* note 8, at 1249.

<sup>184</sup> *Id.*

<sup>185</sup> Darren Lenard Hutchinson, *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1366 (2000).

<sup>186</sup> See Crenshaw, *supra* note 8, at 1298.

<sup>187</sup> Hutchinson, *Race, Sexual Identity, and Equal Protection Discourse*, *supra* note 185, at 1366 (2000).

rather than asking how white, upper class gay men are “like” people of color, which ignores the fact that many LGBT people are also low-income people of color, race and sexuality scholarship teaches that the pertinent inquiry should address how heterosexism and racism are intertwined.<sup>188</sup>

In the case of young LGBT asylum-seekers, it is clear that anti-child bias in the form of the predatory teenager stereotype and anti-gay bias reinforce one another to undermine the adjudication of their claims. However, the nature of the overlapping forms of subordination these youth shoulder is distinct from the intersectional or multidimensional oppression discussed above.<sup>189</sup> Rather than intersectional or multidimensional, heterosexism and anti-child bias are confounding forms of oppression. That is to say “LGBT child” is a contradiction in terms. Heterosexist notions of sexuality and anti-child biases combine such that being a child appears to be incompatible with being LGBT. A person who claims to be an LGBT child encounters not only anti-child and homophobic bias, but, at a basic level, incredulity because an “LGBT child” cannot exist.<sup>190</sup> A child cannot be LGBT, and a person who is LGBT cannot be a child.<sup>191</sup> As Teemu Ruskola points out, “our popular, medical, and legal understandings of homosexuality . . . are premised on a central cultural fantasy that gay and lesbian youth do not exist.”<sup>192</sup>

### 1. Childhood as Performance

The law frequently treats “child” as a performative category, holding that children who commit certain acts are no longer “children” deserving of any special solicitude and should instead be treated as adults.<sup>193</sup> A child accused of a serious crime will, in most states, be charged as an adult, be tried in adult criminal proceedings, and be

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<sup>188</sup> *Id.* (arguing that heterosexism supports and perpetuates racism).

<sup>189</sup> See Crenshaw, *supra* note 8, at 1249 (discussing intersectional oppression); Hutchinson, *Race, Sexual Identity, and Equal Protection Discourse*, *supra* note 185, at 1366 (discussing multidimensional oppression).

<sup>190</sup> Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J. L. & FEMINISM 269, 269-70 (1996).

<sup>191</sup> Cf. *State v. Limon*, 83 P.3d 229, 373 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005) (stating that “children are excluded from the class that ‘may legally engage in private consensual sexual practices common to a homosexual lifestyle,’ and all persons who ‘may legally engage in private consensual sexual practices common to a homosexual lifestyle’ are excluded from the class of children”).

<sup>192</sup> See Ruskola, *supra* note 190, at 269-70.

<sup>193</sup> See *supra* notes 172-173 and accompanying text.

eligible for the same penalty an adult would receive for the crime.<sup>194</sup> The Supreme Court rejected the notion that a young person convicted of a heinous crime ceases to be a child worthy of special solicitude in holding that the death penalty and life imprisonment without the possibility of parole were cruel and unusual punishment when applied to children.<sup>195</sup> But, the fact remains that in almost every state, a sixteen-year-old accused of murder will be prosecuted as an adult and sentenced to decades in prison if convicted.<sup>196</sup> Such a child is simply deemed to be an adult because of his acts, since a “child” would never commit such a crime.

Similarly, “children” are expected to refrain from sexual activities. While the specific age of consent varies, every state in the U.S. requires children to be at least twelve before they can legally consent to sex, with the most common age of consent being sixteen.<sup>197</sup> An adult who engages in sexual contact with a child under the age of consent faces criminal prosecution for statutory rape.<sup>198</sup> The alleged willingness of a child under the age of consent to engage in sex is not an affirmative defense to a statutory rape charge.<sup>199</sup> The law deems children under the minimum age incapable of consent.<sup>200</sup> There are certain children, however, whose sexual contact with adults the law deems both consensual and culpable. For example, children who are accused of prostitution are subject to prosecution under the

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<sup>194</sup> Cf. *Graham v. Florida*, 130 S.Ct. 2011, 2025 (2010) (“Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence.”).

<sup>195</sup> *Id.* at 2030; *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

<sup>196</sup> Only Missouri and Nebraska lack statutes permitting the transfer of children from juvenile court to adult court in cases where the child is accused of murder.

<sup>197</sup> See Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314 (2003); RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 48 (1996).

<sup>198</sup> In some states, a peer who has sex with a fellow teenager also faces prosecution.

<sup>199</sup> See, e.g., *Jones v. State*, 640 So. 2d 1084, 1088 (Fla. 1994), *reh'g denied*, (Kogan, J., concurring) (concurring with the majority's upholding of the conviction of a 19-year-old man for having sex with his 14-year-old girlfriend despite evidence of the girlfriend's consent and stating that “an uncritical acceptance of the notion of youths ‘consenting’ to sexual activity will merely create a convenient smoke screen for a predatory exploitation of children and young adolescents”).

<sup>200</sup> See e.g., N.Y. PENAL LAW §130.05 (Consol. 2011) (stating that “it is an element of every offense defined in this article that the sexual act was committed without consent of the victim” but “[a] person is deemed incapable of consent when he or she is . . . less than seventeen years old . . .”).

delinquency statutes and confinement in a secure institution if the charge is sustained.<sup>201</sup> A child's statutory lack of ability to consent to sex is no defense in such a delinquency prosecution.<sup>202</sup> In effect, the law treats sex with children as rape unless someone is paying for it, in which case the child is deemed a consenting, culpable party.<sup>203</sup>

Advocates for sexually exploited youth decry this practice, arguing that adult procurers coerce children into the sex trade and then profit from their victimization.<sup>204</sup> Their activism has produced legislative efforts to reform the delinquency statutes, but in most jurisdictions, the law continues to treat children accused of commercial sexual activity differently than other children.<sup>205</sup> A child who has sex for

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<sup>201</sup> See, e.g., *In re B.D.S.D.*, 289 S.W.3d 889 (Tex. App. 2009), *reh'g denied*, No. 09-0659, 2010 Tex. LEXIS 391 (2010) (affirming trial court's finding that juvenile appellant engaged in prostitution and noting that, in Texas, the statutory definition of "prostitution" is not limited to adult conduct); *In re Emani G.*, No. D-7650/05, slip op. at 3 (N.Y. Fam. Ct. 2005) (denying appellant's motion to dismiss her juvenile delinquency proceeding for prostitution); *In re Cheri T.*, 83 Cal. Rptr. 2d 397 (Cal. Ct. App. 1999), *petition for rev. denied*, No. S078514, 1999 Cal. LEXIS 4534 (1999) (affirming juvenile court's order sustaining a petition charging appellant with prostitution); *In re Appeal No. 180*, September Term, 1976, 365 A.2d 540 (Md. 1976) (affirming juvenile court's judgment that appellant committed the act of solicitation of prostitution), *In re Elizabeth G.*, 126 Cal. Rptr. 118 (Cal. Ct. App. 1975), *reh'g denied* (affirming juvenile court's order declaring juvenile appellant to be delinquent in that she solicited prostitution).

<sup>202</sup> See *In re Nicolette R.*, 779 N.Y.S.2d 487, 488 (N.Y. App. Div. 2004) (holding that the fact that the respondent in a juvenile delinquency proceeding was 12 and thus too young to consent to sex was "irrelevant to the issue of whether she was properly found to have committed an act, which if committed by an adult, would constitute the crime of prostitution"). But see *In re B.W.*, 313 S.W.3d 818, 822 (Tex. 2010) (overturning the delinquency adjudication of a child accused of prostitution "[b]ecause a thirteen-year-old child cannot consent to sex as a matter of law . . . [so] B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code").

<sup>203</sup> See Bob Herbert, *The Wrong Target*, N.Y. TIMES, Feb. 19, 2008 at A25 (explaining that in cases of sex with minor children, "[I]f no money is involved, the youngster is considered a victim. But if the man pays for the sex — even if the money is going to the pimp, which is so often the case — the child is considered a prostitute and thus subject in many venues to arrest and incarceration."). See also *State v. Brooks*, 739 So. 2d 1223, 1224-25 (Fla. Dist. Ct. App. 1999) (holding that a defendant who pled guilty to lewd, lascivious, or indecent assault upon a child was eligible for a reduced sentence because the child in question was a "thirteen-year-old prostitute" who "willing participated" in the sexual activity).

<sup>204</sup> See Kimberly J. Mitchell et al., *Conceptualizing Juvenile Prostitution as Child Maltreatment: Findings from the National Juvenile Prostitution Study*, 15 CHILD MALTREATMENT 18, 18 (2010).

<sup>205</sup> See, e.g., Safe Harbour For Sexually Exploited Children Act, N.Y. SOC. SERV. LAW § 477 (McKinney 2011). Enacted by the New York State legislature in 2008, the law is designed to offer a supportive, service-based, non-criminal response to children who are "sexually exploited." The statute requires social services districts to identify the

money is no longer treated as a “child” victimized by the sexual contact but rather a consenting, complicit party. A child engaged in commercial sex is viewed as promiscuous and insufficiently childlike to benefit from the presumption of non-consent.<sup>206</sup> Children deemed to be promiscuous are, like those accused of certain violent crimes, no longer seen as children worthy of any particular solicitude.

## 2. Heterosexism and Popular Views of Sexuality

LGBT children seeking asylum are also burdened by heterosexism and, consequently, stereotypes regarding “homosexuals” and people who do not conform to societal gender norms. The idea that homosexuality is a disease continues to hold sway, even though no medical authority holds that homosexuality is an infectious illness and the American Psychiatric Association ceased to regard homosexuality as a mental disorder in 1973.<sup>207</sup> As a result, “homosexuals” are viewed as infected individuals who seek to spread their contagion to others, particularly children.<sup>208</sup> Thus, “it is not uncommon for individuals to express the view that already formed homosexuals deserve public sympathy and protection, but that they should not be permitted to spread their condition to others.”<sup>209</sup>

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use of existing youth services, and to the extent that funds are available, provide preventive services, such as short-term safe houses, for “sexually exploited youth.” It also requires the Family Court, with certain exceptions, to treat a youth under age 18 arrested for prostitution as a Person In Need of Supervision (PINS), rather than a juvenile delinquent. However non-compliance by the youth may result in the case being converted back to a juvenile delinquency proceeding. See N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, LEGIS. SUMMARIES BY YEAR (2008), [http://www.opdv.state.ny.us/law/summ\\_year/sum08.html](http://www.opdv.state.ny.us/law/summ_year/sum08.html) (last visited Oct. 30, 2011); see also Connecticut Safe Harbor for Exploited Children Act, CONN. GEN. STAT. § 53a-82 (2011) (revising Connecticut General Statute Section 53a-82 so that only a person aged 16 or over can be charged with prostitution and providing that “[i]n any prosecution of a person sixteen or seventeen years of age for [a prostitution] offense . . . there shall be a presumption that the actor was coerced into committing such offense by another person”).

<sup>206</sup> Cf. *State v. Brooks*, 739 So. 2d 1223, 1224-25 (Fla. Dist. Ct. App. 1999) (holding that a defendant who was guilty of a lewd, lascivious or indecent act on a child was eligible for a reduced sentence because, among other things, the victim was a thirteen-year-old prostitute who was “looking for action”).

<sup>207</sup> Yoshino, *supra* note 139, at 786.

<sup>208</sup> *Id.*; see also William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1049-50 (2004) (noting that “[m]any traditionalists also consider homosexuality contagious in some way”).

