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Giving Shelter from the Storm: Colombians Fleeing Persecution Based on Sexual Orientation

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GIVING SHELTER FROM THE STORM: COLOMBIANS FLEEING PERSECUTION BASED ON SEXUAL ORIENTATION

Luz E. Nagle*

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Having grown up in Colombia during a time of great social and political turmoil, having been trained in Colombian law and having served as a judge in the court of first instance in the 1980s before fleeing to the United States for my own personal safety following several assassination attempts by drug lords, I can empathize with the anxious, traumatized, and fearful individuals who seek safe haven under U.S. asylum laws. Having dedicated my academic career and scholarship to understanding the many facets of law and society, human rights, international criminality, internal armed conflict and overwhelming corruption pervasive in Colombia and throughout Latin America, my perspective as an expert witness on behalf of more than seventy people fleeing for their lives to the United States for safety is credible and informed. It is my hope that this article will prove helpful to the judges who hear Colombian asylum cases.

This article is dedicated to Colombia's LGBT community in the hope that they will one day know a society that tolerates and respects the constitutional and human rights of all who call themselves Colombian.

I. INTRODUCTION

Colombian nationals have sought refuge under the asylum laws of the United States for many reasons. Some come here to escape persecution by the illegal armed groups that continue to cause horrific political and social turmoil. Some are fleeing Colombia for their political beliefs and activities that have caused them to run afoul of extreme factions within the government that commit social cleansing and extrajudicial killings to suppress opposition to the political and cultural status quo. Some are indigenous and non-European minorities who have been persecuted by a constellation of forces arrayed against their social activism, and the government is unable or unwilling to protect their rights and advocate for the welfare of their communities. Volumes could be written on the legal hardships faced by these groups, who come to the United States to find shelter from the storms that threaten to destroy them in their homeland.

However, this article focuses on another group of Colombians fleeing persecution — Colombia's lesbians, gays, bisexuals and transgender individuals ("LGBTs"). While Colombia has progressed in legislating greater rights for and tolerance of LGBTs in the last two decades, for the vast majority of the nation's homosexual population, each day is still fraught with great personal risk and great peril. For many, the physical abuse and emotional anguish have become so overwhelming that LGBTs have no recourse but to flee to the United States where they hope to find refuge to rebuild their lives.

Granting asylum to homosexuals claiming persecution is by no means settled in U.S. immigration courts, where negative perceptions and stereotypes held by the immigration judges and U.S. government attorneys persist.¹ The appellate process also shows a lack of judicial understanding of the cultural biases and homophobia in other countries that force LGBTs to seek asylum in foreign lands.² The purpose of this article is to shed light on conditions impacting LGBTs in Colombia in order for the U.S. government and our immigration judges to become cognizant of the horrific persecution suffered by LGBTs in a country prized as the closest ally the United States has in the Andean region.

The timing of this article is appropriate because each year over the last decade, legal scholars have been called upon to provide expert testimony regarding conditions in Colombia (and other Latin American states) on behalf of a plethora of asylum seekers fleeing political persecution and human rights violations in their native land. Most experts understand that the government lawyers and judges who argue and hear asylum and removal cases cannot be expected to have a scholar's knowledge of the nuances and conditions that cause foreign nationals to flee their native countries. However, general knowledge of human rights violations and political conditions in Colombia is inadequate and greater understanding is needed in order to render fair and accurate decisions on the fate of asylum and withholding from removal petitioners.

This article will first examine how LGBTs are treated in immigration courts in the United States. The article will then look at Colombian law and the legal developments

1. Swetha Sridharan, *The Difficulties of US Asylum Claims Based on Sexual Orientation*, MIGRATION INFORMATION SOURCE (Oct. 29, 2008), <http://www.migrationinformation.org/USfocus/display.cfm?ID=700>.

2. *Id.*

affecting the LGBT population, followed by an examination of the painful realities of life for Colombia's LGBTs and the peril to which they are subjected on a daily basis. The article concludes with a brief discussion of the well-founded fear of persecution homosexual Colombians have, based on societal characteristics that are unique to Colombia, and argues that we, as a nation professing to champion the progress of civil and human rights, have a moral duty to help those asylum seekers who have no other choice than to flee for their very lives.

II. PROVING ONE'S "GAYNESS" IN UNITED STATES ASYLUM PROCEEDINGS

The U.S. immigration courts labor under daunting conditions and are flooded each year with an average of approximately 44,000 asylum requests from foreign nationals from around the world.³ These cases are included among the more than 305,556 backlogged removal proceedings pending before the court as of March 2012,⁴ of which about sixty-two percent are granted.⁵ By far, the highest number of cases involves nationals from Latin America.⁶ In fact, among the first ten nations represented, eight are nations in Latin America and the Caribbean Basin, and Colombia ranks ninth with more than 3,700 nationals awaiting immigration adjudication.⁷

LGBT foreign nationals seeking asylum in the United States have unique challenges to prove their claims of persecution, and the immigration courts around the country have demonstrated an apparent lack of consistency in making determinations on persecution due to sexual orientation.⁸ Acceptance of LGBT immigrants in the United States has been a matter of gradual evolution of legislation and case law going back to when homosexuals were excluded under the 1917 Immigration Act, lumping them in with "mentally and physically defective" individuals.⁹

In 1965, the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182, was amended to exclude from admission to the United States "alien[s] afflicted with a psychopathic personality, or sexual deviation, or mental defect,"¹⁰ and this specific prohibition of homosexuals immigrating into the United States existed until the passage of the

3. This average is taken from the number of asylum petitions filed between 2000 and 2010 as reported by the Migration Policy Institute. See *Annual Number of Asylum Applications by Countries of Destination, 1980–2010*, MIGRATION POLICY INST., <http://www.migrationinformation.org/datahub/comparative.cfm> (last visited June 15, 2012). Citizenship and Immigration Services does not track how many asylum claims are related to sexual orientation. Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES, Jan. 28, 2011, <http://www.nytimes.com/2011/01/29/nyregion/29asylum.html?pagewanted=all>.

4. *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ (Mar. 28, 2012). This number includes all charges, including immigration violations, asylum requests, criminal charges, national security risks, and suspected terrorism. *Id.*

5. Sridharan, *supra* note 1.

6. See *Immigration Court Backlog Tool*, *supra* note 4 (select "Nationalities" under subheading "Starting with").

7. *Id.* The highest number of cases involves Mexican nationals at 113,829 followed in order by China, El Salvador, Guatemala, Honduras, India, Ecuador, Dominican Republic, Colombia, and Jamaica. *Id.*

8. Sridharan, *supra* note 1.

9. See Act of Feb. 5, 1917, Pub. L. No. 64-301, § 3, 39 Stat. 875 (also excluding "[a]ll idiots, imbeciles, feeble-minded persons, . . . persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude").

10. Immigration and Nationality Act of 1952, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified as amended 8 U.S.C. § 1182(a)(4) (1965)).

Immigration and Nationality Act of 1990, when exclusions related to mental illness, including sexual deviation, were removed.¹¹ Thereafter, it became a matter for the courts to determine if an individual could prove persecution due to one's sexual orientation.

Two U.S. Supreme Court cases in particular stand out in the corpus of gay rights case law as having influenced whether immigration judges would make determinations of asylum claims by homosexuals based on conduct or on identity.¹² The case of *Bowers v. Hardwick*, which upheld Georgia's law against sodomy, was closely followed throughout the federal court system and subsequently used "to defend similar and equally discriminatory laws in other states that governed sexual conduct."¹³ The decision dealt a significant setback at a time of the emerging gay rights movement in the United States. The Court firmly reasoned that "proscriptions against [homosexual conduct had] "ancient roots" going back to the founding of the Republic,¹⁴ and that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."¹⁵

In dissenting, Justice Blackmun¹⁶ argued that the issue before the Court was not about the "right to engage in homosexual sodomy," but the "right to be let alone."¹⁷ He and his fellow dissenters excoriated the Court's "almost obsessive focus on homosexual activity," and wrote that his own interpretation of the Georgia law was that the purpose "seem[ed] to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity."¹⁸ Blackmun argued that prior cases long recognized that the Constitution must shield the "private sphere of individual liberty" from the reach of government.¹⁹ He wrote, "[w]e protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."²⁰ Blackmun asserted that the Court missed an opportunity to protect one's privacy and liberty due to the Court's "most willful blindness" that could "obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'"²¹ This notion went to the heart of how our immigration courts have viewed the granting of asylum to individuals who engage in conduct that has been determined by a long line of case precedent to be contrary to the public welfare. In this way, immigration

11. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 603(a)(15)(A), 104 Stat. 4978 (codified as amended 8 U.S.C. § 1322 (1990)).

12. See Sridharan, *supra* note 1.

13. *Bowers v. Hardwick*, 478 U.S. 186 (1986); Sridharan, *supra* note 1.

14. *Bowers*, 478 U.S. at 192-94 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.")

15. *Id.* at 194.

16. Justices Brennan, Marshall, and Stevens joined the dissent. *Id.* at 199.

17. *Id.* (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

18. *Id.* at 200.

19. *Id.* at 203 (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)).

20. *Bowers*, 478 U.S. at 204.

