Who am I and Who Do You Want Me to Be - Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications

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WHO AM I AND WHO DO YOU WANT ME TO BE? EFFECTIVELY DEFINING A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER SOCIAL GROUP IN ASYLUM APPLICATIONS

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INTRODUCTION

While U.S. law is generally conservative1 in extending rights to lesbians, gay men, bisexuals, and transgender persons (LGBT),2 courts addressing asylum claims regularly recognize LGBT status as a basis for asylum applications.3 U.S. administrative and judicial remedies increasing-


1. The continuing validity of the Defense of Marriage Act (DOMA) is a stark example of the conservative approach of U.S. law. DOMA permits states to decline to recognize valid same-sex unions (including marriages) from other states and prohibits the federal government from recognizing such unions. Defense of Marriage Act §§ 2–3, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006). The Obama administration’s Department of Justice provided a counterexample to this negative attitude towards LGBT rights where it intervened in a lawsuit on behalf of a student subject to bullying because he was “effeminate.” Ari Shapiro, Justice Department Intervenes in Gay Rights Suit, NAT’L PUB. RADIO (Jan. 15, 2010), http://www.npr.org/templates/story/story.php?storyId=122620723. But at the same time, the Obama administration is also currently in the difficult position of defending the parts of DOMA that a Massachusetts federal district court in 2010 ruled unconstitutional. See Devin Dwyer, Obama Justice Department Weighs Appeal in Defense of Marriage Act Case, ABC NEWS (July 9, 2010), http://abcnews.go.com/Politics/president-obama-defense-marriage-act-bind-justice-department/story?id=11126465.

2. This Note uses the term “LGBT” as a blanket term. Doing so should not be read to imply that issues in an asylum application are the same for all groups. To the contrary, women and thus lesbians often have higher evidentiary hurdles than men. Additionally, bisexuals and transgender persons might have greater problems in convincing adjudicators that such statuses are immutable and might also face problems fitting into rigid stereotypes of gender and sexuality. In one especially compelling instance, Esmeralda, a transgender Mexican asylum seeker, suffered sexual abuse and was at one point housed among male asylum seekers where she indicated a fear for her life. Esmeralda’s asylum application was ultimately successful but only after she had suffered inexcusable sexual violence and other life-threatening treatment by unsympathetic or unknowing immigration officials. Esmeralda: A Transgender Asylum Seeker Speaks out Against Immigration Detention, RESTORE FAIRNESS BLOG (Nov. 11, 2009), http://restorefairness.org/2009/11/esmeralda-a-transgender-asylum-seeker-speaks-out-against-immigration-detention.

3. Victoria Nielson, Legal Director of Immigration Equality, indicated: “Compared to other areas [of immigration law], I’m shocked that LGBT asylum even exists. . . . Sometimes, I take a step back, and I can see that this is an amazingly progressive area of the law simply because of the fact that people can stay here because they are gay.” Hollis V. Pfitsch, Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity, 15 LAW & SEXUALITY 59, 72 (2006).
ly grant protection to LGBT individuals who flee from persecution in their home countries by permitting them to remain in the United States.\(^4\) Generally speaking, asylum functions as an exercise of compassion; but this compassion is subject to abuse. Attempts to limit this abuse, though understandable, can result in excessive hurdles for those seeking to benefit from asylum law. Indeed, LGBT individuals sometimes face these hurdles, undermining the otherwise "progressive policy"\(^5\) of asylum law. This Note explores the development and current treatment of LGBT identity\(^6\) as a recognized class under U.S. asylum law.

First, this Note will briefly summarize pertinent immigration procedure, address three common persecution-based applications, and introduce the various adjudicators that hear persecution-based applications. Next, it will address the legal history of LGBT identity as a basis for persecution-based petitions. Following the legal history, this Note will then explore legal frameworks courts have used to define social groups for persecution-based petitions. Thereafter, it will highlight suggestions from U.S. law, sociology, and feminist and queer theories that undermine stereotypes that often factor into definitions of LGBT identity. Finally, it will explore how stereotypical LGBT identity understandings are culture-specific and thus difficult to apply to individuals who come to the United States from other cultures. This Note will recommend that practitioners craft persecution-based applications that define LGBT identity through detailed status and conduct descriptors.

I. PERTINENT IMMIGRATION LAW PROCEDURE

Congress has ultimate power over immigration matters and has delegated authority to many agencies, predominantly the Department of Homeland Security (DHS), as well as the Departments of State, Justice, and Labor.\(^7\) The U.S. Citizenship and Immigration Services (USCIS), a branch of DHS, and the Immigration Courts, established under the Department of Justice, adjudicate asylum claims, as discussed below.

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6. Here, the term "identity" should be understood as neutrally as possible; the goal is to avoid implicating definitional complications that become evident as the Note progresses. Thus, "identity" throughout this Note implies either status or conduct. See infra Part IV–V.

7. ROBERT C. DIVINE & R. BLAKE CHISAM, IMMIGRATION PRACTICE: 2010-2011 EDITION, § 2-2 to 2-3 (2010). Note: the former Immigration and Naturalization Services (INS) was abolished when DHS was created; INS functions are generally distributed among three bureaus in DHS. Id. § 2-2.
USCIS administratively adjudicates asylum cases for applicants who have been in the United States one year or less. Where an applicant files the necessary application within one year of his or her entry into the United States, the applicant will first have a “non-adversarial” interview before a USCIS asylum officer who will affirmatively adjudicate “clearly approvable cases.” An affirmative adjudication grants the applicant the right to remain in the United States.

If the case is not “clearly approvable” or the applicant has been in the United States more than one year, the Immigration Court must rule on the matter, and an immigration judge (IJ) will conduct a full hearing on the matter. Generally, the IJ handles the “removal proceedings,” colloquially known as deportation proceedings, and the application simultaneously. In most, but not all cases, the government or the applicant can appeal the IJ’s decision to the Board of Immigration Appeals (BIA). In more limited circumstances and with proper jurisdiction, either party can appeal the BIA decision to a U.S. court of appeals. Thus in some cases, up to four entities can consider applications: asylum officers, IJs, the BIA, and U.S. courts of appeals.

Asylum officers approve only “clearly approvable” cases and, thus, do not typically draft written opinions. IJs can issue oral or written opinions. Decisions by the BIA and the courts of appeals are written. BIA decisions are sometimes but not usually precedential, and courts of appeals rulings are binding on future matters of the same subject in the particular circuit. Thus, statutory and regulatory language, U.S. Supreme Court rulings, and deference to agency interpretations under the Chevron Doctrine are key sources of law with case decisions often carrying only persuasive value.

