

# HOMOSEXUAL OR FEMALE? APPLYING GENDER-BASED ASYLUM JURISPRUDENCE TO LESBIAN ASYLUM CLAIMS

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## INTRODUCTION

The year 2004 marked the tenth anniversary of former Attorney General Janet Reno's designation of the Board of Immigration Appeals (BIA) decision *In re Toboso-Alfonso*<sup>1</sup> as precedent.<sup>2</sup> The BIA held that Toboso-Alfonso could

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1. 20 I. & N. Dec. 819 (B.I.A. 1990); 1895 Op. Att'y Gen. 94 (1994) (designating *In re Toboso-Alfonso* as precedent).

2. The BIA is the administrative appellate body that reviews Immigration Court decisions. The BIA, like courts, can choose whether to designate any case as precedent. *See* 8 C.F.R. § 1003.1(g) (2005). BIA precedent decisions are binding on immigration judges. *Id.*

remain in the United States because he would face persecution in his native Cuba on account of his sexual orientation.<sup>3</sup> As a result of the Attorney General's designation, persecution based on sexual orientation was unequivocally recognized by the Immigration and Naturalization Service (INS) and its successor agency, the Department of Homeland Security (DHS),<sup>4</sup> as a ground for seeking asylum in the United States. Since then, hundreds, if not thousands,<sup>5</sup> of homosexual<sup>6</sup> foreign nationals have won asylum in the United States upon showing that they suffered past persecution or could demonstrate a well-founded fear of future persecution in their home countries on account of their sexual orientation.

While neither the INS nor its successor agencies within the DHS keeps formal statistics on the basis of asylum grants, it is clear from published cases, non-precedential reported cases, and anecdotal experience that the vast majority of sexual orientation-based asylum grants have been to gay men, not to lesbians.<sup>7</sup> Although the DHS does not track asylum statistics by sexual

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3. *In re Toboso-Alfonso*, 20 I. & N. Dec. at 820-21.

4. In 2003, the duties of the INS were divided among different agencies within the newly created Department of Homeland Security (DHS). Asylum cases may now be adjudicated by two distinct agencies. Affirmative asylum cases are heard by asylum officers at the U.S. Citizenship and Immigration Services (USCIS), which is the immigration "service" division within the DHS. If the case is referred by the asylum office to Immigration Court or if the foreign national is in removal proceedings for other reasons, the application will be decided by an immigration judge who works for the Executive Office of Immigration Review (EOIR), which falls under the jurisdiction of the Department of Justice (DOJ) and thus ultimately answers to the Attorney General. The Board of Immigration Appeals (BIA), which hears appeals from the Immigration Court, also falls under the DOJ. Before the 2003 reorganization of immigration services, both the asylum office and the EOIR fell under the jurisdiction of the DOJ. *See The INS No Longer: Immigration and Asylum under the Department of Homeland Security*, LGIRTF STATUS REPORT No. 1 (Immigration Equality 2003), <http://www.immigrationequality.org/newsletters/2003/1newsletter2003.pdf> (last visited Mar. 22, 2005).

5. Neither the INS nor the DHS have kept statistics on the grounds on which asylum cases are filed or granted. *See U.S. CITIZENSHIP & IMMIGR. SERVS., 2003 YEARBOOK OF IMMIGRATION STATISTICS* (2003), <http://uscis.gov/graphics/shared/aboutus/statistics/RA2002yrbk/RA2002.pdf> (last visited Mar. 22, 2005) (providing asylum statistics). During a panel presentation in 2000, presenter Lavi Soloway, the previous Chair of the Board of Directors of the Lesbian and Gay Immigration Rights Task Force (now known as Immigration Equality), estimated that 2000 sexual orientation-based asylum claims had been filed. Christine Doyle, *Symposium Proceedings: Recent Developments in International Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 187-88 (2000).

6. Although many within the lesbian and gay rights movement disfavor the term "homosexual" because of its clinical connotations, the term is used in this Article to encompass gay men and lesbians with no negative value judgment intended by its use.

7. *See infra* Part II.B (citing published and unpublished decisions which are primarily from gay male cases). This statement is also based on the author's personal experience and conversations with other immigration attorneys who practice in this area. *See also* Jenni Millbank, *Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation*, 1 SEATTLE J. SOC. JUST. 725, 727 n.16 (2003) ("In the whole pool of cases [of sexual orientation-based asylum claims] only 14% of the Canadian claims and 21% of the

orientation, it does record the sex of asylum seekers. The low number of lesbian applicants can be attributed, in part, to the low number of female asylum seekers; approximately thirty-seven percent of all asylum applicants are women.<sup>8</sup> There are several reasons for the discrepancy between the number of male and female applicants. Women often lack the financial resources and independence needed to flee their countries and seek asylum.<sup>9</sup> Moreover, it can be extremely difficult for citizens of developing countries to obtain a visa to the United States. All applicants for tourist visas, for example, must demonstrate that they have sufficient ties to their home countries to overcome a presumption that they intend to remain in the United States permanently.<sup>10</sup> Even if a would-be asylum seeker could muster the funds for a plane ticket, she may be unable to obtain a visa from the U.S. consulate if she cannot demonstrate a substantial financial interest in returning to her home country.<sup>11</sup>

Once a lesbian asylum seeker clears the first hurdle of entering into the United States, she will face further obstacles in articulating her claim for asylum that would not be encountered by a gay male counterpart. In addition to her homosexual orientation, lesbians are, of course, women. As such, they are subject to certain gender-based forms of persecution that are difficult to prove, since lesbians' experiences are less likely to fit within the established definition of persecution than those of a typical gay male applicant. Historically, definitions of persecution in asylum law have been based on a male model of political activity.<sup>12</sup> Men, including gay men, are more likely to suffer harm in

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Australian claims were brought by lesbians”).

8. B.J. Chisholm, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 *How. L.J.* 427, 429 (2001) (citing asylum statistics maintained by the legacy INS available online for 2000). The most recent asylum statistics available online are from 2002 but do not include a breakdown of applicants by gender. *See supra* note 5. Although such a small percentage of asylum seekers are women, women and children actually comprise more than 80% of worldwide refugees. Anjana Bahl, *Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 *CARDOZO WOMEN'S L.J.* 33, 34 (1997). This enormous discrepancy between women who flee their countries and women who are able to seek asylum protection by reaching a country where this is a possibility points to how difficult it is for many women to travel to developed countries.

9. Irena Lieberman, *Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence*, *HUM. RTS. MAG.*, Summer 2002, at 29.

10. Immigration and Nationality Act of 1952 § 214(b), 8 U.S.C. § 1184(b) (2004).

11. Asylum seekers must often overcome a preconception that they are only using the asylum system to claim status when in fact they seek to enter the United States or other countries for economic reasons. Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 *GEO. IMMIGR. L.J.* 1, 4 (1996). Women fleeing persecution are almost by definition less likely to be able to demonstrate the strong ties to their home countries required to obtain a U.S. visa. Moreover, if they make their intention to seek permanent status in the United States known, their applications for temporary visas are almost certain to be denied. *See* Immigration and Nationality Act of 1952 § 214(b) (stating that there is a legal presumption that all foreign nationals seeking entry intend to remain in the United States permanently).

12. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 *DEPAUL L. REV.* 777, 780 & n.29 (2003).

the public arena; thus, the facts in their cases often fit within established precedent for asylum claims.<sup>13</sup> Lesbians, like many women, are more likely to face persecution in the private rather than the public sphere. As a result, they have greater difficulties than gay men in proving eligibility for asylum.<sup>14</sup>

The last decade has seen the emergence both of a body of law related to gay male asylum claims and to gender-based asylum claims for women seeking refuge in the United States.<sup>15</sup> This Article explores the differences in the ways that the United States adjudicates sexual orientation-based and gender-based asylum applications. Part I discusses the difficulties that gender-based applicants have in fitting claims within the “particular social group category” of asylum and distinguishes this difficulty from the relative ease lesbian asylum seekers have in gaining recognition as members of a particular social group.

Part II focuses on the types of persecution that women in both gender-based and lesbian asylum claims are likely to suffer because of their gender. In particular, this Part discusses “private sphere” versus “public sphere” harm and explains that the paradigm for asylum cases involves “public sphere” activity and harm that is more likely to befall men than women. This Part also discusses recent successes in gender-based claims, which have made it possible for women to obtain protection in the United States even in the absence of “public harm” or state action. The significance of this evolving jurisprudence to lesbian claims will also be explained.

Part III sets forth a hypothetical lesbian claim based on a typical fact pattern for such cases. This scenario is analyzed within the framework of both male sexual orientation-based asylum precedent and gender-based asylum precedent. Finally, the Article concludes with a call for adjudicators to understand the dual harms suffered by lesbians in asylum claims based on both their sexual orientation and on their gender.<sup>16</sup>

## I. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Asylum is a form of relief available to foreign nationals who are fleeing their countries based on past persecution or on a well-founded fear of future persecution.<sup>17</sup> The asylum applicant must prove that the persecution she fears

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13. See *infra* Part II.B.

14. See Millbank, *supra* note 7, at 726.

15. See Lieberman, *supra* note 9, at 11.

16. For an excellent discussion of the intersection of gender and race, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993). Crenshaw posits that neither race theory nor feminist theory alone captures the experience of women of color that falls at the intersection of two experiences. Likewise, lesbians, as both women and homosexuals, experience the world in ways that are not captured by the discourse of either gay rights or women's rights.

17. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2005) (defining an asylum-eligible individual as one “who is unable or unwilling to return

is on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>18</sup> The Immigration and Nationality Act (INA), which governs asylum claims, does not define “membership in a particular social group,” so this category has been used by asylum seekers whose claims do not fit within the other four categories.<sup>19</sup> In *In re Acosta*, the leading BIA case discussing the definition of “particular social group,” the BIA determined that while each social group claim must be analyzed on a case-by-case basis, “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.”<sup>20</sup> Thus, the BIA held that Acosta’s proposed social group, Salvadoran taxi drivers who would not participate in work stoppages, did not meet the definition of a particular social group for asylum purposes.<sup>21</sup> As discussed below, the BIA and the Ninth Circuit have recognized that homosexuals fit within this definition<sup>22</sup> of a particular social group, based on the belief that sexual orientation is either immutable or so fundamental to identity that a person should not be required to change it.<sup>23</sup>

#### A. Lesbians Are Members of a Particular Social Group

Since the early 1990s, the U.S. government has recognized status as a homosexual as fitting within the definition of “membership in a particular social group.”<sup>24</sup> In *In re Toboso-Alfonso*, the immigration judge found that Toboso-Alfonso’s homosexuality was an immutable characteristic.<sup>25</sup> Without

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to . . . [one’s] country because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”); see also Immigration and Nationality Act § 208(b)(1), 8 U.S.C. § 1158 (b)(1).

18. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

19. For an insightful analysis of applying particular social group definitions in gender-based claims, see Chisholm, *supra* note 8, at 429.

20. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

21. *Id.* at 234-36.

22. In *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), the Ninth Circuit posited a “voluntary associational relationship” requirement among group members. In 2000, the Ninth Circuit harmonized this decision with the BIA definition in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), deciding that members of a particular social group could share either immutable characteristics or voluntary relationships. For a discussion of these rulings, see Musalo, *supra* note 12, at 783-85.

23. The BIA and the Ninth Circuit have not adopted the same rigorous understanding of immutability as some other courts. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (emphasizing that an “immutable characteristic” is “determined *solely* by the accident of birth” (emphasis added)); *Baehr v. Lewin*, 852 P.2d 44, 69 (Haw. 1993) (Burns, J. concurring) (characterizing immutable as “biologically fated”).

24. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

25. *Id.* The BIA also noted that once the Cuban government had registered Toboso-Alfonso as a homosexual, there did not appear to be a mechanism for him to change this designation, which apparently also contributed to the Board’s finding of immutability. *Id.*

discussing this finding, the BIA accepted that homosexuals could be considered members of a particular social group. On appeal, the BIA noted that the INS had not set forth an argument refuting the immigration judge's conclusion and therefore had accepted that homosexuals could be considered members of a particular social group.<sup>26</sup> Although Toboso-Alfonso was a gay man, the social group recognized by the BIA was the broader category of "homosexuals."<sup>27</sup> Thus, lesbians,<sup>28</sup> like gay men who apply for asylum, have not had to advance creative legal arguments regarding their membership in a particular social group; sexual orientation as a basis for membership in a particular social group is well-established.<sup>29</sup>

### B. Particular Social Group & Gender-Based Claims

In contrast to sexual orientation-based asylum claims, the establishment of membership in a particular social group has proven the most difficult aspect for many gender-based asylum cases.<sup>30</sup> While membership in a particular group has been described as the "most elastic and nebulous" category of asylum—the one designed to provide protection to those who do not fall within the four other grounds<sup>31</sup>—the BIA and Circuit Courts have been loathe to construe this category too widely. In particular, adjudicators have been unwilling to expand the category to include "women" as a particular social group because this interpretation could potentially encompass half the world's population.<sup>32</sup>

The two most important cases<sup>33</sup> to address gender-based asylum claims are the BIA decisions *In re Kasinga*<sup>34</sup> and *In re R-A*.<sup>35</sup> *In re Kasinga* was the first

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26. *Id.*

27. *Id.*

28. For a discussion of the applicability of "particular social group" precedent to a hypothetical sexual orientation-based asylum claim, see Suzanne Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605 (1993).

29. Fatima Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?* 12 HASTINGS WOMEN'S L.J. 387, 400 (2001).

30. In addition to difficulties in establishing that gender-based claims fit within one of the five categories protected by asylum law, gender-based asylum seekers have also had difficulties in proving that the harm they suffered was "on account of" the protected characteristic. Because the analysis of these two concepts is closely related in gender-based asylum cases, this Article will fold the "on account of" discussion into the particular social group discussion. For further discussion, see Musalo, *supra* note 12, at 783-86.

31. Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281 (2002).

32. See Chisholm, *supra* note 8, at 434 (noting the fear asylum adjudicators may have of inviting a "flood" of refugees if protected categories are defined too broadly).

33. See Musalo, *supra* note 12, at 798.

34. 21 I. & N. Dec. 357 (B.I.A. 1996).

35. 22 I. & N. Dec. 906 (B.I.A. 1999; A.G. 2001).

precedential case to recognize female genital mutilation (FGM)<sup>36</sup> as a ground for asylum in the United States.<sup>37</sup> *In re R-A-* was the first BIA case to examine whether severe domestic violence could rise to the level of persecution.<sup>38</sup> *In re Kasinga* was widely hailed for the role it played in advancing the possibility of gender-based asylum cases.<sup>39</sup> Although there has not yet been a final resolution in *In re R-A-*,<sup>40</sup> the case may eventually establish precedent for recognizing domestic violence as persecution if the government in an applicant's home country takes no steps to protect women from their abusers.

In *In re Kasinga*, the applicant was fleeing from her native Togo to escape her tribe's practice of subjecting young women to FGM.<sup>41</sup> The BIA defined the "particular social group" in this case as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."<sup>42</sup> Here the BIA incorporates the fact that Kasinga opposes the practice of FGM into the definition of her particular social group, thus hinting at a possible political opinion ground for her asylum claim as well.

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36. "Female genital mutilation is the practice by which a portion or all of the female genitals are removed." See Musalo, *supra* note 12, at n.19. FGM can range from partial clitoral removal to complete clitoral removal, removal of the labia, and suturing the vagina closed to leave an opening that is only large enough for urination and menstruation. Kasinga would have been subject to the most extreme form of FGM. *Id.*

37. Karen Musalo, *Ruminations on In Re Kasinga: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 361 (1998).

38. Hannah R. Shapiro, *The Future of Spousal Abuse as a Gender-Based Asylum Claim: The Implications of the Recent Case of Matter of R-A-*, 14 TEMP. INT'L & COMP. L.J. 463 (2000).

39. See Chisholm, *supra* note 8; Musalo, *supra* note 37.

40. On January 19, 2001, Attorney General Janet Reno vacated the BIA decision and remanded for reconsideration after final publication of the proposed regulations, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208), which would address, *inter alia*, "particular social group" issues. See *In re R-A-*, 22 I. & N. Dec. 906, 906 (B.I.A. 1999; A.G. 2001); see also Musalo, *supra* note 12, at 802-03.

The regulations had not been finalized when John Ashcroft became Attorney General, and to date no action has been taken on them. In 2003, Ashcroft decided to issue a decision in *In re R-A-*. Both sides briefed the case, and DHS has now taken the position that the case should be granted without opinion and that the regulations should be finalized or, in the alternative, the case should be granted with a narrowly tailored decision. Rachel Swarns, *Ashcroft Weighs Granting Political Asylum to Abused Women*, N.Y. TIMES, Mar. 11, 2004, at A1. Until the newly appointed Attorney General Alberto Gonzales issues a decision in *In re R-A-*, DHS has stated publicly that its position in the brief, 22 I. & N. Dec. at 906, is its position for asylum purposes and that therefore victims of domestic violence are potentially eligible for asylum. As a practical matter, the author has heard from practitioners that DHS is not currently rendering decisions on asylum cases based on domestic violence as it continues to await the Attorney General's decision.

41. The BIA found the FGM practiced by her tribe to be "of an extreme type" which involved cutting the genitals with knives, substantial bleeding, a lengthy recovery period, and the potential for ongoing and life-threatening complications. *In re Kasinga*, 21 I. & N. Dec. 357, 361 (B.I.A. 1996).

42. *Id.* at 365. For a further discussion of the persecution Kasinga feared, see *infra* Part II.D.

By framing the particular social group extremely narrowly, the BIA both allows for the possibility of finding that not all future applicants seeking asylum based on FGM are members of a particular social group and avoids potential arguments that all women in Togo would be eligible for asylum.

