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”Give Me Your Gays, Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution. . .”: The New Grounds for Grants of Asylum

Leonard Birdsong*

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"GIVE ME YOUR GAYS, YOUR LESBIANS, AND YOUR VICTIMS OF GENDER VIOLENCE, YEARNING TO BREATHE FREE OF SEXUAL PERSECUTION...": THE NEW GROUNDS FOR GRANTS OF ASYLUM

LEONARD BIRDSONG*

I. INTRODUCTION

"[T]here have been great advances in [our immigration] laws [that protect] lesbian, gay, bisexual, and transgender (LGBT) immigrants,"[1] as well

* Leonard Birdsong is an Associate Professor of Law at Barry University School of Law, Orlando, Florida. He received his B.A. (Cum Laude) at Howard University and his J.D. from Harvard Law School. He teaches criminal law and immigration law. He wishes to thank Professor Margaret Taylor of the Wake Forest Law School, and Professors Stanley Talcott, and Frederick Jonassen of the Barry Law school for reading and commenting on drafts of this article; and he also wishes to thank Reference Librarians Jennifer Greig, and Ann Pascoe of the Barry University School of Law Library for their excellent and valuable research assistance in preparation of this article.

1. Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 LAW & SEX. 59, 59 (2006).

as laws "in regard to human rights violations inflicted on women."[2] When the United States of America came into being with the signing of the Declaration of Independence in 1776, there were no immigration laws.[3] There were no such laws for almost 100 years.[4] In 1875, the first immigration law was passed by Congress and Americans have since been debating who should be allowed to legally immigrate to the United States and who should be excluded.[5]

One of our earliest immigration laws passed by "Congress excluded lesbian and gay[s]" from legal immigration channels.[6] The law, based on a belief that homosexuality was a medical condition, existed on the books until 1990.[7] "Also in 1990, the [Board of Immigration Appeals] (BIA) affirmed an immigration judge's [(IJ's)] decision to withhold [deportation] of a gay Cuban *marielito* in [the case of] *In re Toboso-Alfonso*."[8] This "was the first known instance in U.S. immigration law where a homosexual was cast as a member of a particular social group, namely that of Cuban gays, and permitted to successfully allege persecution on that basis so as to conform with the statutory definition" found in the law.[9] "Fidel Armando Tobosco [sic] said that because he was gay, he was sentenced to 60 days in a forced labor camp . . . ."[10]

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2. Marissa Farrone, *Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law*, 50 ST. LOUIS U. L.J. 661, 661 (2006).

3. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 124 (3d ed. 2002).

4. *Id.* at 124–25.

5. *Id.* at 125. The "1875 statute barring convicts and prostitutes was quickly followed by the adoption of the first general immigration statute in 1882. The 1882 Act imposed a head tax of 50 cents and excluded idiots, lunatics, convicts, and persons likely to become a public charge." *Id.* This Act excluded the Chinese from immigrating to the U.S. *Id.*

6. Alan G. Bennett, Note, *The "Cure" That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279, 279 (1999).

7. *Id.* at 280. "The Immigration Act of 1917 was the first U.S. law to exclude lesbian and gay aliens from entry into the United States. Congress excluded lesbians and gay men because of the medical and psychiatric communities' belief that homosexuality was a disease." *Id.* at 279. "Congress ended the general exclusion of lesbian and gay aliens in 1990, [which has allowed] refugees to escape . . . sexual orientation-based persecution in their home countries." *Id.* at 280. "The statute simply eliminated 'sexual deviants' from its list of classes of excludable aliens." *Id.* at 280 n.5.

8. Robert C. Leitner, Comment, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 686 (2004). *See also In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 823 (B.I.A. 1990).

9. Leitner, *supra* note 8, at 686.

10. Monica Saxena, *More than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims*, 12 MICH. J. GENDER & L. 331, 342 (2006).

Later, at the time of the Mariel boatlift, he was threatened by the Cuban government "that if he did not leave [Cuba] immediately he would have to serve four years in . . . [prison] for being a homosexual."[11] "The Immigration and Naturalization Service (INS) argued that homosexuality should not be considered a particular social group . . . ."[12] This argument was rejected by the BIA.[13] Four years later, then "Attorney General Janet Reno issued an order declaring that *Tobosco-Alfonso* [sic] was to be considered precedent in all proceedings involving the 'same issue or issues.'"[14]

"[I]n regard to human rights violations inflicted on women, courts have recognized new categories of 'social groups,' one of the grounds on which asylum may be granted or deportation withheld. The consequence of these decisions has been that more women may be granted [asylum] in the United States."[15] The seminal case in this area is *In re Fauziya Kasinga.*[16] In *Kasinga,* the BIA reversed an immigration court's denial of asylum for a young Togolese woman who fled her homeland to escape female genital mutilation (FGM).[17] In its opinion the BIA held:

> "the practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution." The court also found that "young women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group' within . . . the Immigration and Nationality Act."[18]

As a result of this decision, it has become possible, in very particular cases, that women fearing the brutality of genital mutilation in their home country may apply for and "be granted asylum in the United States based on

11. *Id.* at 342–43.
12. *Id.* at 343.
13. *Id.*
14. *Id.*
15. Farrone, *supra* note 2, at 661.
16. 21 I. & N. Dec. 357 (B.I.A. 1996).
17. *Id.* at 368. *See also* Irena Lieberman, *Women and Girls Facing Gender-Based Violence and Asylum Jurisprudence,* HUM. RTS., Summer 2002, at 9–10.
18. Eva N. Juncker, Comment, *A Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation,* 4 J. INT'L LEGAL STUD. 253, 259 (1998) (quoting *Fauziya Kasinga,* 21 I. & N. Dec. at 357) (footnotes omitted).

[their very] reasonable fear of persecution."[19] The BIA immediately designated the decision as precedent to be followed by all 179 immigration courts in the country.[20]

The expansion of grants of political asylum, based on sexual orientation and gender based violence, is a welcomed trend in our law because we, as a society, have come to realize that basic human rights require justice even for those who are persecuted in their country of origin on account of the their sexual identity, their sexual conduct, or as a result of gender violence. Asylum seeks to uphold individual human dignity in the face of persecution in one's country of origin.[21] This is a welcomed expansion of our basic and traditional immigration laws. Our basic immigration system is based on a complicated set of quantitative and qualitative laws passed by Congress over the years regulating and limiting legal immigration to our country. Our current immigration law was passed by Congress in the Immigration and Nationality Act (INA), as amended, first passed in 1952,[22] and is codified in the United States Code.[23] An integral part of our immigration law is the implementation of rules of human rights allowing those prosecuted in their homeland to seek protection in the United States. "Asylum and human rights doctrines are intertwined in that how a country defines persecution reflects its beliefs about what constitutes human rights violations."[24]

Harassment and abuse of LGBT persons, as well as persecution of women who are victims of gender violence, have become "increasingly accepted as grounds for legal asylum in the United States."[25] This is so despite the fact that the country is experiencing a period "of conservative judicial activism, fear [of] HIV/AIDS, . . . and increased scrutiny" of all who wish to legally enter the United States.[26] For persecuted LGBT persons and women

19. *Id.* at 259–60.

20. *Id.* at 260.

21. *See* John A. Russ IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 U.C. DAVIS J. INT'L L. & POL'Y 29, 47 (1998).

22. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). *See also* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 15 (5th ed. 2005). "The Immigration and Nationality Act of 1952 (INA) consolidated previous immigration laws into one coordinated statute. As amended, the 1952 Act provides the foundation for immigration law in effect today." WEISSBRODT & DANIELSON, *supra*, at 15. The 1952 Act was passed by Congress overriding President Truman's veto. *Id.*

23. 8 U.S.C. § 1101 (2000).

24. Russ, *supra* note 21, at 46.

25. Pamela Constable, *Persecuted Gays Seek Refuge in U.S.*, WASH. POST, July 10, 2007, at A6.

26. *Id.*

subjected to persecution because of their gender, such asylum protection represents recognition of their basic rights as human beings.[27]

This article is written to analyze the myriad of problems in obtaining justice in our asylum system with respect to the grants of asylum on the basis of sexual orientation and gender violence. It is also written to expose the need for better-trained and more sensitive immigration judges, the need for more consistency in defining and interpreting our asylum laws, and the need for the Department of Homeland Security to formulate policies that will guarantee uniformly just results for those escaping persecution. Part II will briefly explain the history of how asylum became a part of United States law and discuss immigration court proceedings, appeal, and review. This section will also provide up-to-date statistical information concerning grants of asylum. Part III of this article will discuss the difficulty of adjudicating asylum cases in a uniform way because of the lack of definitions of certain statutory language, such as the term "persecution." It will explore splits in the United States Circuit Courts, which interpret asylum law and discuss why there is little precedent inherent in the system of asylum.

Part IV will discuss two recent asylum decisions concerning sexual orientation and gender violence, which will demonstrate the difficulties and biases in our system of asylum. The two cases are out of the Ninth Circuit. The first, *Ali v. Ashcroft*,[28] involved a Somali woman whose brother-in-law was shot and killed in her home while she was being raped by members of a militia group of a rival clan who opposed Ali's political beliefs.[29] She and her family were forced to flee Somalia.[30] The court upheld her claim of asylum finding that she was persecuted on account of "her political opinion and . . . her membership in a particular social group."[31] The second case, *Karouni v. Gonzales*,[32] involved an "outed" gay, Shi'ite Muslim man from Lebanon, afflicted with AIDS, who was able to reverse the lower court's finding that his fear of future persecution was not well-founded.[33] Analysis will demonstrate, because of the way asylum claims are adjudicated, the outcome of both these cases may have been different if they had been brought in circuits other than the Ninth Circuit Court of Appeals. In some circuits, Ms.

