

Know Your Rights Manual for the Transgender Community: Immigration Law

The National Lawyer's Guild
558 Capp Street
San Francisco, CA 94110
415-285-5067
www.nlgsf.org

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INTRODUCTION

This information was compiled by law students of the National Lawyers Guild, using statutory law, case law, and the work of numerous legal and non-legal organizations across the country, notably, the National Lawyers Guild, Bay Area chapter. While the information here is up to date through April 2010, it is possible that substantive changes have been made to the laws since it was last updated. Please keep this in mind while using this resource. Source and reference information will be provided for most of the content in this manual to help you verify that the information is still good before relying on it.

This manual was created for use by transgender community members and allies, by service providers who work with the transgender community, and by attorneys and legal workers who provide advocacy and legal services to members of the transgender community. For purposes of this manual, the word “transgender” is used as an umbrella term that includes transgender, gender variant, and intersex people who are at any point of self-identification or physical transition. Occasionally, the text will refer to individuals as “he or she” or “his or her.” This reference does not indicate that a statement applies exclusively to persons who identify as male or female, but instead is used for legibility and accessibility. The information in this manual does not constitute legal advice; instead, it is meant to serve as a resource to help understand the landscape of transgender law in a particular area, and to help connect readers with the current information needed to verify law or navigate a particular situation. Although we hope that this manual assists service providers and community members in locating information and resources, it is important to note that only licensed attorneys are authorized to give legal advice. If you have a question of law that is outside of the scope of information provided in this manual, you may wish to consult or refer your client to an attorney or, if you are a client, to contact one of the legal support agencies listed in the resource guide in the back. Many of the organizations listed in the resource guide provide referrals to attorneys who are familiar with transgender law and working with the transgender community.

USING THIS MANUAL

This manual was created to be a first-stop reference for lawyers, service providers, and community members who need legal information about a transgender-specific issue or question of law. For ease of use, the content has been divided by common problems or needs. Case law, statutes, print and web resources, and other service organizations can be found embedded throughout the manual, referenced in the footnotes, and listed in the directory at the back of this manual.

This resource was created by and for people in the San Francisco/Bay Area, and therefore much of the information is specific to California and San Francisco/Bay Area resources and law. We hope that this manual will be a helpful resource to readers outside of California because it includes information that is nationally relevant. However, it is important that non-California readers pay close attention to what information appears to be specific to California or the Bay Area, and not presume that the local information contained in this manual will transfer to other cities and states. Non-California readers are encouraged to use the national resources listed in the directory at the back to locate up-to-date information about the laws and precedent in their state or city. It is important to note that, although the researchers who assembled this information did our best to be accurate on points of both black letter law and how the law tends to play out in the real world, there may be inaccuracies and nothing in this manual should be relied on as legal advice. Legal advice can only come from a lawyer. This manual is, however, a good starting place to understand the law and how it affects transgender people and communities in California and the Bay Area specifically.

FINDING THE LAW FOR FREE

Legal documents, such as cases and statutes, are actually public documents. This means that everyone (members of the public) has the right to research and read these documents. The problem is that sometimes these documents can be hard to find or access.

If a case is cited in document and a person desires to find and read the actual case, we can find it by following a series of steps. The first step is to avoid getting flustered by the complicated series of numbers, letters and punctuation that follows the name of the case. The next step is to simply go to <http://scholar.google.com/>, click the “Legal opinions and journals” button and type in the volume number, the journal name, and the page number

from the case citation.

For example, to find the case of *State v. Jordan*, 742 N.W.2d 149(Minn. 2007). We would ignore the name of the case (*State v. Jordan*), and copy the volume number (742), then journal name (N.W.2d), followed by the page number (149). Those three things are all that's needed to find the case on Google scholar. Sometimes the journal name will be different, but as long as the right information is copied into the search bar, Google Scholar should be able to pull it up.

The information in this manual is not legal advice. We hope that transgender individuals and their allies will use this manual as a first step for beginning to understand applicable law, and identify when legal help is needed. Many transgender people report barriers to accessing legal services for a number of reasons. The cost of hiring a lawyer is a major issue for many, along with fears that lawyers will not be respectful of trans clients, will not know enough about how laws specifically affect transgender people, or that the court system is prejudiced against transgender people. While all of these fears are justified, attorneys, activists, and advocates across the country are making huge strides in increasing legal services and resources for transgender people. Many states have GLBT bar associations that can be helpful in locating legal information or finding lawyers who are knowledgeable about transgender law and sensitive to the specific concerns of transgender clients. Many of the organizations listed in the resource section at the end of this manual are happy to assist individuals in finding legal services. Although legal services often seem too expensive, there are a lot of organizations and individual attorneys committed to making justice more accessible. You may be eligible for pro bono (free of charge) representation or fee structures that work for you (such as contingency fees, where you only pay if you win your case). Additionally, many attorneys are happy to meet with potential clients for free to assess your case. This can be a good way to learn more about your options and whether it's worth it to you to pursue specific legal actions.

A NOTE TO PROFESSIONALS

This manual was designed to be a resource to clients, but it is our hope that service providers and legal professionals will also find it useful. Attorneys may find this manual to be a helpful starting point for legal research and a useful tool for locating additional resources. All manuals in this series contain footnotes to case law, law review articles, and statutes that we hope will assist you. As with any compilation of research, attorneys are urged to check all cited law before relying on it to make sure there haven't been substantive changes and that it will apply to your client's particular case. Many of the organizations listed in the resource section of this document provide assistance to attorneys representing clients, and can be excellent sources for information and insight. When advocating for transgender clients, attorneys can advocate for the use of appropriate name and pronoun for their client in court and other proceedings.