In *In re R-A-*, the applicant was a woman from Guatemala seeking asylum in the United States after suffering years of horrendous physical abuse from her husband in a country where the police would not protect her. Asylum was initially granted by the immigration judge. The INS appealed the decision, and the BIA overturned the grant of asylum.<sup>43</sup> The BIA focused its analysis on whether the applicant fit within the “particular social group” category, virtually taking for granted that the harm that R-A- suffered rose to the level of persecution, even though the harm occurred within the “private sphere” of the marital home.<sup>44</sup> The BIA held, however, that R-A- did not demonstrate that she was a “member of a particular social group” and that the harm she suffered at the hands of her husband was therefore not sufficiently “on account of” any protected characteristic.<sup>45</sup> The immigration judge had formulated her description of the social group as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>46</sup> The BIA found that this construction did not meet the criteria for the “social group” category because it found that the immigration judge had created the “social group” itself in order to validate R-A-'s claim, rather than simply recognizing an existing “societal faction.”<sup>47</sup> Moreover, the BIA found that the applicant's husband had not shown any inclination to target other women who were opposed to male domination. Thus, the Board reasoned, his motivation for harming his wife was not “on account of” her membership in the proposed social group but rather, seemingly, because he was simply a violent person.<sup>48</sup>

By way of contrast, a lesbian asylum seeker has a relatively easy task of establishing that her claim falls within the “particular social group” category of homosexuals.<sup>49</sup> This distinction was recognized by the immigration judge at

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43. 22 I. & N. Dec. at 928; *see also supra* note 40 (explaining procedural history).

44. For a complete discussion of the persecution suffered by R-A-, *see infra* Part II.D.

45. 22 I. & N. Dec. at 917-18.

46. *Id.* at 920-21.

47. Of course, this analysis begs the question of whether there was a “societal faction” within Kasinga's tribe that actually opposed FGM. *See supra* note 42.

48. Fortunately, in its brief to Attorney General Ashcroft, DHS has taken a different position on R-A-'s membership in a particular social group, acknowledging that she is a member of a particular social group but reframing the category to make it sound more like a “societal faction,” namely “married women in Guatemala who are unable to leave the relationship.” Department of Homeland Security's Position on Respondent's Eligibility for Relief, *In Re R- A-* (No. A-73-753-922), [http://www.uchastings.edu/cgrs/documents/legal/dhs\\_brief\\_ra.pdf](http://www.uchastings.edu/cgrs/documents/legal/dhs_brief_ra.pdf) (last visited Mar. 22, 2005).

49. One commentator notes that in a leading gay male asylum case, *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th 2000), the Ninth Circuit decision incorporated the



the outset in the one precedential decision, *Pitcherskaia v. INS*.<sup>50</sup> Although the immigration judge “assumed lesbians constitute a ‘particular social group,’”<sup>51</sup> both the BIA and the Ninth Circuit declined to address this issue and instead focused their analysis on whether or not the harm Pitcherskaia suffered met the legal definition of “persecution.”<sup>52</sup> The reasoning of both appellate bodies was that if Pitcherskaia could not demonstrate persecution, there was no need to reach the issue of whether she fell within a particular social group.<sup>53</sup> Neither decision references any argument by the INS that Pitcherskaia would not fall within the recognized particular social group of homosexuals.

Unlike FGM or domestic violence cases, the primary obstacle to grants of asylum encountered by lesbian applicants is not proving that they are members of a particular social group, but rather showing that the harm they have suffered or will suffer fits within accepted definitions of persecution. While lesbians are well positioned to borrow from precedent established in gay male cases to demonstrate that they are members of a particular social group, gay male cases often do not address the types of violence and abuse suffered by lesbians.

## II. PERSECUTION SUFFERED BY LESBIANS

Every day, throughout the world, lesbians and gay men face harassment, discrimination, physical and sexual abuse, arbitrary arrest and detention, imprisonment, and even death simply because of their sexual orientation.<sup>54</sup>

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qualification “with female sexual identities” into the designation of the applicant’s social group “gay men with female sexual identities,” in part because this was more clearly an identifiable group within their society than the broader group of “gay men.” See Chisholm, *supra* note 8, at 443; see also *infra* Part II.B. for further discussion.

50. 118 F.3d 641 (9th Cir. 1997). Neither the BIA nor the Ninth Circuit resolved whether Pitcherskaia, as a lesbian, was a member of a particular social group. *Id.* at 645.

51. *Id.* at 645, n.5.

52. Based on the precedent in male sexual orientation cases, there is no reason to believe that a circuit court or the BIA could fail to find that lesbians constitute a particular social group. In *In re Toboso-Alfonso*, the BIA accepted without discussion the immigration judge’s finding that the applicant’s homosexuality was an “immutable characteristic” and that he was therefore a member of a “particular social group” of homosexuals. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-233 (B.I.A. 1990).

53. As discussed *supra* at note 22, in 1997 when *Pitcherskaia* was decided, the Ninth Circuit still maintained a “voluntary associational” requirement for members of a particular social group which differed from the “immutable characteristic” definition used by the BIA. In any event, Pitcherskaia could have established her eligibility under either test. She demonstrated that her sexual orientation was immutable and could not even be changed by forcible psychiatric “treatment,” and she demonstrated that her voluntary association with other lesbians was the action that led to her persecution.

54. AMNESTY INT’L, *BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION* 1, 2 (1994) (documenting atrocities against gay men, lesbians, transvestites, and transsexuals throughout the world); see also Liliana Gallelli, *Asylum in the United States Based on Sexual Orientation*, 3 J. LEGAL ADVOC. & PRAC. 40, 47 (2001) (listing crimes committed against lesbian, gay, and transvestite individuals in other countries).

While the United States continues to lag behind much of the developed world in extending immigration benefits to lesbians and gay men,<sup>55</sup> it has saved the lives of and offered new beginnings to countless foreign nationals fleeing their countries because they have suffered harm or fear future harm on account of their homosexuality. At the same time that gay men have had significant success in their claims for asylum—based largely on being targeted by the police and military in their home countries—lesbians continue to have difficulties proving persecution in their cases because the harm they suffer does not often take place in the public arena. While it is important for lesbian asylum applicants to look to gay male precedents, in many ways the persecution suffered by lesbians is more akin to the persecution reported in gender-based asylum cases. It is vital to ensure that adjudicators realize that lesbian asylum cases do not fall exclusively under either category—sexual orientation or gender—but rather lie at the intersection of both categories.<sup>56</sup>

#### A. Defining Public & Private Spheres

The difference between the public sphere and the private sphere is not always entirely clear, and the harm suffered by asylum applicants falls along a spectrum. This Article will use the term “public” to encompass the physical space of activity primarily outside the home, as contrasted with “private,” or within the home or other protected area.<sup>57</sup> In addition to the physical location

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55. Susan Hazeldean & Heather Betz, *Years Behind: What the United States Must Learn About Immigration Law and Same-Sex Couples*, 30 HUM. RTS. MAG. 17 (2003) (discussing recognition for same-sex relationships under other countries' immigration laws).

56. Jenni Millbank notes in her analysis of the low grant rate of lesbian asylum seekers in Australia: “Acknowledging and interrogating gender in lesbian refugee decisions is vital, as ignoring gender has systematically disadvantaged lesbian claimants. Yet, alertness to gender in sexuality-based claims should not obscure the links that arise across gender. These links revolve around the themes of choice, visibility, and public space.” Millbank, *supra* note 7, at 728.

57. Within the United States, “the right to privacy” has meant the right of individuals to be free from state interference within the private space of the home. Prior to *Lawrence v. Texas*, 539 U.S. 558 (2003), which found a Texas law criminalizing consensual, private, same-sex sodomy to be unconstitutional, lesbian and gay activists focused much of their work on advocating for freedom from the state within their homes, specifically for freedom to engage in private consensual sexual activities. In an article written before the *Lawrence* decision, Cheshire Calhoun argued that lesbians and gay men were denied both a private sphere and a public sphere, in that their private behavior was regulated by the state forcing them to hide their sexual identities within the public sphere. Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 241 (1995). Feminists have argued that this “right to privacy” is more of a male right than a female right, as men enjoy more power within the private domain, and “freedom” from state interference often translates into lack of state protection for women within the home. See Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 850 (2000); see also James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALA. L. REV. 989 (1997). Wilets makes the point that although gender-based violence, such as domestic

of the harm, “public” and “private” also refer to the perpetrators of the harm, with “public” generally referring to state actors or state-sanctioned actors, and “private” referring to those acting outside the purview of the state, such as family or community members.<sup>58</sup>

The paradigmatic asylum case is that of a male political dissident targeted for his public activities, such as attending political demonstrations or organizing dissidents, who then suffers harm in a public sphere at the hands of the police or military.<sup>59</sup> This paradigm translates into the gay male context with the prototypical case involving a gay man who engages in public activities, such as frequenting gay bars or marching in a gay pride parade, who is targeted for persecution by the police as a result. In this asylum paradigm, both the targeted activity and the ensuing harm take place in the public sphere.<sup>60</sup> There are also cases that present a mix of public and private persecution, where the activity for which an applicant is persecuted is private, such as placement of a personal ad for another man on the Internet, but the harm inflicted is public, as when the police entrap the man and subject him to a trial and imprisonment.<sup>61</sup> Likewise, there are cases in which the activity is public, exemplified by a man showing physical affection toward another man in a public park, and the harm is private, such as when the man is disowned by his family.<sup>62</sup>

Finally, at the far end of the spectrum are claims where both the activity and the harm suffered are private.<sup>63</sup> These cases are the least likely to receive a grant of asylum. An example of such a case would involve a private activity,

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violence, is often seen as “private” and therefore outside the scope of the state’s power, many states are all too willing to punish activity which takes place within the private sphere of the home if that activity involves same-sex intimacy. *Id.* at 992-1006.