21. *Id.* at 205 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

judges may view their roles as protectors of outmoded notions of morality with a duty to keep out those individuals who, but for the persecution they claim they have suffered, should not be allowed into the country because their conduct is contrary to the public good.

Blackmun's dissent was ultimately reflected in *Lawrence v. Texas*, which struck down sodomy laws in the United States.²² The Court in *Lawrence* was to some extent prompted to act due to a "pattern of nonenforcement" of anti-sodomy laws that made continuing to criminalize private conduct between two consenting adults impractical, particularly in the face of an emerging international corpus of cases ruling that laws proscribing such conduct were against international human rights.²³ The Court recognized that it was out of lockstep with the rest of the world by holding to *Bowers*, pointing to a case before the European Court of Human Rights in which sodomy laws in the United Kingdom were struck down and stating that the ECHR decision "is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western Civilization."²⁴

The *Lawrence* decision decriminalized sodomy and removed from our immigration courts the right to deny asylum to an individual based on homosexual conduct and placed determinations for asylum in the realm of sexual identity. In other words, as one scholar notes, "[a]lthough discrimination against sexual *conduct* is thus endorsed, the United States does not criminalize sexual *identity*. This difference is largely paralleled in the context of asylum, in which claims based on discrimination against sexual conduct are shaky."²⁵

Based on this dichotomy, an LGBT individual seeking asylum must convince an immigration judge that he or she is "gay" enough" to be granted asylum for having suffered severe persecution due to one's identity.²⁶ Based on such a subjective standard, "LGBT asylum claims are "difficult to win"²⁷ because the claims are limited by "(1) the focus on homosexual identity—and not homosexual conduct—in US laws[,] (2) the inapplicability of the usual tests for asylum eligibility in this context[,] (3) varying definitions of persecution[, and] (4) inadequate legal precedent and discriminatory attitudes in US courts."²⁸

"[I]mmigration judges . . . employ the "associational and recognizability tests"²⁹ to determine if an asylum applicant is a member of an identifiable group of individuals who qualify for asylum. "Judges look for material proof of sexual identity in asylum appli-

22. *Lawrence v. Texas*, 539 U.S. 558 (2003).

23. *Id.* at 573.

24. *Id.*

25. Sridharan, *supra* note 1.

26. Kilian Melloy, *Gays Seeking Asylum Can Be Turned Away If They're Not 'Gay Enough'*, EDGE (Feb. 3, 2011), http://www.edgeboston.com/news/115779/gays_seeking_asylum_can_be_turned_away_if_they%E2%80%99re_not_%E2%80%99gay_enough%E2%80%99.

27. Sridharan, *supra* note 1.

28. *Id.* For a list of significant asylum decisions pertaining to LGBT petitioners, see *Asylum Decisions, IMMIGRATION EQUALITY*, <http://immigrationequality.org/issues/law-library/asylum-decisions> (last visited Sept. 7, 2012).

29. Sridharan, *supra* note 1; Peter C. Godfrey, Note, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 265–69 (1994) (employing the language "distinguishing characteristic" in place of recognizability).

cants' answers," outward signs of lifestyle, habits, associations in gay communities, whatever will give the judge an anchor to tie his determination to grant asylum.³⁰

This litmus test, however, has had startling consequences, as some gay asylum seekers and their advocates assert "that they can be penalized for not "outwardly expressing their sexuality."³¹ One asylum petitioner was told by his immigration lawyer that "flaunting [his gay flamboyance] was . . . his best weapon against deportation."³² According to a lawyer with the Human Rights First nonprofit advocacy group, immigration judges are making determinations that if an individual's homosexuality is not "socially visible" then one does not warrant asylum.³³ "The rationale is that if you don't look obviously gay, you can go home and hide your sexuality and don't need to be worried about being persecuted."³⁴ Some foreign nationals are able to gather the real evidence necessary to support their claim of persecution based on sexual orientation. However, those petitioners coming from countries where homosexual orientation and conduct lead to the death penalty under the law may be unable to support their claims due to the difficulty in obtaining the necessary proof.

As of 2012, asylum advocates say the situation for LGBTs with legitimate claims before U.S. immigration courts has worsened due to our poor economy, high unemployment, and an upswing in anti-immigrant sentiments that emerges during tough economic times.³⁵ More startling, however, is that with the spread of knowledge that immigration judges might grant asylum based on how "gay" an applicant looks and behaves, a cottage industry has emerged in which — for a very substantial fee — consultants "coach[] straight people on how to file gay asylum claims."³⁶

While the tactic of exaggerating gay flamboyance or overt masculine traits among gays and lesbians may work before some immigration judges in one part of the country, gaining asylum in an immigration court in another part of the United States can be a throw of the dice, subject to the biases or foibles of a particular judge.³⁷ The fact that only sixty-two percent of asylum cases succeed bears out this statement.³⁸ Therein lies the problem for LGBT asylum seekers from Colombia (and elsewhere). It should not be necessary to resort to exaggerating flamboyant conduct to reinforce stereotypes and play on the biases of an immigration judge in order to convince him or her to grant asylum due to sexual orientation. Life for Colombian LGBTs is fraught with peril, and a determination of suitability for asylum should be based on a judge's informed knowledge of the conditions in Colombia that compel someone to run for their lives.

30. Sridharan, *supra* note 1.

31. Bilefsky, *supra* note 3; *see also* Melloy, *supra* note 26.

32. Bilefsky, *supra* note 3.

33. *Id.*

34. *Id.* (quoting Lori Adams, a lawyer at Human Rights First).

35. *Id.*

36. *Id.* (reporting that a couple in Washington State plead guilty and was sentenced to federal prison for charging fees of up to \$4000 to "provide[d] asylum seekers with "dramatic (if fictional) stories of anti-gay persecution, along with lists of gay bars and maps of the gay pride parade route in Seattle to help them pass as gay").

37. Sridharan, *supra* note 1.

38. *Id.*

III. CONDITIONS IN COLOMBIA AND CONSTITUTIONAL RIGHTS

In reviewing the circumstances of dozens of requests for political asylum by Colombian nationals claiming persecution due to their sexual orientation, it is not difficult to corroborate that the lives of many LGBT petitioners will be in grave danger if they are repatriated to their native Colombia because extreme homophobia is pervasive throughout Colombian society.

It is true that a body of laws and court decisions (often in conflict with each other) have bestowed new civil and human rights on LGBTs that heterosexual Colombians enjoy. Yet, in order to appreciate where the Colombian state is now with regard to homosexuality, one must be cognizant that the antecedent laws that criminalized and demonized homosexual conduct were based not on public policy determinations, but on Catholic morality and the social taboos of homophobic lawmakers who viewed homosexual conduct as an unnatural aberration brought on by moral turpitude and mental deficiency.³⁹ To them, social and public morality was the victim of deviant conduct, and public honesty, good customs, good family order, honor, and “correct” sexual freedom had to be protected. The drafters of the laws that criminalized homosexual conduct were so tied to their traditional morality that they could not see differently than to penalize homosexuality. Moreover, not only did homosexuality have to be penalized because it was viewed as a sin against natural order, but homosexual acts constituted an affront to one’s manhood and patriarchal control of Colombian society.⁴⁰ Protecting the proper and righteous use of the male’s “penetrador”⁴¹ in the carnal nexus between man and woman was paramount to preserving the social patrimony and the advancement of “liberty and order”⁴² in Colombian society.⁴³ Put a bit differently, protecting the heterosexual relationship by criminalizing homosexual intercourse would preserve the virility of men against femininity or a fear of the feminine.⁴⁴ This staunch attitude is the origin of the homophobia that became institutionalized in modern Colombian society, and it persists to this day.

A. *The Penal Code and the Fear of Homosexuality*

The first mention of relations between people of the same sex as being a crime appeared in the Penal Code of 1890, in Article 419, which stated that persons who would abuse a pubescent person of the same sex, with the consent of the victim, would face three to six years in prison.⁴⁵ If trickery, deceit, seduction, or malice were involved, then

39. See WALTER ALONSO BUSTAMANTE TEJADA, *HOMOEROTISMO Y HOMOFOBIA EN COLOMBIA: UNA VISIÓN HISTÓRICA* (Colom.) (2009), available at http://www.ucaldas.edu.co/docs/seminario_familia/HOMOEROTISMO_HOMOFOBIA_COLOMBIA_Walter_Bustamante.pdf.

40. *Id.*

41. *Id.*

42. “Libertad y orden” is the national motto of Colombia. *Colombia*, PROEXPORT COLOMBIA, <http://www.colombia.travel/en/international-tourist/colombia> (last visited Sept. 7, 2012).

43. TEJADA, *supra* note 39.

44. Walter Alonso Bustamante Tejada, *El delito de acceso carnal homosexual en Colombia: Entre la homofobia de la medicina psiquiátrica y el orden patriarcal legal*, 5 CO-HERENCIA 113, 129 (2008).