GETTING STARTED: A NOTABLE TRANSGENDER IMMIGRATION LAW RESOURCE

Because transgender individuals with immigration concerns are doubly vulnerable to unjust actions by police and Immigration authorities, there is a strong network of support for transgender community members dealing with immigration issues. This manual aims to be a general and broad resource to answer common and locally-specific questions, but there are many resources on the internet that are also very thorough and helpful. One notable resource is a project from Immigration Equality a national organization, the Transgender Law Center, an organization based in San Francisco, and published by the American Immigration Lawyer's Association. This resource, "Immigration Law and the Transgender Client" is a large and thorough manual that provides in-depth information about a large scope of transgender-specific concerns. It can be found online at:

<http://www.immigrationequality.org/template3.php?pageid=1135>

GOVERNMENT AGENCIES

After September 11, 2001, the U.S. government abolished the Immigration and Naturalization Service (INS) and formed the new Department of Homeland Security (DHS), and re-organized the agencies which oversee immigration. DHS is now the umbrella organization for Immigration and Customs Enforcement (ICE), which is the enforcement and deportation branch; Citizenship and Immigration Services (CIS), which is the immigration service and application processing branch; and Customs and Border Patrol (CBP), which oversees border protection.

DEALING WITH ICE ON THE STREETS AND IN YOUR HOME

Transgender people frequently report that they are disproportionately stopped on the street by police. It is extremely important for transgender individuals to not only be aware of their rights when dealing with the police, but also to feel empowered to navigate a dangerous situation as safely as possible. Because police do unfairly target and harass individuals and do sometimes retaliate when individuals stand up for themselves, it is important that individuals make careful and personalized decisions about what to say to the police or ICE officers, and how to say it. Particularly when refusing to provide officers with information, being polite and respectful at all times can help to de-escalate interactions with the police, even when the police are not being respectful to you.

Everyone has the same rights if a police or an officer with Immigration and Customs Enforcement (ICE) stops you on the street. You do not have to answer any questions, even if you are arrested. You should not and do not have to say anything about where you were born or how you entered the United States. You do not have to show any documents, unless you were stopped while driving a vehicle, in which case you may get in trouble for failing to produce a valid driver's license. It is extremely important to not show false documents, because doing so is a crime and can make the situation much worse. You have the right to demand to speak to a lawyer, and you do not have to say anything to the police before you talk to a lawyer. Don't sign anything, especially an "Order of Voluntary Departure" without first talking to a lawyer. Do not sign anything that you cannot read or do not understand. If you are arrested and charged, ask to have your hearing in the city with an immigration court closest to where you live, so that your case, and you, are not transferred.

If ICE agents come to your house, you do not have to open the door unless they show you a Search Warrant. The Immigrant Legal Resource Center has produced red cards that you can keep in your wallet and give to police or ICE agents if you are stopped on the street or if agents come to your home. You can download and print your own cards online. The Immigrant Legal Resource Center has pdf versions of the cards in English and Spanish, English and Chinese, and English and Tagalog. http://www.ilrc.org/for_immigrants/red_cards.php

IMMIGRATION LAW TRENDS IN SAN FRANCISCO

Immigrant Youth Policy

Currently, Mayor Gavin Newsom's old policy in San Francisco is being used to report minors who are suspected of being undocumented to Immigrations and Customs Enforcement (ICE) for deportation immediately after being arrested, without being given legal counsel or even face juvenile charges. More than 160 young people have been referred to ICE for deportation under this policy.

Immigration rights advocates worked hard to lobby the San Francisco Board of Supervisors, which pass a new policy by a veto-proof majority. This new policy gives arrested minors a hearing and requires that the court find that the minor committed a felony before the individual can be referred to ICE.

Even after this new policy, Mayor Newsom's office publicly stated that he would not implement the Board of Supervisor's new policy.¹ The policy was supposed to go into effect with Juvenile Probation on february 10, 2010, but instead Juvenile Probation issues a statement announcing that it will continue to follow Mayor Newsom's policy.² Until the Board of Supervisor's new policy is implemented, minor youth are still being referred to ICE for deportation after arrest without being given the chance for legal representation or a hearing.

Sanctuary City and "Secure Communities", or "S-Com"

There has been a major change that affects the previous long-standing "Sanctuary City" policy in san Francisco. Under the 1989 Sanctuary City policy, law enforcement was only required to report felony suspects whose legal status could not be confirmed upon booking to federal officials.

1 Heather Knight, "No Sanctuary for Supes' Immigrant Youth Law", Wednesday, October 21, 2009. San francisco Chronicle. Available online at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/10/20/BAO61A8DTN.DTL&tsp=1#ixzz0UboGjXXf> . Last visited: August 1, 2010.

2 Prerna Lal, "Showdown: Gavin Newsom vs. Sanctuary City Policy", October 27, 2009. Change.org. Available online at: http://immigration.change.org/blog/view/showdown_gavin_newsom_vs_sanctuary_city_policy . Last visited: August 1, 2010.

On June 1st, 2010, a new program was implemented that is a collaboration between San Francisco Police and ICE, called "Secure Communities", or "S-Com". This new program automatically investigated the immigration status of anyone who is arrested and fingerprinted for any crime, no matter the severity. All people are checked, whether citizens or non-citizens, and their fingerprints are electronically crosschecked against an ICE database. Individuals whose legal status cannot be confirmed are then held in jail for ICE to detain them.

This is a federal program that is being implemented across California, and across the United States. This policy is already in place in San Mateo, Alameda, Contra Costa, Solano, and Sonoma counties.

Currently, immigrants rights groups are lobbying and protesting to persuade local law enforcement not to participate in this program. The San Francisco Sheriff's Office tried to opt out of participating in this program, but the CA attorney General Jerry Brown said that the San Francisco Sheriff's office could not opt out. At the time of this writing, local San Francisco police are participating in this program.

Car Impounding in San Francisco

Immigrants have reported a significant increase in car impoundments in since 2008 and early 2009. When a driver could not produce a valid driver's license after being stopped in a vehicle, the car would be impounded. A city-wide policy mandates that impounded vehicles are automatically impounded for thirty days, with new fees every day that it is impounded.

Local advocates lobbied the San Francisco police, and in 2009 SFPD began a new policy that requires police to give a driver who cannot produce a valid license twenty minutes to get someone else who does have a valid license to arrive and drive the vehicle away to prevent impoundment. Community members report that this new policy is not being observed, and individuals are not being given twenty minutes to get someone else to drive the vehicle and avoid impoundment.

