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A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities

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NOTES & COMMENTS

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Debate over immigration policy and immigration law has taken on an unprecedented prominence for the American body politic in recent years. The growing clout and numeric prominence of the nation's Latino community, which now constitutes 12.5 percent of the population, has not gone unnoticed by politicians.[1] Indeed, both the Republican and Democratic parties have sought to portray themselves as friendly to Latinos and to issues that resonate with Latino voters, and the parties have expended enormous efforts to heighten their appeal to this segment of the voting population.[2] Given that most Latino voters have relatively recent roots in the United States, immigration is a prominent concern for most of these newer Americans; many theorize that the collapse of the California Republican Party stems from its rejection by Latino voters still infuriated at the party's support for anti-illegal immigrant Proposition 187.[3] Indeed, President George W. Bush and Mexican President Vicente Fox seemed almost certain to negotiate some type of regularization program for workers illegally present in the United States (or at least undocumented Mexican workers) before the tragic events of September 11, 2001, intervened.[4]

Largely due to concerns about international terrorism and the ability of foreign nationals to infiltrate the U.S. borders in the wake of the 9-11 attacks, immigration has had an uncharacteristically high profile in the American political landscape. In recent months, two courts of appeals have issued conflicting opinions on the legality of closed depor-

1. THE NEW YORK TIMES 2003 ALMANAC 271 (John W. Wright ed., 2002).

2. *See* Deborah Barfield Berry, *A Record Amount Spent on Latino Voters*, NEWSDAY, Nov. 23, 2002, at A12; V. Dion Haynes, *Parties Invest Time, Money to Woo Hispanic Voting Blocs*, CHI. TRIBUNE, Nov. 1, 2002, at 16; Deborah Kong, *Hispanic Voters Resist Party Loyalty*, AP ONLINE, Nov. 8, 2002; John Pain, *Bush, McBride Battle for Hispanic Voters*, TALL. DEM., Oct. 29, 2002, at 6.

3. *See* Harold Meyerson, *A State of Change: California's Tilt Toward the Left*, L.A. TIMES, Nov. 3, 2002, at M1.

4. *See* Kevin Sullivan & Glenn Kessler, *Fox Says It's Time to Reopen Talks on Immigration Concerns; Senior U.S. Delegation Gives Mexico No Signal of Action Soon*, WASH. POST, Nov. 27, 2002, at A12.

tation hearings for aliens suspected of being involved in terrorism.[5] The Third Circuit backed the Bush Administration's policy to employ closed hearings while the Sixth Circuit disagreed, holding that the First Amendment rights of the press and the public will not permit the blanket closure of all deportation hearings for suspected terrorist supporters.[6] On another front, Hady Hassan Omar, a Muslim Egyptian immigrant married to a U.S. citizen, has filed suit in the Western District of Louisiana, alleging that his 73-day detention immediately following 9-11 constituted mistreatment.[7] Additionally, in an effort to shift the U.S. focus on immigration from suspected Muslim terrorists back to loyal Latin undocumented workers and remind President Bush of his commitment to immigration reform, many argue that Mexico made full use of its seat on the United Nations Security Council to force a compromise, rather than meekly back the initial, more bellicose U.S. draft resolution.[8]

Sadly, while more prominence has been accorded to immigration and immigration law in the national psyche than is typical, a fundamental truth remains. Immigration law remains a distinctly different entity when compared to the other branches of American jurisprudence. Writing in 1984, Peter Schuck noted, "Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[9] Schuck's comments are equally applicable today, for immigration law retains its status as a branch of the law where the typical norms of precedents, due process and judicial review operate only constrainedly. A study by Deborah Anker attacked the process employed to adjudicate asylum claims, noting that asylum applicants fail to receive fair and uniform treatment.[10] Given the importance that immigration and immigration-related issues play in today's legal, political, and social environment, the glaring

5. *See* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002). *See also* Adam Liptak, *A Court Backs Open Hearings on Deportation: Secrecy May Be Sought Case by Case, It Says*, N.Y. TIMES, Aug. 27, 2002, at A1; Adam Liptak & Robert Hanley, *Citing 9/11, Appeals Court Upholds Secret Hearings*, N.Y. TIMES, Oct. 9, 2002, at A1.

6. *See Detroit Free Press*, 303 F.3d at 711; *North Jersey Media Group*, 308 F.3d at 220-21.

7. *See* Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES MAGAZINE, Oct. 27, 2002, at 50; Dan Eggen, *9/11 Detainee Files Lawsuit; Egyptian Arrested Sept. 12 Alleges Mistreatment*, WASH. POST, Sept. 10, 2002, at A01.

8. *See* Niko Price, *Mexico Becomes Player in Iraq Debate*, AP ONLINE, Nov. 6, 2002.

9. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

10. *See* Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 447-48 (1992).

weaknesses within the immigration adjudicatory system need to be exposed and corrected.

Among the worst of these faults is the marked lack of precedent that is generated by the immigration courts. While the hallmark of the common law system is the respect for precedent and stare decisis, few, if any, of the decisions that emerge from the immigration courts are published, and these decisions therefore carry minimal precedential value.[11] As a consequence, little precedent exists to guide immigration judges in their decisions, and cases with markedly the same facts that theoretically should merit similar results often end with dissimilar resolutions.

Immigration law is federal law, and, theoretically, the outcome of an alien's case should not depend on his or her location in the country.[12] However, the courts of appeals have marked out strikingly different positions on aspects of immigration law, and the Supreme Court is the only single body capable of resolving these splits.[13] The Supreme Court has, however, tended to decide relatively few immigration cases, and conflicts between the circuits thus linger for long periods.[14]

This Comment attempts to expose the twin problems of the lack of precedent and appellate court conflict within the immigration law by highlighting such problems as they affect a smaller subset of the case law, namely the law governing asylum for sexual minorities.[15] The Comment will begin by discussing briefly the structure of the immigration courts and then will detail the general definitions and procedures for making a claim for asylum in the United States. Next, the Comment will discuss the basic law underlying asylum for sexual minorities specifically, and then will address how the lack of precedent and conflicts between the circuits have injected uncertainty into the decisional process. The Comment will conclude with thoughts on how to rectify the problem.

