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# Seeking Asylum: Literary Reflections on Sexuality, Ethnicity, and Human Rights

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Over the past decade, immigration law in the United States has taken several important steps toward establishing that human rights violations arising from sexual-orientation-based persecution are recognized grounds for granting asylum to refugees. Sexual orientation is joining other more established grounds for seeking protection from persecution. However, US asylum laws and practices still fail to protect all the refugees on US soil who face persecution if returned to their homelands. Asylum law, as written by Congress and interpreted by the courts and the Immigration and Naturalization Service (INS), is forged through the conflict of two incompatible functions: it attempts to meet US obligations under international accords to shelter those persons whose own national governments cannot or will not protect them from persecution, and it attempts to limit the number of successful asylum claims in response to anti-immigrant feelings strongly felt and expressed by the American public. Asylum seekers, immigrant rights activists, and human rights advocates work to overcome the latter of these functions while strengthening the former.

Scholarly human rights advocacy is typically carried out in the fields of law, public health, politics, and journalism. What is to be gained by expanding this range of fields to include literary criticism? In this essay I analyze an autobiography, Reinaldo Arenas' *Before Night Falls*, and two novels, Elías Miguel Muñoz' *The Greatest Performance* and Shyam Selvadurai's *Funny Boy*. These

texts were published between 1991 and 1994, and many of their central concerns overlap with issues confronted in US asylum law and practice during the 1990s: persecution on account of sexual orientation and ethnicity; family and ethnicity as categories of social experience that shape and give meaning to gender and sexuality; the emerging understanding that human rights violations occur not only in the public sphere but also in the domestic or private sphere; and the consideration of barriers that prevent victims from seeking justice, both at home and in the US. I explore these areas of overlap in the sections below. However, more important than overlap is the fact that the representations of immigrant and refugee experience rendered in these literary accounts speak powerfully to human rights issues that US law overlooks and that INS practice ignores. As a result, literary criticism of these texts can contribute to the study of human rights a deeper understanding of human experience and of humanity in the fullest sense of that word. At the same time, human rights discourse provides a critically compelling framework for interpreting the work of Arenas, Muñoz, and Selvadurai.

Before focusing on these authors' texts, however, I need to provide the context for my analysis in the form of an overview of US asylum laws and practices. In the following section, I explain the legal basis for asylum claims. For the purposes of this essay, I will focus on one of the five grounds upon which a refugee can seek asylum: persecution on account of membership in a particular social group. The legal definition of "social group" has proven especially important to persons who seek asylum because they fear persecution on account of their sexual orientation. The INS, through the Board of Immigration Appeals (BIA), the Ninth Circuit Court, and the Second Circuit Court, have offered three definitions of "social group." As I explain in detail below, two of these definitions draw upon notions of "family." Arenas, Muñoz, and Selvadurai complicate the meaning of family, sexuality, and ethnicity by representing these forms of human relation in and through each other. Their fictional and non-fictional representations invite us to reconsider the definition of "social group" as it has emerged in US asylum law. The tension between literary and legal approaches to the idea of "social group" suggests not only that its legal definition is too far removed from lived human

experience, but also that literature can clarify our understanding of human rights and our vision of remedies for rights violations.

### **Asylum in the United States**

English speakers tend to use the word “refugee” to refer to anyone who seeks protection from danger by moving to a safe jurisdiction. We should not lose sight of this general usage of the term because it arises from a common understanding that when human beings suffer injustice against which they have no recourse for relief, they should be able to flee and seek protection elsewhere. However, neither US nor international law define “refugee” so broadly. The legal status of refugees was defined internationally in the Refugee Convention of 1951 and amplified in the Refugee Protocol of 1967.<sup>1</sup> The Convention defines “refugee” precisely and narrowly in article 1(A)(2) to mean a person who has “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion.”

This definition emerged from intense and difficult negotiations in a Cold War context, and it is marked by the biases of the men who negotiated and approved it. Neither gender, sexuality, nor ethnicity are mentioned in this definition although US case law has proven the relevance of all three categories in the US. Four of the grounds upon which a persecuted person can claim refugee status (race, religion, nationality, political opinion) speak to the types of persecution that most shocked world opinion and political leaders during and immediately after World War II. The fifth ground (membership in a particular social group) is more vague than the other four. It seems to have been added to allow for a certain amount of flexibility as states who are party to the Convention interpret its meaning in their own national contexts (Grahl-Madsen 219).

Asylum law in the US has emerged through a combination of Congressional legislation; INS administrative procedures, guidelines, and regulations; and federal court decisions regarding appeals of INS orders. In response to the 1951 Refugee Convention and its 1967 Protocol, in 1980 Congress passed the Refugee Act. This act amended the Immigration and Nationality Act (INA)

of 1952 with respect to refugee and asylum issues. The Refugee Act of 1980 incorporates the definition of “refugee” from the 1951 Convention using the identical five grounds. The same Act assigns the Attorney General the authority to grant or deny asylum at her discretion to refugees thus defined; her authority is implemented through the INS. In response to the 1980 Act, the INS modified some procedures and regulations regarding asylum. Between 1980 and 1996, a person seeking asylum in the United States would present a claim to an INS immigration officer or asylum officer. If the claim could not be resolved administratively, it would be forwarded to an Immigration Judge. The decision of an Immigration Judge could be appealed, by either the INS or the applicant, to the Board of Immigration Appeals (BIA). Decisions by the BIA, an administrative judicial board housed within INS, could be appealed through the federal court system and, if necessary, to the Supreme Court.<sup>2</sup>

Procedures for asylum claims and appeals are more complex than this overview suggests,<sup>3</sup> but I’ve sketched out these fundamentals because they are crucial for understanding how the definition of a “social group” has emerged over time through case law. Diplomats did not explicitly define this category in 1951 or 1967; Congress did not explicitly define it in 1980. INS employees have tried to understand it with reference to internal guidelines. Immigration Judges rely on information from several sources, including (since the mid-1980s) precedent decisions made through the appellate system. “Social group” has been defined by the BIA in *Matter of Acosta* (1985), by the Ninth Circuit Court of Appeals in *Sanchez-Trujillo v. INS* (1986), and by the Second Circuit Court of Appeals in *Gomez v. INS* (1991). The legal parameters of a “social group” as devised in these three decisions have validated some claims for asylum from persecution on account of sexual orientation. However, the current parameters do not admit consideration of persecution in the full range of its complexity.