TRANSGENDER DISCRIMINATION IN IMMIGRATION LAW

There is no law expressly prohibiting transgender people from visiting or immigrating to the U.S. Nevertheless, gender identity and presentation often play a significant role in a person's ability to immigrate. According to guidelines from the Citizenship and Immigration Service (CIS) transgender immigrants should be able to obtain identity documents (such as work authorization, "green card", naturalization certificate, etc.) in the "outward, claimed and otherwise documented sex of the applicant." Unfortunately, it is not clear what CIS meant by otherwise "otherwise documented." Furthermore, CIS applies this rule unevenly, often (but not always) requiring sex reassignment surgery and even failing to correct gender on documents for individuals who have had SRS for no reason.³

One way that transgender people may be approved is by seeking asylum, claiming that they were harmed or fear harm in their home country. Another way that transgender immigrants may be approved is if they are in a bi-national relationship (one partner is a U.S. citizen or permanent resident and the other is not). In such a case, the person's gender identity, or that of the non-immigrant partner, may affect the ability of the person to immigrate based on a marriage or engagement.

In 2005, the Board of Immigration Appeals confirmed the long-standing rule that if the marriage was valid where entered into (under the laws of that state or country), it's valid for immigration purposes. There is no specific federal policy against marriages where one spouse is transgender, so as long as it was legal when and where the marriage took place, it should be a valid basis for a marriage-based "green card" application. Unfortunately, in spite of the good law on the books in this area, transgender individuals continue to have difficulties enforcing their rights, and CIS officials continue to misapply the law.⁴

One issue that might arise when transgender people seek to immigrate to the U.S. is the classification of that person's name or gender on his or her immigration papers. Official immigration papers may include a passport from the home country, a visa permitting the person to enter and remain in the U.S., a permanent resident card,

3 Transgender Issues. Immigration Equality <http://www.immigrationequality.org/template.php?pageid=4>.

4 Transgender Issues. Immigration Equality <http://www.immigrationequality.org/template.php?pageid=4>.

or naturalization papers. If a person wishes to change their name after they have already obtained a permanent resident card or naturalization papers, they must provide the government with a court ordered name change. If a person changed their name prior to receiving immigration papers, they can request that their correct, changed name be used at the time of issuance.⁵

It can be helpful for people to carry their green card or other immigration papers with them. If they have documents authorizing their stay in the U.S., they must carry them with them. Presenting false or expired papers to the DHS may lead to deportation or criminal prosecution. An unexpired green card, I-94 (*Arrival-Departure Record*), Employment Authorization Card, Border Crossing Card or other papers that prove legal status will satisfy this requirement. If people do not carry these documents with them, they could be charged with a crime. It is smart to keep copies with a trusted friend or family member who can easily fax the documents if need be.

BI-NATIONAL COUPLES

The DHS must respect any marriage that is considered valid in the applicant's home country. *Matter of Lovo*, a 2005 decision by the Board of Immigration Appeals, determined that the Defense of Marriage Act (DOMA), defining marriage as only between one man and one woman, does not preclude recognition of a marriage involving a “postoperative transsexual”,⁶ where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.⁷ In other words, there is no specific federal policy against marriages where one spouse is a postoperative transsexual, so long as it was legal when and where the marriage took place, it should be valid for a marriage-based “green card” application.

ASYLUM⁴

Asylum is a legal mechanism for protecting immigrants who know or believe that they will be harmed if they return to their home countries. People who are granted asylum are allowed to stay in the United States, get a work permit and some public benefits, and eventually apply for a green card. Overall, transgender applicants may have a good claim for asylum. Deciding whether to apply for asylum, however, is sometimes a tough decision. If the applicant is given asylum, that person would be able to stay in the U.S. and to apply for several public benefits. If the applicant does not win asylum, however, the individual might eventually be ordered to leave the U.S. and return to that person's home country. Applying for asylum if the applicant has a weak case can be very risky. For some people, it is better if they do not apply. Ideally, the decision should be made after having spoken to the Asylum Program or an immigration attorney.

Applying for Asylum

To apply for asylum, applicants must prove:

- (1) that he/she has well-founded fear of persecution or has suffered past persecution;
- (2) that such persecution is on account of race, religion, nationality, membership in a particular social group or political opinion, and;
- (3) that asylum should be granted in the exercise of discretion⁸

To qualify for asylum, applicants need to prove a well-founded fear of persecution. The U.S. Supreme Court has held that a “well-founded” fear means a “reasonable” fear of persecution.

5 *TransRealities: A Legal Needs Assessment of San Francisco's Transgender Communities*, (2003) National Center for Lesbian Rights and the Transgender Law Center <<http://transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf>> (as of June 23, 2008).

6 The language of “post-operative transsexual” is taken from the text of the case and is not the language choice of the National Lawyers Guild.

7 *Matter of Lovo* 23 I&N Dec. 746 (BIA 2005)

8 *USCIS Application Procedures: Political Asylum & Refugee Status*, available at http://www.rapidimmigration.com/usa/1_eng_info_asylum.html (last visited July 21, 2010). Although asylum has historically been granted to aliens in fear of physical harms, in recent years “sex-based persecution claims including... homosexuality and those with sexually transmitted diseases have been granted asylum.” Id.

In order to prove a *well-founded fear* of persecution, the alien must show:

- (1) that he/she possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
- (2) the persecutor is already aware, or could become aware, that he/she possesses this belief or characteristic;
- (3) the persecutor has the capability of punishing the alien, and;
- (4) the persecutor has the inclination to punish the alien⁹

The Supreme Court has held that individuals seeking asylum “must prove specific facts through objective evidence to prove either past persecution or good reason to fear future persecution.”¹⁰ Additionally, the government of the applicant’s home country must either be the persecutor or unable/unwilling to offer protections against persecution at the hands of another.