45. See *id.* at 118 (quoting CÓDIGO PENAL [C. PEN.] art. 419 (1890) (Colom.), available at http://archive.org/detail/codigo_penal_colombiano_1890).

the penalty would increase by a fourth, and if the person abused was pre-pubescent, then the penalty would be three to six years of imprisonment.⁴⁶

The intention of the law was to punish the abuse of forcing oneself on another by an unnatural sexual act.⁴⁷ However, if there was consent on the part of the victim, then another crime would emerge, that being the erotic relation with consent between individuals of the same sex, in which case both individuals would be punished.⁴⁸

In 1936, a new penal code was drafted that reflected a political movement of liberal reforms occurring in the Colombian state at that time, known as La Revolución de la Marcha.⁴⁹ The goal of the reforms was to liberalize many constitutional rights and freedoms of conduct, as well as to put distance between the State and a Catholic Church that had exerted a strong conservative influence over Colombia's political affairs since independence more than a hundred years earlier.⁵⁰ In fact, notes one Colombia legal scholar, the Code retained a section entitled "Crimes Against Public Morals" that continued to manifest a moral fear of sexual imagery, writing, and pictures of the naked body.⁵¹ With regard to reforms of penal law, however, while the 1936 Code began to address sexual freedom, what seemed to be of more importance was the concept of sexual honor. For example, the crime of rape was forgiven if the rapist married the victim, and a man would be excused from murdering his wife, mother, daughter, or sister if surprised in the commission of indiscrete sexual acts, such as adultery or intercourse outside matrimony.⁵² "And, obviously in crimes of rape and statutory rape and sexual intercourse, the subsequent marriage would annul the previous violence or deceit, as if the mantle of marriage could void any trickery."⁵³

As for crimes of homosexuality, Article 323 of the 1936 Penal Code stated that whoever "executes over the body of a person older than sixteen years of age an erotic sexual act, differing from the carnal access (male/female penetration), using any of the methods stated in the Articles 317 and 320 will be penalized with six months to two years in prison."⁵⁴ The same penalty will apply to those who have homosexual acts regardless of their age.⁵⁵ The interesting point of the law was that it referred only to men

46. CÓDIGO PENAL [C. PEN.] art. 430 (1890) (Colom.), available at http://archive.org/detail/codigo_penal_colombiano_1890.

47. Tejada, *supra* note 44, at 118.

48. *Id.*

49. *Id.*; Julio González Zapata, *Derecho y Sexualidad: ¿Liberación o Represión?* [Law and Sexuality: Liberation or Repression?], REVISTA DE LA UNIVERSIDAD DE ANTIOQUIA 58, 62 (2007), <http://aprendeenlinea.udea.edu.co/revistas/index.php/red/article/viewFile/2525/2058> (Colom.). This was a political-philosophical reform movement of the 1930s led by Alfonso López Pumarejo, a twice-elected Colombian president and a political figurehead of the Liberal Party throughout much of the twentieth century. See Pablo J. Cáceres Corrales, *La Revolución en Marcha*, COLUMBIA LINK, http://www.colombialink.com/01_INDEX/index_historia/07_otros_hechos_historicos/0230_revolucion_en_marcha.html (last visited Sept. 8, 2012).

50. See Zapata, *supra* note 49, at 62.

51. *Id.*

52. *Id.* at 63.

53. *Id.* Moreover, at that time, most doctrines of spousal relations "did not envisage a carnal violation by the husband of the wife, because forced sex was a human right and the woman should endure violence as one of her natural obligations: it was a part of the cross of matrimony." *Id.*

54. See TEJADA, *supra* note 39 (quoting CÓDIGO PENAL [C. PEN.] art. 323 (1936) (Colom.)).

55. See *id.*

and not to women.⁵⁶ Article 323, however, posed a philosophical problem because it criminalized the offender for his conduct during a time when the prevailing opinion of “doctors, psychiatrists, sexologists, and jurists had already said that no will was exerted on the part of homosexuals because they were ill and not responsible for their acts, and therefore needed to be cured rather than punished.”⁵⁷

According to the author of this section of the Code, Dr. Parmenio Cárdenas, homosexuality was penalized in 1936 because it attacked the fundamental basis of public and social morality and the preservation of good family values, good public order, and sexual freedom.⁵⁸ In other words, Article 323 “sought to regulate and control the bodies of men,” and to dictate how and between whom sexual intercourse should occur and for what purpose in order to maintain the righteous virility of men.⁵⁹ This attitude of fear of homosexuality was intentionally codified into the criminal laws of Colombia and goes to the very heart of why homophobia and hatred toward homosexuals has persisted in Colombia for so long.

B. Decriminalization of Homosexual Acts

In 1970, another law revision movement began the tentative steps to revise the Penal Code.⁶⁰ Among the casualties of a new code formulation was the repeal of Articles 323 and 329 by Article 80 of Decree 1118 of 1970.⁶¹ This omission seems to have been in error, for a year later, Articles 323 and 329 of the 1936 Penal Code were reinstated under Decree 522 of 1971.⁶²

In 1972 a revision commission was convened for rewriting the national Penal Code. Although that commission did not move forward, there was a suggestion made to eliminate the homosexual crime articles.⁶³ More commissions followed in 1974 and 1976.⁶⁴ The revision project of 1976 finally went to the Senate, and resulted in the promulgation of the current Colombian Penal Code under Decree Law 100 of 1980, which went into effect in January 1981.⁶⁵ At the time of the revision process, one of the members of the commission objected to the exclusion of the criminalization of homosexuality — the same Dr. Parmenio Cárdenas, the champion of antiquated patriarchal traditions.⁶⁶ Decriminalization of homosexuality did not mean abolition, however, but reduction to the level of a misdemeanor offense.⁶⁷ The pertinent part of Decree 100 of

56. *See id.* (quoting LISANDRO MARTÍNEZ ZÚÑIGA, *DERECHO PENAL SEXUAL* 135 (2d ed. 1997).

57. *Id.*

58. *Id.*

59. *See id.*

60. Tejada, *supra* note 44, at 131–32.

61. *Id.*

62. *Id.*; L. 33/300, abril 29, 1971, DIARIO OFICIAL [D.O.] (Colom.), available at ftp://ftp.camara.gov.co/camara/basedoc/decreto/1971/decreto_0522_1971.html. The decree was also the source for the first police codes of a national character. *Id.*

63. Tejada, *supra* note 44, at 132.

64. *Id.*

65. L. 35/461, febrero 20, 1980, DIARIO OFICIAL [D.O.] (Colom.), available at https://www.icbf.gov.co/transparencia/derechobienestar/codigo/codigo_penal_1980.html.

66. Tejada, *supra* note 44, at 132.

67. *See* 2 ANTONIO VICENTE ARENAS, *COMENTARIOS AL NUEVO CÓDIGO PENAL DECRETO 100 DE 1980*, at 57 (Editorial Temis Librería, 1981) (Colom.).

1980 was that consensual homosexual activity was decriminalized and that consent would be set at fourteen years of age.⁶⁸

However, the 1980s would remain for homosexuals a gray area of rights and uncertainties regarding their conduct and expression of sexual freedoms. Attention in the legislature instead turned to what should be done about common law unions, of which there were hundreds of thousands throughout Colombia. For generations, couples could not afford the cost to marry in the Catholic Church and be recognized as official marriages, or circumstances of life, such as the death of a prior spouse or the inability of individuals to provide birth and baptismal records, which made formal marriage problematic and unattainable. So couples did what has been done for centuries — cohabitated and created de facto family units. These informal arrangements, however, became more complicated as the Colombian state became more pervasive in the lives of its citizens in terms of recording property ownership, inheritance, and national social security and medical care. This eventually led to the enactment of Law 54 of 1990 that recognized civil unions for the first time in Colombia, but made no mention of same-sex couples.⁶⁹

Law 54 was challenged as discriminatory of same-sex couples in 1996,⁷⁰ but the Constitutional Court found no indication of discrimination in the law because the Constitution “did not require recognition of same-sex civil unions because same-sex relationships were differently situated to opposite-sex relationships and therefore it was legitimate for the legislature to treat them differently.”⁷¹ Moreover, the Court stated that, “[t]he family is the only social unit and it is formed when a man and a woman freely decide to marry,” and that such cohabitation should be protected “by the State and society, because it gives rise to the family institution.”⁷²

Following on the heels of Law 54 of 1990, the 1991 National Constitution of Colombia⁷³ conferred historic personal and human rights on all Colombian citizens. The right to one’s sexual orientation was not explicitly stated. Article 13 read:

All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy.

The State will promote the conditions necessary in order that equality may be real and effective [and] will adopt measures in favor of groups which are discriminated against or marginalized.⁷⁴

68. *Id.*

69. INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE: A COMPARATIVE LAW CASEBOOK 326 (2011), available at [http://www.icj.org/dwn/database/Sexual%20Orientation,%20Gender%20Identity%20and%20Justice-%20A%20Comparative%20Law%20Casebook\[1\].pdf](http://www.icj.org/dwn/database/Sexual%20Orientation,%20Gender%20Identity%20and%20Justice-%20A%20Comparative%20Law%20Casebook[1].pdf).

70. Corte Constitucional [C.C.] [Constitutional Court], marzo 7, 1996, Sentencia C-098/96, Gaceta de la Corte Constitucional de Colombia [G.C.C.] (No. 85, p. 5), available at <http://www.corteconstitucional.gov.co/relatoria/1996/c-098-96.htm> [hereinafter Sentencia 1996].