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11. T. David Parish, *Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 950 n.152 (1992).

12. Immigration law is governed by the Immigration and Nationality Act, 8 U.S.C. §§ 101-507 (2002). *Hines v. Davidowitz*, 312 U.S. 52 (1941), held that states are preempted from enacting immigration legislation since federal law fully occupies the field.

13. *See, e.g.*, Fatima Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?*, 12 HASTINGS WOMEN'S L.J. 387 (2001) (noting the conflict over what constitutes membership in a particular social group).

14. *See* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 416 n.5 (1991) (noting that, while the Court decided four immigration cases in the 1991 term, it only decided seven cases during 1971 to 1981).

15. In employing the term "sexual minority," the author intends to refer to all persons whose sexual orientation is not exclusively heterosexual or is perceived not to be exclusively heterosexual by his or her society.

A. The Structure of the Immigration Courts

For most of the nation's history, no separate cadre of immigration judges existed apart from the pool of bureaucrats designated as immigration officers; the more senior, experienced officers were simply designated to conduct the various immigration hearings.[16] Indeed, until 1996, immigration judges were still statutorily labeled "special inquiry officers."[17] Beginning in the 1950s, however, attitudes began to change, and the perception began to take root that responsibilities for conducting hearings should be divorced from responsibilities for enforcement.[18] Special inquiry officers were required to hold law degrees after 1956, and, while still officially labeled special inquiry officers by statute, a 1973 regulation marked the official change of designation from mere officer to immigration judge.[19]

The division between immigration judges and all other officials working on immigration, and the corresponding division between enforcement and judicial process, was greatly enhanced in 1983 with the creation of the Executive Office for Immigration Review (EOIR).[20] The creation of the EOIR removed the immigration judges from the purview of the Immigration and Naturalization Service (INS), and created a separate agency within the Department of Justice, composed of the immigration judges, that was not answerable to anyone within the INS.[21] Along with the creation of the EOIR came the issuance of administrative procedure designed to standardize operating practices, which had previously varied widely from office to office.[22] In 1992, the EOIR employed about 85 immigration judges, while, in 2001, the number had climbed to slightly more than 200.[23] Immigration judges are empowered to render their decisions orally or in writing.[24] The creation of the Department of Homeland Security has not affected the status of the EOIR, which will remain housed in the Department of Justice.[25]

An alien who is found removable by an immigration judge has a

16. Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 254 (4th ed. 1998) [hereinafter Immigration and Citizenship].

17. *Id.*

18. *Id.* at 254-55.

19. *Id.* at 255.

20. *Id.* at 256.

21. *Id.*

22. *Id. See also* 8 C.F.R. §§ 3.12-3.42 (2003).

23. Immigration and Citizenship, *supra* note 16, at 256. *See also* Thomas Alexander Aleinikoff et al., 2001 Supplement to Immigration and Citizenship: Process and Policy 22 (2001) [hereinafter 2001 Supplement].

24. 8 C.F.R. §3.37(a) (2003).

25. While the EOIR remains unaffected, INS has been divided into three separate bureaus housed within Homeland Security. *See* Alfonso Chardy, *INS Down to Its Last Days: U.S. Promises Better Security and Efficiency*, Miami Herald, Feb. 24, 2003, at 1A.

right of appeal to the Board of Immigration Appeals (BIA).[26] The ancestor of the BIA, the Board of Review, was created in 1921 when the Department of Labor held responsibility for immigration matters.[27] In 1940, when immigration affairs were transferred to the Department of Justice, regulations were promulgated officially designating the BIA as such and giving the body the power to issue final orders on immigration appeals.[28] The BIA originally was constituted with five members, but its membership has grown to twenty-one in recognition of its increasing caseload.[29] An individual member of the BIA is authorized to affirm decisions of the immigration judges without opinion if he or she determines that the result is correct, that "any errors in the decision were harmless or nonmaterial," that "the issue on appeal is squarely controlled by existing Board or federal court precedent," and that the "questions raised on appeal are so insubstantial" that review by a three-member panel is unnecessary.[30] If a three-member panel does hear the appeal, the panel's decision must be issued in writing.[31] However, not every written opinion of the BIA is accorded precedential value. BIA decisions, whether of a three-member panel or of the Board sitting en banc, constitute precedent for "all proceedings involving the same issue or issues" only when designated as such by a majority vote of the permanent members of the BIA; the Attorney General may also overrule any decision of the BIA.[32]

Should the BIA's decision prove unfavorable to the alien, he or she may seek relief in the federal courts.[33] Section 242 of the Immigration and Nationality Act sets rather limited bases for federal court review of the decisions of the BIA. Importantly for asylum seekers, the Attorney General's decision whether to grant that discretionary form of relief is deemed "conclusive unless manifestly contrary to the law and an abuse of discretion."[34] If his or her appeal to the Court of Appeal is successful, however, that court's decision is binding on the BIA and immigration judges only for cases that arise in the states in that circuit.[35] Only a

26. 8 C.F.R. §3.1(b) (2003).

27. IMMIGRATION AND CITIZENSHIP, *supra* note 16, at 257.

28. *Id.*

29. *See id. See also* 2001 SUPPLEMENT, *supra* note 23, at 22.

30. 8 C.F.R. § 3.1(a)(7) (2003). For criticism of this practice, see Philip G. Schrag, *The Summary Affirmance Proposal of the Board of Immigration Appeals*, 12 GEO. IMMIGR. L.J. 531 (1998).

31. 8 C.F.R. § 3.1(f). (2003).

32. 8 C.F.R. § 3.1(g). (2003).

33. *See* INA § 242, 8 U.S.C. § 1252 (2003) (Judicial orders of removal).

34. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (2003).

35. *See* Stuart Grider, *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).

Supreme Court decision would produce *erga omnes* effects for the entire immigration system, but, as stated earlier, the Supreme Court has tended to issue relatively few decisions concerning immigration.