Though not defined expressly by statute, courts have defined “particular social group” to mean that the characteristic that defines the group “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹¹ Courts have determined that sexual orientation qualifies an applicant as part of a particular social group, but have not ruled on whether transgender people meet this requirement.¹² Some transgender people identify as gay or lesbian, and therefore could argue that their persecution is based on sexual orientation. Those who do not identify as homosexual or gay might still present an argument based on sexual orientation, arguing that they are persecuted against because of their perceived sexual orientation. Absent either of these two arguments, transgender people still have a strong argument for proving that being transgender classifies them in a particular social group. In fact, courts have recognized that male-bodied people who sleep with men and have female gender identities constitute a social group and may be persecuted because of this identity.¹³

Certain factors in an application for asylum might cause a dismissal. An applicant must apply for asylum within one year of that person's last arrival in the United States.¹⁴ The DHS requires the applicant to mail in the application before the one year deadline. It is safest to mail it at least several weeks before the deadline. Under certain circumstances, an applicant may still apply for asylum even if it has been more than one year since last entry into the US. If the individual can show either the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances that justify the delay in filing, the applicant may still be eligible for asylum.¹⁵ However, these situations are rare.

A criminal record is another element that might stand in the way of a successful application for asylum. The government will deny asylum to anyone who has been convicted of an “aggravated felony.”¹⁶ In this case, the applicant should talk to a lawyer to see if the person still qualifies for asylum. The immigration lawyer should communicate with the attorney who helped with the criminal case. It is important that the applicant be as forthcoming about his or her criminal past as possible. The lawyer needs to know about every arrest in order to

9 Id.

10 Id. Factors generally held to account for persecution include: “murder, torture, prolonged detention, slavery, and cumulative mistreatment.” Persecution may also be proven by severe economic harm, but this typically accompanies another form of persecution. Factors generally held as insufficient evidence of persecution include: “general harassment, brief detention or incarceration, general economic hardship, general civil unrest in [home] country, refusal to be drafted in [home] country’s armed forces, or where the applicant will prosecuted for a violation of [home] country’s criminal laws.” Id.

11 *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985)

12 *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, (B.I.A. 1990)

13 *Hernandez-Motiel v. INS*, 225 F.3d 1084 (9th Cir. 1997); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004)

14 8 U.S.C. § 1158(a)(2)(B)

15 8 C.F.R. §208.4(a)(2)(ii)

16 8 U.S.C. § 1158(b)(2)(B)(i). Whereas the term "aggravated felony" may sound as if it includes only the most serious violent crimes, under the definition provided by the Immigration and Nationality Act, even theft offenses with a penalty of more than one year in prison, illegal gambling, and fraud are generally considered aggravated felonies. 8 U.S.C. § 1101(a)(43)

help make the best decision. If the attorney is unaware of an arrest, this can greatly hurt an asylum case.

If the immigration judges reject a claim for asylum, this rejection can be appealed to the Board of Immigration Appeals, whose members are also appointed by the Justice Department. If the claimant fails there, the case can be appealed to a U.S. federal appeals court.

Work Permits

To apply for an Employment Authorization Document (EAD), individuals must use Form I-765. It is difficult for applicants to get a temporary work permit during their asylum application period.¹⁷ If an applicant has not received a decision after 150 days from the date of filing, the individual can apply for a work permit.¹⁸ Most applicants do not get any kind of work permit until after winning asylum.

Realities of Asylum

In the post-9/11 climate, asylum law has become increasingly stringent. Most asylum cases are rejected because the applicant fails to adequately prove active government involvement in persecution and that the applicant would personally be targeted for persecution. If the asylum officer does not grant asylum, the applicant's case is referred to an immigration court under the Executive Office for Immigration Review (EOIR).

Oftentimes, approval of asylum depends more on the random immigration judge assigned by the clerk than on the merits of the case, according to a 2006 study called "Refugee Roulette" by Philip G. Schrag, a professor at Georgetown University Law Center. 30% of applicants win asylum in San Diego compared to the U.S. Average of 40%, while 54% of applicants win asylum in San Francisco immigration courts.¹⁹ According to the same study, female immigration judges grant asylum at a 44 % higher rate than their male colleagues.

ALTERNATIVES TO ASYLUM

If an applicant cannot get asylum, there may be other ways for the person to stay in the United States if the individual fears harm upon returning. The applicant should ask a lawyer about "Withholding of Removal" and "The Convention Against Torture." These other options may allow an applicant to stay in the U.S. legally and get a work permit. The applicant will not get all of the benefits of asylum, but both are good back-up plans if the person cannot qualify for asylum.

Withholding of Removal²⁰

Withholding of removal is an alternative form of relief that might be available to someone facing persecution in his or her home country.²¹ In order to be granted withholding of removal, an applicant must meet a higher standard than for asylum. Courts have held that the applicant must show that there is at least a 51% likelihood of suffering future persecution in the applicant's country of origin, as compared to a likelihood of at least 10% in asylum cases.²² It can only be granted by an Immigration Judge, not by an Asylum Officer.

It is common practice for applicants to file for asylum and withholding of removal, both of which can be done with the I-589 form. Unlike asylum, withholding of removal is not subject to a one-year filing deadline and may

17 8 C.F.R. §208.4(a)(2)(ii)

18 *Frequently Asked Questions About Asylum*, USCIS - U.S. Citizenship and Immigration Services
<<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=457979812856d010VgnVCM10000048f3d6a1RCRD>> (as of June 23, 2008)

19 Ramji-Nogales, Jaya., Schoenholtz, Andrew. & Schrag, Philip, *Refugee Roulette: Consistency and Disparity in Asylum Adjudication*, (2008) 60 Stan. L. Rev.

20 Most of the information in this section is taken from *LGBT/HIV Asylum Manual*, Immigration Equality
<http://immigrationequality.org/manual_template.php?id=1068#D> 6, (as of June 23, 2008)

21 To qualify for withholding, an applicant must show that life or freedom would be threatened in the country of proposed removal because of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3); 8 U.S.C. § 1101(b)(3)

22 *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

be available for applicants who have been convicted of an aggravated felony. Further, granting withholding of removal is mandatory if the applicant can show a well-founded probability of facing persecution in that person's home country.²³

An applicant who has won withholding does not receive as many benefits as an applicant who was granted asylum. The individual can seek work authorization, but will not be able adjust citizen status to become a legal permanent resident, nor become a citizen. Additionally, a winner of withholding can never travel internationally, and does not have the ability to petition for derivative status for immediate relatives.