8. Id. §§ 2-12, 16-12 to 16-14. This process does not resemble a trial or other court proceeding but instead takes the form of a visit to a government office.
9. Id. at § 16-11 to 16-12, 16-16.
10. See id. §§ 11-2, 16-16.
13. See id. § 11-95 to 11-97, 11-101.
16. See DIVINE & CHISAM, supra note 7, § 2-25.
17. The Chevron Doctrine instructs courts to defer to agency interpretations of the agency’s governing statutes and regulations where the statute or regulation is ambiguous and where the agency interpretation is reasonable or permissible. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
II. GENERAL FEATURES OF U.S. ASYLUM LAW

Aliens seeking lawful status in the United States on account of persecution have three available forms of relief: (1) a petition for asylum, (2) a petition to withhold removal, and (3) a petition for relief under the Convention Against Torture (CAT).18 The three claims carry successively higher burdens in terms of the likelihood and source of persecution.19 Thus, where an applicant fails to meet her burden of proof in an asylum application, it is unlikely that she will meet the higher burdens of proof for the other claims.20 But at the same time, the applications with higher burdens are not as statutorily restrictive as applications for asylum.21 For example, some crimes bar an applicant from receiving asylum but leave open withholding of removal or relief under CAT; some crimes bar both asylum and withholding of removal.22 Additionally, whereas a grant of asylum is given at the discretion of the IJ or the BIA, withholding of removal and CAT are mandatory forms of relief. A discussion of each form of relief including the appropriate burdens follows.

A. Asylum

For a successful asylum claim, an applicant must show that she meets the definition of a “refugee.”23 A refugee is an alien who cannot return to her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”24 Evidence of past persecution raises the presumption that fear of persecution is well-founded.25 DHS can rebut this presumption by showing a fundamental change in circumstances in the

18. See DIVINE & CHISAM, supra note 7, § 16-2, 16-11, 16-52; see, e.g., Sow v. Mukasey, 546 F.3d 953, 955–56 (8th Cir. 2008).
19. See DIVINE & CHISAM, supra note 7, § 16-11, 16-52 to 16-53.
20. See id.
22. See, e.g., Ali v. Achim, 468 F.3d 462, 470–71 (7th Cir. 2007) (particularly serious crimes barred both asylum and withholding but did not bar relief under CAT).
24. 8 U.S.C. § 1101(a)(42)(A). The statutory definition indicates that the alien must also be “unable or unwilling” to return to her home country or to avail herself of the country’s protections; these requirements are not a concern for the scope of this Note.
alien's home country. Severe past persecution in the alien's home country might also suffice to demonstrate an applicant's unwillingness to return to that country regardless of fear of persecution. Where there is no evidence of past persecution, the question of a well-founded fear of future persecution becomes the focus of asylum proceedings and requires the support of reasonable, substantial, and probative evidence. Such evidence must show that the applicant's fear is reasonable. In practice, adjudicator decisions often focus on the credibility of the applicant herself.

B. Withholding of Removal

An applicant may also petition for withholding of removal. Such a step precludes the U.S. government from removing an alien to her home country, but does not necessarily preclude the U.S. government from removing her to a third country. In a successful application for withholding of removal, the applicant must show a clear probability that it is more likely than not that she will be persecuted on account of her race, religion, nationality, membership in a particular social group, or political opinion. Unlike an application for asylum, failure to file an application within one year of entry into the United States does not necessarily bar relief in the form of withholding of removal, nor are as many crimes a bar to relief.

C. Convention Against Torture

An applicant may additionally petition for relief under the CAT. In a successful CAT claim, the petitioner must prove that, more likely than not,
the applicant's home government has the intent to torture her. The applicant must meet this high burden for a successful CAT claim. In addition, the applicant must prove that her government has the motive or purpose to cause torture, not merely that the government is complacent in torture. Unlike claims for asylum or withholding of removal, a claim under the CAT does not, however, depend on the applicant's membership in a statutory class.

D. Defining "Social Group"

In analyzing claims for asylum and withholding of removal, unique problems arise in each of the five categories: race, religion, nationality, membership in a particular social group, and political opinion. Membership in a particular social group is an especially contentious category. This category encompasses petitions based on persecution due to LGBT identity. In looking at petitions based on LGBT identity, adjudicators often use various theoretical approaches to understand the claim. For example, some adjudicators might draw a distinction between LGBT status (or rejection of LGBT status) and LGBT conduct (or the lack of LGBT conduct), arbitrarily attaching more weight to one or the other. Adjudicators sometimes also question whether the applicant’s LGBT identity is changeable, that is, they proceed from the belief that LGBT identity is chosen. Other adjudicators consider the society from which the applicant comes and contemplate how that society would respond to the putative social group, sometimes looking for some undefined level of visibility within the society. These different lines of inquiry overlap, with some gaining prominence over others in a given case. This Note will consider these various approaches, starting with the first case that recognized LGBT identity as a possible basis for asylum.

37. See Pierre, 528 F.3d at 189.
38. See Hayrapetyan v. Mukasey, 534 F.3d 1330, 1336 (10th Cir. 2008).
40. See, e.g., Shahinaj v. Gonzales, 481 F.3d 1027, 1028–29 (8th Cir. 2007) (disapproving of the IJ's focus on lack of stereotypical LGBT conduct).
41. See Toboso-Alfonso, 20 I. & N. Dec. at 822 (accepting the IJ's finding Toboso-Alfonso's characteristic was immutable).
III. DEFINING LGBT UNDER ASYLUM LAW

The seminal case of In re Toboso-Alfonso first established homosexuality as a basis for a social group under U.S. asylum law. The applicant in Toboso-Alfonso "assert[ed] that he [was] a homosexual who ha[d] been persecuted in Cuba and would be persecuted again on account of that status should he return to his homeland." Toboso-Alfonso also described systematic persecution including registration with Cuban authorities, periodic updating, unexplained detention, and penal labor. Supplementary evidence corroborated the applicant's description of official Cuban government actions toward homosexuals. Toboso-Alfonso's testimony further indicated that his persecution was not based on his conduct but rather based on his status as a homosexual. Moreover, Toboso-Alfonso "testified that it was a criminal offense in Cuba simply to be a homosexual." The persecution in Cuba culminated when Toboso-Alfonso received an ultimatum to leave as part of the Mariel boat lift or to face "4 years in the penitentiary for being a homosexual." Toboso-Alfonso arrived in the United States in 1980 and the U.S. government terminated his parole in 1985. An IJ subsequently found Toboso-Alfonso excludable, which is to say not legally permitted to enter the United States, denied a request for asylum, but granted withholding of deportation. The Immigration and Naturalization Service appealed the decision to the BIA, which affirmed the IJ's decision.