58. Although international law and U.S. asylum law recognize harm from non-state actors as persecution if the state is unable or unwilling to control the perpetrators, some countries including France and Germany do not generally recognize asylum claims without direct state action. *See* Musalo, *supra* note 12, at 182 n.33.

59. Musalo explains: “The quintessential refugee was a political dissident in the Soviet Union or one of its allies. ‘Persecution’ was understood to encompass beatings, torture, and political imprisonment but not the multitude of violations that are inflicted mainly on women.” *See* Musalo, *supra* note 12 at 780 n.28.

60. *Id.*

61. *See, e.g.*, HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT (2004), <http://hrw.org/reports/2004/egypt0304> (last visited Mar. 22, 2005).

62. Interestingly, in a study of sexual orientation-based asylum claims in Australia, Jenni Millbank found that even when lesbians had suffered harassment and abuse directly from the police, the violence was more likely to be characterized as “private” in that it was considered to be brought on by the victim herself. Millbank, *supra* note 7, at 728.

63. Millbank writes about a fascinating study of lesbian asylum claims in Australia and Canada. In her study, lesbian asylum applicants in Canada had a 66% success rate, while gay men had a 52% success rate. But in Australia, only 7% of lesbian asylum applicants prevailed, while 26% of gay male applicants won. Millbank posits that the reason for the dismal grant rate for lesbian asylum seekers in Australia was the adjudicators’ characterization of the claims as private harm. *Id.* at 727 and accompanying notes.

like a lesbian discovered to be in a relationship with another woman by a parent or other family member. The private infliction of harm would follow when the lesbian daughter is then beaten by a family member as punishment for her homosexuality and eventually forced into an unwanted marriage. Such examples are played out in reported and unreported sexual orientation-based cases, which are discussed in the following Parts.

#### B. Public Actions, Public Harm

In *In re Toboso-Alfonso*,<sup>64</sup> the first case to establish precedent for sexual orientation-based asylum claims, the BIA upheld a grant of withholding of deportation<sup>65</sup> to a gay Cuban man. Although it is not clear how Toboso-Alfonso's sexual orientation became known to the Cuban government, the harm he suffered was unquestionably in the public sphere. The applicant was forced to register with the Cuban government because he was a known homosexual, and he was made to appear at a government office every two to three months for a "hearing," which primarily consisted of a physical examination. He was frequently detained by the police for three or four days without being charged. On one occasion, he was sentenced to a disproportionate punishment for missing work—sixty days of hard labor—solely because of his homosexuality.<sup>66</sup> *Toboso-Alfonso* fits well within established precedent for asylum cases in that he was subjected to severe harm directly at the hands of his government.<sup>67</sup>

A leading circuit court case on sexual orientation-based asylum also involved a gay man who had suffered harm in the public sphere. In *Hernandez-Montiel v. INS*,<sup>68</sup> the applicant was frequently harassed by the police for being seen publicly with other gay men. He was twice sexually assaulted for having

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64. 20 I. & N. Dec. 819 (B.I.A. 1990).

65. Withholding of deportation (now "removal") is related to asylum and generally applied for simultaneously with asylum. A successful "withholding" application also requires proof of persecution based on one of the five protected categories, but the legal standard is higher. To obtain "withholding," an applicant must prove that there is a "clear probability" that he will be persecuted upon return to his home country. While an asylum grant also requires a "favorable exercise of discretion," "withholding" grants are mandatory and applicants therefore sometimes win this relief if they have a negative factor (such as a criminal conviction) which would prevent a grant of asylum. See Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2005); *In re Toboso-Alfonso*, 20 I. & N. Dec. at 820, 823.

66. *In re Toboso-Alfonso*, 20 I. & N. Dec. at 820-21.

67. Toboso-Alfonso's Cuban nationality also may have increased his chance of winning asylum. Since Fidel Castro assumed power in Cuba, the United States government has granted Cubans many immigration benefits not available to citizens of other countries. See, e.g., Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966) (allowing any national of Cuba to apply for legal permanent residence one year after she or he has been inspected, admitted, or paroled into the United States).

68. 225 F.3d 1084, 1093 (9th Cir. 2000).

an effeminate, gay appearance while walking down the street and waiting at a bus stop.<sup>69</sup> He was later assaulted and stabbed by a homophobic gang and eventually subjected to “treatment” to “cure” his homosexuality.<sup>70</sup> The Ninth Circuit found that these incidents constituted past persecution and that Hernandez-Montiel had a well-founded fear of future persecution.<sup>71</sup> Until recently these were the only precedential decisions<sup>72</sup> from federal courts and the BIA that have addressed the issue of asylum for gay men.<sup>73</sup>

There are, however, numerous non-precedential cases that illustrate successful fact patterns for sexual orientation-based asylum cases. In one such case, a gay, HIV-positive Brazilian man was raped at gunpoint by a military officer. On another occasion, he was taken into police custody where they put him in with the general population of criminals and commanded them to rape him because he was a “faggot.” The applicant was then raped in the jail cell.<sup>74</sup> In a similar case, a gay Venezuelan man was granted asylum after having been arrested nine times by the police simply for being gay. The police detained

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69. *Id.* at 1088.

70. *Id.* at 1088-89.

71. *Id.* at 1097.

72. Each year, while the BIA hears approximately 4000 appeals, it publishes only 50 decisions. In fact, it was not until 1987 that the BIA published a decision granting asylum as opposed to merely publishing decisions issuing denials. Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 695-96 nn.129-38 (2004). It is widely believed that the BIA chooses to keep favorable precedential asylum decisions to a minimum because it does not want to draw a “blueprint” for an asylum case. See Ramanathan, *supra* note 11, at 1 n.2.

73. A recent Third Circuit decision, *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003), discussed whether or not an asylum applicant who had maintained that he was heterosexual could be an imputed member of the particular social group of gay men. Specifically, Amanfi argued that “the BIA should have considered whether . . . the Ghanaian authorities persecuted him because they believed he was a homosexual,” having caught him in a single homosexual act, which Amanfi engaged in to avoid becoming the victim of a ritual sacrifice, “even if he was not actually a member of this social group.” *Id.* at 724. The BIA rejected this argument, but the Third Circuit found that there could be imputed social group membership and remanded the case for further consideration. *Id.* at 730.

Shortly before this Article went to publication, federal courts published several more precedential decisions. See *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding unequivocally that “all alien homosexuals are members of a ‘particular social group’” and finding that Karouni, a gay, HIV-positive man from Lebanon, had established a well-founded fear of future persecution.); *Garcia v. Ashcroft*, 396 F.3d 446 (1st Cir. 2005) (denying Guatemalan gay man’s petition for review because he failed to show state involvement or lack of protection from past mistreatment he suffered by his neighbors); *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004) (holding that the federal court lacked jurisdiction to review his claimed exception to the one-year filing deadline for asylum and that Molathwa had failed to demonstrate that he would be persecuted because of his gay sexual orientation in his native Botswana); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) (holding gay men with female sexual identities constituted a particular social group in El Salvador and remanding for further consideration of his withholding of removal claim).

74. *INS Grants Asylum to Gay Brazilian With HIV*, 73 No. 33 INTERPRETER RELEASES 1140 (1996).

him, harassed him, and on one occasion, raped him.<sup>75</sup> Finally, a Turkish gay man was granted asylum after being harassed, beaten, and raped by the Turkish police and by street gangs because of his sexual orientation.<sup>76</sup>

Immigration Equality, formerly the Lesbian and Gay Immigration Rights Task Force, has assisted hundreds of gay and lesbian asylum seekers and their attorneys.<sup>77</sup> Some of these asylum victories are reported in the organization's newsletter, which provides further illustration of the types of abuse that have been held to rise to the level of persecution. One such example involves a Jamaican gay man who won political asylum based on the persecution he suffered when police targeted him for refusing to pay a bribe, accused him of buggery, and subjected him to a humiliating medical exam. The case was reported widely in the Jamaican media, which made his life there unbearable.<sup>78</sup> In another case, a Korean gay man won asylum because he was repeatedly, brutally beaten during his compulsory military service after his commanding officer discovered he was gay.<sup>79</sup> Additionally, a man who was a dual citizen of Syria and Jordan was sexually assaulted by a teacher and threatened by the police when he attempted to report a second sexual assault.<sup>80</sup> Finally, a Bangladeshi man who was raped by the police, forced into electroshock therapy, and forced into an arranged marriage won his case for asylum.<sup>81</sup> In each of these examples of successful asylum claims, the applicant suffered harm in the public sphere for activities conducted in public.

There are many other examples of "public sphere" violence faced by gay males cited in other law review articles.<sup>82</sup> Thus, in spite of the dearth of

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75. *INS Grants Political Asylum to Gay Venezuelan Man*, 72 No. 12 INTERPRETER RELEASES 430 (1995).

76. *INS Grants Asylum to Turkish Gay Man*, 71 No. 44 INTERPRETER RELEASES 1515 (1994).

77. The author is the Legal Director of this organization. See Website of Immigration Equality, available at <http://www.immigrationequality.org> (last visited Mar. 23, 2005).

78. *Represented by LGIRTF, Jamaican Gay Man Receives Asylum*, LGIRTF STATUS REPORT, *supra* note 4, at 6.