71. INT’L COMM’N OF JURISTS, *supra* note 69, at 326.

72. Sentencia 1996, *supra* note 70.

73. For the text of the Colombian Constitution in English, see CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [Colombian Constitution], translated in *Text of the Constitution of Colombia (1991)*, CONSTITUTION FINDER, http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (last visited Sept. 9, 2012).

74. *Id.* at art. 13.

The Constitution's silence with regard to sexual orientation meant that extending any protections to Colombia's LGBT community was via inference and that the challenges must proceed in the Constitutional Court where the language of the Constitution was open to broad interpretation. The LGBT community then sought to gain the same benefits available to heterosexual couples in civil unions, such as health and social security benefits, mutual insurance benefits, mutual alimony, and the right to conjugal visits in prisons.

In September 1999, a legislative measure was introduced in the Colombian Senate to add sexual orientation as a category for crimes of bias, to create "valid social patrimony agreements" to same-sex couples, and to extend Colombia's Obligatory Health Plan Coverage to families registered under the proposed patrimony agreement.⁷⁵ The bill also would have made coverage for gender reassignment procedures mandatory under the national health plan, and also "call[ed] on the National Ministry of Education to remove all [instances of] anti-[g]ay bias from [school] textbooks."⁷⁶ That bill was promptly rejected by the Senate, and resulted in a widely discussed editorial published in the national newspaper, *El Tiempo*, by the bill's sponsor, Senator Margarita Londoño, who sharply rebuked the actions of the Senate to deny same-sex couples equal rights under the law.⁷⁷

Gradual movement toward recognition of gay rights began to gather momentum in the late 1990s, although progress can only be described as inconsistent, with some victories in the courts, but national institutions remaining very adversarial toward LGBTs.⁷⁸ One case, in particular, was heard before the Inter-American Commission on Human Rights beginning in 1996.⁷⁹ The petitioner, Marta Lucia Álvarez, was a lesbian inmate in a women's prison in Pereira, Colombia.⁸⁰ Upon her incarceration, she requested that the prison authority allow her to have conjugal visits with her partner, which was allowed under Colombian law for heterosexual couples.⁸¹ The Ombudsman for Pereira took up the matter on Ms. Álvarez's behalf and obtained an authorization from a prosecutorial authority in July 1994 for her to have conjugal visitation rights.⁸² The director of the prison still refused to cooperate, whereupon the Ombudsman filed a *tutela*⁸³ with the Criminal Court of Dosquebradas for relief.⁸⁴ The Court agreed with the petition, that the prisoner's rights had been violated, but the director of the prison again refused the au-

75. INT'L LESBIAN & GAY ASS'N, WORLD LEGAL SURVEY 4 (2005), available at <http://www.asylumlaw.org/docs/sexualminorities/llga1021152134.pdf>.

76. *Id.*

77. *Id.*

78. For a comprehensive summary of legal milestones in gay rights in Colombia, see *Colombia*, GAY LAW NET, <http://www.gaylawnet.com/laws/co.html> <http://www.gaylawnet.com/laws/co.html> (last visited July 8, 2012) (GayLawNet website on Colombian law).

79. Marta Lucia Álvarez Giraldo v. Colombia, Case 11.656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3 (1999), available at <http://www1.umn.edu/humanrts/cases/71-99.html> [hereinafter *Giraldo Case*].

80. *Id.* at para. 6.

81. *See id.* at paras. 8–10.

82. *Id.* at para. 6.

83. The *tutela* is a motion for protective relief filed with the Constitutional Court to take up issues of constitutional rights.

84. *Giraldo Case*, *supra* note 79, at para. 6.

thorization on the basis of the prisoner's sexual orientation.⁸⁵ Upon appeal to a higher court, the director's appeal was upheld, at which point the Ombudsman appealed to the Constitutional Court, where on May 22, 1995, the magistrate judges declined to review the decision on the action for protective relief.⁸⁶

A year later, Ms. Álvarez took her case to the Inter-American Commission on Human Rights,⁸⁷ arguing that applicable Colombian legislation did not take exception to intimate visits for prisoners on the basis of their sexual orientation.⁸⁸ The Commission stated:

She maintains that there are no provisions allowing a distinction to be made between the right of a heterosexual prisoner to intimate visits and that of a homosexual. She argues, therefore, that the penitentiary authorities have engaged in discriminatory treatment that is not authorized by domestic law and that, from any standpoint, violates Articles 5, 11, and 24 of the American Convention.⁸⁹

In its response to the Commission, the Colombian government asserted that refusing homosexual conjugal visits was a matter of prison policy and personal behavior. The Commission wrote of the Colombian position:

In its view, accepting the petitioner's request would involve "applying an exception to the general banning of such [homosexual] practices which would affect the internal discipline of prisons." It also referred to the alleged "bad behavior" of the inmate, who was apparently involved in some incidents relating to the functioning of the human rights committee of the prison.⁹⁰

What is notable about this decision, however, is that the Colombian government did not disagree with Ms. Álvarez that her treatment had been discriminatory. Rather, the Colombian government maintained that the prohibition of homosexual conjugal visitation was "based upon a deeply rooted intolerance in Latin American culture of homosexual practices."⁹¹ Following the ruling of the Commission, the Constitutional Court accepted Ms. Álvarez's *tutela* for review and ruled in her favor, establishing that the right of homosexual inmates to have conjugal visitations could not be prohibited based on sexual orientation.⁹²

By early 2003, the Colombian Senate took up a bill introduced two years earlier by Colombian Senator Piedad Córdoba to recognize same-sex unions and grant attendant rights, such as social security benefits and inheritance.⁹³ The bill was met with strong resistance from conservative factions of the legislature despite the support of three former Colombian presidents, and it died after being successfully blocked from further de-

85. *Id.* at para 7.

86. *Id.* at paras. 8–10.

87. *Id.*

88. *Id.* at para. 10.

89. *Id.*

90. *Id.* at para. 11.

91. *Id.* at para. 12.

92. Corte Constitucional [C.C.][Constitutional Court], junio 12, 2003, Sentencia T-499/03 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2003/t-499-03.htm>. See also Esteban Restrepo-Saldarriaga, *Advancing Sexual Health through Human Rights in Latin America and the Caribbean* 29 (2010) (unpublished manuscript), available at http://www.ichrp.org/files/papers/183/140_Restrepo_LAC_2011.pdf.

93. Proyecto 043 (2001) (Colom.).

bate by a cadre of conservative senators and supporters of then President Alvaro Uribe.⁹⁴ When interviewed following the bill's defeat, then Justice and Interior Minister Fernando Londoño Hoyos stressed that the government opposed the bill on legal rather than moral grounds because, "[i]t is difficult to interpret living arrangements between persons of the same sex, . . . and that could have damaging effects."⁹⁵

IV. RECENT CONSTITUTIONAL COURT DECISIONS AND FAILURE OF THE GOVERNMENT TO ACT

Despite legislative setbacks, a flurry of Constitutional Court decisions occurred after 2006 that advanced the acquisition of many civil rights by Colombia's LGBT population. First, in 2007, the Constitutional Court issued a controversial ruling in Sentencia C-075/07, recognizing property and inheritance rights of same-sex couples, based on the Court's interpretation of Law 54 of 1990 (which recognized civil unions and the right to patrimonial property) as modified by Law 979 of 2005.⁹⁶ The Court based its decision on a determination that denying same-sex couples the same protection of marital property that was provided to heterosexual marital unions was "contrary to their dignity and their right to free development of their personality."⁹⁷

According to the decision, the Law had been applied exclusively to heterosexual couples and that such application of Law 54 of 1990 as modified by Law 979 of 2005 was discriminatory. The Court noted that even though there are objective differences between the two types of couples, and notwithstanding the specific considerations that the legislature had in 1990 when it established the protective regime, the Law seemed to have been based on the need to protect the right of the woman and the family.⁹⁸ The Court wrote, "[i]t is not less truthful that today one can say that homosexual couples present analogous requirements of protection and that there are no objective reasons to justify a different treatment."⁹⁹ Moreover, the Court continued,

[i]n light of the prior criteria and without acknowledging the intent of the legislature, in a participatory democratic process, out of the protected ways that result for the requirements of the different social groups, the Court finds that it is contrary to the Constitution to preserve a legal regime of protections exclusively for heterosexual couples.¹⁰⁰

This was a pivotal, decision granting to the LGBT population equal civil rights under the law.

The 2007 decision was then followed in 2009 by Sentencia C-029/09, which bestowed more patrimonial rights conferred on heterosexual married couples to same-sex

94. See Press Release, Colombia Lesbian and Gay Association, Same-Sex Partnership Bill Dies on Colombian Senate Floor, Aug. 27, 2003, available at <http://dir.groups.yahoo.com/group/Visioncompartida-exilio-colombiano/message/6182>.