B. The Asylum Process

According to the provisions of Section 208 of the Immigration and Nationality Act (INA), the Attorney General may exercise his or her discretion to grant asylum to an alien who has arrived or is present, legally or illegally, in the United States.[36] A successful finding of asylum permits the asylee to remain in the United States and file for adjustment of status to permanent residency after waiting one year.[37] To achieve success, claimants of asylum must demonstrate that they fit the INA's definition of the term "refugee."[38]

A refugee is defined as a person outside of his country of nationality or habitual residence who is unable or unwilling to return due to past persecution or a reasonable fear of persecution based on the claimant's race, religion, nationality, membership in a particular social group, or political opinion.[39] Asylees differ from refugees in that asylees are already present in or at the border of the United States, while refugees' claims are assessed outside the United States in a process governed by Section 207 of the INA.[40]

The term "refugee" was first defined legally in the United States in the Refugee Act of 1980.[41] The definition is consistent with that employed by two United Nations treaties, the 1951 Convention Relating to the Status of Refugees[42] and the 1967 Protocol Relating to the Status of Refugees,[43] and reflects the U.S. commitment to international humanitarian principles. Asylum is completely discretionary and the Attorney General may deny this form of relief when he or she sees fit to do so; however, the United States is a signatory to the 1967 Protocol, thus the Attorney General is bound to refrain from practicing *refoulement*, which consists of returning a refugee when the alien's life would be threatened

36. INA §§ 208(a)(1) & (b)(1), 8 U.S.C. §§ 1158(a)(1) & (b)(1) (2003).

37. INA § 209, 8 U.S.C. § 1159 (2003) (adjustment of status of refugees).

38. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2003).

39. *Id.*

40. *Compare* INA § 207, 8 U.S.C. § 1157 (2003) (annual admission of refugees and admission of emergency situation refugees) *with* INA § 208, 8 U.S.C. § 1158 (2003) (asylum procedure).

41. Refugee Act of 1980 §201(a), Pub. L. No. 96-212, 94 Stat. (1980). *See also* Ellen Vagelos, *The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on* Re: Inaudi, 17 Fordham Int'l L.J. 229, 233, 243 (1993).

42. 189 U.N.T.S. 137.

43. 606 U.N.T.S. 267.

in his or her country of origin.[44] Rates of approval for asylum claims vary widely from country to country; in FY 2000, for example, 54.8% of Chinese asylum applicants were successful and 79.0% of Ethiopians were successful, but only 22.2% of Haitians were successful and a mere 7.9% of Mexicans were successful.[45]

There are two ways to initiate the asylum process. If an alien has been placed in removal proceedings, the alien may raise asylum as a grounds for relief from removal; such an asylum claim is labeled a "defensive application."[46] Defensive applications can be made in response to standard removal proceedings[47] or the expedited removal proceeding applied to arriving aliens who lack entry documents or present fraudulent documents.[48] If the alien is legally present and makes his or her claim, this type of claim is known as an "affirmative application."[49]

An affirmative asylum applicant will have his or her claim reviewed by an asylum officer.[50] Asylum officers represent a special subdivision within the immigration system who "receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles."[51] The asylum officer system was created in 1990, and asylum officers are based in eight offices across the country.[52] If the asylum officer determines that the applicant's claim is meritorious, the officer is authorized to grant asylum to the alien.[53] Previously, asylum officers would also issue denials, with lengthy decision letters explaining the reason for the denial, and applicants could then renew their claim in front of an immigration judge if they were ever placed in exclusion or deportation proceedings.[54] Since 1995, however, asylum officers generally refer claims that are not granted to the immigration courts and refrain from detailing the reasons for the failure to grant asylum.[55]

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44. *See* IMMIGRATION AND CITIZENSHIP, *supra* note 16, at 1020. *Nonrefoulement* is codified in INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2003).

45. *See* 2001 SUPPLEMENT, *supra* note 23, Table 9.4A at 164.

46. *See* Vincente A. Tome, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 COLUM. J.L. & SOC. PROBS. 411, 423 (1994).

47. These proceedings are governed by INA §§ 239 & 240, 8 U.S.C. §§ 1229 &1229a (2003) (Initiation of removal proceedings & Removal proceedings).

48. Expedited removal is governed by INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2003).

49. *See* Tome, *supra* note 46, at 422-23.

50. *See* Alan G. Bennett, *The "Cure" That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279, 283-84 (1999).

51. 8 C.F.R. § 208.1(b) (2003).

52. *See* IMMIGRATION AND CITIZENSHIP, *supra* note 16, at 1024.

53. *See* Bennett, *supra* note 50, at 284.

54. IMMIGRATION AND CITIZENSHIP, *supra* note 16, at 1025.

55. *Id.* at 1025-26.

Unlike affirmative asylum applicants, defensive asylum applicants begin their asylum procedure before an immigration judge, who controls the process and makes a ruling on the merits of the alien's claim.[56] The alien makes known his or her desire to seek asylum at the master calendar, which is the initial appearance in immigration court, and the claim is addressed subsequently in a hearing on the merits of the claim.[57] If the immigration judge denies the claim for asylum, the alien may seek review with the BIA, which will hear the appeal if the facts or legal questions at issue are sufficiently specific.[58] If the BIA upholds the decision of the immigration judge, the alien may then seek review by the federal Court of Appeal and, ultimately, may petition the Supreme Court for relief.[59]

C. Homosexuality and Asylum

Until 1990, gay immigrants were categorically barred from entering the United States.[60] Homosexuals were excluded on the grounds that were "aliens afflicted with a psychopathic personality, epilepsy or mental defect."[61] Congress clarified its intent to exclude homosexuals by adding "sexual deviation" to the exclusion grounds in 1965.[62] It was not until the enactment of the Immigration Act of 1990 that homosexuality was finally removed as a bar to admission to the United States.[63]

Also in 1990, the BIA affirmed an immigration judge's decision to withhold removal of a gay Cuban *marielito* in *In re Toboso-Alfonso*.[64] *Toboso-Alfonso* is unique in that it 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 of refugee in Section 101 of the INA.[65] *Toboso-Alfonso* was followed by *In re Tenorio*,[66] a 1993 case in which Immigration Judge Phillip Leadbetter granted asylum to a Brazilian gay man who feared

56. *See* Tome, *supra* note 46, at 424.