44. Id. at 820.
45. Id. at 820–21.
46. Id. at 821.
47. Id.
48. Id.
49. The Mariel boat lift describes the period in which a large number of Cuban emigrants were allowed to or, depending on the point of view, forced to leave Cuba for the United States. The character of the migrants as well as the impact of their migration are debated subjects. See generally David Card, The Impact of the Mariel Boatlift on the Miami Labor Market, 43 INDUS. & LAB. REL. REV. 245, 245–48 (1990).
53. Id. at 819. Withholding of deportation is substantially similar to withholding of removal.
54. This agency's functions are now dispersed throughout DHS.
such that he was entitled to withholding of deportation. In 1994, Attorney General Janet Reno designated *Toboso-Alfonso* as precedent in all proceedings involving the same issue or issues. This move provided a clear basis for courts to consider claims based on sexual orientation. In making the designation, Attorney General Reno was indicating the formal position of the U.S. government that its immigration laws were sympathetic or at least not hostile to those who had faced persecution based on LGBT identity. While this designation is not binding on the courts of appeals, many courts nonetheless recognize the precedential value of *Toboso-Alfonso*.

A. Status Versus Conduct

In its holding in *Toboso-Alfonso*, the BIA attempted to separate the facts of persecution that formed the basis of the application and the potentially far reaching results of its holding. The BIA stressed that its focus was on the persecution the applicant had faced on account of his LGBT identity and added that the issue was “not simply a case involving the enforcement of laws against particular homosexual acts, nor . . . a case of assertion of ‘gay rights.’” Instead, the BIA indicated:

The [Immigration] Service argues that “socially deviated behavior, i.e., homosexual activity[,] is not a basis for finding a social group within the contemplation of the [Immigration and Nationality] Act” and that such a conclusion “would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well.” [Toboso-Alfonso]’s testimony and evidence, however, do not reflect that it was specifically activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual.

Here, the BIA distinguished the Service’s arguments by stressing that Toboso-Alfonso’s persecution for simply being a homosexual—rather than his actions—was the basis of his claim. But in focusing on the fact that Toboso-Alfonso was persecuted for being a homosexual rather than for

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56. See id. at 822–23.
57. See Reno Designates Gay Case as Precedent, 71 INTERPRETER RELEASES 859, 859–60 (1994) (describing Att’y Gen. Order No. 1895-94 (June 9, 1994)). The Attorney General’s order could plausibly be read to cover only “homosexuals in Cuba,” but has instead been read to apply to homosexuals in general.
59. See Pfitsch, supra note 3, at 73; see, e.g., Pacheco v. Holder, 352 Fed. Appx. 571, 572–73 (2d Cir. 2009) (indicating that “sexual orientation . . . fall[s] under the ‘particular social group’ category” but denying the appeal because applicant had failed to prove fear of persecution).
61. *Id.* at 822.
doing something, the BIA implicitly recognized the possibility of defining sexual orientation either in terms of status or conduct.\textsuperscript{62}

To deflect the sorts of arguments the Service made, the BIA asserted that it was concerned \textit{solely} with Toboso-Alfonso’s LGBT status. This was a necessary step because, as the language quoted above suggests, Toboso-Alfonso’s presumed LGBT conduct, such as engaging in same-sex sexual relations, could serve as a possible basis for denying the petition.\textsuperscript{63} U.S. laws at the time of the petition legitimately could—and in some cases did—criminalize some LGBT conduct, namely same-sex sodomy.\textsuperscript{64} Additionally, the BIA’s focus on status may reflect the historical circumstances of the applicant.

That Toboso-Alfonso arrived in the United States as part of the Mariel boat lift from Cuba highlights the important background of this case. Scholar Leonard Birdsong has suggested that Toboso-Alfonso was an outgrowth of U.S. Cold War policy, which often granted asylum to individuals from Communist countries such as Cuba.\textsuperscript{65} Thus, the apparent focus on status in Toboso-Alfonso might be seen as necessary to both traditional interests of U.S. foreign policy (encouraging dissidents from Communist countries) and interests of U.S. domestic policy (desiring to avoid legitimizing LGBT conduct or any other form of “gay rights”).\textsuperscript{66} But despite the BIA’s reticence to deem the matter one of “gay rights,” the case has subsequently opened the door to many successful asylum claims based on LGBT identity.\textsuperscript{67}

\textsuperscript{62} See Diane S. Meier, Comment, \textit{Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law}, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 147, 152 (2008) (indicating that “[t]he status/conduct binary is the most general binary . . . and separates who someone is from what they do”).

\textsuperscript{63} The dissent in \textit{Toboso-Alfonso} suggests this argument but ultimately uses the fact to question whether Toboso-Alfonso had succeed in showing the clear probability of threat to life or liberty. 20 I. & N. Dec. at 825–26 (Vacca, Board Member, dissenting).

\textsuperscript{64} At the time \textit{Toboso-Alfonso} was argued, the case of \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), which found no fundamental right to same-sex intercourse and upheld a challenged anti-sodomy law, was still good law. \textit{Lawrence v. Texas} has since overturned \textit{Bowers}. 539 U.S. 558, 578 (2003). But not everyone is convinced that \textit{Lawrence} will succeed in altering domestic laws with regards to LGBT rights. See Pfitsch, supra note 3, at 83.

\textsuperscript{65} See Leonard Birdsong, \textit{A Legislative Rejoinder to “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution...,”} 35 WM. MITCHELL L. REV. 197, 201–03 (2008).

\textsuperscript{66} Pfitsch argues that the strict identity/status duality in asylum law contrasts with the collapse of such a duality in other areas of law but that all areas of law attempt to avoid extending legal benefits to LGBT individuals. Pfitsch, supra note 3, at 87. Specifically, asylum law still “carefully avoid[s] the extension of protections to those whose persecution targets conduct rather than identity” and that “reluctance to let go of the morality-driven desire to regulate sexual conduct allows discrimination against the LGBT community to continue because discrimination based on conduct cannot be separated from discrimination based on identity.” \textit{Id.} at 83. Note that Pfitsch is using the term “identity” in a way tantamount to this Note’s use of the word “status.”

\textsuperscript{67} See Broverman, supra note 4.
B. Mutable Versus Immutable

The United States joins a number of other countries in granting asylum or other relief to refugees, often granting relief on account of persecution because of LGBT identity. The United Nations High Commission on Refugees (UNHCR) has provided a definition of "refugee," part of which now appears in U.S. law. Under this definition, two methods can be used to determine whether an applicant meets the definition of "refugee" based on membership in a social group. The first looks for a protected characteristic common to the social group; the second looks at the social perception of the social group.

