

Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography

Mary Kapron and Nicole LaViolette

Abstract

This annotated bibliography gives an account of legal and social sciences research sources related to refugee claims based on sexual orientation and gender identity. The bibliography, which focuses primarily on English language publications, includes close to 200 items that fall into the following two categories of research sources:

- (1) scholarly publications on lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees and asylum-seekers and the refugee determination process;
- (2) reports from international, inter-governmental and non-governmental organizations on the same topic.

Research sources are first organized topically according to the definition of a Convention refugee under the 1951 United Nations Convention relating to the Status of Refugees. As a second listing, a geographical classification is provided of the sources that focus on specific countries or regions. Finally, included is an alphabetical listing by author of all of the research sources we were able to locate for this project.

Keywords: LGBTI refugees, refugee law, sexual orientation, gender identity, asylum



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Mary Kapron graduated from Trent University with a degree in International Development Studies and Hispanic Studies. She worked with various non-governmental organizations in South America and Canada before beginning her legal studies where she has concentrated on human rights and refugee law. She is the recipient of the 2014 Library Prize for Undergraduate Research and was awarded a grant in the same year from the Undergraduate Research Opportunity Program. Mary has previously interned at the Organization for Refuge, Asylum and Migration where she conducted legal research on 'country of origin' information and the treatment of LGBTI individuals in various countries. She advised refugees on the Ecuadorian refugee status determination process at Asylum Access Ecuador and she has worked with landmine survivors at the Colombian Campaign Against Landmines. She is currently co-chair of the Canadian Association of Refugee Lawyers University of Ottawa Student Chapter.

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Nicole LaViolette has close to 20 years of experience in international human rights and refugee law. She has published extensively on refugee issues and lectured at national and international conferences on refugee issues. She has focused a significant part of her scholarly research on sexual minorities and the refugee determination system. She is a recipient of the Lambda Foundation Award for Excellence in Gay and Lesbian Studies for her work on the Canadian Gender Guidelines and their impact on sexual orientation and gender identity refugee claims, as well as the Germain-Brière Writing Prize for an article on the definition of torture in Canadian immigration and refugee law. Prof. LaViolette has conducted professional development training related to sexual orientation and gender identity for the Immigration and Refugee Board of Canada since 1995. In addition, she has provided expert advice to the United Nations High Commission for Refugees on lesbian, gay, bisexual and transgender refugees, including participating in a recent innovative training program for staff of the UNHCR. She was recently involved in a Canadian sponsorship project that successfully resettled a lesbian refugee couple from abroad.

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June 2014

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Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography

Introduction

This annotated bibliography gives an account of legal and social sciences research sources related to refugee claims based on sexual orientation and gender identity. The bibliography, which focuses primarily on English language publications, includes close to 200 items that fall into the following two categories of research sources:

- (1) scholarly publications on lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees and asylum-seekers and the refugee determination process;
- (2) reports from international, inter-governmental and non-governmental organizations on the same topic.

Research sources are first organized topically according to the definition of a Convention refugee under the *1951 United Nations Convention relating to the Status of Refugees*. We hope this will make the publications easily accessible by the subject matters they cover. In the topical listing, each citation is followed by a descriptive paragraph, the annotation, which provides a concise summary of each source and some assessment of its relevance to specific subject matters.

As a second listing, we have provided a geographical classification of the sources that focus on specific countries or regions.

Finally, we have included an alphabetical listing by author of all of the research sources we were able to locate for this project.

Every effort has been made to provide a complete listing of all titles available as of June 2014. Nonetheless, this bibliography should not be considered an exhaustive listing of research sources dealing with refugee claims based on sexual orientation and gender identity. We intend to update the bibliography in the future. If readers wish to suggest additional legal and social science research sources, please contact us at:

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A. Bibliographic Listing of Sources According to the Definition of a Convention Refugee

I. Terminology of Sexual Diversity

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 6 of this report discusses sexual diversity stating that “people who are lesbian, gay, bisexual or transgender do not constitute a uniform or necessarily a self-contained group” (pp. 92-114). The report notes the importance of understanding that “lesbians, gays, bisexuals, transgender and intersex persons all experience persecution and discrimination in distinct ways and that an understanding of the unique vulnerabilities of each group is important, including in the context of refugee status determination sets out the legal definition of a refugee.” The report discusses challenges that are particular to gay men, lesbians, bisexuals and transgender individuals in navigating refugee status determination.

Note: Specific to UK refugee status determination. Focus on Scotland.

Kasssieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 2.

Part 1 of this report focuses on further developing Australian Tribunal members’ understanding of sexual diversity so that they will be better able to adjudicate refugee claims based on sexual orientation or gender identity (pp. 2-4). Part 1 stresses the importance of appreciating that “sexual attraction, behaviour and identity will not always neatly correlate and may sometimes seem contradictory or not easily classifiable.” The central issue for the Tribunal to consider is whether the claimant faces a real chance of persecution for reasons of their actual or imputed membership to a sexual minority group.

Note: Specific to Australian refugee status determination.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. Section

3.1 provides definitions for the following terms: sexual orientation, gender, and gender identity (in relation to transgender and intersex individuals).

Note: Specific to Canadian refugee status determination.

Neilson, Victoria. “Immigration Law and the Transgender Client: A Practical Guide and Introduction” (2008) American Immigration Lawyers Association Immigration Law Today, online: Immigration Equality <http://www.immigrationequality.org/wp-content/uploads/2011/08/ILT-Neilson_SepOct08_Final.pdf>.

This article contains a section entitled “Transgender 101” which explains that “the term ‘transgender’ is broadly used to include individuals whose gender identity or expression is different from the one they were assigned at birth.” The article states that it is important to bear in mind that ‘gender identity’ and ‘sexual orientation’ are two distinct concepts. Therefore, a transgender woman may identify as heterosexual if she is attracted to men, as lesbian if she is attracted to women or as bisexual if she is attracted to both sexes.

Note: Author abstract.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 12.

Part 2.4 of this report examines self-identification in sexual orientation and gender identity terms (p. 12-13). The report discusses how often times LGBTI refugee claimants fail to lodge valid claims because they either are not able to bring themselves to identify as LGBTI or because their own perceptions of themselves differ from readily-available definitions. As an answer to this, “the Yogyakarta Principles provide a more flexible and practical approach to ‘sexual orientation’ and ‘gender identity’, including the protected characteristics and self-perceptions of the relevant particular social groups. As defined in the Principles, the concept of sexual orientation encompasses all possibilities for a person’s capacity for romantic, emotional, and intimate attraction to another person and gender identity refers to how one perceives one’s own gender.” The report also reiterates that “the Yogyakarta Principles consciously focus on the broader concepts of ‘sexual orientation’ and ‘gender identity’, rather than fixed terms such as ‘lesbian’, ‘gay’, ‘bisexual’, ‘transgendered’, ‘queer’ or ‘intersex’. This is important because the latter terms have often been framed with a decidedly Western understanding of the constructs of sexual orientation and gender identity.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 8, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines define sexual orientation, gender identity, lesbian, gay man, bisexual, transgender and intersex (paras 8-11). The Guidelines stress that, “the experiences of members of these various groups will often be distinct from one another; and ...

between members. It is, therefore, essential that decision makers understand both the context of each refugee claim, as well as individual narratives that do not easily map onto common experiences or labels.”

II. Convention Refugee Definition

(1) Persecution

(a) International Human Rights Law

Anker, Deborah & Sabi Ardalan. “Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law” (2012) 44 NYU J Int’l L & Pol 529.

This article examines which rights are protected under the Refugee Convention and addresses the importance of using human rights standards to adopt a principled approach to determining which infringements on activities constitute serious violations of core rights (pp. 539-42). The article states that “in determining whether violations of certain rights constitute persecutory harm, courts and adjudicators must consider the ‘nature of the right sought to be exercised’ and whether the right is a ‘fundamental’ or ‘core’ human right.”

Note: Focus on Australia, UK and US. Author abstract.

Frank, David John. “Making Sense of LGBT Asylum Claim: Change and Variation in Institutional Contexts” (2012) 44 NYU J Int’l L & Pol 485.

This article focuses on three inter-related developments: the globalization of society, the individualization of society, and the rise of the global human-rights regime. Each development involves changes in rule-like cultural assumptions, those that are deeply taken for granted, and accompanying changes in their organizational distillations. These developments reconstitute basic features of so-called reality: the actors who populate the social world, the scripts from which they read, and the stages on which they play. From an institutional perspective, the very concept of LGB persons and the very idea of asylum claims are matters that demand explanation.

Note: Author abstract.

Goldberg, Suzanne, et al. “Panel Two: Sexual Orientation” in Timothy Wei & Margaret Satterthwaite, “Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation” (1997) Colum Hum Rts L Rev 496.

This article discusses the relationship between international human rights law and asylum law. The article examines developments in international human rights law such as developments in regional bodies relating to the recognition and protection of sexual rights, including identity and orientation. The article states that rights-based documentation is essential not only for the success of asylum claims, but also for the furtherance of all human rights work. The article also discusses various cases that considered the intersection between human rights and asylum law.

Goodman, Ryan. “Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary Medical Intervention” (1995) 105 Yale LJ 255.

This article begins by recognizing that gays and lesbians world-wide continue to face severe persecution and state-sanctioned violence on account of their sexual orientation. The lack of clear guidelines on what constitutes persecution under the 1951 Refugee Convention often results in violence against sexual minorities being categorized as discrimination as opposed to persecution. The article argues that human rights standards should be incorporated into asylum law to help develop the concept of persecution. This discussion is applied to medical intervention imposed to try to alter individuals’ sexual orientation. The article discusses two possible legal grounds for establishing involuntary medical interventions as persecution, namely the historical rationale for the 1951 Refugee Convention and the Nuremberg Code. The conclusions recommend that sexual minorities who can establish persecution using these international human rights mechanisms should be granted asylum.

Halatyn, Lucy. “Political Asylum and Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians” (1998) 22:1 Suffolk Transnat’l L Rev 133.

This article discusses how sexual minorities are able to seek asylum in the US, yet upon their arrival to the US they may fall victim to hate crimes, discrimination and other forms of oppression because of the lack of protection provided by the US government. The article provides a historical recitation of international law and treaties of which the US is a party, concerning human rights, political asylum law and the gay and lesbian community. The article examines how these international instruments can be used to protect sexual minority asylum seekers.

Note: Specific to US refugee status determination. Author abstract.

International Commission of Jurists. “X, Y and Z: a Glass Half Full for “Rainbow Refugees”? The International Commission of Jurists’ Observations on the Judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*” (2014), online: Refworld <<http://www.refworld.org/pdfid/538dca6f0.pdf>>.

This article discusses the EU *Charter of Fundamental Rights* and the *European Convention on Human Rights* and the provisions that apply to asylum law. Article 18 of the Charter guarantees the right to asylum “with due respect for the rules of the Geneva [Refugee] Convention” and the 1967 Protocol and in accordance with the Treaties. The article states that, “A combined reading of the Charter’s recognition that “[h]uman dignity is inviolable. It must be respected and protected”, together with the remaining Charter provisions applicable in the context of asylum decisions, as well as those coterminous ECHR rights in combination with the preamble to the Refugee Convention’s references to fundamental rights, compels national authorities in charge of asylum determination, the Courts in Member States, as well as the CJEU itself to interpret any EU asylum instrument in a manner that complies strictly with all of the above mentioned human rights treaties.”

Note: Specific to Europe. Author abstract.

Millbank, Jenni. “The Role of Rights in Asylum Claims Based on Sexual Orientation” (2004) 4:2 Hum Rts LR 193, online: Human Rights Law Review <<http://hrlr.oxfordjournals.org/content/4/2/193.full.pdf>>.

This article examines the role of human rights norms in refugee cases based on sexual orientation or gender identity focusing on jurisprudence from the UK and drawing comparisons with Australia and Canada. The article explores the effects of a pervasive lack of human rights analysis in refugee cases, focusing particularly on decision-makers’ inability to see either extreme social repression or criminal sanctions as persecutory in nature. The author argues that the lack of a human rights framework, in general, combined with an underdeveloped analysis of sexual orientation as a human rights issue, has led to some extremely regressive refugee determinations. While the author notes that refugee decision-making can be instantly improved by the use of international human rights standards, she argues that greater use of international jurisprudence on sexual orientation and detailed analysis of the role of fundamental human rights, offer the potential to greatly improve refugee decisions on sexuality.

Note: Focus on UK, Australia and Canada.

Ramanathan, Erik. “Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence” (1996) Geo Immig LJ.

This article compares thirty asylum decisions from Australia, Canada, UK and the US with the aim of enabling the reader to compare the queer asylum jurisprudence of several nations and to understand the issues and solutions debated in each jurisdiction. Part II examines the ways in which human rights instruments can support an asylum claim (pp. 15-17) and then compares the interpretation of this concept in the four jurisdictions (pp. 17-44). The article states that although international human rights standards have not always been interpreted in a way that protects the rights of queer individuals, domestic and international courts are increasingly recognizing queers as full rights-bearing individuals.

Note: Focus on Australia, Canada, UK and US.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 14.

This report states that the most fundamental of the Yogyakarta Principles’ promises is the very right of LGBTI individuals to seek asylum. This right is enumerated in Principle 23 which states that, “Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity.” Section 3.1.1 of this report discusses Principle 23 in detail and its relevance to refugee law (pp. 14-16).

Tobin, John. “Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law” (2012) 44 NYU J Int’l L & Pol 447.

The aim of this paper is to offer some preliminary observations about the relationship between international refugee law and international human rights law in the context of GLBTI claims for refugee status. Part 1 seeks to examine the role of international human rights law in assessing whether there is a well-founded fear of persecution for a GLBTI claimant. Part 2 examines the extent to which international human rights law can be used to set the limits on activities that will warrant protection for a GLBTI claimant under the Refugee Convention. Four broad conclusions are offered.

Note: Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 5, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss sexual orientation and international human rights law (paras 5-7) stating that, “Although the main international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation or gender identity, discrimination on these grounds has been held to be prohibited by international human rights law. As respect for fundamental rights as well as the principle of non-discrimination are core aspects of the 1951 Refugee Convention and international refugee law, the refugee definition must be interpreted and applied with due regard to them, including the prohibition on non-discrimination on the basis of sexual orientation and gender identity.”

Verdirame, Guglielmo. “A Friendly Act of Socio-Cultural Contestation: Asylum and the Big Cultural Divide” (2012) 44 NYU J Int’l L & Pol 559.

This article discusses the socio-cultural dimensions of refugee law. The author examines how refugee law can provide the ideal terrain for a clash of social and cultural values: “[t]he recognition of a political dissident as a refugee may expose the wrongdoing of a government, but the grant of refugee status to women fleeing gender-based persecution or gay men escaping homophobia will often also expose the wrongdoing of a society. The author examines this issue in relation to the *HJ and HT* case and argues that the legal principle of non-discrimination should help in the difficult task of distinguishing between “protected and unprotected activities” under refugee law.

(b) Establishing a Well-Founded Fear of Being Persecuted

Anker, Deborah & Sabi Ardan. “Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law” (2012) 44 NYU J Int’l L & Pol 529.

This article discusses what can amount to persecution in asylum cases (pp. 534-39). It explores the well-established principle that serious emotional and psychological harm, accompanied by a failure of state protection, can rise to the level of persecution. As Hathaway and Pobjoy note, the adjudicators in *S395* and *HJ and HT*

failed to recognize the psychological harm that applicants who are forced to conceal their sexual orientation suffer. The authors emphasize the critical importance of considering both physical and non-physical harm suffered and feared by asylum applicants in assessing claimants' well-founded fear. This article builds on their detailed analysis of endogenous harm, addressing the US law basis for recognizing a broad range of persecutory harms, including physical, psychological, economic and cumulative harm.

Note: Focus on Australia, UK and US. Author abstract.

Bell, Mark. Protecting LGBT People Seeking Asylum: Guidelines on the Refugee Status Directive (Brussels: ILGA Europe, 2005), online: ILGA Europe <www.rfsl.se/public/ilga_eudirektivprotecting.pdf>.

In 2004, the European Union adopted a Directive setting out the minimum rules governing conditions under which refugee status is granted. It applies to third country nationals (i.e. persons from outside the EU) who request asylum within a Member State of the EU. It covers the criteria for being awarded refugee status, but also the rights of persons once they are recognised as refugees. This report discusses what constitutes persecution (pp. 7-9). In the Directive, there are two elements to qualifying for refugee status: persecution and persecution for a reason covered by the Directive.

Note: Specific to Europe. Author abstract.

Bennett, Alan G. "Cure That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution" (1999) Golden Gate UL Rev 279.

This article examines persecution in US asylum law and discusses how there is a split among the federal circuit courts regarding persecution and its requirements. The article discusses *Pitchevskaia v. INS* from the Ninth Circuit and *Faddoul v. INS* from the Fifth Circuit. The article argues that US asylum law needs a single definition of persecution, which recognizes that offensive treatment, from which many lesbians and gay men suffer in numerous countries, constitutes persecution even without punitive intent on the part of the perpetrator.

Note: Specific to US refugee status determination. Author abstract.

Birdsong, Leonard. "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution: The New Ground for Grants of Asylum" (2007) 35:1 Wm Mitchell L Rev 197, online: William Mitchell Law Review <<http://www.wmitchell.edu/lawreview/volume35/documents/birdsong.pdf>>.

Part 3 of this article examines persecution in US asylum law (pp. 205-10). The article discusses various problems with the courts' interpretation of this concept including a split in circuit decisions with respect to the necessity for a finding of punitive intent in the meaning of persecution in asylum cases and the lack of precedent and published asylum decisions. The article argues that the inclusion of a punishment requirement in the determination of whether to grant asylum based on persecution should not be feasible in all circuits and that justice requires that the asylum statute

be amended to make clear that a ‘punitive intent’ need not be required to prove a claim for persecution.

Note: Specific to US refugee status determination. Author abstract.

Bowerman, Kristie, “*Pitcherskaia v. INS: The Ninth Circuit Attempts to Cure the Definition of Persecution*” (1997) 7 L & Sexuality Rev Lesbian, Gay, Bisexual & Transgender Legal Issues 101.

This case comment discusses *Pitcherskaia v. INS* which played an instrumental role in developing the concept of ‘well-founded fear of persecution’ in US refugee law. Pitcherskaia’s asylum claim based on sexual orientation was denied after finding that she failed to establish a well-founded fear of persecution. The Ninth Circuit overturned the decision laying out a two-part test for the establishment of a well-founded fear of persecution. This test requires both a ‘subjectively genuine’ and ‘objectively reasonable’ fear of persecution. The court reiterated that persecution means ‘the infliction of suffering or harm upon those who differ in a way regarded as offensive’. This is an objective definition of persecution because it is determined by what a reasonable person would deem ‘offensive’, as opposed to the subjective intent of the persecutor.

Note: Specific to US refugee determination process. Author abstract.

Buxton, Richard. “A History from Across the Pond” (2012) 44 NYU J Int’l L & Pol 391, online: New York University Journal of International Law and Politics <<http://nyujilp.org/print-edition/#44>>.

This article examines persecution in UK refugee status determinations with a focus on the *HJ (Iran)* case (in which the UK Supreme Court rejected any requirement that claimants be expected to be discreet about their sexual identity in order to avoid persecution). The article argues that the determination of the UK Supreme Court in this case led to an uncritical acceptance of submissions that did not respect the basic principles of refugee law. In particular, the Court adopted an approach to the ‘Convention reasons’ set out in Article 1A(2) that failed to put at the forefront of the case the question of whether what is feared on return to the home state will be persecution in the sense of being something that the claimant cannot reasonably be expected to tolerate. The article outlines the ways in which the outcome of *HJ (Iran)* will be difficult to reconcile with orthodox principles of refugee law and concludes that this decision is likely to lead UK courts down some winding roads in the years to come.

Note: Specific to UK refugee status determination. Author abstract.

Cochran, Laurie Martha. “The Changing Tide of Immigration Law: Equality for All?” (1997) 26 Ga J Int’l & Comp L 673, at 684.

This article discusses the *Pitcherskaia* case (asylum claim based on sexual orientation) and as part of this discussion, examines ‘persecution’ in the context of the American refugee status determination process (pp. 684-87). The author notes that ‘proving persecution focuses more on the qualities and characteristics of the persecutor and the circumstances surrounding the persecution.’ According to the Ninth Circuit, ‘the

definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem ‘offensive’. It is not necessary that the claimant prove intent to harm or punish as an element of persecution.

Note: Specific to US refugee status determination. Report is from 1997. Author abstract.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 4 of this report very briefly discusses the various elements that LGBT claimant must satisfy in establishing a well-founded fear of persecution, examining in particular persecution vs. discrimination, agents of persecution and laws criminalizing same-sex relations (pp. 75-76).

Note: Specific to UK refugee status determination. Focus on Scotland.

Davis, Tracy J. “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States” (1999) HR Brief, online: American University Washington College of Law <<http://www.wcl.american.edu/hrbrief/v6i3/immigration.htm>>.

This article discusses the concept of persecution in US refugee law. Immigration adjudicators look to the claimants to offer both ‘subjectively genuine’ and ‘objectively reasonable’ components as evidence of such persecution. The article examines challenges that claimants face in fulfilling these two components.

Note: Specific to US refugee status determination.

Gallelli, Liliana. “Asylum in the United States Based on Sexual Orientation” (2001) 3 J Legal Advoc & Prac 40.

This article explores sexual orientation as a basis for asylum and the interpretation of the law in its application to cases of this genre. Part 5 undertakes a case study of the *Pitcherskaia v. INS* case which serves to demonstrate what conditions in the refugee's country of origin met the requisite ‘fear of persecution’ (pp. 43-4). The BIA concluded that she has not been persecuted because, ‘although she has been subjected to involuntary psychiatric treatments’, the psychiatric institutions intended ‘to cure her, not to punish her’ and therefore, the actions did not constitute persecution. The Ninth Circuit reversed the decision reiterating that persecution is judged by an objective standard in that the definition of persecution ‘turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem offensive...persecution requires that the persecutor cause the victim suffering or harm’.

Note: Specific to US refugee status determination. Author abstract.

Goldberg, Suzanne, et al. “Panel Two: Sexual Orientation” in Timothy Wei & Margaret Satterthwaite, “Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation” (1997) Colum Hum Rts L Rev 496.

This article examines persecution in sexual minority asylum cases. It examines two important questions: (1) how do we compare and contrast how lesbians and gay men are treated in this country versus how they are treated elsewhere by other governments and societies, and (2) at what point does discrimination-which all of us who are lesbian and gay face on a regular basis-become persecution? The article goes on to discuss how a claimant can establish that he or she has a well-founded fear of persecution.

Note: Author abstract.

Goldberg, Suzanne. “Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men” (1993) 26 Cornell Int’l LJ 605.

This article uses a hypothetical case of a lesbian asylum seeker to illustrate the unique barriers faced by sexual minorities in making refugee claims in the United States. The article begins by noting that, in spite of global developments, many lesbians and gay men continue to face extreme persecution, including electroshock therapy, police harassment and other penalties, because of their sexual orientation. The article examines the definition of a Convention refugee and reviews judicial interpretations and legal tests derived from asylum case law, to determine the criteria for making a successful claim based on the ‘particular social group’ classification. It concludes by considering the refugee jurisprudence of other countries to determine the feasibility of establishing an international legal standard to recognize lesbians and gay men as a particular social group.

Note: Specific to US refugee status determination. Author abstract.

Goodman, Ryan. “Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary Medical Intervention” (1995) 105 Yale LJ 255.

This article begins by recognizing that gays and lesbians world-wide continue to face severe persecution and state-sanctioned violence on account of their sexual orientation. The lack of clear guidelines on what constitutes persecution under the 1951 Refugee Convention often results in violence against sexual minorities being categorized as discrimination as opposed to persecution. The article argues that human rights standards should be incorporated into asylum law to help develop the concept of persecution. This discussion is applied to medical intervention imposed to try to alter individuals’ sexual orientation. The article discusses two possible legal grounds for establishing involuntary medical interventions as persecution, namely the historical rationale for the 1951 Refugee Convention and the Nuremberg Code. The conclusions recommend that sexual minorities who can establish persecution using these international human rights mechanisms should be granted asylum.

Hathaway, James C, & Jason Pobjoy. “Queer Cases Make Bad Law” (2012) 44 NYU J Int’l L & Pol 315, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304165>.

This article takes a careful look at how common law courts have addressed the asylum claims of homosexuals fleeing anti-gay prosecutions and violence in their home countries. In two recent decisions, courts in Australia and the UK struck down the discretion doctrine under which gay claims to asylum had been rejected on the grounds that the applicants could ‘be discreet’ about their sexuality, and thereby avoid the risk of being persecuted at home. The article provides the first critical assessment of their impact on international refugee law as a whole. The article suggests that to reach their preferred result, the Australian and UK courts ran roughshod over the duty to find a ‘well-founded fear’ of future persecution; that they failed clearly to understand the real human rights costs of the enforced concealment that so-called ‘discreet’ homosexuals face; and that by finding that the Convention’s requirement to show that risk ‘for reasons of’ a form of protected status was met when risk follows only from going to concerts, drinking cocktails, or engaging in ‘boy talk’ the courts severed the established and critically important link between refugee law and non-discrimination norms. The article offers an alternative theory of how international refugee law can and should embrace the claims of sexual minorities who can avoid serious harm only by accepting self-repression. It argues that such claims should be assessed on the basis of the real, forward-looking risk of serious psychological harm that ensues in such circumstances.

Note: Specific to Australia and UK refugee status determination. Author abstract.

Heartland Alliance National Immigrant Justice Center, “Know Your Rights: Information on Seeking Asylum in the United States for Detained Immigrants who are Lesbian, Gay, Bisexual, Transgender or HIV-Positive” (2009) at 8, online: National Immigrant Justice Center

<<https://immigrantjustice.org/know-your-rights-manuals-detained-immigrants>>.

This manual outlines what type of conduct can constitute persecution (p. 8) and what is required to establish a well-founded fear of persecution and evidence that will help claimants’ cases (p. 9). Persecution can be physical, emotional or psychological; rape and sexual assault of an LGBTI individual on account of their gender identity; forced institutionalization, electroshock treatments and drug injections; and, severe forms of discrimination. Persecution is not lack of access to adequate medical treatment and harassment and discrimination based on sexual orientation or gender identity. Claimants must show that they have suffered harm in the past or will be harmed in the future; it is not necessary to show both.

Note: Specific to US refugee status determination.

Hojem, Petter. “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia” (2009) Research Paper No 181 UNHCR at 7, online: UNHCR

<<http://www.unhcr.org/4b18e2f19.pdf>>.

This report discusses what amounts to a well-founded fear of persecution (pp. 7-9). The report highlights how “a case-by-case approach needs to be adopted in order to assess whether the degree of discrimination suffered by an individual is enough to constitute persecution.” Furthermore, “even social, cultural or other types of community pressure can amount to persecution, for example, when pressuring an individual to marry a person of the opposite sex despite the former’s wish.” In many

countries, individuals are unwilling to seek protection from their state for fear of persecution.

Immigration Equality & National Immigrant Justice Center, “Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status” (2005) at 17, online: National Immigration Justice Center <<http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>>.

This report discusses persecution by examining: serious physical harm; coercive medical and psychological treatment; invidious prosecution or disproportionate punishment for a criminal offense; economic persecution and other forms of severe discrimination; and, severe criminal extortion or robbery (pp. 17-24).

Note: Author abstract.

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 4.

This report examines persecution of sexual minorities (pp. 4-7). The report states that understanding homophobia and heterosexism is an important part of appreciating how social, cultural and religious norms may lead to persecution in a claimant’s country of origin and how homophobia and heterosexism play an important role in fuelling persecution by state and non-state actors. The report considers the way actual or perceived prejudice, ignorance, hostility or silences around homosexuality impact upon the refugee status determination process.

Kelly, Nancy. “Gender-Related Persecution: Assessing the Asylum Claims of Women” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 17.

This article examines the existing law regarding gender-related persecution and proposes a framework for evaluating the cases of women asylum claimants under US law. The introduction presents an analysis of problems which have historically hindered the full presentation of women’s claims and review current activities of human rights groups, advocates and adjudicators to address the particular asylum needs of women. Parts 1 and 2 review US asylum law and existing US case law regarding gender-related persecution of women. Part 3 sets out a framework for the evaluation of gender-related cases under US law, dividing cases into those involving gender-specific persecution, in which the type of persecution is tied to the claimant’s gender and gender-based persecution, in which the persecution is inflicted because of a basis which is rooted in the claimant’s gender. Finally, part 4 addresses the need for the implementation of procedures in asylum adjudication process as part of a multi-faceted approach to improve access to asylum protection for women.

Note: Author abstract.

LaViolette, Nicole. “Les identités multiples et le droit des réfugiés” (2011) 35:3 *Can Ethnic Stud* 39, online : Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803836>.

In legal discourse, identity markers such as race, religion, gender, or sexual orientation are often used to create judicial and legislative categories. However, we must ensure that we adequately use the identity markers to understand properly the experiences of people in target groups. This article addresses the refugee status claim process of the Immigration and Refugee Protection Act to determine if the identity categories, as currently defined, allow the Immigration and Refugee Board of Canada to systematically evaluate all the motives and ways of persecution for which claimants are victims. The article specifically examines the asylum claims invoking gender and sexual orientation to determine, in light of cases cited, whether the asylum claims recognise the intersection of these two identity markers. As for the enforcement of all laws, the article indicates that it is essential to identify the intersections between the various identity markers to allow people to faithfully expose their personal experiences and their intersectional identity. It is therefore suggested that the links between gender and sexual orientation should be more visible in the context of refugees’ rights.

Note: Specific to Canadian refugee status determination. Author abstract. Article in French.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses various forms of persecution that sexual minorities can face in their countries of origin (pp. 11-14). The article stresses the importance of establishing a link between gender, sexual orientation and gender identity when examining persecution because this reflects the reality, impact and scope of persecution suffered by sexual minorities.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 *Int’l J Refugee L* 173 at 184.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘well-founded fear of persecution’ (pp. 184-89), this article notes that the Guidance Note does a commendable job of canvassing the different forms of persecution that sexual minorities may confront. At the same time, the article takes issues with some parts of the Guidance Note specifically persecution vs. discrimination,

criminalization of same-sex conduct, discreet and non-discreet homosexuals, and, future harm.

Leitner, Robert C. “Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities” (2003) 58:2 U Miami L Rev 679.

This article discusses persecutory vs. punitive intent in US asylum law (pp. 688-91). A major split between the circuits and the BIA has emerged over whether an asylum applicant must establish that his or her persecutor acted with punitive intent. The article discusses the *Pitcherskaia* case in which the Ninth Circuit held that punitive intent is not required. The article discusses how this decision thus means that the BIA may not apply the punitive intent requirement to defeat asylum claims emanating from the states in the Ninth Circuit. However, the BIA remains free to apply the standard to cases emanating from the Fifth and Seventh Circuits, as well as to the remaining circuits, which have not taken a position on the issue. The article argues that the Supreme Court must take action to resolve this conflict.

Note: Specific to US refugee status determination. Author abstract.

Lewin, Simon & Ilan H Meyer. “Torture and Ill-Treatment Based on Sexual Identity: The Roles and Responsibilities of Health Professionals and Their Institutions” (2002) 6:1 Health HR 161.

This article examines the roles and responsibilities of health professionals and their institutions in preventing torture and ill-treatment based on sexual identity. The article discusses how the torture and ill-treatment of lesbian, gay, bisexual and transsexual persons has obvious effects on their health, even though formal assessments of these impacts are seldom conducted. Health care providers must recognize that a social environment that condones prejudice against LGBT people and promotes their social isolation can be detrimental to their physical and mental health. Challenging such a pathogenic environment should be a priority for health professionals. The impacts of health policies, programs and practices on human rights of LGBT persons also deserve consideration and are considered and discussed.

Millbank, Jenni. “Fear of Persecution or Just a Queer Feeling” (1995) 20 Alternative LJ 261.

This article discusses recent decision by the Australian Refugee Review Tribunal regarding the claims of six gay men from Iran, China, Fiji and Zimbabwe to refugee status on the basis that they had been or would be persecuted in their nation of origin. The article discusses the two issues to be decided in the cases which were: whether being homosexual qualified as membership of a ‘particular social group’ and whether each individual claimant had a ‘well-founded fear of being persecuted’ based on his homosexuality.

Note: Specific to Australian refugee status determination. Author abstract.

Minter, Shannon. “Lesbians and Asylum: Overcoming Barriers to Access” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 5.

This article attempts to account for the disparity between the number of lesbian and gay asylees by identifying some of the gender-related barriers that have effectively excluded lesbians from asylum. Part 1 discusses the relationship between persecution on the basis of gender and of sexual orientation and uses this framework to identify some of the specific oppressions that lesbians confront (I.B 4-7; 15-16). The article examines how lesbians face unique and different forms of persecution from other sexual minority groups. For example, lesbians are less likely to be persecuted under statutes criminalizing same-sex relations, however, they are more likely to be persecuted by non-state actors.

Note: Author abstract.

Mohyuddin, Fatima. “United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered” (2001) 12:2 Hastings Women’s LJ 387.

This article discusses the development of United States asylum law and its recognition of sexual minorities. Part 2 of this article examines various forms of persecution that transgender individuals face (pp. 399-410). The article tracks the development of jurisprudence of transgender claims in the US providing examples from cases.

Note: Specific to US refugee status determination. Author abstract.

Neilson, Victoria. “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claim” (2005) 16 Stan L & Pol R 417.

This article focuses on lesbian refugee claimants in the US. It examines how the primary obstacle that lesbian claimants face in the refugee determination process is demonstrating that the harm they have suffered or will suffer fits within accepted definitions of persecution. The *In re Kasinga* and *In re R-A*, decisions have enormous significance for lesbian asylum cases, both because purely private sphere harm was recognized as persecution and because the harm suffered by the two claimants was seen as part of a larger societal goal of subjugating women. Beginning with the theory that lesbian asylum claims would fare better if adjudicated within the framework of gender-based persecution than within the predominately male, sexual orientation-based framework, this article examines a hypothetical lesbian asylum claim in light of the precedents discussed above.

Note: Specific to US refugee status determination.

Neilson, Victoria. “Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims” (2005) 32 Fordham Urb LJ 265, online: Fordham Law Archive of Scholarship & History

<<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2130&context=ulj>>.

This article focuses on individuals who believe that they are born with the wrong anatomical sex and who suffer persecution as a result of their transgender identity. The article discusses existing precedent in the context of transgender asylum seekers and suggests possible theories for framing successful transgender asylum claims. Part I emphasizes the requirement under asylum law that a nexus exist between the

applicant's protected characteristic and the persecutor's motivation to harm (pp. 110-11; 113-20). The article discusses the *Elias-Zacarias* decision where the court held that a level of causation based on the persecutor's intent is necessary; it must be the protected characteristic motivates the persecutor to harm the applicant. Establishing such a nexus may be a particularly difficult aspect of transgender asylum cases. For example, consider an asylum applicant who is anatomically male, dresses like a woman, and has romantic relationships with men. It may not be possible for the applicant (or the adjudicator) to determine whether she has been harmed because the persecutor perceives her to be a homosexual man or because she appears to be a man wearing women's clothes. Regardless of whether she is harmed as a transgender individual or as an actual or perceived homosexual, she should qualify for asylum.

Note: Specific to US refugee status determination. Author abstract.

Nyanzi, Stella. "Homosexuality, Sex Work, and HIV/AIDS in Displacement and Post-Conflict Settings: The Case of Refugees in Uganda" (2013) 20:4 Int'l Peacekeeping 450.

This article aims to disrupt the silence, invisibility and erasures of non-heteronormative sexual orientations or gender identities, and of sex work, in HIV/AIDS responses within displacement and post-conflict settings in Africa. The article includes testimonies from migrants and refugees which recount incidents of negative treatment and persecution in various African countries.

Note: Focus on Uganda.

O'Dwyer, Paul. "Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court" (2008) 52 NYL Sch L Rev 185.

This article discusses how there has been little or no meaningful guidance on what constitutes persecution on account of sexual identity for purposes of protection under the US immigration laws. The article states that courts continue to articulate an artificial distinction between persecution on account of homosexual status or identity, which some circuits hold warrants protection, and punishment for homosexual acts, which some circuits hold does not warrant such protection. As a result, the outcome of these claims depends, to a certain extent, on the adjudicator's subjective opinions about sexual identity. The article argues that, until settled standards on this issue are established, one of the decisive factors in asylum claims based on sexual identity will continue to be the identity of the judge, rather than that of the claimant.

Note: Specific to US refugee status determination. Author abstract.

Park, Jin S. "Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy" (1995) 42 UCLA L Rev 1115.

Part 2 of this article examines the legal test for persecution in the American refugee status determination process (pp. 1136). The article discusses three types of persecution: (1) 'government complicity,' meaning the unwillingness to protect victims of wide-spread crime targeted towards one of the enumerated categories of refugees; (2) official persecution, meaning the actor of persecution are government agents; and, (3) prosecutions that rise to the level of persecution. Part 3 explores the

standard of proof required for establishing a ‘well-founded fear’ of persecution. To establish a ‘well-founded fear’, claimants must (1) have a subjective fear, and (2) this fear must have enough of a basis that it can be considered well-founded. The analysis focuses on a claimant’s subjective beliefs in assessing the claim of well-founded fear but also requires objective evidence to show that persecution is a reasonable possibility. The subjective element can be satisfied by a claimant’s ‘credible testimony stating a genuine fear of persecution’ and the objective element can be satisfied producing by documentary evidence of past persecution or threats of future persecution. If documentary evidence is not available, the claimant’s testimony will suffice if it is credible, persuasive and refers to specific facts that give rise to an inference that the claimant has been or has a good reason to fear that he or she will be persecuted.

Note: Specific to US refugee determination.

Raj, Senthoran. “Affective Displacements: Understanding Emotions and Sexualities in Refugee Law” (2011) 36:3 *Alternative L J* 177.

Validating asylum claims on the basis of a person’s sexual orientation relies on discerning what constitutes sexuality and a ‘well-founded fear’ of persecution. This administrative process works by suturing narratives of ‘functioning’ sexuality to specific incidents of persecution. Emotion, desire and feeling are obscured in this ethnocentric method of verification. In attempting to dislodge how sexuality remains a fixed and universal identity in the law, this article traces how emotion can be considered in spatial and culturally specific terms, to represent how asylum seekers experience persecution in relation to their ‘queerness’.

Ramanathan, Erik. “Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence” (1996) *Geo Immig LJ*.

This article compares thirty asylum decisions from Australia, Canada, the UK and the US with the aim of enabling the reader to compare the queer asylum jurisprudence of several nations and to understand the issues and solutions debated in each jurisdiction. Part II discusses the concept of persecution (pp. 9-14) and then compares the interpretation of this concept in the four jurisdictions (pp. 17-44). The word ‘persecution’ is difficult to define in a universal way. In examining persecution, the article discusses the identity of the agent of persecution; public vs. private sphere persecution; discrimination vs. persecution; and, laws that punish same-sex conduct.

Note: Focus on Australia, Canada, the UK and the US.

Saxena, Monica. “More Than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims” (2006) 12 *Mich J Gender & L* 331 at 346, online: University of Oslo

<<http://www.uio.no/studier/emner/jus/jus/JUR5530/v08/undervisningsmateriale/Mich%20article%20Gender.pdf>>.

Section 1 of this article discusses forms of persecution that LGBTI individuals may face around the world (pp. 333-36). Section 2 discusses the concept of persecution in the American refugee determination process, more specifically the issue of

whether persecution requires punitive intent or just a desire to hurt or harm the claimant, not necessarily to punish (pp. 346-49). In the case of asylum claims based on sexual orientation or gender identity, the question of whether punitive intent is required is especially pertinent because the intent of the persecutor is often difficult to prove. The article discusses the *Pitchevskaia* case where the claimant was denied refugee status on the basis that her fear of continued forced psychiatric treatment did not constitute persecution because the government sought to ‘cure’ her sexual orientation, not to punish her. On appeal, it was held that the definition of persecution is objective and that although many asylum cases involved persecutors with a subjective punitive or malignant intent, this was not essential for a showing of persecution. There remain different interpretations between the Fifth, Seventh and Ninth court and the article notes that until the US Supreme addresses this issue, many sexual minorities remain vulnerable to deportation and continued persecution.

Note: Specific to US refugee status determination. Author abstract.

Schutzer, Mathew. “Bringing the Asylum Process out of the Closet: Promoting the Acknowledgment of LGB Refugees” (2012) 13 Geo J Gender & L 669.

This article discusses the concept of persecution in UK refugee law (pp. 683-85). The article states that UK law has tended to limit the meaning of the word persecution to ‘indicating the infliction of death, torture or penalties’. The article notes that because the law looks only for extreme acts that violate fundamental human rights and finding ‘isolated acts of violence’ and ‘general discrimination or intolerance’ to be insufficient, this ignores a wide swath of otherwise meritorious applications.

Note: Specific to UK refugee status determination. Author abstract.

Sridharan, Swetha. “The Difficulties of US Asylum Claims Based on Sexual Orientation” (2008) Migration Information Source, online: Asylum Law <<http://www.asylumlaw.org/docs/sexualminorities/DiffiUSAsylumClaimsBasedonSO102908.pdf>>.