57. Immigration and Citizenship, *supra* note 16, at 1025.

58. *See* Bennett, *supra* note 50, at 284.

59. *Id.* at 285.

60. *See* Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians under U.S. Immigration Policy*, 42 UCLA L. Rev. 1115, 1118 (1995).

61. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 182 (1952) (superceded 1990).

62. Immigration and Nationality Act, amendments, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965) (superceded 1990).

63. *See* Park, *supra* note 60, at 1119.

64. Int. Dec. 3222 (No. A23-220-644) (BIA Mar. 12, 1990).

65. *See* Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 Geo. Immigr. L.J. 1, 22 (1996).

66. *In re* Tenorio, No. A72-093-558 (Immigration Ct. July 26, 1993).

persecution as the hands of paramilitary groups after suffering a beating in Rio de Janeiro as part of a "gay bashing" incident.[67] Like *Toboso-Alfonso, Tenorio* permitted homosexuality to serve as the basis for claiming membership in a particular social group that was subject to persecution.[68] Neither *Toboso-Alfonso* nor *Tenorio* was, however, assigned precedential value at the time it was decided.[69]

Matters were clarified greatly in 1994, when Attorney General Janet Reno issued a directive mandating that the immigration system adopt *Toboso-Alfonso* as precedent "in all proceedings involving the same issue or issues."[70] Thus, since the adoption of *Toboso-Alfonso* as precedent in 1994, it is clear that foreign gays and lesbians may base asylum claims on their membership in a particular social group — that of sexual minorities. Because asylum proceedings are kept confidential, it is difficult to estimate how many gay men and women have been granted asylum on the basis of alleged persecution due to their status as sexual minorities. However, the *Washington Post* stated that more than sixty homosexuals had been granted asylum by 1996.[71] In his article for the *Post,* William Branigin noted that successful asylum applications have been received from homosexuals from Mexico, Colombia, Venezuela, Brazil, Chile, Russia, Romania, Eritrea, Ethiopia, Togo, Iran, Pakistan, Turkey, Singapore, Lebanon, China, and other nations.[72] The United States is not alone in granting asylum to sexual minorities. Australia, Canada, Germany, Ireland, New Zealand, Belgium, Finland, the United Kingdom, and the Netherlands have also granted asylum to homosexuals.[73]

While the designation of *Toboso-Alfonso* as precedent has eliminated a huge burden for gay and lesbian would-be asylum seekers, since homosexuals no longer have to argue that they are entitled to claim persecution as a member of a particular social group, they are still subject to the general requirements that all asylum applicants must meet. Namely, they still must demonstrate the subjective and objective fears of persecution required by *Matter of Acosta*,[74] and show a nexus between the persecution they have suffered or fear they will suffer and their membership

67. *See* Grider, *supra* note 35, at 213-14.

68. *See* Ramanathan, *supra* note 65, at 22-23.

69. *Id.* at 20-21.

70. Attorney General Order No. 1895-94, June 19, 1994.

71. William Branigin, *Gays' Cases Help to Expand Immigration Rights: More than 60 Homosexuals Claiming Persecution Have Been Granted Asylum in U.S.*, WASH. POST, Dec. 17, 1996, at A1.

72. *Id.*

73. *Id.*

74. 19 I. & N. 211, 226 (BIA 1985).

in the particular social group, that of sexual minorities.[75] Thus, a gay alien could not receive asylum by generally asserting that sexual minorities were subject to persecution in his home country; he would have to additionally demonstrate that he subjectively feared persecution on account of his homosexuality and that such a fear was objectively reasonable. The *Mogharrabi* test holds that an alien's fear is reasonable if a reasonable person in similar circumstances would fear future persecution.[76]

D. Asylum for Sexual Minorities and the General Problems of the Immigration System

Gays and lesbians seeking asylum are far from immune from the more general problems that plague the immigration system, namely the general lack of precedent and the numerous unresolved conflicts between the circuits. Select prominent examples will serve to illustrate this problem.

1) *Persecutory Vs. Punitive Intent and Pitcherskaia v. INS*

A major split between the circuits and the BIA has emerged over whether an asylum applicant must establish that his or her persecutor acted with punitive intent. Alla Pitcherskaia is a Russian lesbian who filed a claim for asylum in 1992; initially, her grounds for filing were based on her anti-Communist political opinion, but she later expanded her claim to include persecution based on membership in the particular social group of Russian gays and lesbians.[77] Pitcherskaia testified that she was repeatedly arrested and charged with "hooliganism," a generic Russian criminal charge used to detain persons without trial for 10-15 days.[78] On one occasion, she stated, she was arrested after protesting the beating of a gay friend, and another time she was arrested after seeking the release of the leader of a lesbian youth organization of which she was a member.[79] Pitcherskaia was interrogated about her sexual orientation when she visited a former girlfriend who was being forcibly detained in a mental institution and subjected to treatment, including electric shock therapy, intended to change her orientation.[80]

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75. *See* B.J. Chisholm, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 How. L.J. 427, 433 (2001).

76. *See In re* Mogharrabi, 19 I. & N. 439, 445 (BIA 1987).

77. *See* Pitcherskaia v INS, 118 F.3d 641, 643 (9th Cir. 1997). *See also* Kristie Bowerman, Pitcherskaia v. INS: *The Ninth Circuit Attempts to Cure the Definition of Persecution*, 7 Law & Sexuality 101 (1997), and Bennett, *supra* note 50.

78. *Pitcherskaia,* 118 F.3d at 643-44.

79. *Id.* at 644.