95. *Id.*

96. Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007 Sentencia C-075/07 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2007/c-075-07.htm>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

couples, including housing subsidies, nationality and residency rights, testimonial privileges, and protections from domestic violence.¹⁰¹ That decision, in turn, was succeeded by Sentencia C-577/11 in which the Constitutional Court asked Congress to make a law to establish the right of gay marriage.¹⁰² The ruling held that the phrase “man and woman” in the definition of marriage is in conformity with the Colombian Constitution, but the magistrate judges were of the view that such a phrase does not imply a prohibition against a legal bond between homosexuals similar or equal to that of the heterosexual couples.¹⁰³ The Court then gave the Congress two years, until 2013, to pass a new law, and if this is not accomplished by that time, then homosexual couples may go before a Notary in order to legalize their union.¹⁰⁴

The Colombian government, however, is often at odds with the activist propensity of the Constitutional Court and reticent, on occasion, to act at the orders of the Constitutional Court because the constituents of elected politicians continue to make abundantly clear their homophobic attitudes and hatred toward any act by the Colombian state to legislate rights for LGBT citizens. Senator Córdoba’s editorial in *El Tiempo* criticizing the political climate for her defeated bill was met with tremendous acrimony. One individual wrote:

Pro-homosexual stories are so frequent that I end up believing that sodomy has a powerful charm. What reason is there to believe that, every time there is proselytizing in favor of such aberration? Such speech for a country in economic crisis, with so much unemployment, social injustice, and war is absurd from every point of view. It does not seem right to me that the best newspaper in the country should spend whole pages in defense of the aberrations of a decadent society.¹⁰⁵

Such anti-gay public opinions give the LGBT little recourse than to continue taking their grievances to the Constitutional Court for redress. A search of the Constitutional Courts online database of the term “homosexuales” retrieves eighty-eight decisions issued since 2001,¹⁰⁶ and the majority of cases concern requests for health and social security benefits, equal treatment, and claims of violations of human dignity.

A Constitutional Court decision affecting gays in the Colombian military also proved controversial and brought out expressions of bias and homophobia by leading Colombian military commanders. In Sentencia C-507/99 of 1999,¹⁰⁷ the Court ruled that certain articles of the Military Code of Conduct (Regimen Disciplinario) made under the

101. Corte Constitucional [C.C.] [Constitutional Court], enero 28, 2009, Sentencia C-029/09 (Colom.), available at http://www.secretariassenado.gov.co/senado/basedoc/cc_sc_nf/2009/c-029_2009.html.

102. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2011/c-577-11.htm>.

103. *Id.*

104. *Id.*

105. Ramón Calderón, *Homosexuales*, EL TIEMPO, Aug. 30, 1999, <http://www.eltiempo.com/archivo/documento/MAM-913689> (Colom.).

106. To reproduce the entire search, visit CORTE CONSTITUCIONAL DE COLOMBIA, <http://www.corteconstitucional.gov.co/relatoria/tematico.php?todos=%25&sql=homosexuales&campo=%2F&pg=0&vs=0> (last visited Sept. 9, 2012).

107. Corte Constitucional [C.C.] [Constitutional Court], julio 14, 1999, Sentencia C-507/99 (Colom.), available at ftp://ftp.camara.gov.co/camara/basedoc/cc_sc_nf/1999/c-507_1999.html#1 [hereinafter *Military Case*].

1989 code revision (Decreto 85 of 1989)¹⁰⁸ failed to acknowledge constitutional rights such as the right to privacy, the right to one's good name, and the right to free development of one's personality. The magistrate judges took the position that homosexuality is a sexual option and is established as valid within the social and legal framework of the Colombian state.¹⁰⁹ Accordingly, to include the exercise of homosexual acts as a fault against the military honor would be to stigmatize homosexuality. Therefore, the Court affirmed that a serving member of the military who reveals openly his homosexual orientation or lives openly with a partner cannot be excluded from military service.¹¹⁰

When interviewed by Colombia's radio station, Todelar, about the Court's ruling, Colombian Navy Admiral Roberto García Márquez noted that the behavior of the military institutions is at odds with homosexual conduct, saying that such conduct "has to be accepted but that somehow is not convenient."¹¹¹ While conceding that the military would not object to homosexual orientation, per se, provided such behavior did not adversely impact the service, the admiral stated, "[a] couple of soldiers holding hands, kissing, showering, would not look good," and that such expressions of affection would collide with ethics and morality.¹¹² The reporter then asked, "[o]ne can infer that you do not want to see homosexuals in the Navy," to which Admiral Márquez responded, "[o]bviously."¹¹³ He went on to say that if the new interpretation of the code of conduct allows gays in the military, "[h]onor may prohibit what the law allows," and that if homosexual behavior is noticeable, then the military does not need to accept it; "[i]f they come out of the closet," then the military would "lower their heads."¹¹⁴

The right of same-sex couples to adopt children is another area of rights for homosexuals that remains unsettled under the law and highly charged in the forum of public opinion. On July 15, 2011, the Constitutional Court was presented a *tutela* to allow a lesbian couple, Turandot and Fedora, to formally adopt a child born to Fedora via artificial insemination.¹¹⁵ The two were Colombian citizens residing in Germany, having formed a de facto union in 2005. The German government authorized Turandot to undergo artificial insemination and Fedora consented in legal filings. The daughter, Lakme, was born in 2008. The couple returned to Colombia, declared their union valid under Colombian law, and in 2009 requested formal adoption before the Instituto Colombiano de Bienestar Familiar (ICBF), the government agency charged with handling adoptions, among other responsibilities.¹¹⁶ The request was rejected by the Defensoría Segunda de Familia [the Family Rights Advocate within the ICBF], because Colombian law prohibits same-sex

108. Proyecto 043 (2001) (Colom.).

109. *Military Case*, *supra* note 107.

110. *Id.*

111. Edgar Artunduaga, 'En la Armada Nacional no aceptamos homosexuales': *Almirante García Márquez*, ORGULLOLGBT – COLUM., Mar. 1, 2012, <http://orgullolgbtcolombia.blogspot.com/2012/03/en-la-armada-nacional-no-aceptamos.html>.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *Orden del Día*, CORTE CONSTITUCIONAL DE COLOMBIA (July 15, 2011), <http://www.corteconstitucional.gov.co/ordendeldia/Orden%20del%20dia%2021,%2022,%2025,%2026-07-11.php> (Colom.) (Expediente T-2597191).

116. For information on the ICBF, see INSTITUTO COLOMBIANO DE BIENESTAR FAMILIAR (Sept. 8, 2012, 4:44 PM), www.icbf.gov.co/.

couples to adopt. The couple then took their case to the Superior Court in Antioquia and won a judgment in their favor, which was then appealed by the ICBF and sent to the Constitutional Court for further ruling.¹¹⁷

The case brought about a broad discussion by interested parties evolving around social rights, divinity, and nature.¹¹⁸ The groups and individuals that came out in opposition to the adoption are worth noting and demonstrate the institutional resistance to the advancement of rights for LGBTs in Colombia. In addition to the ICBF's initial appeal of the Constitutional Court, the Attorney General of the Nation (Procurador General) Alejandro Ordoñez claimed that there is no right for gay couples to adopt and that the family is formed by a man and a woman.¹¹⁹ Senator José Darío Salazar, who is also president of the national Conservative Party, stated that gay adoption "goes against nature and breaks all the values of our society."¹²⁰ Not to be left out of the debate, the Monsignor Juan Vicente Córdoba, a notable in the Catholic Church, also asserted that there is no right to adoption under Colombian law.¹²¹

Just as this article was being completed, on May 4, 2012, the Constitutional Court announced that it was taking no action on this *tutela*, allowing the lower court ruling prohibiting adoptions by same-sex couples to stand.¹²² When interviewed by *El Tiempo*, the same Monsignor, Juan Vicente Córdoba, expressed satisfaction with the Court's decision, saying that a favorable ruling would exceed the duties of the Court in a manner as to "seize the power to amend the Constitution with an ideology contrary to natural order."¹²³

Public reaction to the May 4, 2012 story in *El Tiempo* shows the extent of anti-gay sentiment that exists very much out in the open in Colombian society and is expressed in the most insensitive of terms.¹²⁴ One reader wrote, "[h]elp the extinction of the human race on the planet—gay yourself!"¹²⁵ Another wrote, "[i]f, as miserable as the arguments presented by psychologists are, the Court approves gay adoption, we will all go into the social abyss."¹²⁶ But most telling is the comment of one anonymous reader who, in attempting to sound reasonable, appears to think nothing of using the most derogatory terms for homosexuals used in Colombia — "marica" and "maricones," which is analogous to the use of "fag" and "faggots" in English:

117. See Mauricio Noguera Rojas, *Parejas del mismo sexo: ¿Alguien ha preguntado por los derechos de la niña adoptada?*, RAZONPUBLICA, Feb. 28, 2011, <http://razonpublica.com/index.php/econom-y-sociedad-temas-29/1849-parejas-del-mismo-sexo-ialguien-ha-preguntado-por-los-derechos-de-la-nina-adoptada.html> (Colom.).

118. See *Oposición se funda en la divinidad y la naturaleza*, EL MUNDO, Mar. 5, 2011, http://www.elmundo.com/portal/noticias/antioquia/oposicion_se_funda_en_la_divinidad_y_la_naturaleza.php (Colom.).