### **The Meaning of “Persecution” and “Social Group”: Three Narratives of Cuban Refugees**

The BIA definition of “social group” was formed in the case of Acosta, a man from El Salvador who sought asylum in the US and based his claim on his membership in a taxi cooperative.<sup>4</sup> The Immigration Judge for Acosta’s case found him ineligible for asylum and ordered his deportation; on appeal, the BIA agreed with the judge. In issuing their ruling, the BIA defined “persecution on account of membership in a particular social group” to mean:

persecution that is directed toward an individual who is a member of a group of persons *all of whom share a common, immutable characteristic*. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership . . . whatever the common characteristic that defines the group, it 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* (*Matter of Acosta* 233, emphasis added).

Using this definition, the BIA found that members of a taxi cooperative lacked a common, immutable characteristic, and consequently that Acosta was not a member of a social group under the meaning of the Refugee Act.

The BIA arrived at this definition by reasoning through analogy. The Board stated that since the other four grounds named in the Act (race, religion, nationality, political opinion) describe persecution aimed at characteristics that are either immutable or are so fundamental to one’s identity that they cannot or should not be changed, so also should “social group” be understood in the same framework. While this line of reasoning is logical, it is not the only available interpretation of the law; for example, the Second Circuit Court of Appeals offers a substantially different interpretation. The “advantage” of the BIA definition, for those who work to restrict immigration, is that it limits the chances that the category “social group” will open up substantially new grounds for asylum. Instead, it keeps the meaning of “social group” as close

as possible to the other four grounds and does so through an appeal to identity politics. *Matter of Acosta* says, in essence, that you can become a refugee if you are persecuted for “innate” characteristics (that is, for who you are) or if you are persecuted for “shared past experience” that is fundamental to your identity (that is, for who you are).

The BIA reveals class bias in its use of identity politics, for it names “former military leadership or land ownership” as examples of “shared past experience” that lead to social groups under the Act while dismissing Acosta’s claim that former membership in a taxi cooperative establishes his membership in such a group. Having embraced identity politics in *Matter of Acosta*, there is no guarantee that the BIA or other organs of the INS will use it expansively rather than restrictively. However, the “immutability” standard and its assumptions about identity did play an important role in the BIA decision that established sexual orientation as a grounds for asylum. In *Matter of Toboso-Alfonso*, the BIA upheld an Immigration Judge’s ruling that a gay Cuban man, Fidel Armando Toboso Alfonso, should not be deported, because in Cuba he had a well-founded fear of persecution on account of membership in a particular social group.<sup>5</sup>

Toboso Alfonso arrived in the US in 1980 during the Mariel boat lift; he requested asylum after an arrest and conviction on narcotics charges that would have resulted in deportation in 1985. During his asylum hearing Toboso Alfonso testified that he was homosexual, that his sexual orientation was public knowledge in Cuba, and that the Cuban police harassed him for several years on account of his sexual orientation. In 1980 he was called to a police station, where he was told to choose between leaving Cuba via Mariel or being imprisoned for four years. He further testified that harassment occurred not in response to any specific violation of Cuban law, but rather because of his status of being homosexual.

The fact that Toboso Alfonso was harassed merely for being gay played a decisive role in the BIA’s decision on his case. The INS appealed the Immigration Judge’s ruling in his favor, arguing that homosexuals could not be considered a social group under the Refugee Act. In considering this issue, the BIA as a matter of course turned to its definition of “social group” in *Matter of Acosta*, including the “immutability” standard. Curiously, in

advancing its appeal against Toboso Alfonso the INS did not challenge the “immutability” of homosexuality. Perhaps gay and lesbian identity politics have achieved a measure of success in the US if we have arrived at the point where INS advocates refrain from such a challenge when pursuing it would be in their best interests. In any event, the INS appeal was animated not so much by the case before it as it was by a desire to limit future asylum claims based on the same grounds. The INS based its appeal on the argument that “socially deviated behavior” such as “homosexual activity” is lawfully subject to regulation in Cuba as well as in several of the US states. To grant Toboso Alfonso asylum, INS attorneys argued, would in effect widen the meaning of “social group” to include “those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well” (*Matter of Toboso-Alfonso* 822). With this argument, the INS invoked the familiar paranoia that a liberal asylum policy would flood the US with the world’s oppressed, and added a twist: that perverts and criminals would swim in with the flood.

Fortunately for Toboso Alfonso, the BIA disregarded this alarmist plea and built upon the identity-politics-based definition of “social group” it established in *Matter of Acosta*. In Cuba, the Board found, he would face persecution based on his sexual orientation, not legitimate police action based on his behavior. While the stories of refugees who have received asylum based on their sexual orientation have not yet appeared in literature, recent literary narratives have explored the experience of receiving asylum on other grounds and living in the US as gay and lesbian exiles. Two narratives from Cuba provide especially illuminating texts to read in relation to *Matter of Toboso-Alfonso*. In Elías Miguel Muñoz’s novel *The Greatest Performance*, two Cuban exiles (one a lesbian, one a gay man) meet in the US and tell each other their life stories. Reinaldo Arenas, in his autobiography *Before Night Falls*, describes his life in Cuba, his passion for ideas and literature, his desires for men, and his persecution at the hands of the Cuban state.