Examples of Cases Under Withholding of Removal

- *Molathwa v. Ashcroft*, the Eighth Circuit found that there was not enough evidence demonstrating that Molathwa, a gay man from Botswana, would more likely than not be subject to persecution if returned to Botswana. Molathwa had missed the one-year filing deadline, and the Court determined that an incident where the police entered Molathwa's apartment without a warrant, the beating of a friend by relatives on the basis of his sexual orientation, and the incarceration of a gay man for two days who was caught engaging in sexual activity with another man did not amount to a pattern of harassment.²⁴
- In the *Matter of Toboso-Alfonso*, a gay Cuban man who had been forced to report regularly to the government and had been forced to attend a labor camp, did meet the heightened standard for withholding.²⁵

The Convention Against Torture²⁶

Relief under the Convention Against Torture (CAT) is the third form of relief an individual fearing persecution can seek. An applicant bears the burden of demonstrating that torture is more likely than not if the applicant is removed to the country of origin. The Board of Immigration Appeals has found that torture “must be an extreme form of cruel and inhuman punishment” that “must cause severe pain or suffering.”²⁷ There are no bars to eligibility for relief under CAT. Therefore, since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, an applicant is not required to establish that her fear of torture is on account of membership in a particular social group. However, the United Nations Committee Against Torture has consistently held that the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country.

Immigration regulations create two separate types of protection under CAT.²⁸ The first type of protection is a new form of withholding of removal under CAT. Withholding under CAT prohibits the return of an individual to that person's home country. It can only be terminated if the individual's case is reopened and DHS establishes that the individual is no longer likely to be tortured in his or her home country.

The second type of protection is called deferral of removal under CAT. Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely be subject to torture, but who are ineligible for withholding of removal. It can be terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to his or her home country. Additionally, an individual granted deferral of removal under CAT may be detained by the DHS if an individual is deemed to be a threat to the community. Between March 1999 and April 2001, only

23 *INS v. Stevic*, 467 U.S. 407 (1984)

24 *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004)

25 *Matter of Toboso-Alfonso*, 20 I.&N. Dec. 819 (BIA 1990)

26 *LGBT/HIV Asylum Manual*, Immigration Equality <http://immigrationequality.org/manual_template.php?id=1068#D> 6, (as of June 23, 2008)

27 *Matter of J-E-*, 23 I. & N. Dec. 291 (B.I.A. 2002)

28 8 C.F.R. §§ 208.16, 208.17

1,741 people were granted CAT relief by immigration judges out of 53,471 applications.²⁹

Examples of Cases Under CAT

- 2 HIV-positive applicants who would be jailed upon being returned to their country of origin, met the standard for CAT relief. In these cases, the Immigration Judges found that prison conditions in the applicants' countries of origin, Haiti and Cuba were so atrocious that a person living with HIV would likely die shortly after returning to their country.³⁰
- In *Reyes-Reyes v. Ashcroft*, the Ninth Circuit ruled that the term "government acquiescence" was broad enough to include the government's failure to address severe physical abuse inflicted by non-government actors. The case involved a transgender woman who was kidnapped, severely beaten, and raped by a group of men. In addition, she was also threatened by her abusers and feared retaliation if she reported the crimes.³¹

HIV EXCLUSION

Prior to July 30, 2008, people with HIV were excluded from immigrating to, or even visiting, the United States. On July 30, 2008, President Bush signed into law the President's Emergency Plan for AIDS Relief, which repealed the ban on HIV positive tourists and immigrants in the United States. When an HIV positive person wanted to travel to the US or apply for legal permanent resident status, he or she needed to still obtain a waiver of inadmissibility. The Department of Health and Human Services still had the ability to determine whether HIV falls under this category.

On January 4, 2010, the HIV ban was finally lifted, and new regulations published by the Department of Health and Human Services became law. These regulations officially remove HIV from DHHS' list of "communicable diseases of public health significance". This means that a person can now enter the United States without disclosing his or her HIV status, and there is no longer a requirement for HIV testing of lawful permanent resident applicants.³²

As this major change is implemented, many questions arise about how this will impact people, and there have been inconsistent results.³³ Some doctors still use the old medical forms, which do require HIV testing and disclosure, but Centers for Disease Control is working to ensure that physicians do not test for HIV or request disclosure.³⁴ Individuals who were denied lawful permanent residency only because the applicant was HIV positive after July 2009 (When the final regulations were published) can move to reopen their applications.³⁵

Because there is still a great deal of inconsistency and confusion about what the lifting of the HIV travel ban actually means for individuals, many groups have published FAQs to share the information that is currently

²⁹ *Immigration Relief Under The Convention Against Torture For Serious Criminal And Human Rights Violators*, (2003) 108th Congress, 1st Session < http://commdocs.house.gov/committees/judiciary/hju88220.000/hju88220_0.HTM> (as of July 17, 2008)

³⁰ This information originates from at least two unpublished cases

³¹ *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004)

³² Centers for Disease Control and Prevention, Medical Examination of Aliens- Removal of Human Immunodeficiency Virus (HIV From Definition of Communicable Disease of Public Health Significance, Department of Health and Human Services, 42 CFR Part 34, Docket No. CDC-2009-0003. Available online at: <http://www.immigrationequality.org/uploadedfiles/E9-26337.pdf>. Last visited August 1, 2010

³³ Immigration Equality, "HIV Issues: The HIV Ban is History!", online summary, available at: <http://www.immigrationequality.org/template.php?pageid=5>. Last visited, August 1, 2010.

³⁴ The Centers for Disease Control sent a letter to all doctors who perform Immigration medical exams. The new I-693 form has been updated to remove HIV testing, but some doctors may use the old form. This letter instructs doctors to not test for HIV. Available online at: http://www.uscis.gov/USCIS/Green%20Card/Civil_Surgeon_hiv_vaccination_itr.pdf. Last visited: August 1, 2010.