80. *Id.*

Pitcherskaia was registered as a suspected lesbian and was ordered to undergo treatment at a clinic; as a result of the eight therapy sessions she attended, she was diagnosed with "slow-going schizophrenia" and was prescribed sedative drugs.[81] She continued to receive various "Demands for Appearance" so that authorities could interrogate her about her political activities and her sexual orientation, and she was arrested twice while at the homes of gay friends — in 1990 and 1991 — and imprisoned overnight.[82] The U.S. immigration judge denied her requests for asylum and withholding of deportation[83] and granted her voluntary departure.[84] Pitcherskaia appealed to the BIA.[85]

A divided opinion from the BIA denied her appeal.[86] The majority held that she failed to meet her burden to establish eligibility for relief because she had not shown that she had been persecuted.[87] Although she had been subjected to involuntary psychiatric treatment, the majority viewed these efforts by the militia and the psychiatric institutions as efforts to "cure" Pitcherskaia of a disorder, not to punish her, and, absent some sort of punitive intent at the hands of her persecutors, Pitcherskaia could not demonstrate past persecution or a reasonable fear of future persecution were she to return to Russia.[88] The BIA acted consistently with its decision in *Matter of Acosta*,[89] which held that, among other factors, an alien seeking asylum must establish that her "persecutor has the inclination to punish the alien."[90]

At least two courts of appeals have agreed with the BIA's determination that persecutors must exhibit an intent to punish. The Seventh Circuit, in *Sivaainkaran v. INS*,[91] stated that persecution has been described as "punishment" or "the infliction of harm" for political, religious, or other offensive reasons.[92] The *Sivaainkaran* court then held that the Sri Lankan applicant did not merit asylum merely because he feared harassment from the conflict between the Buddhist Sinhalese and the

81. *Id.* "Slow going schizophrenia" was a phrase widely employed in Russia to "diagnose" homosexuals.

82. *Id.*

83. Withholding of deportation (now withholding of removal) is the term utilized in the United States for the principle of *nonrefoulement*. *See supra* note 44.

84. Voluntary departure is a form of relief that permits an alien to depart voluntarily to a country of her choice without being subject to a removal order. *See* INA § 240B, 8 U.S.C. § 1229c (2003).

85. *Pitcherskaia*, 118 F.3d at 645.

86. *Id.*

87. *Id.*

88. *Id.*

89. 19 I & N Dec. 211, 233 (BIA 1985),

90. *Id.* at 226.

91. 972 F.2d 161 (7th Cir. 1992).

92. *Id.* at 165 n.2.

Hindu/Muslim Tamils.[93]

The Fifth Circuit has also required that asylum-seekers meet a punitive intent requirement. In *Faddoul v. INS*,[94] the Fifth Circuit refused to grant asylum or withholding of deportation to a Palestinian applicant alleging persecution in Saudi Arabia.[95] Faddoul alleged that he and his family were denied basic living, citizenship, and exit/re-entry privileges, but the court noted that all non-Saudis were subject to the same lack of privileges, and Faddoul failed to show that he or his family had been singled out for persecution or that he would fear harm as a result of a desire on the part of the Saudis to punish him for a particular belief or characteristic.[96]

When Alla Pitcherskaia appealed her denial of asylum to the Ninth Circuit, however, that Court of Appeal strongly disagreed with the BIA and the Fifth and Seventh Circuits.[97] The Ninth Circuit held that "persecution" is defined objectively as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[98] Thus, the subjective motives of the persecutor are irrelevant, for "[p]ersecution by any other name remains persecution."[99] The Ninth Circuit remanded *Pitcherskaia* to the BIA for consideration in light of its opinion, concluding with the observation that "[h]uman rights law cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims."[100]

The *Pitcherskaia* decision thus means that the BIA may not apply the punitive intent requirement to defeat asylum claims emanating from the states in the Ninth Circuit. However, the BIA remains free to apply the standard to cases emanating from the Fifth and Seventh Circuits, as well as to the remaining circuits, which have not taken a position on the issue. Thus, the Ninth Circuit's seemingly fairer and more sensible position — that persecution should be defined by an objective test employing a reasonable person standard — governs only within its jurisdiction, whereas the rest of the country seems subject to the punitive intent requirement. Only through the actions of the Supreme Court or the independent actions of the other courts of appeals to adopt the holding of *Pitcherskaia* will this conflict be resolved. In the interim, homosexuals who claim persecution on the basis of involuntary psychiatric

93. *Id.* at 165.
94. 37 F.3d 185 (5th Cir. 1994).
95. *Id.* at 188.
96. *Id.* at 188-89.
97. *See* Pitcherskaia v INS, 118 F.3d 641, 648 (9th Cir. 1997).
98. *Id.* at 647 (citing *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)).
99. *Id.* at 647.
100. *Id.* at 648.

treatment are assured that such a legal theory will be upheld as presumptively valid in only one of the country's courts of appeals.

2. *Homosexual Acts vs. Homosexual Identity and the Definition of Membership in a Particular Social Group*

While the adoption of *Toboso-Alfonso* as precedent by Attorney General Reno's directive greatly facilitates the path of a homosexual seeking asylum on the basis of persecution on account of homosexuality, it is unclear who exactly is protected by *Toboso-Alfonso*. An alien who has lived an openly gay or lesbian lifestyle, such as Pitcherskaia, and who has been identified as homosexual and harassed or threatened because of his or her status as a gay man or lesbian seems to quite neatly fit within the parameters of the ruling. But it is unclear if, for example, a man who engaged frequently in sexual acts with another man but who did not hold himself out as gay and lived discreetly would qualify. It is also uncertain that a prosecution and conviction for violation of a sodomy law would rise to the level of persecution necessary to permit a favorable asylum determination.[101]

While U.S. case law sheds little light on the question, the case law from other common law countries, particularly the United Kingdom and Australia, is instructive. A landmark ruling by the House of Lords in March 1999 established that those persecuted for their sexual identity would be members of a particular social group and thus be eligible for asylum in the United Kingdom.[102] Since the ruling, battered women and sexual minorities have increasingly sought asylum in Great Britain, with two gay Jamaican men among the most recent successful applicants.[103] However, the distinction between persecution because of one's status as a homosexual and the prosecution of a homosexual for engaging in homosexual acts appears to still exist in British law.