79. *Groundbreaking Victory in Korean Gay Male's Asylum Case*, LGIRTF STATUS REPORT, *supra* note 4, at 12.

80. *Gay Syrian Man Granted Asylum In U.S.; Internet Helps Him End Isolation and Find Help*, LGIRTF STATUS REPORT (Immigration Equality 2000) (on file with the author).

81. *Gay Malaysian Granted Suspension by Virginia Immigration Judge; Gay Bangladeshi Granted Asylum*, LGIRTF STATUS REPORT (Immigration Equality 1997) (on file with the author).

82. See Wilets, *supra* note 57, at 1000 n.42 (1997). Other fact patterns from successful cases include: two gay Russian men who were granted asylum after receiving threats from the KGB and being placed on a "pink list" to be watched; an Armenian gay man who had been repeatedly harassed and beaten by the police; a Romanian man who was raped by other inmates when placed in the general population by the police after being arrested because of his homosexuality and was later beaten by the police for complaining of his treatment; a Salvadoran gay man who was disowned by his parents, raped by a soldier, and beaten by paramilitary thugs; a gay Malaysian man who proved that if his homosexuality were discovered he could be subjected to police beatings, lashings, and imprisonment of twenty

precedential cases addressing sexual orientation-based asylum claims, a pattern has emerged of factual scenarios that are likely to succeed. The strongest cases are those in which the applicant suffers harm in the public sphere—such as police beatings or arrest—and in which the activity that was targeted by the government was also public in nature—such as frequenting public meeting places for gay men.

### C. Blurring of Public & Private Spheres

In many cases, it is more difficult to categorize neatly the persecution as either “public” or “private.” For example, in one early sexual orientation-based asylum grant, the applicant, Marcelo Tenorio, a gay male from Brazil, was beaten and stabbed by an anti-gay gang that hurled homophobic epithets during the attack. In this case, the harm took place in the public sphere with a brutal, public, gay bashing, but it is not clear how the gang knew that Tenorio was gay. Moreover, although his attackers were private actors, the applicant feared going to the police because the police themselves were often members of anti-gay gangs, and he believed that the police may have been involved in his attack.<sup>83</sup>

Similarly, in a successful lesbian asylum case, an Iranian lesbian was granted asylum after she had been detained and brutally beaten by the Iranian Revolutionary Committee.<sup>84</sup> Significantly, the applicant was in a secret relationship with a woman and had not engaged in any public displays of her sexual orientation. Nevertheless, her claim fell within the established parameters of persecution after her hidden, private behavior came to the attention of the authorities who then brutally mistreated her.

The only precedential decision to address an asylum claim by a lesbian is *Pitcherskaia v. INS*.<sup>85</sup> Not surprisingly, this case involves both public and private sphere harm.<sup>86</sup> Pitcherskaia testified that she was under surveillance by

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years. Mohyuddin, *supra* note 29, at 402-04.

83. *IJ Grants Asylum to Brazilian Homosexual*, 70 No. 32 INTERPRETER RELEASES 1100, 1100-01 (1993).

84. *Iranian Lesbian Granted Asylum in U.S., Tells of Brutal Torture*, LGIRTF STATUS REPORT (Immigration Equality 1997) (on file with the author).

85. 118 F.3d 641 (9th Cir. 1997). Additionally, there is a published district court case, *Forrester v. Ashcroft*, 2005 WL 281187 at \*1 (E.D. Pa. 2005), denying *habeas corpus* relief to a Jamaican lesbian. Forrester was convicted of selling a controlled substance rendering her statutorily ineligible for asylum or withholding of removal. She challenged the denial of withholding and of relief under the Convention against Torture through a *habeas* petition. *Id.* The district court denied Forrester’s application for relief because it did not find state involvement or complicity when Forrester’s neighbors threw stones at her, nor did it find that country conditions documentation demonstrated the state had a policy of acquiescing in torture against homosexuals. *Id.* at \*6.

86. It is not surprising that the case involves private sphere harm because this is the type of harm women are more likely to face. It is to be expected that there is an element of public sphere harm, or Pitcherskaia probably would not have been successful in her appeal.

the Russian authorities because her father was a political dissident.<sup>87</sup> She was first detained for fifteen days after she protested the beating of a gay friend by a school director.<sup>88</sup> She was arrested and imprisoned again for demonstrating for the release of a lesbian gay youth organization leader.<sup>89</sup> She was subsequently arrested on several other occasions and questioned about the sexual orientation of acquaintances.<sup>90</sup> This early harm suffered by Pitcherskaia fits firmly within the “public” asylum model of public activity and public, state abuse.

The primary issue addressed in the case, however, was whether subsequent abuse Pitcherskaia suffered in the form of forcible psychiatric “treatment” by the state amounted to persecution if the state’s intent was purportedly to help “cure” her of her homosexuality rather than to punish her.<sup>91</sup> Despite her political activities on behalf of lesbian friends, Pitcherskaia denied her own lesbianism when questioned by authorities.<sup>92</sup> It was not until she was visiting an ex-girlfriend who was forcibly institutionalized because of her sexual orientation that Pitcherskaia was added to a list of “suspected lesbians.”<sup>93</sup> This classification resulted in her eventually being forced to undergo psychiatric “treatment.”<sup>94</sup> It was the private sphere activities of visiting her lesbian friend in the hospital, as well as visiting other gay friends in their homes, that ultimately led the authorities to place Pitcherskaia on the list of “suspected lesbians,” which then caused her public sphere persecution in the form of forced psychiatric “treatment” by the state.

Both the immigration judge and the BIA found that because the Russian government’s intent was not to harm Pitcherskaia but rather to “cure” her, the abuses she suffered could not be considered persecution.<sup>95</sup> The Ninth Circuit rejected the BIA’s reasoning, however, and found that Pitcherskaia had been persecuted. The court therefore reversed the BIA decision and remanded the case to develop the record further. The Ninth Circuit’s analysis has far reaching implications for other lesbian claims. Although the state was clearly the actor inflicting the harm on Pitcherskaia, the Ninth Circuit’s holding that the alleged benign motivation of the persecutor could not excuse the harm suffered by the victim is enormously important for asylum claims in which the state is not the persecutor. For example, if the father or brother of a lesbian beats her or forces

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87. *Pitcherskaia*, 118 F.3d at 644.

88. *Id.*

89. *Id.*

90. *Id.*

91. For a detailed discussion of an objective standard versus a punitive intent requirement in sexual orientation-based asylum claims, see Alan G. Bennett, *The “Cure” That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279 (1999).

92. *Pitcherskaia*, 118 F.3d at 644.

93. *Id.*

94. *Id.*

95. *Id.* at 645.



her into marriage, he may well believe that he is doing so “for her own good.” The Ninth Circuit clearly rejected this type of justification by defining persecution objectively and looking to whether a reasonable person would find the suffering or harm inflicted to be “offensive.”<sup>96</sup>

#### D. Private Action, Private Harm in Gender-Based Cases

The most difficult cases under asylum law precedent remain those in which both the targeted activities and the persecution take place within the private realm. Examples of persecution that women may suffer within the private sphere of the home and family include, among other things: “honor” crimes, domestic violence, incest, and forced marriage.<sup>97</sup> In many instances, women are unable to demonstrate persecution at the hands of the state because they literally have no legal relationship with the state.<sup>98</sup> Although this Article points out that frequently there are substantial differences between lesbian and gay male claims, there are, of course, cases in which gay men also experience harm only within the private sphere. Like lesbian cases that involve private sphere harm, these cases are much less likely to be successful.<sup>99</sup>

One of the most significant cases to address private sphere harm was the gender-based BIA decision in *In re Kasinga*.<sup>100</sup> In this case, a woman sought asylum in the United States for fear of being subjected to ritualistic female genital mutilation (FGM) in Togo. Presaging the Ninth Circuit’s reasoning in *Pitcherskaia*, the BIA shifted its focus in *In re Kasinga* from the intent of the perpetrator of the harm to a simple causal connection between the harm and the perpetrator.<sup>101</sup> *In re Kasinga* also looked beyond the potentially benign intent of the midwives and elders who performed the FGM to assess the larger role the practice played in subjugating women.<sup>102</sup> The BIA then analyzed the government’s relationship to the practice of FGM and found that the government’s poor human rights record and unwillingness to provide protection for women demonstrated that it would be impossible for Kasinga to safely relocate within Togo.<sup>103</sup>

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96. *Id.* at 647.

97. See Lieberman, *supra* note 9, at 1.

98. See Wilets, *supra* note 57, at 1023.

99. In an unpublished BIA decision in which relief was denied to a gay man from Honduras, the reason for the denial was “that the respondent has not demonstrated that the Honduran government would persecute the respondent because of his sexual orientation. Rather, the harm the respondent fears is essentially from his immediate family and not the Honduran government.” *In re Aguilar-Martinez*, No. A94-360-086, 2003 WL 23508610, at \*1 (B.I.A. Dec. 18, 2003) (internal citations omitted).

100. 21 I. & N. Dec. 357, 361 (B.I.A. 1996).

101. See Musalo, *supra* note 12, at 799.

102. *In re Kasinga*, 21 I. & N. Dec. at 366-67; see also Musalo, *supra* note 12, at 799, 801.