A review of asylum cases in the past two decades reveals particular difficulties that LGBT asylum applicants have in proving their ‘well-founded fear of persecution’ if returned to their countries of origin. Though these factors affect all asylum petitions, they make LGBT asylum cases especially difficult. Some judges have argued that discriminatory laws and treatment, if they do not intend to punish the applicant, do not constitute ‘persecution’. Additionally, the article discusses how the courts have also attempted a narrow reading of torture.

Note: Specific to US refugee status determination. Author abstract.

Sussman, Aaron. “Expanding Asylum Law's Pattern-or-Practice-of-Persecution Framework to Better Protect LGBT Refugees” (2013) 16 U Pa JL & Soc Change 111, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2097158>.

In 2009, the Ninth Circuit issued the only published opinion to date finding an asylum applicant eligible for protection based in part on the native country’s pattern

or practice of persecution against gay men. According to this approach, an applicant can demonstrate a well-founded fear of persecution by showing that there is a pattern or practice in her country of persecution of LGBT/H individuals. Persecution against a specific group must be systemic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a fear of future persecution. This article posits the infrequently used pattern-or-practice-of-persecution framework as uniquely compatible with assessing persecution on account of an applicant's membership in an LGBT-based social group. To illustrate this compatibility and the need to expand the framework, this article discusses the pattern or practice of persecution the Ninth Circuit identified in Jamaica and uses Jamaica as a case study to support specific proposed guidelines and legal presumptions in favor of asylum eligibility.

Note: Specific to US refugee status determination.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 16, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss the term persecution stating that, "...though not expressly defined in the 1951 Convention, [persecution] can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm (paras 16, 20-25). In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant."

Verdirame, Guglielmo. "A Friendly Act of Socio-Cultural Contestation: Asylum and the Big Cultural Divide" (2012) 44 NYU J Int'l L & Pol 559.

This article discusses the relationship between refugee law and socio-cultural dimensions and how this can translate into persecution of sexual minority individuals. The article examines how refugee law can provide the ideal terrain for a clash of social and cultural values with guidance from the *HJ and HT* case.

Note: Author abstract.

Walker, Kristen. "Sexuality and Refugee Status in Australia" (2000) 12:2 Int'l J Refugee L 175, online: International Journal of Refugee Law <<http://ijrl.oxfordjournals.org/content/12/2/175.full.pdf>>.

Part 3 of this article examines the meaning of 'persecution' in refugee claims based on sexual orientation or gender identity (pp. 190-209). The article assesses persecution by examining discrimination as persecution (pp.193-94); criminal law and persecution (pp. 194-99); harassment and violence by the police (pp. 199-201); persecution by non-state actors (pp. 201-03); the 'discreet' homosexual (pp. 203-07); involuntary medical 'treatment' of homosexuality (p. 207); and, lack of access to medical treatment for people living with HIV (pp. 207-09). The article assesses the

development of Australian jurisprudence in this area and while also considering jurisprudence from the UK, the US, Canada and New Zealand. It concludes that the treatment of persecution by Australian courts and tribunals has been problematic in many cases and stresses that it is important for adjudicators to consider persecutory acts cumulatively.

Note: Focus on Australia, UK, USA, Canada and New Zealand.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses persecution in relation to refugee claims based on persecution on account of sexual orientation or gender identity (pp. 15-16). The article notes that the interpretation of ‘persecution’ still very much depends on the decision-maker in many sexuality-based cases. The article states that “international human rights law should serve as guidance for decision-makers in the determination of the persecutory nature of the various forms of harm that a person may experience due to his or her sexual orientation.”

(c) Past Persecution

Immigration Equality & National Immigrant Justice Center, “Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status” (2005) at 24, online: National Immigrant Justice Center <<http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>>.

This report discusses the concept of past persecution in asylum claims (pp. 24-6). It states that ‘an applicant may be granted asylum based on past persecution alone. If an applicant sufficiently demonstrates past persecution, he or she is presumed to have a well-founded fear of persecution.’ Past persecution is not a requirement in asylum claims. If the claimant’s fear of future persecution is unrelated to the past persecution, the claimant bears the burden of demonstrating that the fear is well-founded. Establishing past persecution generally provides the strongest case for an asylum claim because it puts the burden on the DHS to demonstrate that the fear is not well-founded. However, the article notes that ‘making a case for a well-founded fear of persecution based on past persecution may be weakened if the applicant remained in her country for a lengthy period of time after the initial persecution without any additional incidents.’

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 18, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss the concept of past persecution stating that, “Past persecution is not a prerequisite to refugee status and in fact, the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that

the applicant would have to face if returned to the country of origin (para 18). The applicant does not need to show that the authorities knew about his or her sexual orientation or gender identity before he or she left the country of origin.”

(d) Persecution vs. Discrimination

LaViolette, Nicole. “Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process” (2009) 13:2 Int’l JHR 437, at 450.

This article discusses persecution vs. discrimination in the context of the Canadian refugee status determination process (pp. 450-4). The article discusses how in the last 10 years, Canadian decision-makers have increasingly evaluated evidence to determine whether a sexual minority claimant would be subjected to persecution or to the less serious harm of discrimination. One reason for the increased relevance of the issue is the fact that in several countries the social, political, and legal situations of sexual minorities has been changing and the impact of this progress is now often at issue at refugee hearings.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 4, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses what constitutes persecution as opposed to discrimination in establishing a well-founded fear of persecution in refugee claims (pp. 4-8). Given that, in refugee law, there is a requirement that the harm is serious, a distinction has developed between persecution and discrimination. This report discusses how persecution is distinguished from discrimination in Canadian refugee law and states that there continues to be significant obstacles facing sexual minority claimants in meeting the threshold of persecution rather than discrimination.

Note: Specific to the Canadian refugee status determination.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 184.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘well-founded fear of persecution’, this article notes that the Guidance Note does a commendable job of canvassing the different forms of persecution that sexual minorities may confront. However, “whilst the Guidance Note acknowledges that persecution can be manifested by a series of discriminatory acts, it fails to distinctly chart the emerging focus on discrimination in sexual minority refugee claims, other

than mentioning that ‘the element of discrimination is often central to claims made by LGBT persons’” (pp. 184-87). Furthermore, “the Guidance Note fails to explicitly link evidentiary obstacles facing sexual minority claimants to the increasing challenge of proving that they meet the threshold of persecution rather than discrimination.” As a result, this article states that the Guidance Note offers little guidance on how to determine the distinction between discrimination and persecution and states that the Guidance Note should have suggested that adjudicators be careful to avoid drawing conclusions that claimants face discrimination rather than persecution and that adjudicators must ‘take into account reasons why reports of persecution may be unavailable’.

Lidstone, Robert. *Refugee Queerings: Sexuality, Identity and Place in Canadian Refugee Determination* (M Arts Thesis, Simon Fraser University, 2006) [unpublished] at 101, online: Simon Fraser University <<http://summit.sfu.ca/item/2415>>.

This article discusses persecution vs. discrimination in the Canadian refugee status determination process (pp. 101-03). The author notes that, “[a] distinction between persecution and discrimination only acquires meaning once it is established by an adjudicator in reference to the specific elements of a claim. The outcome therefore depends heavily upon an individual decision-maker’s discretion and her/his assessment of the claimant’s particular situation and country of origin conditions”.

Note: Specific to Canadian refugee determination process.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 19.

Section 3.1.3.1 discusses discrimination vs. persecution in refugee law, as informed by relevant Yogyakarta Principles (pp. 19-20). Yogyakarta Principle 2 states that, “Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity.” The report discusses that the particular importance of the Yogyakarta Principles on this issue is that the Principles “recognize the rights of LGBTI individuals in an integrated fashion which illuminates the extent to which discrimination based on sexual orientation and gender identity can cumulatively amount to persecution.”

Spijkerboer, Thomas. “Sexual Identity, Normativity and Asylum” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

This chapter begins with an overview of the legal developments that followed the acceptance of sexual orientation and gender identity as a persecution ground. The chapter analyses what currently are important issues in academic writings, case law and practise as expressions of a limited number of debates about sexuality which keep re-appearing in different refugee law contexts. The chapter examines how it is possible that these issues seem irresolvable and keep reappearing. The chapter focuses specifically on: discrimination vs. persecution; discretion; prosecution vs. persecution; and, credibility.

Note: Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 17, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss the concept of discrimination in refugee claims at paragraph 17 stating that, “Discrimination is a common element in the experiences of many LGBTI individuals. As in other refugee claims, discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned. Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information.”

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses persecution vs discrimination in relation to refugee claims based on persecution on account of sexual orientation or gender identity (pp. 18-20). The article states that, “while differences in the treatment of various groups do exist in societies without necessarily amounting to persecution, patterns of harassment and discrimination can cumulatively reach the threshold of persecution.”

Note: Author abstract.

(e) Laws Criminalizing Same Sex Relations

European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part 1 – Legal Analysis* (2009) at 87, online: European Union Agency for Fundamental Rights (FRA) <http://fra.europa.eu/sites/default/files/fra_uploads/192-FRA_hdgso_report_Part%201_en.pdf>.

Part 3 of this report examines European countries’ obligations to individuals seeking asylum on the basis of sexual orientation or gender identity under Council Directive 2004/83/EC. The first section of Part 3 discusses the threshold that various European countries use to establish persecution in sexual minority asylum claims (pp. 87-93). Most countries are more likely to grant asylum to individuals fleeing countries that criminalize same-sex conduct. Identity concealment and public sphere vs. private sphere persecution are also touched on very briefly.

Note: Specific to European refugee status determination.

European Union Agency for Fundamental Rights (FRA), *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – 2010 Update*, (2010) at 56, online: European Union Agency for Fundamental Rights (FRA)

<http://fra.europa.eu/sites/default/files/fra_uploads/1286-FRA-LGBT-report-update2010.pdf>.

Section 2 of Part 5 of this report examines the threshold that asylum seekers making claims based on sexual orientation or gender identity must meet to establish persecution in the European Union (pp. 56-8). The report reveals that some EU Member States fail to see the need for protection in the absence of explicit criminalization of homosexuality in the country of origin. As a result, the refugee status determination process fails to consider the social situation in the country of origin and possible persecution by non-state actors. Additionally, even in countries where same-sex conduct is explicitly criminalised, some Member States have concluded “that if such criminalisation only concerns ‘ostensible’ same-sex conduct, but does not extend to criminalisation of LGBT ‘identity’, the fear of persecution might not be established.” Many countries also believe that it is acceptable for individuals to conceal their sexual orientation or gender identity as a means of avoiding persecution.

Note: Specific to European refugee status determination.

International Commission of Jurists. “X, Y and Z: a Glass Half Full for “Rainbow Refugees”?” The International Commission of Jurists’ Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel” (2014), online: Refworld <<http://www.refworld.org/pdfid/538dca6f0.pdf>>.

This article analyses the 7 November 2013, judgment of the Court of Justice of the European Union (CJEU) in the three joined cases of X, Y and Z v. Minister voor Immigratie en Asiel. The ruling arose from the asylum requests lodged in the Netherlands by three refugee applicants claiming to have a well-founded fear of persecution by reason of their same-sex sexual orientation in their countries of origin where consensual same-sex sexual conduct was and remains criminalized. The article discusses criminalization of consensual same-sex sexual conduct (pp. 12-18). The Court determined that “not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach” the level of seriousness required to constitute a persecution within the meaning of Article 1(A) of the Refugee Convention. The article discusses the ICJ’s criticism of the court’s reasoning.

Note: Specific to Europe. Author abstract.

Jansen, Sabine & Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 21, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 2 considers criminalization (pp. 21-7) and finds that, while the existence of laws criminalizing same-sex conduct is sufficient for most European countries to grant protection, five countries deny protection even where these laws exist. This is problematic because the existence of laws criminalizing sexual orientation or gender identity should mean that LGBTI individuals fleeing from those countries have a well-founded fear of persecution.

Note: Specific to European refugee status determination.

LaViolette, Nicole. “Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process” (2009) 13:2 Int’l JHR 437, at 451.

The article examines the concept of persecution in the Canadian refugee status determination process (p. 451). The article states that the Canadian Refugee Protection Division is more sympathetic to claimants from countries where homosexuality is illegal and harder on claimants from countries that have emerging sexual minority communities, rights organisations and concrete legal reforms.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report examines the effect that laws criminalizing same-sex conduct in the claimant’s country of origin has on the claimant’s claim (pp. 8-10). The article discusses how decision-makers are increasingly called upon to assess the persecutory impact of laws criminalizing homosexual conduct. The article also notes, however, that in countries where same-sex conduct is not explicitly criminalized, other laws may be directed at suppressing homosexuality, such as sanctions relating to “public morality or public order laws such as laws against loitering” and it is important for decision-makers to also consider these.

Note: Specific to Canadian refugee status determination.

McGhee, Derek. “Queer Strangers: Lesbian and Gay Refugees” (2003) 73 Feminist Rev 145.

This article discusses whether prosecution or the threat of prosecution for ‘sexual offences’ be considered a form of persecution. The article notes that when asylum claims based on sexual orientation first emerged in the 1990s many UK immigration tribunals proved to be reluctant to criticize another country’s criminal laws or the penalties imposed for their breach, even when these penalties were excessive by British and European standards. The article discusses how this has changed prosecution is now considered a form of persecution where penalties for ‘homosexual offences’ were found to be unnecessarily repressive and extreme in comparison with British legislation and the standards set by the European Convention of Human Rights.

Note: Focus on UK refugee status determination. Author abstract.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 20.

Section 3.1.3.2 examines laws criminalizing same-sex conduct, as informed by relevant Yogyakarta Principles (pp. 20-22). The report states that “there is a substantive body of international and national jurisprudence affirming the human rights standard against criminalizing consensual same-sex relations.” Principles 2, 6, 17 and 19 are relevant to these laws. The report uses these principles in discussing punishment or penalty; enforcement and forcible concealment of an individual’s sexual identity.

Spijkerboer, Thomas. “Sexual Identity, Normativity and Asylum” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

This chapter begins with an overview of the legal developments that followed the acceptance of sexual orientation and gender identity as a persecution ground. The chapter analyses what currently are important issues in academic writings, case law and practise as expressions of a limited number of debates about sexuality which keep re-appearing in different refugee law contexts. The chapter examines how it is possible that these issues seem irresolvable and keep reappearing. The chapter focuses specifically on: discrimination vs. persecution; discretion; prosecution vs. persecution; and, credibility.

Note: Author abstract.

Türk, Volker. “Ensuring Protection to LGBTI Persons of Concern” (Opinion delivered at the Invisible in the City: Urban Protection Gaps Facing Sexual Minorities Fleeing Persecution, HIAS LGBTI Symposium, 20–21 September 2012), (2013) 25:1 Int’l J Refugee L 120, at 124, online: International Journal of Refugee Law <<http://ijrl.oxfordjournals.org/content/25/1/120.full.pdf+html?sid=cef51eb8-fdef-426c-a0da-d1a7b899cb4b>>.

This article examines issues facing LGBTI individuals in the context of forced displacement context (p. 124). The author discusses ‘criminalization’ and the challenges involved in determining whether laws criminalizing same-sex relations amount to persecution. The author states that to amount to persecution recent or regular enforcement of a law criminalizing same-sex conduct is required; mere existence of such a law is usually insufficient. Some countries even require the claimant to show that the law has been enforced against them; however, the author notes that this requirement is unfair.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 26, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss claimants who come from countries where same-sex relations are criminalized from paragraphs 26-29 stating that, “Assessing the ‘well-

founded fear of being persecuted’ in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant needs to be examined...Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted.”

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses prosecution vs persecution in relation to refugee claims based on persecution on account of sexual orientation or gender identity (pp. 16-18). The article states that prosecution may amount to persecution if it was “pretextual, accompanied by excessive punishment or administered under inadequate or arbitrary procedures.” The article examines how this has been interpreted by courts in Australia, the UK and the US, with examples from cases.

Note: Specific to Australia, UK and US. Author abstract.

(f) Concealment of Sexual Orientation or Gender Identity (Discretion Requirement)

Battjes, Hemme. “Accommodation: Sur place Claims and the Accommodation Requirement” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013), online: Scribd <<http://www.scribd.com/doc/64156039/Accommodation-Sur-place-claims-and-the-accommodation-requirement-in-Dutch-asylum-policy>>.

This chapter addresses the treatment of *sur place* claims in Dutch asylum policy and case-law and discusses whether this treatment is in accordance with the Refugee Convention and with the European Convention of Human Rights. A *sur place* claim is an appeal to the Refugee Convention or Article 3 ECHR based on events or circumstances that came up after the applicant left the country of origin. As for LGBTI people, it may concern a coming out after arrival in the country of refuge or public expression of the orientation there after hiding it in the country of origin or a transgender treatment. The chapter reveals that accommodation, the concept that an individual hide their sexual orientation in order to escape persecution or ill-treatment, is required in cases of *sur place* claims.

Note: Specific to European refugee status determination. Author abstract.

Budd, Michael Carl . *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (MA Thesis, The American University in Cairo, 2009) [unpublished] at 30, online: American University in Cairo <http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This thesis discusses the ‘discretion requirement’ which continues to be applied by various countries (pp. 30-4). The author notes that “[e]ven in cases where the court accepts both that the applicant belongs to a sexual minority and that individuals in

his or her country of origin who express an LGBT identity face a genuine risk of persecution, it has been declared reasonable to expect the applicant to live discreetly to avoid persecution.” This section examines various cases where the discretion requirement was raised.

Chelvan, S. “Put Your Hands Up (If You Feel Love)” (2010) 25:1 J Immig, Asylum & Nationality 56.

This article discusses the UK Supreme Court’s decision in *HJ (Iran)* and *HT (Cameroon)* which marked an important development in LGBTI asylum law in the UK as the discretion requirement was struck down. The article provides an insight into the legal history behind the Supreme Court’s decision, an analysis of the decision, and the author forecasts the effect of the reasoning for the future.

Note: Specific to UK refugee status determination. Author abstract.

Choi, Venice. “Living Discreetly: A Catch 22 in Refugee Status Determinations on the Basis of Sexual Orientation” (2010) 36 Brooklyn J Int’l L 241 at 250.

Part 2 of this article examines the discretion requirement in refugee status determination (pp. 250-55). The article argues that the success rate of refugee claims based on sexual orientation will not improve, even as more countries begin to reject discretion reasoning, unless refugee decision makers can better understand the specific social contexts experienced by applicants in their home country. The article states that “the idea of discretion undermines the purpose of the Convention by putting the responsibility of protection on the applicant who is required to ensure their own safety by keeping important aspects of their lives secret, rather than putting the responsibility on the receiving country.” The article examines the Australian refugee system’s treatment of the discretion requirement.

Note: Focus on Australia and Canada.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 3 of this report briefly discusses the discretion requirement that was previously applied in UK asylum law (pp. 52-54, 60-61). The report discusses how the *HJ (Iran)* and *HT (Cameroon)* decision was not only significant because it got rid of the discretion requirement, but also because “it made a clear distinction between a narrow understanding of being gay (which focused on sexual behaviour), and a more progressive understanding that brought in wider issues of identity and behaviour other than just sexual behaviour.”

Note: Specific to UK refugee status determination. Focus on Scotland.

Dauvergne, Catherine & Jenni Millbank. “Before the High Court: Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh” (2003) 25:1 Sydney L Rev 97, at 109, online: Sydney Law Review <http://sydney.edu.au/law/slr/docs_pdfs/editions/slr_v25_n1_bhc.pdf>.

Part 5 of this article argues that the discretion requirement in Australian refugee law, that is the idea that a claimant can conceal their sexual orientation or gender identity to avoid persecution, is discriminatory (pp. 109-124). Australian tribunals and courts have repeatedly failed to find that the requirement is a violation of the fundamental human rights of the claimant. The requirement, however, is increasingly coming under criticism and much of this condemnation has drawn express parallels between persecution on the grounds of sexuality and that of political expression and religious belief. The article considers jurisprudence from Canada, New Zealand and the USA which, in most cases, consider the discretion requirement to be discriminatory. The article concludes by stating that the discretion requirement takes the focus away from persecution and reverses the onus to instead question what is 'reasonable' about the claimant's behaviour and the extent to which they should live a life of secrecy and fear. It is discriminatory and antithetical to the central aims of the Refugee Convention.

Note: Specific to Australian refugee status determination.

Goodman, Ryan. "Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line" (2012) 44 NYU J Int'l L & Pol 407.

This article presents information on the concealment and persecution of sexual orientation with reference to the asylum protection of the gay and lesbians refugees and the landmark case *HJ (Iran) v. Secretary of State for the Home Department* wherein the plaintiff, a homosexual, went through imprisonment and lashing due to the anti-sodomy laws in Iran and the decision of the Supreme Court of Great Britain regarding the case. The international human rights law defines the meaning and forms such as the psychological form of persecution under the refugee status. Information on the decisions of the courts of Great Britain and Australia regarding the discretion in the asylum claims of sexual orientation is also presented.

Note: Specific to Australia and UK refugee status determination. Author abstract.

Gower, Melanie. "Asylum Claims Based on Sexual Identity" (2011) Home Affairs Section, online: UK Parliament

<<http://www.parliament.uk/business/publications/research/briefing-papers/SN05618/asylum-claims-based-on-sexual-identity>>.

In recent years, there have been cases where UK Border Agency officials have cited the fact that a claimant has previously exercised 'discretion' in their country of origin as a reason for refusing asylum. The argument used was that the claimant could avoid future persecution by being 'discreet' about their sexual identity upon their return to their country of origin. On July 7, 2010 the UK Supreme Court unanimously rejected the UKBA's discretion requirement and issued detailed guidance on how these types of asylum claim should be assessed in the future. This article discusses the legal test that came out of the *HJ* and *HT* decisions and how the UKBA has adjusted its practise to confirm with these cases. Following the decisions, the UKBA automatically reviewed some cases in light of the decision, but not those which had already exhausted the appeals process.

Note: Specific to UK refugee status determination. Author abstract.

Hanna, Fadi. “Punishing Masculinity in Gay Asylum Claims”, Case Comment on *In re Soto Vega* No. A-95880786 (BIA 2004), (2005) 114 Yale LJ 913, online: The Yale Law Journal <<http://www.yalelawjournal.org/images/pdfs/331.pdf>>.

Does a homosexual asylum seeker need to prove he is ‘gay enough’ to win protection from a U.S. court? Increasingly, and troublingly, the answer is yes. In *In re Soto Vega*, the American Board of Immigration Appeals (BIA) denied a gay man’s application for asylum because he appeared too stereotypically heterosexual. The decision is representative of a trend in immigration law to equate visibility with the potential for anti-homosexual persecution. This Case Comment argues that visibility should be irrelevant in sexual-orientation-based asylum cases. Part I examines how homosexual claimants are punished for ‘covering’ their sexual identity and those who ‘reverse cover’, or act more visibly ‘gay’ are rewarded. This system of incentives is inconsistent with the purpose and structure of asylum law for at least two reasons. Part II of the comment argues that covering one’s sexual orientation is a natural response to homophobic persecution. Thus, the visibility requirement punishes asylum applicants for exhibiting a symptom of persecution and is therefore inconsistent with the fear-based standard of asylum. Second, the visibility requirement assumes that conspicuous homosexuals have fundamentally different identities than inconspicuous homosexuals, such that they constitute a different social group for asylum purposes. This belief is grounded in a performance-as-identity model which suggests that identity is determined by behavior rather than by immutable characteristics. However, Part III argues that asylum law protects homosexuals on the basis of their immutable sexual orientation and thus precludes the performance-as-identity model.”

Note: Case Comment of US Board of Immigration Appeals’ case *In re Soto Vega*. Author abstract.

Hathaway, James C, & Jason Pobjoy. “Queer Cases Make Bad Law” (2012) 44 NYU J Int’l L & Pol 315, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304165>.

This authors take a careful look at how common law courts have addressed the asylum claims of homosexuals fleeing anti-gay prosecutions and violence in their home countries. In two recent decisions, courts in Australia and the UK struck down the discretion doctrine under which gay claims to asylum had been rejected on the grounds that the applicants could ‘be discreet’ about their sexuality, and thereby avoid the risk of being persecuted at home. The article provides the first critical assessment of their impact on international refugee law as a whole. The article suggests that to reach their preferred result, the Australian and UK courts ran roughshod over the duty to find a ‘well-founded fear’ of future persecution; that they failed clearly to understand the real human rights costs of the enforced concealment that so-called ‘discreet’ homosexuals face; and that by finding that the Convention’s requirement to show that risk ‘for reasons of’ a form of protected status was met when risk follows only from going to concerts, drinking cocktails, or engaging in ‘boy talk’ the courts severed the established and critically important link between refugee law and non-discrimination norms. The authors offers an

alternative theory of how international refugee law can and should embrace the claims of sexual minorities who can avoid serious harm only by accepting self-repression. They argue that such claims should be assessed on the basis of the real, forward-looking risk of serious psychological harm that ensues in such circumstances.

Note: Specific to Australia and UK refugee status determination. Author abstract.

International Commission of Jurists. “X, Y and Z: a Glass Half Full for “Rainbow Refugees”?” The International Commission of Jurists’ Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel” (2014), online: Refworld <<http://www.refworld.org/pdfid/538dca6f0.pdf>>.

This article analyses the November 7, 2013, judgment of the Court of Justice of the European Union (CJEU) in the three joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*. The ruling arose from the asylum requests lodged in the Netherlands by three refugee applicants claiming to have a well-founded fear of persecution by reason of their same-sex sexual orientation in their countries of origin where consensual same-sex sexual conduct was and remains criminalized. The article briefly discusses the discretion requirement (p. 19). The article states that the court “correctly concludes that, “an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin to avoid persecution”. Moreover, the applicant is not expected to exercise greater restraint than a heterosexual in expressing his sexual orientation, even if that would allow him to avoid the risk of persecution.”

Note: Specific to Europe. Author abstract.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 33, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 4 considers the discretion requirement, the idea of an individual concealing his or her sexual orientation or gender identity as a means of avoiding persecution (pp. 33-9). The majority of European countries continue to rule that the concealment of the claimant’s sexual orientation or gender identity can be reasonably expected in order to prevent persecution. The discretion requirement is problematic for two reasons. Firstly, expecting an individual to refrain from giving expression to sexual orientation or gender identity is a violation of the fundamental human rights of the individual. Secondly, concealment can also be dangerous and implies a permanent risk of persecution. The report concludes that the discretion requirement should be abolished.

Note: Specific to European refugee status determination.

Johnson, Toni. “Flamers, Flaunting and Permissible Persecution” (2007) 15:1 Fem Legal Stud 99, online: Springer Link <<http://link.springer.com/article/10.1007%2Fs10691-006-9053-7#page-1>>.

This article analyses a case of the English Court of Appeal in which the applicant, R.G., a gay, H.I.V. positive Colombian claimed asylum on grounds of persecution due to his sexuality. Both the Asylum and Immigration Tribunal (AIT) and the Court of Appeal rejected R.G.'s claim for asylum. The decision considered whether it was persecutory for the AIT to require a change in behaviour on the part of the claimant in order to ensure his or her safety. The Court of Appeal noted that such a change of behaviour must not be excessive and it must be manageable rather than a persecutory burden. However, the court also assumed that it is easy and appropriate for a claimant to return to the closet when he or she is sent home. This article is critical of the approach taken by the Court and argues that it displays an insensitivity to the complexity of sexual identity and its performance and has the effect of perpetuating and legitimating discrimination against lesbians and gay men.

Note: Specific to UK refugee status determination. Author abstract.

Johnson, Toni. "On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings" (2011) 20:1 Soc & Legal Stud 57.

This article discusses the discretion requirement as it existed in UK refugee law prior to the *HJ (Iran) and HT (Cameroon)* case (pp. 61-3). The article contrasts the idea of staying closeted with the way refugee status determination forces claimants to out themselves in order to gain protection. The article discusses how asylum seekers persistently manage to find gaps and create momentary spaces of resistance in court. The article argues that partial narratives of self that combine speech with silence working within the macro structure of the Refugee Convention, enable a limited non-disclosure in an environment which relies on exposure.

Note: Specific to UK refugee status determination.

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 64.

Chapter 7 of this report examines the concept of discretion in Australian refugee law (pp. 64-70). Since the *Appellant S395* case, the discretion requirement is being rejected more often as an inhumane prospect to impose upon claimants. The report highlights, however, that there remains a tendency to understand sexuality as narrowly tied to sexual acts and the leading of a stereotypical gay 'lifestyle'. Without understanding the multifaceted ways sexuality may be expressed in a person's daily life, the Tribunal risks marginalizing claimants that do not follow a stereotypical 'lifestyle'. The report indicates that there is a need to develop the Tribunal's empathy and ability to imagine what it means to be a sexual minority in the claimant's country of origin to ensure better decisions. Additionally, the report recommends that developing a stronger human rights jurisprudential lens for Tribunal Members would achieve more just and fairer outcomes.

Note: Specific to Australian refugee status determination.

Kendall, Christopher N. "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?" (2003) 15:4 Int'l J

Refugee L 715, online: International Journal of Refugee Law
<<http://ijrl.oxfordjournals.org/content/15/4/715.short>>.

This article analyses a decision of the Australian Refugee Review Tribunal in which a gay man was denied refugee status on the basis that he could avoid persecution by ‘acting more discreetly’ and by leading a less ‘public’ sexual profile and contrasts it with a recent decision of the High Court of Australia in which the ‘discretionary option’ was explicitly rejected by a majority of the Court. This paper highlights that the reasoning used by the Tribunal misunderstands the nature of sexuality-based discrimination and offers a line of reasoning that is central to ensuring the types of inequalities and biases that are at the heart of sexuality-based discrimination and that perpetuate the inequalities which international human rights instruments seek to eradicate. While applauding the Court's rejection of the ‘discretionary option’, this paper argues that a much stronger understanding of the sex equality implications of the Tribunal's decisions in this regard is needed if lesbian and gay refugee claimants are to find real protection in Australia. Overall, it is argued that, applying a sex equality analysis of anti-lesbian and anti-gay discrimination, it is clear that, while the High Court has now recognised the errors of discretion, it has yet to find the voice that true systemic equality demands.

Note: Specific to Australian refugee status determination.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report examines the discretion requirement (pp. 10-11). The discretion requirement is the idea that sexual minority refugee claimants could be required to take reasonable steps to avoid persecutory harm by concealing their personal lives or identity. The UNHCR Guidelines are clear on this issue stating that “a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.” The report notes that while the issue of concealment has surfaced in some Canadian tribunal decisions, it has generally not taken a serious hold in Canadian decisions.

Note: Specific to Canadian refugee status determination. French version available (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343318).

Millbank, Jenni. “A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003” (2005) 14:1 Soc & Leg Stud 115, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=676121>.

This article provides a critical and comprehensive overview of the UK case law on refugee claims on the basis of sexual orientation. The article discusses how for many years the UK refused to accept refugee claims on grounds of sexual orientation or

gender identity, by lesbians and gay men has been notably hostile in comparison with other Western refugee receiving nations. Since accepting eligibility in 1999, UK decision-makers have relentlessly enforced the discretion requirement and have repeatedly held that asylum seekers are under a duty to protect themselves by hiding their sexuality. Decision-makers have also been reluctant to hold that sanctions criminalizing same-sex conduct are in and of themselves persecutory and have frequently failed to appreciate the relationship between violence against lesbians and gay men and the existence of criminal provisions.

Note: Specific to UK refugee status determination.

Millbank, Jenni. “From Discretion to Disbelief: Recent Trends in Refugee Determination on the Basis of Sexual Orientation in Australia and the United Kingdom” (2009) 13:2 Int’l JHR 391.

This article discusses the impact that Australian cases *S395/2002* and *S396/2002* had on the refugee jurisprudence of Australia and the United Kingdom. These cases rejected the notion that decision-makers could ‘expect’ or had any jurisdiction to ‘reasonably require’ refugee applicants to ‘co-operate in their own protection’ by concealing their sexuality. Given that the authors’ earlier research found a strong correlation between ‘discretion’ reasoning and negative outcomes for applicants in cases from 1994 to 2003, the authors anticipated that disapproval of discretion-based reasoning, combined with the clear judicial summons to consider sexuality as a form of identity rather than as mere private sexual behaviour, would lead to a higher level of positive outcomes for gay, lesbian and bisexual asylum seekers from 2004 onwards. However, this has not exactly been the case and in fact, the overall success rates for sexual minority applicants improved little over the study’s 14-year timeframe.

Note: Specific to Australian and United Kingdom refugee determination.

Millbank, Jenni. “The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy” (2012) 44 NYU J Int’l L & Pol 497.

This article addresses Hathaway and Pobjoy’s critique of the decisions of the High Court of Australia and Supreme Court of the United Kingdom, respectively, in *S395* and *HJ and HT*. These cases represent the two highest-level judicial determinations in the world to address gay refugee claims to date. These decisions emphatically reject discretion reasoning, affirm that the experience of sexual orientation extends beyond mere private sexual conduct, and articulate the importance of equality in applying the protections of refugee law. The article outlines the problems of discretion and how *S395* and *HJ and HT* responded. Furthermore, the article argues that Hathaway and Pobjoy’s claims rest upon a misleading and unsustainable act/identity distinction.

Note: Specific to Australia and UK refugee status determination. Author abstract.

Schutzer, Mathew. “Bringing the Asylum Process out of the Closet: Promoting the Acknowledgment of LGB Refugees” (2012) 13 Geo J Gender & L 669.

Part 3 of this article examines the rise and fall of the discretion requirement in UK refugee law (pp. 685-93). The article discusses how the discretion requirement was a lynchpin of the UK's asylum jurisprudence until July 2010 when the Supreme Court delivered its judgement in the refugee appeal *HJ (Iran)* and *HT (Cameroon)*. The court unanimously agreed that the 'tolerability test was contrary' to international standards on refugee law which means that LGB asylum claimants fleeing persecution and seeking protection in the UK will no longer need to justify their desire to be open about their sexual orientation. The article discusses the effect that this decision has had and various criticisms that have arisen in regards to it.

Note: Specific to UK refugee status determination. Author abstract.

Spijkerboer, Thomas. "Sexual Identity, Normativity and Asylum" in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

This chapter begins with an overview of the legal developments that followed the acceptance of sexual orientation and gender identity as a persecution ground. The chapter analyses what currently are important issues in academic writings, case law and practise as expressions of a limited number of debates about sexuality which keep re-appearing in different refugee law contexts. The chapter examines how it is possible that these issues seem irresolvable and keep reappearing. The chapter focuses specifically on: discrimination vs. persecution; discretion; prosecution vs. persecution; and, credibility.

Note: Author abstract.

Türk, Volker. "Ensuring Protection to LGBTI Persons of Concern" (Opinion delivered at the Invisible in the City: Urban Protection Gaps Facing Sexual Minorities Fleeing Persecution, HIAS LGBTI Symposium, 20–21 September 2012), (2013) 25:1 Int'l J Refugee L 120, at 123, online:

<<http://ijrl.oxfordjournals.org/content/25/1/120.full.pdf+html?sid=cef51eb8-fdef-426c-a0da-d1a7b899cb4b>>.

This article examines issues facing LGBTI individuals in the context of forced displacement context. The author discusses the trend of adjudicators demanding 'discretion' which is the idea that a claimant can avoid persecution by concealing their sexual orientation (pp.123-4). While some countries have dismissed this idea, others continue to use 'discretion' reasoning in refugee decisions. The article stresses that discretion undermines one of the basic tenants of refugee law which is that "the 1951 Convention protects persons who have a well-founded fear of being persecuted on account of who they are; and that one should not be therefore compelled to hide, change or renounce one's identity in order to avoid persecution."

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 30, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss the concept of concealment of sexual orientation or gender identity (paras. 30-33). The Guidelines state that refugee status cannot be denied “based on a requirement that [an applicant] change or conceal their identity, opinions or characteristics in order to avoid persecution...the question to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences.” The Guidelines stress that requiring an applicant to conceal their sexual orientation or gender identity can result in significant psychological and other harms, furthermore, secrecy may not be an option for the entirety of their lifetime.

Verdirame, Guglielmo. “A Friendly Act of Socio-Cultural Contestation: Asylum and the Big Cultural Divide” (2012) 44 NYU J Int’l L & Pol 559.

This article discusses the socio-cultural dimensions of refugee law in relation to the *HJ and HT* case and the discretion requirement, and argues that the legal principle of non-discrimination should help in the difficult task of distinguishing between “protected and unprotected activities” under refugee law.

Walker, Kristen. “The Importance of Being Out: Sexuality and Refugee Status” (1996) 18 Sydney L Rev 568 at 578, online: Sydney Law Review <<http://www.austlii.edu.au/au/journals/SydLRev/1996/32.html>>.

Through an examination of cases heard before the Australian Refugee Review Tribunal, this article examines the importance of ‘being out’ in refugee claims based on sexual orientation made in Australia (pp. 578-81). The article discusses how when an individual is more open about their sexual orientation, tribunals will be less likely to consider concealment as a valid alternative to avoiding persecution; however, for individuals that have mostly kept their sexual orientation a secret, concealment is seen as a viable option.

Note: Specific to Australian refugee status determination. Article is from 1996.

Wessels, Janna. “‘Discretion’ in Sexuality-Based Asylum Cases: An Adaptive Phenomenon” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013)

This chapter discusses the concept of ‘discretion’ as it arises in refugee status determinations. In particular the chapter examines how the case of *HJ (Iran)* and *HT (Cameroon)* marks a fundamental shift in UK asylum law given that the Supreme Court held that courts can no longer apply the so-called ‘reasonably tolerable’ test as a basis for negative asylum decisions by finding that claimants could be reasonably expected to tolerate being discreet about their sexual identity in order to avoid persecution. This chapter notes, however, that the change contained in this judgment is not as radical as it first seems. The analysis of the new test to be applied reveals that the Judges are far from rejecting ‘discretion’ as a whole; rather, the

distinction between ‘openly’ and ‘discreetly’ gay people that is inscribed in the test risks reinstating a discriminating ‘discretion logic’ in sexuality-based asylum cases.

Note: Specific to UK refugee status determination.

Wessels, Janna. “*HJ (Iran) and HT (Cameroon)* – Reflections on a New Test for Sexuality-Based Asylum Claims in Britain” (2012) *Int’l J Refugee L*, online: *International Journal of Refugee Law* <<http://ijrl.oxfordjournals.org/content/24/4/815.short>>.

The case *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] was celebrated as a ‘fundamental shift in asylum law’. In this decision, the UK Supreme Court rejects the ‘reasonably tolerable test’ which prescribed that claimants could be reasonably expected to tolerate being discreet about their sexual identity in order to avoid persecution. While the rejection of this test was overdue, the Justices go a step further and formulate a new approach to be followed by tribunals in asylum claims on grounds of sexual orientation. This article argues that this new approach fails to discard ‘discretion’ as a concept in asylum cases. The new test continues to be constructed on ‘discretion logic’, which is not tenable for a series of reasons. First, the test creates two distinguishable categories, openly demonstrated sexuality and concealed sexuality. Secondly, it assumes that this distinction and the underlying choice are relevant for assessing whether the applicant is at risk of persecution. Finally, the case relied heavily on the subjective element of assessing the ‘fear’ of persecution, which leads to a stricter test than necessary. The assessment of the existence of a well-founded fear of persecution in LGBT cases should instead be made without reference to whether or not the applicants would conceal their sexual orientation.

Note: Specific to UK refugee status determination. Author abstract.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: *Refworld* <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses the concept of discretion in relation to refugee claims based on persecution on account of sexual orientation or gender identity (pp. 20-7). The discretion requirement is the idea that there is a “reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection.” The article states that “discretion remains a problematic concept in decisions related to asylum claims based on sexual orientation particularly in Australia and in the UK.” The article examines how the discretion requirement has been used in by courts in Australia and UK, with examples from cases.

Note: Specific to Australia and UK. Author abstract.

(g) Change in Country Conditions / Circumstances

Heartland Alliance National Immigrant Justice Center, “Know Your Rights: Information on Seeking Asylum in the United States for Detained Immigrants who are Lesbian, Gay, Bisexual, Transgender or HIV-Positive” (2009) at 11, online: *Heartland Alliance National Immigrant Justice Center* <<https://immigrantjustice.org/know-your-rights-manuals-detained-immigrants>>.

This manual briefly examines the notion of a change in the claimant's circumstances or a change in country conditions (p. 11). Changed circumstances mean that a claimant did not fear returning to their home country when they first arrived in the US but conditions have changed and he or she now fears returning. Changed circumstances may include: criminalization of same-sex relations; the discovery in the home country of the claimant's sexual orientation; a new homophobic government; the coming out of the claimant while in the US; and an HIV diagnosis.

Note: Specific to US refugee status determination.

(h) Agents of Persecution (State vs. Non-State Actors)

Bell, Mark. Protecting LGBT People Seeking Asylum: Guidelines on the Refugee Status Directive (Brussels: ILGA Europe, 2005), online: ILGA Europe <www.rfsi.se/public/ilga_eudirektivprotecting.pdf>.

In 2004, the European Union adopted a Directive setting out the minimum rules governing conditions under which refugee status is granted. It applies to third country nationals (i.e. persons from outside the EU) who request asylum within a Member State of the EU. It covers the criteria for being awarded refugee status, but also the rights of persons once they are recognised as refugees. This report briefly discusses the source of persecution (p. 5) as outlined in the Directive. The Directive clarifies that protection must be provided in respect of both state and non-state actors. Article 6 defines the 'actors of persecution and serious harm'. Article 7 specifies that protection by the state requires reasonable steps to ensure 'an effective legal system for the detection, prosecution and punishment of acts constituting persecution.

Note: Specific to Europe. Author abstract.