The putative social group can be understood in terms of a "protected characteristic." For most courts, a "protected characteristic" is an immutable characteristic, a trait that the applicant either cannot or should not be required to alter. In Toboso-Alfonso, the BIA noted that "the [Immigration] Service has not challenged the immigration judge's finding that homosexuality is an 'immutable' characteristic." The BIA opinion impliedly accepted that homosexuality is immutable.

Some courts, however, are less willing to accept LGBT identity as an immutable characteristic. This view is a reaction to the perceived threat of waves of dubious asylum applications based on LGBT identity. This fear has a legitimate basis. For example, in 2009, a Washington State couple was convicted of encouraging applicants to file asylum petitions based on false assertions of LGBT identity.

69. Id. ¶ 6.
70. In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). Pfitsch discusses the development of this immutable characteristic test, indicating that courts have added other conditions to the baseline characteristic test. See Pfitsch, supra note 3, at 63–64. For example, one test is based on association, see Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986), a proposed Department of Justice test combines immutable characteristics and association and adds other factors, Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76598 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208), and a Second Circuit approach requires characteristics that others can recognize, see Gomez v. INS, 947 F.2d 660, 664–65 (2d Cir. 1991).
72. See id.
73. See Marouf, supra note 42, at 91.
As an alternative to the inquiry into the immutable “protected characteristic,” the UNHCR guidelines recommend that participating states look to “social perception.”75 This approach requires the adjudicator to look into the society from which the applicant comes.76 The question, viewed from within the applicant’s home society, is what the “social perception” of the putative social group is or would be in that society.77 Australia has emphasized this approach.78 The “social perception” test carries the added benefit of offering protection to those with imputed LGBT identity.79 For example, an applicant with a heterosexual identity could apply for asylum based on imputed LGBT identity where her home society “perceives” her to have an LGBT identity.80 The United States has traditionally followed the “protected characteristic” test, but as immigration practitioner Fatma E. Marouf highlights, there has been a “sudden, significant departure” in U.S. jurisprudence that has reinterpreted “social perception” as “social visibility” and demanded an unprecedented level of proof.81

The BIA has applied a “social visibility” test in defining a social group for the purposes of an asylum claim in at least two cases.82 In the first case, In re C-A-,83 the BIA held that Colombian “noncriminal drug informants” were not a social group for asylum purposes.84 That case involved a couple who had learned information about the Cali drug cartel in Colombia.85 After a physical attack on the couple’s son, as well as attacks on the lessee of the couple’s bakery, the couple fled to the United States.86 The BIA, in considering whether the two applicants were members of a particular social group, acknowledged the UNHRC’s “social perception” test but focused closely on the “persecutory action toward a group [as] a relevant factor in determining the visibility of a group in a particular socie-

75. U.N. High Comms’r for Refugees, supra note 68, ¶ 7.
76. Marouf, supra note 42, at 59–60.
77. Id. at 59–62.
78. Id. at 58.
79. See Pfirsch, supra note 3, at 68.
80. See id. at 68–69.
85. Id. at 952.
86. Id. at 952–53.
ty." Later in its opinion, the BIA equated "recognizability" with "visibility" and found that "noncriminal informants" were not "highly visible" enough to satisfy this "social visibility" test. Thus, rather than analyzing how the putative group of "noncriminal informants" would be perceived by Colombian society, the BIA focused on the fact that Colombian society failed to recognize this putative group. The BIA later confirmed In re C-A-'s "social visibility" approach.

In In re A-M-E- & J-G-U-, the BIA rejected the argument that wealthy Guatemalans constituted a social group for asylum purposes. That decision rested, in part, on the recognition that wealth is a mutable characteristic, but the decision also cited a dearth of "background evidence . . . that wealthy Guatemalans would be recognized as a group that is at a greater risk of [persecution] in particular." Like In re C-A-, this decision found that the requisite "high visibility" was lacking for the putative group to qualify as a social group for asylum purposes. The BIA implied that with ample "background evidence . . . that wealthy Guatemalans would be recognized," its decision might differ.

While both BIA decisions implied that "social visibility" was not the sole factor that courts should consider, neither decision indicated how much weight courts should give to the "social visibility" factor, and neither decision indicated what qualifies as a "highly visible" social group. Thus, rather than clarifying matters, the BIA's decisions in In re A-M-E- & J-G-U- and In re C-A- raised more questions. In fact, the Seventh Circuit has said that the "social visibility" approach "makes no sense" and has criticized the BIA for its failure "to explain the reasoning behind the criterion of social visibility."

The BIA's confusing jurisprudence leads to particular problems in asylum applications based on LGBT identity. Because adjudicators using a "social visibility" test might hypothesize that LGBT life in an applicant's home country mirrors LGBT life in the United States, an adjudicator's questions might "focus more on knowledge of gay trivia than on actual experiences and culturally relevant identity markers." From a theoretical

87. Id. at 960 (quoting U.N. High Comms'r for Refugees, supra note 68, ¶ 14).
88. Id. at 959–61.
90. Id. at 74.
91. Id.
92. See id. at 74–75; C-A-, 23 I. & N. Dec. at 956, 960.
93. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) (remanding to the BIA for consideration of a claim based on the social group of defectors from the Mungiki tribe).
94. See Morgan, supra note 5, at 154–55.
95. Id.
point of view, the “social visibility” test lacks an adequate basis for its assumption that the perception of the outside world is an accurate reflection of a personal trait. 66 From a practical point of view, in the area of LGBT-based applications, this test has the wholly unwarranted effect of punishing those applicants who are able to “cover” their true situation 67 and those applicants who are most likely to avoid “acting gay” for fear of persecution. 68 On this matter, Marouf voiced further concerns that

> requiring social visibility as an element of a “particular social group” not only will make it more difficult for lesbians to prevail in asylum claims, but also may have the discriminatory effect of rendering only effeminate men or “butch” women eligible for asylum because they are the only ones perceived as homosexual by their societies. 69

D. An Overly-Demanding Standard

Although the approach in In re A-M-E- has not been universally adopted, it does present a serious evidentiary risk to asylum applicants. 100 As previously noted, adjudicators sometimes pose questions to applicants designed to test their knowledge of LGBT culture in the applicant’s home society. 101 Under this model, a successful applicant must be prepared to describe the LGBT community in her home country and to place herself within that community. However, where an applicant has elected not to participate in the LGBT community out of fear of injury or death or for any other reason or where the applicant’s home country lacks an LGBT culture, the applicant will not be able to meet this evidentiary hurdle. 102