³⁵ United States Immigration Services, "Memorandum: Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection". November 24, 2009. Available online at: <http://d.yimg.com/kq/groups/4317947/1952933142/name/11.24.09%20USCIS%20Memorandum%20on%20HIV%20Inadmissibility%20and%20Fina>. Last visited on: August 1, 2010

known.³⁶ Advocacy groups anticipate that more information about the realities of the ban lifting will emerge over time, and will continue working to make this information available, so it is worth regularly checking resources like Immigration Equality's website: <http://www.immigrationequality.org/template.php?pageid=5>

Immigration Equality, a national organization working to end discrimination in immigration law and reduce the negative impact on transgender, gay, lesbian, and bisexual individuals and families, has produced a helpful document in english and spanish about what the end of the HIV ban actually means for individuals. It can be viewed online at: <http://immigrationequality.org/template.php?pageid=176>

CRIMINAL RECORD ISSUES

For Applicants

An applicant is ineligible for a visa or admission if convicted of a crime involving “moral turpitude” or in violation of any law of a State, the United States, or a foreign country related to a controlled substance.³⁷ The Board of Immigration Appeals has defined *malum in se* crimes (often referred to as crimes of moral turpitude) to be those crimes “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons.”³⁸ Examples of *malum in se* crimes are: larceny, rape, and murder. An individual currently in the U.S. but ineligible for admission should not apply for naturalization because immigration authorities will start proceedings to have him or her deported.

For Legal Residents

Individuals who have been awarded legal immigration status remain at risk for deportation if they commit a crime. As a general rule, most crimes that are considered *malum in se* (see above) are deportable offenses.³⁹ Legal permanent residents, who would like to travel abroad, need to consider whether reentry would succeed. One of the harshest consequences of changes to the immigration law in 1996 was to apply some of the strictest provisions retroactively.⁴⁰ This means that anyone who has any criminal convictions should speak with an experienced immigration attorney before doing anything which would lead to a review of their immigration record. Actions which can trigger review (and possible removal proceedings), include: international travel, any application with DHS such as applying for naturalization or applying to replace a “green card”, contact with the police (arrests, traffic stops), and contact with border patrols within 100 miles of the U.S. Border. Any foreign national who has a criminal conviction, is strongly advised to consult with a qualified immigration attorney to determine what effect the conviction(s) may have on their immigration status.

REAL ID CONCERNS

The REAL ID Act is a federal law enacted in 2005. It mandates security, authentication, and issuance procedures standards for state driver's licenses and state ID cards, which must be followed in order for the IDs to be considered valid for “official purposes”. The Secretary of Homeland Security defines “official purposes” as presenting state driver's licenses and identification cards for boarding commercially operated airline flights and entering federal buildings and nuclear power plants. The REAL ID Act has created potential problems for

36 See: United States Immigration Services, “Memorandum: Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection”. November 24, 2009. A UCIS memo providing guidance to its officers on adjudicating cases after the HIV ban was lifted. The memo states that individuals with HIV will no longer be required to obtain waivers, that HIV will no longer be considered grounds for inadmissibility, and that that HIV testing will no longer be part of medical exams for lawful permanent resident applicants. Available online at: <http://d.yimg.com/kq/groups/4317947/1952933142/name/11.24.09%20USCIS%20Memorandum%20on%20HIV%20Inadmissibility%20and%20Fina> . Last visited on: August 1, 2010. See also: Department of State, “Removal of HIV Infection from the CDC List of Communicable Diseases of Public Health Significance- Questions and Answers” . December 17, 2009. Available online at: http://travel.state.gov/pdf/HIV_Q&As.pdf. Last visited: August 1, 2010.

37 8 U.S.C. § 1182(a)(2)(B)

38 *Matter of Franklin*, 20 I.&N. Dec. 867 (B.I.A. 1994)

39 INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii)

40 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208

asylum seekers and transgender people trying to legitimately acquire or change identification.⁴¹

Asylum

Asylum officers are now given broad discretion in requesting that "the applicant should provide evidence which corroborates otherwise credible testimony", including proof of persecution and additional proof of identification from those in their home country. This kind of proof can be very difficult to obtain, putting applicants. REAL ID gives asylum officers the right to reject asylum based on material inconsistencies. In many cases, inconsistencies in documents, such as different first names or gender references may simply reflect the applicant's efforts to navigate different systems as a transgender person. However, these inconsistencies may be flagged by asylum officers nonetheless. Inconsistencies like these are very common, since people seeking asylum can be fearful and distrust officials, or lack understanding of the system and cultural codes of conduct. Furthermore, the REAL ID system gives immigration judges the power to reject an asylum applicant's case based on their demeanor, such as appearing uncomfortable or laughing nervously while recounting serious or traumatic details.

State Identification Documents

REAL ID requires the states to adopt stricter laws regarding the issuance of state ID cards, which could make it more difficult for transgender people to obtain legitimate ID especially if the state in which they were born does not re-issue birth certificates (such as Ohio, Tennessee, and Idaho). These requirements force states to make electronic copies of all documents used to support a license or state ID application so the state will also make copies of documents used to change the name and/or gender marker on a license. These electronic copies will then be available in a national database to an undefined group of people, which gives rise to privacy concerns.

INDIVIDUAL'S RIGHTS WHEN DEALING WITH DHS⁴²

It is important that people assert their rights when dealing with DHS. Failing to demand one's rights or signing papers waiving those rights may lead to deportation before the individual is able to see a lawyer or an immigration judge. Individuals should never sign anything without reading, understanding and knowing the consequences of signing it. Individuals should speak with a lawyer and, if possible, even carry the name and phone number of an immigration lawyer. DHS will not explain the different options available to an individual.

Based on today's laws, regulations, and DHS guidelines, non-citizens usually have the rights enumerated below, no matter what their immigration status. The following information may change, so it is important to contact a lawyer. The rights below apply to non-citizens who are inside the U.S. Non-citizens at the border who are trying to enter the U.S. do not have all the same rights. A non-citizen inside the U.S. has the right to call a lawyer or family if detained, and has the right to be visited by a lawyer in detention. A detainee has the right to have an attorney at any hearing before an immigration judge, but does not have the right to a government-appointed attorney for immigration proceedings. If the individual has been arrested, immigration officials must provide a list of free or low cost legal service providers.