Immigration Equality & National Immigrant Justice Center, "Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status" (2005) at 29, online: National Immigrant Justice Center <<http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>>.

This report examines state and non-state persecution (pp. 29-31). State agents generally include the police, the military and government-run schools. Groups that the government is unable or unwilling to control include guerrilla and paramilitary groups and gangs. Generally, beatings by other citizens will not constitute persecution if there is no showing that there was government involvement or that the government refused to assist in prosecuting the abusers or protecting the victim. However, the report notes that adjudicators have broadly interpreted what constitutes a group that the government is unable or unwilling to control. Some decisions have held that crimes committed against the applicant by family members may constitute persecution if the government is unwilling or unable to protect the victim or prosecute the violator.

Note: Specific to US refugee status determination. Author abstract.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 27, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 3 considers state persecution vs. persecution by non-state agents (pp. 27-31). In most European countries, LGBTI claimants are required to have turned to the authorities for protection even if these are known to be homophobic or transphobic. The report recognizes that this is problematic as it can result in increased persecution against the claimant.

Note: Specific to European refugee status determination.

Millbank, Jenni. “Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation” (2003) 18:2 *Geo Immig LJ* 71.

This article examines the assumptions concerning the identity of lesbians and gays within the case law on refugee claims. The paper consists of a broad and comparative study of 300 decisions on granting refugee status on basis of sexuality from Canada and Australia from 1994-2000. It reflects upon the importance of understandings of private and public space in construing refugee claims on the basis of sexual orientation and examines how these themes are articulated in the case law focusing specifically on private homes, public toilets and hand-holding in public spaces. The author identifies agency and visibility as key concepts in refugee law on sexuality. The article concludes that there is a push of lesbian and gay rights into the private realm and that laws and processes must respect lesbian and gay choices and offer protection when, where and if, these individuals take chances.

Note: Specific to Australia and Canada.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 34, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss agents of persecution at paragraphs 34-37 stating that persecution can come from both state and non-state actors. “State persecution may be perpetrated...through the criminalization of consensual same-sex conduct and the enforcement of associated laws, or as a result of harm inflicted by officials of the State or those under the control of the State, such as the police or the military.” Persecution by non-state actors, including paramilitary or rebel groups, family members, neighbours or the broader community, “is established where the State is unable or unwilling to provide protection against such harm.”

(i) Persecution by the State

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 55.

Chapter 7 of this report considers the application of the key legal concepts to state-based harms which may be inflicted upon sexual minorities focusing on harms inflicted through: the criminalization of consensual same-sex conduct; the misconduct of police; and, state-sanctioned ‘moral police’ forces (pp. 55-61). The report highlights particular concerns relating to the way state-based harms have been conceived by the Australian Refugee Tribunal. It indicates that there is a need to develop the Tribunal’s empathy and ability to imagine what it means to be a sexual minority in the claimant’s country to ensure that better decisions are made. Additionally, the report recommends that developing a stronger human rights jurisprudential lens for Tribunal Members would achieve more just and fairer outcomes.

Note: Specific to Australian refugee status determination.

Lidstone, Robert. *Refugee Queerings: Sexuality, Identity and Place in Canadian Refugee Determination* (M Arts Thesis, Simon Fraser University, 2006) [unpublished], online: Simon Fraser University <<http://summit.sfu.ca/item/2415>>.

In this article, the author argues that “while refugee determination systems require that we consider the safety of individual persons on a country-by-country basis, it is highly problematic to conceive of the security of the person solely at the level of the state or in the formal law of the country. [T]he relationship between identity, sexuality, security and the state is sufficiently complex that such a restrictive interpretation of ‘state homophobia’ fails to adequately account for or contribute towards the improvement of the situation of sexual minorities globally”.

Note: Specific to Canadian refugee status determination.

National Center for Lesbian Rights, “The Challenges to Successful Lesbian Asylum Claims” (2013) at 6, online: National Center for Lesbian Rights <http://www.nclrights.org/wp-content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf>.

This report examines state-sponsored violence against lesbians (p. 6). The report discusses how state violence against lesbians differs from the open and public force used against gay men. Violence against lesbians is most often part of a government’s broader efforts to control women’s sexuality. Lesbians can also experience police persecution upon arrest including rape.

Note: Author abstract.

(ii) Persecution by Non-State Actors

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 61.

Chapter 7 of this report examines persecution of sexual minorities by non-state actors which includes familial, workplace and community-based persecution (pp. 61-4). For these harms to satisfy the definition of persecution in refugee claims made in Australia the harms must be serious enough to rise to a level of persecution and they must still satisfy a state nexus which is generally established by showing the state is unable or, owing to a well-founded fear, the claimant is unwilling to seek out state protection. The report indicates that there is a need to develop the Tribunal's empathy and ability to imagine what it means to be a sexual minority in the claimant's country of origin to ensure that better decisions are made. Additionally, the report recommends that developing a stronger human rights jurisprudential lens for Tribunal Members would achieve more just and fairer outcomes.

Note: Specific to Australian refugee status determination.

LaViolette, Nicole. "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13:2 Int'l JHR 437.

This article examines a specific evidentiary problem facing women and men who make refugee claims based on sexual orientation or gender identity persecution, namely, the extent to which independent country information provides adequate and useful evidence in support of their applications. The article notes that "persecution by non-state actors is even more difficult to document, particularly where directed at women whose stories may be more difficult to access. Examples of this type of persecution include 'therapeutic' practices to 'cure' homosexuality, domestic violence and honour killings." In discussing state protection the article states that "a significant number of claims identify private violence as the source of the feared persecution." The article discusses some cases where claims were rejected on the basis that the claimant was unable to produce documentary evidence of non-state persecution. This article also examines non-state persecution in relation to internal flight alternatives, stating that "meaningful protection in a different area of the country may indeed be available to a claimant where he or she is being persecuted by non-governmental entities acting independently of any governmental control or support."

Millbank, Jenni. "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melbourne UL Rev 144 at 158, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=676209>.

This article is based upon a comparative analysis of 331 decisions concerning sexuality from the refugee tribunals in Australia and Canada from 1994-2000. Part 3 of this article focuses on how lesbian sexuality is constructed as rightfully private and often therefore not requiring protection as it is believed that future persecution is unlikely or past persecution is characterized as 'merely personal' (pp. 158-163). This article finds that the "persecution of lesbians was often 'domestic' in the sense that it was at the hands of family members, former male partners or current female partners' families" as opposed to gay men's cases where the agent of persecution was usually a state actor. This characterization has resulted in many Australian tribunals denying refugee status because persecution is not based on a Convention

ground. The article also notes a difference in impact on lesbians cases between the Canadian and Australian Gender Guidelines.

Note: Focus is on Australia and Canada.

National Center for Lesbian Rights, “The Challenges to Successful Lesbian Asylum Claims” (2013) at 6, online: National Center for Lesbian Rights

<[http://www.nclrights.org/wp-](http://www.nclrights.org/wp-content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf)

[content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf](http://www.nclrights.org/wp-content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf)>.

This report examines the inability of state actors to protect lesbians (pp. 6-9). State violence against lesbians differs from the open and public force used against gay men. Violence against lesbians is most often part of a government’s broader efforts to control women’s sexuality. A considerable amount of the persecutions lesbians suffer is the result of governments’ unwillingness and inability to protect them from abuse by private actors. Lesbians are often subject to more discrete types of abuse and the primary threat to the safety and survival of lesbians comes from non-state actors including husbands and relatives. In order to make a claim of persecution based on abuse by non-state actors, an asylum applicant must (1) prove that she has been persecuted; and (2) that the government was ‘unwilling or unable to control those elements of its society responsible for targeting’ a particular class of individuals. This section discusses problems associated with proving the above two elements.

Note: Author abstract.

Neilson, Victoria. “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claim” (2005) 16 Stan L & Pol R 417.

This article focuses on lesbian refugee claimants in the USA. Part II examines “private sphere” vs “public sphere” harm and explains that the paradigm for asylum cases in the USA involves “public sphere” activity and harm that is more likely to befall men than women (pp. 425-39). The article examines the *In re Kasinga* and *In re R-A* decisions stating that they have enormous significance for lesbian asylum cases, both because purely private sphere harm was recognized as persecution and because the harm suffered by the two applicants was seen as part of a larger societal goal to subjugate women. This article also discusses how in claims that involve purely private conduct, it is helpful if the applicant has sought protection and has been turned away by the police. It is important for adjudicators to realize that the lack of protection by the government, by failing to enact or enforce protective laws for women, is also a form of persecution.

Note: Specific to US refugee status determination.

Oxford, Connie. “Queer Asylum: US Policies and Responses to Sexual Orientation and Transgendered Persecution” in Marlou Schrover & Deirdre M. Moloney, eds, *Gender, Migration and Categorisation: Making Distinctions between Migrants in Western Countries, 1945-2010* (Amsterdam: Amsterdam University Press, 2013) 127, online: Universiteit Van Amsterdam <<http://dare.uva.nl/document/503483#page=128>>.

This chapter examines US asylum laws (both legislative and case law) and policies regarding sexual orientation and transgendered persecution. It discusses the gendered nature of US asylum laws and policies towards lesbian, gay, bisexual and transgendered migrants, paying particular attention to the claims of gay men and transgendered women. The chapter examines persecution by non-state actors and discusses how family violence has emerged as the dominant narrative in asylum declarations by gay men and transgendered women (pp. 141-44).

Note: Specific to US refugee status determination. Author abstract.

(2) The Causal Link (“for reasons of”)

(a) Membership in a Particular Social Group (MPSG)

Birdsong, Leonard. “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution: The New Ground for Grants of Asylum” (2007) 35:1 *Wm Mitchell L Rev* 197, online: *William Mitchell Law Review* <<http://www.wmitchell.edu/lawreview/volume35/documents/birdsong.pdf>>.

Part 3 of this article examines particular social group in US asylum law (pp. 210-12). The article discusses how, until 2001, there were two seemingly conflicting standards for defining a ‘particular social group’. These were reconciled by the Ninth Circuit in *Hernandez-Montiel v. INS*⁹¹ holding “that a ‘particular social group’ is one united by a voluntary association...or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” The article recommends that the asylum statute should be amended to define ‘particular social group’ in a way that embraces individuals who are actually persecuted, even if they fail to qualify for asylum under the statute’s other enumerated categories.

Note: Specific to US refugee status determination. Author abstract.

Budd, Michael Carl. *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo, 2009) [unpublished] at 20, online: *American University in Cairo* <http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This thesis maps the history of the expansion and the evolution of the particular social group category to include refugee claims made on grounds of sexual orientation (pp. 12-20). The number of countries that grant asylum to LGBT refugees has grown to at least 20 since the first successful claims in Europe and North America were made in the 1980s. The author discusses some foundational cases on this issue from around the globe including *Ward* (Canada) *Applicant A* (Australia), *Shah and Islam* (UK) and *Matter of Acosta* and *Toboso-Alfonso* (US). The author also discusses cases from civil law jurisdictions.

Cowen, Tim et al. *Equality Network BEMIS & GRAMNet, Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow:

Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow
 <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 3 of this report briefly discusses the ‘social group’ under which claims relating to sexual orientation or gender identity are argued (pp. 49-51). The UK Border Agency’s Asylum Policy Instructions on ‘Sexual orientation and Gender Identity in the asylum claim’ states that “A group shall be considered to form a particular social group where, in particular: (1) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and (2) That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”

Note: Specific to UK refugee status determination. Focus on Scotland.

Goldberg, Suzanne. “Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men” (1993) 26 Cornell Int’l LJ 605.

This article uses a hypothetical case of a lesbian asylum seeker to illustrate the unique barriers faced by sexual minorities in making refugee claims in the United States. The article begins by noting that, in spite of global developments, many lesbians and gay men continue to face extreme persecution, including electroshock therapy, police harassment and other penalties, because of their sexual orientation. The article examines the definition of a Convention refugee and reviews judicial interpretations and legal tests derived from asylum case law, to determine the criteria for making a successful claim based on the ‘particular social group’ classification. It concludes by considering the refugee jurisprudence of other countries to determine the feasibility of establishing an international legal standard to recognize lesbians and gay men as a particular social group.

Note: Specific to US refugee status determination. Author abstract.

Hojem, Petter. “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia” (2009) Research Paper No. 181 UNHCR at 6, online: UNHCR
 <<http://www.unhcr.org/4b18e2f19.pdf>>.

Most often, persons seeking asylum on grounds of sexual orientation have been associated with membership in a ‘particular social group’ (pp. 6-7). In order to decide what constitutes a particular social group, UNHCR looks at both characteristics which are often ‘innate, unchangeable, or which is otherwise fundamental to identity’, as well as ‘perceived’ nature as a group by society. Some issues arise, however, when categorizing sexual minorities as constituting a particular social group. For example, this categorization may entail a static perspective on sexuality, that it is something that stays fundamentally unchanged in the individual throughout his or her life. This runs counter to much theory on sexuality, including strands of queer theory and it might pose serious problems in the refugee-status determination process and in the period following decision.

Jenkins, Ellen A. “Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgendered Asylum Seekers” (2009) 40:1 *Golden Gate U L Rev* 67, online: Digital Commons <<http://digitalcommons.law.ggu.edu/ggulrev/vol40/iss1/4>>.

This article discusses the problems that transgender asylum seekers face in the US in making asylum claims on the grounds of membership in a particular social group arguing that the social group currently applied to transgender individuals is socially inaccurate and unnecessarily narrow. The article discusses how although transgender individuals fall under the lesbian, gay, bisexual, and transgender umbrella, they present a distinct set of issues that serve to distinguish them from gay and lesbian asylum seekers. For purposes of obtaining asylum, many transgender individuals are forced to embrace membership in the social group ‘homosexual’ even though this accepted social group does not always match a transgender applicant's sexual orientation. The article argues that, as a result, the homosexual particular social group subsumes a transgender asylum applicant into a sexual identity he or she may not possess. The article concludes by recommending that the immigration judicial system modify its current definition of ‘particular social group’ to explicitly recognize the ‘transgender identity’ for asylum purposes.

Note: Specific to US refugee status determination. Author abstract.

Landau, Joseph. “‘Soft Immutability’ and ‘Imputed Gay Identity’: Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law” (2004) 32 *Fordham Urb LJ* 237 at 242, online: *Fordham University Law Journal* <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2126&context=ulj>>.

This article discusses the concept of membership in a ‘particular social group’ in American refugee law through an examination of various cases (pp. 242-45). The *American Immigration and Nationality Act* does not define ‘particular social group,’ leaving interpretation to the Board of Immigration Appeals and the federal courts.

Note: Specific to US refugee status determination.

LaViolette, Nicole. “December 30, 1991-February 22, 1993: Canada Grants Asylum Based on Sexual Orientation” in Lillian Faderman, Horacio Roque Ramirez, et al., eds., *Great Events from History: Gay, Lesbian, Bisexual, Transgender Events*, 2 vols, (Ipswich MA: Salem Press, 2007) at 555, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297638> (also available in *GLBT Life with Full Text : Online Database* (Ipswich, MA: EBSCO Publishing, 2005).

This article is a brief account of the first cases in Canada to recognized sexual orientation as a legitimate basis for refugee protection. It reviews the first two refugee applications from gay men that were granted refugee status in 1991 and 1992, as well as the 1993 Supreme Court case in *Ward* that confirmed that sexual orientation can constitute the basis of a particular social group.

Note: Specific to Canadian refugee law.

LaViolette, Nicole. “Les identités multiples et le droit des réfugiés” (2011) 35:3 *Can Ethnic Stud* 39, online : Social Science Research Network
 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803836>.

In legal discourse, identity markers such as race, religion, gender, or sexual orientation are often used to create judicial and legislative categories. However, we must ensure that we adequately use the identity markers to understand properly the experiences of people in target groups. This article addresses the refugee status claim process of the Immigration and Refugee Protection Act to determine if the identity categories, as currently defined, allow the Immigration and Refugee Board of Canada to systematically evaluate all the motives and ways of persecution for which claimants are victims. The article specifically examines the asylum claims invoking gender and sexual orientation to determine, in light of cases cited, whether the asylum claims recognise the intersection of these two identity markers. As for the enforcement of all laws, the article indicates that it is essential to identify the intersections between the various identity markers to allow people to faithfully expose their personal experiences and their intersectional identity. It is therefore suggested that the links between gender and sexual orientation should be more visible in the context of refugees’ rights.

Note: Specific to Canadian refugee status determination. Author abstract. Article in French.

LaViolette, Nicole. “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group” *Training Manual for Immigration and Refugee Board (IRB) Members*, last updated: May 2004, online: Social Science Research Network
 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763>.

The majority of refugee claims based on sexual orientation or gender identity are grounded on an individual’s membership in a particular social group and as a result, one of the elements to be satisfied in a refugee claim will be the claimant’s membership in that particular social group. Assessing the accuracy of the claimant’s sexual orientation or gender identity is a difficult, sensitive and complex task in the context of an administrative hearing. In particular, the very private and intimate nature of a claimant’s sexual orientation or gender identity poses real challenges for adjudicators who are nonetheless required to engage with claimants about their personal lives and relationships. This document outlines a suggested approach that adjudicators can use in questioning a claimant about their sexual orientation. The purpose of this approach is to provide adjudicators with a range of issues that they may explore with a claimant when membership in a particular social group is an issue to be determined in the refugee claim.

LaViolette, Nicole. “The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*” (1997) 55:1 *UT Fac L Rev* 1, online: Social Science Research Network
 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803862>.

The Canadian Immigration Act requires that refugee claimants establish a well-founded fear of persecution based on one of the enumerated grounds, namely race,

religion, nationality, membership in a particular social group, or political opinion. As sexual orientation is not enumerated, many lesbian and gay asylum seekers have attempted to establish their claim on the basis of ‘membership in a particular social group.’ The 1993 Supreme Court decision in *Canada (A.G.) v. Ward* has clarified that sexual orientation is a ground upon which a refugee claimant may claim membership in a particular social group because it is an innate or unchangeable characteristic. The decision in *Ward*, while a positive development, inappropriately classifies sexual orientation as an immutable personal characteristic. It suggests that lesbians and gay men are deserving of international protection only because they cannot change the personal attribute for which they are persecuted. Instead, refugee status should be granted because lesbians and gay men have a common social identity which is ascribed an inferior social and political status by their persecutors.

Note: Specific to Canadian refugee status determination. Author abstract.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 189.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘membership in a particular social group’ (pp. 189-93), this article discusses how while “the Guidance Note properly conveys that sexual orientation and gender identity are encompassed in several Convention grounds and that membership may also be imputed, UNHCR fails to comprehensively discuss several issues relating to the scope of the particular social group ground.” The Guidance Note fails to mention that intersex individuals may constitute a particular social group. Furthermore, the Guidance Note fails to “address trends in national case law that may eventually undermine the recognition of LGBT persons as constituting particular social groups.”

Leitner, Robert C. “Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities” (2003) 58:2 U Miami L Rev 679.

This article briefly discusses membership in a particular social group (pp. 691). The article argues that while the adoption of *Toboso-Alfonso* as precedent greatly facilitates the ability of sexual minority claimants to seek asylum on the basis of persecution on account of their sexual orientation or gender identity, it is unclear who exactly is protected by *Toboso-Alfonso*. The article discusses various definitions of particular social group which have emerged from various US circuit courts. The article also examines case law from Australia and the UK to elaborate on this principle.

Note: Specific to Australia, UK and US refugee status determination. Author abstract.

Margulies, Peter. “Asylum, Intersectionality and AIDS: Women with HIV as a Persecuted Social Group” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.E. 3.

This article explores the tension between the United States immigration policy, which generally excludes those who are HIV/AIDS positive, and the obligations of the US under international refugee law. The article argues that women with HIV/AIDS who are facing persecution in their own countries would constitute a particular social group under the definition of refugee in US law. The article also examines many of the negative perceptions regarding individuals with HIV and argues that focusing on this debate through the lens of asylum would allow for the inclusion of positive rights and freedoms.

Note: Specific to US. Author abstract.

Southam, Keith. “Who am I and Who Do You Want Me to Be-Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications” (2011) 86:3 Chicago-Kent L Rev 1363.

Part 3 of this article discusses the concept of ‘particular social group’ in US asylum law (pp. 1369). The article discusses *In re Toboso-Alfonso* which first established homosexuality as a basis for social group under US asylum law and which was designated as precedent in 1994. In discussing this case and the concept of particular social group, the article examines status vs. conduct; mutable vs. immutable; and, social perception and social visibility. The article concludes by recommending that practitioners craft persecution based applications that define LGBT identity through detailed status and conduct descriptors.

Note: Specific to US refugee status determination.

Sridharan, Swetha. “The Difficulties of US Asylum Claims Based on Sexual Orientation” (2008) Migration Information Source, online: Asylum Law <<http://www.asylumlaw.org/docs/sexualminorities/DiffiUSAsylumClaimsBasedonSO102908.pdf>>.

This article discusses the various challenges that sexual minorities face in making asylum claims based on sexual orientation or gender identity in the US including the focus on homosexual identity and not homosexual conduct in US laws. The article discusses how the form that US sexual-orientation asylum takes today is largely shaped by American constitutional and statutory law relating to the rights of same-sex couples. Although discrimination against sexual conduct is thus endorsed, the United States does not criminalize sexual identity. The article argues that this difference is largely paralleled in the context of asylum, in which claims based on discrimination against sexual conduct are shaky. Since the United States itself has laws that make homosexual conduct illegal, it becomes difficult for asylum applicants to argue they would receive adequate protection here from similar laws in their home countries. Therefore, immigration courts favor claims founded on persecution based on sexual identity.

Note: Specific to US refugee status determination. Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the*

Status of Refugees (October 23, 2012), HCR/GIP/12/01, at para 44, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

“Refugee claims based on sexual orientation or gender identity are most commonly recognized under the ‘membership of a particular social group’ ground.” The Guidelines discuss from paragraphs 44-49 two approaches to identifying a ‘particular social group’: ‘protected characteristics’ and ‘social perception.’ Regardless of which approach is applied, “there is broad acknowledgment that under a correct application of either of these approaches, lesbians, gay men, bisexuals and transgender persons are members of ‘particular social groups’ within the meaning of the refugee definition.” The Guidelines stress that when determining if a claimant is a member of a particular social group they should avoid reliance on stereotypes or assumptions because these can be misleading.

Walker, Kristen. “Sexuality and Refugee Status in Australia” (2000) 12:2 Int’l J Refugee L 175 at 178, online: International Journal of Refugee Law <<http://ijrl.oxfordjournals.org/content/12/2/175.full.pdf>>.

Part 2 of this article focuses on membership in a ‘particular social group’ as a basis for claiming refugee status (pp. 178-190). The article specifically examines whether ‘queer identity’ can constitute a particular social group within the meaning of the 1951 Convention by looking at four sub-categories: gay men and lesbians (who are generally treated by courts and tribunals as forming one social group, ‘homosexuals’); bisexuals; transgendered individuals; and, people living with HIV/AIDS. The article assesses the development of Australian jurisprudence in this area and takes into account jurisprudence from the UK, the US, Canada and New Zealand. The article concludes that Australian courts and tribunals have appropriately recognized that sexual minorities can constitute particular social groups.

Note: Focus on Australia, UK, USA, Canada and New Zealand.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses ‘particular social group’ in relation to refugee claims based on persecution on account of sexual orientation or gender identity (pp. 9-14). The article notes that “[S]exual orientation was accepted as the basis for a particular social group claim in most major refugee-receiving nations by the mid-1990s. In spite of this general acceptance, the question of whether gay people constitute a particular social group under the 1951 Convention still gives rise to discussion today.” The article examines how ‘particular social group’ has been interpreted by courts in Canada, UK and US, with examples from cases.

Note: Focus on Canada, UK and US. Author abstract.

(i) Sexual Orientation and MSPSG

Anker, Deborah & Sabi Ardalán. “Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law” (2012) 44 NYU J Int’l L & Pol 529.

This article discusses membership in a particular social group (pp. 542-52). In particular, the article examines whether it is immutable characteristics or activities that define the grounds of persecution. Additionally, the article discusses Hathaway and Pobjoy's comments on *S395* and *HJ and HT* in regards to particular social group membership.

Note: Focus on Australia, UK and US. Author abstract.

Benson, Christi Jo. "Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society" (2008-09) 30 Whittier LR 53.

This article discusses the unique difficulties that transgender claimants face in establishing that they are actual or imputed members of a particular social group in the context of the United States Asylum System (pp. 53-56). Transgender individuals that identify as gay or lesbian can make claims as members of these groups, however, those that do not can attempt to argue that transgender individuals constitute a protected social group based on their gender identity. The article also discusses that even though not all transgender individuals identify as gay or lesbian, they are often persecuted based on the perception that they are gay or lesbian. This imputed identity places them within a particular social group.

Note: Specific to US refugee status determination.

Braimah, Tim S. "The Admission of Lesbians and Gay Asylum Seekers to the USA: From Victory (*Ejusdem Generis*) to Complications (Social Visibility)" (2014) Middlesex University, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405759>.

Under US asylum law, lesbians and gay men are considered members of a particular social group as established by the case of *Toboso-Alfonso*. The phrase 'membership in a particular social group' was effectively defined in *Matter of Acosta*, based on the doctrine of *ejusdem generis*. The *ejusdem generis* approach was utilised until 2006, when the Board of Immigration Appeal (BIA) introduced a new interpretation of membership in a particular social group, known as the social visibility test, which requires lesbians and gay men to be visible and recognizable in their societies to be eligible for asylum. Unlike the BIA's social visibility test, the *ejusdem generis* approach grants asylum to lesbians and gay men on the basis that their sexuality is innate and fundamental to their identity. This article presents arguments to suggest that the social visibility test should be rejected by all US courts, and the *ejusdem generis* approach should be the only adopted test in interpreting membership in a particular social group, and used to adjudge refugee claims based on sexual orientation.

Note: Specific to US refugee status determination. Author abstract.

Cochran, Laurie Martha. "The Changing Tide of Immigration Law: Equality for All?" (1997) 26 Ga J Int'l & Comp L 673, at 682.

This article focuses on an examination of the *Pitcherskaia* case which was argued before the U.S. Court of Appeals for the Ninth Circuit on December 11, 1996. The article discusses the 'social group' concept and tensions that exist as to the

interpretation of social group as used in the American Immigration Act (pp. 682-4). According to the Ninth Circuit Court, the term ‘particular social group’ implies “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.” The author states that homosexuals clearly meet the criteria of the Ninth Circuit’s test.

Note: Specific to US refugee status determination. Report is from 1997. Author abstract.

Dauvergne, Catherine & Jenni Millbank. “Before the High Court: Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh” (2003) 25:1 Sydney L Rev 97 at 117, online: Sydney Law Review
<http://sydney.edu.au/law/slr/docs_pdfs/editions/slr_v25_n1_bhc.pdf>.

Part 7 of this article considers how a ‘particular social group’ should be defined in the context of the Australian refugee status determination process (pp. 117-123). The article discusses how, in cases of lesbians and gay men, their membership is treated as a given and while this broad categorization is advantageous, it also has disadvantages. “By broadly defining private sexual activity – not sexual identity, not same-sex relationships and not public expressions of sexual identity – as the protected ground, the tribunal has very narrowly defined the experience of lesbian and gay lives as if they were always and *only* sex.” As a result, “the group has been implicitly defined in two different ways within the decisions: homosexual is the group for the purposes of eligibility, but when the questions of persecution and nexus are raised the narrower group of ‘person wanting to have same-sex intercourse under secretive circumstances’ is the category under assessment.” The article argues that the best way to resolve the tension between broad and narrow definitions of the ‘particular social group’ in question is to follow the Australian High Court’s own jurisprudence: “define the group broadly as ‘homosexuals’ but then assess persecution and nexus with an appropriate understanding of the diversity of experiences and identities that are captured by this category.”

Note: Specific to Australian refugee status determination.

Davis, Tracy J. “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States” (1999) HR Brief, online: American University Washington College of Law
<<http://www.wcl.american.edu/hrbrief/v6i3/immigration.htm>>.

This article discusses sexual orientation and membership in a particular social group in US refugee law. The article discusses the *Toboso-Alfonso* and *Acosta* cases in examining how sexual minority claimants are able to make their claims for asylum under the particular social group category in US refugee law.

Note: Specific to US refugee status determination.

European Council on Refugees and Exiles, “ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status” (1997), online: Refworld
<<http://www.refworld.org/docid/3decd1fa4.html>>.

This article contains a good introduction to the concept of membership in a particular social group in sexual orientation applications for Convention refugee status. The report is brief and sets out arguments by various academics on this issue.

Gallelli, Liliana. “Asylum in the United States Based on Sexual Orientation” (2001) 3 J Legal Advoc & Prac 40.

This article explores sexual orientation as a basis for asylum and the interpretation of the law in its application to cases of this genre. Part 3 of the article examines membership in a particular social group (pp. 42-3). The article discusses the evolution of this concept in US refugee law looking at the *Matter of Acosta* and *Matter of Toboso* cases. Part 5 of the article undertakes a case study of *Hernandez-Montiel v. INS* which further considered if sexual orientation and gender identity can define a ‘particular social group’ (pp. 45-7).

Note: Specific to US refugee status determination. Author abstract.

Immigration Equality & National Immigrant Justice Center, “Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status” (2005) at 26, online: National Immigrant Justice Center <<http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>>.

This article discusses sexual orientation and membership in a particular social group (pp. 26-9). A claimant must prove that the persecution he or she fears is motivated by the claimant’s actual or in a particular social group. Since 1994, homosexual men have been recognized as a particular social group under American asylum law. An essential component of an asylum application for a lesbian or gay claimant will be proving that he or she is in fact gay. This may include testimony or documentation by past partners or friends living in the United States. The claimant must also provide evidence, either direct or circumstantial, that there is a nexus between the persecution and his or her sexual orientation.

Note: Specific to US refugee status determination. Author abstract.

International Commission of Jurists. “X, Y and Z: a Glass Half Full for “Rainbow Refugees”? The International Commission of Jurists’ Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel” (2014), online: Refworld <<http://www.refworld.org/pdfid/538dca6f0.pdf>>.

This article analyses the 7 November 2013 judgment of the Court of Justice of the European Union (CJEU) in the three joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*. The ruling arose from the asylum requests lodged in the Netherlands by three refugee applicants claiming to have a well-founded fear of persecution by reason of their same-sex sexual orientation in their countries of origin where consensual same-sex sexual conduct was and remains criminalized. The article discusses the interpretation of ‘particular social group’ that was adopted in the case (pp. 11-12). In ruling on this question, the CJEU adopted the cumulative application of the ‘protected characteristics’ and the ‘social perception’ approaches

to the definition of membership of a particular social group, despite the fact that the UNHCR's authoritative interpretation of the Refugee Convention does not support such a reading.

Note: Specific to Europe. Author abstract.

Juncker, Eva. "Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation" (1998) 4 J Int'l Legal Stud 253.

This article draws parallels between the asylum claims of gays and lesbians and women fleeing forced female genital mutilation, noting that all are based upon membership in a particular social group. Both groups are juxtaposed to analyze how the *Acosta* test, the test for granting asylum, is applied. Grants of asylum to women fleeing genital mutilation are supported by legal precedent, the Immigration and Naturalisation Service (INS) Guidelines, and the 1996 *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA). Grants of asylum to gays and lesbians are supported by legal precedent, ISN Guidelines, and growing humanitarian concern of the issues facing gays and lesbians. However the grants are not supported by any existing legislation and both groups are only afforded ISN guideline status, by which immigration officials are not bound. The article raises the question why female genital mutilation is not an ISN regulation-approved ground for asylum, when there exists considerable public and legislative condemnation for the practice. However, despite the rights of states to criminalize consensual same-sex sodomy, gays and lesbians may be granted asylum based on reasonable fear of persecution. The article argues that women seeking asylum due to the threat of female genital mutilation should be granted INS regulation-approved status, rather than guideline status.

Note: Specific to US refugee status determination. Author abstract.

Keenan, Sarah. "Safe Spaces for Dykes in Danger? Refugee Law's Production of the Vulnerable Lesbian Subject" (2011) in Sharron Fitzgerald, ed, *Regulating the International Movement of Women: From Protection to Control* (London: Routledge, 2011), online: SOAS <http://eprints.soas.ac.uk/14278/1/safe_spaces_dykes_in_danger.pdf London>.

This article examines how refugee law's requirement of an essentialised vulnerability from women applying for asylum on the grounds of sexuality persecution, serves to reinforce transnational power structures of patriarchy and racial oppression. The author argues that refugee law relies on and reproduces a discourse in which space and identity are represented as essential, static and separable from each other – so the claimant must prove that she is and always has been a "real and vulnerable lesbian" across multiple and very different spaces. Examining case law from Britain, Canada and Australia, the author argues that the criteria used to test the identity of these applicants produces an ideal vulnerable lesbian subject that reinforces rather than challenges normative boundaries of the nation-state. Refugee law requires women seeking asylum on the basis of sexuality persecution to perform their identities in a way that shows they are 'in place' among the receiving state's good gay and lesbian citizenry.

Note: Focus on Australia, Canada and UK. Author abstract.

LaViolette, Nicole. “December 30, 1991-February 22, 1993: Canada Grants Asylum Based on Sexual Orientation” in Lillian Faderman, Horacio Roque Ramírez, et al., eds., *Great Events from History: Gay, Lesbian, Bisexual, Transgender Events*, 2 vols, (Ipswich MA: Salem Press, 2007) at 555, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297638> (also available in *GLBT Life with Full Text : Online Database* (Ipswich, MA: EBSCO Publishing, 2005).

This article is a brief account of the first cases in Canada to recognized sexual orientation as a legitimate basis for refugee protection. It reviews the first two refugee applications from gay men that were granted refugee status in 1991 and 1992, as well as the 1993 Supreme Court case in *Ward* that confirmed that sexual orientation can constitute the basis of a particular social group.

Note: Specific to Canadian refugee law.

LaViolette, Nicole. “Les identités multiples et le droit des réfugiés” (2011) 35:3 *Can Ethnic Stud* 39, online : Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803836>.

In legal discourse, identity markers such as race, religion, gender, or sexual orientation are often used to create judicial and legislative categories. However, we must ensure that we adequately use the identity markers to understand properly the experiences of people in target groups. This article addresses the refugee status claim process of the Immigration and Refugee Protection Act to determine if the identity categories, as currently defined, allow the Immigration and Refugee Board of Canada to systematically evaluate all the motives and ways of persecution for which claimants are victims. The article specifically examines the asylum claims invoking gender and sexual orientation to determine, in light of cases cited, whether the asylum claims recognise the intersection of these two identity markers. As for the enforcement of all laws, the article indicates that it is essential to identify the intersections between the various identity markers to allow people to faithfully expose their personal experiences and their intersectional identity. It is therefore suggested that the links between gender and sexual orientation should be more visible in the context of refugees’ rights.

Note: Specific to Canadian refugee status determination. Author abstract. Article in French.

LaViolette, Nicole. “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group” *Training Manual for Immigration and Refugee Board (IRB) Members*, last updated: May 2004, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763>.

The majority of refugee claims based on sexual orientation or gender identity are grounded on an individual’s membership in a particular social group and as a result, one of the elements to be satisfied in a refugee claim will be the claimant’s membership in that particular social group. Assessing the accuracy of the claimant’s sexual orientation or gender identity is a difficult, sensitive and complex task in the

context of an administrative hearing. In particular, the very private and intimate nature of a claimant's sexual orientation or gender identity poses real challenges for adjudicators who are nonetheless required to engage with claimants about their personal lives and relationships. This document outlines a suggested approach that adjudicators can use in questioning a claimant about their sexual orientation. The purpose of this approach is to provide adjudicators with a range of issues that they may explore with a claimant when membership in a particular social group is an issue to be determined in the refugee claim.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 15, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses the grounds upon which sexual minorities can base their refugee claims. It first discusses and examines the nuances of membership in a particular social group based on sexual orientation (pp. 15-17). In 1993, the Supreme Court of Canada clarified in *Ward* that sexual orientation can constitute the basis of a claim for membership in a particular social group.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. "The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*" (1997) 55:1 UT Fac L Rev 1, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803862>.

The Canadian Immigration Act requires that refugee claimants establish a well-founded fear of persecution based on one of the enumerated grounds, namely race, religion, nationality, membership in a particular social group, or political opinion. As sexual orientation is not enumerated, many lesbian and gay asylum seekers have attempted to establish their claim on the basis of 'membership in a particular social group.' The 1993 Supreme Court decision in *Canada (A.G.) v. Ward* has clarified that sexual orientation is a ground upon which a refugee claimant may claim membership in a particular social group because it is an innate or unchangeable characteristic. The decision in *Ward*, while a positive development, inappropriately classifies sexual orientation as an immutable personal characteristic. It suggests that lesbians and gay men are deserving of international protection only because they cannot change the personal attribute for which they are persecuted. Instead, refugee status should be granted because lesbians and gay men have a common social identity which is ascribed an inferior social and political status by their persecutors.

Note: Specific to Canadian refugee status determination. Author abstract.

Lewis, Rachel. "Deportable Subjects: Lesbians and Political Asylum" (2013) 25:2 Feminist Formations 174.

This article discusses the challenges that lesbian asylum seekers face in obtaining refugee protection (pp. 177-81). The article argues that the greatest challenge facing lesbian asylum claimants is not being able to prove their sexual orientation on membership of a particular social group. The article states that while sexual orientation and gender identity have been grounds for asylum since the mid-1990s under the category of membership of a particular social group, it is still the case that the closer one's application conforms to the traditional model of the male political activist fleeing an oppressive regime, the more likely one is able to obtain asylum.

Note: Focus on UK. Author abstract.

Lewis, Rachel. "The Cultural Politics of Lesbian Asylum: Angelina Maccarone's *Unveiled* (2005) and the Case of the Lesbian Asylum-Seeker" (2010) 12:3-4 *Int'l Fem J Pol* 424.

Although asylum for lesbians, gays, bisexuals and transsexuals has been on the international human rights agenda since the early to mid-1990s, lesbian asylum cases do not tend to figure centrally in analyses of the relationship between refugee law and international human rights law. While a number of regional and comparative studies of lesbian asylum exist by legal activists and scholars, a discussion of the politics of lesbian asylum claims has so far remained absent from both feminist and queer studies. This article explores how the subject of lesbian asylum is treated within the context of film and visual media. Focusing particular attention on Angelina Maccarone's 2005 film *Unveiled* about an Iranian lesbian asylum-seeker, the article considers the ways in which film and media might transform how we conceive of and imagine lesbian rights. It suggests that *Unveiled* offers important insights into the kinds of representational challenges that are specific to lesbian asylum claims and it argues that, in this way, the film constitutes a much-needed intervention into current advocacy on behalf of the issue of lesbian asylum.

Note: Author abstract.

McGhee, Derek. "Persecution and Social Group Status: Homosexual Refugees in the 1990s" (2001) 14 *J Refugee Stud* 20.

This article examines membership in a particular social group based on sexual orientation in the UK. The article describes how the 1951 Refugee Convention has traditionally been interpreted in the UK to the disadvantage of 'non-traditional' social groups such as male homosexuals. The article provides a critical overview of UK cases in the 1990s where homosexuals were excluded from the social group definition. The article then examines a noticeable shift in the determination of cases based on sexual orientation in Canada, New Zealand and the USA which had an impact on UK cases in the late 1990s. The article argues that this shift was achieved as a result of the forging of connections between international refugee law and human rights law.

Note: Focus on Canada, New Zealand, UK and the USA.

McGhee, Derek. "Queer Strangers: Lesbian and Gay Refugees" (2003) 73 *Feminist Rev* 145.

When we consider sexuality as the grounds of an application for refugee status we enter into a highly charged discursive field which has existed since the introduction

of the United Nations Convention of 1951. This controversy surrounds the provision for persecution on account of membership of a particular social group. This is one of the most contested 'provisions' in refugee law. Lesbian and gay applications for refugee status under the persecuted social group category are characterized by the following two problems: (1) can groups whose associations are those of choice, rather than familial, tribal and racial bonds be included in the convention 'social group' status?; and (2) how can membership of a group be proven when some groups, such as lesbians and gays, form clandestine and secretive 'associations' in cultures that are hostile to them?

Note: Focus on UK refugee status determination. Author abstract.

Meister, Julia Blanche. "Orientation-Based Persecution as Grounds for Refugee Status: Policy Implications and Recommendations" (1995) 9 Notre Dame J L Ethics & Pub Pol'y 275, online: Notre Dame Journal of Law, Ethics and Public Policy <<http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1423&context=ndjlepp>>.

This article argues that homosexuals are members of a 'social group' for the purposes of refugee law. It suggests that an appropriate policy response to the growing reports of violence against homosexuals in other countries which have been presented by non-governmental organizations and the international press. It explores the US' legal and ethical obligations to grant asylum to those who satisfactorily prove a 'well-founded fear of persecution'. The article's policy recommendations acknowledge the inherent conflict between 'compassion and control,' the INS' recently articulated twin goals for asylum reform. It is important to note that this article is from 1995, before sexual orientation as a particular social group was widely accepted; however, the article provides good arguments as to why this classification is correct.

Note: Specific to US refugee status determination.

Middelkoop, Louis. "Normativity and Credibility of Sexual Orientation in Asylum Decision Making" in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

In this chapter, thirteen sexual orientation asylum cases adjudicated in the Netherlands are studied. The results indicate that credibility of the asylum seeker's sexual orientation is very relevant for status determination in the Netherlands. This warrants an evaluation of how the particular social group is defined and how the credibility of an asylum seeker's sexual orientation is assessed in practise. Accordingly, the chapter addresses three corresponding questions. First, how does the Immigration and Naturalization Service (IND) define the particular social group of homosexuals? Second, how is this definition applied in practise? Third, how should definition and practise be evaluated?