119. *Id.*

120. *Id.*

121. *Id.*

122. See *Líderes LGBT rechazan 'dilación' en fallo sobre la adopción homosexual*, EL TIEMPO, May 4, 2012, http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-11714881.html#opusuarios_content/11714881/1/home [hereinafter *Líderes*] (Colom.).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

[While] I strongly agree with those who believe that everyone chooses the lifestyle you want, that does not mean that two maricones choose the fate of a defenseless child. One thing is what adults do and [it is] quite another to engage children if they want to adopt The hidden fact here is that there are many maricas in the courts and high in government and now they come to choose for everyone. This issue is of national interest and should be settled in a referendum . . . we are a democracy where the majority is the one who chooses [instead of] a herd of maricas who are choosing for all.¹²⁷

On the other hand, when asked to respond to a survey on the *El Tiempo* Facebook page about the story, asking whether children growing up with homosexual parents may suffer some psychological impairment, more than sixty-five percent of the followers said “no,” but nearly thirty-three percent said “yes” to the survey.¹²⁸

V. REAL DANGERS PERSIST FOR COLOMBIA’S LGBT POPULATION

The reality for Colombia’s LGBTs is that having laws enacted and court rulings rendered to extend rights to them is far different than LGBTs being able to actually reap the benefits of those rights. Laws can be on the books in Colombia, but enforcement and redress for discrimination based on sexual orientation are a very different matter in the course of daily life for Colombia’s LGBT population. Moreover, those anti-gay Colombians that continue to discriminate against LGBTs know this and know that the chances of being held accountable by a judicial system that is mired in red tape, corruption, lingering homophobic bias, and years of backlog is unlikely.

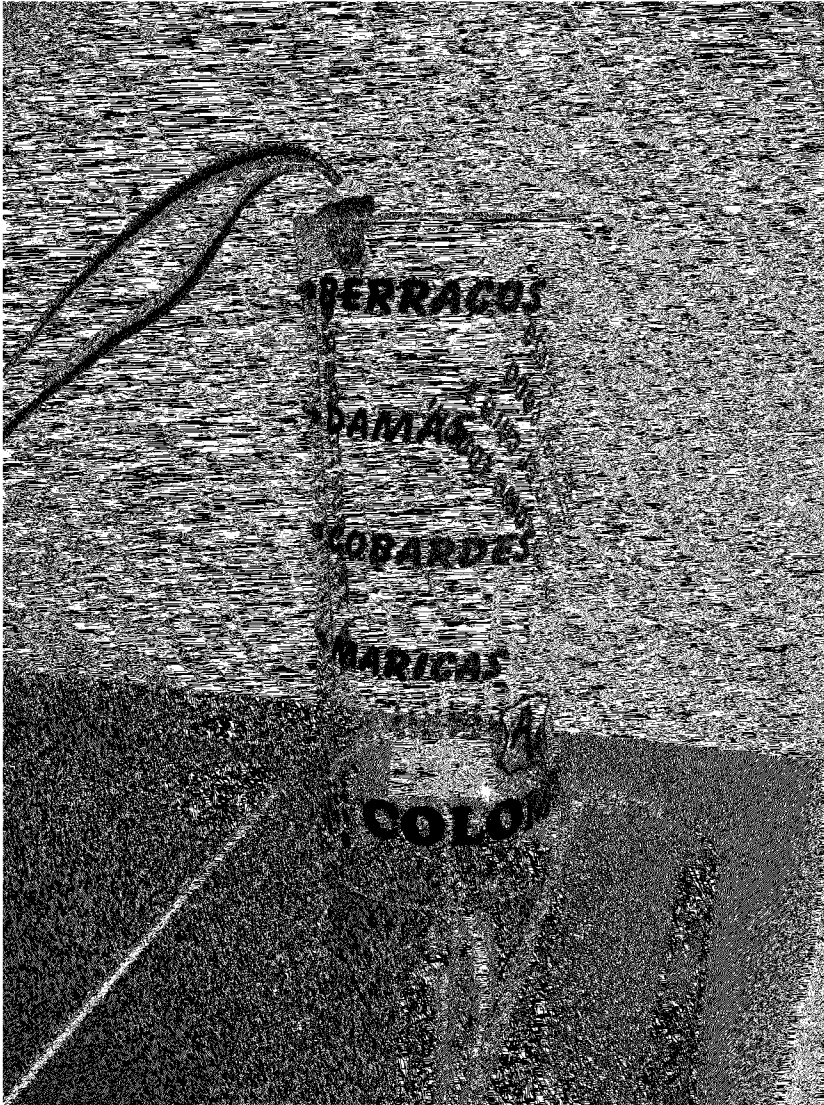
This is not to say that the LGBT community has not emerged in recent years as a recognizable, if not very particularly tolerated, segment of Colombian society. In each major city, there are now gay neighborhoods where LGBTs are able to express themselves and live a lifestyle that is more open. But having a gay neighborhood of clubs, businesses, and residences for LGBTs to congregate is not the same as having the freedom to move about the country or among other segments of the community, which is in itself a violation of Article 24 of the Constitution, which states, “[a]ny Colombian citizen, except for the limitations established by law, has the right to move freely across the national territory, to enter and exit the country, and to remain and reside in Colombia.”¹²⁹

Colombians remain among the most homophobic and bigoted people to be encountered in almost any modern society. Homosexual conduct is considered an unmanly affront to the overt masculinity of Latin men, known as *machismo*.

127. *See id.*

128. *See id.*

129. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 24, available at http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.



This shot glass, purchased in José María Córdova International Airport in Medellín, demonstrates how homosexuals are denigrated in Colombian society. Those who fill the shot glass full of liquor are *berracos*, Colombian slang for being macho or virile, while those who fill it the least amount are *maricas*, Colombian slang for sissies or faggots.

Even after the Colombian Constitution was ratified, social cleansing occurred throughout the 1990s, when it is believed that as many as 7,000 victims of the 40,000 extrajudicial killings reported in Colombia were gays, transvestites, and prostitutes. More recently, the Colombian gay civil rights organization, Colombia Diversa, reported that in 2006 and 2007, at least sixty-seven LGBTs were murdered (twenty-one of the killings occurred in the third largest city of Cali, alone), and at least thirty-one cases of police abuse were reported by transvestites and individuals, “who visibly showed their sexual orientation or gender identity.”¹³⁰ Colombia Diversa asserts that despite some social progress for Colombia’s LGBT citizens, their civil rights are still inadequately established.

[I]n Colombia, the rights of lesbians, gays, bisexuals and transgeneristas are not only disrespected but also not guaranteed, because in practice judicial and administrative authorities often prioritize their biased conceptions when enforcing the law and/or ignore the unique needs and rights of this population. So, lesbians, gays, bisexuals and transgeneristas see their rights to life, personal integrity, personal freedom and security, freedom of expression and others violated, without the existing recourses for guaranteeing those rights being really effective.¹³¹

The majority of Colombian society refers to LGBTs in pejorative and crude terms, and there is no attempt to contain such bigotry or show discretion. LGBTs are constantly ridiculed or mildly tolerated for being different and inferior, and therefore, a curiosity and social pariah. LGBTs are depicted in the popular media as comical caricatures to be laughed at and derided. Gay individuals in the arts, entertainment, and fashion industries are expected to be so overtly “gay” in their mannerisms and flamboyance that their homosexuality becomes a trait of celebrity. One of the most notable portrayals of homosexuality and transsexuality is the character of Laisa Reyes, played by the Colombian transsexual actress Endry Careño, in the highly successful telenovela, *Los Reyes*. The celebrity of Laisa (and Endry) comes not because the character projects legitimacy for homosexuality and transsexuality, but because the role is so overtly stereotypical, and therefore, comical. Overtly flamboyant gay celebrities are largely left alone by the society because they have achieved a status that assumes they move in their own circles beyond daily Colombian life. But for the thousands of Colombian LGBTs who have no celebrity to protect their “gayness,” their lives among their families, in their communities, and on the streets often constitute a living hell with very real danger and constant fear of persecution and harm coming at them from all points of the compass.

Family members who have LGBT siblings typically prefer not to acknowledge or confront their orientation; keeping up appearances to society is paramount to preserving the status quo. Those who are forced, through whatever circumstances, to acknowledge the homosexuality of their family relations decide to live with the “situation” but rarely will accept it. There are neighborhoods, particularly working class barrios and slum are-

130. IMMIGRATION AND REFUGEE BOARD OF CANADA, COLOMBIA: TREATMENT OF HOMOSEXUALS; ESPECIALLY IN BOGOTÁ AND CALI, AVAILABILITY OF STATE PROTECTION AND SUPPORT SERVICES 1 (2009), available at <http://www.unhcr.org/refworld/docid/4a7040a8c.html>.

131. COLOMBIA DIVERSA, HUMAN RIGHTS SITUATION OF THE LGBT POPULATION: SHADOW REPORT SUBMITTED TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 2 (2010), available at http://www.globalrights.org/site/DocServer/LGBT_ICCPR_Shadow_Report_Colombia_Diversa.pdf?docID=12067.

as, plagued by high crime, domestic abuse, drug use, and alcoholism. Gangs, many formed after the failed government attempt to demobilize paramilitary forces (known as BACRIMS),¹³² own the streets of these neighborhoods throughout Colombia. These are places where law enforcement loathes to go to. The residents are hard scrabble, poorly educated, and generally intolerant about things they do not understand — like homosexuality and gay lifestyles. To them, life is black and white. One struggles to survive, one works hard to live hard, and the natural course of life means heterosexual relationships, having children, and repeating the process from generation to generation. For boys, it means acting macho, chasing girls and dominating them, having sex to prove one's manhood, and carrying on in often dangerous and violent activities to prove one's virility and toughness. Homosexuality is viewed among the lower classes as a sickness, while homosexual lifestyles are associated with belonging to a decadent elite class — to the bourgeois that has the wealth, luxury, and leisure to pursue alternative lifestyles.