Like Toboso Alfonso, Reinaldo Arenas arrived in the US via the Mariel exodus. Unlike Toboso Alfonso, Arenas was not forced into exile; in fact, the authorities wished to keep him under close



scrutiny in Cuba, and his escape happened only by chance. Arenas is one of the most important Cuban novelists of the twentieth century, famous both for his densely lyrical novels and for his withering criticism of Cuban authoritarianism. His first novel was published in Cuba, but subsequent novels were smuggled out and published abroad. Each new publication was an embarrassment to the Cuban authorities, and during the 1970s Arenas came under increasing pressure. When he was arrested in 1973 for creating a “public scandal” and charged with “corrupting minors,” the state assembled evidence that he was a dangerous counter-revolutionary: a homosexual writer who published unauthorized books abroad. The prosecutors hoped that by trying Arenas on a morals charge, they could diminish his international reputation, punish him for the ideas expressed in his novels, and at the same time appear not to persecute him for his political convictions. He was convicted of performing “lascivious abuses” and spent two years in prison and work camps (*Before Night Falls* 154-224).

As a Cuban carried to the US via the Mariel boat lift in 1980, Arenas was granted entry as a matter of course. If, like Toboso Alfonso, he had faced the rigors of a deportation hearing, he could have made a strong case for asylum based on his political beliefs. However, an application based on persecution for homosexuality would have faced significant hurdles. Not until 1990 was US law amended to allow the entry of a homosexual person.<sup>6</sup> Moreover, unlike Toboso Alfonso, Arenas had been convicted of a sexual crime in Cuba, and the INS would have been in a position to argue that he had been punished on the basis of activity rather than identity, and thus had been prosecuted rather than persecuted. Comparing the cases of these two Cuban men suggests one reason why the identitarian definition of “social group” in *Matter of Acosta* provides too narrow a basis for understanding persecution on account of sexual orientation. Prosecution on trumped up “morals” charges is yet another form of persecution, particularly when the laws are written or selectively enforced to harass a segment of the population.

Applicants for asylum in the US must present the INS with convincing evidence of past persecution and provide a reasonable explanation of why one fears future persecution if returned home. The INS definition of “persecution,” like that of “social group,”

has emerged through case law. The BIA provides an overview of its interpretation of this term in *Matter of Acosta*. In that decision, two aspects of persecution are emphasized: persecution “means harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome,” and this harm or suffering must be inflicted “either by the government of a country or by persons or an organization that the government was unable or unwilling to control” (*Matter of Acosta* 222). Not every human rights violation rises to the legal definition of persecution. “Mere” discrimination is not persecution and neither, of course, is legitimate prosecution for criminal activity. The stipulation that state actors must be involved (either actively or, by refraining from action, tacitly) for abuse to be considered persecution has traditionally meant that “private” and “domestic” human rights abuses could not be considered persecution. Violence directed at women and at sexual minorities often occurs within these latter two categories, for example, in cases of rape and physical abuse. Only in recent years have human rights activists begun to convince courts, governments, and international organizations that “private” and “domestic” human rights violations can at times rise to the level of persecution.<sup>7</sup>

In *The Greatest Performance*, the lesbian narrator Rosita Rodríguez remembers as a child watching “public” persecution of queer Cubans as the police “pick up all the long-haired men, women in miniskirts or hot pants, the whores, the ducks, and the dykes (*Las Tortilleras*)” and confine them in “Las Barracas,” political re-education work camps (17, 43). Her gay childhood friend is among those who suffer. In the novel, these forms of state persecution mirror “domestic” violence and abuse. Mario, the novel’s other narrator, suffers at the hands of his macho father. The father cannot abide the sight of an effeminate son, whose principal joy in life is to express himself through drawing and painting. During a typical family meal, Mario’s father erupts in rage and violence. He “pinches the inside of my thighs, hits my chest. He grabs me by the hair and pokes my stomach with his fingers.” The reason? Mario has straddled his chair, and “‘Men don’t sit that way, shit!’ he yells. ‘Only broads sit that way, so they can air out their pussies!’” (35). The pinching and poking, forms of sexualized violence, enforce on the boy the stark realities of Cuban patriarchal

heteronormativity. The merest hint of effeminacy is treated as treachery to masculinity, and traitors are subjected to the kinds of violence suffered by women. After the beating, Mario's father "tears up my drawings and pushes my face into the watercolor set, forcing me to eat my greens, my reds and blues and grays" (35). His father objects not only to hints of effeminacy, but also to Mario's creative free expression of his own humanity.

In this regard, the father's domestic abuse of Mario directly parallels the Cuban state's treatment of Reinaldo Arenas. Homosexuality was regarded as a crime against the nation during a period of the revolution when nationalism and patriotic socialism were defined by heteronormative gender roles and sexual behaviors.<sup>8</sup> Arenas wrote novels explicitly concerned with free expression, individual imagination and desire, and other attributes of the liberal subject. Thus, both his homosexuality and his writings were regarded as subversive expressions. Arenas reinforces the inextricable connection between free sexuality and free expression in *Before Night Falls*. "All dictatorships are sexually repressive and anti-life," he claims. "All affirmations of life are diametrically opposed to dogmatic regimes. It was logical for Fidel Castro to persecute us, not to let us fuck, and to try to suppress any public display of the life force" (93). Arenas records in detail the sexual adventures he pursued with countless Cuban men in parks, beaches, buses, theaters, and homes. The only place he refused to seek sex was in prison, for in prison there "was no beauty in the act. . . it became something sordid, an act of submission and subjugation, of blackmail and violence, even of murder" (179). Likewise, in prison he cannot write, not merely for lack of paper, but for lack of freedom. Sex and writing coincide not by coincidence but by necessity, for "the body needs to feel satisfied to give free reign to the spirit" (101).