Note: Specific to the Netherlands refugee status determination. Author abstract.

Millbank, Jenni. "Fear of Persecution or Just a Queer Feeling" (1995) 20 Alternative LJ 261.

This article discusses decisions by the Australian Refugee Review Tribunal regarding the claims of six gay men from Iran, China, Fiji and Zimbabwe to refugee status on

the basis that they had been or would be persecuted in their nation of origin. The article discusses the two issues to be decided in the cases which were: whether being homosexual qualified as membership of a ‘particular social group’ and whether each individual claimant had a ‘well-founded fear of being persecuted’ based on his homosexuality.

Note: Specific to Australian refugee status determination. Author abstract.

Miller, Alice M. “Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity” in Brad Epps, Keja Valens & Bill Johnson Gonzalez, eds, *Passing Lines: Sexuality and Immigration* (Cambridge, MA: David Rockefeller Center for Latin American Studies, Harvard University, 2005) 137.

This article examines sexual orientation as a ‘particular social group’, specifically arguing that this categorization serves to naturalize and globalize Western identity categories like ‘gay’ and ‘lesbian’ despite the varying social significance and subjective meaning of sexual orientation and gender identity. The article discusses how the nature of the refugee status determination process demands that it develop standardized procedures for adjudicating claims and that it has a tendency to generate “rules for ‘seeing’ persecuted gayness that preclude or exclude unrecognizably ‘gay’ persons, or others fleeing abuse for their sexual or gender difference.” The author offers a particularly cogent explanation of asylum's political preoccupations, which she argues rest upon the following principles: finitude (limiting numbers), credibility (assuring truthfulness), acceptability (of protected persons' identities), distinguishability (separating worthy from unworthy queers), and identity (recognition of status, not just conduct).

National Center for Lesbian Rights, “The Challenges to Successful Lesbian Asylum Claims” (2013), online: National Center for Lesbian Rights <http://www.nclrights.org/wp-content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf>.

This article addresses the difficulties in determining that lesbians are members of a particular social group (pp. 2-6, 10-1). The purpose of this paper is to explain the factors that complicate lesbian applications for asylum based on sexual orientation and to provide a greater understanding of the complex and multiple issues inherent to lesbian asylum claims. Part II discusses legal challenges to lesbian asylum claims. In 1996, the American Immigration and Naturalization Service formally adopted the position that ‘homosexuals do constitute a particular social group.’ However, despite this positive affirmation, nearly all the precedential homosexual asylum cases, including all of those mentioned, have involved homosexual men. These cases have created a framework for decisions based primarily on the homosexual male identity and experience. This construction presents two challenges in regards to lesbian asylum claims. First, what is the scope of the particular social group when it applies to lesbians? Second, how does an applicant prove that she is a member of that social group?

Note: Specific to US refugee status determination.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 9.

Part 2 of this report examines sexual orientation and particular social group membership (pp. 9-11). The report discusses the ‘protected characteristics’ or immutability approach and the ‘social perception’ or ‘objective observer approach’ noting that a wide variety of jurisdictions have applied either of the two approaches to conclude that social-group protection against persecution exists for gays and lesbians. The report states that claims of bisexuals on social group grounds have not fared as well often because decision-makers have attributed to bisexuality a certain flexibility which many believe inconsistent with the requirement of ‘immutability’. The report states that “the Yogyakarta Principles provide, for the first time, a reliable framework that steers away from the group-by-group approach by deemphasizing named groups and focusing instead on the broader concepts of sexual orientation and gender identity under the ‘particular social group’ rubric.”

Park, Jin S. “Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy” (1995) 42 UCLA L Rev 1115, at 1122.

This article argues that the U.S. should be able to grant asylum to gay men and lesbians as a social group when they are subject to a well-founded fear of persecution in their country of origin. Part I of the article examines various American courts’ definitions of ‘social group’ including the B.I.A. definition and proposes that courts should consider the persecutor’s criteria for targeting a particular group of victims rather than the nature of the victim’s characteristics in defining ‘social group’ (pp. 1122-36). The article concludes that under U.S. decisions that follow the B.I.A. approach and the *Gomez* approach, gay men and lesbian women are almost certain to qualify as social group. It is important to note that this article is from 1995, before sexual orientation as a particular social group was widely accepted; however, the article provides good arguments as to why this classification is correct.

Note: Specific to US refugee status determination.

Pfitsch, Hollis V. “Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity” (2006) 15 L & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues 59.

This article examines the concept of particular social group in US asylum law (pp. 64-71). The article discusses how different courts in the US have interpreted ‘particular social group’ and its requirements with examples from precedential cases. It states that “the test for ‘particular social group’ remains unclear and could exclude some LGBT immigrants who cannot demonstrate the requisite ‘association’ with other gays and lesbians because they have not come out publicly.”

Note: Specific to US refugee status determination. Author abstract.

Ramanathan, Erik. “Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence” (1996) Geo Immig LJ.

This article compares thirty asylum decisions from Australia, Canada, the UK and the US with the aim of enabling the reader to compare the queer asylum jurisprudence of several nations and to understand the issues and solutions debated in each jurisdiction. Part II discusses membership in a particular social group (pp. 5-9) and then compares the interpretation of this concept in the four jurisdictions (pp. 17-44). The article states that most of the initial queer asylum opinions in each jurisdiction primarily addressed not whether queers experienced a well-founded fear of persecution in their home countries, but whether queers could constitute a particular social group. At least 10 countries now consistently accept that gay men and lesbians comprise a social group within the meaning of the Convention's definition of refugee. This fact, however, disguises the significant degree to which each nation varies in its interpretation of the social group concept.

Note: Focus on Australia, Canada, UK and US.

Rehaag, Sean. "Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia" (2009) 13 Int'l JHR 415, online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1683623>.

This article offers an analysis of refugee claims on grounds of bisexuality by empirically assessing the success rates of bisexual refugee claimants in Canada, the United States, and Australia. The article concludes that bisexuals are significantly less successful than other sexual minority groups in obtaining refugee status in those countries. Through an examination of selected published decisions involving bisexual refugee claimants, the author identifies two main areas of concern that may partly account for the difficulties that bisexual refugee claimants encounter: the invisibility of bisexuality as a sexual identity, and negative views held by some refugee claim adjudicators towards bisexuality as well as the reluctance of some adjudicators to grant refugee status to sexual minorities who differ from gay and lesbian identities as traditionally understood.

Note: Focus on Australia, Canada and the US. Author abstract.

Rehaag, Sean. "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 McGill LJ 59, online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1468712>.

This article examines why the success of refugee claimants alleging a fear of persecution on account of bisexuality are far less successful than other sexual minority groups. The author contends that a major cause of the difficulties bisexual refugee claimants encounter is establishing their membership in a particular social group. This is because the dominant understanding of sexual orientation is that it is an innate and immutable personal characteristic, however, the life experiences of many bisexual claimants cannot be easily located within such an understanding. This leads many adjudicators to approach accounts of bisexual life with skepticism. The author concludes that adjudicators should embrace an alternative understanding of sexual orientation that can accommodate a multitude of sexual minority life stories. The author presents specific ways in which this may be applied to decision making

regarding sexual-minority refugee claims and which encourage decision makers to focus not on the sexual identity of claimants but rather on evidence of their persecution on account of traditional gender roles and compulsory heterosexuality.

Note: Specific to Canadian refugee status determination. Author abstract.

Sussman, Aaron. “Expanding Asylum Law's Pattern-or-Practice-of-Persecution Framework to Better Protect LGBT Refugees” (2013) 16 U Pa JL & Soc Change 111, online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2097158>.

This Article posits the infrequently used pattern-or-practice-of-persecution framework as uniquely compatible with assessing persecution on account of an applicant's membership in an LGBT-based social group. Part 1 of this article discusses LGBT status as a basis for membership in a particular social group (pp. 8-12). The article examines how this concept has evolved in US refugee law.

Note: Specific to US refugee status determination.

Vagelos, E. “The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status-Comment on *Re: Inaudi*” (1993) 17 Fordham Int'l LJ 228.

In April 1992, the Canadian Convention Refugee Determination Division of the Canadian Immigration and Refugee Board granted refugee status to an Argentine man who was persecuted in Argentina because of his homosexuality. The Canadian IRB held in *Re: Inaudi* that homosexuals constitute a particular social group for the purpose of satisfying the definition of ‘refugee’. This article argues that *Re: Inaudi* provides a thorough analysis of why homosexuals constitute a particular social group, integrating into its decision the various factors that the US has applied in determining what constitutes a particular social group in general. The article further argues that US courts and administrative agencies should rely on *Re: Inaudi* to hold that homosexuals constitute a particular social group.

Note: Focus on Canada and US.

(ii) Gender Identity and MSPG

Abdi, MA. *Gender Outlaws between Earth and Sky: Iranian Transgender Asylum Seekers Trapped within (Inter)National Heteronormative Frameworks* (M A Thesis, Central European University, Feb. 2011), online: Central European University

<<http://goya.ceu.hu/search~S0?/aabdi/aabdi/1%2C4%2C4%2CB/frameset&FF=aabdi+mohammad+ali&1%2C1%2C/indexsort=->>>.

This thesis aims at understanding the Iranian Islamic Republic's recognition of sex-change operations and the UNHCR's acceptance of transgender people as potential refugees by looking at the dominant politics of gender and sexuality in the Islamic Republic and on the international level. Invoking interviews conducted in Turkey, the thesis shows that disciplining trends on national and international levels, which inform and are informed by each other, works as discriminating against those

transgender people who do not fit within the dominant definition of discreet transgender citizens along the binary lines of male/female and man/woman.

Note: Focus on Iran. Author abstract.

Bach, Jhana. “Assessing Transgender Asylum Claims”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 34, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the challenges facing transgender individuals in navigating the UK refugee status determination process. Transgender individuals can make their refugee claims based on their membership in a particular social group constituted by their gender identity. Establishing membership is not always easy given that applicants are expected to be able to identify as transgender upon their first interview, in spite of the fact that asylum seekers may not be familiar with UK transgender terminology, and therefore may not know how to describe themselves to the UK Border Agency. Furthermore, membership may also not be established given that decision-makers refer to practices which are common in the UK and often neglect the consideration that transitioning is often not socially, medically or legally possible in the applicant’s country of origin.

Note: Specific to UK refugee status determination.

Bell, Mark. *Protecting LGBT People Seeking Asylum: Guidelines on the Refugee Status Directive* (Brussels: ILGA Europe, 2005), online: ILGA Europe <www.rfsf.se/public/ilga_eudirektivprotecting.pdf>.

In 2004, the European Union adopted a Directive setting out the minimum rules governing conditions under which refugee status is granted. It applies to third country nationals (i.e. persons from outside the EU) who request asylum within a Member State of the EU. It covers the criteria for being awarded refugee status, but also the rights of persons once they are recognised as refugees. This report briefly discusses persecution of transgender persons (p. 11). While the Directive does not make specific reference to persecution based on ‘gender identity’, the Directive does recognize that ‘gender-specific’ acts fall within the concept of persecution.

Note: Specific to Europe. Author abstract.

Benson, Christi Jo. “Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society” (2008-09) 30 *Whittier LR* 53.

This article discusses the unique difficulties that transgender claimants face in establishing that they are actual or imputed members of a particular social group in the context of the United States Asylum System (pp. 53-56). Transgender individuals that identify as gay or lesbian can make claims as members of these groups, however, those that do not can attempt to argue that transgender individuals constitute a protected social group based on their gender identity. The article also discusses that even though not all transgender individuals identify as gay or lesbian, they are often persecuted based on the perception that they are gay or lesbian. This imputed identity places them within a particular social group.

Note: Specific to US refugee status determination.

Berg, Laurie & Jenni Millbank. “Developing a Jurisprudence of Transgender Particular Social Group” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887>.

This chapter analyzes refugee status determinations in claims brought by applicants who articulate a fear of persecution on the basis that they are transgender which is broadly defined to include those who are transsexual, cross-dressing, transvestite or who identify strongly with another gender. The study examines all publicly available decisions concerned with gender identity made by administrative tribunals and courts in Australia, New Zealand, Canada, the United Kingdom and the United State. The authors indicate that, while trans claims appeared relatively successful, the jurisprudence in this area is fundamentally incoherent. The chapter argues that the specific issues raised by trans asylum claims must be examined within an overarching analysis of persecution related to gender non-conformity, a framework which allows for complex intersections between sexuality, gender identity and gender. Attending to the claimant’s experience of gender non-conformity requires a careful and flexible process of setting out the particular social group.

Note: Focus on Australia, Canada, New Zealand, the United Kingdom and the United States refugee status determination. Author abstract.

Buscher, Dale. “Unequal in Exile: Gender Equality, Sexual Identity and Refugee Status” (2011) 3:2 *Amsterdam L Forum* 92, online: *Amsterdam Law Forum* <<http://ojs.uvu.vu.nl/alf/article/view/199>>.

This article examines gender identity in asylum claims. It discusses the disconnect between international law and United Nations policy on the one hand which increasingly includes the promotion of gender equality in its policies and programmes and national legislation and host country practice on the other which repress expressions of gender identity. The author notes that this is highly problematic for LGBTI refugees because not only may their sexual orientation and gender identity be the primary basis for their refugee claim, the countries of asylum where they flee for protection and safety are often as discriminatory and repressive as those that they have left. The author argues that the protection of LGBTI refugees not only requires a gender-sensitive interpretation of the definition of refugee but also a gender-sensitive refugee status determination procedure.

De La Maza, Pérez Tamayo. “(Re) Producing Transgender Invisibility in Asylum Law” (2013) *J Chicano Stud* 235.

This article responds to a lack of research on certain queer and disabled bodies focusing on transgender migrants. The article offers a crip/queer feminist theoretical examination of representations of transgender migrants in US asylum-based legal scholarship in an effort to both deconstruct the oppositional processes that attempt to produce cohesive national identities, as well as to recover, re-center, and redefine

the counter-hegemonic bodies that bear the brunt of this constitutive violence. The article examines the state as a primary stakeholder in transgender asylum processes discussing, in particular, the required narratives of persecution, the strategic use of ‘imputed gay identity’ in transgender asylum cases, and the creation, regulation and maintenance of idealized notions of authenticity. These issues are analyzed through the immutability standard on which transgender asylum claims are dependent.

Note: Specific to US refugee status determination. Author abstract.

Foster, Michelle. “Why We Are Not There Yet: The Particular Challenge of ‘Particular Social Group’” in Efrat Arbel, Catherine Dauvergne & Jenni Millbank, eds, *Gender in Refugee Law From the Margins to the Centre* (Routledge: 2014).

This chapter examines and explores current challenges in interpreting social group for claims based on gender and gender identity. The chapter notes the challenges of establishing membership in a particular social group for claims based on gender or gender identity given the lack of explicit reference to ‘women’, ‘sex’, ‘gender’, ‘homosexuality’, or ‘gender identity’ in the 1951 Refugee Convention. It begins with a brief overview of the key conceptual approaches to interpreting the social group ground, outlining and explaining the two dominant approaches. The chapter then analyzes a wide range of jurisprudential developments both common law and civil law, concerning social group over the past ten years in order to identify why many gender-based claims fail at this crucial stage. The chapter concludes by making some recommendations that might guide decision-making in the future.

Gallelli, Liliana. “Asylum in the United States Based on Sexual Orientation” (2001) 3 J Legal Advoc & Prac 40.

This article explores sexual orientation as a basis for asylum and the interpretation of the law in its application to cases of this genre. Part 3 of the article examines membership in a particular social group (pp. 42-3). The article discusses the evolution of this concept in US refugee law looking at the *Matter of Acosta* and *Matter of Toboso* cases. Part 5 of the article undertakes a case study of *Hernandez-Montiel v. INS* which further considered if sexual orientation and gender identity can define a ‘particular social group’ (pp. 45-7).

Note: Specific to US refugee status determination. Author abstract.

Jenkins, Ellen A. “Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgendered Asylum Seekers” (2009) 40:1 Golden Gate U L Rev 67, online: Digital Commons <<http://digitalcommons.law.ggu.edu/ggulrev/vol40/iss1/4>>.

This article discusses the problems that transgender asylum seekers face in the US in making asylum claims on the grounds of membership in a particular social group arguing that the social group currently applied to transgender individuals is socially inaccurate and unnecessarily narrow. The article discusses how although transgender individuals fall under the lesbian, gay, bisexual, and transgender umbrella, they present a distinct set of issues that serve to distinguish them from gay and lesbian asylum seekers. For purposes of obtaining asylum, many transgender individuals are

forced to embrace membership in the social group 'homosexual' even though this accepted social group does not always match a transgender applicant's sexual orientation. The article argues that, as a result, the homosexual particular social group subsumes a transgender asylum applicant into a sexual identity he or she may not possess. The article concludes by recommending that the immigration judicial system modify its current definition of 'particular social group' to explicitly recognize the 'transgender identity' for asylum purposes.

Note: Specific to US refugee status determination. Author abstract.

Landau, Joseph. "Soft Immutability' and 'Imputed Gay Identity': Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law" (2004) 32 Fordham Urb LJ 237 at 246, online: Fordham University Law Journal
<<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2126&context=ulj>>.

This article discusses recent cases from the Ninth Circuit Court which adopted a soft immutability standard of identity and expanded asylum protection to transgender individuals (pp. 246-55). This soft immutability standard reduces the need for scientific or biological proof through static characteristics by way of chromosomal makeup, sex organs or the sexual identity assigned at birth. Rather, transgender asylum seekers can seek protection based on traits adopted over time yet integral to identity. These cases signal a consensus in the Ninth Circuit that those who deviate from established gender norms deserve no less protection than those who are gay or lesbian. Although the cases do not dispense with the immutability requirement entirely, they show remarkable flexibility in terms of what can constitute an immutable trait.

Note: Specific to US refugee status determination. Author abstract.

LaViolette, Nicole. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19:2 Int'l J Refugee L 180, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1149667>.

In 1993, the Immigration and Refugee Board of Canada adopted guidelines entitled Women Refugee Claimants Fearing Gender-Related Persecution. The Guidelines represent a cutting edge approach and have helped to guarantee a refugee determination process for women refugees that is more sensitive to gender-related claims of asylum. However, this article demonstrates that the concept of gender-based persecution, as it is presently defined, makes it difficult for members of the Board to systematically evaluate all types of gender-related persecution, to which certain men and women are subjected. Part 2 of this article examines the applicability of the Guidelines to transgendered claimants arguing that these claims clearly raise the issue of persecution based on gender. The article notes that "some Board members have difficulty distinguishing 'sexual orientation' from 'sexual identity', which may partially explain the lack of gender-specific analyses." It states that "the lack of gender-specific analyses in the cases of transsexual claimants suggests, once again, that the conceptual framework of the Guidelines is not being applied in all instances where the Guidelines are relevant."

Note: Specific to Canadian refugee status determination process. Author abstract.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 189.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘membership in a particular social group’ (pp. 189-93), this article discusses how while “the Guidance Note properly conveys that sexual orientation and gender identity are encompassed in several Convention grounds and that membership may also be imputed, UNHCR fails to comprehensively discuss several issues relating to the scope of the particular social group ground.” The Guidance Note fails to mention that intersex individuals may constitute a particular social group. Furthermore, the Guidance Note fails to “address trends in national case law that may eventually undermine the recognition of LGBT persons as constituting particular social groups.”

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 18, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses the grounds upon which sexual minorities can base their refugee claims. It first discusses membership in a particular social group based on gender identity focusing on transgendered and intersex individuals (pp. 18-19). The report notes that some decision-makers have had difficulty distinguishing ‘sexual orientation’ from ‘gender identity’ and that this may explain the lack of gender-specific analyses in transgender and intersex cases. The report cites the UNHCR Guidelines which state that, “transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual.” The report also stresses the importance of referring to transgender claimants by their chosen name and gender identity.

Note: Specific to Canadian refugee status determination.

Mohyuddin, Fatima. “United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered” (2001) 12:2 Hastings Women’s LJ 387.

This article discusses the development of United States asylum law and its recognition of sexual minorities. Specifically, this article examines the meaning of the term ‘third gender’ for asylum claims. The article explains the concept of a third gender by looking beyond the gender categories of male and female and its implications for United States asylum law by examining how transgender individuals can claim persecution based on membership in a particular social group. The article discusses the various interpretations of particular social group in US asylum law.

Note: Specific to US refugee status determination. Author abstract.

Neilson, Victoria. “Immigration Law and the Transgender Client: A Practical Guide and Introduction” (2008) American Immigration Lawyers Association Immigration Law Today, online: Immigration Equality <http://www.immigrationequality.org/wp-content/uploads/2011/08/ILT-Neilson_SepOct08_Final.pdf>.

This article discusses the ‘particular social group’ category in regards to transgender individuals. The article notes that “although there has not yet been a precedential case that explicitly addresses whether transgender identity constitutes a ‘particular social group’, there have been several Ninth Circuit US Court of Appeals cases where the claimant is clearly transgender.” In *Hernandez-Montiel v. INS*, the Ninth Circuit found that ‘gay men with female sexual identity’ comprised a particular social group in Mexico. The article argues that because there have been several cases that have recognized the particular social group of ‘gay males with female sexual identities’, “it may be strategic to advance this as one particular social group construction in an applicant’s asylum claim, provided that the applicant can truthfully state that this is a way that he or she self-identifies.”

Note: Specific to US refugee status determination. Author abstract.

Neilson, Victoria. “Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims” (2005) 32 Fordham Urb LJ 265, online: Fordham Law Archive of Scholarship & History <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2130&context=ulj>>.

This article focuses on individuals who believe that they are born with the wrong anatomical sex and who suffer persecution as a result of their transgender identity. The article discusses existing precedent in the context of transgender asylum seekers and suggests possible theories for framing successful transgender asylum claims. Part I explains the legal standard for asylum claims specifically focusing on the definition of the ‘particular social group’ category of protection within US asylum law because this is the category under which transgender applicants would put forward their asylum claims (pp. 106-09; 112-13). The article discusses various cases which have defined ‘particular social group’. The article notes that, “unlike sexual orientation claims, there has yet to be a precedential decision establishing transgender individuals as members of a particular social group, however, the inclusion of sexual orientation as a viable particular social group has opened the door to the possibility for other sexual minorities to fit within this category.”

Note: Specific to US refugee status determination. Author abstract.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 11.

Part 2 of this report examines gender identity and particular social group membership (pp. 11-12). The report discusses the ‘protected characteristics’ or ‘immutability approach’ and the ‘social perception’ or ‘objective observer approach’ used in determining membership in a particular social group. The report states that claims based on gender identity have met with less success than those based on sexual orientation. Furthermore, no published decisions have been found regarding

intersex individuals who often suffer persecution for having physical and sexual attributes of both sexes. The report states that “the Yogyakarta Principles provide, for the first time, a reliable framework that steers away from the group-by-group approach by deemphasizing named groups and focusing instead on the broader concepts of sexual orientation and gender identity under the ‘particular social group’ rubric.”

(iii) Gender and MPSG

Berger, Susan. “Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States” (2009) 34:3 Signs 659.

This article examines gender and sexuality focusing on six asylum cases from Latin America. The author discusses how lesbian asylum seekers have difficulty convincing the courts that the level of oppression they have faced is equivalent to persecution. Part of the problem is that the women may not self-identify as lesbians and they may take great pains to hide their sexual interest in women. Additionally, lesbian persecutions are often of a private nature. Given that lesbians face some of the same translation dilemmas that heterosexual female asylum seekers face, advocates for lesbian asylum seekers have begun to adjudicate their cases within a gender-based framework of persecution rather than within ‘the predominantly male, sexual orientation-based’ persecution framework.

Note: Specific to US refugee status determination. Author abstract.

Birdsong, Leonard. “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution: The New Ground for Grants of Asylum” (2007) 35:1 Wm Mitchell L Rev 197, online: William Mitchell Law Review <<http://www.wmitchell.edu/lawreview/volume35/documents/birdsong.pdf>>.

Part 4 of this article discusses claims by women seeking asylum as a result of gender-based violence noting that these claims have not always fared well (pp. 213-20). A number of such cases of women seeking asylum from persecution involved women who had been abused by husbands or significant other male figures in their lives who had no connection to the government. While many have stated that granting women asylum based upon such perceived ‘domestic abuse’ on the ground that they comprise a ‘particular social group’ would open the ‘floodgates’ of millions of abused women seeking asylum in the United States, this article argues that this would not be the case. This is because many women who may be so abused will unlikely have the resources or wherewithal to make it to the US to make such asylum claims and furthermore, the Act already provides that the filing of frivolous applications of asylum can result in permanent ineligibility for any other immigration benefits under the Act.

Note: Specific to US refugee status determination. Author abstract.

Budd, Michael Carl. *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo, 2009) [unpublished] at 64, online: American University in Cairo <http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This article examines the complex identities of LGBTI refugees. The article examines gender and the dichotomy between the public and private spheres (p.64-9). The article states that “Taking into account the extremely high proportion of sexual assault visited upon women together with the fact that sexual minorities are more often victims of sexual assault than heterosexuals, it is not unsurprising that lesbians are uniquely vulnerable.” Furthermore, “Stated-tolerated violence is intended to control women in their so-called private lives.” The article discusses various cases that dealt with these issues.

Buscher, Dale. “Unequal in Exile: Gender Equality, Sexual Identity and Refugee Status” (2011) 3:2 Amsterdam L Forum 92, online: Amsterdam Law Forum <<http://ojs.uvu.vu.nl/alf/article/view/199>>.

This article examines gender identity in asylum claims. It discusses the disconnect between international law and United Nations policy on the one hand which increasingly includes the promotion of gender equality in its policies and programmes and national legislation and host country practice on the other which repress expressions of gender identity. The author notes that this is highly problematic for LGBTI refugees because not only may their sexual orientation and gender identity be the primary basis for their refugee claim, the countries of asylum where they flee for protection and safety are often as discriminatory and repressive as those that they have left. The author argues that the protection of LGBTI refugees not only requires a gender-sensitive interpretation of the definition of refugee but also a gender-sensitive refugee status determination procedure.

Foster, Michelle. “Why We Are Not There Yet: The Particular Challenge of ‘Particular Social Group’” in Efrat Arbel, Catherine Dauvergne & Jenni Millbank, eds, *Gender in Refugee Law From the Margins to the Centre* (Routledge: 2014).

This chapter examines and explores current challenges in interpreting social group for claims based on gender and gender identity. The chapter notes the challenges of establishing membership in a particular social group for claims based on gender or gender identity given the lack of explicit reference to ‘women’, ‘sex’, ‘gender’, ‘homosexuality’, or ‘gender identity’ in the 1951 Refugee Convention. It begins with a brief overview of the key conceptual approaches to interpreting the social group ground, outlining and explaining the two dominant approaches. The chapter then analyzes a wide range of jurisprudential developments both common law and civil law, concerning social group over the past ten years in order to identify why many gender-based claims fail at this crucial stage. The chapter concludes by making some recommendations that might guide decision-making in the future.

Juncker, Eva. “Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation” (1998) 4 J Int’l Legal Stud 253.

This article draws parallels between the asylum claims of gays and lesbians and women fleeing forced female genital mutilation, noting that all are based upon membership in a particular social group. Both groups are juxtaposed to analyze how the Acosta test, the test for granting asylum, is applied. Grants of asylum to women fleeing genital mutilation are supported by legal precedent, the Immigration and Naturalisation Service (INS) Guidelines, and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Grants of asylum to gays and lesbians are supported by legal precedent, ISN Guidelines, and growing humanitarian concern of the issues facing gays and lesbians. However the grants are not supported by any existing legislation and both groups are only afforded ISN guideline status, by which immigration officials are not bound. The article raises the question why female genital mutilation is not an ISN regulation-approved ground for asylum, when there exists considerable public and legislative condemnation for the practice. However, despite the rights of states to criminalize consensual same-sex sodomy, gays and lesbians may be granted asylum based on reasonable fear of persecution. The article argues that women seeking asylum due to the threat of female genital mutilation should be granted INS regulation-approved status, rather than guideline status.

Note: Specific to US refugee status determination. Author abstract.

Keenan, Sarah. “Safe Spaces for Dykes in Danger? Refugee Law’s Production of the Vulnerable Lesbian Subject” (2011) in Sharron Fitzgerald, ed, *Regulating the International Movement of Women: From Protection to Control* (London: Routledge, 2011), online: SOAS <http://eprints.soas.ac.uk/14278/1/safe_spaces_dykes_in_danger.pdf London>.

This article examines how refugee law’s requirement of an essentialised vulnerability from women applying for asylum on the grounds of sexuality persecution, serves to reinforce transnational power structures of patriarchy and racial oppression. The author argues that refugee law relies on and reproduces a discourse in which space and identity are represented as essential, static and separable from each other – so the claimant must prove that she is and always has been a “real and vulnerable lesbian” across multiple and very different spaces. Examining case law from Britain, Canada and Australia, the author argues that the criteria used to test the identity of these applicants produces an ideal vulnerable lesbian subject that reinforces rather than challenges normative boundaries of the nation-state. Refugee law requires women seeking asylum on the basis of sexuality persecution to perform their identities in a way that shows they are ‘in place’ among the receiving state’s good gay and lesbian citizenry.

Note: Focus on Australia, Canada and UK. Author abstract.

Kelly, Nancy. “Gender-Related Persecution: Assessing the Asylum Claims of Women” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 17.

This article examines the existing law regarding gender-related persecution and proposes a framework for evaluating the cases of women asylum claimants under US law. The introduction presents an analysis of problems which have historically

hindered the full presentation of women's claims and review current activities of human rights groups, advocates and adjudicators to address the particular asylum needs of women. Parts 1 and 2 review US asylum law and existing US case law regarding gender-related persecution of women. Part 3 sets out a framework for the evaluation of gender-related cases under US law, dividing cases into those involving gender-specific persecution, in which the type of persecution is tied to the claimant's gender and gender-based persecution, in which the persecution is inflicted because of a basis which is rooted in the claimant's gender. Finally, part 4 addresses the need for the implementation of procedures in asylum adjudication process as part of a multi-faceted approach to improve access to asylum protection for women.

Note: Author abstract.

LaViolette, Nicole. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19:2 Int'l J Refugee L 180, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1149667>.

In 1993, the Immigration and Refugee Board of Canada adopted guidelines entitled Women Refugee Claimants Fearing Gender-Related Persecution. The Guidelines represent a cutting edge approach and have helped to guarantee a refugee determination process for women refugees that is more sensitive to gender-related claims of asylum. However, this article demonstrates that the concept of gender-based persecution, as it is presently defined, makes it difficult for members of the Board to systematically evaluate all types of gender-related persecution, to which certain men and women are subjected. The article examines asylum claims based on sexual orientation and identity, as well as those based on persecution specifically inflicted upon men, and argues that the gender-specific analytical framework adopted by the Immigration and Refugee Board is relevant to these cases. The article concludes that change is needed in the form of a more clearly defined social constructionist interpretation of gender. Clearly, defining gender as a socially constructed concept would reveal the gender-specific factors that interfere with the rights of certain men and would make more visible the links between gender and other causes of persecution, like sexual orientation.

Note: Specific to Canadian refugee status determination process. Author abstract.

LaViolette, Nicole. "Les identités multiples et le droit des réfugiés" (2011) 35:3 Can Ethnic Stud 39, online : Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803836>.

In legal discourse, identity markers such as race, religion, gender, or sexual orientation are often used to create judicial and legislative categories. However, we must ensure that we adequately use the identity markers to understand properly the experiences of people in target groups. This article addresses the refugee status claim process of the Immigration and Refugee Protection Act to determine if the identity categories, as currently defined, allow the Immigration and Refugee Board of Canada to systematically evaluate all the motives and ways of persecution for which claimants are victims. The article specifically examines the asylum claims invoking gender and sexual orientation to determine, in light of cases cited, whether the asylum claims recognise the intersection of these two identity markers. As for the

enforcement of all laws, the article indicates that it is essential to identify the intersections between the various identity markers to allow people to faithfully expose their personal experiences and their intersectional identity. It is therefore suggested that the links between gender and sexual orientation should be more visible in the context of refugees' rights.

Note: Specific to Canadian refugee status determination. Author abstract. Article in French.

LaViolette, Nicole. "Les revendications du statut de réfugié fondées sur le sexe : constats et orientations nouvelles" (2001) 13:2 CJWL 285, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803840>.

In 1993, the Immigration and Refugee Board of Canada adopted guidelines entitled Women Refugee Claimants Fearing Gender-Related Persecution. The guidelines represent a cutting edge approach and help to guarantee a process of determination of refugee status for women refugees that is more sensitive to gender-specific claims of asylum. However, this article demonstrates that the concept of gender-related persecution, as it is presently defined, makes it very difficult for members of the Commission to evaluate, in a systematic manner, all of the grounds and methods of gender-related persecution to which certain women and certain men are subjected. The article examines claims of asylum based on sexual identity or orientation as well as those based on persecution specifically inflicted upon men, in order to evaluate the relevance of the gender-specific analytical framework adopted by the Immigration and Refugee Board, in light of recently published case law. The article concludes that a major change in direction is imperative in order to make more visible the relationship between gender discrimination and other grounds of persecution such as sexual orientation, and to better understand the way the rights of certain men can be violated based on sex-specific factors.

Note: Specific to Canadian refugee status determination. Article is in French.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses gender in regards to claims based on sexual orientation or gender identity (pp. 17-8). The UNHCR Gender Guidelines indicate that gender is relevant to LGBTI refugee claims made by both men and women and that these claims contain a gender element. The report notes, however, despite the intersection of gender and sexual orientation, this link is still infrequently made in determinations relating to membership in a particular social group. The report stresses the importance of using the Canadian Gender Guidelines in these cases.

Note: Specific to Canadian refugee status determination.

Macklin, Audrey. “Cross-Border Shopping For Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims” (1999) 13:1 Geo Immig LJ 25.

Australia, Canada and the USA have all released guidelines on gender-based asylum claims. This article examines and compares how the directives from these three countries respond to the issues raised by gender-related claims within their respective legal, political, and administrative milieu. Beyond delineating the common and distinctive features of the various directives, the article identifies a number of problems in the directives, particularly in relation to the issue of assessment of state protection in the context of domestic violence and the link between a woman’s fear of persecution and a Convention ground. The article concludes by recommending some sources in the international arena such as the United Nations Special Rapporteur on Violence against women to which domestic decision-makers can turn to for guidance on what constitutes effective protection against domestic violence.

Note: Specific to Australia, Canada and the USA.

Minter, Shannon. “Lesbians and Asylum: Overcoming Barriers to Access” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 5.

This article attempts to account for the disparity between the number of lesbian and gay asylees by identifying some of the gender-related barriers that have effectively excluded lesbians from asylum. Part 3 summarizes the growing recognition of gender-based persecution as a ground for asylum, and discusses how this new recognition may benefit lesbian asylum seekers (I.B 10-15).

Note: Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 7, 2012), HCR/GIP/02/01, online: Refworld <<http://www.refworld.org/docid/3d36f1c64.html>>.

These Gender Guidelines specifically focus on the interpretation of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (hereinafter “1951 Convention”) from a gender perspective, as well as propose some procedural practices in order to ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such. The Gender Guidelines are an important and useful resource for LGBTI refugee claims. The *UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity* itself states that it is to be read in conjunction with the Guidelines. The Gender Guidelines recognize that “the refugee definition has traditionally been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognized.” The Gender

Guidelines confirm that “refugee claims based on differing sexual orientation contain a gender element.”

(iv) Social Visibility and MPSG

Bresnahan, Kristin A. “The Board of Immigration Appeal’s New ‘Social Visibility’ Test for Determining ‘Membership of a Particular Social Group’ in Asylum Claims and its Legal and Policy Implications” (2011) 29:2 Berkeley J Int’l L 649, online: <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1410&context=bjil>>.

The article focuses on the background and implications of the social visibility test used by the U.S. Board of Immigration Appeals (BIA) to determine particular social group membership in asylum case. The article finds that the test deviates and is inconsistent with the intended meaning of the 1951 Refugee Convention. The article concludes that the BIA should adopt an alternative test that incorporates both the ‘protected characteristic’ and ‘social perception’ approaches which will ensure that the United States honors its obligations under the Refugee Convention and addresses the legal and policy problems associated with a dispositive social visibility standard.

Note: Specific to US refugee status determination. Not specific to LGBTI refugee claimants. Author abstract.

Hanna, Fadi. “Punishing Masculinity in Gay Asylum Claims”, Case Comment on *In re Soto Vega* No. A-95880786 (BIA 2004), (2005) 114 Yale LJ 913, online: The Yale Law Journal < <http://www.yalelawjournal.org/images/pdfs/331.pdf>>.

Does a homosexual asylum seeker need to prove he is ‘gay enough’ to win protection from a U.S. court? Increasingly, and troublingly, the answer is yes. In *In re Soto Vega*, the American Board of Immigration Appeals (BIA) denied a gay man’s application for asylum because he appeared too stereotypically heterosexual. The decision is representative of a trend in immigration law to equate visibility with the potential for anti-homosexual persecution. This Case Comment argues that visibility should be irrelevant in sexual-orientation-based asylum cases. Part I examines how homosexual claimants are punished for ‘covering’ their sexual identity and those who ‘reverse cover’, or act more visibly ‘gay’ are rewarded. This system of incentives is inconsistent with the purpose and structure of asylum law for at least two reasons. Part II of the comment argues that covering one’s sexual orientation is a natural response to homophobic persecution. Thus, the visibility requirement punishes asylum applicants for exhibiting a symptom of persecution and is therefore inconsistent with the fear-based standard of asylum. Second, the visibility requirement assumes that conspicuous homosexuals have fundamentally different identities than inconspicuous homosexuals, such that they constitute a different social group for asylum purposes. This belief is grounded in a performance-as-identity model which suggests that identity is determined by behavior rather than by immutable characteristics. However, Part III argues that asylum law protects homosexuals on the basis of their immutable sexual orientation and thus precludes the performance-as-identity model.”

Note: Case Comment of US Board of Immigration Appeals' case *In re Soto Vega*.
Author abstract.

LaViolette, Nicole. "The UNHCR's Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary" (2010) 22 Int'l J Refugee L 173 at 189.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity'. In examining the concept of 'membership in a particular social group' (pp. 189-93), this article discusses how while "the Guidance Note properly conveys that sexual orientation and gender identity are encompassed in several Convention grounds and that membership may also be imputed, UNHCR fails to comprehensively discuss several issues relating to the scope of the particular social group ground." The Guidance Note fails to mention that intersex individuals may constitute a particular social group. Furthermore, the Guidance Note fails to "address trends in national case law that may eventually undermine the recognition of LGBT persons as constituting particular social groups."

Marouf, Fatma E. "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" (2008) 27 Yale L & Pol'y Rev 47, online: University of Nevada, Las Vegas <<http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1428&context=facpub>>.

This article examines in detail the relevance of 'social visibility' in determining 'membership in a particular social group' in American refugee law. Of the five protected grounds for asylum, 'membership in a particular social group' has always generated the most debate. In 2002, the United Nations High Commissioner for Refugees issued guidelines that present the 'protected characteristic' and 'social perception' approaches as alternative ways of establishing a particular social group, instructing States Parties to the 1951 Refugee Convention to determine first if there is a protected characteristic and, only if no such characteristic exists, to determine whether the group is recognized by society. The article argues that adjudicators should reject the 'social visibility' approach because it destroys the principled framework developed in the *Acosta* case, represents an abdication of U.S. obligations under the 1967 Protocol, cannot be applied in a consistent way and ignores the complex relationship between visibility and power.

Note: Specific to US refugee status determination. Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 44, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

"Refugee claims based on sexual orientation or gender identity are most commonly recognized under the 'membership of a particular social group' ground." The Guidelines discuss from paragraphs 44-49 two approaches to identifying a 'particular

social group’: ‘protected characteristics’ and ‘social perception.’ Regardless of which approach is applied, “there is broad acknowledgment that under a correct application of either of these approaches, lesbians, gay men, bisexuals and transgender persons are members of ‘particular social groups’ within the meaning of the refugee definition.” The Guidelines stress that when determining if a claimant is a member of a particular social group they should avoid reliance on stereotypes or assumptions because these can be misleading.

Sussman, Aaron. “Expanding Asylum Law's Pattern-or-Practice-of-Persecution Framework to Better Protect LGBT Refugees” (2013) 16 U Pa JL & Soc Change 111, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2097158>.

This Article posits the infrequently used pattern-or-practice-of-persecution framework as uniquely compatible with assessing persecution on account of an applicant’s membership in an LGBT-based social group. Part 1 of this article discusses imputed membership in a LGBT-based particular social group (pp. 12-14). The article argues that, in certain circumstances, there should be a presumption favoring an LGBT asylum applicant or one perceived as LGBT, with no distinction between those two categories. The article uses the case of *Amanfi v. Ashcroft*, the most significant case recognizing someone inaccurately perceived as LGBT as a member of a particular social group, to make this argument.

Note: Specific to US refugee status determination.

(v) Imputed Membership in a Particular Social Group

Landau, Joseph. “‘Soft Immutability’ and ‘Imputed Gay Identity’: Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law” (2004) 32 Fordham Urb LJ 237 at 258, online: Fordham University Law Journal
<<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2126&context=ulj>>.