27. *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 564 (3d ed. 2007). The 1948 Universal Declaration of Human Rights at Article 14 recognizes that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." *Id.*

28. 394 F.3d 780 (9th Cir. 2005).

29. *Id.* at 782–83.

30. *Id.* at 783.

31. *Id.* at 787.

32. 399 F.3d 1163 (9th Cir. 2005).

33. *See id.* at 1166–69, 1179.

Ali's rape may have been determined to be a case of rape and burglary not amounting to persecution under the statutory requirements of our asylum system. Whereas in other circuits, Mr. Karouni may have been found not "gay" enough to have received a grant of asylum. Part V of this article concludes that there is a need to harmonize the splits in circuit interpretation of asylum terms and concepts. Also, the BIA should publish more of its cases and designate them for precedential treatment each year in order to gain more uniform adjudication by immigration judges. The author suggests that the American Law Institute and the American Bar Association work together to codify asylum law regulations that can be uniformly interpreted by immigration judges, practitioners, and law teachers.

II. BACKGROUND ON ASYLUM

A. *History*

International protection efforts and measures for refugees were first initiated after World War II by the creation of the UN Convention of 1951.[34] These protections were later expanded in the Protocol Relating to Refugees passed in 1967.[35] Under the 1951 Convention, a "refugee" is:

> [A]ny person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.[36]

The 1951 Convention provided protection for World War II refugees.[37] Future refugees were included in the 1967 Protocol.[38] The United States

34. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force April 22, 1954) [hereinafter 1951 Convention].

35. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

36. 1951 Convention, *supra* note 34, art. 1A(2).

37. *See id.* pmbl. *See also* Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEX. 135, 139 (2006).

38. *See* 1967 Protocol, *supra* note 35, pmbl. *See also* Morgan, *supra* note 37, at 139.

acceded to the Protocol in 1968,[39] but Congress did not enact its own Refugee Act until 1980.[40] In that year Congress adopted the 1967 Protocol as part of the immigration law at section 1101(a)(42) of the INA.[41] This provision provides "that an applicant for asylum: 1) must have 'a well founded fear of persecution;' 2) the fear must be based on past persecution or the risk of future persecution; [and] 3) the persecution must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'"[42]

B. *Eligibility for Asylum*

It should be understood that the concept of asylum provides a legal avenue for both documented and undocumented aliens to obtain relief from persecution in their home country. Under our law such persecution must be on account of one of the protected grounds mentioned in the statute: "race, religion, nationality, political opinion, [or] membership in a 'particular social group.'"[43] As a result not all those fleeing some form of hardship in their home countries are eligible for asylum. Their claim must be on account of one of the statutory grounds.

"An asylum request is automatically considered an application for an alternat[e] claim [of relief known as] withholding of removal."[44] Both forms

39. 1967 Protocol, *supra* note 35, 19 U.S.T. at 6223.

40. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. *See also* Arwen Swink, Note, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 HASTINGS INT'L & COMP. L. REV. 251, 254 (2006).

41. Refugee Act § 201(a) (codified as amended at 8 U.S.C. § 1101(a)(42) (2000)).

42. Morgan, *supra* note 37, at 140 (quoting 8 U.S.C. § 1101(a)(42)). An alien will be considered a refugee if she has suffered persecution in the past on account of one of the statutory grounds or if she can show an objectively reasonable fear of such persecution in the future. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 425 (1987). If the alien establishes past persecution, moreover, a rebuttable presumption arises in favor of granting asylum. Draganova v. INS, 82 F.3d 716, 722 (7th Cir. 1996). Yet that presumption may be overcome by evidence suggesting that conditions in the alien's home country have changed to such an extent that she no longer is in danger of persecution there. *Id. See also* 8 C.F.R. § 208.16(b)(3)(ii) (2007).

43. Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 240 (2005) (citing 8 U.S.C. § 1101(a)(42)).

44. *Id.* (citing 8 U.S.C. § 1101(a)(42)). This provision of the law is found in § 1231 of the *United States Code* and was formerly known as withholding of deportation. 8 U.S.C. § 1231(b)(3)(A); April E. Schwendler, In the Matter of Pearson: *Partisan Politics and Political Pressure Contravene Congressional Intent*, 10 PACE INT'L L. REV. 607, 613 n.20 (1998). The amendments to the Immigration and Naturalization Act of 1952 in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act replaced former hearings known as deportation

of relief require the claimant to demonstrate a certain quantum of persecution that the individual suffered in his or her home country or would suffer if returned there, and both require a "nexus" between the persecution and one of the protected grounds.[45]

"Asylum and withholding of removal appear nearly identical but have important differences . . . ."[46] "[A]sylum is subject to" the discretion of the Attorney General of the United States.[47] "[W]ithholding of removal, [if] proven, is a mandatory form of relief."[48] A person granted asylum may be eligible for permanent residency in the United States after one year as an asylee.[49] "[M]ost litigants prefer asylum."[50]

Withholding of removal guarantees only that the person will not be forcibly returned to his or her country of origin and does not preclude the possibility of being removed to a third country.[51] "The applicable standard of proof is also higher [in a] withholding of removal" than in an asylum grant.[52] In order to obtain withholding or removal, the claimant "must show a clear probability of persecution."[53] The showing for asylum is only a "'well-founded fear of persecution.'"[54]

Applications for asylum are termed either "affirmative" applications or "defensive" applications. Applicants who are not currently in removal proceedings may file an affirmative application by mailing a Form I-589 to a regional USCIS[55] service center, under the auspices of the Department of Homeland Security.[56] A specialized corps of full time professional asylum officers receive the applications and interview the applicants.[57] "Asylum

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hearings and exclusion hearings and renamed them both as removal hearings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 308, 110 Stat. 3009-546, 3009-614 to 3009-615. Removal is synonymous with deportation. *See id.* The concept of deportation is readily recognized by most people.

45. Landau, *supra* note 43, at 242.
46. *Id.* at 241.
47. *Id.*
48. *Id. See also* 8 U.S.C. § 1231(b)(3)(A).
49. 8 U.S.C. § 1159(a)(1)(B).
50. Landau, *supra* note 43, at 241.
51. WEISSBRODT & DANIELSON, *supra* note 22, at 328.
52. *Id.*
53. *Id.* at 335.
54. *Id.*
55. This is the abbreviation for the United States "Bureau of Citizenship and Immigration Services, Department of Homeland Security. Created in 2003, this bureau houses the principle services and adjudications functions inherited from the [INS], including asylum officers and the refugee corps." DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY xi–xii (2007). It is sometimes referred to as CIS. *Id.*
56. *Id.* at 79.
57. *Id.*

officers grant [asylum in] meritorious cases, which initially ran between 15 and 30[%] . . . but in recent years have . . . exceeded 40%. They do not deny the other cases; instead, asylum officers refer them to immigration court" placing the cases in removal proceedings.[58]

C. *Immigration Court Proceedings, Appeal, and Review*

IJ's provide the initial evaluation of all defensive applications for asylum and withholding, and they provide a second review of affirmative applications referred by asylum officers.[59] This allows the case to be heard in "the more formal setting of the immigration court" where witnesses may be examined and cross examined by the alien's counsel and the Department of Homeland Security's (DHS) counsel.[60] If removal proceedings are already underway, the applicant can apply for asylum or withholding only by presenting a defensive application that is heard exclusively by the IJ.[61]

At the hearing, the claimant must present evidence to avoid removal.[62] The DHS will present evidence and argument in support of its decision to refuse asylum.[63] Alan G. Bennett, an observer of IJ court procedures, reminds us with respect to such proceedings:

> Neither state nor federal rules of evidence apply in immigration proceedings. However, evidence presented must be relevant and conform to requirements of constitutional due process.
>
> If the [claimant] persuades the [IJ] that she meets the statute's asylum requirements, the judge [may] grant asylum for an indefinite time . . . . In addition, the [claimant's] immediate family members who are still abroad may join her in the United States . . .
>
> If, on the other hand, the [IJ denies] the . . . asylum request, she may appeal her case to the Board of Immigration Appeals.

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58. *Id.*

59. MARTIN ET AL., *supra* note 55, at 80.

60. *Id.* at 80. ICE—Bureau of Immigration and Customs Enforcement, Department of Homeland Security. *See id.* at x. "Created in 2003, this bureau houses interior enforcement functions transferred from the former [INS], including investigations, detention and removal, [as well as] the trial attorneys who represent the government in immigration court." *Id.*

61. *Id.* at 80. Typically the alien makes known at the master calendar hearing—the first appearance in immigration court—"her wish to seek asylum [or withholding] as a form of relief from removal, and the judge then grants a specified period of time for [the] completion of the [Form] I-589, to be filed with the immigration court." MARTIN ET AL., *supra* note 55, at 80.

62. *See* Bennett, *supra* note 6, at 284.