Judges may engage in an unintentional evidentiary sleight-of-hand because of the difficulty in proving protected status or social visibility. This means that “[w]hen no other evidence of perception is available... adjudicators may end up relying primarily, if not exclusively, on evidence of harm in analyzing the social group.” 103 Put differently, an applicant’s inability to produce evidence of participation in the LGBT community

97. Id. at 913.
98. See id. at 920. Furthermore, doing so might contravene obligations under the 1967 Refugee Convention to which the United States is a party. See Marouf, supra note 42, at 70–71.
100. See id. at 76.
101. See Morgan, supra note 5, at 154–55.
102. See Hanna, supra note 96, at 916.
103. Marouf, supra note 42, at 76.
adjudicators to rely instead on evidence of harm, conflating the separate elements of persecution-based petitions.\textsuperscript{104} The end result of the recent BIA precedent is to punish applicants who “cover” their sexuality while rewarding those who “reverse cover,” those who “act more visibly ‘gay’”\textsuperscript{105} In the eyes of adjudicators using the social visibility model, those applicants who successfully “cover” have eliminated evidence of LGBT community participation, of harm from persecution, and thus of fear of persecution. For applicants who face such adjudicators, the effect of successfully avoiding harm is the denial of an asylum application.\textsuperscript{106} In effect, adjudicators that require social visibility fail to recognize that a fear of future persecution is not eliminated through the efforts of LGBT applicants to hide their LGBT identity. Moreover, adjudicators using the social visibility test place especially onerous burdens on applicants whose asylum claims are based on LGBT identity or gender.\textsuperscript{107} Women and LGBT individuals are often forced to stay out of the public eye for fear of injury or even death.\textsuperscript{108} Fear of injury or death should provide legitimate evidence of fear of persecution, but under the social visibility test this fear would have the perverse effect of eliminating the most vulnerable individuals from meeting evidentiary standards.\textsuperscript{109} In sum, in defining what constitutes a “social group” for the purposes of asylum applicants, adjudicators have a number of competing tests. Toboso-Alfonso highlights the two halves of the status/conduct dichotomy, and indicates that LGBT status alone suffices.\textsuperscript{110} Problems in defining LGBT status have resulted in a number of competing tests,\textsuperscript{111} including a test that looks to the actual or probable “social perception” of the putative group. Recently, the BIA has reinterpreted this “social perception” test as a “social visibility” test requiring that the putative social group actually be visible in society.\textsuperscript{112} Thus, while this selection of competing tests is frustrating for an applicant, who can never be sure which test her adjudicator will apply, it reflects broader difficulties in defining LGBT identity from theoretical and cultural points of view.\textsuperscript{113}

\textsuperscript{104} Id.
\textsuperscript{105} Hanna, supra note 96, at 913, 915–16.
\textsuperscript{106} See id. at 919.
\textsuperscript{107} See Marouf, supra note 42, at 78.
\textsuperscript{108} Id. at 79; see Pfitsch, supra note 3, at 70.
\textsuperscript{109} Marouf, supra note 42, at 79, 104–05; see Hanna, supra note 96, at 918.
\textsuperscript{111} See supra note 70 and accompanying text.
\textsuperscript{113} See Meier supra note 62, at 148–49.
IV. THEORETICAL EXPLANATIONS

A. Status and/or Conduct

In *Toboso-Alfonso*, the BIA emphasized that its opinion was based on the applicant's “status as a homosexual” and not the applicant’s conduct. The BIA added that the decision was not “a case of assertion of ‘gay rights.’” And while the BIA was not consciously addressing any underlying theoretical debates about LGBT identity, the BIA decision assumes that anyone with an LGBT identity will readily identify as such. This assumption overlooks the fact that the appellations “homosexual” and “gay” are inappropriate or undesirable for some applicants. Thus, while in many instances it is generally true that “it is persecution based on [status], not conduct, that merits protection,” a naked focus on LGBT status, as viewed from the United States or from the applicant’s home country, might exclude otherwise eligible applicants.

For some applicants, adopting an LGBT status may invite unwanted cultural connotations and unwanted preconceptions of what LGBT status in the United States means. These connotations and preconceptions could encompass a range of features: same-sex couples in committed relationships, drag queens, stereotypically masculine lesbians, or LGBT pride rallies, to name a few. An applicant may reject these connotations and preconceptions and therefore reject LGBT status while still engaging in the type of LGBT conduct that leads to persecution and ought to suffice for asylum applications. For example, an applicant might not embrace ideas of LGBT activism or might wish to distance herself from stereotypes of masculine lesbians but still engage in LGBT conduct such as establishing a same-sex relationship. In any event, some applicants will recognize that in many cases “modern heteronormativity reinforces heterosexuality as the single and natural sexual orientation.” Thus, some applicants will shy away from voluntarily identifying with an “unnatural sexual orientation.”

115. *Id.*
116. Recall that this Note consciously uses the term “identity” as broadly as possible, encompassing both status and conduct, among others. See *supra* note 6 and accompanying text. In the following discussion, descriptors like “gay” and “lesbian” define “status” while “identity” applies where status alone may or may not suffice for a given applicant.
118. The unaltered quotation uses the term “identity,” but the author seems to use that term in a manner tantamount to the use of the term “status” in this Note.
119. *Pfitsch, supra* note 3, at 70.
An applicant’s home culture will also influence the applicant’s willingness to adopt an LGBT status. The applicant’s home country may have a well-developed notion of LGBT status or, more likely, it may fully lack a “gay movement” or a “gay scene.” This is especially true where an open “gay lifestyle” would lead to potential or likely injury or even death. An open “gay lifestyle” is unimaginable in a number of countries, especially those from which LGBT asylum applicants can be expected to come, such as Iran. In these cases, an applicant might reject LGBT status not because she is uncomfortable with U.S. connotations and preconceptions, but rather out of continuing fear of persecution. In such cases, a focus on LGBT status alone would have the effect of excluding applicants from the most anti-LGBT countries; tragically, these are the applicants most in need of asylum protection. For that reason, Toboso-Alfonso’s exclusive focus on LGBT status, whether viewed from the United States or from the applicants’ home countries, is misplaced. But this does not mean that a focus on conduct alone or even a combination of status and conduct provides more favorable results.

Following Toboso-Alfonso, some adjudicators might deny asylum to those who reject an LGBT status. On the other hand, some adjudicators might deny asylum to those who seem to reject LGBT conduct. For example, an adjudicator might deny asylum where the applicant was not “gay enough” or where an applicant could not sufficiently highlight her own LGBT conduct. Perhaps most harshly of all, some adjudicators require both status and conduct. For example, in Shahinaj v. Gonzales, the IJ denied the application for asylum, noting that “[n]either [Shahinaj’s] dress nor his mannerisms, nor his style of speech give any indication that he is a homosexual.” Here, the IJ was prepared to believe Shahinaj’s claim about status only through corroborating conduct evidence. Luckily for Shahinaj, when his appeal was considered by the Eighth Circuit, that court faulted the IJ for applying a “personal and improper opinion [that] Shahinaj did not dress or speak like or exhibit the mannerisms of a homosexual.”