The first case presenting a claim for homosexual asylum to the British courts, *Regina v. Binbasi*,[104] clearly considered this distinction and rejected the claim for asylum of Zia Mehmet Binbasi, a resident of the Turkish Republic of North Cyprus. The court did not broach the issue of whether homosexuals constituted members of a particular social

101. *See* Shelley M. Hall, *Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law*, 73 WASH. L. REV. 105, 127-29 (1998) (discussing the prosecution/persecution controversy in the context of illegal departure).

102. *See* Sonia Purnell, *Gay asylum charter Lords ruling could trigger a flood of claims for refuge by women and homosexuals*, DAILY MAIL, Mar. 26, 1999.

103. *See* Robin Yapp, *Gays' asylum victory; Jamaicans win refugee status after claiming fear of attacks*, DAILY MAIL, Oct. 14, 2002.

104. Regina v. Secretary of State for the Home Dep't *ex parte* Zia Mehmet Binbasi, [1989] Imm. A.R. 595 (Q. B. Div. July 25, 1989).

group. Instead, the court noted that "it is clear that in Cyprus there is no discrimination against homosexuals who are not active."[105] While a Cypriot law criminalizing sodomy and permitting brief imprisonment did exist, Binbasi could escape prosecution and imprisonment so long as he did not engage in homosexual activity.[106] Binbasi was not at risk for prosecution or persecution because of his status as a gay man, and, while his homosexuality might lead him to be the subject of ridicule, that "degree of discrimination would not be such as to have the quality of persecution."[107]

While it might be tempting to ignore *Binbasi* as outmoded in light of the successful homosexual asylum claims that have been won in the United Kingdom since 1999, a 2002 decision by the Court of Appeal regarding the asylum applications of three gay Zimbabweans suggests that *Binbasi*'s reasoning may be alive and well.[108] Outrage!, a British gay rights organization, reports that the Court of Appeal, led by Lord Justice Schiemann, rejected the asylum claim of the three men, holding that the criminalization of private, consensual sodomy does not violate the right to privacy and does not constitute inhuman or degrading treatment.[109] The decision makes explicitly clear that homosexuals seeking asylum in Britain may not base their claims solely on actual or feared prosecution for sodomy. In other words, a gay man or lesbian's claim for asylum would also need to contain some sort of component of persecution because of the alien's status as a homosexual, and the decision would seem to bar the claim of a person who is not openly gay and does not identify as such, and possibly also the claim of a lesbian who acknowledges her orientation but has lived very discreetly and is not known to be a lesbian by the wider community.

Australian case law has also suggested that the ability to live a discreetly homosexual lifestyle might also bar an asylum claim. Like the United Kingdom, Australia has permitted asylum for homosexuals.[110] The very first published decision in Australia that granted asylum to a homosexual was explicit that homosexuals constituted members of a particular social group.[111] However, a subsequent decision involving a

105. *Id.* at 599.

106. *Id.* at 597.

107. *Id.* at 497, 500.

108. *See* Peter Tatchell, *Court of Appeal rejects gay asylum: No protection under Refugee Convention & Human Rights Act*, (July 7, 2002), *at* http://outrage.nabumedia.com/pressrelease.asp?ID=157.

109. *Id.*

110. *See* Decision of Jan. 21, 1994, RRT No. N93/02240 (the first published Australian case, involving an Iranian, where a homosexual was granted asylum).

111. *Id.* ¶ 55.

gay Chinese man from Shanghai,[112] which denied the man's claim for asylum, appears to raise the same sorts of issues that underlay the decision in *Binbasi*. While the Australian tribunal noted that the Chinese record of treatment of its homosexual citizens was not pristine, several reports suggested that Shanghai was different from the rest of the country and that "it appears likely that in Shanghai a homosexual who is discreet in his behavior can avoid the risk of harm."[113] Thus, as in Britain, it seems that only an outspoken, openly gay individual may take benefit of the determination that homosexuals constitute members of a particular social group, while those who are discreetly gay and lesbian, and even those with the mere *potential* to live discreetly homosexual lives, will not be able to demonstrate the level of persecution necessary to secure asylum.

Whether the distinction between persecution because of status versus prosecution because of act and the related question of the ability to live a discreet homosexual lifestyle will affect U.S. jurisprudence remains to be seen. The overruling of *Bowers v Hardwick*[114] by the decision in *Lawrence v Texas*[115] obliterates the argument that a gay applicant could not base an asylum claim on a prosecution for sodomy in another country because the United States itself permits the criminalization of sodomy. However, applicants, such as the Zimbabweans previously mentioned, would still be far from assured of prevailing on their asylum claim, given the wide discretion accorded to the immigration judges and asylum officers. As for the ability of an alien to secure asylum who does not identify as lesbian and lives very discreetly, much would depend on her ability to cast herself as a member of a particular social group, homosexual or otherwise, that is subjected to persecution. Given the lack of consistency among the various circuit courts and the BIA, the outcome of her claim would be uncertain.

There are no less than three principal definitions of the "particular social group" enshrined in U.S. law;[116] additionally, the INS has proposed additional regulations regarding the definition that have yet to be adopted.[117] The BIA definition of the social group has the longest history, as it emerged in 1985 in *Matter of Acosta*.[118] The alien in *Acosta*, a

112. *See* Decision of June 10, 1994, RRT No. BV93/00242.

113. *Id.* ¶ 68.

114. 478 U.S. 186 (1986) (upholding Georgia's criminalization of sodomy and held that the right to privacy does not include consensual sodomy).

115. 123 S.Ct. 2472 (2003) (holding Texas's same-sex sodomy law unconstitutional).

116. *See* Matter of Acosta, 19 I. & N. 211 (BIA 1985); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Gomez v INS, 947 F.2d 660 (2d Cir. 1991).

117. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588-98 (2000) (to be codified at 8 C.F.R. § 208.15(c))(proposed Dec. 7, 2000).

118. *See Acosta*, 19 I&N 211.