63. *Id.*

> Only one BIA exists and it reviews all appeals from immigration courts throughout the United States.[64]

The BIA is "an administrative appeals tribunal that is part of the Executive Office for Immigration Review in the Department of Justice (EOIR). The [BIA] has never been recognized by statute; it is entirely a creature of the Attorney General's regulations, and the Attorney General appoints its members."[65] "The BIA has several options [with respect to the appeals]: [i]t can reject the [claim] on appeal, [it may] remand a case to the [IJ] with instructions to follow [an] appropriate course of action, or [it may] grant asylum directly."[66] Although "[t]he BIA hands down a large volume of appellate decisions each [year,] [o]nly a small fraction are designated as precedent decisions for inclusions in the official reports."[67]

If the BIA rules against the claim, judicial review may be available to the claimant by bringing an appeal "to the Federal circuit court of appeals that has jurisdiction over the area from which the case originated."[68] The circuits have a number of options with respect to adjudicating the case if an appeal is taken.[69] In some cases, the case may be remanded back to the BIA with orders to rule in accord with the circuit's findings.[70] The Court may adopt a different rule of the case.[71] "[I]f a circuit court of appeals adopts a different rule than the BIA, the new rule will be applied within that court's circuit in future cases. As a result, circuit splits [have arisen] because of inconsistent rulings among the circuit courts regarding the same legal issue."[72]

D. *The Statistics on Grants of Asylum*

"The [USCIS] . . . does not break down its general asylum statistics according to the basis of the claim, [thus,] there are no official statistics available to indicate the number of sexual orientation [and gender violence] claims filed or approved."[73] However, USCIS makes available other infor-

64. *Id.*
65. MARTIN ET AL., *supra* note 55, at 83.
66. Bennett, *supra* note 6, at 285.
67. MARTIN ET AL., *supra* note 55, at 83.
68. Bennett, *supra* note 6, at 285.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. Morgan, *supra* note 37, at 141–42.

mation such as "the characteristics of asylum seekers."[74] The trend reveals that grants of asylum are on an upswing.[75]

The *Annual Flow Report of Refugees and Asylees*: *2006*, published by the Office of Immigration Statistics of the U.S. Department in May of 2007, reveals, more specifically:

> The total number of persons [who were] granted asylum in the United States increased from 25,160 in 2005 to 26,113 in 2006. The number of persons who were granted asylum affirmatively through USCIS decreased from 13,423 in 2005 to 12,873 in 2006. Conversely, the number of persons granted asylum defensively through an [i]mmigration [c]ourt increased 13 percent from 11,737 in 2005 to 13,240 in 2006. The leading countries of origin for persons granted asylum in 2006 were China (21 percent), Haiti (12 percent), Colombia (11 percent), and Venezuela (5.2 percent). These [four] countries accounted for the origin of nearly 50 percent of the asylees.[76]

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74. *Id.* at 142.

75. *See* KELLY JEFFERYS, U.S. DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2006 5 (2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsyleeSec508Compliant.pdf. On November 15, 2007, this author had the opportunity to have a telephonic interview with Attorney Victoria Neilson, who is the Legal Director of Immigration Equality. "Immigration Equality is a national organization" based in New York City "that works to end discrimination" under U.S. immigration laws for lesbian, gay, bisexual, and transgender immigrants and those immigrants who may be HIV positive, and "to help obtain asylum for those [who are] persecuted in their home country based on their sexual orientation." *See generally* Immigration Equality, ImEq Mission, http://www.immigrationequality.org/template.php?pageid=8 (last visited Apr. 16, 2008). Attorney Neilson maintains that her organization has seen an increase of asylum claims based on sexual orientation over the years since the organization was founded in 1994. Telephone Interview with Victoria Neilson, Legal Director, Immigration Equality, in New York City, N.Y. (Nov. 15, 2007) [hereinafter Neilson Interview]. She further advised that in the last year, Immigration Equality has handled approximately seventy-five GLBT asylum cases and has had a very high success rate in winning asylum. *Id.* She also advised that two-thirds of the cases won were affirmatively filed cases. *Id.* One-third of the cases won were by a defensive filing while the claimants were in removal proceedings. *Id.* She opined that their success rate in gaining asylum resulted because they do not accept every GLBT case that comes to them. *Id.* Instead, they accept only the cases they believe likely will merit a grant of asylum. Neilson Interview, *supra*. It was also her opinion that agencies such as Immigration Equality have attorneys who prepare their affirmatively filed cases very well with ample documentation. *Id.* Such agency attorneys are well prepared for trials in the defensively filed cases. *Id.* It is her observation that IJs love to see such level of preparation and trial skill. *Id.*

76. JEFFERYS, *supra* note 75, at 5.

> The largest percentages of individuals granted asylum [in 2006] affirmatively were living in Florida (41 percent) and California (24 percent). Sixty-five percent of affirmative asylees were located in one of these two states. Other major . . . states included New York (10 percent),

Demographic data for 2006 only includes that of affirmative asylees.[77] "Of the 12,873 persons granted asylum affirmatively . . . 80 percent were between the ages of 18 and 54. Fifteen percent were under 18 years of age, and individuals aged 55 or over accounted for less than 5 percent . . . [48] percent were married and 48 percent were single."[78]

"In 2006, 53 percent of affirmative asylees were male."[79] "According to 2003 statistics, male applicants filed sixty-two percent of . . . new asylum claims."[80] This indicates that more women appear to have won asylum claims in the United States if they received 47% of the affirmative applications in 2006.[81] Nevertheless, "[t]he lack of a [specific] data breakdown" for claims of asylum for gender based violence

> makes it impossible to estimate the number of women who apply for asylum on [this] basis; however, it is likely that male applicants outnumber [women] . . . by a considerable margin. The fact that . . . landmark cases in the area of sexual orientation asylum law [mostly] deal with male applicants appears to bolster this assertion.[82]

"[I]t is likely that a large proportion of sexual orientation" and gender violence grants of asylum were to people of color.[83] The statistics indicate that in 2006, 21.3% of the asylum claims were granted to people from China, approximately 11.5% of such claims were awarded to Haitians, 3% went to Ethiopians, 2.8% to Indonesians, and 2.2% to people from Cameroon.[84]

III. PROBLEMS IN ADJUDICATIONS

A. *Persecution*

Problems and inconsistencies prevail in asylum adjudications for a number of reasons, including lack of definitions for certain statutory words. "Under both asylum and withholding of deportation, the [claimant] must

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Maryland (4.1 percent), Washington (2.1 percent), Virginia (1.9 percent), and Georgia (1.5 percent).

Id. at 6.

77. *Id.* at 5.
78. *Id.*
79. *Id.*
80. Morgan, *supra* note 37, at 142.
81. *See* JEFFERYS, *supra* note 75, at 5.
82. Morgan, *supra* note 37, at 142–43.
83. *Id.* at 142.
84. JEFFERYS, *supra* note 75, at 4.

show . . . that she [has] be[en] persecuted" in the past or will be persecuted in the future if forced to return to the country of origin.[85] Unfortunately, the statutes do not offer a definition of "persecution."[86] "The Ninth Circuit has [utilized a] very broad [definition of] persecution [as:] 'the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.'"[87] "[T]he First Circuit has [held] that a brief detention on several occasions did not rise to the level of persecution. Rather, persecution 'encompasses more than threats to life or freedom, but less than mere harassment or annoyance.'"[88]

"The Third Circuit . . . limits persecution to 'threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom.'"[89] The Ninth Circuit reminds us "that persecution must be inflicted either by the government or by groups that the national government was unwilling or unable to control."[90] "[W]here the source of the [persecution] is personal hostility, it is . . . considered outside [of] the realm of 'persecution,' [for statutory purposes] and asylum is denied."[91] This limitation on "persecution may be particularly disadvantageous to women" who are victims of gender violence in cultures where conditions for many women "are 'generally harsh,' and their basic rights are likely to be violated."[92] Such was the situation in the aforementioned case of *Ali v. Ashcroft*, the Somali woman who was raped by militia men from a rival clan who also shot and killed her brother in law.[93] The IJ denied her request for asylum on the ground that such persecution was not a result of her political opinion, but was instead a routine rape and burglary in a lawless country that has no functioning civil government.[94]

Analysis of persecution requires the IJ's, the BIA, and the courts to decide the motive of the persecutor. The United States Supreme Court held in

85. Farrone, *supra* note 2, at 672. *See also* 8 C.F.R. § 1208.13 (2007).

86. 8 C.F.R. § 1208.13. *See also* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2000); 8 U.S.C. § 1231(b)(3)(A) (2000).

87. Farrone, *supra* note 2, at 672 (quoting Desir v. Ilchert, 840 F.2d 723, 727 (9th Cir. 1988)).

88. *Id.* at 672–73 (quoting Fesseha v. Ashcroft, 333 F.3d 13, 18 (1st Cir. 2003)).

89. *Id.* at 673 (quoting Li Wu Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001)). In *Fatin v. INS*, Fatin was an American educated Iranian woman who feared persecution if she was deported to Iran because she did not want to have to cover herself in a chador in order to go out in public. 12 F.3d 1233, 1235–36 (3d Cir. 1993).

90. Farrone, *supra* note 2, at 673 (citing McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981)).

91. *Id.* (citing Zayas-Marini v. INS, 785 F.2d 801, 805–06 (9th Cir. 1986)).

92. *Id.*

93. Ali v. Ashcroft, 394 F.3d 780, 782–83 (9th Cir. 2005).

94. *Id.* at 785–86.