<sup>209</sup> Yoshino, *supra* note 139, at 811; See also WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 3-4, 298 (2002) (discussing the view that

One example of this heterosexism is state legislation against presenting any positive information regarding homosexuality in schools. These so-called “no promo homo” statutes’ purpose is “ostensibly to prevent impressionable youth from being converted into homosexuals[,] . . . [which] casts the laws as defending against an act of aggression on the part of homosexuals themselves.”<sup>210</sup> This attitude reflects a belief that homosexuality is like a disease that children should be shielded from catching. Children who learn about homosexuality might recognize themselves in the description and become gay.<sup>211</sup> These laws amount to a demand that potentially gay or lesbian children become heterosexual. Children are thus viewed as “waverers” who could go either way, and these laws are “an attempt to convert waverers into heterosexuals.”<sup>212</sup>

That children are thought of as “waverers” or “confused” is not mere coincidence. Popular understandings of sexuality continue to be influenced by Freud’s theory that homosexuality is an instance of

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youth can (and should) be protected from homosexuality, lest they fall “victim” to it). New York gubernatorial candidate Carl Paladino expressed such a viewpoint when he stated that although he is not homophobic, he would not march in a gay pride parade because “I don’t want [children] brainwashed into thinking that homosexuality is an equally valid and successful option — it isn’t.” Elizabeth A. Harris, *Paladino Laces Speech with Antigay Remarks*, N.Y. TIMES, Oct. 11, 2010, at A17.

<sup>210</sup> Yoshino, *supra* note 139, at 810-11.

<sup>211</sup> *Id.* at 827.

<sup>212</sup> See *id.* at 811. The Kansas Court of Appeals similarly claimed that “[d]uring early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity. As a result, the legislature could well have concluded that homosexual sodomy between children and young adults could disturb the traditional sexual development of children.” *State v. Limon*, 83 P.3d 229, 236 (Kan. Ct. App. 2004). The Court thus suggested not only that the state had a legitimate interest in preventing children from becoming LGBT adults, but that adolescent sexuality was mutable and could be altered by keeping young people from having same-sex sexual relationships. The lower court’s description of the young man involved in the sex act at issue in the case is also noteworthy. The Court pointedly objected to the fact that the 18-year-old in *Limon* characterized the 14-year-old boy with whom he had voluntary oral sex as gay or bisexual. The Court stated that “[l]abeling M.A.R. in this way is unfair. . . if M.A.R.’s sexual identity was not well defined before his homosexual encounter with [the defendant], M.A.R. might have become confused about his sexual identity . . . [but] the record does not show that M.A.R. was either homosexual or bisexual.” *Id.* The Court could conceive of only two possible identities for a 14-year-old boy: heterosexual or “confused.” See *id.* To infer that he might be gay or bisexual given that he voluntarily had oral sex with another boy was “unfair” because the Court assumed he would follow what it characterized as the “traditional sexual development of children” and become heterosexual. See *id.*

arrested development.<sup>213</sup> I call this paradigm “Popular Freudianism.” In this view, adolescents may pass through a phase of same-sex attraction, but will eventually return to “normal” heterosexuality.<sup>214</sup>

The pervasive notion that children are wavering and should become heterosexual by whatever means necessary has serious implications for young people’s sexual-orientation based asylum claims.<sup>215</sup> First, it suggests that adjudicators will have a difficult time accepting that children are “really” LGBT. Second, it implies that adjudicators may not recognize the harms inflicted upon LGBT youth because they will fail to take their minority age into account in evaluating whether an act rises to the level of persecution.

*B. Determined Disbelief: Why Young People Are Asked for Objective Evidence of Their Sexuality*

The “Popular Freudianism” paradigm deems young people incapable of determining that they are lesbian, gay, bisexual, or transgender. It asserts that youths cannot comprehend their own sexual orientations or gender identities, much less reliably articulate them.<sup>216</sup> This paradigm also construes human sexual development as a steady progression towards conventionally gendered heterosexuality, thereby suggesting that an LGBT-identified adolescent is defying the “natural” course of events.<sup>217</sup>

<sup>213</sup> See *A Letter from Freud*, 107 AM. J. OF PSYCHIATRY 786, 786 (1951) (in which Freud argues that “[h]omosexuality is . . . produced by a certain arrest of sexual development.”).

<sup>214</sup> SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905), reprinted in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (1901-1905): A CASE OF HYSTERIA, THREE ESSAYS ON SEXUALITY AND OTHER WORKS, 123-246, 228 (James Strachey ed. and trans., Hogarth Press 1957) (“One of the tasks implicit in object-choice is that it should find its way to the opposite sex. This, as we know, is not accomplished without a certain amount of fumbling. Often enough the first impulses after puberty go astray, though without any permanent harm resulting. Dessoir has justly remarked upon the regularity with which adolescent boys and girls form sentimental friendships with others of their own sex. No doubt the strongest force working against a permanent inversion of the sexual object is the attraction which the opposing sexual characters exercise upon one another”) (citations omitted); see also Ruskola, *supra* note 190, at 280.

<sup>215</sup> See *infra* Parts III.B-C.

<sup>216</sup> See Ruskola, *supra* note 190, at 280-81.

<sup>217</sup> See *id.* In reinforcing the notion that heterosexuality is not only the desired outcome of adolescence, but the *likely* outcome, the popular Freudianism paradigm could be said to erect a “confused and defiant” closet around young people who try to come out as LGBT.



This explains why asylum adjudicators decline to credit young people's testimony regarding their sexual orientation even where it is consistent, sincere, and unrefuted.<sup>218</sup> Instead, judges fault young people for failing to provide various corroboration, such as a history of same-sex sexual relationships or proof that a youth's family knew he was gay.<sup>219</sup> Without such evidence, adjudicators argue that the youth cannot establish membership in the "homosexuals" social group.<sup>220</sup> Importantly, that determination is not based on some contrary evidence that the young people concerned are heterosexual. Instead, heterosexuality is assumed and treated as the default.

While the desire for some corroboration to support an applicant's eligibility for asylum might be understandable, it is important to consider the actual probative value of such evidence. Studies in the United States show that children become aware that they are gay, lesbian, bisexual, or transgender years before they tell anyone about their feelings.<sup>221</sup> The fact that a youth has not told her parents she is a lesbian does not mean she is heterosexual. A lesbian youth facing violence or hostility from her family and community might try to keep her sexual orientation a secret by not talking about her identity, or refraining from same-sex sexual relationships. Requiring such an applicant to provide testimony from her family members or a history of lesbian relationships to prove her sexual orientation effectively bars her from asylum eligibility.

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<sup>218</sup> See *supra* Part I.

<sup>219</sup> See *supra* notes 37-44 and accompanying text.

<sup>220</sup> See *supra* notes 37-48 and accompanying text.

<sup>221</sup> See Shira Maguen, Frank J. Floyd, Roger Bakeman & Lisa Armistead, *Developmental Milestones And Disclosure Of Sexual Orientation Among Gay, Lesbian, And Bisexual Youths*, 23 J. APPLIED DEV. PSYCHOL. 219, 225-26 (noting that only 13% of the youth studied disclosed their sexual orientation at the same age they became aware of it, while 88% became aware of their same-sex attraction at one age but did not tell anyone about their identity until an older age.) Same-sex sexual attraction begins to form in mid-childhood, and children's subjective awareness of these attractions begins to take hold at approximately age ten. These patterns mirror those of children who develop opposite-sex attractions. See Gilbert Herdt & Martha McClintock, *The Magical Age of 10*, 29 ARCHIVES SEXUAL BEHAV. 587, 597-99 (2000). A study of gay, lesbian, and bisexual youth of color in New York City found that these young people first became aware of their same-sex attractions at age ten, first considered that they might be gay, lesbian, or bisexual at ages 12-13, and conclusively decided they were gay, lesbian, or bisexual at ages 14-15. See Margaret Rosario et al., *The Psychosexual Development of Urban Lesbian, Gay, and Bisexual Youths*, 33 J. SEX RES. 113, 117-18 (1996).

Such a result is also inconsistent with the legal requirements for asylum claims.<sup>222</sup> Recognizing that asylum-seekers fleeing persecution may have access to very little evidence to support their claim, the INA allows a grant of asylum based on the applicant's testimony alone, provided that testimony is consistent and credible.<sup>223</sup> The 2005 REAL ID Act made the evidentiary requirements in asylum cases more onerous. The REAL ID Act places the burden on an applicant to satisfy the trier of fact that the applicant's testimony "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."<sup>224</sup> The IJ may demand asylum-seekers produce evidence corroborating their claim unless the IJ believes the applicant does not have such proof and is unable to acquire it.<sup>225</sup> Previously, courts refused to impose such a corroboration requirement because refugees frequently flee their home countries with few belongings and asylum claims are by nature difficult to document.<sup>226</sup> Even post-REAL ID, however, an asylum applicant can only be required to provide corroborating evidence if he has it or can "reasonably obtain" it.<sup>227</sup> Demanding young LGBT people to produce evidence they do not have and that is not "reasonably" available is inconsistent with the statute. Requiring additional corroboration of a youth's sexual identity because she is young also does not comport with the Supreme Court's insistence in *Roper* and *Graham* that youth must be a mitigating factor. *Roper* and *Graham* stand for the proposition that children deserve more solicitude because of their age; they cannot be treated worse because they are young.<sup>228</sup>

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<sup>222</sup> See Immigration and Nationality Act § 208(b)(1)(B)(ii), 8 U.S.C.A. § 1158(b)(1)(B)(ii) (2011) ("The testimony of the [asylum] applicant may be sufficient to sustain the applicant's burden [of proof] without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."); 8 C.F.R. §208.13 (2011) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [that he qualifies as a refugee under the Act] without corroboration.").

<sup>223</sup> See 8 U.S.C.A. § 1158(b)(1)(B)(ii).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984)("[T]he imposition of such a [corroboration] requirement would result in the deportation of many people whose lives genuinely are in jeopardy. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.").

<sup>227</sup> 8 U.S.C.A. § 1158(b)(1)(B)(ii).

<sup>228</sup> See *Emens*, *supra* note 179, at 53.

### C. *The Failure to Recognize Mistreatment of LGBT Youth as Persecution*

Asylum adjudicators also diverge from constitutional norms in their failure to recognize abuses perpetrated against LGBT youth as acts of persecution. In evaluating acts of violence against young LGBT asylum-seekers, adjudicators often do not show of the abuse persecution. The acts of rape perpetrated against Calle and Joaquin-Porras, for example, were not viewed as persecutory acts against children who deserve special protection because they are particularly vulnerable. Rather, the adjudicators viewed these rapes as the equivalent of “mere harassment” or “random violence” against adults.<sup>229</sup> The fact that Calle and Joaquin-Porras identified as being gay was enough to make the crimes committed against them no longer acts of persecution against children.<sup>230</sup> One explanation for these outcomes is that the IJs concluded that a person could not simultaneously be a “child,” who must be by definition non-sexual,<sup>231</sup> and a “homosexual,” who is assumed to be hypersexual.<sup>232</sup>

Adjudicators hearing these cases also may not see applicants’ rapes as persecution because, at some level, they do not believe gay men can be raped.<sup>233</sup> There is an enduring stereotype that gay people are so hypersexual that there is no sexual contact they do not welcome.<sup>234</sup> Another IJ denied asylum to a man who had been subject to a series of sexual assaults and rapes by the police because “the rape of a homosexual cannot be considered an act [of persecution] equivalent

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<sup>229</sup> See *Calle v. U.S. Att’y Gen.*, 264 Fed. App’x 882, 884 (11th Cir. 2008) (citing *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1231 (11 Cir. 2005); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 177 (2d Cir. 2006)).