Immigration Status

An officer may not request evidence of a person's immigration status in that person's home or other private place unless the officer has a warrant. If the officer requests evidence, however, and the person fails to provide it, there is a chance that the individual will be arrested. A person is not required to talk to government officers about his or her immigration history. Once a person has shown evidence of immigration status, the individual does not have to talk to officers further. It may be smarter to remain silent and speak with a lawyer. A person does not have to answer anything about political and religious beliefs, groups the person belongs to or contributes to, things the individual has said, or where that person has traveled.

Hearings

41 Information in this section is obtained from *The Real ID Act: Bad Law for our Community*, National Center for Transgender Equality & Transgender Law Center <www.nctequality.org/realid.pdf> (as of June 23, 2008)

42 Information in this section is obtained from: *Know Your Rights*, (2004) National Lawyers' Guild, 2004 <www.nlg.org/resources/kyr/kyr_English2004.pdf> (as of June 23, 2008)

Anyone arrested for an immigration violation has the right to a hearing before an immigration judge to defend him or herself against deportation charges. In most cases only an immigration judge can order that someone be deported, unless the person has waived his or her rights or taken “voluntary departure,” agreeing to leave the country. Other instances when a person might be deported without a hearing is if the individual has a criminal record, was arrested at the border, came to the U.S. through the visa waiver program or has been ordered deported in the past. If a person gives up the right to a hearing or leaves the U.S. before the hearing is over, the person could lose eligibility for certain immigration benefits, and could be barred from returning to the U.S. for a number of years.

Detention and Deportation

For service providers, locating a client who has been detained by ICE can be a challenge. It will always be helpful to have your client's alien number (A#). Contact the Deport Office of the Bureau of Immigration and Customs Enforcement's Detention and Removal Branch, they may be able to assist in locating your client. If your client is or was on parole, it may be helpful to contact the parole officer. Foreign citizens convicted of a crime are generally placed in deportation proceedings while in detention. ICE serves them a “notice to appear” (NTA) and a detainer so they cannot obtain release prior to deportation. The NTA is the document the government gives the individual and the court to explain why an individual should be removed from the United States. The NTA starts the case against that person. ICE must give the individual the NTA within 72 hours of detention.

The NTA is divided into two parts. The first part, “Allegations,” has the person's name, the country of origin, and the date and manner of entry into the United States. It also gives the factual basis or reason for removal. The second part “Charges,” lists the sections of the law under which the individual may be removed. The individual's first date to see the immigration judge is usually scheduled within one or two weeks after receiving the NTA, though it may be longer. The first appearances before an immigration judge are known as the Master Calendar Hearings. At the first court appearance the court will ask the individual if he or she has an attorney or would like time to obtain one, and will then grant time to find an attorney, if necessary. At the beginning of the case the judge will “take the pleadings,” which means that the judge will review the NTA with the individual. The judge will ask if the facts contained in the NTA are true, if the individual admits that he or she is removable, and whether he or she will be applying for any type of relief from removal. The Government will need to prove both that the individual is a foreign citizen and that he or she is removable.⁴³ Transgender people are placed in detention facilities according to genitalia. For example, a transgender woman who has not had bottom surgery would be placed in a men's detention facility. Advocates can petition on behalf of transgender prisoners for release or alternative sentencing on the grounds that the transgender person is in imminent danger while housed in an inappropriate detention facility as a transgender person.⁴⁴

Almost all facilities holding ICE detainees have implemented the ICE Detention Standards to ensure consistent treatment and care for detainees in immigration custody. However, these standards are not legally enforceable, leaving many detainees without access to phones, adequate medical care, and basic legal materials. To file a grievance related to a situation or event related to a person's detention, a complaint should be sent to Department of Homeland Security, Mail Stop #0800, Office for Civil Rights and Civil Liberties, Washington, DC 20528, or online at www.dhs.gov/xabout/structure/editorial_0372.shtm

Online Detainee Locator System

One common problem in Immigration law is that people who are detained in Immigrations and Customs Enforcement (ICE) can be very difficult to keep track of, as they are often transported to different states and facilities.

To address this long-standing problem, on July 23, 2010, ICE announced the launch of a new public, internet-based system to help people locating individuals who have been detained in ICE custody. This system is called

43 *Immigration Detention and Removal: A Guide for Detainees and their Families*, (2006) Bryan Lonagan & the Immigration Law Unit of the Legal Aid Society
<http://www.nysda.org/idp/docs/06_ImmigrationDetentionRemovalGuideDetaineesFamilies.pdf> (as of June 23, 2008).

44 *Trans 101 Training* (June 20, 2008) Transgender Law Center

the Online Detainee Locator System (ODLS), and is on ICE's public website, <http://www.ice.gov/locator>. This detainee locator program only searches for exact match names, so you have to enter the individual's information as it appears in their detention paperwork; preferred names will not be honored.

Consulates

Non-citizens arrested in the U.S. have the right to call their consulate or to have the police tell the consulate of their arrest. The police must let the consulate visit or speak with them if consular officials decide to do so. The consulate might help find a lawyer or offer other help. A non-citizen has the right to refuse help from the consulate.

GETTING LEGAL HELP

Asylum

Because asylum law is confusing and because everything an applicant says or gives to the DHS may become a part of her or his asylum record, it is strongly encouraged that an applicant talk to a lawyer before sending anything to DHS. If the one year filing deadline for asylum is coming up or has already passed (see below), the applicant should get help immediately.

Applicants should be aware that some people who say they are immigration experts are not experts and may not even be lawyers. Sometimes asylum applicants will pay a *notario* or paralegal to help them apply for asylum. Using these kinds of services is often a mistake. Many times these people can ruin a person's chances for asylum. If you want to use one of these businesses or think you were harmed by one of them, call the anti-fraud unit of the Immigrant Legal Resource Center at (415) 255-9499 extension 774.