The persecution and humiliation by family members and by boys in the lower class neighborhoods, especially during a person's formative years, is very typical of how the lower levels of Colombian society behave toward LGBTs. The Colombian government cannot legislate away such bigotry and homophobia out of most segments of the Colombian society. As a result, LGBTs can find havens where the risks of persecution and abuse are reduced, but as soon as they step beyond those areas where gay lifestyles are tolerated, LGBTs risk very real dangers.

What does this mean? This means that if LGBTs need to go to a hospital, to the university, to a government office for a driver's license, or to visit family members in other communities, as soon as they leave the areas in which they feel safe, they are immediately exposed to abuse. This is the harsh, daily reality of the vast majority of Colombia's LGBTs and a significant factor that motivates them to seek asylum abroad.

In addition to family and the community biases, persecution by police officers against homosexuals in Colombia is a symptom of firmly entrenched homophobia throughout law enforcement agencies nationwide. The proclivities of Colombia's "macho" attitudes so pervade the police forces that fear and disdain for homosexuals border on paranoia. Such widespread hatred toward LGBTs makes it impossible for a homosexual, who has experienced persecution by the very officers who are supposed to protect his or her safety, to enjoy the constitutional rights bestowed by Article 16 which states "[a]ll persons are entitled to their free personal development without limitations other than those imposed by the rights of others and those which are prescribed by the legal system,"¹³³ and by Article 21 which reads "[t]he right to dignity is guaranteed. The law will provide the manner in which it will be upheld."¹³⁴ How does one uphold the

132. "BACRIMS" means *Bandas Criminales* or criminal bands, and they are becoming a potent collection of criminal organizations. The number of BACRIM group members is believed to be at least 6,000 and probably many more. See MARK P. SULLIVAN, CONG. RESEARCH SERV., RS21049, *LATIN AMERICA: TERRORISM 2* (2012), available at <http://www.fas.org/sgp/crs/terror/RS21049.pdf>. Of greater concern is that Human Rights Watch reports that at least 180 police officers in Colombia were convicted in 2011 for having ties to BACRIMS. See HUMAN RIGHTS WATCH, *WORLD REPORT 2012: COLOMBIA 1* (2012), available at http://www.hrw.org/sites/default/files/related_material/colombia_2012_0.pdf.

133. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 16, available at http://confinder.richmond.edu/admin/docs/colombia_cons12.pdf.

134. *Id.* at art. 21.

law, when the police are the abusers?

Sexual violence remains a serious problem, as well, within government military forces. For example, a gay Colombian man recounted in 2007 how, as a fifteen-year-old army recruit, he was brutally raped by other soldiers, “but commanded by officers who constantly exhorted the troops ‘not to act like women.’”¹³⁵ The recruit felt equally threatened by all parties in Colombia’s internal armed conflict — all of which have engaged in social cleansing against social undesirables. “To them, people like me were filth,” the recruit said.¹³⁶

Hatred of homosexuality in Colombia also extends beyond the civil society to Colombia’s illegal armed groups, including guerrilla groups like the Revolutionary Armed Forces of Colombia (“FARC”), which portrays itself as defending the rights of the down-trodden and disaffected but draws the line at defending the rights of LGBTs. The FARC has a longstanding record of persecuting male and female homosexuals “because they break social norms,”¹³⁷ viewing them as sub-human degenerates that have no place at the table of social and political liberation envisioned by their Marxist-based revolutionary movement. Yet, the FARC is rife with sexual violence and subjects both male and female FARC members to rape, sodomy and genital mutilation as a means of asserting discipline by the male dominated leadership of the group.¹³⁸

The FARC’s persecution constitutes “social cleansing,”¹³⁹ but it is justified by the FARC leadership as a legitimate weapon of war against the government for having supported and legislated the recognition of political and civil rights for Colombia’s gay and lesbian community.

In 2000, in the municipality of Mesetas in the department¹⁴⁰ of Meta, the FARC’s Front 27 undertook a cleansing campaign against gays and lesbians, declaring that all homosexuals must leave the region. Two lesbian women were targeted and told to leave. Soon thereafter, they “disappeared,” and were presumed murdered.¹⁴¹ The same Front 27 was blamed for conducting a cleansing campaign throughout Meta against HIV and AIDS infected individuals, including displacements of “hairdressers and homosexuals forced to leave their homes and establishments.”¹⁴²

Persecution of LGBTs is also used by right-wing paramilitary groups as a method to intimidate and destabilize further already-disaffected and vulnerable members of Colombian society. In one such incident from 2002, a fourteen-year old girl was found murdered in the streets of Cali, with her breasts cut off and a letter pinned to her declar-

135. Pamela Constable, *Persecuted Gays Seek Refuge in the U.S.*, WASH. POST, July 10, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/09/AR2007070902027.html>.

136. *Id.*

137. Deborah Schurman-Kauflin, *Exclusive: Terrorists Forcing Abortions: Women and Gays Raped & Mutilated*, FAMILY SECURITY MATTERS (Sept. 11, 2008), http://www.familysecuritymatters.org/publications/id.1146/pub_detail.asp.

138. *Id.*

139. See U.S. DEP’T OF STATE, COLOMBIA 18, available at <http://www.state.gov/documents/organization/160452.pdf>.

140. A department in Colombia is similar to a province or state.

141. Leonardo Fernández, *Grave Informe de Amnistía Internacional sobre Colombia*, ANODIS, Dec. 22, 2004, <http://anodis.com/nota/3235.asp>.

142. *Id.*

ing, “I am lesbian.”¹⁴³ According to witnesses living in her poor neighborhood, she had been sexually assaulted by three men, presumed to be paramilitaries.¹⁴⁴

Another particularly humiliating act of abuse occurred over the course of two days in May 2003 in the town of San Onofre in the northern Colombian department of Sucre.¹⁴⁵ There, a paramilitary force rounded up gay men in the area and forced them into a makeshift arena in the town center to fight each other. It was like a “Roman circus,” one witness recalled.¹⁴⁶ The paramilitary commander, Marco Tulio Perez Gúzman, ordered the spectacle in honor of a missing commander of the Bloque Montes de Maria paramilitary group. The paramilitary forces went house to house throughout the municipality to round up people to attend the “boxing” event and forced each one to pay 20,000 pesos admission. This spectacle went on for two days, and the repercussions continued when one of the victims was murdered by paramilitaries months after the fights and other victims fled the area to escape further humiliation and violence.

While we might think that this is an isolated act in a remote part of the country, the fact is that San Onofre has a population of some 33,000 people¹⁴⁷ and is a bustling commercial center along an important maritime corridor in northern Colombia.¹⁴⁸ There is a government official present in San Onofre who oversees human rights (the Personería Promueve),¹⁴⁹ and the National Police are present,¹⁵⁰ along with the town’s Sección Justicia y Control, which oversees safety and security for the town.¹⁵¹ One must ask, then, where were the police and law enforcement elements of the town while this violation of civil and human rights occurred? Where was the government to protect the victims of this humiliation and physical and mental abuse? The only conclusion one can draw from this episode is that the government ignored its duty to protect the constitutional and human rights of its citizens, either because its officials thought they did not have the capacity to stand up to the paramilitaries, or because the victims were homosexuals — or both.

VI. WELL-FOUNDED FEAR OF PERSECUTION

For LGBTs fleeing Colombia with the hope of asylum in the United States, the simple truth is that they can never return to Colombia without the real possibility that their constitutional and human rights will be violated — repeatedly. The nature and char-

143. *Id.*

144. *Id.*

145. *Testimonios de los abusos cometidos por los ‘paras,’* EL TIEMPO, Nov. 16, 2011, http://www.eltiempo.com/archivo/documento/CMSjusticia/ARTICULO-WEB_NOTA_INTERIOR-10778338.html (Colom.).

146. *Id.*

147. *City Data for San Onofre, Colombia*, WOLFRAM ALPHA (Oct. 18, 2011, 10:08 AM), http://www.wolframalpha.com/entities/cities/san_onofre%2C_colombia/hr/ct/of/.

148. San Onofre is represented online by a very sophisticated webpage promoting economic vitality and a good deal of commercial activity. *See* SAN ONOFRE, <http://www.sanonofre-sucre.gov.co/index.shtml> (Colom.) (last updated Aug. 28, 2012).

149. *See* Personería, SAN ONOFRE, <http://www.sanonofre-sucre.gov.co/orgcontrol.shtml?apc=glsx-1-&m=p> (Colom.) (last updated Sept. 26, 2009).

150. *See* Cabaña Milimar, SAN ONOFRE, <http://www.sanonofre-sucre.gov.co/sitio.shtml?apc=B-xx1-&x=2664989> (Colom.) (last updated Sept. 16, 2009).