<sup>230</sup> See *Calle*, 264 Fed. Appx. at 884; *Joaquin-Porras*, 435 F.3d at 177.

<sup>231</sup> See Sutherland, *supra* note 197, at 332. (noting that “[o]n their face, age of consent laws suggest that the only appropriate teenage sexuality is an absence of sexuality.”).

<sup>232</sup> See MICHAEL SCARCE, *MALE ON MALE RAPE* 70-71 (1997) (describing how gay men are assumed to be hypersexual).

<sup>233</sup> *Id.* (noting that gay men are stereotyped as “hypersexual beings always having or wanting to have sex . . . [who] cannot be raped. . . . [G]ay men are culturally designed to be unrapeable, unable to be violated sexually on any level”).

<sup>234</sup> See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2161 (2003). Similar tropes about the sexuality of Black women negatively affect the ability of rape victims to achieve justice when their rapist is criminally prosecuted. Men of all races who are convicted of raping Black women on average receive more lenient sentences than those who rape white women. This is due to the impact of stereotypes about Black women: “Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women’s sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores.” Crenshaw, *supra* note 8, at 1271.

to ethnic cleansing.”<sup>235</sup> The only reason to emphasize that a rape victim was a “homosexual” rather than some other kind of person is to suggest that raping a “homosexual” is fundamentally different than raping anyone else.<sup>236</sup> Indeed, the trope of the homosexual-as-predator is so powerful that the IJ does not have to explicitly state it. Simply by using the word “homosexual” to describe the applicant, the IJ telegraphs that he is a sexual aggressor rather than a victim of an unwanted sexual violation.<sup>237</sup>

Similarly, it is no coincidence that the BIA stated that Geovanni Hernandez-Montiel was mistreated “because of the way he dressed (as a male prostitute),” despite the fact that Geovanni had never been charged with, much less convicted of, prostitution.<sup>238</sup> In labeling Geovanni a prostitute, the BIA invoked the same logic present in juvenile delinquency statutes that permit the prosecution of children for alleged prostitution when they are legally too young to consent to sex.<sup>239</sup> The BIA marked him as a promiscuous sexual deviant, no longer an innocent child in need of protection.

In the case of William Kimumwe, the IJ emphasized William’s testimony that a boy he had sex with when both were twelve years old was not gay and that William had “lured” or convinced him to have sex.<sup>240</sup> Similarly, with regard to a boy William had sex with when he and the boy were sixteen, “the IJ apparently believed that Kimumwe had taken advantage of [him] by getting him drunk for the purpose of having sex.”<sup>241</sup> William’s uncontradicted testimony was that both sexual encounters were consensual, and that he did not coerce his partners in any way.<sup>242</sup> Despite his unrefuted testimony, the IJ viewed William as a sexual predator, and that doomed his application. The IJ concluded that William failed to provide adequate evidence that he

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<sup>235</sup> *Morett v. Gonzales*, 190 Fed. App’x 47, 48 (2d Cir. 2006).

<sup>236</sup> See SCARCE, *supra* note 232, at 70-71; Elizabeth J. Kramer, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV 293, 319-20 (1998) (arguing that evidence regarding a male rape victim’s sexual orientation should be inadmissible under rape shield laws because it is prejudicial and does not bear on consent).

<sup>237</sup> This is an example of what sociologist Jerry Himmelstein called a “rhetorical wink” — using a code phrase to communicate a well-understood but implicit meaning without stating it directly (and thus allowing the speaker to disavow that meaning). Lani Guinier, *Clinton Spoke the Truth on Race*, N.Y. TIMES, Oct. 19, 1993, at A29.

<sup>238</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1095 (9th Cir. 2000).

<sup>239</sup> See *supra* notes 201-203 and accompanying text.

<sup>240</sup> *Kimumwe v. Gonzales*, 431 F.3d 319, 322 (8th Cir. 2005).

<sup>241</sup> *Kimumwe v. Gonzales*, 431 F.3d 319, 324 (8th Cir. 2005) (Heaney, J., dissenting).

<sup>242</sup> *Id.*

was gay. The IJ also found that William's expulsion from school after he had sex with a boy at age twelve and his arrest and detention by the Zimbabwean authorities after he had sex at age sixteen were motivated not by anti-gay animus. Rather, these were legitimate actions to punish William for engaging in prohibited sexual conduct despite the fact that William was never charged with any crime.<sup>243</sup>

The decision suggests that the IJ saw William not as a gay child who had been singled out for mistreatment because of his sexual orientation, but as a hypersexual predator who had lured his heterosexual peers into gay sex and suffered legitimate consequences as a result.<sup>244</sup> The IJ's view of William appears to have been influenced not just by heterosexism and anti-youth bias but also by racist stereotypes. African-American men are frequently stereotyped as being promiscuous and sexually aggressive.<sup>245</sup> Such stereotypes about African-Americans likely influence immigration adjudicators' views of African asylum-seekers.<sup>246</sup> In this case, when confronted with a young black man who had been sexually active at an early age and who admitted that his sexual partners did not identify as gay, the IJ did not see a child who had been persecuted, but a sexually promiscuous "recruiter" who deserved to be punished for luring straight boys into gay sex.<sup>247</sup>

Under *Lawrence* and *Romer*, however, "moral disapproval of [LGBT people] cannot be a legitimate government interest."<sup>248</sup> Asylum adjudicators, therefore, cannot reject an asylum applicant's claim because they disapprove of the fact that he is gay or the fact that he had consensual sex with peers who identified as straight. Similarly, the Supreme Court's decisions in *Roper* and *Graham* make clear that all children must be treated with special solicitude, even if they commit

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<sup>243</sup> *Id.*

<sup>244</sup> See *id.* at 321, 324.

<sup>245</sup> See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 81 (1999).

<sup>246</sup> See, e.g., Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 *LAW & SEXUALITY* 135, 149-50 (2006) (arguing that "essentialist racist stereotypes of black men as sexually aggressive apply to both African-American men and African men").

<sup>247</sup> The Court was in the grip of "the fundamental fear about homosexuality[.]. . . the apocalyptic 'fear of a queer planet,' the fear that homosexuality can spread without being spread thin." Yoshino, *supra* note 139, at 802 (referencing MICHAEL WERNER, *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993)).

<sup>248</sup> *State v. Limon*, 122 P.3d 22, 35 (Kan. 2005) (per curiam).

adult-like acts. Thus, there is no basis for denying LGBT youth the solicitude extended to other child asylum-seekers. Under its own guidelines, the U.S. government must take the age of the victim into account when weighing the seriousness of a persecutory act.<sup>249</sup> Failing to evaluate acts of abuse against LGBT youth with the same standard used for other children's claims violates the constitutional norm announced by *Roper* and *Graham*. LGBT children cannot be treated as adults simply because they are LGBT.

#### IV. HOW YOUNG LGBT ASYLUM-SEEKERS ARE DENIED PROCEDURAL DUE PROCESS

The asylum system has fallen behind constitutional norms by failing to afford young LGBT asylum-seekers due process of law in the adjudication of their claims. Young LGBT people are denied an opportunity to fairly litigate their asylum claims in a number of ways. First, the government does not take adequate steps to inform children that they do not need their parents' consent to file an asylum claim. Second, children who have been a derivative on a previous case filed by a parent are frequently ordered removed without an opportunity to be heard on their own independent asylum claim. Third, the failure to automatically exempt children from the one-year filing deadline for asylum results in the unfair denial of meritorious asylum claims. Fourth, the failure to provide counsel to children in immigration court denies them the ability to present their case. Finally, placing the burden of proof solely on child asylum-seekers to prove that their government persecuted them directly or was unable or unwilling to protect them from mistreatment by private parties results in erroneous and unfair asylum denials. These procedural failures in the asylum system amount to an unconstitutional denial of procedural due process to LGBT youth asylum-seekers.

The Fifth Amendment guarantee of due process applies to all persons in the United States, regardless of immigration status: "[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."<sup>250</sup> Even young LGBT people who are in the United States without valid immigration status are entitled to a fair hearing on their claim for asylum before they are ordered removed. Asylum procedures that deny young LGBT asylum-

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<sup>249</sup> WEIS, *supra* note 103, at 19 ("The harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution.").

<sup>250</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

seekers an opportunity to be heard on their claim, or unfairly burden their ability to present their case effectively, violate the Fifth Amendment's due process clause.<sup>251</sup>

#### A. *The Process of Asylum Adjudication*

Young people who are not in immigration proceedings file their asylum applications with the Department of Homeland Security ("DHS").<sup>252</sup> An asylum officer with special training in international law, country conditions, and other issues affecting asylum claims<sup>253</sup> adjudicates their claims following a non-adversarial asylum interview.<sup>254</sup> If the asylum officer decides not to grant the applicant asylum, she refers the applicant to an IJ for removal proceedings.<sup>255</sup> The applicant can then renew the application before the IJ, who will review it *de novo*.<sup>256</sup>

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<sup>251</sup> The determination of whether the denial of any procedural safeguard in a governmental decisionmaking process constitutes a violation of the Fifth Amendment due process clause involves a balancing test. The Supreme Court has emphasized that it is necessary to weigh three distinct factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335-336 (1976).

<sup>252</sup> 8 C.F.R. § 208.2(a) (2011). Researchers examining the treatment of children seeking asylum in the United States have concluded that the non-adversarial setting of an asylum interview is more appropriate for evaluating their claims. See BHABHA & SCHMIDT, *supra* note 14, at 37 ("We recommend that all children's asylum cases originate in the affirmative [asylum interview] process, with the defensive [adversarial immigration court hearing] system reserved for cases that are denied.").

<sup>253</sup> 8 CFR §208.1(b) (2011) (requiring that asylum officers "receive special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles"); JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, AND PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 112 (2009) (noting that "the tenure of every asylum officer begins with a five-week basic training course (including testing). In addition, on a continuing basis, four hours a week are set aside for training officers on new legal issues and country conditions").

<sup>254</sup> 8 C.F.R. § 208.9(b) (2011).

<sup>255</sup> 8 C.F.R. § 208.14(c) (2011). Applicants who already have valid non-immigrant or immigrant status, or Temporary Protected Status, or who have been paroled in to the United States are not referred to an immigration judge; the asylum office simply denies their claims and they remain in the status they had prior to applying for asylum. 8 C.F.R. § 208.14(c)(2)-(3) (2011).

<sup>256</sup> 8 C.F.R. § 208.14(c)(1) (2011).

Ordinarily, an asylum-seeker already in removal proceedings at the time of filing her application would not be entitled to an asylum interview;<sup>257</sup> her claim would only be reviewed by the IJ in an adversarial removal hearing in immigration court.<sup>258</sup> However, the enactment of the Trafficking Victims Protection Reauthorization Act (“TVPRA”) altered the procedure for certain children.<sup>259</sup> Unaccompanied immigrant children seeking asylum are now entitled to have their claims heard by the Asylum Office in the first instance, even if they are in removal proceedings when they file their applications.<sup>260</sup> Minors who have a parent or legal guardian available to care for them in the United States, or who are eighteen years or older when they apply for asylum do not qualify for this benefit under the TVPRA.<sup>261</sup> Accompanied minors and asylum-seekers over the age of eighteen who are already involved in immigration court proceedings must argue their case for the first time in the adversarial setting of their removal hearings.