103. *In re Kasinga*, 21 I. & N. Dec. at 367. Under U.S. asylum law, if persecution is

The significance of the *In re Kasinga* decision for private sphere lesbian claims goes beyond the shift in focus to the victim of persecution. *In re Kasinga* is also ground-breaking in that the BIA not only rejected the argument that the persecutors' intentions were benign, but it also actually looked beyond the motivations of the individual persecutors to conclude that their actions were part of a larger social pattern of oppression of women.<sup>104</sup> As in *In re Kasinga*, winning or losing lesbian-based claims may hinge upon the adjudicator's willingness to see the private harm suffered by a lesbian as part of a larger social pattern to marginalize or eliminate lesbians.

In *In re Kasinga*, as in many lesbian claims, the harm that the applicant feared was entirely private. At the age of seventeen, Kasinga's father died, and she was left in the custody of her aunt.<sup>105</sup> Her aunt forced her into a polygamous marriage with a forty-five-year-old man.<sup>106</sup> Kasinga's aunt and new husband intended to force her to undergo FGM, in accordance with tribal custom, before he would consummate the marriage.<sup>107</sup> With her sister's help, Kasinga was able to flee Togo before the FGM could be carried out.<sup>108</sup> Kasinga testified and submitted corroborating evidence that she would receive no protection from the police and that, if deported to Togo, she would be turned over by the police to her husband, who would force her to undergo FGM.<sup>109</sup>

In *In re Kasinga*, the BIA recognized harm that occurred entirely within the private sphere as persecution. Kasinga herself had not engaged in any public or political activity to call attention to her belief that women should not be subjected to FGM, nor was there any evidence that the state itself would participate in her persecution. Kasinga's entire case rested on fear of the private actions of her family and the elders and midwives who would carry out her family's intentions. This harm, especially at the hands of one's own family, has not traditionally warranted protection by the legal system, which makes *In re Kasinga* a revolutionary case for gender-based claims.<sup>110</sup>

Because the extreme private sphere harm in *Kasinga* was recognized as persecution, it seems logical that the equally horrific family harm of repeated, inescapable domestic violence would also be recognized by the BIA as persecution. Accordingly, as discussed above,<sup>111</sup> while the BIA in *In re R-A-*

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inflicted by private actors whom the government is unable or unwilling to control, the applicant must also demonstrate that it would not be possible for her to safely relocate within her country. See 8 C.F.R. § 208.13(b)(3) (2005).

104. *In re Kasinga*, 21 I. & N. Dec. at 366.

105. *Id.* at 358.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 359.

110. See Wilets, *supra* note 57, at 992-93.

111. See *supra* Part I.B and note 40 (providing history on the case, as well as noting that there is still no final decision in the *In re R-A-*).

found that the applicant had failed to show that the harm she suffered was on account of her membership in a particular social group, it did acknowledge that the harm she suffered rose to the level of persecution.<sup>112</sup> The facts of *In re R-A-* are particularly horrendous. A woman was repeatedly beaten and raped by her husband and threatened with murder and disfigurement if she dared to leave him.<sup>113</sup> R-A- filed reports with the police, but they were unresponsive.<sup>114</sup> On one occasion, when her husband appeared before a Guatemalan judge, the judge stated that he would not interfere in domestic disputes.<sup>115</sup> With little discussion, the BIA found that the immigration judge had correctly concluded that the severe physical harm to which R-A- had been subjected by her husband constituted persecution.<sup>116</sup> The BIA also credited R-A-'s testimony and evidence that the Guatemalan government was unable and unwilling to protect her from the abuse.<sup>117</sup> Thus, if the final decision in the case finds a cognizable social group for victims of domestic violence, it seems clear that the BIA is prepared to find that the harm R-A- suffered constitutes persecution under asylum law.

The *In re Kasinga* and *In re R-A-* decisions have enormous significance for lesbian asylum cases, both because purely private sphere harm was recognized as persecution and because the harm suffered by the two applicants was seen as part of a larger societal goal to subjugate women.<sup>118</sup> Nonetheless, the facts in both of these cases are quite extreme. Kasinga faced permanent, life-threatening mutilation that would forever prevent her from receiving sexual pleasure,<sup>119</sup> and R-A- endured years of daily physical abuse and threats on her life.<sup>120</sup> While there are undoubtedly some lesbians who have faced similar, horrific levels of harm, most lesbian applicants will not present such extreme facts. For this reason, the 2000 BIA decision, *In re S-A-*,<sup>121</sup> may be the most

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112. 22 I. & N. Dec. 906, 913-14 (B.I.A. 1999; A.G. 2001).

113. *Id.* at 908-10.

114. *Id.* at 909.

115. *Id.*

116. *Id.* at 913-14.

117. *Id.*

118. James Wilets has correctly recognized:

Understanding society's violent reaction to gender nonconformity by women and sexual minorities helps to illustrate that gendered violence is not the result of isolated, irrational reactions by individual, maladjusted males to private, personal affronts, but rather is a predictable response by members of a dominant class to perceived threats to their dominant position. In that sense, "private" violence against women and sexual minorities is profoundly public, political, and systemic.

Wilets, *supra* note 57, at 1049. See generally Crenshaw, *supra* note 16 (noting that domestic violence stems from community norms, not just randomly violent people).

119. *In re Kasinga*, 21 I. & N. Dec. 357, 361 (B.I.A. 1996).

120. *In re R-A-*, 22 I. & N. Dec. at 906.

121. 22 I. & N. Dec. 1328 (B.I.A. 2000). The BIA completely side-stepped the difficulties of defining the particular social group in gender-based claims by concluding that the harm suffered was on account of religion rather than membership in a particular social group. Although the facts do not indicate that S-A- and her father ever discussed religion,

important gender-based asylum case for lesbian asylum claims.

In *In re S-A-*, the applicant was a woman from Morocco in her early twenties who had been beaten and abused by her father because of his strict Muslim beliefs.<sup>122</sup> Although her brothers were never harmed, S-A- suffered beatings at least once a week from her father.<sup>123</sup> At one point, her American aunt sent S-A- a short skirt that she wore outside the house.<sup>124</sup> When her father found out, he burned the insides of her thighs to scar her so she would not be tempted to wear a short skirt in the future.<sup>125</sup> On another occasion, her father beat her severely after he saw her on the street speaking with a man to whom she was giving directions.<sup>126</sup> Her father then forbade S-A- to leave the house, including preventing her from attending school.<sup>127</sup> Shortly thereafter, when her father discovered she had snuck out of the house to spend time with some female friends, her father again beat her severely.<sup>128</sup> S-A- attempted suicide twice while in Morocco.<sup>129</sup> She fled to the United States when the opportunity presented itself and believed that if she was deported to Morocco, her father would kill her for having traveled unaccompanied by a male family member.<sup>130</sup>

The facts of *In re S-A-* most closely parallel the types of harm that lesbians are likely to fear from their family members. Many lesbians have experienced violence at the hands of family members, and often the greatest fear that lesbians express at the thought of returning to their home countries is that they will be forced to marry, suffer beatings, or be killed by family members.<sup>131</sup>

#### E. Private Sphere Persecution in the Lesbian Context

As discussed above, the Ninth Circuit in *Pitcherskaia* is the only precedent to address a lesbian asylum claim.<sup>132</sup> It is likely that many lesbian asylum claims are denied because the harm that the applicant has suffered in the past or fears in the future is private in nature. It is also likely that, after consulting an attorney, many lesbians who are considering whether to file for asylum will choose not to file because their chances of winning seem so slim.

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the BIA appears to assume that her religious opinion must differ from her father's strict Muslim beliefs based on her behavior, which does not conform to his religious edicts. *Id.* at 1333-34.

122. *Id.* at 1329.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1330

128. *Id.*

129. *Id.*

130. *Id.* at 1331.

131. This statement is based on the author's own experience in meeting with potential asylum seekers who are lesbians as well as closed client files in the author's possession.

132. See *supra* Part II.C.

Of course, for any asylum application to be successful, the applicant must either show direct state involvement in the persecution or demonstrate that the applicant's government was unwilling or unable to protect her.<sup>133</sup> In claims that involve purely private conduct, it is very helpful if the applicant has sought protection and been turned away by the police.<sup>134</sup> It is important for adjudicators to realize that the lack of protection by the government, by failing to enact or enforce protective laws for women, is also a form of persecution.<sup>135</sup>

Ironically, the more repressive a country is towards lesbianism, the more difficult it may be for an applicant to prove her claim. In one case in which a Chinese lesbian sought asylum in Australia, the case was denied primarily because the applicant had never had an overt relationship with another woman.<sup>136</sup> The applicant claimed that she did not feel free to do so in China, but the adjudicator did not examine what the potential consequences would have been of her having a lesbian relationship in China. Instead, the adjudicator concluded that a "homosexual-lesbian can avoid the risk of harm by being discreet in her conduct."<sup>137</sup> A woman whose fear of the consequences of beginning a relationship with another woman is so great that she will not dare to do so might lead a more repressed life than a man. Gay men at least know that venues to meet other men exist and thus face potential police violence when attempting to meet other men. Such complete lack of visibility of lesbians has been noted as an act of repression in and of itself.<sup>138</sup>

Applying the reasoning of *In re Kasinga* to lesbian asylum cases creates a much stronger argument for asylum in cases that involve purely private harm. As in *In re Kasinga*, the actions of the persecutors must be seen as part of a broader societal desire to eliminate lesbianism or, at the very least, to render it completely invisible. It is still common in sexual orientation-based asylum cases for adjudicators to assume that if the applicant does not "flaunt" his or her sexual orientation, he or she can avoid harm.<sup>139</sup> While this attitude may

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133. *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).