INS v. Elias-Zacarias[95] that a claimant is not required to provide direct proof of the persecutor's motivations, but a claimant "must [produce] some evidence of [the persecutors' motive whether] direct or circumstantial."[96] Yet, the question remains, does persecution require a "punitive intent"? Circuit courts have been split on this question of "punitive intent." It is a very important question when analyzing claims of asylum by sexual minorities. The Ninth Circuit has decided that a broader standard than mere intent to punish should be utilized in sexual minority cases.[97]

1. Punitive Intent: The Ninth Circuit

"In 1992, thirty-five-year-old Alla Pitcherskaia, a Russian national, claimed asylum in [the] United States" on the ground that she was persecuted in Russia because she was a lesbian.[98] In her trial, she recounted that she had been arrested several times for such things as "failing to procure required government permits for a gay-rights protest."[99] She suffered further harassment "including forced psychiatric counseling to 'cure' her . . . homosexuality."[100] Her claim for asylum was denied.[101] On appeal to the BIA, her claim was again denied on the ground

> that "even if her testimony is essentially credible," she had failed to meet her burden in establishing eligibility for relief under . . . the Act. The BIA majority concluded that Pitcherskaia had not been persecuted because, although she had been subjected to involuntary psychiatric treatments, the militia and psychiatric institutions intended to "cure" her, not to punish her, and thus their actions did not constitute "persecution" within the meaning of the Act.[102]

"The issue on appeal [to the Ninth Circuit] was whether the [INA] requires an applicant to prove that the persecutor 'harbored a subjective intent to harm or punish when persecuting the victim.'"[103] The court found the BIA's interpretation of persecution "to be 'arbitrary, capricious, [and] mani-

95. 502 U.S. 478 (1992).
96. *Id.* at 483 (emphasis omitted).
97. Saxena, *supra* note 10, at 346.
98. *Id.* at 346–47. *See* Pitcherskaia v. INS, 118 F.3d 641, 643 (9th Cir. 1997)).
99. Saxena, *supra* note 10, at 346–47; see *Pitcherskaia*, 118 F.3d at 644.
100. *Id.*
101. *Pitcherskaia*, 118 F.3d at 645.
102. *Id.*
103. Bennett, *supra* note 6, at 300 (quoting *Pitcherskaia*, 118 F.3d at 643).

festly contrary to the statute,' [which allowed] the court [to] overrule [the BIA's] definition and impose another."[104]

> [T]he court noted that neither the Supreme Court nor the Ninth Circuit has ever required an asylum applicant to show that her persecutor had the intention of inflicting harm or punishment. The court found that the term "punishment" implied that the perpetrator believed the victim did some wrong or committed a crime. As a result, the perpetrator . . . took action in retribution. Persecution, on the other hand, only required that the perpetrator caused the victim suffering or harm. Although many asylum cases involved situations where the persecutor had a subjective intent to punish, the court concluded that punitive intent was not required in order to establish persecution. In clarifying th[e] new legal standard, the court stated that the definition of persecution is objective.[105]

The court reversed the BIA and remanded the case "to the BIA for reconsideration [in light of the] opinion."[106]

2. Punitive Intent: The Fifth Circuit

Although the Ninth Circuit's definition of persecution appears reasonable, "disagreement[s] exist[] among the Circuits regarding [the] legal issue."[107] In *Pitcherskaia*, "the Ninth Circuit recognize[d] persecution as the infliction of suffering or harm in a way regarded . . . offensive to a reasonable person, [but] the Fifth Circuit finds persecution only when the perpetrator acts with . . . intent to punish the victim."[108] In defining its own standard, the Ninth Circuit, in *Pitcherskaia*, expressly rejected the punitive intent requirement that the Fifth Circuit applied in *Faddoul v. INS.*[109]

Joseph Faddoul, a thirty-three year old man of Palestinian ancestry who was born in and raised in Saudi Arabia, "alleged that he was persecuted by the Saudi Arabian practice of *jus sanguinis*, granting citizenship rights only to residents of Saudi Arabian ancestry."[110] He alleged further "that as a noncitizen living in Saudi Arabia he would be unable to own property or busi-

104. *Id.* at 300–01. (quoting *Pitcherskaia*, 118 F.3d at 646).
105. *Id.* at 301 (citing *Pitcherskaia*, 118 F.3d at 646–48).
106. *Pitcherskaia*, 118 F.3d at 648.
107. Bennett, *supra* note 6, at 303.
108. *Id.* (citing *Pitcherskaia*, 118 F.3d at 648 n.9; Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994)).
109. *Pitcherskaia*, 118 F.3d at 648 n.9. *See also Faddoul*, 37 F.3d at 188.
110. Saxena, *supra* note 10, at 348 (citing *Faddoul*, 37 F.3d at 188).

nesses or attend" university and as a result this constituted persecution.[111] "The Fifth Circuit affirmed the BIA's denial of . . . Faddoul's asylum [claim] and held that persecution required both a showing of the infliction of harm and intent to punish on one of the five protected . . . grounds" set out in the statute.[112] In *Faddoul*, the court noted that he "receive[d] the same rights and [was] subject to the same [discrimination] as a Saudi-born Egyptian."[113] The court found no evidence that Faddoul had ever been "arrested, detained, interrogated, or . . . harmed" because of his ancestry.[114] This distinction in definitions of persecution may be especially important to sexual minorities. In many countries, LGBT persons "may be abused because of their sexuality, [yet] the specific intent to punish is not always present, as in *Pitcherskaia*."[115]

3. Punitive Intent: The Seventh Circuit

> The Seventh Circuit has adopted a position [that may lie between] the Fifth and Ninth Circuits. In *Sivaainkaran v. INS*,[116] the court ruled that an asylum [claimant] could demonstrate persecution by a showing of either the persecutor's motivation to punish or, more generally, the infliction of harm for one of the five protected . . . grounds [of the statute]. . . . The specific use of the term "punishment" suggests that, for the second requirement, "infliction of harm," punitive intent is not required. . . . The Seventh Circuit's definition comes from a 1970 case in the Sixth Circuit, a jurisdiction that has yet to address the question of punitive intent and uses the Webster's Dictionary definition of persecution.[117]

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111. *Id.* (citing *Faddoul*, 37 F.3d at 187).

112. *Id.* (citing *Faddoul*, 37 F.3d at 188).

113. *Faddoul*, 37 F.3d at 189.

114. *Id.* at 188.

115. Saxena, *supra* note 10, at 348–49. *See* Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).

116. 972 F.2d 161 (7th Cir. 1992).

117. Saxena, *supra* note 10, at 349. "'Persecution' is not defined in the Act, but we have described it as 'punishment' or 'the infliction of harm' for political, religious, or other reasons that are offensive." *Sivaainkaran*, 972 F.2d at 164 n.2.

> No doubt 'persecution' is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience. But there is nothing to indicate that Congress intended section 243(h) to encompass any less than the word 'persecution' ordinarily conveys—the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.

Berdo v. INS, 432 F.2d 824, 846 (6th Cir. 1970).

"Future consequences of decisions such as [the one to reverse Pitcherskaia's BIA denial of asylum] must be taken into account."[118]

> Nations have human rights laws to protect their citizens as well as the citizens of other nations. If people were able to [circumvent] these laws by simply stating that they were "curing" someone to correct what they saw as a problem, [such] laws would be totally useless. . . . If nations [were] allowed to torture their own people to "cure" sexual orientation, it is impossible to know where the line will be drawn. . . . [T]he inclusion of a punishment requirement in the determination of whether [there should be a grant of] asylum based on persecution [should] not [be] feasible [in all circuits].[119]

B. *Lack of Precedent and Published Opinions*

Very few IJ court decisions are published each year. As a result of the lack of published opinions, it is difficult to determine or analyze whether important precedents have been established in the system. The "decisions based on sexual orientation [and gender based violence against women] at the Board of Immigration Appeals, which does publish a significant number of decisions, indicates that [the] decisions in the United States display significant variation . . . ."[120]

Both the claimant and the government can appeal an IJ's trial decision to the BIA.[121] "The Attorney General is authorized to assign as precedent or overrule any decision made at the BIA level."[122] The claimant can then appeal directly to the relevant federal circuit court, whose decision will be binding on the BIA in that circuit.[123]

Stuart Grider, another commentator on Immigration Court and BIA proceedings advises:

> The EOIR is authorized to publish its decisions selectively and thereby establish precedential value for individual BIA level rulings at its discretion. Few BIA decisions are released; one scholar has reported that only about fifty of the four thousand decisions made each year by the BIA are actually published. [A] vast majority of these published cases are decisions

118. Kristie Bowerman, Note, Pitcherskaia v. I.N.S.: *The Ninth Circuit Attempts to Cure the Definition of Persecution,* 7 LAW & SEX 101, 110 (1997).

119. *Id.*

120. Swink, *supra* note 40, at 263.

121. Stuart Grider, Recent Development, *Sexual Orientation as Grounds for Asylum in the United States*—In re Tenorio, *No. A72 093 558 (EOIR Immigration Court, July 26, 1993)*, 35 HARV. INT'L L.J. 213, 215 (1994).

122. *Id.* (citing 8 C.F.R. § 3.1(h) (1992)).

123. *Id.*

> where asylum is denied, which creates a system in which it is nearly impossible for the [claimant], or the immigration judge, to discern clear standards necessary to establish a successful asylum claim. In addition, the few evidentiary and other standards that have been established clearly by published precedent or recent revisions to the administrative code are [often] ignored by immigration judges in favor of outdated or overturned standards. [Since] the vast majority of [asylum] cases are not appealed, outdated procedures persist and dictate the outcome of most cases. [This leaves the local IJ] with broad discretion [but] very little guidance regarding the exercise of that discretion.[124]

Hence, often justice will not prevail in many cases, particularly cases involving sexual minorities and victims of gender based violence.

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124. *Id. See, e.g.*, Swink, *supra* note 40, at 264–65. Swink discusses an unpublished IJ opinion in his possession that gave a "detailed analysis [of] the intersection of gender and sexual orientation in Peru." Swink, *supra* note 40, at 265. The case was heard by an IJ in San Francisco, and involved an asylum claim by a lesbian woman from Peru. *Id.* at 264.

> In this case, the [claimant] had not come out as a lesbian while in Peru, but had done so after developing a relationship with another woman while visiting the United States. The Immigration Judge (IJ) described a "strong level of social opprobrium against homosexuals in Peru, as well as a certain level of violence." The IJ noted that "while homosexuality is legal in Peru," homosexuals are excluded from certain areas of employment and may be fired if their sexual orientation is revealed. This was the case for 117 foreign diplomats relieved of their positions by former President Alberto Fujimori, who also "referred to homosexuality as a type of 'subversion' that the state needed to abolish." The [IJ] specifically noted the significance of such anti-gay rhetoric from Peru's highest elected official with regard to respondent's prospects for state protection: "President Fujimori's negative words about homosexuals represented the Peruvian government's antipathy for homosexuals and the lack of protection Respondent can expect if she suffers persecution."