151. *See* Dependencias, SAN ONOFRE, <http://www.sanonofre-sucre.gov.co/sitio.shtml?apc=B-xx1-&x=1901619> (Colom.) (last updated Sept. 16, 2009).

acteristics of Colombian society are such that it is extremely difficult to relocate elsewhere in Colombia without calling undue attention to oneself. Colombia is one of the most class-conscious and rigidly stratified countries in the western world. Regional identity is very important, and it is virtually impossible to move from one part of the country to another without someone taking note. Skin color, colloquial mannerisms and customs, speech inflections, and social orientation to the external environment all pose challenges for a Colombian individual to hide his or her roots or social origins. Rural peasants are distinctive from long-time urban dwellers. People originating in the Andean highlands of Boyacá bear strong indigenous physical characteristics in sharp contrast to the less integrated descendants of the European elites living in other regions of Colombia. Add to this a gay man or lesbian from an urban background, and his or her ability to survive elsewhere in Colombia will be severely limited.

Colombians are acutely aware of their national and regional idiosyncrasies and, even more so, acutely aware of each other's place in the society. As an example, several years ago a former professor of industrial engineering at the Universidad Militar Nueva Granada in Bogotá was "contacted" by the FARC because they wanted the professor to train the FARC in the same things he was teaching the Colombian military. He fled his job at the college and took a job at a public university in a northern Colombian city. A short time after he began working there, the FARC located him and again threatened him with dire consequences if he did not accede to their demands. He was uncertain how his whereabouts were discovered, but he believed that students involved with the guerrillas took note of his "Bogotano" mannerisms and reported on his arrival at the university to the FARC front operating there, which put two and two together to positively identify him. He was forced to flee to the United States where he was eventually granted political asylum.

As already noted, the Colombian government is deficient in protecting the human rights of Colombia's LGBT population, even with the introduction of legislation and court decisions and the steps undertaken by the Colombian government to devote greater resources and create a special jurisdiction apparatus within the government to monitor and prosecute human rights abuses. For example, as long ago as the mid-1980s, the Colombian government created a special jurisdiction of public order, known then as the Special Tribunal of Criminal Proceedings, which the government argued would help prevent impunity in human rights violations.¹⁵² Yet, few violators were ever brought to trial and found guilty of committing human rights violations. Within a year of its enactment, the Supreme Court declared Decree 750 of 1987, establishing the Special Tribunal, unconstitutional and ordered the Tribunal disbanded on the grounds that "the said court did not integrate adequately to the branch structure," such that the Tribunal constituted a "loose wheel within said gear."¹⁵³ Impunity has also prevailed in the cases in which the Inter-American Commission on Human Rights became involved and subsequently issued

152. See *The Judiciary*, COLOMBIA: A COUNTRY STUDY (Dennis M. Hanratty & Sandra W. Meditz eds., 1988), available at <http://countrystudies.us/colombia/82.htm>.

153. Corte Suprema de Justicia [C.S.J.] [Supreme Court], junio 16, 1987, Sentencia No. 58 (Colom.). See Ana María Bejarano, *Centro de Investigaciones Socio Jurídicas (CIJUS)*, Jan. 1998, at 51 (on file with the author).

resolutions.¹⁵⁴ In some investigations the evidence needed to implicate the accused was not collected, and even when such evidence was gathered, charges were never brought or, when charges were brought, nothing was done to ensure the accused appeared in court.

My own experience as a judge in Colombia in the 1980s was often an exercise in futility, especially with regard to assaults against weak members of the society, particularly women. There was very little desire by male police officers to investigate charges of violence against women, because they believed that if women were beaten or raped, it was their own fault for putting themselves in such positions to be victimized. Even if investigations proceeded, evidence, if collected at all, was gathered with little enthusiasm or professional methodologies, and bribes could be paid by suspects to corrupt police officers to sabotage proceedings. That same level of ignorance extended to the LGBT community, too.

International human rights organizations have been monitoring violence against Colombia's LGBT populations for many years, compiling a catalog of astonishing violence against homosexuals. The World Organization against Torture ("OMCT") has documented several instances of violence against Colombia LGBTs. A report issued in May 2008 by the OMCT asserted that Colombia has a high level of homophobia and transphobia and related acts of persecution against homosexual and transsexual individuals. According to the report, "the Lesbian, Gay, Bisexual and Transsexual (LGBT) communities . . . are victims of frequent and daily acts of violence, humiliation, and maltreatment, including crimes committed by illegal armed groups and . . . the police."¹⁵⁵ The report also noted that the United Nations Committee for Human Rights had determined that since 2004, despite efforts by the Colombian judiciary to protect an individuals' sexual orientation, extrajudicial, summary and arbitrary executions of LGBTs indicate a "preoccupation for the practices of social cleansing, of which includes assassinations motivated by the sexual orientation of the victims."¹⁵⁶ Amnesty International also accuses the Colombian government of doing too little to protect the civil and human rights of homosexuals, stating that, "[s]exism and homophobia impedes women and men from exercising their sexual rights."¹⁵⁷

154. Patricia Rivera v. Colombia, Case 9477, Inter-Am. Comm'n H.R., Report No. 22/93, OEA/Ser.L/V/85, doc. 9 (1993), available at <http://www.cidh.oas.org/annualrep/93eng/Colombia.9477.htm> Orlando Garcia Villamizar v. Colombia, Case 10.235, Inter-Am. Comm'n H.R., Report No. 1/92, OEA/Ser.L/V/II.81, doc. 6 (1992), available at <http://www.cidh.oas.org/annualrep/91eng/Colombia10235.htm> (both discussed in INTER-AM. COMM'N H.R., SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS IN COLOMBIA 113-19, OEA/Ser.L/V/II.84 (1993)); see also Alirio de Jesfis Pedraza v. Colombia, Case 10.581, Inter-Am. Comm'n H.R., Report No. 33/92, OEA/Ser.L/V/II.83, doc. 14 (1992), available at <http://www.cidh.oas.org/annualrep/92eng/Colombia10.581.htm>; Martin Calderón Jurado v. Colombia, Case 10.454, Inter-Am. Comm'n H.R., Report No. 32/92, OEA/Ser.L/V/II.83, doc. 14 (1992), available at <http://www.cidh.oas.org/annualrep/92eng/Colombia10.454.htm>.

155. *En Colombia se vive un clima de transfobia, alerta OMCT*, CIMACNOTICIAS, May 18, 2008, http://www.cimacnoticias.com/site/index.php?id=33204&print=1&no_cache=1. The report also details the murder of sixteen female transsexuals by illegal armed groups. *Id.*

156. *Id.*

157. Fernández, *supra* note 141.

VII. CONCLUSION

In spite of efforts by politicians and social reformers to improve conditions for Colombia's LGBT population, homophobia and the violent reactions manifested by homophobia remain deeply entrenched in Colombian society. The cultural environment is such that someone who has experienced such horrific abuse and persecution cannot live a normal life at liberty to pursue the free expression of one's sexual orientation. Those Colombians who have experienced violent victimizations by law enforcement, illegal armed groups, vigilantes, and anti-gay zealots, have no hope of returning to Colombia to live a peaceful life. Their privacy and dignity have been permanently stolen from them, and they cannot be protected by the police or other security forces or government authorities despite what the laws may say.

Colombian society has many notable and noble attributes, but it is a nation of extreme contradictions and inexplicable conduct. It is a country where love for the arts, for learning, for pursuing economic progress and development is contrasted by an internal armed conflict spanning more than sixty years and the loss of hundreds of thousands of lives with no signs of ending. It is a place where extreme conservative attitudes based on pedantic and antiquated notions of Christianity inform the hearts and minds of a ruling elite that places its own prerogatives and self-interests above the welfare of the majority of Colombian citizens, and it thinks it is by their rights perfectly acceptable to do so. It is a country in which the urban elites go blissfully through life unaware, or choose to remain aloof or ignorant, of the socio-political, economic, and human rights struggles that play out every day in impoverished barrios and in disaffected rural communities throughout the national territory.

As the commenter in *El Tiempo* wrote in 1999, in replying to Senator Londoño's op-ed following the defeat of her bill to give equal rights to homosexuals, the country is at war and has too many other things to worry about than to think about giving rights to gays and lesbians.¹⁵⁸ That is still very much the case in 2012, and despite advances in the human and civil rights for Colombia's LGBTs, the homosexual population is still very much preoccupied with well-founded fears of persecution.

If the United States aspires to be "a shining city upon a hill whose beacon light guides freedom-loving people everywhere,"¹⁵⁹ then the nation cannot continue supporting countries where human rights abuses, social violence, persecution for political activities, labor activism, religious beliefs, and sexual orientation occur with far too much frequency, especially in countries like Colombia where the United States is justifiably perceived by some as acquiescent. It is incumbent upon our immigration judges to understand the ramifications of the decisions they make, because in many cases the deci

158. See Proyecto 043, *supra* note 93.

159. This quote, inaccurately attributed to President Ronald Reagan, has become part of the political lexicon. President Reagan alluded to the city on a hill imagery throughout his political career, but there is no source available to confirm that he actually uttered this sentence exactly in the way it has been repeated by others over time. See Anne Applebaum, *Cleanup Task for a Shining City*, WASH. POST, Mar. 17, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/16/AR2009031602318.html>.

sion they render is not so much the outcome of an administrative process that certainly can become repetitive and tedious, but a turn of legal procedure that could constitute a death sentence for those who view asylum in the United States as their only option for survival.