To succeed under this status-and-conduct model that the IJ in Shahinaj used, an applicant would have two hurdles to overcome. First, the applicant would have to agree to adopt an LGBT moniker, “gay,” putting aside any negative connotations the applicant may find in both U.S. culture and his home culture. Second, the applicant would also have to engage in some sort

121. See Morgan, supra note 5, at 158.
122. Marouf, supra note 42, at 79, 104–05; see Hanna, supra note 96, at 918.
123. See Morgan, supra note 5, at 136.
124. Shahinaj v. Gonzales, 481 F.3d 1027, 1028 (8th Cir. 2007) (alteration in original).
125. Id. at 1029.
of stereotypically LGBT conduct that vividly corroborates U.S. connotations of LGBT status.\textsuperscript{126} The harsh status-and-conduct test for LGBT identity would seem to exclude a number of applicants with legitimate persecution-based claims.

\textbf{B. Conduct Deconstructed}

The previous discussion suggests both that status and conduct are easily distinguishable and that they are readily understandable. However, U.S. law, sociology, and feminist and queer theory all suggest that this is not the case. To start, some adjudicators will approach the question of LGBT identity with the preconception that “[b]eing gay . . . is considered mutable conduct,” and that LGBT identity is a choice.\textsuperscript{127} For these adjudicators, LGBT status and conduct are mere manifestations of the same choice. A recent and prominent U.S. law similarly collapsed the distinction between status and conduct in the U.S. military’s former “Don’t Ask Don’t Tell” (DADT) policy.\textsuperscript{128} DADT prohibited homosexual “conduct” in the military.\textsuperscript{129} At first glance, this seems clear, but DADT defined “conduct” in broadly inclusive terms, including the “conduct” of a service member “stat[ing] that he or she [wa]s a homosexual or bisexual.”\textsuperscript{130} Thus, DADT “effectively create[d] a nearly irrefutable connection between homosexual status and homosexual conduct.”\textsuperscript{131} DADT swept status and conduct together in all but the most limited of circumstances. Indeed, a reading of the statutory language and media reports confirm that being a “homosexual or bisexual” was fine, so long as the service member never told anyone this fact.\textsuperscript{132} While DADT is no longer good law, the effect of DADT may continue to influence U.S. jurisprudence for an indefinite length of time. Similarly, a short line in the 2010 Supreme Court case \textit{Christian Legal Society v. Martinez} suggests a status/conduct collapse, albeit with a more LGBT-positive purpose: “Our decisions have declined to distinguish between status and conduct in this context.”\textsuperscript{133}

\textsuperscript{126} See id.
\textsuperscript{127} Meier, \textit{supra} note 62, at 153.
\textsuperscript{129} National Defense Authorization Act for Fiscal Year 1994, § 574.
\textsuperscript{130} Id.
\textsuperscript{131} Meier, \textit{supra} note 62, at 159.
Meanwhile, sociology, queer theory, and feminist theory question the theoretical legitimacy of categorical definitions and dualities such as status and conduct. Sociologist Dawne Moon describes sociological movement towards “denaturalizing the notion that sex as we know it is both natural and private.” Moon compares this idea to a goal of queer theory: “destabilizing rigid binary forms of thinking that obscure the ways that people live and understand themselves as sexual and gendered.” Three binaries are important in considering petitions for asylum based on LGBT identity: sex (woman/man), gender (female/male), and sexuality (homosexual/heterosexual). “Sex” traditionally describes biological features, “gender” traditionally describes the culturally-based outward expression of “sex,” and “sexuality” traditionally describes to which “sex” or “gender” a person is attracted. Feminist and queer theorist Judith Butler argues that these binaries are cultural constructs. Butler argues that it is only our performances within a given society that constitute a sex, gender, and sexuality identity. Or, in the words of famous drag performer RuPaul: “You’re born naked—the rest is drag.” Thus, for an adjudicator to focus on either status or conduct misses the point. The two are simply part of the same whole; conduct defines and is defined by status. An especially important point from Butler’s performative model needs highlighting: Where sex, gender, and sexuality are mere social constructs, adjudicators will encounter incongruities when applying U.S. cultural constructs to the different cultures from which asylum applicants come. This point adds another explanation as to why some applicants reject U.S. cultural constructs. Applicants already have their own cultural constructs; they have no need for those of another culture.

Butler’s argument that sex, gender, and sexual orientation are social constructs gains support by comparing the United States and other western countries to a non-western country. Nepal’s highest court ruled in 2007 that “sexual minorities” are entitled to equal rights. The most prominent result of Nepal’s high court ruling is likely to be the new Nepalese Constitution, which is expected to provide protections to “sexual minorities,”

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135. Id. at 195.
137. See id.
including marriage rights and non-discrimination laws.\footnote{Utpal Parashar, \textit{Nepal Charter to Grant Gay Rights}, HINDUSTAN TIMES, Jan. 19, 2010, http://www.hindustantimes.com/News-Feed/nepal/Nepal-charter-to-grant-gay-rights/Article1-499154.aspx.} These equal rights have manifested in at least one gay man receiving an identity card bearing the gender “both.”\footnote{Pokharel, \textit{supra} note 139.} This mirrors the general practice in Nepal of using the descriptor “third gender” to refer to the broad category that I have been calling “LGBT.”\footnote{See \textit{id.}} From this isolated sliver of Nepalese culture, a sharp contrast with the United States is clear. Those with an LGBT identity in the United States do not use the term “third gender,” nor does LGBT identity manifest within the gender duality “female/male.” Nepal has conceptualized a triality of “third/female/male.” U.S. culture has largely kept the gender duality “female/male” but has added a sexuality duality “homosexual/heterosexual.” Given this, why would a “third gender” Nepalese person want to choose, for example, to identify as a “female homosexual”? Even within U.S. jurisprudence, some cracks are apparent in the otherwise rigid dualities of sex and gender. In the area of sex discrimination under Title VII of the Civil Rights Act,\footnote{42 U.S.C. § 2000e-2 (2006).} the Supreme Court has implicitly recognized Butler’s gender performance paradigm. In \textit{Price-Waterhouse v. Hopkins}, the Court encountered an allegation that Price-Waterhouse, an accounting firm, did not promote a woman candidate to partner status because she did not conform to the partners’ stereotypes of how women should act.\footnote{Price-Waterhouse \textit{v. Hopkins}, 490 U.S. 228, 232 (1989) (plurality), \textit{superseded by statute}, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m). The holding in \textit{Price Waterhouse} technically addressed whether a “mixed motive” case, that is, a case in which both a permissible (e.g., ability to do a job) and an impermissible (e.g., sex) motive influenced an adverse employment decision. Section 107 of the Civil Rights Act of 1991 supersedes \textit{Price Waterhouse} by indicating that an impermissible motive alone makes an adverse employment decision a violation of Title VII, whether or not the employer would have made the same adverse employment decision absent the impermissible motive. Thus, \textit{Price Waterhouse}'s implicit recognition of the overlapping nature of “sex” and “gender” is unchanged.} After the Price-Waterhouse board placed Ms. Hopkins’s promotion on hold, she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\footnote{Price Waterhouse, 490 U.S. at 235.} In other words, Hopkins faced criticism for not engaging in stereotypical woman/female conduct, for not performing her gender.\footnote{See \textit{id.} (quoting fellow employees who indicated Hopkins was “macho,” “overcompensated for being a woman,” and should attend “a course at charm school”) (citations omitted).} The Supreme Court indicated that the failure of Price-Waterhouse to promote Hopkins because of her “failure” to live up to gender stereotypes was a violation of Title VII protections against discrimination based on
"sex." The Court implicitly indicated that Title VII bans discrimination based on both status (Title VII specifies "sex") as well as conduct (sexual stereotyping).