Before his capture, and again after his release, Arenas discovers and expresses his humanity through both sex and writing. He is hardly alone in his sexual exuberance; his narrative describes a society in which men from all walks of life frequently seek sex with each other. The sexual revolution in Cuba was, according to Arenas, a kind of counter-revolution, for it "came about as a result of the existing sexual repression. Perhaps as a protest against the regime, homosexuality began to flourish with ever-increasing

defiance" (107). As his hundreds of adventures with army recruits and other *machos* demonstrates, homosexual activity flourished, even among men who identified themselves as heterosexual. Homosexual activity in Cuba, according to Arenas, is not determined by one's sexual identity, but is rather inspired by one's expression of humanity in defiance of a state that represses sexuality by way of oppressing its citizens.

The qualification of "sexual orientation" as a "social group" for purposes of adjudicating asylum claims in the US did grant relief to Toboso Alfonso; however, the BIA definition of "social group" could not comprehend the complexity of homosexual expression represented in *Before Night Falls*. Were he to have applied for asylum based on his sexual orientation, Arenas would have had to overcome the BIA distinction between persecution for identity and prosecution for acts. A vast number of his sex partners would face another obstacle, insofar as they would confound the BIA definition of social group, based as it is on American identity politics that would name them "heterosexual" or perhaps "bisexual."

Moreover, Arenas and Muñoz highlight the limitations of the BIA definition of "persecution," which attempts to confine applicability to the "public" realm of state action. A gay man beaten by a policeman and a gay son beaten by his father suffer from the same root sources of heteronormative prejudice. Both situations meet the first part of the BIA's definition of persecution, for both policeman and father inflict "harm or suffering" in order to "punish" a person "for possessing a belief or characteristic a persecutor seeks to overcome." Indeed, those who persecute homosexuals often believe that sexual identity, desire, and activity can be "overcome" or "cured." However, the law considers the former but not the latter to be persecution worthy of asylum because only the policeman is an agent of the state.

BIA definitions of both "social group" and "persecution" are cautious, conservative interpretations of the law animated by a desire to limit as much as possible the types of human rights violations that qualify one for asylum in the US. Literary representations of violence and abuse place this conservative approach under scrutiny; in the following section I will explore how literary representations of family life complicate these issues even further.

### Family in Fiction and Law: Persecution on Account of Ethnicity and Sexuality

In its definition of “social group,” the BIA provides three examples of “innate” characteristics it feels exemplify the standard of “immutability”: sex, color, and kinship ties. In the wake of civil rights struggles in the US, discrimination based on two of the three, sex and color, is widely condemned in this country. Providing asylum against persecution on these grounds is not especially innovative or controversial. After all, the Refugee Convention and the US Refugee Act already name “race” a qualifying ground, and “color” is a related concept.<sup>9</sup> Had the Refugee Convention been written in the 1990s rather than the 1950s, “sex” and/or “gender” might well have been included explicitly as a protected ground.<sup>10</sup> “Kinship,” the third innate characteristic highlighted by the BIA, does not have the same kind of civil rights currency in the US as do sex and color although there are certainly precedents for considering kinship in the discourse of international human rights.<sup>11</sup> In a US context, then, its appearance alongside the other exemplary types of “social group” (and thus as an accepted ground for asylum from persecution) is somewhat curious.

I can only speculate on the reasoning of the BIA, but the inclusion of kinship is logical if one is casting about for examples of “innate” characteristics that form the basis of social groups. Focusing on characteristics we are born with leads us to the realm of genetic relations, and what social group better exemplifies genetic relations than a family? Of course not all members of a family are directly related through genetics: adopted children, married couples, and in-laws are notable exceptions. The BIA does not offer an extended definition of “kinship ties” as this term appears in *Matter of Acosta*, but does further develop its understanding of family as a social group in another decision, *Matter of H-*. In this case, a Somali man was granted asylum from persecution on account of his membership in a social group. The applicant testified that his father and brother had been killed and he had been severely mistreated in detention during the upheavals following the demise of dictator Siad Barre’s government in Somalia. The applicant’s family belong to the same subclan as Barre, meaning

that they share kinship ties that have particular social and political meanings in Somalia.<sup>12</sup>

In *Matter of H-*, the social group in question extends from the immediate family members who face persecution to the entire subclan against which other subclans express animus. The case demonstrates the elasticity of kinship considered as the basis of a social group. Starting with the nuclear family, moving to other close relations, from there to subclan and clan, could kinship ties extend to an entire ethnicity? Kinship does not define ethnicity, but there is a metaphorical association between them. Understood as a sense of relatedness through common origins, ethnicity shares with kinship the notions of heritage and of interconnection through marriage and reproduction. Extending kinship through generations involves biological reproduction; extending ethnicity through generations involves social reproduction. The impetus for biological and social reproduction often merges, in which case ethnicity can, in some cases, be defined through heterosexual relations, to the exclusion of non-reproductive forms of sexual expression.

Aside from the role of sexuality, ethnicity is also, and more typically, defined in relation to shared culture, language, religion, and/or nationality. In relation to asylum law, “ethnicity” is not explicitly mentioned in the Refugee Convention nor in the US Refugee Act (which name only five grounds for consideration: race, religion, nationality, social group, and political opinion). However, some claims for asylum on account of ethnic persecution have been successful. In a 1999 decision concerning a Quiche couple from Guatemala, the Ninth Circuit Court discussed persecution using the word “race” but acknowledged the more precise term would be “ethnicity” (*Duarte de Guinac v. INS* 3-4). One year later, the same court began to use the word “ethnicity” in asylum appeals, noting that since “ethnicity” falls somewhere between “race” and “nationality” it is an appropriate category for consideration under US asylum law (*Shoafera v. INS* 4).

Thus, persecution on account of ethnicity has become a ground for asylum in the US through case law. As *Matter of H-* indicates, some forms of ethnic violence overlap with persecution on account of kinship relations. Literary representations of violence in family life, however, remind us that human rights violations can also occur within the family. For example, in *The Greatest Perform-*

ance, Mario is beaten by his father on account of his sexual orientation; later in the novel, Rosita is sexually harassed by an uncle. In *Before Night Falls* one of Arenas' most wicked political enemies is his aunt, who spies on his sexual and intellectual activities and reports to state security. These examples of domestic persecution arise out of heterosexual norms of behavior, which in turn arise out of the twin imperatives of biological and social reproduction. In these examples drawn from Cuba, ethnic cohesion is subsumed under Cuban nationalism, which during the 1960s and 1970s called for the creation of a "new man": a virile, patriarchal, dominant heterosexual man who would create a socialist nation through sexual reproduction and heteronormative family life.