134. For example, R-A- sought police protection, but it was to no avail. *See In re R-A-*, 22 I. & N. Dec. at 909.

135. *See Bahl*, *supra* note 8, at 41-42.

136. *See Ramanathan*, *supra* note 11, at 37.

137. *Id.*

138. *See Wilets*, *supra* note 57, at 1022.

139. In *In re Soto-Vega*, the immigration judge found that although the applicant had suffered past persecution, the judge himself could not tell that the applicant was gay and therefore did not believe the applicant was at risk for future persecution. While admitting the applicant's testimony was credible, the judge said, "It seems to me that if he returned to Mexico in some other community, that it would not be obvious that he would be homosexual unless he made that . . . obvious himself." Press Release, Lambda Legal, Lambda Legal Urges Appeals Board to Grant Asylum to Gay Mexican Immigrant and Overturn Judge's Ruling that He Could Hide His Sexual Orientation to Avoid Persecution (Oct. 14, 2003), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1335> (last visited Mar. 24, 2005). The BIA affirmed the decision without opinion, and the case is now on appeal before the Ninth Circuit. For a more general discussion of how "covering" one's sexual

prejudice asylum claims for both gay men and lesbians, lesbian asylum claims are more likely to face denial based on this faulty reasoning. Lesbians are less likely than gay men to engage in targeted public activities and could therefore be especially expected to avoid mistreatment by hiding their sexual orientation.

### III. APPLYING GENDER-BASED PERSECUTION ANALYSIS TO A HYPOTHETICAL LESBIAN CLAIM

Beginning with the theory that lesbian asylum claims would fare better if adjudicated within the framework of gender-based persecution than within the predominantly male, sexual orientation-based persecution framework, this Article will now examine a hypothetical lesbian asylum claim<sup>140</sup> in light of the precedents discussed above.

Luisa is a twenty-three-year-old lesbian from a developing country, where gender roles are very clearly delineated between men and women, and husbands are generally chosen for women by their families at a young age. Luisa has always tried to keep her attraction to women secret from her family, knowing that their reaction would be severe. In an effort to hide her true identity, Luisa has even dated men, though she has never had a serious relationship with a male. In fact, Luisa has been in a relationship with Maritza, a young woman who she has known since grade school and refers to as her “best friend.”

Last year, Luisa’s brother came home unexpectedly early from work and found Luisa and Maritza in an intimate position. He chased Maritza out of the house and beat Luisa so badly that she had to go to the hospital and receive stitches on her face. Luisa lied to the doctor at the hospital, claiming that she had fallen down, because she felt things would only be worse for her at home if she blamed her brother. Luisa also knew that the police commonly committed acts of violence against gay people and believed that if she attempted to report her brother’s attack, she could face persecution as a lesbian.

When Luisa returned home from the hospital, no one in her family would look at or speak to her. She went to her room where she cried and contemplated suicide. That night her family let a male neighbor into her room. The neighbor forced her to have sex with him. Luisa believed her family must have arranged this to try to “cure” her of her homosexuality. For two weeks after this attack, Luisa did not leave the house, fearing that her entire community knew about her relationship with Maritza and fearing physical harm. Luisa’s family continued to ignore her, and she only left her room late at night to eat.

Luisa’s father then returned from work-related travel. As soon as he heard

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orientation is often (wrongly) seen as acceptable in the legal context, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

140. Although this claim is posited as a hypothetical, it is loosely based on the facts of a pending case on which the author is working.

what happened, he burst into Luisa's room and beat her. He then threw her out of the house, screaming that he no longer had a daughter and that if he ever laid eyes on her again, he would kill her with his own hands. In Luisa's country, there are simply no options for a woman to live without a man. Women live with their families until they marry and then move in with their husbands. It would be impossible for Luisa to obtain housing or work without the support of her family. If she remained in her country, Luisa would face homelessness and could probably only earn a living by becoming a prostitute.

Luisa spent the night on the street, withdrawing all of her money from her savings account in the morning and using it to buy a fake passport on the black market. She escaped to the United States and applied for asylum shortly after arriving.<sup>141</sup> As an applicant for asylum, Luisa does not have a right to counsel in the United States. Many attorneys, even experienced immigration lawyers, are still not aware that sexual orientation can be the basis for an asylum claim. If Luisa is lucky, she may be able to find an attorney to assist her pro bono. However, it is unlikely that such an attorney would have handled a lesbian asylum case before.

Luisa's case would first be presented to a trained asylum officer employed by the Citizenship and Immigration Services (USCIS).<sup>142</sup> Two weeks after an interview with the asylum officer, Luisa would return to the asylum office to pick up her decision. If the officer felt that her case met the asylum standard, the officer would recommend approval of her application.<sup>143</sup> If the officer did not feel that Luisa had met her burden of establishing a well-founded fear of future persecution, Luisa would be placed in removal proceedings,<sup>144</sup> where she would have a second opportunity to present her case de novo to an immigration judge. These proceedings are more formal, with an attorney from Immigration and Customs Enforcement pursuing removal. If the immigration judge also felt that Luisa's case did not warrant a grant of asylum, Luisa would be ordered removed to her home country.<sup>145</sup> She would still have the

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141. The issue of detaining asylum seekers is beyond the scope of this Article, but it is worth noting that if Luisa's passport were discovered to be fraudulent upon arrival at a U.S. airport, she would be subject to detention for months or even years until her claim could be adjudicated. See MARK DOW, *AMERICAN GULAG: INSIDE AMERICA'S IMMIGRATION PRISONS* (2004); HUMAN RIGHTS FIRST, *IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY* 41 (2004), [http://www.humanrightsfirst.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf) (last visited Mar. 23, 2005).

142. 8 C.F.R. § 208.9 (2005).

143. 8 C.F.R. § 208.14(b) (2005).

144. In this example, Luisa would be placed in removal proceedings because she is illegally present in the United States since she entered with a false passport. Asylum seekers who are in the United States with a lawful status (e.g., a student visa holder or tourist whose authorized stay has not expired) are not placed in removal proceedings if they lose before the asylum office. Instead, their asylum cases are denied, and they are permitted to remain in the United States for the remainder of their lawful status. See 8 C.F.R. § 208.14(c) (2005).

145. Changes to the INA in 1996 substituted the term "removal" for the previous term, "deportation." See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L.

opportunity to appeal this decision to the BIA; while the appeal was pending, the removal order would be stayed,<sup>146</sup> and Luisa would remain at liberty in the United States.<sup>147</sup> If Luisa again lost her case before the BIA, her only option would be an appeal before a federal court of appeals. Unless the circuit court granted a stay of her appeal, she could be removed from the United States while the appeal was pending.

The stakes are enormously high for Luisa. If she is successful, she will gain asylum status, which will enable her to apply for legal permanent residence and eventual U.S. citizenship. On the other hand, if Luisa loses, she faces removal to the very country from which she has fled. With Luisa's future hanging in the balance, it is imperative that she put forth the strongest possible asylum claim.

#### A. Luisa's Claim Under Sexual Orientation-Based Precedent

Luisa will probably not have any difficulty establishing that she is a member of a particular social group<sup>148</sup>—that of lesbians within her country.<sup>149</sup> Establishing that the harm Luisa suffered rises to the level of persecution within the framework of sexual orientation cases based on a male, "public" paradigm, however, will be much more difficult.

First, unlike many gay men, Luisa has not engaged in a public activity that has caused her to be targeted. The activity that resulted in Luisa's abuse was a private act within the confines of her own home. Indeed, Luisa went to great lengths to hide her sexual orientation in public, even going so far as to date men so that no one would learn of her identity as a lesbian. Already, then, Luisa's facts diverge from the male sexual orientation model in which gay men are targeted for their public behavior, such as meeting other men in locations frequented by homosexuals or having a noticeably gay appearance on a public street.

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No. 104-132, 110 Stat. 1214 (1996).

146. 8 C.F.R. § 1003.6 (2005).

147. If Luisa had the misfortune of filing her case in Denver or Atlanta, pursuant to an Immigration and Customs Enforcement pilot project, she would be taken into custody and detained pending the decision on the appeal. See *Detention of Asylum Seekers—A Step Forward, A Step Back*, 26 ASYLUM PROTECTION NEWS 26 (Human Rights First, Apr. 5, 2004), [http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet\\_26.htm](http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_26.htm) (last visited Mar. 23, 2005).

148. If Luisa's claim were put forth in a circuit which required a "voluntary association" among members of the group, her claim might be more problematic. Such an additional requirement would make claims for any lesbian or gay man who is deeply "in the closet" much more difficult to prove. Once again, sexual orientation-based asylum seekers who come from the most repressive countries often have the greatest difficulties meeting the standard for asylum claims. See *supra* note 22; Musalo, *supra* note 12, at 783-85.