Salvadoran taxi driver, was held not to exhibit membership in a particular social group. The BIA stated that a particular social group is composed of persons who share a "common, immutable characteristic" that is either "innate" or arises from "shared past experience."[119] The characteristic must be one that the group members "cannot change" or be so "fundamental to their individual identities or consciences" that they should not be required to change.[120] Because the alien's claim for social group membership was based on his participation in a taxi cooperative, his asylum claim was rejected on the rationale that membership in the taxi cooperative was not immutable or fundamental to his identity or conscience.[121] The First Circuit has adopted this definition of social group membership as well.[122]

The Ninth Circuit enunciated its own definition of the particular social group in *Sanchez-Trujillo v INS*.[123] The Ninth Circuit held that a social group consisted of a group united by a common interest and emphasized that the associational relationship must be voluntary and possess a common characteristic that is fundamental to the shared identity.[124] The court also implied it would favor a "small, readily identifiable group," such as a family, in an attempt to impose a boundary on the use of the social group.[125] Both the *Acosta* tests and *Sanchez-Trujillo* tests imply a certain amount of rigidity. *Acosta* is clearly insistent on the immutability of the characteristic, while *Sanchez-Trujillo* is equally insistent that a voluntary association exist (implying that the members of the group are aware of their association) and that the group not be overbroad.

The rigidity of both tests is overcome somewhat by the definition offered by the Second Circuit. In *Gomez v. INS*,[126] the social group was defined as "individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a Persecutor — or in the eyes of the outside world in general."[127] The court also held that "the attributes of a particular social group must be recognizable and discrete."[128] Thus, the *Gomez* definition depends on a more objective standard than the other two tests. Membership is defined by whether the persecutor would view the alien as a member of the persecuted group.

119. *Id.* at 233.
120. *Id.* at 233-34.
121. *Id.*
122. *See* Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).
123. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986).
124. *Id.* at 1576.
125. *Id.*
126. 947 F.2d 660 (2d Cir. 1991).
127. *See id.* at 664.
128. *Id.*

Unlike in *Sanchez-Trujillo*, the alien's own self-identification with the group is irrelevant; clearly, *Gomez* provides the best support for an alien who does not identify as homosexual but who is alleging persecution on account of his participation in "homosexual activities" or even his perceived homosexuality. *Gomez* also avoids the question of whether homosexual actions or homosexual identity is an immutable characteristic, a question that the *Acosta* definition would seem to unearth.

The proposed regulations of Dec. 7, 2000, which have yet to be adopted, also attempt to update the earlier two definitions. The regulations would characterize a social group as "composed of members who share a common, immutable characteristic . . . that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she not be required to change it."[129] While the definition maintains the immutability requirement of *Acosta*, its mention of characteristics "fundamental to the identity or conscience" mirrors language in the recent *Hernandez-Montiel* decision,[130] which granted asylum to a gay Mexican with a female sexual identity. Thus, the proposed regulations provide some assurance that sexual minorities apart from the openly gay, activist alien would be able to place themselves in a social group. The proposed regulations also permit consideration of factors including whether the voluntary associational relationship under the *Sanchez-Trujillo* definition exists among the members and whether the society distinguishes members of the group for different treatment or status, in keeping with the *Gomez* definition.[131]

As with the question of a punitive intent requirement, one of the definitions of the social group, the *Gomez* definition, is clearly the most favorable to all types of sexual minorities seeking asylum in the United States, for the applicants need only show that they have faced persecution because the persecutor has perceived that they are members of a discrete social group. As in the case of *Pitcherskaia*, however, the BIA is required to apply the *Gomez* definition only in the jurisdiction of the Second Circuit. Thus the definition of the social group, like the question of punitive intent, will vary from circuit to circuit until either the Supreme Court accepts a case for review and definitively resolves the question, or all the circuits independently agree to adopt a standard definition.

3. *Lack of Precedent*

While the general lack of legal precedent is perhaps the single

129. Asylum and Withholding Definitions, *supra* note 115, at 76,598.
130. 225 F.3d 1084 (9th Cir. 2000).
131. Asylum and Withholding Definitions, *supra* note 115, at 76,598.

greatest problem facing asylum applicants and other persons navigating the immigration courts, there is, relatively speaking, little that can be concluded about this issue, despite its importance. The clashes between the circuits can be illustrated quite easily because the courts of appeals publish their decisions, and the competing legal arguments thus can easily be compared and contrasted. As for the lack of precedent, less can be said simply because so little case law is released in published opinions, not all of which are assigned precedential value.

David Parish noted that, "The BIA renders approximately 4,000 decisions yearly, but publishes only about 50."[132] As regards asylum specifically, it was not until 1987, with the release of the *Cardoza-Fonseca* opinion,[133] that a BIA decision that granted asylum was assigned precedential value; previously, the only BIA precedents on asylum consisted entirely of denials.[134] Because the vast majority of cases that carry the weight of precedent all deny asylum, there is little guidance for aliens or immigration judges as to what factors are present in a valid asylum claim.[135]

The result of the lack of precedent is clear from the eighteen-month study that Deborah Anker performed for EOIR hearings at an immigration court in a major urban setting.[136] The period witnessed the filing of 149 asylum cases; 42 decisions were rendered, and only 7 asylum claims were granted.[137] Anker states, "No consistent application or coherent view of legal doctrine governed the outcome of these decisions; many of the cases granted were approved on the basis of theories rejected in other cases in which asylum was denied."[138]

Thus, the immigration system appears to have evolved as a system divorced from the strict guidelines of precedent and stare decisis that govern the other realms of American law. While immigration judges and the members of the BIA must follow Supreme Court and circuit courts' decisions that are on point, as well as the decisions of the BIA that are designated as precedent, so relatively few decisions exist, when viewed in comparison with the other legal fields, that it is difficult for an alien to argue that Case A with Facts B & C received Decision D and, since Facts B & C exist in the present case as well, that Decision D should be reached again. It is as if, in the center of a common law

132. *See* Parish, *supra* note 11, at 950 n.152.

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

134. *See* Anker, *supra* note 10, at 447 n.46.

135. *Id.* at 461.

136. *Id.* at 443 n.31 (noting that the court was not identified in order to preserve the anonymity of the parties involved in the adjudication process).

137. *Id.* at 444, Table 2.