From another national perspective, Shyam Selvadurai offers a thorough exploration of persecution on account of ethnicity and sexuality at the nexus of the family. His novel *Funny Boy* explores the childhood and adolescence of Arjie, who comes into consciousness of his sexuality in the midst of mounting ethnic conflict in Sri Lanka in the 1970s and 1980s. Arjie belongs to an urban, prosperous, middle class Tamil family that seeks a quiet, peaceful accommodation with the majority Sinhalese in Colombo. Such an accommodation is, however, elusive. Arjie's great-grandfather was killed during anti-Tamil riots, and his grandparents are murdered during the fresh wave of ethnic violence erupting around him. The bonds that unite this family are forged in large part through ethnic differentiation, and anger toward and fear of Sinhalese mobs are a family legacy. In this respect, the meaning of family and domestic security cannot be separated from the exercise of politics in the public realm.

The private and public realms cross with special intensity when individuals fall in love, act on sexual desires, seek marriage, and contemplate sexual reproduction. Arjie first becomes conscious of how ethnic politics impinge on affectional relationships when his aunt Radha begins dating a Sinhalese man named Anil. Freshly returned from study in America, Radha has a progressive view of inter-ethnic relations. "If two people love each other, the rest is unimportant," she tells her sister Mala (*Funny Boy* 76). Radha is not alone in experiencing cross-ethnic affectional and sexual desires. Arjie's mother would have preferred to marry a man named Daryl, a Sri Lankan descendent of Portuguese and Dutch

settlers. His father, when a student in England, loved a working-class English woman. Later in the story, Arjie falls in love with a Sinhalese boy, breaking norms of sexual orientation as well as ethnic allegiance. But none of these relationships can flourish in ethnicity-conscious Sri Lanka. As Mala tells her sister Radha, a Tamil-Sinhalese marriage can only go forward if both families agree to support it. The murder of their grandfather years earlier forecloses this possibility. "Ultimately, you have to live in the real world," says Mala, "And without your family you are nothing" (76).

In threatening her sister with the "nothing" of existence outside a family, Mala suggests that to be fully human one must have the allegiance of a kinship network. For Tamils in the novel, this imperative extends from kin to ethnicity. However, at what costs to one's humanity must one maintain this allegiance? *Funny Boy* raises this question in several contexts, but especially with regard to sexual desire and expression.

Arjie's mother Amma is forced to make a series of impossible choices when her former lover, Daryl, appears in Colombo. He had emigrated to Australia and became a journalist there, but has returned to investigate reports that the Sri Lankan government is torturing and killing Tamils in the countryside. Her first choice is whether to follow her heart and have an affair with Daryl. She decides to do so at considerable risk because sexual scandal and divorce carry enormous penalties in her social class. The potential nobility of choosing fidelity to her true love rather than to her husband is, however, compromised when Daryl disappears. She reports his disappearance to the police, who "investigate" by torturing Daryl's neighbor, a servant boy. Daryl has, of course, been murdered by the police for his human rights work; their "investigation" reveals only that Amma and Daryl are lovers. Amma is at first determined to remain faithful both to her love for Daryl and to the truth about his disappearance. However, the police blackmail her. Her need to keep her sexual and affective expression private stymies her ability to make the facts of Daryl's murder and the truth about government persecution of Tamils public. "We must do something," she tells Arjie. "But where does one turn when the police and the government are the offenders?" (134). The human rights crisis of government-sponsored assassination and



ethnic violence extends from the public realm directly into the intimacy of Amma's domestic life. As her friend, a civil rights lawyer, advises her, she can do nothing for Daryl's case or against persecution. "You must remind yourself that you have a family and they could be at risk" (137).

Ultimately, Amma chooses faithfulness to her family and its safety at the expense of truth, justice, and fidelity to her heart's desires. Her son Arjie faces comparable dilemmas as he comes into consciousness of his sexuality. Arjie is targeted as a "funny boy" from an early age, and faces the predictable array of taunts and insults. His father is determined not to have a queer son, although fortunately he does not express this determination violently as does Mario's father in *The Greatest Performance*. Rather, Arjie's father sends him to a school known for its colonial-era discipline. Headed by a principal known as Black Tie (after the severe necktie he wears with his colonial white suit), the school is administered under a strict hierarchy, including a prefect system to police and discipline any irregularities. Black Tie is especially vigilant about any hint of queer sexuality and will whip and abuse any boy discovered with long hair or other hint of effeminacy. Punishment is exercised unjustly and arbitrarily, and there is no possibility of appeal.

"Never complain," Arjie's brother warns, "Once you come to Queen Victoria Academy you are a man. Either you take it like a man or the other boys will look down on you." (207). Masculinity is here characterized by silence in the face of unjust abuse. While this system has no effect on sexual orientation (there is plenty of queer sexuality among the boys, merely twisted by the sadism of the institution), in many respects it provides an excellent preparation for life as a male citizen under a repressive government. Black Tie and his prefects mirror the power of the state the boys will encounter once they graduate into adult society. In addition, ethnic politics at the school mirror those of society at large. Black Tie, a Tamil, is trying to maintain control over the school so as it keep it multi-ethnic; the vice principal Mr. Lokubandara wishes to transform it into an exclusively Sinhalese enclave.