Id. Swink opines that:

> [the] decision [in this case] is notable for its comprehensive assessment of the social situation of homosexuals, as a class, within Peru. After describing the hostile economic and political climate, the [IJ] went on to discuss the centrality of the Catholic Church in the Peruvian Constitution and the significance of religious antipathy towards gays as it relates to the individual asylum seeker. Specifically, the court noted that the asylum seeker in this case was "a devout Catholic" who regularly attended church while growing up and with her partner while in the United States. The court also discussed other forms of persecution to which homosexuals in Peru have been subject, most notably forced sterilization, violent raids on nightclubs, and uninvestigated attacks by a gang known as "The Fagkillers."

Id. at 264–65. Although it is unclear whether there was a grant of asylum or withholding of removal, Swink is complimentary of the IJ in this case, because he or she wrote such a "nuanced and detail-oriented analysis" of the facts and country conditions in the analysis of this case. *Id.* at 264.

C. *Social Group*

Among the problems in adjudicating asylum cases, "has been the shifting scope of the 'particular social group' standard: in order to be eligible for asylum, refugees must belong to a particular social group if they do not qualify under" the other protected categories "of race, religion, nationality . . . or political opinion." [125] We know that in 1994, the Attorney General designated the *Toboso-Alfonso* case as precedent for the proposition that homosexuals, who had been persecuted in their country of origin, could be recognized "as a particular social group . . . in all proceedings involving [issues of persecution involving] the 'same issue or issues.'"[126]

Until 2001, there had been "two seemingly conflicting standards for defining a 'particular social group.'"[127] The first was the standard which was derived from the BIA in its 1985 case of *In re Acosta*.[128] In *Acosta*, the BIA upheld the IJ's denial of asylum to a thirty-six year old man from El Salvador who was in deportation proceedings.[129] Among his claims for asylum was the proposition that he was a member of "a particular social group" of young taxi drivers, in the capital city of San Salvador, in the taxi cooperative known as COTAXI, who feared persecution at the hands of guerrillas who wanted to disrupt the public transportation system of the country.[130] The BIA held that:

> "[P]articular social group" . . . mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship, . . . or in some circumstances it might be a shared past experience such as former military leadership or land ownership.[131]

125. Recent Case, *Immigration Law—Asylum—Ninth Circuit Holds That Persecuted Homosexual Mexican Man with a Female Sexual Identity Qualifies for Asylum under Particular Social Group Standard*—Hernandez-Montiel v. INS, *225 F.3d 1084 (9th Cir. 2000)*, 114 HARV. L. REV. 2569, 2569 (2001) [hereinafter Recent Case].

126. Saxena, *supra* note 10, at 343. *See also In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 820 (B.I.A. 1990).

127. Recent Case, *supra* note 125, at 2571.

128. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). *See also* Recent Case, *supra* note 125, at 2570–71.

129. *Acosta*, 19 I. & N. Dec. at 213.

130. *Id.* at 216–17, 232.

131. *Id.* at 233.

Acosta's claim for asylum on this ground was denied because his membership in a taxi cooperative was not an immutable trait.[132] The court indicated that he could leave the cooperative, change jobs, and move to another part of the country, and he would not be a possible target of guerilla persecution.[133] In 1986, the Ninth Circuit Court of Appeals departed from the *Acosta* standard in *Sanchez-Trujillo v. INS*,[134] another case involving a claimant from El Salvador who feared return to his homeland because he might be drafted by the government there to fight against the guerillas.[135] In deportation proceedings, Sanchez-Trujillo sought asylum on the ground that he would be persecuted if deported to El Salvador on account of the fact that he was a member "of a 'particular social group,' [to wit: a group] of young, urban, working class males of military age who had never served in the military or otherwise [supported] the government."[136] The court rejected his claim of asylum and held that:

> [T]he phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.[137]

Hernandez-Montiel was a native of Mexico who filed for asylum on the ground that he was persecuted in Mexico on account of his homosexuality and his female sexual identity, a particular social group.[138] He testified at trial "that, at the age of eight, he 'realized . . . [he] was attracted to people of [his] same sex' [and a]t the age of 12, [he] began dressing and behaving as a woman. He faced numerous reprimands from family and school officials because of his sexual orientation."[139] He was also abused and sexually assaulted by Mexican police officers.[140] He subsequently "fled to the United States."[141] His asylum claim was denied by the IJ and his appeal was re-

132. *Id.* at 234.
133. *Id.* at 234, 236.
134. 801 F.2d 1571 (9th Cir. 1986).
135. *See id.* at 1573.
136. *Id.*
137. *Id.* at 1576 (emphasis omitted).
138. Hernandez-Montiel v. INS, 225 F.3d 1084, 1087–89 (9th Cir. 2000), *overruled by* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005).
139. *Id.* at 1087–88.
140. *Id.* at 1088.
141. *Id.*

jected by the BIA.[142] "The BIA found that Hernandez-Montiel did not meet his burden of 'establishing that the abuse he suffered [in Mexico] was because of his membership in a particular social group,' which [they] classified as 'homosexual males who dress as females.'"[143] The court concluded:

> that the "tenor of [his] claim [was] that he was mistreated because of the way he [was] dressed (as a male prostitute) and not because he [was] a homosexual." [T]he BIA found that [he] failed to show that "his decision to dress as a female was an immutable characteristic."[144]

The Ninth Circuit Court of Appeals in *Hernandez-Montiel v. INS*,[145] reconciled the *Acosta* and the *Sanchez-Trujillo* definitions of a particular social group into "one expansive standard, holding that a particular social group 'is one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.'"[146] "*Hernandez-Montiel* [represents] an important development because it defines 'particular social group' in a way that embraces individuals who are actually persecuted—even if they fail to qualify for asylum under the statute's other enumerated categories."[147] Such a standard "provides a mechanism that meets the needs of those who do not fit neatly into a particular racial or religious group, but who are [still] persecuted [on account] of something immutable or fundamental to their persons."[148]

The Ninth Circuit held that it was not just his dress that was critical for the particular social group requirement.[149] Instead, the Court found that Hernandez-Montiel's female sexual identity was so basic to him that either he could not change it or "[he] should not be required to change [it]."[150] The implication of such a standard is readily apparent in asylum claims based on sexual orientation or gender violence.

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142. *Hernandez-Montiel*, 225 F.3d at 1089.
143. *Id.*
144. *Id.* at 1089–90.
145. 225 F.3d 1084 (9th Cir. 2000).
146. Recent Case, *supra* note 125, at 2571 (quoting *Hernandez-Montiel*, 225 F.3d at 1093 (emphasis omitted)).
147. *Id.* at 2573.
148. *Id.*
149. *Hernandez-Montiel*, 225 F.3d at 1094.
150. *Id.*

Recent cases such as *Reyes-Reyes v. Ashcroft*[151] and *Molathwa v. Ashcroft*[152] demonstrate, however, that despite the "particular social group" claims, asylum may still be denied if there is not credible, and sometimes, strong evidence of past persecution because of homosexual activity or abuse for being a homosexual.[153] Insufficient evidence of past harassment or mistreatment by the government or the public will usually warrant a denial of asylum.[154]

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151. 384 F.3d 782 (9th Cir. 2004).

152. 390 F.3d 551 (8th Cir. 2004).

153. *Reyes-Reyes*, 384 F.3d at 787–88; *Molathwa*, 390 F.3d at 554. "Luis Reyes-Reyes, a citizen of El Salvador, fled to the United States as a teenager. . . ." *Reyes-Reyes*, 384 F.3d at 785. He lived in this country for twenty-five years until placed in removal proceedings. *Id.* "Reyes is a homosexual male with a female . . . identity. He dresses and looks like a woman, wearing makeup and a woman's hairstyle. . . . [He] has not undergone sex reassignment surgery, [but] has . . . characteristically female . . . mannerisms and gestures . . . ." *Id.* "When [he] was thirteen and living with his [parents] in San Salvador, he was kidnaped [sic] by a group of men, taken to a remote location in the mountains, and raped and beaten because of his homosexual orientation. Reyes's attackers threatened future brutality if he reported their [activity]." *Id.* He never did until his removal proceedings. *Id.* The IJ denied his claim for asylum on the ground that it was not timely filed, that is, within one year from the date of April 1, 1997. *Reyes-Reyes*, 384 F.3d at 785. The IJ also found that he "failed to state that anyone in the government or acting on behalf of the government tortured him." *Id.* The BIA affirmed the IJ denial. *Id.* at 786. The Ninth Circuit Court of Appeals found it lacked jurisdiction to overturn the denial of asylum because of the late filing, but remanded the case to the BIA to determine whether he was eligible for relief under the Convention Against Torture or withholding of removal. *See id.* at 789.

154. *See id.*; *Molathwa*, 390 F.3d at 554. "[Mareko] Molathwa, a native of Botswana, entered the United States . . . as a nonimmigrant visitor." *Id.* at 552. He overstayed his visa and was placed in removal proceedings. *Id.* He filed a claim for asylum testifying that "he had been married" in Botswana, but that his wife divorced him when he entered into

> a romantic relationship with another man, Berger Hartlebrakke. . . . [W]hile Molathwa and Berger were living together in Botswana, police officers entered [their] apartment without a warrant. The police . . . said they were doing "routine checks" for drugs, but never searched the apartment for drugs. Molathwa claim[ed] the incident was merely a pretext to harass him and Berger because of their sexual orientation.