Aside from the TVPRA carve-out allowing some children to receive an initial determination on their claim from an asylum officer, all youths in immigration proceedings are treated exactly like adults. They must meet the same legal definition of a “refugee” in order to qualify for asylum by demonstrating a well-founded fear of persecution on the basis of a protected ground.<sup>262</sup> Like adults, they have a right to be represented by counsel in their removal hearing, but only at their own expense.<sup>263</sup> Neither the immigration statute nor the regulations explicitly grant IJs the ability to appoint an attorney or a

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<sup>257</sup> 8 C.F.R. § 208.2(b) (2011) (“Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served . . . [with a] charging document [that] has been filed with the Immigration Court.”).

<sup>258</sup> *Id.*

<sup>259</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

<sup>260</sup> *Id.* (amending Immigration and Nationality Act § 208 (b)(3), 8 U.S.C. § 1158(b)(3), to state “INITIAL JURISDICTION.—An asylum officer (as defined in section 235(b)(1)(E)) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))), regardless of whether filed in accordance with this section or section 235(b).”).

<sup>261</sup> See 6 U.S.C.S. § 279(g)(2) (2011) (defining an unaccompanied alien child as one who has no lawful immigration status in the United States, has not attained 18 years of age and for whom there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody).

<sup>262</sup> See *supra* note 103 and accompanying text.

<sup>263</sup> Immigration and Nationality Act § 292, 8 U.S.C.A. § 1362 (2011).



*guardian ad litem* for a child in removal proceedings, regardless of how young or immature that child is.<sup>264</sup> While an experienced prosecutor will represent the government in the adversarial hearing, a majority of young people are *pro se*.<sup>265</sup> The hearing is formal both in tone and in setting, involving an oath, formal testimony, cross-examination, and the introduction of evidence. Children unable to secure counsel must navigate this hearing on their own.

The Executive Office for Immigration Review ("EOIR") and the Asylum Office each adopted guidelines for adjudicators handling children's asylum claims.<sup>266</sup> The Asylum Office guidelines are more substantive; for example they clarify that what constitutes persecution varies according to the age of the asylum applicant, so that harm to a child may constitute persecution even when it would not rise to that level for an adult.<sup>267</sup> The Asylum Office guidelines are also mandatory and asylum officers must follow them when adjudicating children's claims.<sup>268</sup> The EOIR guidelines, however, are merely recommendations to IJs.<sup>269</sup> They amount to a collection of discretionary measures IJs can take to make a child more comfortable during the hearing, such as choosing not to wear a robe, giving an opening statement explaining

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<sup>264</sup> The power to appoint a GAL or an attorney for a child who is unable to represent herself in immigration court is arguably implied by the Fifth Amendment due process clause, but no published case reports an instance in which an IJ actually appointed either a GAL or a lawyer for a child in immigration proceedings.

<sup>265</sup> See Women's Refugee Comm'n & Orrick, Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children In Immigration Custody* 23 (2009), available at [http://womensrefugeecommission.org/docs/halfway\\_home.pdf](http://womensrefugeecommission.org/docs/halfway_home.pdf) (estimating that 60% of all children in immigration proceedings lack legal representation); Cara Anna, *Children Facing Deportation Have Few Advocates; Court System Designed for Adults Just Starting to Adapt for Youths*, WASHINGTON POST, Dec. 10, 2006 at A03 (noting that half of unaccompanied minor children appearing in immigration court in 2006 were unrepresented). In fiscal year 2009, only 39% of all respondents in immigration court were represented by attorneys. EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2009 STATISTICAL YEARBOOK G1 (March 2010), available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

<sup>266</sup> See WEIS, *supra* note 103; David L. Neal, Exec. Office for Immigration Rev., *Operating Policies and Procedures Memorandum 07:01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (2007), available at <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> (hereinafter Neal, *Guidelines for Unaccompanied Alien Children*).

<sup>267</sup> WEIS, *supra* note 103, at 19.

<sup>268</sup> See *id.* at 18 ("In assessing a child's claim of persecution, asylum adjudicators should follow the procedural considerations outlined above.").

<sup>269</sup> Neal, *Guidelines for Unaccompanied Alien Children*, *supra* note 266, at 3 ("These guidelines are suggestions that should be applied as circumstances warrant.").

what is happening, or letting the child hold a toy while testifying.<sup>270</sup> Neither set of guidelines alters the legal standard for the adjudication of asylum claims nor explicitly gives the adjudicators the power to appoint an attorney or a *guardian ad litem* for a child.<sup>271</sup>

Following the removal hearing, either the asylum-seeker or the government may appeal to the BIA within thirty days of the IJ's decision. The BIA is often criticized for failing to give meaningful review to immigrants whose asylum cases were denied by the IJ. A series of "streamlining" reforms under Attorney General John Ashcroft made very brief affirmances by a single BIA member the norm, with very few cases granted a full review by a three-member panel of the BIA.<sup>272</sup> Asylum-seekers who lose their claim before the BIA can file a petition for review with the court of appeals having jurisdiction over the location of the removal hearing.<sup>273</sup> The courts grant the BIA a great deal of deference on review, however, particularly with regard to questions of fact; thus, reversals of the administrative agency's decisions are rare.<sup>274</sup> A full discussion of the inadequacy of review of Immigration Court decisions is beyond the scope of this paper, but it is worth noting that LGBT youth who lose their asylum claim before the IJ have very little chance of that decision being fully reviewed, much less overturned.<sup>275</sup> This is particularly true given that young people have no right to the appointment of an attorney to represent them at the BIA and the courts of appeal.

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<sup>270</sup> *Id.* at 3-6.

<sup>271</sup> *Id.* at 4 ("Issues of law — questions of admissibility, eligibility for relief, etc. — are governed by the Immigration and Nationality Act and the regulations. . . . [These guidelines] cannot provide a basis for providing relief not sanctioned by law . . . . Neither the INA nor the regulations permit immigration judges to appoint a legal representative or a *guardian ad litem*. Immigration judges should encourage the use of appropriate pro bono resources whenever a child respondent is not represented.").

<sup>272</sup> See John Palmer, Stephen Yale-Loehr, and Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 28 (2005).

<sup>273</sup> Immigration and Naturalization Act §242(b)(2), 8 U.S.C.A. §1252(b)(2) (2011).

<sup>274</sup> The federal Courts of Appeal reviewed 4215 petitions for review by asylum-seekers in 2004 and 2005. They ruled in favor of the asylum-seeker in only 15% of those cases. Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L.REV. 295, 362 (2007).

<sup>275</sup> RAMJI-NOGALES ET AL., *supra* note 253, at 71.

## B. *The Specific Barriers LGBT Youths Confront in Litigating Asylum Claims*

### 1. *The Perception that Parental Consent or Notification is Required*

DHS takes the position that a child older than twelve is capable of deciding whether to apply for asylum and need not seek the consent of a parent.<sup>276</sup> A thirteen-year-old LGBT child would not even be required to inform her parents that she had sought asylum. However, as a practical matter, this DHS policy is not widely publicized, and many children are likely unaware of it.<sup>277</sup> Asylum Office policy also requires that asylum officers ask child applicants whether their parents are aware of the application and if so, whether they consent to it.<sup>278</sup> Lack of parental consent for or notification of an asylum application is

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<sup>276</sup> See *Polovchak v. Meese*, 774 F.2d 731, 732-36 (7th Cir. 1985) (finding that the parents of Walter Polovchak, a 12-year-old boy who applied for asylum from the Soviet Union and was granted it over their objection, should have been granted formal notice of his pending asylum application and an opportunity to be heard before Walter's application was granted); Memorandum from Bo Cooper, U.S. Dept. of Justice, Immigration and Naturalization Service, to Commissioner Doris Meissner (Jan. 3, 2000), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/Archive%201998-2008/2000/ins\\_counsel\\_elian\\_gonzalez.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Archive%201998-2008/2000/ins_counsel_elian_gonzalez.pdf) (last visited December 19, 2011) ("The *Polovchak* case recognized that a twelve-year-old boy was sufficiently mature to be able to articulate a claim in express contradiction to the wishes of his parents. It did not specifically reach issues relating to the capacity of a younger child, but opined that a twelve-year-old was probably at the low end of maturity necessary to sufficiently distinguish his asylum interests from those of his parents.").

<sup>277</sup> For example, information on this policy does not appear in the information about applying for asylum on the USCIS website or in the instructions to the asylum application form. See U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR FORM I-589, available at <http://www.uscis.gov/files/form/i-589instr.pdf> (last visited December 19, 2011). Indeed, the USCIS webpage related to "Minor Children Applying for Asylum By Themselves" indicates that child applicants will be asked if they "have a guardian or parent" and whether that person "allowed [them] to apply for asylum," which arguably implies that parental permission is required. U.S. CITIZENSHIP & IMMIGRATION SERVS., MINOR CHILDREN APPLYING FOR ASYLUM BY THEMSELVES, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=21bf011522a9c110VgnVCM1000004718190aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited December 19, 2011).

<sup>278</sup> Memorandum from Joseph E. Langlois, U.S. Citizenship and Immigration Service, to HQRAIO 120/9.7 (August 14, 2007), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/procedures-minor-children-raps.pdf> (last visited December 19, 2011) (stating that when interviewing a minor child asylum-seeker, "[t]he Asylum Officer should . . . elicit information about . . . parental knowledge and consent of the application for asylum[.]").

not a basis for denying an application.<sup>279</sup> But, this standard inquiry of all children seeking asylum might lead applicants to believe that parental notification or permission is required.

Parental consent or notification is required before minor children can make many significant life decisions: several states require a minor to notify her parents or get their permission before obtaining an abortion; in many states, parental consent is required for a child to get married, obtain medical treatment, or take a job; and a child must notify her parent before legally changing her name. Similarly, under federal law, seventeen-year-old children can join the U.S. military, but they must have parental consent. The government's failure to inform potential asylum applicants that parental notification or permission is not required before a minor can seek asylum constitutes a significant barrier to their filing an application. LGBT youth who are afraid to come out to their parents are not going to ask them for help when filing an asylum application on the basis of sexual orientation or gender identity; nor are they going to file an application alone if they think their parents will be told about it.<sup>280</sup>

The U.S. government's failure to tell children that they can apply for asylum without their parents' knowledge or involvement likely discourages young LGBT people from seeking asylum.<sup>281</sup> Children who do not apply because they are afraid their parents will learn they are LGBT and reject them obviously will not receive a hearing on their claim. Even if the children seek asylum after they become adults, the one-year deadline may bar their applications.<sup>282</sup> The failure to make children aware of their ability to file an application independent of their parents creates a barrier to the fair adjudication of their asylum eligibility that is both counterproductive and unnecessary. It may even

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<sup>279</sup> *Id.*

<sup>280</sup> Researchers have identified fear of disclosure as an important reason why LGBT youth do not seek help when they are subjected to homophobic or anti-transgender harassment. See, e.g., Warren J. Blumenfeld and R.M. Cooper, *LGBT and Allied Youth Response to Cyberbullying: Policy Implications*, 3 INT. J. CRITICAL PEDAGOGY 114, 123 (2010) (finding that LGBT teenagers subjected to cyberbullying were reluctant to tell their parents because they feared revealing their sexual orientation).

<sup>281</sup> Susan Hazeldean and Pradeep Singla, *Out in the Cold: The Challenges of Representing Immigrant Lesbian, Gay, Bisexual, and Transgender Youth*, 7 BENDER'S IMMIGR. REV. 642 (2002) ("Some parents . . . want nothing to do with their child after they find out about his or her sexual orientation or gender identity. Many will even refuse to help their own child gain lawful immigration status once they know she is LGBT.").