When Arjie witnesses abuses at school, he is forced to make choices analogous to those his mother faces when Daryl is murdered. Arjie becomes the friend and later the lover of Shehan, one

of the students who are severely punished for wearing long hair. The two boys attempt to protect each other from Black Tie, who has taken an interest in Arjie's skills at poetic recitation. Black Tie appeals to Arjie's solidarity as a fellow Tamil, insofar as both will suffer should Lokubandara succeed in taking control of the school. The principal enlists Arjie to read two poems at a school assembly to be attended by a senior government minister who has the power to determine the school's fate. If read well, the poems will remind the minister of his ties to the school and of the value of a multiethnic student body. Arjie believes in a multiethnic society; he has many Sinhalese friends, including his lover Shehan. However, "I was not sure," he says, "that, as a Tamil, my loyalties lay with Black Tie" (241). Black Tie abuses his students, including Shehan and Arjie, with the same authoritarian disregard for their humanity as do the Sinhalese prefects, who assault Tamil boys. "Was one better than the other?" he asks himself (242).

Arjie discovers that loyalty to his ethnicity—and to the value of a multiethnic society—does not necessarily coincide with justice. "Right and wrong, fair and unfair had nothing to do with how things really were," he decides (267). He witnesses Black Tie arbitrarily punishing Shehan day after day. He knows that if his family discovers his sexual activities with Shehan they will react severely, yet "how could loving Shehan be bad?" (267). So, out of love for Shehan, he does the one thing in his power to put an end to Black Tie's authoritarian rule: he mangles the poems during his recitation and reduces Black Tie to a laughing-stock in front of the minister. This choice in favor of love and justice is made at the expense of Arjie's family, not so much because of their disappointment in his recitation as because in making a commitment to Shehan "I was no longer a part of my family in the same way. I now inhabited a world they didn't understand and into which they couldn't follow me" (278). This is a world in which sexual affection and affiliation carry more weight than family responsibility. Arjie effects a metaphorical exile from his family into adult male subjectivity.

Arjie, his mother Amma, and his aunt Radha are forced into the choices they make because the politics of ethnicity in Sri Lanka bleed over into the "private" realm of sexual desire and affect at the nexus of the family. They are called upon to prioritize their

sense of justice, their commitment to family and ethnicity and multiethnic society, and their innermost sexual and affective desires. Compromise and balance are not options although Arjie, as a young man, has considerably more latitude to pursue illicit sex and still maintain family ties than do his mother or aunt. As the intensity of persecution targeted at Tamils increases, the family as a whole is also called upon to choose between their lives and loyalty to their homeland. They hold on until their house is burned and Arjie's grandparents are murdered in a fresh outburst of ethnic violence; then they seek asylum in Canada.<sup>13</sup>

State actors plan and help carry out the anti-Tamil riots, for example, by supplying lists of Tamil residences while the police and army "cheered the mobs and joined in the looting and burning" (284). There is no question that the family faces persecution on account of ethnicity. The novel does not represent persecution on account of sexual orientation as occurring in precisely the same fashion. Whether state actors engage in this variety of persecution is not a matter explicitly raised in the novel, and the youthful narrator Arjie seems not to have specific knowledge about homosexuality and its persecution in the wider society. What he describes is the world of his childhood, including school life, and in school he discovers a mirror of adult Sri Lankan society, politics, and human rights abuse. Persecution on account of sexual orientation is not represented as identical to persecution on account of ethnicity, but rather as an analogous form of injustice. Both merit remedies, and in a society intolerant of compromise, asylum is the only remedy available. Arjie is forced into a literal exile on account of his ethnicity and a metaphorical exile from his family on account of his sexual orientation.

The family led by the father is, in this case, the potential persecutor. Arjie keeps his sexual activities secret, but if the secret is exposed he faces the prospect of "harm or suffering" inflicted as punishment for a "characteristic" his father has for years sought to "overcome." In framing its definition of "social group" the BIA seems not to have imagined such a case, insofar as it casts the family in the opposite role: that of the persecuted. The fact that the family occupies opposite roles in different cases does not, in itself, undermine the BIA's definition of social group. In that definition, the BIA is centrally interested in establishing a standard of "immu-

tability” as a defining feature. Both sexual orientation and family can and should be understood as “immutable.” However, it is inadvisable to narrowly define either as “innate.” The BIA specifies that “innate” characteristics such as sex, color, or kinship ties are ones that group members “cannot change,” a fact which both gives meaning to the group relation and partially explains why persecution on those grounds is unjust. The BIA also provides examples (former military leadership or land ownership) of a different kind of “immutable” characteristic that defines a social group and that members “should not be required to change because it is fundamental to their individual identities or consciences.” Family crosses over the two definitions of “immutable.” (Sexual orientation crosses over as well, as I explain in the conclusion.) In some respects family is “innate,” while in other respects it is “fundamental” to one’s identity.

The Ninth Circuit Court of Appeals recognized the element of affiliation in family life when it offered its own definition of “social group.” It did so in a case involving two refugees from El Salvador: Luis Alonzo Sanchez Trujillo and Luis Armando Esobar Nieto.<sup>14</sup> The court found that:

the phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a *voluntary associational relationship* among the purported members, which imparts some common characteristic that is *fundamental to their identity* as a member of that discrete social group.

Perhaps a prototypical example of a “particular social group” would consist of the *immediate members of a certain family*, the family being a focus of fundamental affiliational concerns and common interests for most people. (*Sanchez-Trujillo* 14-16, emphasis added, footnote omitted)

Like the BIA in *Matter of Acosta*, the Ninth Circuit in *Sanchez-Trujillo v. INS* (1986) considered “family” an exemplary social group. However, the Ninth Circuit construed the meaning of that word differently than did the BIA. The BIA seemed to be thinking of biological ties when it referred to kinship as an “innate” characteristic; the Ninth Circuit defined “social group” (and presumably its exemplar, the family) as a “voluntary associational relation-

ship.” One might interpret the Ninth Circuit’s definition of social group as implying a definition of “family” in which voluntary association plays a more significant role than do biological ties. Such a definition could assist human rights advocacy for lesbian and gay families that organize themselves through affection and affiliation rather than biological reproduction. However, the Ninth Circuit subsequently refuted such a construal of its decision in *Sanchez-Trujillo v. INS*. In *Estrada-Posadas v. INS* (1991) the court flatly declared that a family cannot be considered a social group under US asylum law. Having sent mixed signals about its definition of social group in relation to family, with the attendant confusion about voluntary association and kinship ties in social groups and families, the Ninth Circuit clarified its position in *Hernandez-Montiel v. INS* (1999). The court declared that “a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it” (*Hernandez-Montiel v. INS* 8).<sup>15</sup> This clarification upholds the integrity of earlier asylum claims based on *either* voluntary association *or* innate characteristics while eliminating language of “family.”