The most important thing a person can do for his or her attorney is to be as honest as possible. If an applicant meets with someone from the Asylum Program or hires a private lawyer on his or her own, anything he or she says to that lawyer is confidential. That means that this lawyer is not allowed to tell this information to the U.S. government or to anyone else without the permission of the applicant. Speaking with an attorney is also a good way to calm fears about the risk of applying for asylum. It is very helpful for an applicant to collect documents for the case. Some helpful documents include pictures from when the applicant lived in his or her home country, a birth certificate or identity card, and letters from relatives or friends that will help prove the case. These documents are not necessary, but can be helpful. The Asylum program at the Immigrant Legal Resource Center is a good resource for obtaining "country packets." These packets contain information about different countries' persecution of people based on sexual orientation and/or HIV status.

RESOURCES

Below is a brief list of resources that may be especially helpful. This collection is only a small representation of transgender-welcoming services in California and the United States. Searching online for additional resources may yield more specific information or assistance. Resources are divided by California-specific organizations, national organizations, and general resources, which includes legal documents, publications, research tools, and “know your rights” resources. For ease of use, we have specified whether organizations provide direct or support services, and to what extent they serve the LGBTQI (Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex) communities, and specifically, to what extent they serve transgender communities. National Lawyers Guild Interns spoke with representatives of almost all of these organizations to ensure that our description of their services is correct and up-to-date, and that they are explicitly welcoming of transgender community members.

CALIFORNIA RESOURCES

Bay Area Immigrant Rights Coalition, www.immigrantrights.org

310 8th Street, Ste. 303

Oakland, CA 94607

Phone: (510) 839-7598

BAIRC is a coalition of groups around the Bay Area, providing services to applicants and current immigrants.

Lawyer’s Committee for Civil Rights Asylum Program,

www.lccr.com/immigration_direct_services_asylum.shtml

131 Steaurt Street, Suite 400

San Francisco, CA 94105

Phone: (415) 543-9444

The Asylum Program may be able to find a lawyer to represent the applicant for free, otherwise, they can provide a list of attorneys who charge lower than average fees. All information shared with them is confidential and cannot be shared with the U.S. government or anyone else without your permission.

San Francisco Immigrant Legal and Education Network, www.sanfrancisconetWORK.org

938 Valencia Street

San Francisco, CA 94110

SFILEN works to achieve immigrants’ rights through building grassroots leadership, providing free immigration legal services and comprehensive legal assistance, promoting community education, and organizing to empower the immigrant community.

Survivors International, www.survivorsintl.org

703 Market Street, Ste 301

San Francisco, CA 94103

(415) 546-2080

Survivors International is a 501 (c)(3) non-profit organization dedicated to providing essential psychological and medical services to survivors of torture who have fled from around the world to the San Francisco Bay Area. SI aims to help survivors put the pieces back together by providing the support they need to re-establish healthy and productive lives after their experiences of torture.

Transgender Law Center, www.transgenderlawcenter.org

870 Market Street, Room 400

San Francisco, CA 94102

Phone: (415)865-0176

Email: info@transgenderlawcenter.org

The Transgender Law Center (TLC) is a civil rights organization advocating for transgender communities. TLC provides direct legal services, engages in public policy advocacy and education and works to change laws and systems that fail to incorporate the needs and experiences of transgender people.

NATIONWIDE RESOURCES

Department of Homeland Security Office for Civil Rights and Civil Liberties

www.dhs.gov/xabout/structure/editorial_0372.shtm

Department of Homeland Security Office for Civil Rights and Civil Liberties

Review and Compliance 245 Murray Lane, SW Building 410, Mail Stop #0800

Washington, DC 20528

Phone: (1-866)644-8360

Email: civil.liberties@dhs.gov

The office is led by the Officer for Civil Rights and Civil Liberties who provides advice to the Secretary and the senior officers of the Department on a full range of civil rights and civil liberties issues. Contact this office to file complaints.

Immigration Equality, www.immigrationequality.org

40 Exchange Place, 17th Floor

New York, NY 10005

(212) 714-2904

A national organization that advocates for the equality for lesbian, gay, bisexual, transgender (LGBT) and HIV-positive immigrants. They run a pro-bono asylum project, provide trainings to LGBT immigrants about immigration law, and match up people needing legal services with volunteer attorneys. Immigration Equality specifically provide support and resources to transgender and HIV positive individuals, and their website features written resources in english and spanish about immigration law for transgender and HIV positive people.

Immigrant Legal Resource Center, www.ilrc.org

1663 Mission Street, Suite 602

San Francisco, CA 94103

Phone: (415)255-9499

The Immigrant Legal Resource Center (ILRC) is a national non-profit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. ILRC publishes some of the top reference manuals on immigration law, with 11 current titles. ILRC offers a nation-wide consultation service called Attorney of the Day (AOD), which can be accessed through their website. AOD provides legal assistance to attorneys, staff of non-profit organizations, public defenders, and others assisting immigrants.

National Immigration Justice Center, www.immigrantjustice.org

208 S. La Salle Street, Ste. 1818

Chicago, IL 60604

Phone: (312) 660-1370

The Immigrant Legal Defense Project serves immigrants applying for permanent residence through a family-based application; permanent residents applying for citizenship ; immigrants who are victims of domestic violence or violent crime and seek protection in the United States; and victims of international human trafficking.

The National Center for Lesbian Rights, www.nclrights.org

870 Market Street, Ste. 370
San Francisco, CA 94102
Phone: (415) 392-6257

NCLR provides free legal assistance to LGBT immigrants nationwide. They help individuals understand various aspects of immigration law and provide direct representation to LGBT immigrants in impact cases and individual asylum claims.

Sylvia Rivera Law Project, www.srlp.org

Attn: Gabriel Arkles
322 8th Avenue, 3rd Floor
New York, NY 10001
Phone: (212) 337-8550

SRLP provides free legal services to transgender, intersex and gender nonconforming low-income people and people of color in the New York area. SRLP provides advice and referral for a wide variety of legal issues. Sometimes, they can also provide more help, such as advocacy, help with a case you are bringing on your own, or, more rarely, representation in a legal action. The best way to reach them is to either call or write to Gabriel Arkles directly.