<sup>282</sup> See 8 C.F.R. § 208.4(a)(5)(ii) (2011).

amount to a constitutional due process violation if it prevents LGBT children from obtaining a hearing on their claims.<sup>283</sup>

## 2. Children Previously Ordered Deported in an Unrelated Case

Some LGBT youth are legally barred from applying for asylum because they have an outstanding removal order against them. Most children who apply for immigration benefits in the U.S. do so as derivatives of an application their parent filed.<sup>284</sup> For example, parents applying for asylum or permanent residency can include their unmarried children who are under twenty-one years old as derivatives on the application, and those children are granted the status along with the parent.<sup>285</sup> Children who seek an immigration benefit as a derivative on a parent's case usually are not present during the adjudication of the claim.<sup>286</sup> Regulations authorize IJs to waive the presence of a derivative child during the adjudication of her parents' application; this is standard practice in the nation's immigration courts.<sup>287</sup> In fact, children who are derivatives on a parent's claim for asylum or other relief are virtually invisible during the decision-making process.<sup>288</sup> If an IJ denies the parent's claim and orders the parent removed from the country, the IJ will likely order the derivative child to be removed as well.<sup>289</sup> A child can be ordered removed during proceedings in which she never participated. She might not even learn of the removal order until years later.<sup>290</sup> The resulting removal order is

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<sup>283</sup> See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

<sup>284</sup> David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991 (2002) ("The vast majority of children encountered by the Immigration and Naturalization Service (INS) are derivatives of adults in the context of family immigration.").

<sup>285</sup> 8 U.S.C. §§ 1153(d), 1158(b)(3)(2011).

<sup>286</sup> 8 C.F.R. § 1003.25 (2011) (allowing the IJ to waive the presence of the child).

<sup>287</sup> *Id.*

<sup>288</sup> See Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 87 (1999) ("[a]ccompanied children have tended to be subsumed within their family's asylum application; indeed both the United Nations High Commissioner for Refugees . . . and the INS have pointed out that invisibility is a common problem for refugee children.").

<sup>289</sup> Thronson, *supra* note 284, at 996.

<sup>290</sup> "It is not uncommon for children who are later separated from their parents to learn that an immigration court ordered them removed in absentia as a derivative of a

an enormous hurdle for a child asserting her own independent claim to asylum either during the parents' proceedings or at a later date.

A young person under such an order of removal is not eligible to apply for asylum unless the immigration court proceedings are reopened and the removal order is vacated.<sup>291</sup> Under current regulations, motions to reopen must be filed within ninety days of the entry of a removal order, unless the movant is seeking asylum based on changed conditions in her country of origin.<sup>292</sup> This exception is unlikely to apply to LGBT youth, however, because their asylum claims are not grounded in changed country conditions but rather changed personal circumstances — namely the realization that they face persecution based on their sexual orientation or gender identity.<sup>293</sup> This situation deprives young people of any opportunity to be heard and likely constitutes a denial of due process under the Fifth Amendment.

### 3. Asylum Claims Time-Barred Under the One-Year Deadline

Asylum applications generally must be filed within one year of the applicant's last entry into the United States, unless "changed circumstances" or "extraordinary circumstances" justify a delay.<sup>294</sup> Regulations indicate that being an unaccompanied minor is an "extraordinary circumstance" that would exempt an applicant from the one-year deadline.<sup>295</sup> The BIA has ruled that a fifteen-year-old who

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parent in an immigration proceeding of which the children had no knowledge." *Id.*

<sup>291</sup> See 8 CFR § 1208(g)(2)(i) (stating that a person previously ordered removed who has a credible fear of persecution can apply only for withholding of removal, not asylum); 8 CFR § 1208.4(b)(3) (noting that a person who was the subject of previously completed removal proceedings must file her asylum application with the immigration court along with a motion to reopen the prior proceeding).

<sup>292</sup> 8 C.F.R. §§ 1003.23(b)(1), (b)(4)(i). Separate rules also apply to removal orders entered in absentia. An immigrant also has 180 days to move to reopen a removal order entered in absentia, and can move to reopen at any time if she never received notice of the hearing. 8 C.F.R. § 1003.23(b)(4)(ii).

<sup>293</sup> See *Ait Ali v. Gonzales*, 160 Fed. App'x 485, 486-87 (7th Cir. 2005) (holding that the B.I.A. committed no error in denying a motion to reopen filed by an applicant who only "came out" as gay after the 90-day-deadline for filing a motion to reopen had passed: "Since Ait Ali says that he was born gay, the 'change' that he is asserting was the public admission, which occurred here, not in Algeria. . . . When . . . an asylum applicant waits more than 90 days to file a motion to reopen based on a change in personal circumstances . . . the motion is too late.").

<sup>294</sup> Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C.A. § 1158(a)(2)(B) (2011). There is no deadline for applying for withholding of removal or relief under the Convention Against Torture.

<sup>295</sup> 8 C.F.R. § 208.4(a)(5)(ii) (2011) (stating that the term "extraordinary

was in detention during his entire first year in the United States qualified for asylum even though his application was filed after the one-year deadline.<sup>296</sup> The BIA implied, however, that not all minor children automatically qualify for the “extraordinary circumstances” exception even if they are unaccompanied.<sup>297</sup>

The one-year deadline operates to prevent many people who would otherwise be eligible for asylum from obtaining it.<sup>298</sup> It is particularly difficult for LGBT refugees to file their asylum applications within one year of their arrival in the United States.<sup>299</sup> Many LGBT asylum-seekers are profoundly traumatized and ashamed by their sexual orientation or gender identity.<sup>300</sup> Having spent years being abused by their families, neighbors, community members, and the authorities for being LGBT, they find even acknowledging their identities profoundly frightening.<sup>301</sup> Many recent LGBT immigrants are isolated, rejected by their immigrant community for being LGBT and by the larger

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circumstances” may include “[l]egal disability (e.g., the applicant was an unaccompanied minor . . . ) during the 1-year period after arrival”).

<sup>296</sup> Y-C-, 23 I. & N. Dec. 286, 288 (B.I.A. 2002) (holding that a child who entered the U.S. at 15, was detained throughout his first year in the country, and who filed while still a minor would not be barred from asylum even though he failed to meet the one-year deadline: “On these facts, we find that the respondent has established extraordinary circumstances for the delay in filing his application for asylum”) (emphasis added).

<sup>297</sup> *Id.*

<sup>298</sup> The effect is draconian: unless an applicant qualifies for an exception under the rule, she must be denied asylum, even if she is a bona fide refugee. A recent study found that one in five asylum seekers whose asylum cases were appealed to the Board of Immigration Appeals “have missed the deadline or are alleged to have missed it.” HEARTLAND ALLIANCE ET AL., *THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS* 6 (2010).

<sup>299</sup> Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 262-65 (2006); see also Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 279, 271 (1997) (“Refugees had many different reasons for having waited for more than a year before filing. The reasons included: ignorance of the asylum process; more urgent needs to find family, friends, food and shelter in the United States; the inability, following torture and the onset of post-traumatic stress syndrome, to tell their stories to advocates, much less official governmental authorities; the inability to pay lawyers or locate free sources of professional assistance; the inability to obtain promptly the documents needed to file for asylum or prove a claim; and deliberate decisions to wait before filing for asylum, hoping that conditions would change for the better and permit the refugee to return home.”).

<sup>300</sup> Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay, and Bisexual Asylum Seekers*, 22 J. REFUGEE STUD. 195, 196 (2009).

<sup>301</sup> *Id.* at 198.

community for being immigrants.<sup>302</sup> As such, they are less able to learn about the process of applying for asylum than other refugees and may not know it exists. If they are aware of asylum, they do not necessarily realize that they would be eligible to apply based on the persecution they face for their sexual orientation or gender identity.<sup>303</sup>

These profound barriers to filing an application within one year of arrival apply with particular force to LGBT children and young adults. Young LGBT asylum-seekers are less likely to have parents who support their asylum claims and are willing to help them apply than children seeking asylum based on a characteristic they share with a parent, like ethnic or religious persecution.<sup>304</sup> Parents who are unaware, unsympathetic, or hostile towards their child's sexual orientation or gender identity are unlikely to help her file an asylum application on that basis.<sup>305</sup> Consequently, LGBT children might be afraid to apply for asylum because they believe doing so will require a parent's knowledge or consent.<sup>306</sup>

An LGBT young person who travels to the United States with a parent or guardian is not an unaccompanied minor, but her age should still trigger the "extraordinary circumstances" exception to the one-year deadline.<sup>307</sup> While the regulations specifically mention "being an unaccompanied minor" as an example of a "legal disability" that would constitute extraordinary circumstances justifying delayed filing, the ordinary meaning of "legal disability" includes all minor children, not just those who live apart from their parents.<sup>308</sup> Any minor child is under a legal disability that should qualify as an exception to the one-year deadline under the regulations.<sup>309</sup>

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<sup>302</sup> Neilson, *The Gay Bar*, *supra* note 299, at 264; John Leland, *Gays Seeking Asylum Find Familiar Prejudices in the U.S.*, N.Y. TIMES, Aug.1, 2001, at A10.

<sup>303</sup> Neilson, *The Gay Bar*, *supra* note 299, at 263.

<sup>304</sup> See Hazeldean, *supra* note 281, at 642.

<sup>305</sup> *Id.*

<sup>306</sup> See *supra* notes 276-283 and accompanying text.

<sup>307</sup> See 8 C.F.R. § 208.4(a)(5) (2011).

<sup>308</sup> See *id.* (stating that extraordinary circumstances "may include but are not limited to: . . . (ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival."); BLACK'S LAW DICTIONARY 764 (7th ed. 1999) (defining "legal incapacity" to include minority); Lee Berger & Davina Figeroux, *Protecting Accompanied Child Refugees from the One-Year Deadline: Minority As A Legal Disability*, 16 GEO. IMMIGR. L.J. 855, 858-9 (2002).

<sup>309</sup> LGBT young people might also qualify for an extraordinary circumstances exception to the one-year-deadline because they face other severe challenges, such as homelessness or mental illness. A young LGBT asylum-seeker who has experienced anti-gay abuse might be suffering from post-traumatic stress disorder, for example, or other mental or physical impairments. As noted above, an LGBT child might also face



Therefore, due process requires a hearing on the asylum claim of an applicant who missed the one-year deadline because she was a minor during her first year in the United States — she suffered from legal incapacity during the only period she could file an application. To deny such an applicant a hearing on the merits of her asylum claim would mean she had no opportunity to be heard and did not enjoy due process of law.

#### 4. The Failure to Appoint Counsel for LGBT Children Seeking Asylum

The lack of legal counsel for indigent asylum-seekers makes applying for asylum daunting even for adults. Children and young people who have suffered profound trauma and who face life-threatening violence if returned to their home countries are ill equipped to navigate the asylum process without the assistance of a professional advocate.<sup>310</sup> To their credit, a number of immigration courts have tried to address this problem by establishing “juvenile dockets” whereby cases involving unaccompanied minor children are all held on a particular day and pro bono attorneys are recruited to screen and represent the young people who appear.<sup>311</sup> The Office of Refugee Resettlement also developed an Unaccompanied Child Pro Bono Program and contracted with nonprofits to provide some representation for unaccompanied minors in immigration proceedings.<sup>312</sup> Despite these efforts, however, the majority of minors in immigration proceedings have no counsel.<sup>313</sup> They must represent

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isolation in a refugee community, extreme family hostility, language barriers, and other such challenges. All of these should qualify as extraordinary circumstances justifying an exception to the one-year-deadline. See IMMIGRATION AND NATURALIZATION SERVICE, LESSON PLAN OVERVIEW FOR ASYLUM OFFICER BASIC TRAINING: ONE YEAR FILING DEADLINE 20 (2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBT%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf>.