In contrast, Elías Miguel Muñoz, Reinaldo Arenas, and Shyam Selvadurai draw attention to families defined by both filiation and affiliation. Rosita and Mario form their own family of two. Having spent their lives looking for “true love, for a generous homeland, for a family who wouldn’t abuse us or condemn us,” they at last find “each other: a refuge, a song, a story to share” (149). Arenas flees from the home of his spying aunt and forges a life among a family of friends. The machinery of state security destroys loyalty among many friends, but Arenas is blessed with a small circle of chosen family who arrange to have his work published and support him when he is ill with AIDS. Arjie’s love for Shehan leads him to place Shehan’s interests above those of his biological family. His choice challenges the warning of his aunt Mala (without your family you are nothing) by establishing a new sense of self supported by a newly chosen family.<sup>16</sup> The importance of blood as an aspect of family ties is not diminished in these representations of human experience, but rather it is complicated by the insistence

that family is also defined by voluntary association. Both the BIA and the Ninth Circuit definitions of “social group” express elements of wisdom about the meaning of family and the formation of social groups, but each definition is at best partial. Literary representation reminds us of the necessity of arriving at a wider definition that reflects lived human experience.

### Conclusion

Jin S. Park argues that the definitions of “social group” advanced by the BIA and the Ninth Circuit are too restrictive, and that the Second Circuit offers a definition that, when applied in asylum cases, more adequately fulfills US obligations under international law. The Second Circuit definition of “social group” appears in the case of *Gomez v. INS*.<sup>17</sup> In its decision, the Court cited *Sanchez-Trujillo v. INS* to the effect that a “social group” must consist of people “closely affiliated” with each other who have a “common interest or impulse.” However, unlike the Ninth Circuit, in *Gomez v. INS* the Second Circuit showed no interest in considering whether a “social group” is characterized by voluntary association. Unlike the BIA, the Second Circuit was not interested in defining a “social group” in relation to an “immutable characteristic.” Rather, the Second Circuit offered a new standard: “A particular social group is comprised of individuals who possess some fundamental characteristic in common *which serves to distinguish them in the eyes of a persecutor*” (*Gomez v. INS* 664, emphasis added). As Park points out, the BIA and Ninth Circuit definitions rely on the notion that social groups are internally constituted (either by sharing immutable characteristics or by the formation of voluntary affiliations). In contrast, the Second Circuit definition advances the notion that social groups are (at least in part) externally constituted by the perceptions of others.

Underlying the Second Circuit’s definition is the insight that people are persecuted not because of their membership per se in a targeted social group but rather because persecutors *perceive* them to be members of a targeted group. This insight—and the definition of “social group” advanced by the Second Circuit—supplies a valuable corrective to the approach in use at the BIA and the Ninth Circuit. If it were acted upon in US asylum practice, it could

minimize the problems associated with imposing American identity politics in the analysis of asylum claims that originate in cultural contexts far removed from American forms of social identity.

A classic example of the inadequacy of US identity categories for understanding other cultural contexts appears in Reinaldo Arenas' comparison of sexuality in Cuba and the US. In Cuba, he writes, people of all sexual orientations mixed together freely. "This has been lost in more advanced societies, where the homosexual has had to become a sort of sexual recluse and separate himself from the supposedly nonhomosexual society, which undoubtedly also excludes him. Since such divisions did not exist in Cuba, the interesting aspect of homosexuality there was that you did not have to be a homosexual to have a relationship with a man; a man could have intercourse with another man as an ordinary act" (107-108). The BIA's definition of "social group," based as it is on American perceptions of sexual identity, was helpful in the case of Toboso Alfonso, who identified himself as homosexual and was persecuted as such very much within the dominant contemporary American understanding of identity. In issuing its order in his case, the BIA did not specify whether it found his sexual orientation an immutable characteristic because it is an "innate" characteristic or a "fundamental" aspect of identity and consciousness. Both aspects of immutability make sense within a framework of identity politics. But what about the men Arenas describes who have sex with other men but in no way identify as gay or homosexual? If they face persecution on account of their sexual acts, an asylum policy that depends wholly on identity as a qualification for asylum would seem to exclude them. In fact, a court that believes homosexual acts can legitimately be subject to legal sanction could turn its back on some forms of persecution, misunderstanding them as prosecution.

The Ninth Circuit definition of social group admits the BIA's immutability standard but also specifies that a social group can be defined as a voluntary association. By doing so, the Ninth Circuit avoids the tension between "innate" and "fundamental" modes of immutability. However, the Ninth Circuit definition is still rooted in identity politics, for it specifies that the voluntary association must be fundamental to the identities of the group members. This

definition certainly encompasses the experience of Toboso Alfonso and Arenas, as well as of Mario, Rosita, Arjie, and Shehan. However, could it serve people who are persecuted on account of sexual orientation in countries that have no social, political, or commercial networks through which sexual minorities can identify themselves through association?