From a practical point of view, regardless of the source or effect of the conceptual framework, adjudicators ultimately decide whether an applicant has succeeded in proving she is a member of a social group. Some adjudicators will be familiar with *Price Waterhouse*, or with Judith Butler; others will be more familiar with DADT. It is also unfortunately true that at least some "immigration judges across the country [will] demonstrate[] marked stereotyping of and homophobic assumptions about gays and lesbians." For this reason, some practical considerations follow.

V. RECOMMENDATIONS

This state of the law and the complexity of the issues of identity suggest different avenues that can be used to address the problem. After strategies that others have proposed, this section proposes a strategy that focuses on the adjudicator and the applicant as well as the background and belief of both the adjudicator and the applicant. Specifically, this strategy suggests that, where appropriate, the "social group" category should be defined in terms that accurately describe the applicant's own understanding of her LGBT identity but also that flag the applicant as falling within the adjudicator's pre-existing notions of LGBT identity. Additionally, this strategy recognizes that the present standard for defining "social group" is at best unclear or at worst improperly restrictive, but attempts to work within this ambiguity to present the applicant's LGBT identity in a manner that can encompass different conceptions of the proper standard.

In the LGBT context, practitioners are legitimately faced with a dilemma of how to present a potential persecution-based petition. Immigration practitioner Paul O'Dwyer suggests adjusting claims where possible to fit within the precedents of a given circuit. Following precedent is an especially effective strategy for applicants in the Ninth Circuit in light of its

147. See id. at 258. The holding in *Price Waterhouse* is actually much more narrow: "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving . . . that it would have made the same decision even if it had not taken the plaintiff's gender into account." Id. The holding, however, uses the word "gender" twice, despite the fact that Title VII bans employment discrimination "because of . . . sex." See 42 U.S.C. § 2000e-2.

148. See *Price Waterhouse*, 490 U.S. at 258.


flexible social group tests based on association. In a less friendly circuit or in front of a less friendly BIA member, IJ, or asylum officer, an applicant faces the specter of "[j]udges . . . imposing their personal views on whether some of the most intimate aspects of a person's life are a constituent part of personal identity." Still another alternative would be judge-focused and would encourage judges to "reject unconsciously [discriminatory] evidentiary requirements that attach more worth to malleable physical characteristics and knowledge of gay trivia than to testimony about same-sex relationships and persecution by government officials who threaten to expose the applicant's homosexuality." This shift in focus to same-sex relationships and governmental persecution, though not without its own problems, is a laudable goal. Unfortunately, neither practitioners nor applicants are in a position to constrain adjudicators' thought processes. Furthermore, while this seems to be the approach that is most plausibly understood from UNHRC guidelines, the truth is that adjudicators often make their decisions either based on or at least influenced by their attitudes and preconceptions of LGBT culture. Moreover, "the lack of prescribed, objective standards allows judges to indulge their own prejudices and stereotypes regarding LGBT applicants." This lack of standards suggests that legislative action is in order. Indeed, scholar Leonard Birdsong has proposed such a legislative fix. However, just as practitioners and applicants cannot constrain adjudicators' thought processes, they are individually unable to effect legislative change.

As an alternative, this Note recommends an approach that takes into account the different backgrounds through which adjudicators and applicants view LGBT identity. Both theory and case law suggest defining the social group using terminology that encompasses but does not require both status and conduct. This approach is pragmatic in nature and does not resolve the theoretical debates regarding conflicts between status and conduct. This approach recognizes that, for all of the legal and theoretical paradigms outlined above, different adjudicators will find different strategies more cogent. Additionally, this approach recognizes that an applicant's background may dovetail nicely with U.S. LGBT culture or that it may be completely incompatible. Thus, appealing to the widest variety of legal and

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152. See supra note 70 and accompanying text.
155. See O'Dwyer, supra note 151, at 206.
156. Id. at 210.
157. See Birdsong, supra note 65, at 220–22.
theoretical backgrounds and wisely using status and conduct descriptors to highlight similarities or differences between U.S. and applicant cultures offers a better chance of success.

As a threshold matter, in defining an LGBT social group for the purposes of a persecution-based application for asylum, a practitioner should start with a status descriptor such as “gay men in Cuba” or “Armenian lesbians.” These terms fall within the social group that Toboso-Alfonso established and are the quickest signals to an adjudicator that LGBT identity is the basis of the application. While the simple status descriptor may suffice for a number of adjudicators and for a number of applicants, this will not always be the case. Some adjudicators will want more proof of what about “gay men in Uganda” makes their identity immutable or why “Armenian lesbians” is believable enough not to be a scam. And at the same time, some applicants will object, arguing that there is no “lesbian scene” in Armenia or that being “gay” in Uganda is a completely different affair than being “gay” in the United States. As indicated, Nepalese “third gender” persons might reject the imposition of a U.S. sexuality duality (homosexual/heterosexual) on top of a gender duality (female/male) and instead adopt a gender triality (third/female/male). For such applicants, a two part status descriptor will be appropriate: “Nepalese third gender person or what might be termed a ‘female homosexual’ in the U.S.” Here, the status descriptor appeals to both the adjudicator, putting the status into terms that he or she is more likely to be familiar with (“female homosexual”) and also to the applicant, preserving her cultural identity (“third gender”).