<sup>310</sup> Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States* 45 Harv. C.R.-C.L. L. Rev. 247, 255-57 (2010).

<sup>311</sup> There are juvenile dockets at the immigration courts in Phoenix, Los Angeles, San Diego, San Francisco, Miami, Chicago, New York, Harlingen, Houston, and San Antonio. See News Release, U.S. Dep’t of Justice, Unaccompanied Alien Children in Immigration Proceedings (Apr. 22, 2008) (noting that “EOIR has established ‘juvenile dockets’ throughout the country to facilitate consistency, encourage child-friendly courtroom practices, and promote pro bono representation for unaccompanied alien children”).

<sup>312</sup> Young & McKenna, *supra* note 310, at 257.

<sup>313</sup> See WOMEN’S REFUGEE COMM’N & ORRICK, HERRINGTON & SUTCLIFFE LLP,

themselves in a formal proceeding against an experienced government prosecutor. This constitutes a denial of procedural due process strikingly similar to forcing a child to appear without counsel in a juvenile delinquency proceeding.<sup>314</sup>

Courts have repeatedly held that the Sixth Amendment provides no categorical right to appointed counsel in immigration proceedings.<sup>315</sup> Several courts have stated that a due process right to appointed counsel may exist in exceptional cases when "fundamental fairness" is at stake.<sup>316</sup> Unfortunately, "in practice the protection has proven hollow. There have been no published decisions requiring appointment of counsel in removal proceedings under the fundamental fairness test."<sup>317</sup> Still, the failure to provide counsel to children in immigration proceedings arguably violates their Fifth Amendment right to due process of law.<sup>318</sup> Certainly, the lack of counsel is especially troubling in cases where respondents with diminished capacity, such as minor children, are forced to represent themselves in proceedings they cannot fully comprehend.<sup>319</sup>

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HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 23 (2009), available at [http://womensrefugeecommission.org/docs/halfway\\_home.pdf](http://womensrefugeecommission.org/docs/halfway_home.pdf) (estimating that 60% of all children in immigration proceedings lack legal representation); Margaret Graham Tebo, *Children Without a Country*, A.B.A. J., Mar. 1, 2004, available at [http://www.abajournal.com/magazine/article/children\\_without\\_a\\_country/](http://www.abajournal.com/magazine/article/children_without_a_country/) (noting that "[immigrant] children and teens wait in federal custody, most with no attorneys to advocate for them"); Anna, *supra* note 265, at A03.

<sup>314</sup> The Supreme Court found that children facing juvenile delinquency charges were entitled to counsel in *In re Gault*, 387 U.S. 1, 35 (1967).

<sup>315</sup> See, e.g., *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999) (noting that the Sixth Amendment does not apply to civil deportation proceedings), *reh'g denied*, 1999 U.S. App. LEXIS 26528 (1999); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (same); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986) (same).

<sup>316</sup> See, e.g., *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990); *Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986); *Barthold v. I.N.S.*, 517 F.2d 689, 691 (5th Cir. 1975); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568-9 (6th Cir. 1975).

<sup>317</sup> Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1549 (2007).

<sup>318</sup> The Fifth Amendment guarantee of due process applies to all persons in the United States, regardless of immigration status. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

<sup>319</sup> A lawsuit is currently pending in the Central District of California on behalf of indigent immigration detainees suffering from mental illnesses seeking injunctive and declaratory relief including the appointment of counsel to represent them in immigration court pursuant to the Fifth Amendment due process clause. See generally *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) ("Because

### 5. Denying Asylum for Failure to Seek Police Protection in the Country of Origin

Many LGBT young people suffer mistreatment at the hands of private actors, which adds an additional layer of difficulty to their asylum claims. An applicant who has been harmed by a private individual must show that her government was “unwilling or unable to control” the perpetrator.<sup>320</sup> Without such evidence, the harm inflicted on the applicant is not past persecution but mere private harm that does not form the basis for a grant of asylum.<sup>321</sup> IJs are quick to dismiss the harm inflicted on LGBT youth on that basis.<sup>322</sup> For example, Olivia Nabulwala sought asylum because, among other abuses, her relatives arranged to have her raped because she was a lesbian.<sup>323</sup> The IJ viewed Nabulwala’s family-arranged rape as “private family mistreatment,” and denied her application for asylum.<sup>324</sup>

Sadly, Nabulwala’s experience is not unique; many LGBT young people experience horrific abuse from parents and other family members desperate to make them gender normative and heterosexual.<sup>325</sup> Indeed, the family is a key site for the formation of traditional sex roles and the perpetuation of compulsory heterosexuality.<sup>326</sup> As Wayne Koestenbaum stated, “home” has “grim meanings for the gay kid or the kid on the verge of claiming that ambiguous identity. Home is the boot camp of gender; at home, we are

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Plaintiffs are mentally incompetent, they are likely to be irreparably harmed if they are unable to meaningfully participate in their respective immigration proceedings”).

<sup>320</sup> *Rahimzadeh v. Holder*, 613 F.3d 916, 920 (9th Cir. 2010); see Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2011).

<sup>321</sup> *Silva v. Ashcroft*, 394 F.3d 1, 7 (1st Cir.2005) (“Action by non-governmental actors can undergird a claim of persecution only if there is some showing that the alleged persecutors are in league with the government or are not controllable by the government.”).

<sup>322</sup> See *Liu v. U.S. Att’y Gen.*, 278 Fed. App’x 212, 214 (3d Cir. 2008); *Janem v. Mukasey*, 295 Fed. App’x 89, 92 (7th Cir. 2008).

<sup>323</sup> Nabulwala also testified that her father physically assaulted her because she is a lesbian, and she was attacked by a mob, resulting in an overnight hospitalization. *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118, 1116-17 (8th Cir. 2007).

<sup>324</sup> On appeal, the Eighth Circuit held that the IJ had inappropriately focused on whether the rape was sponsored or authorized by the government, instead of determining whether the government was unwilling or unable to control the perpetrators, which is the appropriate standard. The case was remanded for the BIA to address that issue. *Id.* at 1119.

<sup>325</sup> See Marouf, *supra* note 21, at 84.

<sup>326</sup> Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 787 (2006).

supposed to learn how to be straight.”<sup>327</sup> An LGBT child can be a source of immense shame to a family.<sup>328</sup> As such, the pressure to force a child to conform to societal expectations can be great: “In most societies, women’s sexual behavior and their conformity to traditional gender roles [signify] the family’s value system. Thus, in many societies, a lesbian daughter . . . can be seen as ‘proof’ of the lax morals of a family.”<sup>329</sup> Parents are constantly bombarded by the message that they have failed if their child is not “normal.” In that situation, it is hardly surprising that some parents would resort to extreme measures, including rape, violent abuse, and even murder, to change their child, punish her, or end the shame she brings on the family.

When a child subject to this kind of abuse applies for asylum, the case often turns on whether the applicant reported the abuse to the police and if so, whether the police took any action. In cases where the asylum-seeker did not make a police report, courts frequently conclude that she has failed to establish that the government was unwilling or unable to control the perpetrators.<sup>330</sup> While an applicant who did not make a police report can try to demonstrate that such a report would have been futile, this is an extremely difficult standard to meet.<sup>331</sup> The asylum-seeker must produce documentation of contemporaneous country conditions proving that the police would have taken no action had she filed a report, such as evidence that the police were involved in or indifferent to incidents of violence against gay people.<sup>332</sup> Even when such evidence is submitted, an adjudicator can still properly consider the applicant’s failure to report the abuse in

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<sup>327</sup> *Id.* at 787 n.64 (quoting WAYNE KOESTENBAUM, *THE QUEEN’S THROAT: OPERA, HOMOSEXUALITY, AND THE MYSTERY OF DESIRE* 47 (1993)).

<sup>328</sup> See Berta Esperanza Hernandez-Truyol, *Latinas – Everywhere Alien: Culture, Gender, and Sex*, in *CRITICAL RACE FEMINISM: A READER* 62 (Adrien Wing, ed., 2nd ed. 2003).

<sup>329</sup> *Id.* (quoting Oliva M. Espin, *Leaving the Nation and Joining the Tribe: Lesbian Immigrants Crossing Geographical and Identity Borders*, 19(4) *WOMEN & THERAPY* 99, 103 (1996)).

<sup>330</sup> See, e.g., *Galicia v. Ashcroft*, 396 F.3d 446, 448 (1st Cir. 2005) (affirming an IJ’s finding that petitioner “did not show that the harassment he suffered was by the government or a group the government could not control” where, *inter alia*, the petitioner did not inform authorities of his attack).

<sup>331</sup> See, e.g., *Izquierdo v. U.S. Att’y Gen.*, 352 Fed. App’x 682, 684 (3rd Cir. 2009) (finding an applicant who failed to report sexual abuse committed against him from age 8 until age 14 failed to demonstrate that following up with police would have been futile even though he submitted evidence of police involvement in anti-gay mistreatment, because the evidence concerned events ten years after his sexual abuse ended).

<sup>332</sup> See *id.*

determining whether she met her burden to establish that the police were “unable or unwilling to control” the abuse.<sup>333</sup>

Young LGBT people are doubly disadvantaged by the requirement that a victim report mistreatment to the police. Like all children, they do not necessarily have the ability to independently seek police assistance: “The requirement that government protection be sought presupposes an unmediated relationship between the applicant and the state.”<sup>334</sup> In reality, however, children do not directly interact with the police or other government entities.<sup>335</sup> In most instances, any decision to contact the police would necessarily involve a parent or other adult. Of course, an LGBT child’s parents might very well be the ones inflicting harm upon her, as in the case of Olivia Nabulwala.<sup>336</sup> Even if someone outside the family is abusing the child, she might face further violence from her parents if she tells them about the mistreatment she has suffered. Alternatively, her parents might not file a report because they are ashamed or embarrassed to tell the police that their child was singled out for homophobic or anti-transgender abuse. In many places, a child without a parent willing to act on her behalf has no ability to file a police report.<sup>337</sup> Making a finding of persecution contingent upon proof that such a child sought police protection effectively bars her from asylum eligibility.<sup>338</sup>

#### V. RECOMMENDATIONS TO IMPROVE THE ADJUDICATION OF ASYLUM CLAIMS FILED BY LGBT CHILDREN AND YOUNG ADULTS

A number of reforms are needed to bring asylum law into line with current constitutional norms on the rights of LGBT people and youth and to ensure that young LGBT asylum-seekers receive a fair hearing on their claims. Some of the following recommendations require legislative action, but many should be implemented by asylum adjudicators themselves. Other recommendations are directed at young LGBT asylum-seekers and their advocates. These reforms would ensure that LGBT young people receive a fair hearing on their claims for asylum without being misjudged according to inaccurate stereotypes or forestalled from applying by unfair procedural roadblocks.

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<sup>333</sup> *Id.* at 684 n.5.

<sup>334</sup> Bhabha & Young, *supra* note 288, at 107.

<sup>335</sup> *Id.*

<sup>336</sup> See Nabulwala v. Gonzales, 481 F.3d 1115, 1118 (8th Cir. 2007).

<sup>337</sup> See Bhabha & Young, *supra* note 288, at 107.

<sup>338</sup> *Id.* at 108.