138. *Id.* at 452.

jurisdiction, a quasi-civil law institution has emerged that permits adjudicators to decide different outcomes for cases with the same facts. These different outcomes occur not because immigration judges are authorized to ignore precedent (to the contrary, INS regulations are explicit that BIA decisions designated as precedent are "binding on all officers and employees of the Service or immigration judges"),[139] but because so few decisions are recorded and released publicly, let alone assigned precedential value. Judges simply have precious little in the way of guidance and, in Anker's view, too often were guilty of "imposing their own cultural and political assumptions in assessing applicants' credibility, and making implicit political and ideological judgments."[140]

Thus, for a homosexual asylum applicant, *Toboso-Alfonso*, *Tenorio*, and *Hernandez-Montiel* aside, there are really no other cases that have been published and circulated that provide the gay or lesbian applicant with a sense of what facts will rise to the level of persecution and how one can create the nexus between social group membership and persecution. Moreover, *Tenorio* is not designated precedent and thus may serve only as persuasive authority, and the reach of *Hernandez-Montiel* is limited to the courts in the Ninth Circuit.

Even the precedential status of *Toboso-Alfonso*, and therefore the basic assumption that gays and lesbians constitute members of a particular social group, seems far from absolute. Attorney General Reno, per her power in Section 3.1 of Part 8 of the Code of Federal Regulations, was clearly authorized to modify the BIA's decision in *Toboso-Alfonso* in order to designate it as precedent.[141] However, the same section appears to give the Attorney General the power to overrule any BIA decision, which would seemingly authorize a later Attorney General to un-designate *Toboso-Alfonso* as precedent.[142] While such a move does seem unlikely and an Attorney General would likely deem the hallowedness of precedent and legal certainty too great to risk so audacious an act, the Attorney General's statutory power to overturn any BIA precedent seems apparent, ominously feeding the precedential murkiness of the immigration system in addition to the more apparent lack of case law. Moreover, the current Attorney General has shown a clear willingness to overturn the BIA's decisions on numerous occasions. Former Board Member Lory Rosenberg notes that Attorney General Ashcroft has overturned more BIA decisions than any other attorney general at

139. 8 C.F.R. § 3.1(g) (2003).
140. *See* Anker, *supra* note 10, at 452.
141. 8 C.F.R. § 3.1(g) (2003).
142. *Id.*

the halfway mark of his or her first term in office.[143] Attorney General Ashcroft has thus shown a willingness to shape the immigration law as he sees fit. Whether he would act so brazenly as to upset the holding of *Toboso-Alfonso* is another, perhaps unanswerable, question.[144]

E. Brief Conclusions

The importance of immigration issues to the present-day American society is widely apparent. Similarly, the problems inherent within the immigration legal system are obvious and unavoidable. The lack of precedent and lingering conflicts between the BIA and the courts of appeal prevent a uniform application of justice that should not occur when federal law, as is immigration law, is at play. As cases involving detention of Muslim aliens and closed hearings for suspected terrorists continue to wend their way through the legal system, and as ever greater numbers of sexual minorities flee persecution for the relatively safe haven of the United States,[145] the need for the immigration system to reform itself seems painfully apparent.

The solutions to the two main problems identified in this Comment, protracted decisional conflicts between the BIA and the courts of appeals and the general paucity of precedent, seem relatively simple. As for the conflicts between the circuits and the BIA, the Supreme Court simply must shed its reticence to address immigration issues and must act to regularize standards. There is certainly a danger for aliens in greater uniformity, namely that the unifying body will adopt the most draconian measures and discard the holdings that are most favorable to alien applicants. Still, as it stands now, a gay man who has been subject to forced hospitalization in Country P and who wishes to arrive at a U.S. port of entry and apply for asylum would clearly benefit by entering in Los Angeles or Honolulu, so as to assure himself of the benefits of the favorable *Pitcherskaia* ruling. Similarly, a woman from Country K who was involved romantically with another woman and has been detained repeatedly by the police in her country since ending the relationship

143. Judge Lory Rosenberg, Address to Advanced Immigration Seminar Class at University of Miami School of Law (Jan. 30, 2003).

144. Recently, it has been reported that Attorney General Ashcroft is considering making major changes to the regulations regarding gender-based persecution. *See* George Lardner, Jr., *Ashcroft Reconsiders Asylum Granted to Abused Guatemalan: New Regulations Could Affect Gender-Based Persecution*, WASH. POST, Mar. 3, 2003, at A2.

145. *But see* Lucy Halatyn, *Political Asylum and Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians*, 22 SUFFOLK TRANSNAT'L L. REV. 133 (1998) and 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 (1998) (both arguing that the United States fails to protect its own domestic homosexual population as effectively as it grants asylum to foreign gays and lesbians).

would rationally want to enter the United States in New York or Buffalo in order to guarantee that she can use the *Gomez* definition and thus possibly avoid the question of whether she herself identifies as a lesbian and simply argue that the police viewed her as such. Rational aliens would concentrate only in the circuits that tend to produce favorable immigration decisions, thus limiting the great benefits and burdens of immigration to a few states.

The solution to the lack of precedent is even clearer. The BIA simply cannot afford to release so few precedential decisions. For the immigration judges to properly carry out their duties, they must receive more guidance in the way of firm law that speaks to the issues they confront daily. Published denials of claims should not so outweigh published grants. Procedures like the unpublished affirmance of immigration judges' decisions by single members of the BIA obviously reflect the view that the BIA is overloaded with cases. But the current opacity of the decision-making process inspires little confidence in the result; perhaps greater transparency would actually lessen the number of appeals rather than increase them.

The immigration adjudicatory system is clearly at a crossroads. Immigration is not likely to recede in importance in the public conscience any time soon, and, unless reform occurs, the partially broken system that exists now may become unfixable. The federal court system must remove the conflicts that apply immigration law unevenly across the circuits. Similarly, the BIA must discontinue its practice of rendering so many of its decisions without written opinion and must allow the generation of formal precedent that will guide non-citizens and legal practitioners alike. While immigration law has historically been estranged from the typical constitutional norms, the heightened importance of immigration in an increasingly globalized world necessitates that executive, legislature, and judiciary alike all act to correct the system's flaws or else risk a far greater future administrative nightmare.

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