Id. A number of his friends in Botswana experienced beatings, arrest and jailing for several days "for engaging in homosexual activity;" one of these men subsequently committed suicide due to the "disgrace from being exposed as a homosexual." *Id.* Although Molathwa, a teacher, suspected that people in Botswana "knew he was a homosexual, he never experienced . . . problems at work." *Molathwa*, 390 F.3d at 552. He feared being returned to Botswana because in Botswana "homosexuals are blamed for . . . AIDS, and for natural disasters;" he feared that "others would beat him to death to save Botswana from epidemics." *Id.* The IJ denied his claim of asylum. *Id.* at 553. The BIA affirmed. *Id.* The Eighth Circuit Court of Appeals denied his petition for review, even though the court assumed, for purposes of his appeal, that "homosexuals are a particular social group eligible for relief." *Id.* at 553–54. The court found that Molathwa had not proven that "it was more likely than not [that] he would be subject to persecution in Botswana" because the "warrantless entry into [his] apartment . . . was an isolated event and did not involve violence, threats, intimidation . . . or even a search."

Despite the *Kasinga* decision, discussed in the introduction of this article, which designated FGM a form of persecution and found that young Togolese women who had not undergone such process and opposed it could be "a particular social group," claims by women seeking asylum as a result of gender based violence have not always fared well. In 1995, a Guatemalan woman, R.A., sought asylum in the United States.[155] She had fled her country to escape a husband who for years had abused her, beaten her, kicked her in her vagina, raped and sodomized her, and had threatened to kill her.[156] The police would not help her.[157] The IJ found her testimony credible and granted asylum on the grounds that she was a member of a "particular social group of 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.'"[158] The IJ "found that such a group was cognizable and cohesive, as members shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practice[ed] male domination through violence."[159] The BIA reversed this decision and the reversal was affirmed by the Attorney General.[160] The BIA held that "'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination' [are] not a particular social group."[161] "Absent from this group's makeup is 'a voluntary associational relationship' that is of 'central concern' in the Ninth Circuit."[162]

Earlier, in 1990, a Salvadoran woman had been denied asylum as not being in a cognizable particular social group.[163] "[Carmen] Gomez was born

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Molathwa, 390 F.3d at 554. Further he had never been charged with a crime or detained by police. *Id.*

155. *In re* R-A-, 22 I. & N. Dec. 906, 909 (B.I.A. 2001).

156. *Id.* at 908.

157. *Id.* at 909.

158. *Id.* at 911.

159. *Id.*

160. R-A-, 22 I. & N. Dec. at 927–28.

161. *Id.* at 911.

162. *Id.* at 917 (citing Li v. INS, 92 F.3d 985, 987 (9th Cir. 1996)); The court also found:

> [T]hat the respondent has been the victim of tragic and severe spouse abuse. We further find that her husband's motivation, to the extent it can be ascertained, has varied; some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of psychological disorder, pure meanness, or no apparent reason at all. . . . [w]e are not persuaded that the abuse occurred because of her membership in a particular social group or because of an actual or imputed political opinion. We therefore do not find respondent eligible for asylum.

Id. at 927.

163. Gomez v. INS, 947 F.2d 660, 662–63 (2d Cir. 1991).

in El Salvador and" lived there until she was eighteen.[164] "Between the ages of twelve [to] fourteen [she] was raped and beaten by guerilla forces on [each of] five . . . occasions."[165] After living in the United States for almost a decade, she pled guilty to a "sale of a controlled substance," served time in jail, and was placed in deportation proceedings.[166] She claimed asylum on the ground of fear of persecution because she was a member of a particular social group: "women who have been previously battered and raped by Salvadoran guerillas."[167] The IJ denied her claim of asylum.[168] The BIA affirmed.[169] The Second Circuit Court of Appeals dismissed her petition on the grounds that "Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics—other than gender and youth—such that would-be persecutors could identify them as members of the purported group."[170]

There have been several recent cases, cited below, wherein women who have been subjected to gender based violence have been granted asylum on the grounds that they were members of a particular social group, or on other grounds found in their cases.[171]

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164. *Id.* at 662.

165. *Id.*

166. *Id.*

167. *Id.* at 663–64.

168. *Gomez*, 947 F.2d at 663.

169. *Id.*

170. *Id.* at 664. The court further held:

> Indeed, there is no indication that Gomez will be singled out for further brutalization on this basis. Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman.

Id.

171. *See, e.g.*, Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997). In this case, a Bulgarian woman claimed asylum based on past persecution on an account that she was sexually assaulted by a state security officer, which caused her to flee Bulgaria. *Id.* at 783. The Seventh Circuit vacated and remanded her BIA denial of asylum on the ground that she may have been persecuted because of her Macedonian nationality. *Id. See also* Shoafera v. INS, 228 F.3d 1070 (9th Cir. 2000). In *Shoafera*, the claimant, an Ethiopian woman of Amharic ethnicity, petitioned for review of her denial of asylum by the BIA. 228 F.3d at 1072. The Ninth Circuit held that her rape by a government official of Tigrean ethnicity, who was her boss, was motivated at least in part by the applicant's Amharic ethnicity, and that she was persecuted on account of her nationality and remanded the case to the BIA. *Id.* at 1072, 1076. *See also* Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003) (involving a claim of asylum by a twenty-eight year old woman from the Democratic Republic of the Congo, where she was raped and imprisoned by soldiers during that country's civil war in 2000). The Third Circuit in *Zubeda* vacated and remanded the BIA's order denying asylum and withholding of asylum providing

IV. RECENT CASES AND THEIR IMPLICATIONS

The foregoing demonstrates that the United States continues to be a country which will accept and give asylum to those who flee persecution in their homelands, even if that persecution is a result of sexual orientation or gender based violence against women. It is apparent that not all LGBT persons or abused women obtain asylum status, but from a human rights point of view, we remain a safe haven where people of all sexual orientations can seek justice if they believe they have been persecuted.

The lack of precedent and the discretionary power of IJ's in asylum cases, and the other aforementioned problems with adjudication, make it difficult to readily predict how such cases may be decided before filing.[172] This may be by design because many asylum seekers are not represented by counsel.[173]

Nevertheless, practitioners who do file claims for affirmative asylum or who represent claimants already in removal proceedings, are best advised to work to insure their efforts of gaining asylum for those they do represent. In this regard, it is advisable that counsel work with the claimant to prepare an affidavit which recounts the claimant's background and recounts in detail each instance of persecution encountered in the country of origin.[174] Attached to the affidavit should be as much documentary evidence as possible—relevant to the claim of asylum and that will support the claimant's position—such as newspaper articles, photographs, hospital reports, and any evidence one can discover on the country of origin's conditions and how that country treats LGBT persons.[175] This section will examine two recent cases concerning gender based violence and sexual orientation, respectively, and may be helpful to practitioners and scholars interested in asylum law.

A. *Deqa Ahmad Haji Ali*

As recounted earlier in this article, Deqa Ahmad Haji Ali was a Somali woman who was granted asylum in the United States in 2005.[176] Her story is

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only a minimal analysis of Zubeda's claims of degrading treatment or punishment under the Convention Against Torture. 333 F.3d at 478–80.

172. *See* LEGOMSKY, *supra* note 3, at 980.

173. *Id.* at 1026.

174. *Id.* at 981.

175. *See id.* at 1021.

176. *See* Ali v. Ashcroft, 394 F.3d 780, 782 (9th Cir. 2005).

filled with instances of cruelty, anguish, and redemption.[177] "After two merit[] hearings, the IJ issued an oral decision . . . denying" the asylum request.[178] The IJ found her ineligible for asylum on the ground that "she failed to establish past persecution on account of a protected basis" as required by the statute.[179] "Instead, the IJ [ruled] that the sole motivation for the murder, detention, and robbery . . . 'was shown to clearly be simply to steal, and in the case of the rape to take gratification from the helpless condition of the respondent.'"[180] "The BIA affirmed the IJ without [a written] opinion."[181]

It is not completely clear whether Ali had sought asylum at the hearing level on the ground of her nationality—as a member of the Muuse Diriiye

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177. *See id.* at 782–83. Ms. Ali "was born in Berbera, a northern Somali city." *Id.* at 782. Somalia society is made up of a number of clans and sub-clans. *Id.* There is no functioning central civil government in the country. *See id.*

> [She] is a member of the Muuse Diriiye clan, which is referred to pejoratively as the Midgan clan. Muuse Diriiye clan members are bound in servitude to noble Somali families and are considered low-caste and subhuman by other Somali clans . . . . Traditionally, the Muuse Diriiye had no rights to engage in political activities or undertake political work, but under the presidency of Mohammed Siad Barre they were allowed to assume political positions for the first time. [The] opening of civil service positions to a non-noble clan angered higher-status clans, including members of the United Somali Congress (USC) militia that ousted Siad Barre in a civil war in 1991.

Ali, 394 F.3d at 782. Siad Barre fled Somalia and clan warfare has continued to rage there. *Id.*

> [Ali's] husband, Ahmed Omar Osman, . . . [is] also a member of the Muuse Diriiye clan, [and] worked for the Ministry of Education under the administration of President Mohammed Siad Barre. In early January 1991, six armed members of the USC militia broke into Ali's home around sunrise. Ali recognized one of the intruders as a neighbor who knew that Ali's husband worked for Siad Barre. Ali was brutally gang-raped by three of these armed men while her husband and brother-in-law were bound and forced to watch. While they were raping Ali, the persecutors called Ali and her family "Midgans [sic] traitor" and told her she was "getting what [she] deserved" because she and her family were Muuse Diriiye, who were not supposed to advance in society, while the militia, members of higher-class clans, "were supposed to have everything . . . . When Ali's brother in law cursed and spit on the militia for raping her, he was shot dead in front of her."

Id. at 782–83.

> The militia also looted Ali's home, taking everything of value and destroying her household decorations. After raping Ali, the militia took her husband with them and said "let Siad Barre save you now . . . . We came back to our country, you Midgan you have everything, but now we are in power and Siad Barre is gone." Ali's two sons, age eight and nine at the time, were in another room of the family home during these brutal rapes and murder.