A. *End the Status/Conduct Distinction in Asylum Adjudication*

Asylum adjudicators should end their focus on the imagined distinction between “homosexual conduct” and LGBT identity.<sup>339</sup> As *Lawrence* and its progeny make clear, expressing one’s sexual orientation or gender identity by engaging in intimate relationships, making verbal statements, wearing expressive clothing, and associating with other LGBT people are key parts of being LGBT. Acts of mistreatment directed at a person for these kinds of “conduct” are anti-gay or anti-transgender abuse.<sup>340</sup> There is simply no basis for ruling that a gay boy who is incarcerated for having sex with another gay boy has been punished because of his behavior and not because of his sexual orientation. Such acts of anti-gay abuse must be recognized for what they are: persecution because of sexual orientation. The victims of such persecution deserve asylum.

B. *Stop Demanding Corroboration of a Youth’s Identity That Does Not Exist*

Asylum adjudicators should end the practice of demanding additional proof from LGBT youth regarding their sexual identity that they simply do not have and cannot possibly obtain. Such evidentiary requirements are grounded in heterosexist, anti-child stereotypes that deny the existence of LGBT children and are contrary to law.<sup>341</sup> Under the asylum statute, applicants can only be required to produce corroborating evidence if he has it or can “reasonably obtain” it.<sup>342</sup> In the case of a young person who has never spoken about her sexual orientation to her parents, parental testimony on the subject is not available and would not be probative. Similarly, a youth who identifies as gay, lesbian, bisexual, or transgender but who has not had a sexual relationship, cannot be required to produce evidence of same-sex sexual activity if it does not exist.<sup>343</sup> The credible testimony of an

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<sup>339</sup> *Supra* Part II.

<sup>340</sup> See *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (there is “no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts”); *Maldonado v. U.S. Att’y Gen.*, 188 F. App’x 101, 104 (3d Cir. 2006) (“The fact that Maldonado was targeted by the police only while engaged in an elective activity [leaving gay discos at night] does not foreclose the possibility that he was persecuted on account of his membership in a particular social group.”).

<sup>341</sup> *Supra* Part III.

<sup>342</sup> Immigration and Nationality Act § 208(b)(1)(B)(ii), 8 U.S.C.A. §1158(b)(1)(B)(ii).

<sup>343</sup> See generally *State v. Limon*, 122 P.3d 22, 35 (Kan. 2005) (noting that a child’s

asylum applicant as to her sexual orientation or gender identity is sufficient to corroborate her asylum claim under the immigration statute and regulations and should be accepted as such.

*C. Utilize a Child-Specific Standard for Evaluating Whether Harm Suffered by an LGBT Child Rises to the Level of Persecution*

The U.S. Government takes the position that harm to a child can qualify as persecution even when it would not be serious enough to constitute persecution if inflicted on an adult.<sup>344</sup> This child-specific standard should be applied to LGBT youths' asylum claims. Many LGBT youths report verbal abuse and violence perpetrated by fellow students at their schools, as well as abuse by neighbors, family members, and strangers. Such mistreatment can have a profound impact on children, and courts should give that due consideration in determining whether the harm constitutes persecution.<sup>345</sup> Lovis Liantu Liu was beaten by his father and his neighbors, verbally harassed by his fellow students and threatened with expulsion from school because he was gay.<sup>346</sup> Anonymous individuals also painted graffiti on his house, poisoned his dog, and left a note "referencing his sexual orientation."<sup>347</sup> The BIA and the Third Circuit held that the mistreatment Liu had faced was insufficiently serious to constitute persecution — apparently without considering the relevant fact that he was a child when these acts took place.<sup>348</sup> It seems quite possible, however, that a minor child who was physically assaulted by his own father, verbally harassed by his peers, beaten by his neighbors, and whose home was defaced and dog killed to punish him for being gay experienced "the infliction of suffering or harm . . . ."<sup>349</sup> Asylum adjudicators should evaluate LGBT children's asylum claims using the same standard applied to other children.

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sexual orientation is established by age fourteen and is not affected by the sexual experiences he or she has as a teenager).

<sup>344</sup> WEIS, *supra* note 103, at 19.

<sup>345</sup> *See id.*

<sup>346</sup> Liu v. U.S. Att'y Gen., 278 Fed. App'x 212, 213-14 (3d Cir. 2008).

<sup>347</sup> *Id.* at 214.

<sup>348</sup> *Id.*

<sup>349</sup> Prasad v. I.N.S., 47 F.3d 336, 339 (9th Cir. 1995) (citations omitted).

*D. Inform Children That They Can Apply for Asylum Without Parental Consent*

DHS should inform potential child asylum-seekers that they have the right to apply for asylum without telling their parents or seeking their consent. This could be done quite simply by stating clearly in the instructions on the asylum application form and the USCIS website that parental consent is not required for children to apply for asylum. Asylum officers adjudicating children's claims should also tell them that they do not have to inform their parents they are applying for asylum if they do not feel comfortable doing so.

*E. Allow LGBT Youth With Prior Removal Orders to Reopen Their Cases and Apply for Asylum*

The INA and regulations should be amended to prevent young people from being denied an opportunity to be heard on their asylum claim because they were previously ordered removed as a derivative on a parent's case. The regulations should permit young people to move to reopen within ninety days of turning twenty-one, or ninety days after the entry of the removal order, whichever is later. Before entering a removal order against a derivative child, IJs should be required to inform her that she has the right to move to reopen her case after attaining the age of majority. Even without any legislative or regulatory change, however, due process requires reopening the immigration cases of young people who were ordered removed without any opportunity to be heard on their asylum claim.<sup>350</sup> Courts should grant motions to reopen filed by young people who would be eligible to apply for asylum but for the fact that they were ordered removed as derivatives of a previous case filed by their parents.

*F. Exempt All Children from the One-Year Filing Deadline*

All children, not just those who meet the technical definition of an unaccompanied minor, should be exempt from the requirement to file for asylum within a year of arriving in the U.S. The regulations state that being under a "legal disability" is an extraordinary circumstance

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<sup>350</sup> See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).



that justifies filing for asylum after the one-year deadline.<sup>351</sup> All children, not just unaccompanied minors, fall into this category.<sup>352</sup> Given that twenty-one is the cut off for being considered a “child” under most immigration laws, courts should consider children exempt from the one-year deadline until their twenty-first birthday.<sup>353</sup> Upon reaching the age of twenty-one, young people should be afforded a reasonable period of time to file asylum applications. The regulations should also be amended to clarify that all children are exempt from the one-year deadline.

### G. *Appoint Counsel to Represent Minor Asylum-Seekers*

Minor children and other young people who are incapable of effectively representing themselves in immigration court cannot receive due process of law without the appointment of an attorney to represent them.<sup>354</sup> IJs should, therefore, appoint counsel for children who are unable to afford an attorney or find a pro bono lawyer to represent them. Congress should also act to allow indigent children and young adults seeking asylum the ability to access legal representation. Congress could allow legal service organizations who receive federal funding to provide civil legal services to low-income people to represent undocumented young asylum-seekers in the same way they can represent undocumented battered immigrants seeking relief under the Violence Against Women Act.<sup>355</sup> Alternatively and perhaps more fittingly, Congress could appropriate money specifically for the provision of representation to all asylum-seekers in immigration proceedings.<sup>356</sup> As many commentators have argued, the

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<sup>351</sup> 8 C.F.R. § 208.4(a)(5)(ii) (2011) (stating that the term “extraordinary circumstances” may include “legal disability (e.g. the applicant was an unaccompanied minor . . . during the 1-year period after arrival)”).

<sup>352</sup> Lee Berger and Davina Figeroux, *Protecting Accompanied Child Refugees from the One-Year Deadline: Minority As A Legal Disability*, 16 GEO. IMMIGR. L.J. 855, 858-59 (2002).

<sup>353</sup> See 8 U.S.C.A. § 1101(b)(1)(2011) (“The term ‘child’ means an unmarried person under twenty-one years of age.”).

<sup>354</sup> *Supra* notes 333-342 and accompanying text.

<sup>355</sup> Legal services organizations that receive federal funding through the Legal Services Corporation (LSC) are ordinarily not allowed to assist undocumented immigrants. But the recent reauthorization of the Violence Against Women Act, permitted LSC funding recipients to provide legal assistance to immigrants who are victims of domestic violence, trafficking, sexual assault and a variety of other violent crimes. See Violence Against Women and Department of Justice Reauthorization Act, Pub. L. No. 109-162 § 104, 112 Stat. 2960, 2978 (2006).

<sup>356</sup> Cf. RAMJI-NOGALES, *supra* note 253, at 114 (2009) (recommending that Congress

stakes are so high in determining whether any asylum-seeker will be returned to a country where she might face persecution and even death, and the risk of error is so great, that the appointment of counsel is warranted.<sup>357</sup>

*H. Employ a System of Burden Shifting in Cases Where Children Must Show That Their Native Government Was "Unwilling or Unable" to Prevent Abuse by Private Actors*

Young people who have suffered mistreatment at the hands of nongovernment actors in their home countries have been denied asylum on the basis that their government was not "unwilling or unable" to control the perpetrators.<sup>358</sup> This decision is often based solely on whether the child reported her mistreatment to the police. It ignores the fact that children are not autonomous actors who can choose to seek police assistance.<sup>359</sup> To deny a child's asylum claim on this basis is arbitrary; the decision is based on evidence that does not demonstrate whether the child's government was actually unwilling or unable to protect her. Thus, the current evidentiary standard may prevent children with a genuine fear of persecution from obtaining asylum.

Asylum adjudicators must adopt a different a different system of analysis to ensure that young people in need of refuge are not arbitrarily denied relief. A presumption that the state is unwilling or unable to control a minor's persecutor should exist where an asylum-seeker demonstrates that, as a minor, she suffered harm that would constitute persecution if government acquiescence were established.<sup>360</sup>

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create such a program).

<sup>357</sup> See Linda Kelly Hill, *The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 59 (2011); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-And-A-Half Amendment*, 58 UCLA L. REV. 1461, 1511 (2011); Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 141-42 (2008); Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1157-58 (1985); John R. Mills et al., "Death is Different" and a Refugee's Right to Counsel 3 (Jan. 13, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1290382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290382).

<sup>358</sup> Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2011); *Silva v. Ashcroft*, 394 F.3d. 1, 7 (1st Cir. 2005).

<sup>359</sup> See *supra* notes 354 -362 and accompanying text.

<sup>360</sup> In these cases, the asylum applicant has established that she suffered very serious harm that it would constitute persecution if her government was unwilling or unable to control the perpetrator. It is also undisputed that the applicant's government did not prevent this harm from occurring. It therefore seems logical that the

DHS should then bear the burden of proving that the child's government was in fact willing and able to control the perpetrators.<sup>361</sup> This would ensure that decisions about whether a young person qualifies for asylum are made on the basis of evidence that is actually probative of whether the applicant's government was unwilling or unable to protect her. It would also place the evidentiary burden on the U.S. government, which is the party with the most resources and access to information about international affairs and policing in foreign nations.

In addition, the flight of children from their home countries is such an extreme event that it justifies additional protections for applicants who are seeking asylum while still minor children. In cases where a minor child is the principal applicant, even the burden-shifting scheme described above may not be adequate to ensure a decision is rendered on the basis of the best available evidence.<sup>362</sup> In those situations, the child should also be entitled to call an expert witness, at government expense if necessary, to refute DHS's evidence regarding her government's willingness or ability to protect her from persecution by private actors.