This article discusses the idea of imputed gay identity under which courts look not to the asylum seeker’s identity but the persecutor’s perceptions and motivations behind the persecution (pp. 258-62). If the persecutor perceives an individual to be a member of a particular social group and persecutes him or her on that basis, the applicant’s actual identity is irrelevant; all that matters is the persecutor’s belief. Advancing the imputed gay identity theory has the advantage of placing transgender asylum seekers into a category of persons already deemed eligible for ‘particular social group’ status as opposed to having to persuade an adjudicator that transgender persons organically constitute a particular social group. Imputed identity is most commonly found in cases of political opinion.

Note: Specific to US refugee status determination. Author abstract.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report notes that a claimant does not actually have to be a member of the particular social group, it is sufficient that the agents of persecution believe the person to be a member of the particular social group (pp.28-29). A Federal Court of Canada case entitled *Dykon v Canada* is cited in support of this principle.

Note: Specific to Canadian refugee status determination.

Sussman, Aaron. “Expanding Asylum Law's Pattern-or-Practice-of-Persecution Framework to Better Protect LGBT Refugees” (2013) 16 U Pa JL & Soc Change 111, online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2097158>.

This Article posits the infrequently used pattern-or-practice-of-persecution framework as uniquely compatible with assessing persecution on account of an applicant’s membership in an LGBT-based social group. Part 1 of this article discusses imputed membership in a LGBT-based particular social group (pp. 12-14). The article argues that, in certain circumstances, there should be a presumption favoring an LGBT asylum applicant or one perceived as LGBT, with no distinction between those two categories. The article uses the case of *Amanfi v. Ashcrof*, the most significant case recognizing someone inaccurately perceived as LGBT as a member of a particular social group, to make this argument.

Note: Specific to US refugee status determination.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 50, online: Refworld

<<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines, at paragraph 39, refer to the fact that a claimant does not actually have to be a member of the particular social group: “...where it can be shown that the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.”

(b) Political Opinion

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report mentions political opinion in relation to claims based on sexual orientation or gender

identity (p. 15) and cites three Canadian sexual orientation cases that raised persecution based on political opinion (note 104).

Note: Specific to Canadian refugee status determination.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 50, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines, from paragraphs 42-3, discuss LGBTI refugee claims made on political opinion grounds stating that, “The term political opinion should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged.” This can include an opinion as to gender roles expected in the family or in regards to education, work or other aspects of life. “The expression of diverse sexual orientation and gender identity can be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values. Anti-LGBTI statements could be part of a State’s official rhetoric, for example, denying the existence of homosexuality in the country or claiming that gay men and lesbians are not considered part of the national identity.”

(c) Religion

Budd, Michael Carl. *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo, 2009) [published] at 73, online: American University in Cairo <http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This article discusses the possibility of LGBT claims being made based on religious grounds rather than relying on membership in a particular social group which does not recognize religious dimensions of sexual identity (pp. 73-76). The author notes that, “Just as adjudicators’ views of same-sex sexuality may reflect a narrow understanding specific to their cultural context, their views about religion and the authenticity of religious claims may fail to incorporate diversity within religion. For LGBT refugees who are also religious, this has proven an obstacle to asylum.” The article suggests that persecution on both religious and social grounds is in play when “religious LGBT individuals are barred from having a say in how their religion is constructed and functions if they either suffer ‘serious harm’ in the process of trying to exercise their freedom of religion (attempting to participate in the discourse that shapes their religion) or are so afraid of this possibility that they remain silent and suffer discrimination as a result.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report mentions religion in relation to claims based on sexual orientation or gender identity (p. 15) and cites one Canadian sexual orientation cases that raised persecution based on religion (note 104).

Note: Specific to Canadian refugee status determination.

Ramanathan, Erik. “Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence” (1996) *Geo Immig LJ*.

This article compares thirty asylum decisions from Australia, Canada, UK and Us with the aim of enabling the reader to compare the queer asylum jurisprudence of several nations and to understand the issues and solutions debated in each jurisdiction. Part II discusses queer asylum cases based on religious persecution (pp. 5-7). The article notes that such a claim might be viable where homosexual status conflicts with conventional religious doctrine, compliance with which is enforced by state or private actors. Queer individuals may be perceived and persecuted as atheists or members of minority religious groups. They may be barred from membership in a religious community or from worshipping in public places. They might also be punished for not following the formal requirements of their religion, which may include abstinence from sexual interaction with individuals of the same sex.

Note: Focus on Australia, Canada, UK and US.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 42, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines, from paragraphs 42-3, discuss LGBTI refugee claims made on religious grounds stating, “Where an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity, and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion. Negative attitudes held by religious groups and communities towards LGBTI individuals can be given expression in a range of ways and LGBTI claimants may continue to profess adherence to a faith in which they have been subject to harm or a threat of harm. The Guidelines note that not all religions view sexual orientation and gender identity in a negative way.

(3) State Protection

LaViolette, Nicole. “Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process” (2009) 13:2 *Int’l JHR* 437, at 454.

This article discusses state protection (pp. 454-59). State protection has been a consistent and recurring issue in sexual orientation and gender identity claims in the last ten years. Increasingly, the outcome of claims has depended on whether the claimant has adduced clear and convincing evidence that state authorities cannot or will not protect sexual minorities. This section of the article notes that this framework is problematic given that violence against sexual minorities is often committed by individuals such as family members, who do not represent the state. Furthermore, this section discusses complications LGBTI individuals face in seeking state protection and highlights how a lack of country of information evidence on state and non-state protection has been detrimental to sexual orientation and sexual identity claims in Canada.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses the concept of state protection (pp. 28-32). The report states that noting that the outcome of many claims depends on whether the claimant has adduced clear and convincing evidence that state authorities cannot or will not protect sexual minorities. “Absent a complete breakdown of the state apparatuses or an admission by the state authorities that they are unable to protect the claimant, a claimant must advance clear and convincing evidence of the state’s inability to protect him or her. In Canada, the burden of proof is proportional to the degree of democracy within the state in question.” In examining state protection the report discusses various issues including the impact that laws criminalizing same-sex activity have on the availability of state protection; the fact that sexual minorities have to declare their sexual orientation and gender identity in order to access state protection; and, the lack of independent country information.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 196.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining state protection (pp. 196-99), this article states that “one of the most significant omissions in the Guidance Note is the failure to deal with the issue of state protection in a distinct and detailed section of the document. There are two references to state protection, but they are brief and located in discussions about other substantive issues.” This article argues that this is a “perplexing oversight given that increasingly the outcome

of many claims depends on whether the claimants has adduced clear and convincing evidence that states authorities cannot or will not protect sexual minorities.”

Lidstone, Robert. *Refugee Queerings: Sexuality, Identity and Place in Canadian Refugee Determination* (M Arts Thesis, Simon Fraser University, 2006) [unpublished] at 103, online: Simon Fraser University <<http://summit.sfu.ca/item/2415>>.

This article examines state protection using the concept of geographical scale and argues that security must be examined at the scale of the body in considering the persecution of sexual minorities (pp. 103-08). The author discusses how conflicts between a claimant’s experience and the legal-rational knowledge of country information can lead a decision-maker to determine that no persecution exists. The author also discusses how sexual minorities seeking state protection may result in more discrimination and violence.

Note: Specific to Canadian refugee status determination.

Liew, Jamie Chai Yun. “Beyond Country of Origin: *Smith v. Canada* and Refugees from Unexpected Places” (2011) 23:2 CJWL 686.

This article examines the notion of state protection by focusing on refugee claimants that come from countries that are not traditionally known to be refugee producing. The article states that the Canadian refugee system should not create procedural or substantive disadvantages because of a claimant’s country of nationality or habitual residence. The author uses *Smith v. Canada*, a case in which a lesbian army deserter from the US made a refugee claim in Canada, to argue that policy makers and advocates alike should steer away from making generalizations, stereotypes, and pronouncements that a person coming from a particular country simply could not be a refugee. Members of the gay and lesbian community or women threatened by domestic violence, for example, are not protected by a refugee system that sees the claimant’s country of origin as the most important component of a claim. The article concludes by briefly discussing the notion of ‘designated country of origin’, a recent amendment made to the *Canadian Immigration and Refugee Protection Act*, arguing that this amendment further marginalize individuals that the Refugee Convention is intended to protect.

Note: Focus on Canadian refugee status determination.

Saxena, Monica. “More Than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims” (2006) 12 Mich J Gender & L 331 at 350, online: University of Oslo <<http://www.uio.no/studier/emner/jus/jus/JUR5530/v08/undervisningsmateriale/Mich%20article%20Gender.pdf>>.

The final section of this article discusses state protection and suggests that the USA adopt the New Zealand and Canadian standards under which the sufficiency or effectiveness of state protection is the crucial factor in determining refugee status (pp. 350-57). The article also examines international law which indicates that focus should be placed on state protection and not on the individual act of the persecutor.

The article notes, however, that inquiring into the availability of state protection is not protective enough of sexual minorities and even if state protection systems are available, they may only be available in theory.

Note: Specific to US refugee status determination. Author abstract.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses state protection (pp. 27-28). The article examines how there are at least two situations in which the establishment of a state nexus may be particularly problematic in sexuality-based cases. The first is when the decision-makers place a high expectation on claimants to report harms inflicted by non-state actors to the police, especially in situations where the police itself has shown persecutory conduct. The second is where it is found that existing legal proscriptions of same-sex conduct are not actually enforced.

Note: Author abstract.

(4) Safe Countries of Origin

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 41, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries treat refugee claims based on sexual orientation or gender identity. Section 2.3.2 of the report briefly considers the practice in some Member States to use lists of so-called ‘safe countries of origin’. These are countries of origin considered to be safe, resulting in asylum seekers from these countries having less chance of being granted protection. They might, for instance, have their claims fast-tracked and their rights of defence restricted. The report mentions eight European countries that have a ‘safe country of origin’ list.

Note: Specific to European refugee status determination.

Jordan, Sharalyn & Christine Morrissey. “Refugee Protection at Risk: Impact of Bill C-31 on Refugees Facing Persecution Related to Sexual Orientation or Gender Identity” Submission to Senate Committee on Social Affairs, Science and Technology (2012).

This report discusses various concerns with the effects that Canadian Bill C-31, which introduced serious changes to Canadian refugee law, will have on refugees facing persecution related to sexual orientation and gender identity. One concern relates to the new regime in Canadian refugee law of ‘designated countries of origin’. The authors urge members of the Senate committee to ensure that any efforts to reform the Canadian refugee system uphold its core purpose of protecting human lives and safety and to seriously consider the negative impacts that Bill C-31 will have on sexual minority claimants.

Note: Specific to Canadian refugee status determination.

Liew, Jamie Chai Yun. “Beyond Country of Origin: *Smith v. Canada* and Refugees from Unexpected Places” (2011) 23:2 CJWL 686.

This article examines the notion of state protection by focusing on refugee claimants that come from countries that are not traditionally known to be refugee producing. The article states that the Canadian refugee system should not create procedural or substantive disadvantages because of a claimant’s country of nationality or habitual residence. The author uses *Smith v. Canada*, a case in which a lesbian army deserter from the US made a refugee claim in Canada, to argue that policy makers and advocates alike should steer away from making generalizations, stereotypes, and pronouncements that a person coming from a particular country simply could not be a refugee. Members of the gay and lesbian community or women threatened by domestic violence, for example, are not protected by a refugee system that sees the claimant’s country of origin as the most important component of a claim. The article concludes by briefly discussing the notion of ‘designated country of origin’, also known as ‘safe countries of origin’, a recent amendment made to the *Canadian Immigration and Refugee Protection Act*, arguing that this amendment further marginalize individuals that the Refugee Convention is intended to protect.

Note: Focus on Canadian refugee status determination.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 8, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The UNHCR *Guidelines No. 9* suggests that ‘safe country of origin’ regimes have a particularly deleterious effect on LGBT refugee claimants. According to the UNHCR, “[d]ue to their often complex nature, claims based on sexual orientation or gender identity are generally unsuited to accelerated processing or the application of “safe country of origin” concepts (para. 59).

(5) Internal Flight or Relocation Alternative

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 4 of this report briefly discusses the concept of ‘internal flight alternative’ (IFA) (pp. 77-79). The report states that “asylum seekers are not usually entitled to international protection if it is considered that they can relocate to a different area to where they experienced persecution.” The report discusses various problems associated with IFA including that it means LGBTI individuals will have to hide their sexual orientation and/or gender identity in the IFA. The report notes that developments in UK refugee law such as that some countries including Iran and Cameroon have been recognized as having no IFA practices must be monitored to

ensure that these instructions are implemented. Furthermore, documentary evidence can also affect the IFA determination.

Note: Specific to UK refugee status determination. Focus on Scotland.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 41, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries treat refugee claims based on sexual orientation or gender identity. Part 5 considers the internal flight alternative (IFA) which is the notion that if the well-founded fear of persecution is specific to only one region of the country of origin, a claimant may be expected to go to another region of the country where he or she will be safe from persecution (pp. 41-5). An IFA only applies to situations where persecution is on behalf of a non-state agent and therefore, is not applicable to countries that have laws criminalizing same-sex conduct. This report found that 16 European countries applied the IFA in their refugee status determination processes.

Note: Specific to European refugee status determination.

LaViolette, Nicole. “Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process” (2009) 13:2 Int’l JHR 437, at 459.

This article discusses internal flight alternative (IFA) (pp. 459-61) in the context of Canadian refugee law. The article examines the role that independent country information plays in determining whether there is an IFA. The problems associated with IFAs stem from its increasing use to deny refugee status to claimants who cannot produce enough relevant evidence to negate the possibility of an IFA. Furthermore, the concern that independent country information does not probe the actual reality of protection is a constant concern in refugee claims based on sexual orientation or gender identity.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 32, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses the concept internal flight alternative (IFA) (pp. 32-34). The report notes that IFA has become an integral part of the determination as to whether a claimant is a Convention refugee. It must be raised by the Canadian Refugee Protection Division at the hearing and the claimant must be afforded the opportunity to address it with evidence and argument. IFAs are increasingly being assessed in claims based on sexual orientation and gender identity given that social, political and legal progress is sometimes highly localized in a state and more tolerant parts of the

country may therefore constitute an IFA for gay men, lesbians, bisexuals or transgender persons. In addition, meaningful protection in a different area of the country may indeed be available to a claimant when he or she is being persecuted by private or non-state actors. The report discusses some of the problems that arise when an IFA is being considered.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 199.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘internal flight alternative’ (IFA) (pp. 199-201), this article discusses that “the Guidance Note briefly deals with IFAs by suggesting that ‘it can often be assumed that if the State is not willing or able to protect in one part of the country, it will not be willing or able to do so in any other part’. This article argues that “issues related to IFAs warrant more than the cursory examination provided in the Guidance Note.”

National Center for Lesbian Rights, “The Challenges to Successful Lesbian Asylum Claims” (2013), online: National Center for Lesbian Rights <http://www.nclrights.org/wp-content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf>.

This report discusses the concept of internal flight alternative stating that, “a claimant must show that the threat of persecution exists throughout the country.” When persecution comes at the hands of state actors, evidence supporting the likelihood of persecution country-wide may be readily available. In cases of persecution by non-state actors, adjudicators may find that the persecution is individualized and therefore, limited to the specific reach of the individuals or jurisdictions of the complacent governmental officials. Various socio-economic factors may make it impossible for a woman to relocate within her own country. Furthermore, the report discusses how assessments about the national climate may take evidence into consideration that focuses on the existence of areas of the country that are gay-friendly. This is troubling because the existence of such establishments can actually increase the likelihood of persecution, both by giving law enforcement an open and obvious target at which to aim their hostilities, as well as by infuriating members of the community who are hostile towards homosexuality and especially the open expression of homosexuality.

Note: Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 51, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss the concept of internal flight or relocation alternative (IFA) (para. 51-56), stating that “[IFA] refers to whether it is possible for an individual to be relocated to a specific area of the country where the risk of feared persecution would not be well-founded and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself and live a normal life. The assessment of whether or not there is an IFA requires two main analyses: (i) the relevance analysis and (ii) the reasonableness analysis, which are discussed in the Guidelines.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

This article discusses the concept of internal flight alternative (IFA) (pp. 28-30). The article states that, “internal flight is normally not considered relevant where the state is the agent of persecution, and that in cases where the persecutor is a non-state actor, it can be assumed that the state will be unwilling or unable to protect the person concerned in any part of the country.” The article discusses criticisms of IFA in relation to refugee claims based on persecution on account of sexual orientation or gender identity and examines the way it has been applied by courts in Canada and UK.

Note: Focus on Canada and UK. Author abstract.

Young, Jessica. “The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants” (2009) 60 UNB LJ 294 at 321.

This article analyzes the procedural and substantive elements of the alternate refuge requirement and evaluates the requirement’s impact upon individuals seeking protection on the basis of sexual orientation or gender identity. Part 3 explores how Canadian refugee law determines in individual cases if protection is available to refugees within their home states by way of an internal flight alternative (IFA) (pp. 321-33). This part focuses on the legal principles developed by the Federal Court and the Federal Court of Appeal and the principles applied by the Immigration and Refugee Board in regards to IFA focusing on refugee determinations involving Mexican claimants. The article argues that alternate refuge measures systematically disadvantage sexual minority claimants. This misapplication could be alleviated, however, if decision-makers applied a more nuanced analysis to such claims. Decision-makers must consider the particular circumstances of sexual minority claimants in a consistent manner and refine their evaluations of country conditions in order to reduce the disadvantage perpetuated by the current methods of analysis.

Note: Specific to Canadian refugee status determination.

(6) Safe Third Countries

Immigration Equality & Midwest Immigrant and Human Rights Center, *LGBT/HIV Asylum Manual*, 3rd ed. (2006), online: Immigration Equality <<https://immigrationequality.org/issues/law-library/lgbth-asylum-manual/>>.

This handbook generally explains the law and procedure of asylum in the United States. The handbook provides best practices for the preparation and adjudication of LGBT/HIV asylum cases and it is intended for use by pro bono attorneys and immigration attorneys working on LGBT/HIV asylum cases rather than towards asylum seekers themselves. Section 10 explains the Safe Third Country Agreement between the United States and Canada which now requires most asylum seekers to apply for asylum in whichever of these two countries they land in first. The exceptions to the Safe Third Country Agreement are also outlined.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 201.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘safe third countries’ (pp. 201-03), this article states that the “Guidance Note overlooks the emergence of the ‘country of first arrival’ principle and its potentially negative impact on sexual minorities.” For example, a claimant’s failure to seek refugee status in a safe third country may have a negative impact upon an adjudicator’s assessment of his or her subjective fear of persecution. Additionally, agreements negotiated between states under which a state may return a refugee claimant to the first country from whom they could have sought refugee status can be detrimental to sexual minority claimants.

Young, Jessica. “The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants” (2009) 60 UNB LJ 294 at 300.

This article analyzes the procedural and substantive elements of the alternate refuge requirement and evaluates the requirement’s impact upon individuals seeking protection on the basis of their sexual orientation or gender identity. Part 2 of this article focuses on the safe third country rule and analyzes its impact upon sexual minority claimants (pp. 300-21). This section examines the procedural and substantive elements of the concept, specifically how the opportunity to claim refuge in a third country can affect the ability of individuals to make successful refugee claims within Canada. The *Safe Third Country Agreement* (STCA) between Canada and the United States, relevant Canadian Federal Court decisions and the issue of credibility are examined.

Note: Specific to Canadian refugee status determination.

(7) *Sur Place* Claims

Battjes, Hemme. “Accommodation: Sur place Claims and the Accommodation Requirement” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013), online: Scribd <<http://www.scribd.com/doc/64156039/Accommodation-Sur-place-claims-and-the-accommodation-requirement-in-Dutch-asylum-policy>>.

This chapter addresses the treatment of *sur place* claims in Dutch asylum policy and case-law and discusses whether this treatment is in accordance with the Refugee Convention and with the European Convention of Human Rights. A *sur place* claim is an appeal to the Refugee Convention or Article 3 ECHR based on events or circumstances that came up after the applicant left the country of origin. As for LGBTI people, it may concern a coming out after arrival in the country of refuge or public expression of the orientation there after hiding it in the country of origin or a transgender treatment. The chapter reveals that accommodation, the concept that an individual hide their sexual orientation in order to escape persecution or ill-treatment, is required in cases of *sur place* claims.

Note: Specific to European refugee status determination. Author abstract.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 203.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’. In examining the concept of ‘*sur place* claims’ (p. 203), this article states that “whilst the Guidance Note appropriately points out the relevance of *sur place* claims, there are serious problems with the presentation of the issue.” The main issue is that regarding *sur place* claims, the Guidance Note “implies that there are situations where an individual’s ‘coming out’ in the country of asylum is ‘self-serving’, rather than a legitimate assertion of a basic and fundamental human right” after having explained in other sections of the Guidance note that “a person cannot be expected or required by the State to change or conceal his or her identity to avoid persecution.”

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 57, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines at paragraph 57 discuss *sur place* claims which “arise after arrival in the country of asylum, either as a result of the applicant’s activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant’s country of origin since their departure. *Sur place* claims may also arise due to changes in the personal identity or gender expression of the applicant after his or her arrival in the country of asylum. Their fear of persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim *sur place*.”

III. Procedural Issues in the Adjudication of LGBTI Refugee Claims

(1) General

Anker, Deborah & Sabi Ardalán. “Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law” (2012) 44 NYU J Int’l L & Pol 529.

This article discusses the main challenges that LGBT claimants face including critical issues of corroboration, the failure of NGOs and states to report increasingly brutal attacks on LGBT persons around the world and the accompanying failure of adjudicators to find that claimants’ fear is in fact well-founded (pp. 545-55). The article states that, “human rights organizations often do not have the resources, time, or inclination to devote to documenting physical, emotional, psychological, economic or other harm suffered by LGBT asylum seekers around the world and claimants, who have first-hand knowledge of conditions in their countries of origin, must therefore attempt to educate adjudicators in understanding the conditions they face if forced to return.

Note: Focus on Australia, UK and US. Author abstract.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 5 of this report examines procedural issues in the adjudication of LGBTI refugee claims (pp. 83-86). The report first discusses the quality of decision making based on interviews held with staff from 11 Scottish organizations. The report then discusses how access to good quality legal advice was seen as vital for LGBTI asylum seekers in order for their asylum claims to have a chance of succeeding. The report states that the interviews revealed that in Scotland, “there was a lack of easily identifiable experts in LGBT asylum work and a real shortage of information to enable organisations to know who to best refer LGBT asylum seekers on to for legal advice.” Chapter 6 discusses challenges that are particular to gay men, lesbians, bisexuals and transgender individuals in navigating refugee status determination.

Note: Specific to UK refugee status determination. Focus on Scotland.

Cragolini, Guilia. “Lesbian, Gay, Bisexual and Transgender Refugees: Challenges in Refugee Status Determination and Living Conditions in Turkey” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

When severe human rights violations occur, some LGBT people feel forced to leave their countries to seek protection in another state. However, the living conditions in the state of asylum are not necessarily safe, as the case of Turkey illustrates. This chapter addresses the challenges faced by LGBT asylum seekers and refugee looking for legal protection as a refugee in order to enjoy human rights, and for safety, in terms of physical and psychological peace outside their countries of origin. The first part of the chapter presents the main challenges that LGTB asylum seekers face during the asylum procedure.

Note: Specific to Turkey. Author abstract.

Gray, Amanda & Alexandra McDowall. “LGBT Refugee Protection in the UK: From Discretion to Belief?”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 22, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the development of the United Kingdom’s refugee law’s treatment of claims based on sexual orientation or gender identity. The article first discusses how, prior to 2010, there existed ‘systematic discrimination’ against those claiming asylum on the basis of sexual persecution. However, the case of *HJ (Iran) and HT (Cameroon)* resulted in a drastic improvement of UK refugee law and the article outlines some of the key policy changes and guidance that were introduced after this decision. The article concludes by noting that while improvements have been made, the quality of credibility assessment continues to be a problem.

Note: Specific to UK refugee status determination.

Hojem, Petter. “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia” (2009) *Research Paper No. 181 UNHCR* at 17, online: UNHCR <<http://www.unhcr.org/4b18e2f19.pdf>>.

This report touches on the issue of sexual minority asylum seekers not being aware that they can make their claim on grounds of sexual orientation (pp. 17-8). It is important that asylum seekers know which grounds for persecution might merit protection. The report argues that this can be accomplished by general information disseminated at reception centres; through lawyers or qualified legal aid; and LGBTI non-governmental organizations. The report stresses that it is important that these resources and information be available to asylum seekers before they make their claims.

Immigration Equality & Midwest Immigrant and Human Rights Center, *LGBT/HIV Asylum Manual*, 3rd ed. (2006), online: Immigration Equality <<https://immigrationequality.org/issues/law-library/lgbth-asylum-manual/>>.

This handbook generally explains the law and procedure of asylum in the United States. The handbook provides best practices for the preparation and adjudication of LGBT/HIV asylum cases and it is intended for use by pro bono attorneys and immigration attorneys working on LGBT/HIV asylum cases rather than towards asylum seekers themselves. Section 11 examines difficult issues that frequently arise in LGBT/H asylum cases which require extra thought and preparation. Some of these issues include marriage, bisexual claims, stereotypes, return trips to country of origin, and criminal issues. Sections 13 and 14 provide advice to attorneys about how best to work with LGBT/H Asylum Seekers and on how to prepare an application.

Johnson, Toni. “On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings” (2011) 20:1 *Soc & Legal Stud* 57.

This article considers the nature of silence in UK asylum cases involving lesbian and gay claimants, asking whether the ambiguous and textured quality of silence can be a productive site of resistance, or whether the effect of silence perpetuates the problematic conceptualization of the refugee as a subjugated actor whose voice is muted within a hearing. The article discusses silence in light of the formal provisions of the Refugee Convention and evidentiary necessities around proof of an objective/subjective fear of persecution, questioning the impact silence has on the rendering of testimony and whether it is detrimental to an asylum claim. The equivocal nature of silence imparts a vulnerability to interpretation, rendering it subject to the imposition of unsolicited meaning. Silence's indeterminacy, it is suggested, should give pause to the court to proceed in a manner that invokes caution around such inference.

Note: Specific to UK refugee status determination.

Jordan, Sharalyn & Christine Morrissey. "Refugee Protection at Risk: Impact of Bill C-31 on Refugees Facing Persecution Related to Sexual Orientation or Gender Identity" Submission to Senate Committee on Social Affairs, Science and Technology (2012).

This report discusses various concerns with the effects that Canadian Bill C-31, which introduced serious changes to Canadian refugee law, will have on refugees facing persecution related to sexual orientation or gender identity. These concerns include: that the designated countries of origin regime endangers LGBTQ refugees; that access to the Refugee Appeal Division is compromised and inaccessible; and, humanitarian safety-nets have been eroded. The authors urge members of this Senate committee to ensure that any efforts to reform the Canadian refugee system uphold its core purpose of protecting human lives and safety and to seriously consider the negative impacts that Bill C-31 will have on SOGI claimants.

Note: Specific to Canadian refugee status determination.

Kasssieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 14.

Chapter 4 of this report discusses overarching preliminary issues in the operation of the Australian refugee determination process as a whole (pp. 14-7). The report discusses concerns with the actual and perceived openness, accountability and independence of the Tribunal. Unlike other countries, the Australian Tribunal has never developed or operated under guidelines relating to sexuality-based claims nor trained its Members on sexual diversity and while gender and credibility guidelines exist, they are not binding on the Tribunal. The report recommends the development of sexuality guidelines, making these guidelines binding and revising the existing guidelines to include substantive legal issues.

Note: Specific to Australian refugee status determination.

LaViolette, Nicole. "Sexual Minorities, Migration, and the Remaining Boundaries of Canadian Immigration and Refugee Laws" in Soheila Pashang, Debbie Douglas & Avvy Go, eds, *Unsettled Settlers: Barriers to Integration* (Toronto: de Sitter, 2012) 29, online:

Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122577>.

This chapter outlines the various ways in which LGBTI refugees settle in Canada and then discusses the particular challenges that confront LGBTI refugees and immigrants during their migration and settlement in Canada. The three primary ways in which LGBTI refugees settle in Canada are: (1) the inland refugee system; (2) resettlement from outside Canada; and (3) immigration in the family class. The chapter then discusses various challenges that LGBTI individuals face in navigating the refugee status determination process specifically looking at prejudice and discrimination from decision-makers; the use of interpreters; difficulties in testifying about sexual orientation and gender identity; establishing membership in a particular social group; and, proving persecution.

Note: Specific to the Canadian refugee status determination.

Leitner, Robert C. “Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities” (2003) 58:2 U Miami L Rev 679.

In the US, Immigration law is federal law, and, theoretically, the outcome of an alien's case should not depend on his or her location in the country. However, the courts of appeals have marked out strikingly different positions on aspects of immigration law, and the Supreme Court is the only single body capable of resolving these splits. The Supreme Court has, however, tended to decide relatively few immigration cases, and conflicts between the circuits thus linger for long periods. This article attempts to expose the twin problems of the lack of precedent and appellate court conflict within the immigration law by highlighting such problems as they affect a smaller subset of the case law, namely the law governing asylum for sexual minorities. The article begins by discussing the structure of the immigration courts and then details the general definitions and procedures for making a claim for asylum in the US. Next, it discusses the basic law underlying asylum for sexual minorities specifically, and then addresses how the lack of precedent and conflicts between the circuits have injected uncertainty into the decisional process. The article concludes with thoughts on how to rectify the problem.

Note: Specific to US refugee status determination. Author abstract.

Magardie, Sheldon. “‘Is the Applicant Really Gay?’ Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation” (2003) Agenda: Empowering Women for Gender Equity No. 55, Women The Invisible Refugees 81.

While a survey of refugee case law in various jurisdictions does indeed indicate an increase in the recognition of asylum claims based on persecution as a result of sexual orientation, it is arguable whether the decisions of immigration tribunals and courts represent a de facto improvement in the quality of protection afforded to gay asylum seekers. This article argues that gay asylum seekers who have been persecuted on account of their sexual orientation, still face significant obstacles at all levels of the refugee status determination process. The author also argue that many of these obstacles are specific to the experience of gay male asylum applicants, and are representative of an underlying social prejudice and intolerance, which is not

eliminated merely by according legal recognition and granting refugee status to asylum seekers who are persecuted because they are gay. In particular, the article discusses unfair credibility findings, a lack of documentary evidence and detention.

Note: Focus on Australia, UK and US.

Millbank, Jenni. “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia” (2002) 26 Melbourne UL Rev 144, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=676209>.

This article is based upon a comparative analysis of 331 decisions concerning sexuality from the refugee tribunals in Australia and Canada from 1994-2000. The author argues that in refugee determinations on the basis of sexuality, Western decision-makers have to come to terms with a very *other* other: a lesbian or gay man from a different culture. They must translate that experience of sexuality and culture not just into the international and national framework of refugee law, but also into something that is intelligible to themselves. This paper explores the role of empathy and imagination in that process which can have an effect on a decision-makers ability to properly adjudicate a claim based on sexual orientation or gender identity.

Note: Focus on Australia and Canada. Author abstract.

Murray, David AB. “Becoming Queer Here: Integration and Adaption Experiences of Sexual Minority Refugees in Toronto.” (2011) 28:2 Refuge 127.

Since the early 1990s Canada has become a primary destination for individuals who make refugee claims on the basis of sexual orientation persecution. However, until recently, there was little research focusing on this growing component of Canadian urban queer communities and their experiences of the refugee claim process, and their integration and adaptation to Canadian society. This paper, based on interviews with lesbian, gay, bisexual and transgender (LGBT) refugee claimants and participation in LGBT newcomer support groups in Toronto, explores the formal and informal processes, spaces and practices through which LGBT refugee claimants learn about the Canadian nation-state, citizenship and queer identities and communities, and in so doing enter a space/moment of becoming a ‘becoming’ refugee as they learn the social, cultural, and bureaucratic processes and norms of the Canadian refugee apparatus.

Note: Focus on Canada.

Murray, David AB. “The (not so) Straight Story: Queering Migration Narratives of Sexual Orientation and Gendered Identity Refugee Claimants” (2014) 17:4 Sexualities 451.

Canadian media coverage of sexual orientation and gendered identity (SOGI) refugees presents a relatively uniform story of these queer newcomers. While LGBT media have identified problems in some Canadian Immigration and Refugee Board (IRB) decisions, the hegemonic narrative remains one of ‘migration to liberation nation’. In this article the author argues that this hegemonic narrative is produced in relation to particular socio-cultural and juridical-legal categories which are themselves historically produced in and through the bureaucratic machinery of the state, human rights organizations, and some legal scholarship. The effect of this

model narrative is to reinscribe what Ahmed (2010) calls the ‘happy migrant’, that is, someone who espouses national ideals which are couched in terms of empire, the new twist being that sexual diversity is now held aloft as justification of empire’s liberation from abjection. Based on interviews with SOGI refugee claimants in Toronto.

Note: Specific to Canadian refugee status determination. Author abstract.

Murray, David AB. “Real Queer: ‘Authentic’ LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System” (2014) 56:1 Anthropologica 21.

Since the early 1990s, Canada has become a primary destination for individuals who make refugee claims on the basis of sexual orientation persecution. Based on interviews with lesbian, gay, bisexual and transgender (LGBT) identified refugee claimants, social workers and refugee lawyers in Toronto, the author argues that LGBT refugees and those who work with them are enmeshed in a system predicated upon highly malleable, historically and socio-politically specific sexual terms and identities that privilege particular gendered, classed and raced interests and, thus, place LGBT refugees from non-North American societies in a particularly vulnerable position.

Note: Specific to Canada. Author abstract.

O’Leary, Barry. “We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals...’: The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity” (2008) 16 Fem Legal Stud 87.

The author of this article, a solicitor and legal activist for lesbian and gay refugees, draws on his experience as a lawyer representing lesbian and gay asylum seekers in the United Kingdom and discusses challenges that LGBTI claimants face in navigating the UK refugee status determination process. The article notes that while the legal basis for claiming asylum on the ground of sexual identity is now well established, making these claims remains very difficult for claimants. Western cultural expectations around sexual identity often mix with homophobic assumptions about sexual behaviour to present applicants as “not sufficiently gay”. Furthermore, applicants may not initially disclose their sexual identity to legal advisors, leading to assumptions that they are not “telling the truth” to the Immigration Tribunal.

Note: Specific to UK refugee status determination.

Organization for Refuge, Asylum & Migration, *Migration and Travel Information for Russian LGBTI Individuals and their Families* (2014), online: ORAM <http://www.oraminternational.org/images/stories/PDFs/information_for_lgbti_individuals_seeking_to_flee_russia_2014-02-11.pdf>.

This guide, aimed at Russian LGBTI people who fear for their safety and the safety of their families, outlines various options for leaving Russia for short or extended periods, and highlights important considerations for people who decide or are forced to leave Russia permanently. Section IV describes national asylum systems and off-shore refugee resettlement programs.

Pfitsch, Hollis V. “Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity” (2006) 15 L & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues 59.

This article discusses how some commentators view recent advances in US asylum protections for gays and lesbians as a threat. The article examines Michael Scaperlanda’s article *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, which presents the concern that immigration cases won on behalf of gay and lesbian immigrants may constitute “a body of precedent accepting and protective of the homosexual lifestyle” thereby threatening the “social, political and moral fabric of the country”. The article argues that the inverse relationship is more likely and that the limits of various cases could slow advances in asylum law unless the Supreme Court acts to correct lower courts’ current interpretation of the case.

Note: Specific to US refugee status determination. Author abstract.

Raj, Senthurun Sunil. *Protecting the Persecuted: Sexual Orientation and Gender Identity Refugee Claims* (2013), online: Academia.edu
 <https://www.academia.edu/4217667/Protecting_the_Persecuted_Sexual_Orientation_and_Gender_Identity_Refugee_Claims> [unpublished, archived at Churchill Trust].

Recognizing that there is a lack of consistency in adjudication of asylum claims based on sexual orientation or gender identity, this report is the culmination of research which involved conducting interviews with lawyers, advocates, organisations and caseworkers in the US and the UK. Based on this research, the report argues that a holistic and interdisciplinary approach to casework and advocacy is the most effective way to ensure the proper adjudication of sexual orientation and gender identity refugee claims. It proposes 15 recommendations that should be implemented as part of this approach.

Schutzer, Mathew. “Bringing the Asylum Process out of the Closet: Promoting the Acknowledgment of LGB Refugees” (2012) 13 Geo J Gender & L 669.

Part 4 of this article discusses how the narratives of persecution should be used to provide asylum decision makers with the perspective necessary to make informed and sensitive determinations of refugee eligibility (pp. 693-707). The article discusses various challenges that LGB claimants face in making their claims for asylum including adjudicators not believing their sexual orientation, lack of human rights documentation on the treatment of LGB individuals in their country of origin, if the claimant has had past heterosexual relationships or is married and judicial bias. The article argues that claimant narratives should be given more weight in UK refugee status determination as a means of countering these challenges.

Note: Specific to UK refugee status determination. Author abstract.

Śledzińska-Simon, Anna & Krzysztof Śmiszek. “LGBTI Asylum Claims: the Central and Eastern European Perspective”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 16, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the treatment of LGBTI refugee claims in Central and Eastern European (CEE) countries. The article discusses how procedures for granting refugee status to LGBTI asylum seekers is far from consistent in this region of the world. Furthermore, none of the CEE countries have any official guidelines on how to handle LGBTI asylum claims and there are no specialised national NGOs providing legal and social support for LGBTI asylum seekers in the CEE region. Low levels of awareness, lack of guidance and cultural hostility are jeopardising asylum seekers' prospects for fair treatment. The article recommends that all stakeholders specifically government officials and human rights NGOs should cooperate more closely in order to exchange information and good practices.

Note: Specific to Central and Eastern European Countries.

Sridharan, Swetha. "The Difficulties of US Asylum Claims Based on Sexual Orientation" (2008) Migration Information Source, online: Asylum Law

<<http://www.asylumlaw.org/docs/sexualminorities/DiffiUSAsylumClaimsBasedonSO102908.pdf>>.

This article discusses the various challenges that sexual minorities face in making asylum claims based on sexual orientation or gender identity. These challenges include presenting material proof of sexual identity and the ability of a claimant to conceal their identity. The article discusses the challenges that claimants face in presenting this evidence and also notes that the courts often look for proof that fits American conceptions of sexual identity which is problematic.

Note: Specific to US refugee status determination. Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 58, online: Refworld

<<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines from paragraphs 58-61 highlight the unique challenges that claimants making refugee claims on grounds sexual orientation or gender identity face and outline various measures that should be borne in mind to ensure that refugee claims relating to sexual orientation or gender identity are properly considered during the refugee status determination process.

US Citizenship and Immigration Services, *RAIO Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims* (2011) at 29, online:

<<http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>>.

Section 6.2 of this training manual discusses suggested techniques for eliciting testimony from LGBTI claimants (pp. 29-38). The manual stresses the importance when interviewing LGBTI applicants that decision-makers set a tone that allows the

applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. Decision-makers must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant. This section outlines various techniques that decision-makers can use when interviewing LGBTI claimants.

Webster, Richard. “Canadian Refugee Policy & Sexual Orientation: An Analysis of an Innovative yet Implicit Guardian of Freedom” (2009) Web Reports 48 Institute of Migration, online: Institute of Migration <<http://www.migrationinstitute.fi/pdf/webreports48.pdf>>.

This article examines the Canadian refugee determination process' treatment of claims based on sexual orientation or gender identity and evaluates the Government's success in upholding its international obligations under the 1951 Geneva Convention. The article undertakes a comprehensive analysis of the five stages of the policy process (refugee determination process) and while the research indicates that Canada must establish clearer and more equitable guidelines for assessing a refugee claim based on sexual orientation or gender identity, overall, Canada has upheld its obligations under the 1951 Convention.

Note: Specific to Canadian refugee status determination.

(2) Credibility and Establishing the Applicant's Sexual Orientation or Gender Identity

Budd, Michael Carl. *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo, 2009) [unpublished] at 77, online: American University in Cairo <http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This thesis discusses credibility determination in refugee claims based on sexual orientation (pp. 77-82). An analysis of case law from both common law and civil law jurisdictions uncovers the negative impact of judicial stereotypes about sexuality on refugees and asylum-seekers. The thesis follows the increasing importance placed on proving the genuineness of the claimant's professed sexual identity that has coincided with an increased emphasis on credibility, a trend that has heightened the impact of decision-makers' biases regarding sexuality.

Choi, Venice. “Living Discreetly: A Catch 22 in Refugee Status Determinations on the Basis of Sexual Orientation” (2010) 36 Brooklyn J Int'l L 241 at 254.

Part 3 of this article examines credibility in refugee status determination (pp. 254-62). In particular the article discusses demeanor as a poor indicator of credibility; the idea that inconsistency does not always equal fabrication; and, that all surrounding circumstances should be considered in an assessment of whether an individual's expression of a homosexual identity is plausible.

Note: Focus on Australia and Canada.

Connely, Elizabeth. *Queer, Beyond a Reasonable Doubt: Refugee Experiences of 'Passing' into Membership of a Particular Social Group* (M Sc Global Migration, University College London, 2013) [unpublished], online: University College London <<http://www.geog.ucl.ac.uk/research/transnational-spaces/migration-research-unit/working-papers/Elizabeth%20Connely%202014%203.pdf>>.