Ironically, while both the BIA and the Ninth Circuit rely on notions of the family to exemplify identity-politics-based social groups, the lived experience of family life also strains against these very legal definitions. The BIA thinks of kinship ties as “innate” and the Ninth Circuit in *Sanchez-Trujillo v. INS* thinks of family as a “voluntary association,” but *Funny Boy* explores the ways family is socially constructed. This is not a matter of choice in the sense I have described above (in situations where families are formed through love and friendship), but is rather an imposition of ethnic politics in Sri Lanka. Arjie, his mother, his aunt Radha, and several other characters would prefer to refashion their kinship ties through friendship and love with Sinhalese and European people. The constant threat of ethnic violence, however, constrains their ability to move in these directions, and forces them back into an ethnic family fold.

The Chelvaratnam family is in this sense fashioned by the forces of persecution. So also are communities of sexual minorities who band together in the face of human rights violations, including both discrimination and persecution. These communities may or may not conform to the BIA and Ninth Circuit definitions of “social group,” but the Second Circuit definition more adequately addresses their experience in the world. Even though the circuit court definitions establish legal precedent for cases arising in their jurisdiction, the BIA definition remains the most influential across the US and in INS practice. It only begins to address the persecution endured by people in different cultural contexts on account not only of their sexual identity and orientation but also for expressing their sexuality in words and in acts. The Second Circuit definition, if thoughtfully implemented in INS practice, could provide more comprehensive protection to refugees who suffer at the hands of persecutors on account of how those persecutors perceive them.

Persecuted persons seeking asylum in the US improve their chance for success by explaining their lives to the INS using



concepts and words recognized by asylum law. A work of literature, on the other hand, does not require that lived human experience be compromised to fit legal definitions. On the contrary, *Funny Boy*, *The Greatest Performance*, and *Before Night Falls* invite us to reexamine asylum law in the light of complex experiences of family, ethnicity, culture, and sexuality. The discrimination, violence, and abuse represented in all three books remind us that sexual rights are human rights. Reinaldo Arenas writes of Cuba, "I had never been allowed to be a real human being in the fullest sense of the word" (276). He attempts to attain his full humanity under an oppressive state through two related activities: writing and sex. By linking these two, Arenas establishes a truth that is larger than legal interpretations of the meaning of "social group": all people have a right to sexual expression, and, when persecuted on account of it, should have a right to asylum.

### Notes

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1. The Refugee Convention is formally known as the U.N. Convention Relating to the Status of Refugees. It entered into force in 1954. In 1967 it was expanded with the U.N. Protocol Relating to the Status of Refugees.
2. In 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which eliminated an applicant's right to appeal to the federal courts. The US Supreme Court has since reversed some aspects of this blanket ban on appeals, but many limitations remain in place.
3. Readers who seek detailed information, and especially those who seek legal advice, should consult an immigration lawyer and organizations such as the Asylum Project of the International Gay and Lesbian Human Rights Commission (IGLHRC).
4. From 1978 until the time Acosta fled in 1981, anti-government guerrillas murdered several members of the cooperative and made repeated threats on Acosta's life.
5. Toboso Alfonso was not granted asylum, but neither was he deported. In the US, the practice of refraining from deporting a refugee to a place where she will face persecution is known as "withholding of deportation." That is to say, the person remains in the US but with limited rights and protections. A grant of

asylum, on the other hand, regularizes the person's legal status in the US so that, among other things, she can apply for permanent resident status.

6. Toboso Alfonso applied for asylum shortly after legislation in 1990 legalized the entry of homosexual persons into the US by withdrawing the phrase "sexual deviation" from the list of grounds upon which immigrants could be forbidden entry. This phrase had been added in 1965 to the Immigration and Nationality Act of 1952.

7. In February 2001 the International Criminal Tribunal for the Former Yugoslavia established that systematic rape can be considered a war crime. Social pressure to undergo female genital mutilation has now been recognized in the US as a form of persecution that can qualify one for refugee status, if forced on a woman who opposes the practice. See Kassindja and *Matter of Kasinga*.

8. For a good introduction to the considerable literature on nationalist formations of sexuality in Cuba, including discussion of improved treatment of gays and lesbians in recent years, see Lumsden.

9. In *Matter of Acosta* the BIA gives no definition of "color," but I speculate that this term draws attention to skin color alone rather than to the more complex array of associations that define "race" in a given context.

10. The international consensus that discrimination on account of sex or gender requires specific attention in international human rights accords has grown since the 1960s and is reflected in such documents as the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), and the Beijing Declaration (1995).

11. The Universal Declaration and the ICCPR include language about protecting rights to privacy, home, and family; these conventions and the ICESCR include language about the right to marry and found a family.

12. Somalia is fractured by clan and subclan allegiances which Siad Barre accentuated and manipulated to stay in power, leaving a legacy of intra-ethnic conflict behind him.

13. Were *Funny Boy* to continue its story into flight and asylum, it would be necessary to analyze it in relation to Canadian asylum law, which is in some respects more progressive than US law, although both countries recognize refugees from Sri Lanka. For my purposes here, it is sufficient to focus on the persecution which leads the family to seek asylum, regardless of which country's refugee policies they subsequently encounter.

14. Sanchez Trujillo and Escobar Nieto applied for asylum based on their membership in a persecuted social group consisting of "young, working class males who have not served in the military of El Salvador." The Immigration Judge, the BIA, and the Ninth Circuit all rejected the construction of "social group" to include a group so large and loosely connected.

15. Significantly, this decision was made in the case of Geovanni Hernandez Montiel, a Mexican youth who had faced discrimination and persecution from an early age on account of his sexual orientation and effeminate appearance. The

Ninth Circuit ruled in his favor, finding that his sexual orientation was fundamental to his identity.

16. His challenge is only emergent since it comes at the end of the narrative before the family departs for exile. It might be that only in exile will he be able to afford to risk building this new family.

17. Carmen Gomez fled to the US from El Salvador, where as a child and teenager she had been repeatedly beaten and raped by guerrillas. Her application for asylum argued that she feared persecution on account of her membership in a social group, the group defined as women previously beaten and raped by guerrillas in El Salvador. Her Immigration Judge, the BIA, and the Second Circuit all denied her application for asylum.

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