For incredulous adjudicators and for applicants unwilling to adopt U.S. connotations, attaching some description of LGBT conduct will offer additional help. For adjudicators, evidence of LGBT conduct will help alleviate worries about granting asylum to applicants who falsely claim an LGBT identity solely for the purposes of gaining asylum. Evidence of LGBT conduct over time might also help to sway those adjudicators that regard LGBT identity as “mutable” or a “choice.” For applicants, conduct descriptors might help to alleviate concerns about what the terms “lesbian,” “gay,” “bisexual,” or “transgender” actually mean.

For example, an applicant might feel that he is fleeing persecution based on a long-term relationship with another man. This applicant’s relationship in a number of countries would not be typified by the comparatively high-profile relationships that many same-sex couples in the United States have. The applicant’s family may know nothing of the relationship, to say nothing of the applicant’s friends, colleagues, or acquaintances. The applicant and his boyfriend likely rarely go out in public as a couple and
almost surely do not attend pride rallies or go to gay bars. Thus, for this applicant, the descriptor “gay men in Uganda” might not fit because of the connotations that come along with that descriptor, like being out to family, friends, and coworkers; going out in public as a couple; attending pride rallies; or visiting gay bars. Here, it might be important to use conduct descriptors to indicate why the relationship was kept secret or why the applicant faced persecution. Of course, the facts of an applicant’s background will dictate any social group descriptor, but in this example, a possibility is “gay men in Uganda who must hide even their long-term same-sex relationships because of past violence on account of such relationships” or “gay men in Uganda who must hide even their long-term same-sex relationship because of fear of personal injury on account of such relationships.” This type of detailed social group definition and explanation will demonstrate the legitimacy of claims to incredulous judges and will also sweep in individuals who shy away from traditional LGBT status descriptors. Here, the conduct is sustained over a period of time (“long-term”), indicating that the identity is immutable. The conduct also indicates that the stereotypical LGBT activities did not and could not occur for fear of violence. Thus, the conduct descriptor could also provide a reason for the persecution while not sweeping in the entire gamut of LGBT culture for applicants who would find this uncomfortable. At the same time, practitioners must be careful not to describe a putative social group only in terms of past or likely future persecution; the chosen descriptors must highlight commonality among members of the putative social group other than through persecution.

The status-with-conduct approach gains force when considering the recent case of *Halmenschlager v. Holder*, in which the Tenth Circuit used the phrase “self-described homosexual with effeminate traits” to identify an applicant for asylum.158 While the applicant’s petition for asylum was ultimately unsuccessful because the applicant failed to prove fear of future persecution,159 the Tenth Circuit’s characterization of the applicant fell in line with the approach advocated in this Note.160 In its opinion, the Tenth Circuit’s use of descriptors was almost exclusively status-oriented and suggested that the court found bald status descriptors sufficient.161 In de-

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159. The Tenth Circuit agreed with the BIA’s holding that the applicant had failed to demonstrate past persecution or a fear of future persecution that was on account of his being “homosexual and ‘very feminine.’” Id. at 622.
160. The opinion does not actually discuss the definition of the social group in question. See id. at 615–17. The discussion focuses mostly on questions past and future persecution.
161. See id.
scribing the social group in question, the opinion almost exclusively used the status terms “homosexual(s)” and “sexual orientation.” The opinion did, however, also include some conduct references, for example, “transvestite prostitutes,” “same-sex partner[s],” and “jilted lovers.” But the bulk of the opinion adopted a paradigm that recognized the possibility of asylum for individuals persecuted because of their status as “homosexuals” or because of their “sexual orientation.” Additionally, the applicant himself used the term “homosexual,” indicating his comfort with the connotations of the term. Thus, it is clear that both the three-judge appellate panel and the applicant were comfortable with status descriptors in this case.

Notably, however, in a few instances, the Tenth Circuit’s opinion did not exclusively use status descriptors. Two phrases clearly implicated both status and conduct: “homosexual with effeminate traits” and “homosexual and ‘very feminine.’” The applicant himself used the first phrase, and the IJ used the second phrase. The opinion does not provide additional background on the applicant’s or the IJ’s concepts of LGBT status, but both were more interested in conduct than the Tenth Circuit. The different focuses from three different actors in this case highlight the different approaches that are possible when defining an LGBT social group. The IJ seemed to treat both status and conduct as relevant and used both to reach a conclusion. In contrast, the Tenth Circuit focused only on status. The inclusion of a conduct descriptor did not, however, negatively affect treatment of the application in the Tenth Circuit. This fact shows another positive aspect of the approach, namely that, while the inclusion of an “unnecessary” descriptor does not seem to be harmful, the exclusion of a “necessary” descriptor might well be.

The recommended approach has certain limitations. Where an applicant’s history and background show little LGBT conduct or where the applicant has successfully “covered,” the approach may be unworkable. Unfortunately, this problem mirrors a major problem of the “social visibility” test. But unlike the “social visibility” test, the suggested approach relies on status as well. Thus, where lack of conduct is ostensibly fatal under a “social visibility” test, it is not necessarily fatal under this approach. Similarly, where conduct alone is fatal under a “protected characteristic” test, it is not fatal here. Evidentiary problems will constrain any approach, but appealing to both status and conduct will alleviate significant problems.

162. See id.
163. Id. at 616, 622.
164. Id. at 615, 617.
165. Id.
while positively resolving a greater amount of legal and theoretical approaches.

CONCLUSION

The current landscape for LGBT individuals who file persecution-based applications is increasingly friendlier, and U.S. administrative and judicial remedies continue to provide better options for such individuals to lead persecution-free lives in the United States. Still, future LGBT asylum cases will no doubt continue to struggle with the various methods that can be used to conceptualize and test LGBT identity. Moreover, applicants, adjudicators, and attorneys will continue to work under sometimes conflicting conceptual paradigms. In order for all parties to work out these differences successfully, an approach that uses and explains both LGBT status and LGBT conduct is warranted. The recommendations in this Note provide a framework to help craft complex descriptions of social groups. These complex descriptions will appeal to a broad range of adjudicators by taking many different paradigms and evidentiary concerns into account. In this way, the approach will help improve access to the benefits of asylum law for the truly needy. Indeed, “[d]espite the poor reputation of the immigration courts and asylum offices as being arbitrary and hostile to asylum seekers, they have proven themselves far more receptive to sexual-orientation based protection claims than the federal courts.”166 The approach in this Note will help ensure that this positive trend continues and that U.S. asylum law continues to provide a refuge for individuals who face persecution because of their identity.

166. O'Dwyer, supra note 151.