This paper examines credibility and evidentiary issues in sexual orientation-based asylum claims. The paper presents the results of a small qualitative research project that examined the way the UK asylum system is negotiated by queer asylum-seekers themselves, focusing on in-depth interviews with applicants who had been refused at least once and were submitting a fresh claim. The paper discusses how, in many cases, decision-makers have been shown to rely on stereotypes of what they consider to be 'gay' identity. Following the 2010 (*HJ*) *Iran (HT) Cameroon* ruling, anecdotal evidence suggests that decision-makers are increasingly refusing lesbian, gay and bisexual (LGB) asylum claims based on negative credibility findings. Furthermore, it focuses on the issue of providing 'proof' for the claim by examining specifically the impact and experience of gathering evidence and creating a narrative for the claim. The paper's findings suggest that the asylum process substantially regulates the way queer asylum seekers feel they must live and that they must regularly negotiate between what the Home Office demands and what they are willing give.

Note: Focus on UK. Author abstract.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 4 of this report briefly discusses the challenges that sexual minority individuals face in establishing their sexual orientation and/or gender identity during the refugee status determination (pp. 63-72). The report discusses how credibility assessments have played an increasingly major role in determining negative outcomes in claims involving LGBT asylum seekers. This is because, in cases involving LGBT individuals, "the claim to group membership often rests entirely on the applicant's testimony, rather than on external proof." The report discusses various elements that factor into credibility determinations including demeanour, consistency, disclosure of sexual orientation and/or gender identity, consistent expression of homosexuality and plausibility.

Note: Specific to UK refugee status determination. Focus on Scotland.

European Council on Refugees and Exiles, "ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status" (1997) at 7, online: Refworld <<http://www.refworld.org/docid/3decd1fa4.html>>.

This report briefly discusses how homosexuals face added burdens in establishing the credibility of their refugee claims, corroborating their fears of persecution and submitting evidentiary information (p. 7).

European Union Agency for Fundamental Rights (FRA), *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – 2010 Update*, (2010) at 58, online: European Union Agency for Fundamental Rights (FRA) <http://fra.europa.eu/sites/default/files/fra_uploads/1286-FRA-LGBT-report-update2010.pdf>.

Section 3 of Part 5 of this report examines measures that European Union Member States employ to establish the sexual orientation or gender identity of individuals making claims for asylum based on sexual orientation or gender identity (pp. 58-60). The report reveals that some countries use psychiatric testing and others ‘phalometric testing’, a practise which has been found as a violation of the fundamental human rights of the claimant. Additionally, many adjudicators have prejudiced ideas regarding LGBTI individuals based on stereotypes which results in negative decisions.

Note: Specific to European refugee status determination process.

Heller, Pamela. “Challenges Facing LGBT Asylum-Seekers: The Role of Social Work in Correcting Oppressive Immigration Processes” (2009) 21:2 J Gay Lesbian Soc Services 294.

This article utilizes the concepts of “covering” and “reverse-covering” to aid social workers in understanding the complicated asylum requirements for LGBT people. Yoshino describes covering as the process through which people individually and collectively downplay characteristics identifying them as members of oppressed and marginalized groups. In contrast, reverse-covering occurs when an individual is compelled to display or perform stereotypical aspects of his or her identity. Individuals cover and reverse-cover for a variety of reasons, though external pressure generally plays a role. In recent years, successful asylum claims by gay men have sometimes required that the asylees display or perform stereotypical gay attributes, typifying an oppressive reverse-covering demand. The author concludes with the argument that the asylum process could be greatly changed and improved by eradicating covering and reverse-covering demands and that policy advocates need to continue to consider the options for improving the asylum process for LGBT people.

Note: Specific to US refugee status determination. Author abstract.

Immigration Equality & National Immigrant Justice Center, “Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status” (2005) at 58, online: National Immigrant Justice Center <<http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>>.

This report discusses how to present a claim based on sexual orientation if the claimant is married to a member of the opposite sex (pp. 58-9). The report stresses that it is essential to remember in preparing a sexual orientation-based asylum claim, that the first element which must be proven to the adjudicator is that the applicant really is lesbian or gay. This can be achieved by including a variety of evidence in the application. But what if the applicant was or is married? Will this be fatal to a sexual orientation-based asylum application? The answer, as with most asylum issues, is, it

depends. It is important when preparing the case to realize that this will be a significant issue and to prepare the client to talk about the marriage honestly.

Note: Author abstract.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 47, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 6 considers the complexity of credibility assessments in these claims (pp. 47-63). Two issues add to the complexity of these assessments. Firstly, in many European countries, remnants of the notion that LGBTI identities are deviant in a medical, psychiatric or psychological sense are prevalent in an asylum context, although the notion has been formally abolished. Secondly, the use of stereotypes results in unreasonable decisions. The report suggests that training for adjudicators is necessary to combat these problems.

Note: Specific to European refugee status determination.

Jordan, Sharalyn & Chris Morrissey. “On what grounds?” LGBT Asylum Claims in Canada”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 13, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the challenges that LGBT individuals face in establishing their sexual orientation or gender identity in their asylum claims. The article states that “[t]o be recognised as a refugee, applicants must convince decision-makers of the genuineness of their sexual orientation or gender identity, their fear of persecution because of this identity, and the lack of protection in their country.” Claimants making claims based on their sexual orientation or gender identity face challenges in obtaining evidence to support their claims and are often evaluated against expected narratives of refugee flight and Western narratives of LGBT identity and community which can result in unreasonable decisions. The article argues adjudication practices have become more skillful with the training of decision-makers on sexual orientation and gender identity claims.

Note: Specific to Canadian refugee status determination.

Jordan, Sharalyn R. “Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution” (2009) 26:2 *Refugee* 165, online: York University <<http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/32086/29332>>.

This article presents research from a larger project that traces and explores the intertwined psychological, spatial, and social trajectories of LGBTQ refugees settling in Vancouver, Canada. The author draws on queer refugees’ accounts of their experiences of their country-of-origin, migration, and the refugee application with a view to understanding how these shape and curtail possibilities for safety and belonging. The refugee system evaluates applicants against expected trajectories of

refugee flight and against Western narratives of LGBT identities, *coming out*, or *gender identity dysphoria*. Yet, as the article examines, the migration trajectories and identity accounts of queer refugees may not meet Canada's refugee system's expectations and queer refugee claimants' potential for safety and belonging is constrained when they do not conform to conventions. The article concludes by highlighting the importance of providing training on sexual orientation and gender identity issues to decision makers. The paper includes narratives and stories of LGBTQ refugee claimants that highlight the credibility issues that these claimants face.

Note: Specific to Canadian refugee determination process. Author abstract.

LaViolette, Nicole. "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group" Training Manual for Immigration and Refugee Board (IRB) Members, last updated: May 2004, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763>.

The majority of refugee claims based on sexual orientation or gender identity are grounded on an individual's membership in a particular social group and as a result, one of the elements to be satisfied in a refugee claim will be the claimant's membership in that particular social group. Assessing the accuracy of the claimant's sexual orientation or gender identity is a difficult, sensitive and complex task in the context of an administrative hearing. In particular, the very private and intimate nature of a claimant's sexual orientation or gender identity poses real challenges for adjudicators who are nonetheless required to engage with claimants about their personal lives and relationships. This document outlines a suggested approach that adjudicators can use in questioning a claimant about their sexual orientation. The purpose of this approach is to provide adjudicators with a range of issues that they may explore with a claimant when membership in a particular social group is an issue to be determined in the refugee claim.

Note: Author abstract.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 20, online: Social Science Research Network
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report examines how claimants establish their membership in a particular social group (pp. 20-21). This assessment is a very difficult, sensitive and complex task for decision-makers who are nonetheless required to examine the claimant's personal lives and intimate relationships. The report notes that one element that is determinative in establishing whether the claimant is a member of the particular social group is the claimant's credibility. In other words, the determination of a claimant's membership in a particular social group will require decision-makers to determine whether they believe the claimant's evidence. As part of this discussion, the report also examines lack of corroborating evidence and implausibility.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 193.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity⁷. In examining a claimant’s credibility (pp. 193-96) as outlined in the Guidance Note, this article states that the “Guidance Note’s statements on stereotyping could have been further reinforced by explaining that there are no universal characteristics and qualities that typify sexual minorities.” In considering situations where a claimant has had heterosexual relationships, this article states that the Guidance Note fails to address this issue in the case of bisexual claimants. The Guidance Note addresses issues surrounding appropriate interviewing techniques in relation to questioning of sexual minority claimants and this article suggests that the UNHCR could have referenced best practises from various countries such as Canada and Australia.

Lewis, Rachel. “Deportable Subjects: Lesbians and Political Asylum” (2013) 25:2 Feminist Formations 174.

This article discusses the challenges that lesbian asylum seekers in the adjudication of their asylum claims, specifically credibility (pp. 177-81). The article discusses how adjudicator’s often rely upon stereotypical assumptions and expectations. Furthermore, the article argues that lesbian and gay asylum claimants frequently are expected to conform to neoliberal narratives of sexual citizenship grounded in visibility politics, consumption and an identity in the public sphere in order to be considered worthy candidates for asylum.

Note: Focus on UK. Author abstract.

McGhee, Derek. “Accessing Homosexuality: Truth, Evidence and the Legal Practices For Determining Refugee Status - The Case of Ioan Vraciu (2000) 6:1 Body Soc’y 29.

This article explores the credibility assessment undertaken in refugee claims based on sexual orientation using as a case study the 1995 decision of the United Kingdom’s Immigration Appeals Tribunal regarding Romanian asylum seeker Ioan Vraciu. The article examines how the adjudicator’s attempt to verify the truthfulness of Vraciu’s claim to a homosexual identity was frustrated by Vraciu’s refusal or inability to supply evidence deemed to be appropriate for legal purposes. The case demonstrates the existence of a difference between what can be described as the self-knowledge of homosexuality and the legal, fact-based knowledge of homosexual identity, and the article explores “how sexuality in the form of intimate pleasure, preferences, practices, desires, etc. is to be knowable and translated into the ‘objective standards’ required by law.” The article concludes by recognizing that in UK refugee law it is very difficult for a claimant to be the author of his own sexual identity, which instead must be ascertained by another party with the legal authority to know homosexuality.

Note: Specific to UK refugee status determination.

Middelkoop, Louis. “Normativity and Credibility of Sexual Orientation in Asylum Decision Making” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

In this chapter, thirteen sexual orientation asylum cases adjudicated in the Netherlands are studied. The results indicate that credibility of the asylum seeker’s sexual orientation is very relevant for status determination in the Netherlands. This warrants an evaluation of how the particular social group is defined and how the credibility of an asylum seeker’s sexual orientation is assessed in practise. Accordingly, the chapter addresses three corresponding questions. First, how does the Immigration and Naturalization Service (IND) define the particular social group of homosexuals? Second, how is this definition applied in practise? Third, how should definition and practise be evaluated?

Note: Specific to the Netherlands refugee status determination. Author abstract.

Millbank, Jenni. “From Discretion to Disbelief: Recent Trends in Refugee Determination on the Basis of Sexual Orientation in Australia and the United Kingdom” (2009) 13:2 Int’l JHR 391.

This article discusses the impact of Australian cases *Appellants S395/2002* and *S396/2002* on the refugee jurisprudence of Australia and the United Kingdom. Adjudicators in both countries have been slow to fully appreciate the fact that sexual minorities are secretive about their sexuality and relationships as a result of oppressive social forces rather than by ‘choice’. In the UK, adjudicators have resisted seeing *S395* and *S396* as persuasive and have tended to reframe issues in terms of general UK law on persecution, thus avoiding the question of why the applicant shielded their identity from becoming known. In Australia, there has been a clear shift away from discretion towards disbelief as the major area of contest, with a significant increase in decisions where the applicant’s claim to actually being gay, lesbian or bisexual is outright rejected. In an alarming number of cases tribunal members used highly stereotyped and Westernised notions of ‘gayness’ as a template against which the applicants were judged and when applicants did not fit this template, their claim of sexual identity was rejected.

Note: Examination of Australian and United Kingdom refugee status determination. Author abstract.

Millbank, Jenni. “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J Refugee L, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306102>.

This article explores the practice of credibility assessment in lower level tribunals using a case study of over 1000 refugee decisions made on the basis of sexual orientation from Australia, the United Kingdom, Canada and New Zealand from 1994 to 2007. The article notes how credibility played an increasingly major role in claim refusals and negative credibility assessments were not always based on well-reasoned or defensible grounds. The author notes that disbelief regarding actual group membership almost always dooms the claim to failure and decision-makers

overestimated their ability to determine truthfulness, relied on assumptions and failed to articulate reasons for disbelief when assessing claims. This article examines avenues to improve the practise of credibility assessment including measures such as instructing decision-maker discretion through the use of guidelines and other means, improved selection and training of decision-makers, and through the creation of critical spheres of self-reflection in refugee adjudication processes and structures. This article argues that sexual orientation claims can be used to explore general issues in the determination of credibility.

Note: Focus on Australia, Canada, New Zealand and UK. Author abstract.

Miller, Liz. “Queer is in the Eye of the Newcomer: Mapping, Performance & Place Based Media” (2010) InTensions J, online: York University
 <<http://www.yorku.ca/intent/issue4/articles/pdfs/lizmillerarticle.pdf>>.

This article describes two collaborative media projects that work with groups of LGBTQ or queer youth with refugee experience in Toronto to explore alternative representations to the victimization they must perform in order to obtain refugee status. Canada has traditionally maintained a progressive interpretation of the UN Refugee Convention permitting individuals who are exposed to violence based on their sexual preference/identity to apply for asylum. At the same time the state works with essentialized Western notions of gay identity and the act of proving oneself often becomes a humiliating process. The objectives of the collaborative media projects are to challenge past performances of victimization, to help the youth involved articulate their identity in a new place, and to explore the advocacy potential in taking their personal stories public.

Note: Specific to Canada refugee status determination.

Murray, David AB. “To Feel the Truth: Discourse and Emotion in Canadian Sexual Orientation Refugee Hearings” (2014) 3:1 J Language & Sexuality 6.

This article explores how adjudicators in the Canadian refugee determination system assess sexual orientation refugee claims. By focusing on discourse and terminology of questions utilized in the hearing, the article outlines how these questions contain predetermined social knowledge and thus operate as a cultural formation through which particular arrangements of sexual and gendered practices and identities are privileged. However, documents and interviews with IRB staff reveal the presence of a ‘gut feeling’ or ‘sixth-sense’ in determining the credibility of a claimant’s sexual orientation. While some may argue that these feelings represent a level of sensitivity that humanizes the decision making process, the article argues that they reveal adjudicators’ application of their own understandings and feelings about ‘authentic’ sexual identities and relationships derived from specific cultural, gendered, raced and classed experiences, which, in effect, re-inscribe a homonormative mode of gatekeeping that may have profound consequences for a claimant whose narrative or performance fails to stir the appropriate senses.

Note: Specific to Canadian refugee status determination. Author abstract.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010).

Section 3.1.2 discusses aspects of refugee status determination (RSD) that bear particular rights dangers for LGBTI asylum claimants, as informed by relevant Yogyakarta Principles (pp. 16-18). Yogyakarta Principle 6 covers the right to privacy and is relevant to RSD interviews. Principle 6 “recognizes the deeply personal nature of one’s sexual orientation or gender identity and provides that all persons have the right to choose whether to divulge information regarding these characteristics.” The report states that this means that decision-makers must exercise the utmost sensitivity when placing a claimant in the position of disclosing sexual orientation or gender identity-related information. This section also discusses human rights abuses that may arise in assessing credibility such as intrusive physical procedures. Principle 18 is relevant here because it enshrines the right to protection from medical abuses.

Organization for Refuge, Asylum & Migration, *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings* (2010), online: ORAM

<<http://www.oraminternational.org/images/stories/PDFs/oram%20phallometry%20paper%202010-12-15%20--for%20download.pdf>>.

Phallometry, a mechanical attempt to measure sexual arousal, has been applied in the refugee status determination context to ascertain the sexual orientation of males seeking asylum based on homosexuality. Physically invasive and scientifically questionable, phallometry has been rejected and doubted by courts, scientists and advocates as a severely flawed tool at best and an abuse of human rights at worst. The ultimate result of phallometric testing can be the rejection of a valid asylum claim, leading to deportation to a country where a refugee faces serious harm up to and including execution”. The report concludes by stating that as the number of asylum applications made by sexual minorities increases, adjudicators need systematic and reliable tools to determine sexual orientation. Some recommendations include the development of accurate training materials and inoffensive and lawful techniques for interviewing asylum seekers and refugees who claim persecution based on their sexual orientation or gender identity; working with LGBTI rights groups and other human rights bodies to develop standards and guidelines for evaluating sexual minority refugee claims; and providing intake staff, claims adjudicators, and judges with training on sexual orientation and gender identity, including basic definitional concepts on these identities and their characteristics.

Note: Author abstract.

Oxford, Connie. “Queer Asylum: US Policies and Responses to Sexual Orientation and Transgendered Persecution” in Marlou Schrover & Deirdre M. Moloney, eds, *Gender, Migration and Categorisation: Making Distinctions between Migrants in Western Countries, 1945-2010* (Amsterdam: Amsterdam University Press, 2013) 127, online: Universiteit Van Amsterdam <<http://dare.uva.nl/document/503483#page=128>>.

This chapter examines US asylum laws (both legislative and case law) and policies regarding sexual orientation and transgendered persecution. It discusses the gendered nature of US asylum laws and policies towards lesbian, gay, bisexual and transgendered migrants, paying particular attention to the claims of gay men and transgendered women. The chapter examines how the process of seeking asylum for queer claimants requires that the claimant be open about her or his sexual or gender identity, in order to convince an immigration official that he or she has been persecuted or fears persecution based on that identity (pp. 138-41). Not only can this affect credibility in the refugee determination process, it can have a negative effect on the claimant.

Note: Specific to US refugee status determination. Author abstract.

Raj, Senthoran. “Affective Displacements: Understanding Emotions and Sexualities in Refugee Law” (2011) 36:3 *Alternative L J* 177.

This article discusses credibility issues and the use of stereotypical notions of sexual orientation in refugee status determination processes. Determining what counts as sexuality and persecution within the terms of international refugee law is fraught with challenges. Many decisions that seek to discern if a refugee was or was not homosexual, rely on discourses of sexuality that privilege the authentic from the inauthentic (i.e. the 'confused' or 'experimental' sexual experience from the 'genuine' sexual identity). Authenticating refugees on the basis of sexuality relies on a causal narrative - suturing stereotypes of 'functioning' sexuality to incidents of persecution. Emotion, desire and feeling are obscured by a largely ethnocentric administrative method of verification, a narrative process which produces a caricatured, stereotyped and overdetermined legal trope of the gay or lesbian asylum seeker. Refugee voices become mute within the colonising space in which they seek asylum. Such an approach raises broader questions as to why the law continues to construe identity and experience within objectifying representations of legitimate sexual practices or violent experiences.

Ricard, Nathalie. “Testimonies of LGBTIQ Refugees as Cartographies of Political, Sexual and Emotional Borders” (2014) *J Language & Sexuality* 28.

To be granted status, refugee claimants have to testify at the Immigration and Refugee Board of Canada (IRB). This liminal space is charged with both the promise of liberation and the threat of deportation. Adding to the challenge are the governmental measures that constrain the right to asylum. This article examines the role of credibility in sexual-orientation based asylum claims. It suggests answers to the questions: What language and other discursive features do LGBTIQ claimants have to use to be recognized as refugees? What elements should their written and oral testimonies include to be deemed credible? The article concludes by discussing how new avenues for justice are being fostered by grassroots organizations.

Note: Specific to Canadian refugee status determination.

Santos, Michael. “In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Courts” (2012) *LGBTQ Pol’y J*, online: *The LGBTQ Policy Journal* <<http://hkslgbtq.com/?p=57>>.

This article discusses various effects that the *US REAL ID Act of 2005* has had on sexual minority asylum seekers. Part 1 examines credibility and corroboration requirements of US refugee status determination. The article argues that these requirements can result in force unnecessarily traumatic experiences on LGBT asylum seekers by forcing claimants to publicly self-identify as LGBT ('come out') while they are still struggling to deal with their identity. Furthermore, the article discusses credibility and evidentiary hurdles that claimants face in making their cases for asylum. The article argues that the application of the REAL ID Act to LGBT asylum claims reveals how asylum law fails to recognize and offer protection to LGBT asylum seekers and how it violates their rights to privacy and to a fair trial.

Note: Specific to US refugee status determination. Author abstract.

Spijkerboer, Thomas. "Sexual Identity, Normativity and Asylum" in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

This chapter begins with an overview of the legal developments that followed the acceptance of sexual orientation and gender identity as a persecution ground. The chapter analyses what currently are important issues in academic writings, case law and practise as expressions of a limited number of debates about sexuality which keep re-appearing in different refugee law contexts. The chapter examines how it is possible that these issues seem irresolvable and keep reappearing. The chapter focuses specifically on: discrimination vs. persecution; discretion; prosecution vs. persecution; and, credibility.

Note: Author abstract.

Tabak, Shana & Rachel Levitan. "LGBTI Migrants in Immigration Detention: A Global Perspective" (2014) 37 *Harv J L & Gender* 1 at 21, online: [Harvard Journal of Law & Gender <http://harvardjlg.com/wp-content/uploads/2014/02/Tabak.LGBTIMigrants.pdf>](http://harvardjlg.com/wp-content/uploads/2014/02/Tabak.LGBTIMigrants.pdf).

This article discusses credibility assessments in immigration evaluations (pp. 21-3). The article notes that a central problem with the legal determination of sexual orientation and gender identity claims is that individuals are forced to demonstrate that they are 'credibly' identifiable as LGBTI to an adjudicator. This bar can be difficult to meet if an individual has not had or does not have at the time of seeking asylum, concrete evidence of this identity, such as a relationship with someone of the same sex or evidence of hormonal therapy or attempts to receive such therapy for the purpose of transitioning between genders. Another issue is rooted in stereotypical assumptions regarding what constitutes LGBTI behaviour. Research demonstrates that in a large number of cases, tribunal evaluations used 'highly stereotyped and Westernised notions of 'gayness' as a template that, when applicants did not fit, led to their claim being rejected.' A central concern is the non-probative and insensitive interrogation of the applicants' sexual practises and gender expression which would not occur with asylum claims by heterosexual or gender-conforming applicants and may contribute to discrimination against and even exoticization of LGBTI asylum seekers. The article suggests that in determining

credibility, adjudicators must recognize that identities exist on a continuum and are culturally varied and dependent on local norms.

Türk, Volker. “Ensuring Protection to LGBTI Persons of Concern” (Opinion delivered at the Invisible in the City: Urban Protection Gaps Facing Sexual Minorities Fleeing Persecution, HIAS LGBTI Symposium, 20–21 September 2012), (2013) 25:1 Int’l J Refugee L at 124, online: International Journal of Refugee Law <<http://ijrl.oxfordjournals.org/content/25/1/120.full.pdf+html?sid=cef51eb8-fdef-426c-a0da-d1a7b899cb4b>>.

This paper examines issues facing LGBTI individuals in the context of forced displacement (pp. 124-5). The author discusses various challenges that LGBTI refugees face in the adjudication of their claims. The first is the over-emphasis by some decision makers on sexual acts rather than on sexual orientation as an identity. This can lead to intrusive and humiliating questioning and overlooks the fact that LGBTI individuals are often persecuted because of the threat they represent to prevailing social and cultural norms. The second is that decision makers often use stereotypical perceptions of sexual orientation and gender identity in assessing the credibility of a claimant. Not all adjudicators accept the self-identification of the claimant and request evidence on this matter often ignoring the fact that such evidence may be impossible for the claimant to produce.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 62, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss the issue of credibility in claims based on sexual orientation or gender identity at paragraphs 62-63. Credibility assessments in these cases “need to be undertaken in an individualized and sensitive way. Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.” These paragraphs also outline useful areas of questioning for adjudicators.

US Citizenship and Immigration Services, *RAIO Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims* (2011) at 38, online: <<http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>>.

Section 7 of this training manual discusses how decision-makers can determine credibility during refugee status determination (pp. 38-43). The section provides advice to decision-makers examining specific categories including if the applicant is married or has children; the applicant is not familiar with LGBTI terminology; the

application does not ‘look or act gay’; and, the country of origin information does not address LGBTI issues.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

Part 3 of this article examines various procedural issues that arise in sexual orientation claims (pp. 32-4). Credibility is very often an issue of significance in refugee determinations generally. It is “at the core of the asylum process” and may often be “the single biggest substantive hurdle before applicants beginning the refugee status determination process.” The article discusses how credibility is of particular importance when it comes to asylum claims based on sexual orientation and that unlike disbelief regarding other aspects of a claimant’s narrative, disbelief regarding actual group membership, such as that the applicant really is gay, almost always leads to a negative decision. The article also examines demeanour (pp. 36-8), constituency (pp. 38-40) and plausibility (pp. 40-41).

(3) Evidentiary Matters

Bach, Jhana. “Assessing Transgender Asylum Claims”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 34, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the challenges that transgender claimants face in demonstrating that they are at risk of persecution. The UK Border Agency’s training manual ‘Gender Identity Issues in the Asylum Claim’ directs decision-makers to the Country of Origin Information (COI) to determine if persecution against transgender individuals exists in the claimant’s country of origin. This can be problematic given that COI is only updated periodically, that there is little or no information on lesbians and transgender people in most COI reports and that the lack of trans-specific discrimination information is frequently viewed by decision-makers as an absence of threat.

Note: Specific to UK refugee status determination.

Bell, Mark. *Protecting LGBT People Seeking Asylum: Guidelines on the Refugee Status Directive* (Brussels: ILGA Europe, 2005), online: ILGA Europe <www.rfsl.se/public/ilga_eudirektivprotecting.pdf>.

In 2004, the European Union adopted a Directive setting out the minimum rules governing conditions under which refugee status is granted. It applies to third country nationals (i.e. persons from outside the EU) who request asylum within a Member State of the EU. It covers the criteria for being awarded refugee status, but also the rights of persons once they are recognised as refugees. This report discusses evidentiary burdens that LGBTI claimants face (p. 6). The Directive provides some guiding principles that could assist in the handling of sexual orientation claims: The absence of documentary evidence should not be decisive; credible, coherent and

plausible statements by the applicant should be accepted, especially where the applicant explains the absence documentary evidence; and, a risk of persecution arising from acts engaged in after leaving the country of origin can qualify, provided these are consistent with ‘convictions or orientations’ already held before departure.

Note: Specific to Europe. Author abstract.

Berg, Laurie & Jenni Millbank. “Developing a Jurisprudence of Transgender Particular Social Group” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013) at 23, online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887>.

This chapter discusses some of the challenges that transgender individuals face in making refugee claims (pp. 23-29). The chapter notes that lack of country of origin information is a major problem stating that “around the world, including in Western countries, high levels of violence experienced by trans people are not reflected in official crime statistics.” Furthermore, the study undertaken by the authors found that “the cases studied take highly divergent approaches to the questions of the relationship between gender and sexuality in the claimants’ identities and how this plays out in their experiences of persecution and state protection.” The chapter concludes by proposing that an examination of common issues and barriers across nations is a useful starting point in developing a more sophisticated jurisprudence of transgender asylum.

Note: Focus on Australia, Canada, New Zealand, United Kingdom and United States refugee status determination.

Connely, Elizabeth. *Queer, Beyond a Reasonable Doubt: Refugee Experiences of ‘Passing’ into Membership of a Particular Social Group* (M Sc Global Migration, University College London, 2013) [unpublished], online: University College London

<<http://www.geog.ucl.ac.uk/research/transnational-spaces/migration-research-unit/working-papers/Elizabeth%20Connely%202014%203.pdf>>.

This paper examines credibility and evidentiary issues in sexual orientation-based asylum claims. The paper presents the results of a small qualitative research project that examined the way the UK asylum system is negotiated by queer asylum-seekers themselves, focusing on in-depth interviews with applicants who had been refused at least once and were submitting a fresh claim. The paper focuses on the issue of providing ‘proof’ for the claim by examining specifically the impact and experience of gathering evidence and creating a narrative for the claim. The paper’s findings suggest that the asylum process substantially regulates the way queer asylum seekers feel they must live and that they must regularly negotiate between what the Home Office demands and what they are willing give.

Note: Focus on UK. Author abstract.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow

<http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 4 of this report briefly examines the role of documentary evidence in sexual orientation and/or gender identity claims (pp. 72-75). The report states that gathering reliable independent country information remains a challenge given that, until recently, most important international human rights organizations did not focus on gathering LGBTI specific evidence. This lack of evidence makes it difficult for claimants to corroborate their stories.

Note: Specific to UK refugee status determination. Focus on Scotland.

Dauvergne, Catherine & Jenni Millbank. “Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers” (2003) 31 Fed L Rev 299, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=700503>.

This article examines evidence in the context of refugee determinations specifically focusing on claims based on sexual orientation or gender identity. The article draws its conclusions from a detailed study of more than 300 refugee tribunal decisions made in Canada and Australia in response to asylum claims brought by lesbians and gay men. It considers the place of independent evidence; the quality of evidence used by Australian and Canadian tribunals; inappropriate uses of evidence; gender-blind evidence; misrepresentation of evidence; and, alternative approaches to independent evidence. The article argues that the evidentiary practices and procedures that have been developed by the Australian Refugee Review Tribunal are operating at a routinely low standard and that such practices contribute to decisions that are manifestly unfair and potentially wrong in law. The greater success rates of claims based on sexual orientation or gender identity in Canada, compared to Australia, can be explained in part by the poor evidentiary practises of the Australian tribunal. The article concludes with some recommendations on how the use of evidence can be improved in Australia.

Note: Focus on Australia and Canada.

Fairbairn, Bill. “Gay Rights Are Human Rights: Gay Asylum Seekers in Canada” in Brad Epps, Keja Valens & Bill Johnson Gonzalez, eds, *Passing Lines: Sexuality and Immigration* (Cambridge, MA: David Rockefeller Center for Latin American Studies, Harvard University (2005) 237.

This chapter draws on the author’s work with the Canadian-based Inter-Church Committee on Human Rights in Latin America (ICCHRLA) and his experiences testifying as an expert witness in asylum hearings before the Immigration and Refugee Board (IRB) of Canada. The author focuses on two cases for which he testified in the early 1990s, both involving claims by gay men from Ecuador who had faced persecution by police. In both instances, IRB members challenged the credibility of documentation by lesbian and gay organizations as potentially biased. The author notes that while the IRB has progressed significantly in recognizing the validity of information collected by LGBT groups internationally and of LGBT claimants themselves, decisions continued to be vexed and marked by homophobia.

Note: Specific to Canadian refugee status determination process.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 71, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 8 considers the role of country of origin information (COI) in refugee claims (pp. 71-6). The report stresses the importance that COI should not only focus on gay men, but must also consider lesbians, bisexuals, transgender and intersex individuals. Furthermore, it should not only provide facts about criminal law provisions but should provide data about the legal position of LGBTI individuals in family law, labour and social security, etc. in policy and in practise. The report recognizes the challenges of obtaining COI for all countries and states that the European Asylum Support Office can play an important role in this regard.

Note: Specific to European refugee status determination.

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 32.

Chapter 6 of this report examines issues relating to the use and sourcing of independent country information by the Australian Refugee Tribunal (pp. 32-53). Independent country information plays an important role in refugee status determination because it is used to ascertain the existence of a future risk of persecution and is a means of testing a claimant's credibility. The report highlights some concerns with the information used by the Tribunal including the use of poor quality information; the non-use of readily available sources; and, the over reliance on government sources rather than sexuality-specific independent sources. Furthermore, the report also notes that the Tribunal has sometimes inferred that a lack of independent country evidence equates to a lack of persecution. The report recommends specific professional development and guidelines on the use and sourcing of independent country information as well as facilitating ready access to the highest quality information for Tribunal Members in the context of time and resource pressures.

Note: Specific to Australian refugee status determination.

LaViolette, Nicole. "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13:2 Int'l JHR 437.

This article examines a specific evidentiary problem facing women and men who make refugee claims based on sexual orientation or gender identity persecution, namely, the extent to which independent country information provides adequate and useful evidence in support of their applications. The article focuses on claims submitted by sexual minorities to the Canadian refugee determination system that were adjudicated between 1991 and 2008. Given the shift in the legal questions most relevant to these claims, two time periods are examined. First, the evidentiary hurdles that confronted sexual minorities in the 1990s when claims were first

processed in Canada are examined. During this time both the refugee claimants and the Immigration and Refugee Board were unable to produce what was perceived as acceptable independent country evidence on the situations of sexual minorities in the claimants' countries of origin. A review of cases in the last 10 years reveals that while some of the initial obstacles have been overcome, existing human rights documentation still fails to provide the kind of information sexual minority refugees need to support their claims. This paper demonstrates that problems with independent country information can translate into poor assessments in the refugee hearing room.

Note: Specific to Canadian refugee determination process. Author abstract.

LaViolette, Nicole. "Proving a Well-Founded Fear: The Evidentiary Burden in Refugee Claims Based on Sexual Orientation" in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: IGLHRC, 1996) 3, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294719>.

This article examines the nature and consequences of the evidentiary problems facing individuals making refugee claims based on sexual orientation and gender identity. It begins by briefly surveying the nature of a refugee hearing in Canada and the role of documentary evidence in refugee status determination. It then proceeds to illustrate some of the problems encountered by lesbians and gay men by focusing on one element of a refugee claim which is the requirement that an individual have a 'well-founded fear of persecution'. This article demonstrates that documentation on human rights violations against sexual minorities is often very difficult to find and if information does exist, the refugee panels of the Convention Refugee Determination Board of the IRB have sometimes questioned the bias of the sources. This results in challenges for lesbian and gay claimants in proving that their fears of persecution are well-founded.

Note: Focus in on Canadian refugee status determination process. Article is from 1996.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 34, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report discusses independent human rights documentation in refugee claims based on sexual orientation or gender identity (pp. 34-37). When claims based on sexual orientation and gender identity were first presented in the early 1990s, sexual minorities encountered a specific set of problems in the area of fact-finding. The report notes that "the situation has improved given that mainstream human right organizations have expanded their mandates to include the investigation of discrimination and persecution against sexual minorities and documentation from sexual minority rights organizations is increasingly regarded as a credible source of

information.” However, documentary challenges persist. Furthermore, increased activism and documentation has been met with attacks on gay, lesbian, bisexual, and transgender human rights defenders which impedes their ability to collect evidence.

Note: Specific to Canadian refugee status determination.

LaViolette, Nicole. “The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary” (2010) 22 Int’l J Refugee L 173 at 203.

This article critically discusses the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity. In examining objective documentation used in asylum claims (pp. 203-07), this article notes that the Guidance Note says very little about the challenges that sexual minorities face in accessing this documentation to support their claims. The article suggests that this is a serious oversight considering that a lack of specific country of origin information continues to be a serious hurdle for LGBTI refugee claimants. The article examines several issues including that the availability of documentation remains a problem and that the legal issues considered determinative of a refugee claim have shifted towards more complex issues of fact and law. The article suggests that “UNHCR should use the Guidance Note to caution decision makers about using inappropriate sources as substitutes.”

Santos, Michael. “In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Courts” (2012) LGBTQ Pol’y J, online: The LGBTQ Policy Journal <<http://hkslgbtq.com/?p=57>>.

This article discusses various effects that the *US REAL ID Act of 2005* has had on sexual minority asylum seekers. Part 2 discusses the role of international law, through the Yogyakarta Principles, in shaping the adjudication of U.S. transgender asylum cases. The article argues that the Principles could be used to address the REAL ID Act’s heightened credibility and corroboration requirements and allow for greater judicial discretion.

Note: Specific to US refugee status determination. Author abstract.

Swink, Arwen. “Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities” (2006) 29:2 Hastings Int’l & Comp L Rev 251.

This article seeks to explore some of the difficulties the asylum adjudication process poses for LGBT people seeking refuge from persecution. Specifically, this article addresses the various ways in which asylum adjudicators in Canada, Australia and the United States analyze the conditions faced by members of sexual minorities in their country of origin. This analysis focuses on the ways in which the asylum process may more effectively address the differing forms of persecution faced by lesbians, gay men, bisexuals and transgendered people, with a focus on the intersection of gender, gender display and sexual orientation. The article discovers that country conditions evaluations which generalize about the experiences of sexual minorities

over time, within a given country, or without regard to the different social experiences of lesbians as opposed to gay men fail to provide an accurate picture of the social context in question. The article concludes that a system for the adjudication of asylum claims which fails to develop such a picture faces a serious danger of failing to serve its fundamental purpose: the protection of individuals fleeing persecution.

Note: Focuses on experiences from Australia, Canada and United States. Author abstract.

UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 23, 2012), HCR/GIP/12/01, at para 64, online: Refworld <<http://www.refworld.org/docid/50348afc2.html>>.

The Guidelines discuss evidentiary matters in claims based on sexual orientation or gender identity at paragraphs 64-66 stating that, “[t]he applicant’s own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community or where there is a lack of country of origin information. Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation. Furthermore, medical ‘testing’ of the applicant’s sexual orientation is an infringement of basic human rights and must not be used.”

US Citizenship and Immigration Services, *RAIO Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims* (2011) at 43, online: <<http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>>.

Section 7.2 of this training manual examines country of origin information (COI) in claims based on sexual orientation or gender identity (pp. 43-44). The section notes that COI on LGBTI issues can sometimes be more difficult to find than on other issues. The manual provides resources where information on LGBTI claims can be found. The section suggests that where there is a lack of sufficiently specific country of origin information, the decision-maker may have to rely on the applicant’s testimony alone to make his or her decision.

Wessels, Janna. “Sexual Orientation in Refugee Status Determination” (2011) Working Paper Series No. 73, online: Refworld <<http://www.refworld.org/pdfid/4ebb93182.pdf>>.

Part 3 of this article discusses the role of corroborative evidence in sexual orientation or gender identity claims (pp. 34-36; 41-46). The article discusses how the use of such corroborative evidence is indeed double-edged. In some case it has been beneficial to the claimant’s case whereas in others it has had a negative effect.

A major problem is that sometimes documentary evidence is not available or does not exist. The article discusses how in these cases, the adjudicator must rely strongly on the claimant's testimony.

(4) Discriminatory Procedures

Arnold, Samantha K. "Identity and the Sexual Minority Refugee: A Discussion of Conceptions and Preconceptions in the United Kingdom and Ireland" (2013) 20:3 HR Brief 26, online: American University Washington College of Law
<<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1874&context=hrbrief>>.

This article focuses on the ways in which the concepts of sexual orientation and gender identity are perceived using examples from Ireland and the United Kingdom and the impact that the factors have on sexual orientation-based asylum claims. First, the article reflects on the conceptualization of sexual minorities in receiving countries to analyze to what extent pre-conceived notions of sexual orientation and gender identity adversely affect the sexual minority claimant in the pursuit of asylum. Secondly, it highlights where stereotypes or assumptions are imputed onto the applicant by the interviewer while discussing the variety of ways in which a sexual minority claimant may express sexual orientation or gender identity. In conclusion, the article asserts that interviewers do not apply flexible enough approach in determining whether or not a claimant is indeed a member of a sexual minority, for example, in cases where the interviewer does not deem self-identification as sufficient.

Note: Focus on UK and Ireland.

Benson, Christi Jo. "Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society" (2008-09) 30 Whittier LR 41 at 56.

This article discusses discrimination that transgender refugee claims face in US refugee status determination (pp. 56-8). Asylum adjudicators, lacking the proper training, mirror the misconceptions of society, which results in a transgender individual being stigmatized both for being transgender and then for being gay or lesbian, even though the transgender applicant may identify as heterosexual. The article states that, unfortunately, just as a transgender applicant can be persecuted because of an imputed gay identity, he or she can be stereotyped by the asylum adjudicator because he or she is believed to be gay or lesbian. The article argues that as a result of this bias, the courts' evidentiary requirements [for establishing membership in a particular social group] should focus less on knowledge of gay trivia than on actual experiences and culturally relevant markers.

Note: Specific to US refugee determination process. Author abstract.

Budd, Michael Carl. *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo, 2009) [unpublished], online: American University in Cairo
<http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This thesis examines the prejudice that exists on the part of decision-makers responsible for determining refugee status and adjudicating refugee claims in jurisdictions that accept claims based on sexual orientation. An analysis of case law from both common law and civil law jurisdictions uncovers the negative impact of judicial stereotypes about sexuality on refugees. The thesis then suggests that Western stereotypes about sexuality and non-normative sexuality in particular, that revolve around appearance, demeanor, past relationships, sexual activity, cultural values and other experiences and elements of identity are particularly problematic for LGBT refugees, most of whom come from a non-Western context. The thesis asserts that to be understood properly, the refugee narrative must be examined with regards to the intersection of multiple identities: gender, ethnic, religious and others.

Hojem, Petter. “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia” (2009) Research Paper No. 181 UNHCR at 20, online: UNHCR <<http://www.unhcr.org/4b18e2f19.pdf>>.

This report discusses some of the problems that sexual minority asylum seekers face during the refugee status determination interview (pp.20-21). The report states that interviewers should be trained to be sensitive with regards to the uniqueness of refugee claims based on sexual orientation. Special considerations should be given to selecting interpreters for claims based on sexual orientation. Claimants should have the choice to have interpreters of the same-sex as themselves. Claimants also may feel reluctant to openly talk about their sexuality in front of an interpreter that comes from the same ethnic group because they may be afraid that their whole ethnic community in the country of asylum will then know about his or her sexual orientation.