Id. at 783. "Osman was released from detention by the militia after two weeks, and came home with broken ribs and wrists. Upon his release, Ali, Osman, and their sons immediately fled to Ethiopia." *Id.* Upon arriving in Ethiopia, Osman divorced Ali because she had been raped. *Ali*, 394 F.3d at 783.

178. *Id.* at 784.

179. *Id.*

180. *Id.*

181. *Id.*

clan, on account of her being in a particular social group—as a Midgan woman raped by USC militia members, upon an imputed political opinion, or upon all of these grounds.[182] In a noteworthy opinion, the Ninth Circuit disagreed with the IJ opinion that stated that she was not persecuted on account of one of the statutory grounds.[183] The court reversed the BIA and ruled that she had, in fact, suffered "past persecution on account of two protected grounds: 1) her political opinion; and 2) her membership in a particular social group."[184]

The court ruled that "[a]lthough the USC militia was not the ruling government in Somalia, its actions . . . [were] appropriately . . . considered persecution" because "groups seeking to overthrow a government can be non-state agents of persecution for asylum purposes."[185] "The USC [had been] involved in the overthrow of the Siad Barre administration."[186] The court saw that her persecution had been "on account of the political opinion [they] believed she held and [as a member of] a particular social group, her clan."[187] Here, the court seems to be mixing the protected classes in an unusual way. In other cases we have seen claimants attempting to delineate themselves as a particular social group such as: "young women [that] are members of the Tchamba-Kunsutu tribe of Northern Togo, who have not been subjected to [FGM] . . . and who oppose the practice,"[188] or "Guatemalan women who have been [abused by] male companions [that] believe women are to live under male domination,"[189] or "women who have been . . . battered and raped by Salvadoran guerillas" in the past and who fear such future persecution.[190] In the instant case, the court rolls it all into one concept expressing the notion that Ali's particular cognizable social group would be all members of the Muuse Diriiye who were helped by Siad Barre, and would have political opinions different from that of the USC and other clans that believe that the Muuse Diriiye should not rise in society.[191] This is a novel approach to finding persecution on both political opinion and particular social group grounds.

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182. *See Ali*, 394 F.3d at 784–85.
183. *Id.* at 785.
184. *Id.* at 787.
185. *Id.* at 785.
186. *Id.*
187. *Ali*, 394 F.3d at 785.
188. Juncker, *supra* note 18, at 259 (quoting *In re* Fauziya Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996)).
189. *In re* R-A-, 22 I. & N. Dec. 906, 911 (B.I.A. 2001).
190. Gomez v. INS, 947 F.2d 660, 663–64 (2d Cir. 1991). *See also* Lieberman, *supra* note 17, at 9–10.
191. *See Ali*, 394 F.3d at 783, 786.

The court relied heavily on the words said to Ali by her persecutors during her rape to determine that there was a political motivation to their actions.[192] Their words included statements such as: she was a "Midgans [sic] traitor" and that she was "getting what [she] deserved because she and her family were . . . not supposed to advance in society" since they were Muuse Diriiye; and finally, "let Siad Barre save you now. . . . We came back to our country, you Midgan you have everything, but now we are in power and Siad Barre is gone."[193]

The Ninth Circuit court also found that the IJ was incorrect when it held that the rape was for sexual gratification.[194] The court held that "[s]erious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall [into] this rule."[195] This particular rule was from a 1995 memorandum to all INS and asylum officers adjudicating claims from women.[196] Either the IJ had not read this important memorandum or ignored it.

Among the implications that we may draw from this case on asylum claims for women who are victims of gender based violence, is that IJ's may not have read the literature, regulations, and memoranda that would help them to justly and properly adjudicate cases that come before them. Thus, the attorney bringing such claims must be up to date on such literature, regulations, and memoranda concerning adjudicating claims by women and take them to the hearing and make them known to the IJ during the hearing or at sidebar. Another implication that comes from *Ali* is the obvious one: the claimant may have more than one statutory ground upon which persecution can be founded.[197] In *Ali*, there were both political opinion and particular social group grounds.[198] It should become a mantra to often be repeated by those who do political asylum work that the five grounds are: race, religion, nationality, political opinion, or a member of a particular social group.[199] One should attempt to help the claimant determine as many grounds as possible for which the claimant may have been, or will be, persecuted.

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192. *Id.* at 786.
193. *Id.* at 783 (alterations in original) (quotations omitted).
194. *Id.* at 787.
195. *Id.* (citing Memorandum from Phyllis Coven, Office of Int'l Affairs, U.S. Dep't of Justice, to ALL INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995) [hereinafter Coven Memorandum]) (quotations omitted).
196. *See* Coven Memorandum, *supra* note 195.
197. *See Ali*, 394 F.3d at 784–85.
198. *See id.* at 785.
199. *Id.* (citing 8 U.S.C. § 1101(a)(42)(A) (2000)).

An example might be that of the Ethiopian citizen of Oromo nationality who was persecuted by the Ethiopian government for seeking better political rights for the Oromo people.[200] She claimed persecution on account of the fact that she was persecuted: 1) because of her nationality, that is her Oromo nationality; 2) because of her religion in that she was a Muslim in a majority Christian country; and 3) on account of her political opinion, the fact she opposed the Ethiopian government because for years most Ethiopians viewed the Oromo as the "slave" caste of Ethiopia, much like the Muuse Diriiye are viewed in Somalia.[201]

The final implication that may be drawn from *Ali* is that this same result might not have been obtained if the case had been brought in a circuit other than the Ninth Circuit.[202] Although the facts of *Ali* are compelling, and it is natural to believe that such a case warranted a grant of asylum, this may not have been the case if this had been heard by the Fifth Circuit, where the persecution must be performed with a "punitive intent."[203] Were the six USC militia men who broke into Ali's home, raped her, shot her brother in law, and stole their belongings acting to punish her?[204] The words of the milita men could be so construed to understand that they were punishing her for trying to rise in society. However, the "punitive intent" requirement of the Fifth Circuit could well allow a DHS attorney in the Fifth Circuit to argue that this was nothing more than a rape and burglary done for sexual gratification and pecuniary gain, and not a punitive act of persecution because of political opinion or social group, since the words of the militia men were nothing more than harassment of a helpless victim.

B. *Nasser Mustapha Karouni*

The *Karouni* case is also a Ninth Circuit case from 2005, and involved an "outed" gay, Shi'ite Muslim man from Lebanon afflicted with HIV, who was able to show that his fear of future persecution was well founded.[205] The

200. This example derives from an actual case in which the author represented an asylum claimant from Ethiopia who was awarded asylum on the ground that she was persecuted on account of her nationality, religion, and political opinion. The opinion was unpublished in the matter of Roman H. Abadir, A 29 015 236 (1995).

201. *Id.*

202. *Compare Ali*, 394 F.3d at 780, *with* Pitcherskaia v. INS, 118 F.3d 641, 648 (9th Cir. 1997), Faddoul v. INS, 37 F.3d 185, 193 (5th Cir. 1994), *and* Sivaainkaran v. INS, 972 F.2d 161, 166 (7th Cir. 1992).

203. *Pitcherskaia*, 118 F.3d at 646.

204. *See Ali*, 394 F.3d at 782–83.

205. Karouni v. Gonzales, 399 F.3d 1163, 1165–66 (9th Cir. 2005). "Karouni is a native and citizen of Lebanon who [legally] entered the United States in 1987," and was placed in

IJ denied his claim for asylum on the ground that Karouni had not established past persecution on account of his homosexuality and held with respect to future persecution "that Karouni's testimony was 'full of supposition and devoid of supporting facts.'"[206] "The IJ [also] found that Karouni failed to provide evidence to corroborate that Hizballah militants" had shot Karouni's cousin, "Khalil, in the anus and later [had murdered] him."[207] Karouni appealed "to the BIA, which . . . summarily affirmed the IJ."[208]

The Ninth Circuit held that the IJ's findings concerning the facts of Karouni's case were not supported by substantial evidence.[209] The court disputed the notion that Karouni should have corroborated the evidence of the shooting in the anus—and later the murder of Khalil—by reminding us that: "[t]he testimony of the applicant, if credible, may be sufficient to sustain the

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removal proceedings. *Id.* at 1166. At his hearing he sought asylum because he feared "persecut[ion] if removed to Lebanon because he [was] a homosexual, suffering from AIDS, and Shi'ite. . . . Karouni [had grown] up in the southern Lebanese province of Tyre," a region that is "controlled by an Islamic paramilitary organization named 'Hizballah.'" *Id.* "Hizballah applies Islamic law in [the] areas [it] control[s]." *Id.* at 1166–67 (internal citations omitted). "Under Islamic law, homosexuality . . . according to Karouni, [is a crime] 'punishable by death.'" *Id.* at 1167.