Frequently, DHS and IJs rely on documentary evidence in the form of a State Department Report to establish the human rights conditions in an asylum applicant's country of origin.<sup>363</sup> Appellate courts consistently question this practice.<sup>364</sup> These reports frequently contain

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presumption should be that the government was unwilling or unable to control the perpetrators. After all, the harm happened, and so by definition the government did not prevent it. That suggests the government was either unwilling or unable to do so. Such evidence should therefore be sufficient to meet the applicant's burden of demonstrating her government's acquiescence in the harm she suffered.

<sup>361</sup> DHS could meet that burden by showing that the applicant's attackers were arrested, convicted, and imprisoned, and she suffered no further harm, for example, or by proving that such violence against LGBT people is an anomaly in the country.

<sup>362</sup> Children are likely to be particularly unsophisticated regarding the political situation or policing practices in their country of origin, which would make it almost impossible for them to refute whatever evidence DHS produces in support of the proposition that the child's government was in fact willing and able to protect her from harm.

<sup>363</sup> Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J. L. & SOC. POL'Y 1, 10, 12 (2007) (describing asylum adjudicators' "chronic overreliance" on "generalized summaries of recent country conditions" by the State Department).

<sup>364</sup> See *Tian-Yong Chen v. I.N.S.*, 359 F.3d 121, 130 (2d Cir. 2004) ("[T]he immigration court cannot assume that a report produced by the State Department—an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid abrading relations with other countries, especially other major world powers—presents the most accurate picture of human rights in the country at

little information about the treatment of LGBT people. As a practical matter, there is no way to know from reading the report why that document does not contain more information about the situation confronting LGBT people. It might be because LGBT communities face no violence or human rights problems. Another possible explanation is that LGBT people are so invisible and oppressed within the society at issue that attacks against them are never reported or recorded. A live expert can be questioned as to these matters, ensuring that the IJ gets an accurate picture of the conditions in the country.

The ability to produce expert testimony, at government expense if necessary, allows child asylum-seekers to refute any biased or inaccurate testimony presented by DHS. The U.S. Government has argued that it cannot provide counsel to unaccompanied children in removal proceedings because the INA allows them to be represented by an attorney only “at no expense to the government.”<sup>365</sup> Whether this amounts to a prohibition on providing government-funded counsel in removal proceedings is an open question, of course, but it certainly would not preclude the provision of an expert witness to testify in support of a child’s claim.

The Supreme Court has held that the government must pay for a psychiatric expert to evaluate the defendant in a death penalty case when his mental health will be a significant factor at trial.<sup>366</sup> A death penalty defendant also has a constitutional right to the assistance of a psychiatric expert witness where the government puts his future dangerousness at issue in the sentencing phase.<sup>367</sup> In holding that defendants must be granted such assistance, the Supreme Court noted that “where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to [a psychiatric expert witness].”<sup>368</sup> While the Court has emphasized that “death is different,” that does not mean that child asylum-seekers facing removal to their

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issue.”); *Galina v. I.N.S.*, 213 F.3d 955, 959 (7th Cir. 2000) (“The country report is evidence and sometimes the only evidence available, but the [BIA] should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ.”); *Shah v. I.N.S.*, 220 F.3d 1062, 1069-70 (9th Cir. 2000) (quoting *Gramatikov v. I.N.S.*, 128 F.3d at 620); *Gailius v. I.N.S.*, 147 F.3d at 46 (1st Cir. 1998) (same); *Gramatikov v. I.N.S.*, 128 F.3d 619, 620 (7th Cir. 1997) (“[T]here is perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with.”).

<sup>365</sup> Immigration and Nationality Act § 292, 8 U.S.C.A. § 1362 (2011).

<sup>366</sup> See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

<sup>367</sup> *Id.* at 84.

<sup>368</sup> *Id.*

countries of origin do not enjoy analogous due process rights.<sup>369</sup> Immigration proceedings where a refugee is seeking asylum, withholding of removal, or relief under the Convention Against Torture are arguably analogous to death penalty cases because the applicant may face death if the claim is wrongly rejected.<sup>370</sup> One tragic example is that of Edgar Chocoy, a sixteen-year-old boy who fled Guatemala after leaving a street gang.<sup>371</sup> He was murdered just seventeen days after being deported following the denial of his asylum application.<sup>372</sup>

Given the risk of death confronting a child who is wrongly denied asylum, due process requires obtaining an accurate picture of the asylum seeker's home country's willingness or ability to protect her from persecution by private actors. Establishing two requirements would ensure that IJs receive the most accurate information available. The first would require DHS to prove that a child applicant's government is willing and able to control the private individuals who harmed her. The second would ensure that the child is entitled to present her own expert testimony — available without cost to her — in rebuttal. These two requirements would ensure that child asylum-seekers' claims are decided on the basis of the best available evidence regarding the conditions in her country. Such an effort is vital to ensure that children who have taken the extraordinary step of crossing an international border to escape mistreatment are not wrongly removed to face further persecution.

*I. Advocates for Young LGBT Asylum-Seekers Should Use Expert Testimony*

LGBT youths seeking asylum are burdened by a number of stereotypes that undermine adjudicators' ability to accurately evaluate the seriousness of the harm that they have suffered. The perception that children cannot comprehend or accurately articulate their sexual orientation or gender identity is one example. Another is the perception that LGBT people are hypersexual and less affected by sexual violence than heterosexuals. Overcoming such stereotypes requires trial-based interventions to convince the finder of fact that the child has suffered real harm. Expert witness testimony can prove

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<sup>369</sup> See Mills et al., *supra* note 357, at 3.

<sup>370</sup> See *id.*

<sup>371</sup> Sergio DeLeon, *Guatemalan Youth Slain 17 Days After Being Deported from U.S.*, L.A. TIMES, May 9, 2004 at A4.

<sup>372</sup> *Id.*

particularly valuable in countering stereotypes and other “common sense” dominant narratives.<sup>373</sup>

Expert witness testimony could serve to educate the adjudicator about the impact of the persecution the LGBT child suffered. In particular, an expert witness could draw on recent research concerning the profound impact family and community rejection has on young LGBT people. This research would show that being singled out for violent abuse because of his or her sexual orientation or gender identity can profoundly impact a child’s development and adult functioning.<sup>374</sup> Attorneys representing LGBT youth in asylum cases should, therefore, consider utilizing expert testimony to bolster their clients’ claims.

*J. LGBT Youth Should Consider Filing for Asylum on the Basis of “Imputed Sexual Orientation”*

Young transgender and bisexual people face a particular challenge in applying for asylum because no court has ruled that either of those identities constitutes a “particular social group” within the meaning of the INA. In addition to arguing for court recognition, transgender and bisexual youths can also apply for asylum on the basis of imputed sexual orientation.<sup>375</sup> For a transgender girl, for example, doing so would allow her to state honestly that she does not identify as a “gay man with a female sexual identity” but is still subject to anti-gay persecution because she was designated male at birth and is attracted to men and is, thus, assumed to be gay.<sup>376</sup> A heterosexual man who faced persecution because people believed he was gay qualified for asylum because of his “imputed status as a homosexual.”<sup>377</sup> There is

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<sup>373</sup> See Crenshaw, *supra* note 8, at 1271 n.93; Miller, *supra* note 11, at 153.

<sup>374</sup> See generally Caitlin Ryan, David Huebner & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009) (finding a predictive link between negative family reactions to a child’s sexual orientation and serious health problems for the adolescent in young adulthood, such as depression, illegal drug use, risk for HIV infection, and suicide attempts).

<sup>375</sup> See Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, *supra* note 83, at 285-86.

<sup>376</sup> *Id.* The Americans with Disabilities Act (ADA) similarly prohibits discrimination against a person who is “regarded as” disabled by her employer, even though she does not actually suffer from a disability that would qualify her for protection under the Act. 42 U.S.C. § 12102(3)(A). Thus an employer who discriminates against a person because she perceives him to be disabled violates the ADA even if the victim does not actually have a disability. *Id.*

<sup>377</sup> *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003).

no reason why a bisexual or transgender young person cannot also apply on that basis.

Imputed sexual orientation claims on behalf of young bisexual and transgender people make practical sense because persecutors may not see lesbian, gay, bisexual, and transgender people as distinct identities. Rather, a persecutor might have the same homophobic reaction to all LGBT people and target a gay man or a transgender woman alike for violent abuse. For example, a transgender girl who is attacked by a group of young men calling her a “faggot” has suffered persecution on the grounds of imputed sexual orientation; her attackers assumed incorrectly that she is gay.<sup>378</sup> Applying for asylum on the basis of imputed sexual orientation also makes sense for lesbian and gay young people. “Homosexuals” are clearly established as a social group, but adjudicators frequently cannot accept that children are really gay.<sup>379</sup> Consequently judges deny young people asylum because they failed to produce “objective evidence” of their sexual orientation even when such evidence simply does not exist.<sup>380</sup> Gay and lesbian young people could avoid this catch-22 by applying for asylum on the basis of imputed sexual orientation as well as on the basis of their actual sexual identity. Doing so would allow applicants to argue that it does not matter whether the IJ believes they are actually gay or not. In an imputed sexual orientation asylum case, the applicant’s true identity is irrelevant – the only issue is whether he will be targeted for anti-gay mistreatment.<sup>381</sup> An applicant who had been subjected to horrific anti-gay abuse in the past would be eligible for asylum on the basis of imputed sexual orientation if he would be targeted again in the future; the IJ could not deny the application even if he thought the asylum-seeker had not produced enough “objective evidence . . . [of] his homosexuality”<sup>382</sup> to prove he was gay.

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<sup>378</sup> “Many persecutors use slang terminology for transgender persons synonymous with derogatory terms like ‘fag’ or ‘dyke,’ demonstrating that, from the persecutor’s perspective, transgender identity and homosexual identity are synonymous.” Landau, *supra* note 62, at 260-61.

<sup>379</sup> See *supra* notes 38-51 and accompanying text.

<sup>380</sup> See *supra* Part I.B.

<sup>381</sup> See *Amanfi*, 328 F.3d at 730 (remanding *Amanfi*’s petition for review for the BIA to determine the extent of his persecution on account of his imputed status as a homosexual).

<sup>382</sup> *Kimumwe v. Gonzales*, 431 F.3d 319, 321 (8th Cir. 2005).

## CONCLUSION

Recent developments in both juvenile law and the legal rights of sexual minorities are remarkable in their challenges to long-held assumptions about children and LGBT people. In its recent decisions limiting the criminal penalties that can be constitutionally imposed upon minors, the Supreme Court rejected the idea that children who commit adult-like acts cease to be children. The Court instead indicated that all children must be given special solicitude because they are biologically different from adults. These decisions establish that courts can no longer treat a child as an adult simply because he has committed adult-like acts. Courts have also proscribed a variety of forms of discrimination against sexual minorities, even when that discrimination ostensibly targets "behavior" rather than "status." But, contrary to these holdings, young LGBT asylum-seekers have continued to be denied relief on the basis of outmoded thinking about youth and sexuality. Asylum adjudicators continue to hold young LGBT asylum-seekers to an adult standard of persecution and to disregard severe mistreatment perpetrated against them. Similarly, while recent legal developments with regard to the rights of sexual minorities clearly indicate that judicial reliance on homophobic stereotypes is inappropriate, young LGBT asylum applicants continue to have their cases denied on the basis of outdated misconceptions about LGBT people.

Ensuring that LGBT youth receive due process and fair treatment requires a number of reforms to the adjudication of child asylum-seekers' claims. Only with substantive and procedural changes to asylum adjudication can young LGBT asylum-seekers realize the promise of recent advances in both juvenile law and the legal rights of sexual minorities. At present, these young peoples' cases show there is a long way to go before LGBT youth realize the gains made on behalf of (presumptively heterosexual) children and LGBT adults.



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