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 18.

Chapter 5 of this report examines issues facing claimants when they appear before the Tribunal including sensitive questioning; stereotypes; and, medical examinations (pp. 18-31). The report concludes that there is a need to conduct sexual diversity training for Tribunal Members to develop skills in sensitive questioning and redress recurrent stereotypes that manifest in Tribunal questions and reasoning, including stereotypes surrounding gay lives and lifestyles. Furthermore, the report states that it is important to emphasize to Tribunal Members that there will never be one set of ‘correct’ answers to many questions the Tribunal may ask about a claimant’s sexuality and lifestyle.

Note: Specific to Australian refugee status determination process.

LaViolette, Nicole. “Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013) 189, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122573>.

This article discusses cultural competency training for refugee claim decision-makers as a solution to overcoming problems with refugee claims based on sexual orientation or gender identity. The article notes that when problems related to sexual orientation and gender identity are raised in relation to refugee determination proceedings, many advocates, refugee lawyers and refugees call on adjudication authorities to mandate continuing professional training for decision-makers involved in LGBT refugee cases. While calls for training have sometimes outlined specific competencies to be developed by adjudicators, for the most part proponents fail to be specific about what type of professional development will result in better decision-making in LGBT refugee cases. By first considering the objectives and goals of sexual orientation and gender identity training for refugee personnel, the article argues that 'LGBT Cultural Competency Training,' an approach developed in the health and social work fields, is an appropriate model for the refugee context given that it would conceptualise more clearly the kinds of professional development interventions that are required to improve the refugee determination process, and that it would also help in targeting training modules to be more effective. The article also highlights the limitations of the tool and cautions that LGBT Cultural Competency Training is not a cure-all for the full range of problems facing LGBT refugees.

Note: Author abstract.

LaViolette, Nicole. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (2013) Report prepared for the Immigration and Refugee Board of Canada at 24, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276049>.

This report was prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada as part of a professional development session on sexual orientation, gender identity and the refugee determination process. The report examines challenges that claimants face in establishing their membership in a particular social group such as stereotyping by decision-makers (pp. 24-28). The report states that it is highly problematic when decision-makers disbelieve the sexual identity of a claimant when he or she does not fit 'highly stereotyped and westernised notions of 'gayness'.' The report stresses that "decision-makers should be very cautious about assessing a claimant's membership in a particular social group based on the perception of the claimant's physical appearance, mannerisms or manner of dress, or on any expectations of how they are to behave" given that such conclusions may constitute stereotyping. The report also discusses appropriate enquiries that decision-makers should make and difficulties relating to testifying about sexual orientation and gender identity.

Note: Specific to Canadian refugee status determination process.

Lee, EO & S Brotman. "Identity, Refugeeeness and Belonging: Experiences of Sexual Minority Refugees in Canada" (2011) 48:3 Can Rev Sociol 241 at 256.

This article explores the results of a qualitative community-based research project on the intersectional experiences of sexual minority refugees living in Canada.

Undertaken between 2008 and 2010, this study examines sexual minority refugees' multifaceted experiences of migration, the refugee determination process, and settlement. Excerpts from interviews conducted with LGBTI refugee claimants reveal discrimination in the Canadian refugee determination process (pp. 256-67).

Note: Specific to Canadian refugee status determination.

Morgan, Deborah A. “Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases” (2006) 15 Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues 135.

Asylum seekers who are lesbian, gay, bisexual, and transgender (LGBT) come to the United States to escape persecution including police abuse, harsh penalties (including death) for consensual sex, incarceration, drug or electroshock ‘treatments,’ and government inaction to prevent antigay violence. Thus, the sexual orientation asylum applicant must explain the basis of his or her fear with personal testimony and supporting evidence that proves he or she is homosexual and that he or she was persecuted on account of that homosexuality. The prevalent stereotype of a homosexual identity is based on upper-class white male norms of behavior, which marginalizes LGBT persons of color. The government appears to have adopted the substitutive model of homosexual identity in its adjudication of sexual orientation asylum cases. As a result, in many cases, evidence that the persecutors could identify the applicant as homosexual would be more relevant than whether the judge could identify the applicant as homosexual. This article argues that recognition of a sexual orientation asylum applicant's multidimensional identity is fundamental to an accurate representation of the basis of their subjugation. However, these changes require the government to work to change the process by which asylum seekers gain asylum on the basis of sexual orientation because it is a product of a historically racist and homophobic immigration system which today continues to use facially neutral policies to discriminate against people of color and LGBT individuals.

Note: Specific to US refugee status determination. Author abstract.

(5) Timelines

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 5 of this report briefly discusses ‘fast tracking’ in UK asylum law (pp. 87-89). Fast tracking is where “UKBA feel that there is less chance of a person qualifying for asylum as they come from a country which is generally perceived as being ‘safe.’” The report discusses various problems with the fast tracking such as claimants do not have enough time to properly prepare their cases and the psychological impact it has on asylum seekers.

Note: Specific to UK refugee status determination. Focus on Scotland.

Human Rights First, “The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Government Efficiency” (2010) online: Human Rights First <<http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>>.

In 1996, the U.S. Congress passed a provision barring an individual from seeking asylum if he or she did not apply for protection within one year of arriving in the United States. In the 12 years since the deadline was introduced, more than 53,400 applicants have had their requests for asylum denied, rejected or delayed due to the filing deadline. This report argues that the filing should be eliminated. The report confirms that this technical filing requirement is barring legitimate refugees with well-founded fears of persecution from receiving asylum in the United States and is leading to the unnecessary expenditure of government resources. The deadline pushes the cases of credible refugees into the overburdened immigration courts, diverts limited time and resources that could be more efficiently allocated to assessing the actual merits of asylum applications, and is not needed to counter abuse in the system. Refugees in cases involving gender, sexual orientation, or social stigma are further denied the exceptions to the filing deadline (pp 32-33).

Note: Specific to US refugee determination process. Not exclusively focussed on LGBTI refugee claims.

Immigration Equality & Midwest Immigrant and Human Rights Center, *LGBT/HIV Asylum Manual*, 3rd ed. (2006), online: Immigration Equality <<https://immigrationequality.org/issues/law-library/lgbth-asylum-manual/>>.

This handbook generally explains the law and procedure of asylum in the United States. The handbook provides best practices for the preparation and adjudication of LGBT/HIV asylum cases and it is intended for use by pro bono attorneys and immigration attorneys working on LGBT/HIV asylum cases rather than towards asylum seekers themselves. Section 5 outlines the requirement of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* that all asylum applicants must apply within one-year of their last entry into the United States and the exception to this rule.

Jordan, Sharalyn & Christine Morrissey. “Refugee Protection at Risk: Impact of Bill C-31 on Refugees Facing Persecution Related to Sexual Orientation or Gender Identity” Submission to Senate Committee on Social Affairs, Science and Technology (2012).

This report discusses various concerns with the effects that Bill C-31, which introduced serious changes to refugee law in Canada, will have on refugees facing persecution related to sexual orientation or gender identity. The authors find that the unrealistic accelerated timelines under Bill C-31 place LGBTI refugees at risk given that sexual orientation and gender identity claims require claimants to provide details about highly stigmatized, intimate and frequently traumatic aspects of their lives. This requires time and trust. Furthermore, the report argues that claimants will not have enough time to obtain competent legal counsel, prepare their case and collect evidence. As a result, the shortened timelines will unfairly prejudice LGBTI claimants.

Note: Specific to Canadian refugee status determination.

Musalo, Karen & Marcelle Rice. “Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum” (2008) 31 Hastings Int’l & Comp L Rev 693, online: University of California
 <<http://librarysource.uchastings.edu/repository/Musalo/31HastingsIntlCompLRev693.pdf>>.

In 1996, U.S. Congress passed the *Illegal Immigration Reform and Immigrant Responsibility Act* which contains a provision commonly known as the ‘one-year bar’ which requires any individual seeking asylum to apply within one year of his or her arrival in the United States. This article presents case summaries compiled from NGOs and practitioners in order to offer insight into the current application of the one-year bar. The article finds that between 1999 and 2005, asylum officers denied at least 35,429 claims on account of the one-year bar. The article finds that congress’ intent that the one-year bar rule be applied flexibly is often not followed; that the one-year bar does not prevent fraud; cases that meet the regulatory exceptions specifically post-traumatic stress disorder are rarely denied; the bar is applied to unaccompanied minors; and, adjudicators interpret the non-exhaustive list of exceptions as exhaustive. The most serious implications of the one-year bar are that its current application returns bona fide refugees to countries where they fear persecution; it deters legitimate refugee claimants; and, it disproportionately impacts detained persons and groups of applicants where stigma delays filing including LGBTI claimants (p. 717). The article recommends that the one-year bar be abolished and in addition, offers the following recommendations: reducing the burden of proof required to establish the date of entry; requiring asylum officers to reach a claim’s merits despite the implication of the one-year bar; replacing the ‘one-year’ bar with a ‘reasonable period’ bar; expanding the non-exhaustive list of examples of exceptional and changed circumstances; and, making application of the bar non-obligatory.

Note: Specific to US refugee determination process. The article is not specific to LGBTI refugee claims. Author abstract.

National Center for Lesbian Rights, “The Challenges to Successful Lesbian Asylum Claims” (2013), online: National Center for Lesbian Rights <http://www.nclrights.org/wp-content/uploads/2013/04/Resources_Challenges_Lesbian_Asylum_Claims.pdf>.

This report discusses the one-year bar in the US refugee state determination process and argues that this deadline presents difficulties for lesbian asylum-seekers. A lesbian may not be out to herself and she may discover her sexual identity after the one-year deadline has passed. Lesbians may be discouraged or deterred from applying for asylum because of the real or perceived likelihood of rejection and forcible removal to the country of origin due to the difficulties of proving the case. Because of the often hostile or discriminatory attitudes of local police and governments in the United States and because of discriminatory policies towards LGBT people in other areas of immigration, a lesbian may realistically fear that her homosexuality may not be grounds for asylum, but rather grounds for deportation.

Note: Specific to US refugee status determination process. Author abstract.

National Immigrant Justice Center’s LGBT Immigrant Rights Initiative (formerly National Asylum Partnership on Sexual Minorities), Human Rights First & Penn State Law’s Center for Immigrants’ Rights, “The One-Year Asylum Deadline and the BIA: No Protection, No Process” (2010) online: National Immigrant Justice Center <<https://www.immigrantjustice.org/oneyeardeadline>>.

This report is the first to examine how the one-year asylum deadline is handled by the American Board of Immigration Appeals (BIA). The report analyzed 3,472 BIA asylum cases decided from 2005 to 2008 (one case involving a gay man is cited at page 8) and the key findings include:

- One out of five asylum cases was denied for being filed after the deadline.
- In 46% of the 662 filing deadline denials, the BIA did not provide any reason for the denial other than that the application was submitted after the filing deadline. Of the 662 denials, no exceptions were recognized to the filing deadline.
- When an immigration judge granted an exception to the one-year deadline, the BIA affirmed that decision 75% of the time. By contrast, when an immigration judge denied asylum based on the one-year deadline, the BIA affirmed the decision 96% of the time.

The report concludes that the filing deadline must be repealed to ensure that refugees are not denied protection based on a technicality. The one-year deadline is unnecessary, arbitrary and a violation of the U.S. government’s commitments to refugees’ basic human rights.

Note: Specific to US refugee determination process. Not specific to LGBTI refugee claims. Author abstract.

Neilson, Victoria & 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” (2005) 8 NY City L Rev 233, online: Immigration Equality <<http://www.immigrationequality.org/wp-content/uploads/2011/08/Published-version-pdf-CNY106-3.pdf>>.

This article discusses the *Illegal Immigration Reform and Immigrant Responsibility Act* which requires asylum seekers to file their application within one year of their last entry into the United States unless they can prove that their case falls within certain narrow exceptions. This article notes that while a primary rationale behind the change in the law was to reduce the number of fraudulent asylum applications, a major consequence of the change has been to foreclose relief for untold numbers of otherwise eligible and deserving asylum seekers. This article explores the detrimental effect of the one-year ban, in particular, the deportation of many vulnerable foreign nationals to the very countries from which they fled due to a justifiable fear of persecution. The article argues that the one-year ban have had particularly harsh consequences for individuals seeking asylum based on their sexual orientation, transgender identity or HIV-positive status. The article concludes by calling for the elimination of the one-year ban or, short of that, for a liberal application of the exceptions to ensure that deserving applicants are not removed to countries from which they are legitimately seeking protection.

Note: Specific to US refugee status determination process. Author abstract.

Schrag, Philip G et al. “Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum” (2010) 52:3 Wm & Mary L Rev 651, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684231>.

Since 1980, the *American Refugee Act* has offered asylum to individuals who flee to the United States to escape persecution in their homeland. In 1996, however, Congress amended the law to bar asylum, regardless of the merit of the claim, for any applicant who fails to apply within one year of entering the United States, unless the applicant qualifies for one of two exceptions to the rule. Examining more than 300,000 claims from the Department of Homeland Security’s (DHS) database, the authors found that:

- Nearly a third of all affirmative asylum applicants missed the filing deadline.
- In the years immediately after the deadline went into effect (1998-2002), only 27% of applicants were late but this has increased to 35% (2003-09).
- DHS has rejected the applications, finding no applicable exception, in the cases of 59% of those who were determined to have filed late (18% of all affirmative asylum applicants).
- Applicants from certain countries such as the Gambia and Sierra Leone are much more disadvantaged by the deadline than applicants from certain other countries, such as Haiti and India. The deadline may particularly impact refugees who, upon arrival, are unable to find a community of immigrants from their home countries who could warn them about its existence.
- It is likely that as a result of the deadline, since April 1998 DHS has rejected more than 15,000 asylum applications, involving more than 21,000 refugees that would otherwise have been granted asylum (a gay case is described at p. 678).

The authors conclude that because the costs of the one-year deadline exceed its benefits, it should be repealed.

Note: Specific to US refugee determination process. The article is not specific to LGBTI refugee claims. Author abstract.

(6) Training of Adjudicators

Breen, Duncan & Yiftach Millo. “Protection in the City: Some Good Practice in Nairobi”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 54, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article discusses various assistance programmes for LGBTI refugees in Nairobi and offers examples of good practices that can be replicated in other urban settings. The article states that “LGBTI refugees often struggle to access assistance from NGOs, UNHCR offices or health-care providers due to a fear of being identified as LGBTI by other refugees and consequently, subjected to harassment or violence. Others fear being subjected to discrimination and prejudice from service providers.” Despite these challenges, the article examines various good practices that have been developed in Nairobi which include: outreach and identification; safe shelter; psychosocial support; training; having specific staff members at UNHCR and

NGOs focus solely on LGBTI claims; confidentiality; fast-tracking registration and refugee status determination; and, expediting resettlement.

Note: Focus on Kenya.

Carroll, D & M, Quinlan. *KINDA Ireland 2004: Findings from a Qualitative Study and Interviews with Young Male Migrants, Asylum Seekers and Refugees in Relation to Sexual Orientation and Other Experiences including Selling Sex* (Dublin: Gay Men's Health Project, 2004) online: Ireland's Health Services

<http://hse.ie/eng/services/list/5/sexhealth/gmhs/research/KINDA_Ireland_2004.pdf>

This KINDA Ireland Report 2004 is presented for local distribution to help inform policy and practice on migrant gay and bisexual men and on male sex work. The report gives an overview of the situation and background on homosexuality, sexual health, HIV, the legal issue for migrants and for male prostitution, together with a summary of research and reports on male sex workers. It details the specific interviews held with six asylum seeking/migrant men about their experiences since coming to Ireland. Based on these experiences, the report offers various recommendations including that there is a greater need for services to be aware of cultural and language differences and to implement these changes into their existent services; training on homophobia and heterosexism for those in contact with migrants is essential; and, networking and communications between the different disciplines and agencies working with this target group is also important.

Note: Specific to Ireland. Author abstract.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow

<http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 7 of this report discusses the challenges that LGBTI asylum seekers face in Scotland (pp. 120-48, 163-71). In particular, the report examines the unique needs of LGBTI asylum seekers; barriers to accessing services; gaps in services; partnership work across sectors; and, organizational support and training needs. The report concludes that there are many barriers for LGBT asylum seekers and refugees in accessing services and real problems exist around housing, poverty, destitution and the risk of sexual exploitation. The report offers various recommendations including that more training and awareness raising for organizations working with this population.

Note: Specific to UK refugee status determination. Focus on Scotland.

Grungras, Neil, Rachel Levitan & Amy Slotek. "Unsafe Haven: Security Challenges Facing LGBT Asylum Seekers and Refugees in Turkey" (2009) PRAXIS The Fletcher Journal of Human Security 41, online: The Fletcher School

<http://fletcher.tufts.edu/Praxis/Archives/~media/Fletcher/Microsites/praxis/xiv/PRAXISXXIV_4Grungas.pdf>.

Lesbian, gay, bisexual, and transgender individuals (LGBTs) face persecution and violence around the globe. Many are forced to escape this persecution in their

countries of origin and make claims for refugee status on the basis of their sexual orientation or gender identity. Turkey is increasingly a crossroads for mixed migration flows from Asia and Africa to Europe, and has seen a rise in the numbers of LGBT asylum seekers in recent years. Many arrive in Turkey to confront new violence and harassment by local communities and other refugees. While awaiting the determination of their refugee status, they avoid the police, are afraid to leave their homes, and have very limited access to social support, employment, and medical care. Expedited resettlement is one short-term solution to the security concerns facing this group. Longer-term solutions include training government agencies and social service providers on basic concepts regarding LGBT status and the rights of LGBT asylum seekers and refugees.

Note: Specific to Turkey.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 47, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 6 considers the complexity of credibility assessments in these claims (pp. 47-63). Two issues add to the complexity of these assessments. Firstly, in many European countries, remnants of the notion that LGBTI identities are deviant in a medical, psychiatric or psychological sense are prevalent in an asylum context, although the notion has been formally abolished. Secondly, the use of stereotypes results in unreasonable decisions. The report suggests that training for adjudicators is necessary to combat these problems.

Note: Specific to European refugee status determination.

Jordan, Sharalyn & Chris Morrissey. “‘On what grounds?’ LGBT Asylum Claims in Canada”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 13, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the challenges that LGBT individuals face in establishing their sexual orientation or gender identity in their asylum claims. The article states that “[t]o be recognised as a refugee, applicants must convince decision-makers of the genuineness of their sexual orientation or gender identity, their fear of persecution because of this identity, and the lack of protection in their country.” Claimants making claims based on their sexual orientation or gender identity face challenges in obtaining evidence to support their claims and are often evaluated against expected narratives of refugee flight and Western narratives of LGBT identity and community which can result in unreasonable decisions. The article argues adjudication practices have become more skillful with the training of decision-makers on sexual orientation and gender identity claims.

Note: Specific to Canadian refugee status determination.

Kassisieh, Ghassan. *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Gay & Lesbian Rights Lobby: 2008) at 18.

Chapter 5 of this report examines issues facing claimants when they appear before the Tribunal including sensitive questioning; stereotypes; and, medical examinations (pp. 18-31). The report concludes that there is a need to conduct sexual diversity training for Tribunal Members to develop skills in sensitive questioning and redress recurrent stereotypes that manifest in Tribunal questions and reasoning, including stereotypes surrounding gay lives and lifestyles. Furthermore, the report states that it is important to emphasize to Tribunal Members that there will never be one set of 'correct' answers to many questions the Tribunal may ask about a claimant's sexuality and lifestyle.

Note: Specific to Australian refugee status determination process.

LaViolette, Nicole. "Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?" in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013) 189, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122573>.

This article discusses cultural competency training for refugee claim decision-makers as a solution to overcoming problems with refugee claims based on sexual orientation or gender identity. The article notes that when problems related to sexual orientation and gender identity are raised in relation to refugee determination proceedings, many advocates, refugee lawyers and refugees call on adjudication authorities to mandate continuing professional training for decision-makers involved in LGBT refugee cases. While calls for training have sometimes outlined specific competencies to be developed by adjudicators, for the most part proponents fail to be specific about what type of professional development will result in better decision-making in LGBT refugee cases. By first considering the objectives and goals of sexual orientation and gender identity training for refugee personnel, the article argues that 'LGBT Cultural Competency Training,' an approach developed in the health and social work fields, is an appropriate model for the refugee context given that it would conceptualise more clearly the kinds of professional development interventions that are required to improve the refugee determination process, and that it would also help in targeting training modules to be more effective. The article also highlights the limitations of the tool and cautions that LGBT Cultural Competency Training is not a cure-all for the full range of problems facing LGBT refugees.

Note: Author abstract.

LaViolette, Nicole. "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group" Training Manual for Immigration and Refugee Board (IRB) Members, last updated: May 2004, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763>.

The majority of refugee claims based on sexual orientation or gender identity are grounded on an individual's membership in a particular social group and as a result, one of the elements to be satisfied in a refugee claim will be the claimant's membership in that particular social group. Assessing the accuracy of the claimant's sexual orientation or gender identity is a difficult, sensitive and complex task in the context of an administrative hearing. In particular, the very private and intimate nature of a claimant's sexual orientation or gender identity poses real challenges for adjudicators who are nonetheless required to engage with claimants about their personal lives and relationships. This document outlines a suggested approach that adjudicators can use in questioning a claimant about their sexual orientation. The purpose of this approach is to provide adjudicators with a range of issues that they may explore with a claimant when membership in a particular social group is an issue to be determined in the refugee claim.

Millbank, Jenni. "The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Int'l J Refugee L, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306102>.

This article explores the practice of credibility assessment in lower level tribunals using a case study of over 1000 refugee decisions made on the basis of sexual orientation from Australia, the United Kingdom, Canada and New Zealand from 1994 to 2007. The article notes how credibility played an increasingly major role in claim refusals and negative credibility assessments were not always based on well-reasoned or defensible grounds. The author notes that disbelief regarding actual group membership almost always dooms the claim to failure and decision-makers overestimated their ability to determine truthfulness, relied on assumptions and failed to articulate reasons for disbelief when assessing claims. This article examines avenues to improve the practise of credibility assessment including measures such as instructing decision-maker discretion through the use of guidelines and other means, improved selection and training of decision-makers, and through the creation of critical spheres of self-reflection in refugee adjudication processes and structures. This article argues that sexual orientation claims can be used to explore general issues in the determination of credibility.

Note: Focus on Australia, Canada, New Zealand and UK. Author abstract.

Organization for Refuge, Asylum and Migration, *Blind Alleys Part 1: Guidance for NGOs, Governments, UNHCR & Program Funders* (2013) online: ORAM <http://www.oraminternational.org/images/stories/PDFs/blindalleys/oram_recommend_eng_final_lr.pdf>.

Based on ORAM's research findings in the disparate protection environments of Uganda, South Africa and Mexico, as well as on ORAM's extensive work with this population in other locations, this guide offers key recommendations relevant to narrowing the protection gaps plaguing urban LGBTI refugees. Some of these recommendations include recommending that refugee-serving NGOs conduct trainings within their organizations to hone awareness, sensitization and expertise and that NGOs train other stakeholders including government agencies and community groups. Additionally, the guide recommends that NGOs focus training

on the implementation of procedures including codes of conduct prohibiting discrimination on the basis of sexual orientation and gender identity which the report believes will help to create non-threatening, accepting environments that signal safety and inclusion to LGBTI refugees.

Note: Focus on Mexico, South Africa and Uganda. Author abstract.

Organization for Refuge, Asylum & Migration, *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings* (2010), online: ORAM

<<http://www.oraminternational.org/images/stories/PDFs/oram%20phallometry%20paper%202010-12-15%20--for%20download.pdf>>.

Phallometry, a mechanical attempt to measure sexual arousal, has been applied in the refugee status determination context to ascertain the sexual orientation of males seeking asylum based on homosexuality. Physically invasive and scientifically questionable, phallometry has been rejected and doubted by courts, scientists and advocates as a severely flawed tool at best and an abuse of human rights at worst. The ultimate result of phallometric testing can be the rejection of a valid asylum claim, leading to deportation to a country where a refugee faces serious harm up to and including execution". The report concludes by stating that as the number of asylum applications made by sexual minorities increases, adjudicators need systematic and reliable tools to determine sexual orientation. Some recommendations include the development of accurate training materials and inoffensive and lawful techniques for interviewing asylum seekers and refugees who claim persecution based on their sexual orientation or gender identity; working with LGBTI rights groups and other human rights bodies to develop standards and guidelines for evaluating sexual minority refugee claims; and providing intake staff, claims adjudicators, and judges with training on sexual orientation and gender identity, including basic definitional concepts on these identities and their characteristics.

Note: Author abstract.

Rousseau, Cécile et al. "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15:1 J Refugee Studies 43, online: < <http://f-origin.hypotheses.org/wp-content/blogs.dir/920/files/2012/10/Rousseau-et-al.pdf>>.

This article documents the influence of legal, psychological and cultural factors on the refugee status determination process through a study of forty Canadian refugee cases (including some sexual orientation cases). The results indicate numerous problems affecting the role and behaviour of all actors such as difficulties in evaluating evidence, assessing credibility and conducting hearings; problems in coping with vicarious traumatization and uncontrolled emotional reactions; and, poor knowledge of the political context, false representations of war, and cultural misunderstandings or insensitivity. In a majority of cases, these legal, psychological and cultural dimensions interact together, often impacting negatively upon Board Members' abilities to evaluate credibility and upon the overall conduct of hearings. These findings suggest that the refugee determination process might benefit from

revised selection criteria for Board Members and refugee claim officers, as well as improved training and support for all actors.

Note: Specific to Canadian refugee status determination. Not specific to LGBTI refugee claims. Author abstract.

US Citizenship and Immigration Services, *RAIO Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims* (2011) at 29, online:

<<http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>>.

Section 6.2 of this training manual discusses suggested techniques for eliciting testimony from LGBTI claimants (pp. 29-38). The manual stresses the importance when interviewing LGBTI applicants that decision-makers set a tone that allows the applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. Decision-makers must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant. This section outlines various techniques that decision-makers can use when interviewing LGBTI claimants.

(7) Other Factors (Psychological, Cultural, Gender, Medical, etc.)

Abdi, MA. *Gender Outlaws between Earth and Sky: Iranian Transgender Asylum Seekers Trapped within (Inter) National Heteronormative Frameworks* (M A Thesis, Central European University, Feb. 2011), online: Central European University

<<http://goya.ceu.hu/search~S0?/aabdi/aabdi/1%2C4%2C4%2CB/frameset&FF=aabdi+mohammad+ali&1%2C1%2C/indexsort=->>>.

This thesis aims at understanding Islamic Republic recognition of sex-change operations and UNHCR acceptance of transgender people as potential refugees by looking through the dominant politics of gender and sexuality in the Islamic Republic and on the international level. Invoking interviews conducted in Turkey, the thesis shows that disciplining trends on national and international levels, which inform and are informed by each other, works as discriminating against those transgender people who do not fit within the dominant definition of discreet transgender citizens along the binary lines of male/female and man/woman.

Note: Author abstract.

Bennett, Claire & Felicity Thomas. “Seeking Asylum in the UK: Lesbian Perspectives”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 25, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article is based on recent doctoral research which examined the ways that lesbian women navigate the UK asylum process and the impacts of this process on their experiences, their identity and their well-being. The research found that the

asylum process, legal arguments and court appearances were all considered to be confusing and disempowering. A major concern for the women interviewed was how individual decision-makers understood and interpreted 'sexuality' and made assumptions about the appearance, characteristics and behaviour of 'a lesbian'; perceptions which were found to have a significant influence on the outcome of women's asylum applications. The article concludes with various recommendations based on the research.

Note: Specific to UK refugee status determination.

Berg, Laurie & Jenni Millbank. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants" (2009) 22:2 J Refugee Stud 195, online: Journal of Refugee Studies <<http://jrs.oxfordjournals.org/content/22/2/195.abstract>>.

This article draws upon psychological and sociological literature to explore the issues that arise in eliciting and presenting a refugee narrative when the claim is based upon sexual orientation. Rigid notions of homosexual identity may consciously or subconsciously shape decision-makers' approaches in this field. First, the authors identify psycho-social issues of particular significance to lesbian, gay and bisexual claimants which may act as barriers to eliciting their narrative of self-identity, including: a reluctance to reveal group membership as the basis of a claim, the experience of passing or concealment strategies, the impact of shame and depression on memory, common experience of sexual assault and sexualization of the identity narrative in the legal process. Secondly, the authors explore factors which inhibit the reception of such narratives in the legal process. In particular the authors explore the psychological 'stage model' of sexual identity development and examine the pervasive impact this model has had upon decision-makers' 'pre-understanding' of sexual identity development as a uniform and linear trajectory.

Coven, Phyllis. "Regarding Considerations for Asylum Officers Adjudicating Claims From Women" in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 53.

This memorandum is written to provide the INS Asylum Officer Corps with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender. The memorandum states that enhancing understanding of and sensitivity to gender-related issues will improve US asylum adjudications while keeping pace with international concerns. It serves as a useful tool for new asylum officers and will help to ensure uniformity and consistency in procedures and decisions.

Note: Specific to US refugee status determination. Author abstract.

Higgins, Stephen & Catherine Butler. "Refugees and Asylum Seekers" in Roshan das Nair & Catherine Butler, eds, *Intersectionality, Sexuality and Psychological Therapies: Working with Lesbian, Gay and Bisexual Diversity* (Blackwell, 2012) 113.

In this chapter the phases of exile faced by LGBTI asylum seekers are presented, followed by a focus on psychological issues including early life experiences, sexuality

development and the consequences of trauma. The chapter discusses how the psychological trauma that LGBTI claimants face and have faced may negatively impact their refugee claim. For example, the authors note, "...some of the men were so traumatised by their experiences that the last thing they wanted to do on arriving in the USA was 'to be gay'. Being gay had been the reason they had been targeted and tortured and they actually wanted to be 'invisible'." (p. 123). The end of the chapter focuses on ways in which psychologists can support LGBTI asylum seekers including community support and psychotherapy.

Howe, Cymene. "Sexual Adjudications and Queer Transpositions" (2014) 3:1 J Language & Sexuality 136.

Each of the articles included in this special issue of the *Journal of Language and Sexuality* asks us to imagine queer im/migration, asylum and sexual citizenship in multiple dimensions and to probe the discursive operations that establish the parameters of sexual subjectivity. This review article argues that these processes are illustrative of 'sexual adjudication': the discursive coordinates, legal logics and linguistic sensibilities that produce the category of the sexual migrant, the sexual refugee and the sexual asylum seeker. The discussions featured here engage questions of how sexual epistemics work in both sending and receiving countries, as well as the role of borders in constituting narratives of sexual subjectivity. In addition to analyzing the theoretical overlaps and reciprocal conversations between the articles included in the special issue, this essay provides a historical, comparative context by situating these discussions within larger theoretical and terminological questions regarding queer im/migration, asylum and subjectivity.

Note: Author abstract.

Immigration Equality & National Immigrant Justice Center, "Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status" (2005) at 58, online: National Immigrant Justice Center <<http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>>.

This report discusses how to present a claim based on sexual orientation if the claimant is married to a member of the opposite sex (pp. 58-9). The report stresses that it is essential to remember in preparing a sexual orientation-based asylum claim, that the first element which must be proven to the adjudicator is that the applicant really is lesbian or gay. This can be achieved by including a variety of evidence in the application. But what if the applicant was or is married? Will this be fatal to a sexual orientation-based asylum application? The answer, as with most asylum issues, is, it depends. It is important when preparing the case to realize that this will be a significant issue and to prepare the client to talk about the marriage honestly.

Note: Author abstract.

Kelly, Nancy. "Gender-Related Persecution: Assessing the Asylum Claims of Women" in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 17.

This article examines the existing law regarding gender-related persecution and proposes a framework for evaluating the cases of women asylum claimants under US law. The introduction presents an analysis of problems which have historically hindered the full presentation of women's claims and review current activities of human rights groups, advocates and adjudicators to address the particular asylum needs of women. Parts 1 and 2 review US asylum law and existing US case law regarding gender-related persecution of women. Part 3 sets out a framework for the evaluation of gender-related cases under US law, dividing cases into those involving gender-specific persecution, in which the type of persecution is tied to the claimant's gender and gender-based persecution, in which the persecution is inflicted because of a basis which is rooted in the claimant's gender. Finally, part 4 addresses the need for the implementation of procedures in asylum adjudication process as part of a multi-faceted approach to improve access to asylum protection for women.

Note: Author abstract.

Lewin, Simon & Ilan H Meyer. "Torture and Ill-Treatment Based on Sexual Identity: The Roles and Responsibilities of Health Professionals and Their Institutions" (2002) 6:1 Health HR 161.

This article examines the roles and responsibilities of health professionals and their institutions in preventing torture and ill-treatment based on sexual identity. The article discusses how the torture and ill-treatment of lesbian, gay, bisexual and transsexual persons has obvious effects on their health, even though formal assessments of these impacts are seldom conducted. Health care providers must recognize that a social environment that condones prejudice against LGBT people and promotes their social isolation can be detrimental to their physical and mental health. Challenging such as a pathogenic environment should be a priority for health professionals. The impacts of health policies, programs and practices on human rights of LGBT persons also deserve consideration are considered and discussed.

Lewis, Rachel. "The Cultural Politics of Lesbian Asylum: Angelina Maccarone's *Unveiled* (2005) and the Case of the Lesbian Asylum-Seeker" (2010) 12:3-4 Int'l Fem J Pol 424.

Although asylum for lesbians, gays, bisexuals and transsexuals has been on the international human rights agenda since the early to mid-1990s, lesbian asylum cases do not tend to figure centrally in analyses of the relationship between refugee law and international human rights law. While a number of regional and comparative studies of lesbian asylum exist by legal activists and scholars, a discussion of the politics of lesbian asylum claims has so far remained absent from both feminist and queer studies. This article explores how the subject of lesbian asylum is treated within the context of film and visual media. Focusing particular attention on Angelina Maccarone's 2005 film *Unveiled* about an Iranian lesbian asylum-seeker, the article considers the ways in which film and media might transform how we conceive of and imagine lesbian rights. It suggests that *Unveiled* offers important insights into the kinds of representational challenges that are specific to lesbian asylum claims and it argues that, in this way, the film constitutes a much-needed intervention into current advocacy on behalf of the issue of lesbian asylum.

Note: Author abstract.

Margulies, Peter. “Asylum, Intersectionality and AIDS: Women with HIV as a Persecuted Social Group” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.E. 3.

This article explores the tension between the United States immigration policy, which generally excludes those who are HIV/AIDS positive, and the obligations of the US under international refugee law. The article argues that women with HIV/AIDS who are facing persecution in their own countries would constitute a particular social group under the definition of refugee in US law. The article also examines many of the negative perceptions regarding individuals with HIV and argues that focusing on this debate through the lens of asylum would allow for the inclusion of positive rights and freedoms.

Note: Specific to US. Author abstract.

Minter, Shannon. “Lesbians and Asylum: Overcoming Barriers to Access” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.B. 5.

This article attempts to account for the disparity between the number of lesbian and gay asylees by identifying some of the gender-related barriers that have effectively excluded lesbians from asylum. Part 2 describes the barriers that have prevented lesbians from seeking asylum, including gender-based social and economic disadvantage, lack of lesbian-specific human rights analysis and documentation, and the historical failure of international asylum law to protect women fleeing gender-based persecution (I.B 7-10). Part 5 offers concrete suggestions for how attorneys and other immigration and human rights advocates can better represent lesbian clients and mitigate some of the barriers identified in Part 2.

Note: Author abstract.

Neilson, Victoria. “On the Positive Side: Using a Foreign National’s HIV-Positive Status in Support of an Application to Remain in the United States” (2004) 19 *AIDS & Public Pol’y* J 45, online: [Immigration Equality <http://www.immigrationequality.org/wp-content/uploads/2011/08/AIDS-Public-Policy-Article.pdf>](http://www.immigrationequality.org/wp-content/uploads/2011/08/AIDS-Public-Policy-Article.pdf).

Since 1987, the United States has maintained a restrictionist and discriminatory policy toward foreign nationals who are HIV positive. This policy can only be waived in limited circumstances. In most instances, testing positive for HIV makes it difficult or impossible for a foreign national to visit or obtain permanent residence in the United States. This article discusses two unusual cases where, in direct contrast to general immigration policy, a foreign national’s HIV-positive status actually helped the individual to obtain lawful immigration status in the United States. Part 1 of the article describes the parameters of immigration law as it applies to HIV-positive individuals. Part 2 focuses on two cases in which two immigration judges granted legal status to foreign nationals because of their HIV-positive status.

Finally, part 3 calls for a change in the law to allow a greater number of foreign nationals, whose lives would be in jeopardy if they returned to their home countries, to remain lawfully in the United States, where they can obtain lifesaving medical treatment and become productive members of society.

Note: Specific to US immigration law. Author abstract.

Perez-Ramirez, Luis Angel. “Immigration and trauma: A Study with Latino Gay Men Asylum Seekers” (2003) 64:3 Wright Institute Graduate School of Psychology 1553.

This study explores the previously reported finding that refugees frequently have re-traumatizing experiences during immigration generally, and in the process of seeking asylum in particular. Data is presented from a sample of Latino gay men seeking asylum in the United States through the use of Grounded Theory methodology. A qualitative analysis was applied to the transcripts of semi-structured interviews and the Harvard Trauma Questionnaire was used to capture trauma symptoms related to the refugee experience associated with Post Traumatic Stress Disorder criteria. Results are reported as themes or codes that represent participants’ ideas, thoughts, feelings, and perspectives about the asylum process. Noteworthy codes are organized within categories that support the findings that the process of asylum seeking by Latino gay men is a re-traumatizing experience, with a major aspect being the re-living of past traumatic experiences.

Note: Author abstract.

Randazzo, Timothy. “Social and Legal Barriers: Sexual Orientation and Asylum in the United States” in Eithne Luibheid & Lionel Cantu Jr., eds., *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings* (Minneapolis: University of MN Press, 2005) at 30.

This article examines the social and legal barriers facing sexual orientation and gender identity refugee claimants through an examination of departure; community isolation; inability to afford an attorney; discrimination in the American asylum process; the one-year filing deadline; expedited removal; and, mandatory detention. The author concludes that in the wake of renewed restrictive currents in immigration policy, it is more important than ever that gay and lesbian rights organizations as well as immigrant rights advocates recognize the connectedness of the issues they have too often viewed as unrelated and the potential for coalition building around these issues.

Note: Specific to US refugee status determination.

Reading, Romy & Lisa R Rubin. “Advocacy and Empowerment: Group Therapy for LGBT Asylum Seekers” (2011) 17:2 Traumatology 86.

The asylum-seeking process may be particularly challenging for individuals with complex trauma histories. Although many LGBT asylum seekers are referred to individual psychotherapy by their legal counsel to prepare for the asylum process and to mitigate risks for re-traumatization, many decline due to fear, shame and cultural barriers. This article presents a model of group therapy for LGBT asylum seekers, rooted in multicultural and empowerment frameworks, which aims to address the unique concerns and challenges faced by these individuals. These include

recovery from the effects of complex trauma, managing the stress of immigration and acculturation, minimizing the risk for retraumatization which may occur during the asylum-seeking process and overcoming cultural obstacles to individual psychotherapy. The article reviews and integrates empirical and theoretical literature on the mental health of immigrants and asylum seekers, LGBT mental health and group therapy for trauma, and LGBT individuals and asylum seekers to offer theoretical support for the value of group therapy for LGBT asylum seekers. The authors offer recommendations for research along with suggestions for addressing the practical challenges encountered in working with LGBT asylum seekers.

Note: Author abstract.

Rousseau, Cécile et al. “The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board” (2002) 15:1 J Refugee Studies 43, online: < <http://f-origin.hypotheses.org/wp-content/blogs.dir/920/files/2012/10/Rousseau-et-al.pdf>>.

This article documents the influence of legal, psychological and cultural factors on the refugee status determination process through a study of forty Canadian refugee cases (including some sexual orientation cases). The results indicate numerous problems affecting the role and behaviour of all actors such as difficulties in evaluating evidence, assessing credibility and conducting hearings; problems in coping with vicarious traumatization and uncontrolled emotional reactions; and, poor knowledge of the political context, false representations of war, and cultural misunderstandings or insensitivity. In a majority of cases, these legal, psychological and cultural dimensions interact together, often impacting negatively upon Board Members’ abilities to evaluate credibility and upon the overall conduct of hearings. These findings suggest that the refugee determination process might benefit from revised selection criteria for Board Members and refugee claim officers, as well as improved training and support for all actors.

Note: Specific to Canadian refugee status determination. Not specific to LGBTI refugee claims. Author abstract.

San Francisco AIDS Foundation & National Immigration Project, HIV/AIDS and Immigrants: A Manual for Service Providers (2004), online: National Immigration Project <http://www.nationalimmigrationproject.org/legal_archives/Archive_2004%20NIPNLG%20HIV%20Manual.pdf>.

Part 2 of this report examines the impact of HIV on immigration status. The article discusses two major sets of rules prevent noncitizens from entering or staying in the United States: the grounds of inadmissibility and deportability. HIV is not a ground of deportability, but is a ground of inadmissibility. This means DHS can ‘remove’ someone from the United States for HIV only if the person entered the United States without government permission. DHS cannot deport people for being HIV positive or having an AIDS diagnosis if they entered on visas or now have lawful permanent residence.

Note: Specific to US.