> Karouni stated in his asylum application that he has "always been gay." As a youth in the late-1970s, [he and his cousin Khaleil] spent time together secretly meeting other gay men. Sometime between the late-1970's and 1984, Khaleil's family learned that Khaleil was gay and ostracized him. In 1984, Khaleil was shot in the anus at his apartment, apparently by the Hizzballah because he was gay. Khaleil survived the injuries but, in 1986, was shot to death at his apartment, again apparently by the Hizballah. Karouni has also been the subject of anti-gay animus. In Fall 1984, two men armed with machine guns, "dressed in military garb," and identifying themselves as members of the Amal Militia, interrogated and attempted to arrest Karouni at his apartment after they learned that Karouni had been involved in a homosexual relationship with a man named Mahmoud. [He was] told to confess to the crime of homosexuality [and was asked] to name other homosexuals. [He] "feigned ignorance." An armed neighbor and friend of Karouni's interrupted the encounter and prevented the militia-men from arresting Karouni. Mahmoud was not as fortunate as Karouni: he was arrested and beaten by Amal militia-men and Karouni never saw him again. Karouni believe[d] that Mahmoud told . . . authorities that Karouni is gay. After Karouni's encounter with the militia-men . . . he avoided his apartment for [two] months and started "playing a straight life" by dating women. In 1987, shortly after Khaleil's murder, Karouni finally fled Lebanon for the United States. [He was compelled to return twice to see his dying father in 1992, and in 1996, to visit his mother who was ill. In his 1992 visit to Lebanon, he attended a handful of dinner parties with other homosexuals. After his return to the U.S. he learned] that at least three of the friends with whom he [had] dined were arrested, detained, beaten, and/or killed because they were gay. One of these friends, Andre Baladi, was arrested by . . . police because he [was] gay. [He] was jailed, beaten, and interrogated for names of other homosexuals . . . Karouni learned that during the interrogation, Baladi "outed" Karouni as a gay man . . . Karouni fears . . . he would be identified and persecuted for having associated with these homosexual friends [if removed to Lebanon].

Karouni, 399 F.3d. at 1167–69.

206. *Id.* at 1169.

207. *Id.* at 1173.

208. *Id.* at 1169.

209. *Id.* at 1173–74.

burden of proof without corroboration."[210] The court found that through his own testimony Karouni had presented substantial evidence that Hizballah had a military presence in his region of the country, and "that homosexuality [was] punishable by death," and that "state officials have arrested, beaten, and in some cases killed known or suspected homosexuals."[211] In particular, at his hearing "Karouni submitted [as evidence] a BIA opinion from a similar immigration case involving a Lebanese homosexual, in which Muslim militia-men repeatedly forced the barrel of a rifle into the homosexual asylum-seeker's anus."[212]

This last point underscores the need for those who represent asylum seekers to file with the application for asylum, or submit as evidence prior to the hearing to the immigration court, all relevant authority, such as BIA opinions, circuit decisions, regulations and other documentary evidence that will help strengthen the claimant's case. An advocate should not presume that the IJ will be aware of all aspects of asylum law.

"The IJ faulted Karouni for failing to provide evidence to corroborate that he had been identified as a homosexual to the authorities by either his former homosexual partner, Mahmoud, or the friends with whom he attended dinner parties in . . . 1992."[213] The court disagreed, finding that

> Karouni *did not* speculate that he [had] been identified to the authorities . . . [r]ather, Karouni testified that his friend and Mahmoud's cousin . . . told him that his name had been submitted to the authorities as a homosexual. The IJ [had ruled] that Karouni should have obtained affidavits from [the cousin] or other friends . . . .[214]

Again, the court reminds us that when an applicant presents credible testimony "[n]o further corroboration is required."[215]

In another finding the IJ "found that Karouni's return[] to Lebanon in 1992 to attend to his dying father and in 1996 to attend to his dying mother 'cut against' his claim of fear of future persecution [since such] actions '[did] not appear to be the actions of [one] who fear[ed] persecution because he [was] gay.'"[216] The Ninth Circuit dispatched with this finding, stating that

210. *Karouni*, 399 F.3d at 1174 (quoting 8 C.F.R. § 1208.13(a)) (quotations omitted). *See also* Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998).

211. *Karouni*, 399 F.3d at 1174.

212. *Id.*

213. *Id.* at 1175.

214. *Id.*

215. *Id.* (quoting Salaam v. INS, 229 F.3d 1234, 1239 (9th Cir. 2000)).

216. *Karouni*, 399 F.3d at 1175.

Karouni's stays in Lebanon on both occasions were short and that the court found no fault with Karouni going "to see his parents one last time."[217] The IJ found that such trips "constitute[d] substantial evidence that [Karouni's] fear of persecution was not well-founded."[218] Concerning the IJ's conclusion that Karouni's fear was not well founded, the Ninth Circuit appropriately held this to be "'personal conjecture' about what choice someone in Karouni's unfortunate position would have" done.[219] "An [IJ's] personal conjecture 'cannot be substituted for objective and substantial evidence.'"[220] In sum, the court reversed the IJ and the BIA's finding, instead concluding that Karouni had "both a subjectively and objectively well-founded fear of future persecution" if removed to Lebanon.[221]

The implications of *Karouni*, for those who seek justice in immigration court for LGBT persons, are not as varied as those set out after *Ali*. As a result of *In re Toboso-Alfonso*, there is no need to prove that homosexuals are "a particular social group" under the statute.[222] There are no circuit splits and the concept of "punitive intent" normally does not have to be proven.[223] If the case had been brought in the Fifth Circuit, Karouni's petition for review may have been denied because of the fact that he had never been arrested or jailed for being a homosexual and that he had only been accosted by the Amal militia men on one occasion, and for only a brief amount of time.[224] In other words, there may not have been much evidence of persecution on account of his homosexuality. Some observers might describe Karouni as not being "gay enough" for the government because he could cover his homosexuality and should not fear future persecution in Lebanon.[225]

The greater implication that we may draw from *Karouni* is that there is often much insensitivity in immigration courts, and too often asylum claimants encounter IJ's who are hostile to many of the cases they hear.[226] Such hostility may be the result of managing an overly burdensome daily docket, or it may result from racism, sexism, homophobia, or a belief that the testimony and facts are contrived or fabricated. Those who represent claimants in asylum cases must understand that such hostility may not be overcome at

217. *Id.* at 1176.
218. *Id.*
219. *Id.*
220. *Id.* (quoting Paramasamy v. Ashcroft 295 F.3d 1047, 1052 (9th Cir 2002)).
221. *Karouni*, 399 F.3d at 1178–79.
222. *Saxena*, *supra* note 10, at 343.
223. *See, e.g.*, Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).
224. *Karouni*, 399 F.3d at 1168. *See also* Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994).
225. *See* Morgan, *supra* note 37, at 146.
226. *See, e.g.*, Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998).

the IJ level, but the representative must walk into the hearing with as strong a case as possible and armed with as much corroborative evidence as possible, if available. The representative needs to be aware of relevant prior decisions, current regulations, and rules.

The greatest implication that may be drawn from *Karouni*, is the rule concerning credibility. If the testimony of the claimant is credible, corroboration is not required to prove a well-founded fear of persecution.[227] Thus, the claimant must know her case, must be truthful about her case, and testify in such a way to make the record show that the claimant believes her own case. There must be extensive preparation.

V. CONCLUSION

There have been great advances in our immigration laws that protect LGBT persons and women who may have been victims of gender based violence. Earlier immigration law legally "excluded lesbian[] and gay men because . . . the medical and psychiatric communities[] belie[ved] . . . homosexuality was a disease."[228] We, as a country, are to be commended for now extending grants of political asylum to those who may have experienced past persecution, or who fear future persecution in their country of origin because of their sexual orientation or victimization on account of gender violence. Grants of political asylum on account of such persecution recognize the basic human rights that all human beings deserve. Recent statistics reveal that grants of asylum are increasing, including such grants for persecution on account of sexual orientation or gender based violence.[229]

Asylum is a legal remedy available to legal and illegal aliens who seek protection from persecution in their country of origin "on account of race, religion, nationality," political opinion, or being a member of "a particular social group."[230] Thus, not all immigrants are protected from persecution. Yet, as is often the case, the devil is in the details. We have no definition of "persecution" or "particular social group" in the statute.[231] Many of the definitions come from BIA or circuit court opinions. The circuits are sometimes split on their definitions of these words "persecution" and "particular social group." The definitions are specific to those particular circuits. Some circuits, like the Fifth Circuit Court of Appeals, require that there be a "punitive

227. Morgan, *supra* note 37, at 141.
228. Bennett, *supra* note 6, at 279.
229. *See* Morgan, *supra* note 37, at 141–43.
230. 8 U.S.C. § 1101(a)(42) (2000).
231. *See id.*

intent" motivating the persecutor before asylum be granted.[232] What is needed is for the United States Supreme Court to set some kind of standard that would reconcile and harmonize these definitions and make them uniform for all immigration courts and the BIA. It is unlikely that this will happen. Immigration cases seldom reach the Supreme Court because so few immigration cases dealing with asylum are appealed at all. The Attorney General could well designate more cases as precedent for certain grants of asylum.[233] A review of the *Ali* and *Karouni* cases reveal that IJ's need better knowledge, training, and sensitivity in order to justly adjudicate the asylum cases that they hear.

Generally, the immigration service, now under the auspices of DHS, has written regulations for interpreting the immigration laws, but this is a slow and bureaucratic process. Some IJ's appear to ignore some of the regulations which already exist. In order to refine and harmonize our immigration rules and regulations for asylum, it would be best for an outside and disinterested group to set about accomplishing this task. The American Law Institute (ALI) would be the perfect group to become involved with such a project. ALI was first formed in 1923, and included American judges, lawyers, and legal scholars who would address uncertainty in the law.[234] Over the years the work of the ALI has resulted in studies by scholars and experts in certain fields of the law who have provided "restatement[s] of basic legal subjects that . . . tell judges and lawyers what the law [means]."[235]

DHS should authorize the ALI to study the problems with respect to grants of political asylum and produce a restatement or codification upon which IJ's, practitioners, and law teachers could rely with respect to grants of asylum. The ALI has already worked with the American Bar Association (ABA) to produce course study materials for the American Immigration Lawyers Association.[236] A codification project for political asylum would be a logical and valuable ALI-ABA project.

232. *See* Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994).

233. *Saxena, supra* note 10 at 343.

234. Am. Law Inst., About the American Law Institute, http://www.ali.org/ali/thisali.htm (last visited Apr. 16, 2008).

235. *Id.*

236. Marshall L. Cohen, *Obtaining Political Asylum After Physically Entering the U.S.*, SC38 ALI-ABA 75 (1998).