149. See *supra* Part I.A (discussing sexual orientation as a basis for particular social group membership).



Second, Luisa's case is even more difficult because the harm she suffered was also entirely in the private realm. Luisa was beaten by her brother, raped by a neighbor, and thrown out of the house by her father. She was never subjected to any direct mistreatment from the police, perhaps because her private actions never came to their attention. Moreover, she never sought (and therefore was never denied) police protection because she believed that making a police complaint would not protect her from the abuse and would instead likely make her situation worse.

Again, Luisa's facts have little in common with the prototypical gay male case in which asylum seekers have suffered public harm as a result of public activities. Unlike *In re Toboso-Alfonso*, Luisa has not been placed on a government list of known homosexuals, nor has she been detained by the police or forced to perform hard labor.<sup>150</sup> Unlike *Hernandez-Montiel v. INS*, Luisa has not been targeted by the police nor raped by police officers.<sup>151</sup> Indeed, Luisa has not even faced the quasi-public harm of state-imposed psychiatric "treatment" that Pitcherskaia endured.<sup>152</sup> Thus, looking only to precedent in the realm of sexual orientation-based asylum cases, it does not appear likely that Luisa's claim will succeed.

#### B. Luisa's Claim Under Gender-Based Asylum Precedent

If the harm that Luisa suffered is analyzed within the framework of gender-based asylum claims, however, she may be successful. Like Kasinga, Luisa lives in a society where she does not have the ability to determine her own fate.<sup>153</sup> Luisa's future is entirely in the hands of her family, and it is unthinkable for her to choose a life in her country outside her family's sphere of influence. Like R-A-, Luisa has suffered horrific, direct harm at the hands of her closest family members<sup>154</sup> and, in Luisa's case, from other individuals with the acquiescence of her family. As in R-A-'s case, Luisa knows there is nothing the police would or could do to protect her.<sup>155</sup> Finally, like S-A-, Luisa suffered violence because her family believed there was no place for her sexual identity within their society; they would rather see her dead than allow her to shame the family.<sup>156</sup> As in all of the above cases, it is critical to view the harm Luisa suffered and would continue to suffer in the future, not as an individual act of family trauma, but rather as part of her society's larger pattern of subjugating both sexual minorities and women.

Viewed in light of these precedents, Luisa should be able to win her claim

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150. 20 I. & N. Dec. 819, 820 (B.I.A. 1990).

151. 225 F.3d 1084, 1088 (9th 2000).

152. *Pitcherskaia v. INS*, 118 F.3d 641, 644 (9th Cir. 1997).

153. *In re Kasinga*, 21 I. & N. Dec. 357, 358-59 (B.I.A. 1996).

154. *In re R-A-*, 22 I. & N. Dec. 906, 908-10 (B.I.A. 1999; A.G. 2001).

155. *Id.*

156. *In re S-A-*, 22 I. & N. Dec. 1328, 1328-36 (B.I.A. 2000).

for asylum. She has suffered physical harm, including beatings and rape, because of her membership in the particular social group of lesbians. Luisa has shown that her government is unwilling or unable to protect her because the police themselves target homosexuals for prosecution.<sup>157</sup> She has also proven that it would be impossible for her to safely relocate within her country, since it is impossible for a woman to establish a household outside the confines of her own family or her husband. She has further demonstrated that she would face future persecution if forced to return to her country, because—as an unmarried woman—she would literally have no place to go but back to her family's home, and her father has threatened to kill her if he ever sees her again. The harm that Luisa would suffer from her family is indicative of her society's overall attitude toward homosexuals and women as disposable and unworthy of state protection. For all of these reasons, Luisa should be eligible for a grant of asylum in the United States under gender-based asylum precedent.

#### CONCLUSION

In spite of the firm establishment of the principle that sexual orientation can be the basis for a grant of asylum, lesbian applicants continue to file fewer asylum applications and receive fewer asylum grants than their gay male counterparts. This phenomenon is the result of both the fact that fewer women than men seek asylum in the United States generally and the fact that sexual orientation-based jurisprudence has been built on a male model of public activities resulting in public persecution, a paradigm that the facts of lesbian asylum claims do not often follow. Instead, lesbian asylum seekers may find that the persecution they suffer fits more squarely within precedents for gender-based asylum seekers than for predominantly male, sexual orientation-based asylum seekers.

The recognition of gender-based harm as grounds for political asylum has been a recent and hard fought development in asylum law. Although asylum is a humanitarian form of relief, like all immigration law, asylum has a political component. Thus, it was relatively easy during the era of the Cold War for the United States to grant asylum to political dissidents, because such grants served the dual purpose of helping individuals who had suffered abuse to begin new lives and simultaneously advancing a political agenda of supporting regime change in communist countries. While the United States at times acknowledges the advancement of human rights abroad and the expansion of women's rights, these issues have never been primary U.S. foreign policy objectives.<sup>158</sup>

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157. For Luisa to succeed in her case, it will be imperative for her to document, through the use of human rights reports, news stories, and expert testimony, that her government would not protect her from her family. No matter how brutally her family might treat her, it is the government's unwillingness or inability to protect her from the private actors that forms the basis of her asylum claim. *See supra* Part II.

158. Even now as the United States continues to occupy Afghanistan, reports about

Similarly, the United States has never placed international lesbian and gay rights on its foreign policy agenda, as homosexual Americans continue to suffer discrimination and lack equal rights at home.

Anti-immigrant groups, such as the Federation for American Immigration Reform (FAIR), decry asylum as a “back door” means for foreign nationals to obtain legal status in the United States without establishing the family or employment-based ties of other immigration categories. Not surprisingly, such groups adamantly oppose the expansion of asylum categories to include harm based on persecution that occurs within the private sphere. These advocates fear that such expansion would lead to a floodgate of asylum seekers in the United States.<sup>159</sup> This fear is simply unfounded.

In spite of the limited successes in expanding possible grounds for asylum claims discussed above, the number of asylum seekers and asylum winners in the United States has been decreasing in recent years. There were 5000 fewer asylum applications in 2003 than in 2002, and there were nearly 4000 more denials of claims by immigration courts in 2003 than in the previous year.<sup>160</sup>

Asylum is generally an application of last resort. The standard of proof is high, and the consequences of denial—removal to the country from which the individual is fleeing and in which the individual would likely face further persecution—are extreme. Moreover, even if asylum law continues to expand to recognize private sphere harm, applicants will only be successful in their claims if they can demonstrate through objective evidence that their governments are unable or unwilling to protect them from this harm. Even if an applicant has suffered terrible harm by private actors, she can only prevail by proving that her government would not protect her from this harm.<sup>161</sup> The difficulty of proving governmental acquiescence in the harm, coupled with an

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female participation in the current elections estimate that only 10% of women in certain areas of Afghanistan will vote, both because of lack of understanding about the election process and fear that their voting would disturb their male family members. Amy Waldman, *Fearful Choice for Afghan Women: To Vote or Not to Vote*, N.Y. TIMES, Oct. 5, 2004, at A3.

159. FAIR wages the following criticism about asylum law: “Continued efforts by immigration lawyers have expanded the definition of asylum far beyond its original meaning of individualized persecution by one’s government. Now, aliens are granted asylum simply for showing that their beliefs and practices are not in perfect agreement with those of their society and culture.” FED’N FOR AM. IMMIGR. REFORM, ASYLUM REFORM (2004), available at <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1177&c=12> (last visited Mar. 23, 2005).

160. U.S. COMM. FOR REFUGEES, WORLD REFUGEE SURVEY 2004 COUNTRY REPORT: UNITED STATES (2004), available at <http://www.refugees.org/article.aspx?id=1156> (last visited Mar. 22, 2005).

161. Thus, even though lesbians and gay men may be disowned or abused by family members in developed countries with strong records on human rights, it is the lack of governmental protection because of their sexual orientation in their home country that forms the basis of the asylum claim. No matter how badly a lesbian was treated by her family in a Western European country, for example, she would be able to seek protection from the state and have options to relocate within her country.

individualized assessment of the facts of each asylum case, functions as a gatekeeper in the asylum adjudication process.

The United States continues to serve as a beacon of hope for many who live under repressive governments. During the last ten years, hundreds of homosexual individuals, mostly gay men, have been spared lives filled with fear, secrecy, physical abuse, and death threats because of Janet Reno's courageous decision to designate *In re Toboso-Alfonso* as precedent,<sup>162</sup> a decision that made asylum a possibility for homosexuals. If the current Attorney General shows similar courage and grants relief in *In re R-A-*, and the Department of Homeland Security issues the related regulations on asylum, which would clarify the circumstances under which gender-based claims fall within the particular social group category, many more foreign nationals would be able to begin new lives in the United States, free from the abuse of families and neighbors from whom their governments will not protect them.<sup>163</sup> In addition to the relief this would offer asylum seekers fearing gender-based harm, this will also increase the likelihood that lesbians will succeed in their claims for asylum. Only then will lesbians have the same opportunities as their gay male counterparts to begin a new life—free of fear—in the United States.

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162. 20 I. & N. Dec. 819 (B.I.A. 1990); 1895 Op. Att'y Gen. 94 (1994) (designating *In re Toboso-Alfonso* as precedent).

163. 22 I. & N. Dec. 906 (B.I.A. 1999; A.G. 2001); *see also supra* note 40 (describing the current status of *In re R-A-*).