Shidlo, Ariel & Joanne Ahola. “Mental Health Challenges of LGBT Forced Migrants” in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 9, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article examines the mental health challenges that face LGBT refugees. The article discusses how many LGBT refugees have significant and sometimes incapacitating psychological scars. These scars can negatively impact on the ability of a claimant to recount their story during the refugee status determination process which may result in their claim being found to be incredible. Additionally, “repeated retelling of a history of persecution can be re-traumatising for the forced migrant and cause secondary trauma to advocates and adjudicators.” The article expresses that mental health providers can assist in documenting the psychological effects of anti-LGBT persecution and its impact on the ability to secure refugee status.

IV. Problems Facing LGBTI Refugees in Country of Asylum

(1) General

BeLonG To, *Key Principles for Working with LGBT Asylum Seekers and Refugees – BeLonG To LGBT Asylum Seekers and Refugees Project* (2013), online: BeLonG To <<http://www.belongto.org/pro/page.aspx?contentid=8923>>.

In April 2011, Irish NGO BeLonG To initiated a project focused on LGBT asylum seekers and refugees under 30 years of age. The objective of the project was to improve the safety and quality of life of LGBT asylum seekers and refugees, many of whom face isolation and vulnerability on the basis of sexual orientation and gender identity. The project sought to develop best practise models for mainstreaming LGBT asylum seekers and refugees in the statutory and voluntary services which work with these populations and this report outlines these best practises models.

Breen, Duncan & Yiftach Millo. “Protection in the City: Some Good Practice in Nairobi”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 54, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article discusses various assistance programmes for LGBTI refugees in Nairobi and offers examples of good practices that can be replicated in other urban settings. The article states that “LGBTI refugees often struggle to access assistance from NGOs, UNHCR offices or health-care providers due to a fear of being identified as LGBTI by other refugees and consequently, subjected to harassment or violence. Others fear being subjected to discrimination and prejudice from service providers.” Despite these challenges, the articles examines various good practices that have been developed in Nairobi which include: outreach and identification; safe shelter; psychosocial support; training; having specific staff members at UNHCR and

NGOs focus solely on LGBTI claims; confidentiality; fast-tracking registration and refugee status determination; and, expediting resettlement.

Note: Focus on Kenya.

Brown, Warren. *Out of Many One People: Telling the Stories of Jamaican Gay Men and their Move to Canada* (M A Thesis, Royal Roads University, 2012) [unpublished], online: Royal Roads University <<https://dspace.royalroads.ca/docs/handle/10170/593>>.

In Jamaica, sexual acts between men are still punishable by law. Numerous incidents of violence against gay men and lesbians have prompted human rights groups to distinguish it as one of the most homophobic places on earth. There are many cases of gay Jamaican men seeking resettlement and refuge in Canada. While any transition to a new country and culture can be challenging for immigrants, there is limited research that speaks to the experiences of the gay Jamaican men. This paper is based on stories gathered from four gay Jamaican men who came to Canada as refugees and highlights issues of acculturation related to connection with Canadian culture, letting go of the home culture, challenges in support systems and the inability to feel comfortable, confident and settled in the new Canadian environment.

Note: Specific to Canada.

Budd, Michael Carl. *Mistakes in Identity: Sexual Orientation and Credibility in the Asylum Process* (M A Thesis, The American University in Cairo, 2009) [unpublished] at 62, online: American University in Cairo <http://www.aucegypt.edu/GAPP/cmrs/Documents/MichaelCarlBudd_Thesis.pdf>.

This article discusses some of the problems that LGBT refugees face in integrating into the host country (pp. 62-4). The article discusses how LGBT refugees are often shunned by the refugee community from their country of origin in the host country because of their sexual orientation or gender identity. As a result, the individual lacks vital information which can exacerbate problems such as those revolving around filing claims within a fixed amount of time after arrival. The article states that organizations that assist LGBT refugees can play a role in mitigating some of these problems.

Cantu, Lionel. *The Sexuality of Migration: Border Crossings and Mexican Immigrant Men.* (New York & London: New York University Press, 2009).

This book provides an innovative study of the experiences of Mexican men who have same sex with men and who have migrated to the United States. Until recently, immigration scholars have left out the experiences of gays and lesbians. In fact, the topic of sexuality has only recently been addressed in the literature on immigration. The book makes significant connections among sexuality, state institutions, and global economic relations. It situates its analysis within the history of Mexican immigration and offers a broad understanding of diverse migratory experiences ranging from recent gay asylum seekers to an assessment of gay tourism in Mexico. The book uses a variety of methods including archival research, interviews, and ethnographic research to explore the range of experiences of Mexican men who have sex with men and the political economy of sexuality and

immigration. Its primary research site is the greater Los Angeles area, where the author interviewed many immigrant men and participated in organizations and community activities alongside his informants. Sure to fill gaps in the field, the book simultaneously complicates a fixed notion of sexual identity and explores the complex factors that influence immigration and migration experiences.

Note: Focus on US and Mexico. Author abstract.

Carroll, D & M, Quinlan. *KINDA Ireland 2004: Findings from a Qualitative Study and Interviews with Young Male Migrants, Asylum Seekers and Refugees in Relation to Sexual Orientation and Other Experiences including Selling Sex* (Dublin: Gay Men's Health Project, 2004) online: Ireland's Health Services

<http://hse.ie/eng/services/list/5/sexhealth/gmhs/research/KINDA_Ireland_2004.pdf>

This KINDA Ireland Report 2004 is presented for local distribution to help inform policy and practice on migrant gay and bisexual men and on male sex work. The report gives an overview of the situation and background on homosexuality, sexual health, HIV, the legal issue for migrants and for male prostitution, together with a summary of research and reports on male sex workers. It details the specific interviews held with six asylum seeking/migrant men about their experiences since coming to Ireland. Based on these experiences, the report offers various recommendations including that there is a greater need for services to be aware of cultural and language differences and to implement these changes into their existent services; training on homophobia and heterosexism for those in contact with migrants is essential; and, networking and communications between the different disciplines and agencies working with this target group is also important.

Note: Specific to Ireland. Author abstract.

Chavez, Karma. "Identifying the Needs of LGBTQ Immigrants and Refugees in Southern Arizona" (2011) 58:2 J Homosexuality 189, online:

<http://www.academia.edu/432430/Identifying_the_Needs_of_LGBTQ_Immigrants_and_Refugees_in_Southern_Arizona>.

This article discusses the results of a needs assessment evaluation conducted for lesbian, gay, bisexual, transgender, and queer immigrants, asylees, refugees and their allies in Southern Arizona. Utilizing data collected from interviews with migrants, allies, and service providers, the article presents findings on the quality of service provision provided to this underserved community with a focus on health care, housing, and legal services. The article shows that no services are provided specifically for LGBTQ migrants and most LGBTQ migrants turn to family and friends when they have needs. The most significant result of this study pertains to the lack of cultural competence and an overall deficiency in terms of cultural awareness when it comes to the specific needs of LGBTQ migrants.

Note: Specific to US refugee assistance services. Author abstract.

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow

<http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 7 of this report discusses the challenges that LGBTI asylum seekers face in Scotland (pp. 120-48, 163-71). In particular, the report examines the unique needs of LGBTI asylum seekers; barriers to accessing services; gaps in services; partnership work across sectors; and, organizational support and training needs. The report concludes that there are many barriers for LGBT asylum seekers and refugees in accessing services and real problems exist around housing, poverty, destitution and the risk of sexual exploitation. The report offers various recommendations including that more training and awareness raising for organizations working with this population.

Note: Specific to UK refugee status determination. Focus on Scotland.

Cragolini, Guilia. “Lesbian, Gay, Bisexual and Transgender Refugees: Challenges in Refugee Status Determination and Living Conditions in Turkey” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

When severe human rights violations occur, some LGBT people feel forced to leave their countries to seek protection in another state. However, the living conditions in the state of asylum are not necessarily safe, as the case of Turkey illustrates. This chapter addresses the challenges faced by LGBT asylum seekers and refugee looking for legal protection as a refugee in order to enjoy human rights, and for safety, in terms of physical and psychological peace outside their countries of origin. The difficulties that the refugee LGBT community has in Turkey derive from the dual condition of being foreigners seeking asylum and being LGBT. This status implies double discrimination that results in precarious living conditions, serious security concerns and psychological disorders. These factors can have a negative impact on the asylum procedure.

Note: Specific to Turkey. Author abstract.

Grungas, Neil, Rachel Levitan & Amy Slotek. “Unsafe Haven: Security Challenges Facing LGBT Asylum Seekers and Refugees in Turkey” (2009) PRAXIS The Fletcher Journal of Human Security 41, online: The Fletcher School <http://fletcher.tufts.edu/Praxis/Archives/~//media/Fletcher/Microsites/praxis/xiv/PRAXISXXIV_4Grungas.pdf>.

Lesbian, gay, bisexual, and transgender individuals (LGBTs) face persecution and violence around the globe. Many are forced to escape this persecution in their countries of origin and make claims for refugee status on the basis of their sexual orientation or gender identity. Turkey is increasingly a crossroads for mixed migration flows from Asia and Africa to Europe, and has seen a rise in the numbers of LGBT asylum seekers in recent years. Many arrive in Turkey to confront new violence and harassment by local communities and other refugees. While awaiting the determination of their refugee status, they avoid the police, are afraid to leave their homes, and have very limited access to social support, employment, and medical care. Expedited resettlement is one short-term solution to the security concerns facing this group. Longer-term solutions include training government

agencies and social service providers on basic concepts regarding LGBT status and the rights of LGBT asylum seekers and refugees.

Note: Specific to Turkey.

Halatyn, Lucy. “Political Asylum and Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians” (1998) 22:1 Suffolk Transnat’l L Rev 133.

This article discusses how while sexual minorities are able to seek asylum in the US, upon their arrival to the US they may fall victim to hate crimes, discrimination and other forms of oppression because of the lack of protection provided by the US government. The article argues that the US government needs to create a uniform federal law that provides equal protection not only for gay and lesbian asylees but also for its gay and lesbian citizens, to end a legacy of hypocrisy. The article explores the legal treatment of the gay men and lesbians within the US and the discrimination, animosity and violence aimed toward this community. The article concludes with solutions to these practises.

Note: Specific to US refugee status determination. Author abstract.

Hojem, Petter. “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia” (2009) Research Paper No. 181 UNHCR, online: UNHCR <<http://www.unhcr.org/4b18e2f19.pdf>>.

This report examines some of the problems that sexual minorities face upon receiving asylum in Denmark, Norway and Sweden (pp. 18-20). For example, at reception centres, accommodating several men of the same cultural background in a small room can be challenging for LGBT asylum seekers as they may fear being revealed as homosexual and they may experience harassment or be subject to threats. Additionally, “the lack of privacy makes it impossible for some individuals to openly express their sexual orientation, which in turn might have bearings on their credibility in the RSD procedure itself.” The report states that these issues have resulted in many sexual minority refugees avoiding reception centres. Furthermore, “LGBT communities and LGBT organizations are generally located in larger urban areas, whereas reception centres in the Scandinavian countries are often found in remote and sparsely populated regions of the country” and this results in sexual minority refugees being unable to access important services and information. The report recommends private accommodation as a possible solution to remotely located reception centres.

Note: Specific to Denmark, Norway and Sweden.

Human Rights First, *Persistent Needs and Gaps: the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Refugees* (2010), online: Human Rights First <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Persistent-Needs_LGBTI_Refugees_FINAL.pdf>.

In all regions of the world people continue to flee their homes on account of their sexual orientation or gender identity. Often faced with limited resources, lesbian, gay, bisexual, transgender or intersex (LGBTI) persons may have no choice but to flee to asylum states where homophobia is as pervasive as the environments which

they initially fled. As they seek safe refuge, LGBTI refugees and asylum seekers face a number of specific protection problems which hinder their ability to access fair asylum or refugee status determination procedures, as well as protection and assistance measures which include access to asylum; biased adjudicators, civil society groups, UN staff and refugees; detention; sexual violence; bias-related violence; and, inconsistent protection policy and inadequate programming. This report examines these challenges and offers recommendations.

Jenicek, Ainsley, Alan D Wong & Edward Ou Jin Lee. “Dangerous Shortcuts: Representations of Sexual Minority Refugee in the Post-9/11 Canadian Press” (2009) 34 Can J Comm 635, online: Canadian Journal of Communication Online < <http://www.cjc-online.ca/index.php/journal/article/viewFile/2119/2140>>.

Given the media’s influence on policy development and social action, this article demonstrates the ways in which Canadian newspapers represent individual seeking refugee status in Canada on the basis of their sexual orientation. Specially, the article examines the racialized, imperialist, gendered and hetero-narrative constructed by major Canadian newspapers around sexual minority refugee bodies. It addresses how sexual minority refugee claimants have been used as mediating agents to maintain binaries of “us versus them,” of backward, oppressive countries and cultures versus civilized, progressive Canada. The differences between the social and legal treatments of their sexualities in their countries of origin in comparison to Canada enable journalists to highlight implicit and explicit distinctions between the two social-geographical entities, resulting in the culturalization of homophobia.

Note: Focus on Canada.

Lee, EO & S Brotman. “Identity, Refugeeess and Belonging: Experiences of Sexual Minority Refugees in Canada” (2011) 48:3 Can Rev Sociol 241.

This article explores the results of a qualitative community-based research study on the intersectional experiences of sexual minority refugees living in Canada. Undertaken between 2008 and 2010, the study examines sexual minority refugees' multifaceted experiences of migration, the refugee determination process and settlement. Through an analysis of the interrelated themes of identity, refugeeess and belonging, the article reveals the ways in which conceptions of sexual and gender identities interact with a heteronormative Canadian refugee regime. Excerpts from interviews conducted with LGBTI refugee claimants reveal discrimination in the Canadian refugee determination process. The article concludes with an exploration of strategies for increasing protection of sexual minority refugees in Canada.

Note: Canadian focus.

Lewin, Simon & Ilan H Meyer. “Torture and Ill-Treatment Based on Sexual dentity: The Roles and Responsibilities of Health Professionals and Their Institutions” (2002) 6:1 Health HR 161.

This article examines the roles and responsibilities of health professionals and their institutions in preventing torture and ill-treatment based on sexual identity. The

article discusses how the torture and ill-treatment of lesbian, gay, bisexual and transsexual persons has obvious effects on their health, even though formal assessments of these impacts are seldom conducted. Health care providers must recognize that a social environment that condones prejudice against LGBT people and promotes their social isolation can be detrimental to their physical and mental health. Challenging such as a pathogenic environment should be a priority for health professionals. The impacts of health policies, programs and practices on human rights of LGBT persons also deserve consideration are considered and discussed.

Munro, Lauren et al. “A Bed of Roses?: Exploring the Experiences of LGBT Newcomer Youth Who Migrate to Toronto” (2013) 4:6 Ethnicity & Inequalities in Health & Social Care 137, <http://www.emeraldinsight.com/journals.htm?articleid=17109765>.

This study examines the experiences of youth in a large and complex, multicultural, and gay-friendly urban centre, thus providing timely and current data about the well-being of newcomer LGBT youth. It is one of the first studies to offer some insights into the life issues and challenges post-migration of Canadian LGBT newcomer youth. The study explores the nature of various forms of oppression experienced by LGBT newcomers and offers recommendations for transforming services to better serve the complex needs of this marginalized population. The findings of the study include that youth experienced of homophobia and racism within interpersonal relationships, in the LGBT community, in their respective diasporic communities, in social service encounters and during the immigration and refugee process. Additionally, LGBT refugee youth experienced difficulties finding work and accessing health care, as well as the additional burden of proving their sexual orientation during refugee claimant hearings. The findings reveal systemic discrimination on the basis of race and sexual orientation with Canadian society and the refugee system. The study recommends focused anti-homophobia and anti-racism training and the implementation of policies designed to enhance accessibility, could improve service provision for newcomer LGBT youth.

Note: Specific to Canada. Author abstract.

Murray, David AB. “Becoming Queer Here: Integration and Adaption Experiences of Sexual Minority Refugees in Toronto.” (2011) 28:2 Refuge 127.

Since the early 1990s Canada has become a primary destination for individuals who make refugee claims on the basis of sexual orientation persecution. However, until recently, there was little research focusing on this growing component of Canadian urban queer communities and their experiences of the refugee claim process, and their integration and adaptation to Canadian society. This paper, based on interviews with lesbian, gay, bisexual and transgender (LGBT) refugee claimants and participation in LGBT newcomer support groups in Toronto, explores the formal and informal processes, spaces and practices through which LGBT refugee claimants learn about the Canadian nation-state, citizenship and queer identities and communities, and in so doing enter a space/moment of becoming a ‘becoming’ refugee as they learn the social, cultural, and bureaucratic processes and norms of the Canadian refugee apparatus.

Note: Focus on Canada.

Murray, David AB. “Real Queer: ‘Authentic’ LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System” (2014) 56:1 Anthropologica 21.

Since the early 1990s, Canada has become a primary destination for individuals who make refugee claims on the basis of sexual orientation persecution. Based on interviews with lesbian, gay, bisexual and transgender (LGBT) identified refugee claimants, social workers and refugee lawyers in Toronto, the author argues that LGBT refugees and those who work with them are enmeshed in a system predicated upon highly malleable, historically and socio-politically specific sexual terms and identities that privilege particular gendered, classed and raced interests and, thus, place LGBT refugees from non-North American societies in a particularly vulnerable position.

Note: Specific to Canada. Author abstract.

Noto, Oliva, William Leonard & Anne Mitchell. *Nothing for Them: Understanding the Support Needs of Lesbian, Gay, Bisexual and Transgender (LGBT) Young People from Refugee and Newly Arrived Backgrounds* (Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University, 2014), online:

<<http://arrow.latrobe.edu.au:8080/vital/access/manager/Repository/latrobe:35659>>.

While there is limited research on the support needs of lesbian, gay, bisexual and transgender (LGBT) culturally and linguistically diverse young people, even less is known about the lived experiences of LGBT people from refugee and newly arrived backgrounds in Australia. The paucity of research is matched by a lack of long-term support programs. This report discusses the challenges that sexual minority migrants face upon arrival to Australia and the services that are available to them. The report hopes that its finding will accelerate the development of policies, programs and services that are better able to support and meet the specific needs of LGBT young people from refugee and newly arrived backgrounds.

Note: Specific to Australia.

Nyanzi, Stella. “Homosexuality, Sex Work, and HIV/AIDS in Displacement and Post-Conflict Settings: The Case of Refugees in Uganda” (2013) 20:4 Int’l Peacekeeping 450.

This article aims to disrupt the silence, invisibility and erasures of non-heteronormative sexual orientations or gender identities, and of sex work, in HIV/AIDS responses within displacement and post-conflict settings in Africa. Informed by Gayle Rubin's sexual hierarchy theoretical framework, it explores the role of discrimination and violation of the rights of sex workers and of gender and sexual minorities in driving the HIV/AIDS epidemic during displacement. Specific case materials focus on ethnographic research conducted in urban and rural Uganda. Recommendations for policy, practice and programmes are outlined.

Note: Focus on Uganda.

O’Neil, Brian. “Challenges Faced by Lesbian, Gay, and Bisexual Newcomers Implications for Services” (2010) 12(1) Canadian Social Work 24, online: Integration-Net

<<http://integration-net.ca:81/infocentre/2011/002e.pdf>>.

The goal of immigrant settlement services is to help newcomers to establish themselves in Canada, and to participate fully in the community's economic and social life. Although service providers have recognized the settlement needs of various other populations, those specific to lesbian, gay, and bisexual (LGB) newcomers have, for the most part, been overlooked. In addition to coping with language and cultural differences, and possibly discrimination based on race, gender, or disability, LGB newcomers may also encounter barriers related to their sexual orientation. This article describes a qualitative study of the perceptions of 24 participants (6 LGB newcomers, and 18 settlement service workers) regarding the challenges faced by LGB people, and the issues relevant to serving them. The study highlights the importance for social workers of understanding newcomers' values and practices in regard to same-sex orientation; the need for safety and acceptance of LGB people in immigrant communities; and the necessity of welcoming newcomers into mainstream LGB communities. The article also proposes some directions for developing more inclusive and responsive services.

Note: Specific to Canada. Author abstract.

O'Neill, Brian & Hossein Kia. "Settlement Experiences of Lesbian, Gay, and Bisexual Newcomers in BC" (2012) No. 12-15 Metropolis British Columbia Centre of Excellence for Research on Immigration and Diversity, online: Metropolis British Columbia <<http://mbc.metropolis.net/assets/uploads/files/wp/2012/WP12-15.pdf>>.

This report discusses the settlement experiences of lesbian, gay and bisexual newcomers in British Columbia, Canada and reveals that LGB newcomers undergo the process of settlement distinctly from other groups of immigrant and refugees. In particular, the report examines issues of identity among LGB newcomers and how these identity issues influence their access and use of immigration and refugee services. The report also explores differences in perceptions of experience and need among newcomers and service providers.

Note: Focus on Canada.

Organization for Refuge, Asylum and Migration, *Blind Alleys Part 1: Guidance for NGOs, Governments, UNHCR & Program Funders* (2013) online: ORAM <http://www.oraminternational.org/images/stories/PDFs/blindalleys/oram_recommend_eng_final_lr.pdf>.

Based on ORAM's research findings in the disparate protection environments of Uganda, South Africa and Mexico, as well as on ORAM's extensive work with this population in other locations, this guide offers key recommendations relevant to narrowing the protection gaps plaguing urban LGBTI refugees. Some of these recommendations include recommending that refugee-serving NGOs conduct trainings within their organizations to hone awareness, sensitization and expertise and that NGOs train other stakeholders including government agencies and community groups. Additionally, the guide recommends that NGOs focus training on the implementation of procedures including codes of conduct prohibiting discrimination on the basis of sexual orientation and gender identity which the

report believes will help to create non-threatening, accepting environments that signal safety and inclusion to LGBTI refugees.

Note: Focus on Mexico, South Africa and Uganda. Author abstract.

Organization for Refuge, Asylum and Migration, *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers* (2012) online: ORAM <<http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf>>.

This report seeks to help NGOs protect LGBTI refugees and it is based on a survey of hundreds of NGOs around the world. The report's findings reveal both extraordinary commitments to, and in other respects, considerable room for improvement in, LGBTI refugee protection by NGOs. The report reveals that, of particular concern, is the dense shroud of invisibility and silence that surrounds the realities of sexual orientation and gender identity. As the results of the report indicate, many NGOs are unaware of the LGBTI refugees in their midst and many others are unaware of the need for targeted policies to help these vulnerable individuals. The report makes several key recommendations including that NGOs should build their knowledge and capacity on core LGBTI issues through ongoing, context-specific sensitization trainings; the adoption of codes of conduct that will reduce discrimination on the basis of sexual orientation and gender identity; expanded collaboration with LGBTI groups; and, NGOs must create welcoming environments for LGBTI individual by encouraging staff to address issues of sexual orientation and gender identity while avoiding stereotypes and assumptions.

Note: Author abstract.

Organization for Refuge, Asylum and Migration, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees & Asylum Seekers Under the Yogyakarta Principles* (2010) at 22.

Section 3.2.1 of this report examines challenges that LGBTI refugees encounter in the country of refuge, as informed by relevant Yogyakarta Principles (pp. 22-38). The report discusses how LGBTI refugees are often confronted with new violence and harassment in their countries of first asylum or resettlement. Furthermore, "concerns regarding physical safety and security permeate virtually all other protection areas for LGBTI individuals, from housing, to employment, to education. Moreover, physical violence and its aftermath play a critical part in the multiple marginalization mix which characterizes their plight." The report in particular discusses persecution in general; adequate housing; access to secure and safe employment; medical and mental health care; education; and, social rights.

Oxford, Connie. "Queer Asylum: US Policies and Responses to Sexual Orientation and Transgendered Persecution" in Marlou Schrover & Deirdre M. Moloney, eds, *Gender, Migration and Categorisation: Making Distinctions between Migrants in Western Countries, 1945-2010* (Amsterdam: Amsterdam University Press, 2013) 127, online: Universiteit Van Amsterdam <<http://dare.uva.nl/document/503483#page=128>>.

This chapter examines US asylum laws (both legislative and case law) and policies regarding sexual orientation and transgendered persecution. It discusses the

gendered nature of US asylum laws and policies towards lesbian, gay, bisexual and transgendered migrants, paying particular attention to the claims of gay men and transgendered women. The chapter examines how queer asylum seekers face particular obstacles because of homophobia and transphobia in their own immigrant communities (pp. 137-38). The chapter argues that this has a negative effect on queer asylum seekers because they are not able to rely on the assistance of their own immigrant community in navigating the asylum process.

Note: Specific to US refugee status determination. Author abstract.

Randazzo, Timothy. “Social and Legal Barriers: Sexual Orientation and Asylum in the United States” in Eithne Luibheid & Lionel Cantu Jr., eds., *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings* (Minneapolis: University of MN Press, 2005) at 30.

This article examines the social and legal barriers facing sexual orientation and gender identity refugee claimants through an examination of departure; community isolation; inability to afford an attorney; discrimination in the American asylum process; the one-year filing deadline; expedited removal; and, mandatory detention. The author concludes that in the wake of renewed restrictive currents in immigration policy, it is more important than ever that gay and lesbian rights organizations as well as immigrant rights advocates recognize the connectedness of the issues they have too often viewed as unrelated and the potential for coalition building around these issues.

Note: Specific to US refugee status determination.

(2) Detention and Deportation

Cowen, Tim et al. Equality Network BEMIS & GRAMNet, *Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland* (Glasgow: Equality Network, BEMIS and GRAMNe, 2011), online: University of Glasgow <http://www.gla.ac.uk/media/media_195792_en.pdf>.

Chapter 5 of this report briefly discusses the detention of LGTB asylum seekers (pp. 86-87). Findings on detention centres included: the high levels of homophobic and transphobic bullying and violence within detention centres; major difficulties in accessing expert legal advice; and, the impact of detention on LGBT asylum seekers' mental health. The report also notes the particular risks faced by transgender asylum seekers.

Note: Specific to UK refugee status determination. Focus on Scotland.

Fialho, Christina. “A Model Immigration Detention Facility for LGBTI?”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 50, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article discusses the treatment of gay and transgender asylum seekers in immigration detention centres in the USA. The article notes that while some positive steps have been taken to improve treatment in detention, further improvements can

be made in four key areas which include: (1) LGBTI training for detention centre employees; (2) health care; (3) visitation; and, (4) transfers.

Note: Specific to US refugee law.

Jansen, Sabine & Thomas Spijkerboer. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, (Vrije Universiteit Amsterdam: 2011) at 77, online: Refworld <<http://www.refworld.org/docid/4ebba7852.html>>.

This report examines the differences in the ways European countries examine refugee claims based on sexual orientation or gender identity. Part 8 discusses reception and detention centres stating that, in these places, LGBTI claimants often face homophobic and transphobic behaviour which range from discrimination to abuse and violence (pp. 77-8). In regards to this problem, the reports recommends that the specific needs of LGBTI claimants should be addressed by developing appropriate procedures and guidelines, that LGBTI claimants be given a form of control over their housing situation and training the staff at reception and detention centres.

Note: Specific to European refugee status determination process.

Jordan, Sharalyn & Christine Morrissey. “Refugee Protection at Risk: Impact of Bill C-31 on Refugees Facing Persecution Related to Sexual Orientation or Gender Identity” Submission to Senate Committee on Social Affairs, Science and Technology (2012).

This report discusses various concerns with the effects that Bill C-31, which introduced serious changes to refugee law in Canada, will have on refugees facing persecution related to sexual orientation or gender identity. The report finds prolonged detention and delayed permanent residence for ‘irregular arrivals’ under Bill C-31 to be unjust. For individuals fleeing persecution based on sexual orientation or gender identity, the report notes that neighbouring countries are often just as unsafe as their home country and smugglers or agents are often the only means to leave their countries. Refugees should not be punished for resorting to these means to reach potential safety. Furthermore, the report states that the safety of LGBTI refugees who are detained cannot be guaranteed and detention makes it difficult for these refugees to access legal counsel with expertise in sexual orientation or gender identity claims.

Note: Specific to Canadian refugee status determination.

Lewis, Rachel. “Deportable Subjects: Lesbians and Political Asylum” (2013) 25:2 Feminist Formations 174.

This article explores how deportation as a state of emergency structures the queer migration narratives of lesbian refugees and asylum-seekers. The first part of the article discusses the ways in which the political asylum system produces queer, and specifically lesbian, migrants as deportable subjects. The second part examines queer anti-deportation advocacy emerging from within these spaces of deportability or crisis. The third part analyzes a 2010 piece of performance art, Oreet Ashery's *Staying: Dream, Bin, Soft Stud and Other Stories*, that reflects upon the everyday practices and embodied experiences associated with deportability. What is crucial

about this particular text is that it enables the lesbian refugees involved in the project to take an active role in the production of their asylum narratives. In doing so, the article suggests, media and cultural advocacy on behalf of lesbian asylum can provide a site for the articulation of new sexual rights claims.

Note: Focus on UK. Author abstract.

Tabak, Shana & Rachel Levitan. “LGBTI Migrants in Immigration Detention: A Global Perspective” (2014) 37 Harvard JL & Gender 1, online: Harvard Journal of Law & Gender <<http://harvardjlg.com/wp-content/uploads/2014/02/Tabak.LGBTIMigrants.pdf>>.

This article focuses on the special concerns of lesbian, gay, bisexual, transgender and intersex detained migrants. The article demonstrates the severe harms detained LGBTI migrants experience and the need for special protection within this community. The article states that LGBTI detainees are particularly susceptible to heightened levels of physical and mental abuse which often includes targeted violence and sexual assault given that perpetrators of violence often choose victims that appear to be the most vulnerable. In addition to analyzing the human rights violations confronting LGBTI migrants in detention, the article offers some recommendations including that detention should never be applied to the most vulnerable populations; if detention is necessary, states must take measures to remedy the human rights problems that LGBTI detainees often face; the importance of appropriate training for detention facility staff; and, ensuring access to healthcare, welfare services, legal counsel and LGBTI support systems. The article concludes by identifying the lack of either detailed empirical data or legal scholarship on the particular problems that LGBTI migrants face when they are subject to immigrant detention and notes that further investigation is required before the extent of the problems experienced by LGBTI detainees can be fully understood.

Note: Author abstract.

(3) Family Sponsorship of Same-Sex Partners

Dunton, Elise S. “Same Sex, Different Rights: Amending U.S. Immigration Law to Recognize Same-Sex Partners of Refugees and Asylees” (2012) 50:2 Fam Ct Rev 357.

The United States continues to refuse to federally recognize any form of same-sex partnership, a decision which bears directly on those relationships considered valid for immigration purposes. The *Uniting American Families Act (UAF)* represents the closest any proposed legislation has come to successfully granting immigration rights to gay immigrants. However, through its restrictive provisions, the *UAF* fails to fully account for the needs of refugees, asylees and their same-sex partners. This article argues that, while the *UAF* is a step in the right direction, it does not go far enough to protect gay refugees and asylees. The article further proposes that legislation be enacted which would provide this unique segment of the immigrant population with the opportunity to share their lives together, free from fear of persecution. It advocates for the use of the conjugal partner provision set out in Canada's *Immigration and Refugee Protection Act* as a template for changes to U.S.

immigration law, thereby expanding the category of relationships viewed as valid for the purpose of immigration.

Note: Specific to US refugee law. Author abstract.

European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part 1 – Legal Analysis* (2009) at 93, online: European Union Agency for Fundamental Rights (FRA) <http://fra.europa.eu/sites/default/files/fra_uploads/192-FRA_hdgso_report_Part%201_en.pdf>.

Section 3 of Part 3 of this report examines the possibility of spouses or partners of individuals granted asylum on the basis of their sexual orientation or gender identity to also be granted residence permits (pp. 93-106). The report states that Council Directive 2003/86/EC “should be implemented in conformity with the requirements of fundamental rights and without discrimination on grounds of sexual orientation”. The report then examines three implications of the non-discrimination requirement on European countries which are: (1) that the same-sex ‘spouse’ of the sponsor should be granted the same rights as would be granted to an opposite-sex ‘spouse’; (2) if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship or to registered partners, this should not only benefit opposite-sex partners; and, (3) if a European Union Member State decides to grant the benefits of the provisions of EC law on the free movement of persons to the partners of a third-country national residing in another Member State, this may not be restricted to opposite-sex partners.

Note: Specific to European refugee status determination process.

LaViolette, Nicole. “Coming Out to Canada: The Immigration of Same-Sex Couples Under the *Immigration and Refugee Protection Act*” (2004) 49:4 McGill LJ 969, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803800>.

While Canadian immigration policy has long favoured family reunification, until 2002, Canadian immigration laws allowed only married heterosexual Canadians to sponsor their spouses as family class immigrants. The 2002 *Immigration and Refugee Protection Act*, and the accompanying *Immigration and Refugee Protection Regulations*, have expanded the family class to allow gay men and lesbians to formally sponsor their partners. This article argues that despite the important progress made in recognizing gay and lesbian conjugal relationships under the new legislation, the issue of same-sex immigration remains problematic. The article examines the legislative scheme to reveal that the new family class categories still contain policy and drafting weaknesses that could hinder same-sex immigration. Section II examines some issues of relevance to refugee law: the inability of spouses to cohabit because of persecution or penal control; and (2) the evidence required to prove persecution or penal control in the context of a spousal application.

Note: Specific to Canadian refugee law. Author abstract.

LaViolette, Nicole. “Sexual Minorities, Migration, and the Remaining Boundaries of Canadian Immigration and Refugee Laws” in Soheila Pashang, Debbie Douglas & Avvy

Go, eds, *Unsettled Settlers: Barriers to Integration* (Toronto: de Sitter, 2012) 29, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122577>.

This chapter outlines the various ways in which LGBTI refugees settle in Canada and then discusses the particular challenges that confront LGBTI refugees and immigrants during their migration and settlement in Canada. The three primary ways in which LGBTI refugees settle in Canada are: (1) the inland refugee system; (2) resettlement from outside Canada; and (3) immigration in the family class. Part of the chapter specifically examines the challenges that LGBTI individuals face in establishing the genuineness of their same-sex relationship when sponsoring their same-sex partner (pp. 41-43). The chapter notes that some LGBTI individuals will be able to prove the genuineness of their relationship by producing marriage certificates, wedding photos or proof of civil union registration. However, for other individuals these types of documents will not be available. Furthermore, the chapter stresses that it is important for decision-makers to recognize that same-sex relationships can be very different from opposite-sex relationships and decision-makers must assess the genuineness of these relationships without using markers that may only apply in the context of heterosexual relationships.

Note: Specific to Canadian refugee law.

Pischl, Stephen. “Circumventing Shari’a: Common Law Jurisdictions’ Response to Persecuted Sexual Minorities’ Asylum Claims” (2006) 5:2 *Wash U Global Stud L Rev* 425, online: *Global Studies Law Review* <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1183&context=globals_tudies>.

This article discusses the impact of US legal barriers to sexual minority asylum applicants’ unification with their same-sex partners (pp. 439-40). “If an asylum applicant has been granted asylum or withholding of removal in the United States, after maintaining his or her status for one year, such an individual may apply to become a lawful permanent resident of the United States. Individuals who have successfully achieved designation as lawful permanent residents can then petition the BIA to obtain visas allowing their foreign spouses to come to the United States. Same-sex spouses of lawful permanent residents, however, are excluded from this provision; in effect, grants of asylum to sexual minority applicants have the perverse effect of separating them from their families.”

Note: Specific to US refugee law. Author abstract.

Soloway, Lavi S. “Challenging Discrimination Against Gays and Lesbians in United States Immigration Law: The Lesbian and Gay Immigration Rights Task Force” in Sydney Levy, ed, *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay and Lesbian Human Rights Commission and Lambda Legal Defence and Education Fund, 1996), I.E. 3.

This article discusses same-sex family reunification. One of the purported humanitarian purposes of immigration policy is the unification of families. Accordingly, U.S. immigration law facilitates the immigration of spouses of U.S.

citizens and permanent residents. The article notes, however, that nowhere in US immigration law are there any provisions for gay and lesbian couples in ‘binational’ relationships. Since they cannot legally marry, and since the law provides no avenue for a US citizen or permanent resident to petition for his/her same-sex partner, binational gay and lesbian couples are torn apart, their lives routinely disrupted and their relationships destroyed. Often, a partner residing abroad cannot even obtain a visa to travel to the United States for a temporary visit.

Note: Specific to US. Author abstract.

Sussner, Petra. “Invisible Intersections, Queer Interventions – Same Sex Family Reunification under the Rule of Asylum Law” in Thomas Spijkerboer, ed, *Fleeing Homophobia. Sexual Orientation, Gender Identity and Asylum* (Oxon, UK: Taylor & Francis Books, 2013).

This chapter discusses the entanglement of race and sexuality using the *Austrian Registered Partnership Act* (RPA) and the *Austrian Asylum Act* as examples. To address these issues the chapter aims to sum up major implications for a queer rights-oriented strategy and link them to the debate about queer anti-racist critique. The chapter examines legal steps that could become necessary against the background of queer anti-racist critique. For this purpose, the chapter turns to the European Convention on Human Rights (ECHR) and raises the question whether the reunification of LGBTQ refugee families under the Asylum Act may constitute a violation of Article 14 taken together with Article 8.

Note: Specific to Austria. Author abstract.

Tiven, Rachel & Victoria Neilson. “Working with Lesbian, Gay, Bisexual, and Transgender Immigrants” in Fernando Chang-Muy & Elaine P Congress, eds, *Social Work with Immigrants and Refugees: Legal Issues, Clinical Skills and Advocacy* (New York: Springer Publishing Co, 2009) 257.

Gay and lesbian families are not able to sponsor their spouses under American immigration law. No matter how long the family has been together or how many children they have, under American immigration law they have no recognition and no rights. This chapter reviews the history of how US immigration laws have treated lesbian, gay, bisexual, and transgender (LBGT) newcomers; why sponsorship by a same-sex partner is not an option; how lesbian, gay, bisexual, and transgender people may be able to apply for asylum; issues related to transgender immigrants; challenges facing newcomers; and, challenges facing social work providers.

(Taken from abstract)

Note: Specific to US refugee law.

(4) Resettlement

LaViolette, Nicole. “Sexual Minorities, Migration, and the Remaining Boundaries of Canadian Immigration and Refugee Laws” in Soheila Pashang, Debbie Douglas & Avvy Go, eds, *Unsettled Settlers: Barriers to Integration* (Toronto: de Sitter, 2012) 29, online:

Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122577>.

This chapter outlines the various ways in which LGBTI refugees settle in Canada and then discusses the particular challenges that confront LGBTI refugees and immigrants during their migration and settlement in Canada. The three primary ways in which LGBTI refugees settle in Canada are: (1) the inland refugee system; (2) resettlement from outside Canada; and (3) immigration in the family class. Part of the chapter specifically examines to what extent Canadian resettlement programs have extended international protection to LGBTI refugees.

Note: Specific to the Canadian refugee status determination.

Organization for Refuge, Asylum & Migration, *Migration and Travel Information for Russian LGBTI Individuals and their Families* (2014), online: ORAM

<http://www.oraminternational.org/images/stories/PDFs/information_for_lgbti_individuals_seeking_to_flee_russia_2014-02-11.pdf>.

This guide, aimed at Russian LGBTI people who fear for their safety and the safety of their families, outlines various options for leaving Russia for short or extended periods, and highlights important considerations for people who decide or are forced to leave Russia permanently. Section IV describes national asylum systems and off-shore refugee resettlement programs.

Organization for Refuge, Asylum and Migration, *Rainbow Bridges: A Community Guide to Rebuilding the Lives of LGBTI Refugees and Asylees* (2012) online: ORAM

<<http://www.oraminternational.org/images/stories/PDFs/oram-rainbow-bridges-2012-web.pdf>>.

This manual seeks to improve the resettlement integration model used for LGBTI refugees and asylees by providing community and faith-based groups with the knowledge they need to help refugees build new lives in the United States. This manual shares ORAM's knowledge, experience, and observations in partnership with several supportive communities. Information about individual cases was culled from ORAM's hands-on experience assisting and intensively following a small number of LGBTI (or queer) refugees in the San Francisco Bay Area and elsewhere in the United States. ORAM hopes that its pilot resettlement initiative will be the first of many. As we work toward a world where LGBTI persons are safe in their home countries, we must also work to assure the survival of those who have no choice but to escape.

Note: Focus on US. Author abstract.

Portman, Scott & Daniel Weyl. "LGBT Refugee Resettlement in the US: Emerging Best Practices", in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 44, online: Refworld <<http://www.refworld.org/pdffid/517eab7f4.pdf>>.

This article examines challenges in resettling LGBTI refugees in the US. The article discusses some of the best practises that are beginning to emerge in resettlement examining in particular: (1) preferred sites; (2) mainstreaming LGBTI resettlement; and, (3) communities of support.

Note: Specific to US refugee law.

Rumbach, Jennifer. “Towards Inclusive Resettlement for LGBTI Refugees”, in Marion Couldrey & Maurice Herson, eds, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants* (2013) 42 *Forced Migration Review* at 40, online: Refworld <<http://www.refworld.org/pdfid/517eab7f4.pdf>>.

This article discusses the challenges that LGBTI refugees face within the resettlement context. The article examines various practical initiatives which can promote a more humane resettlement experience including creating a welcoming space, ensuring confidentiality, training staff, providing critical resources and fostering inclusive workplaces.

B. Bibliographic Listing of Sources by Country or Region

(1) Africa

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