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## The "Cure" That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution

Alan G. Bennett

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## NOTE

# THE "CURE" THAT HARMS: SEXUAL ORIENTATION-BASED ASYLUM AND THE CHANGING DEFINITION OF PERSECUTION

*Give me your tired, your poor, your huddled masses yearning  
to breathe free, the wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door.*<sup>1</sup>

### I. INTRODUCTION

The Immigration Act of 1917 was the first U.S. law to exclude lesbian and gay aliens from entry into the United States.<sup>2</sup> Congress excluded lesbians and gay men because of the medical and psychiatric communities' belief that homosexuality was a disease.<sup>3</sup> However, with the elimination of homosexuality from the psychiatric lists of mental disorders has come the opportunity for gay men and lesbians to gain asylum in this coun-

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1. Emma Lazarus, *Statue of Liberty*.
  2. See Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?*, 7 YALE L. & POL'Y REV. 201, 208 (1989) (citing Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875 (1917)).
  3. See *id.*

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try.<sup>4</sup> Congress ended the general exclusion of lesbian and gay aliens in 1990, thus allowing refugees to escape from sexual orientation-based persecution in their home countries.<sup>5</sup> Asylum case law has established that lesbians and gays now meet the statutory requirements of “members of a particular social group” subject to persecution.<sup>6</sup> As a result, gays and lesbians may now attempt to prove past persecution or a well-founded fear of future persecution in order to achieve asylum.<sup>7</sup>

While no statutory definition of “persecution” exists, immigration and federal circuit courts have determined the term’s legal meaning.<sup>8</sup> The United States Court of Appeals for the Ninth Circuit and the Board of Immigration Appeals (BIA) have held that an asylum applicant need not show punitive intent to prove persecution.<sup>9</sup> However, the United States Court of Appeals for the Fifth Circuit disagrees with the Ninth Circuit and the Board of Immigration Appeals regarding the definition of persecution, and has held that persecution requires “intent to punish the victim.”<sup>10</sup> As a result, a split exists among the federal circuit courts regarding persecution and its requirements.<sup>11</sup> U.S. asylum law needs a single definition of persecution, which recognizes that offensive treatment, from which many lesbians and gay men suffer in numerous countries, constitutes persecution even without punitive intent on the part of the perpetrator.

Part II of this note will discuss the history of sexual orientation-based asylum law. Further, it will outline the statutory

4. See LESBIAN, GAY, BISEXUAL RIGHTS COMMITTEE, NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW, § 7.01(1)(2) (Roberta Achtenberg & Karen B. Moulding eds., West Group 1998) [hereinafter “SEXUAL ORIENTATION AND THE LAW”].

5. See SEXUAL ORIENTATION AND THE LAW, *supra* note 4, § 7.01(1). See generally Immigration Act of 1990, Pub. L. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990). The statute simply eliminated “sexual deviants” from its list of classes of excludable aliens.

6. *In re Toboso-Alfonso*, 20 I & N Dec. 819, 822 (B.I.A. 1990).

7. See *id.*

8. See MARK SILVERMAN, ET. AL., IMMIGRANT LEGAL RESOURCE CENTER, WINNING ASYLUM CASES, § 3.2 (5th ed. 1998).

9. See *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997); *In re Kasinga, I.* & N. Dec. 3278 (B.I.A. 1996).

10. *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994); see also *Pitcherskaia*, 118 F.3d at 648 n.9.

11. See *Pitcherskaia*, 118 F.3d at 648 n.9.

requirements for asylum, explain the legal procedure of gaining asylum, and discuss the case law recognition of lesbians and gay men as “a particular social group.” In addition, it will address the standards and definitions of persecution. Part III will discuss *Pitcherskaia v. INS*, a Ninth Circuit Court of Appeals case that addressed sexual-orientation based persecution. Pitcherskaia was a Russian lesbian who applied for sexual orientation-based asylum and whose application was initially rejected by an immigration court and the BIA before she appealed to the Ninth Circuit. In *Pitcherskaia*, the Ninth Circuit established a different standard from the Fifth Circuit which eliminated punitive intent as a requirement of persecution. Part IV will discuss the Fifth Circuit’s decision in *Faddoul v. INS* where it required punitive intent for purposes of asylum. Part V will critique the Fifth Circuit’s requirement of punitive intent and compare it with the Ninth Circuit’s definition of persecution, which does not require evidence of punitive intent. Finally, Part VI will propose the uniform adoption of the Ninth Circuit’s definition of persecution by all Federal appeals courts and the maintenance of this definition by the Board of Immigration Appeals. Further, it will apply the Ninth Circuit’s definition of persecution to Alla Pitcherskaia’s case, showing the importance of a definition of persecution that does not require punitive intent.

## II. BACKGROUND

### A. GENERAL ASYLUM ELIGIBILITY

For decades, the prohibition against lesbian and gay immigrants was based on the medical and psychiatric communities’ persistence in labeling homosexuality as a disease.<sup>12</sup> In 1917 and again in 1952, U.S. immigration acts excluded lesbians and gay men from immigration eligibility because Congress adhered to the psychiatric profession’s labeling of lesbians and gays as being “mentally defective” or as having “psychopathic

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12. See Carro, *supra* note 2 at 208-209; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875 (1917).

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personalities.”<sup>13</sup> In 1965, Congress further justified the exclusion of lesbians and gays by excluding what it termed to be “sexual deviants from entry into the U.S.”<sup>14</sup>

In 1979, the American Psychiatric Association removed homosexuality from the class of mental disorders known as “sexual deviation.”<sup>15</sup> Congress eventually recognized these changing medical and societal attitudes in its 1990 Immigration Act and ended the exclusion of gays and lesbians from immigration eligibility.<sup>16</sup> The Act’s congressional report stated that the prior exclusion of groups such as lesbians and gays was based on “outmoded grounds.”<sup>17</sup> During debate on the proposed Act, Congressman Theodore Weiss of New York called this exclusion of gays and lesbians “onerous and discriminatory.”<sup>18</sup> As a result of changing medical and political attitudes, lesbian and gay applicants are now eligible to meet the statutory require-

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13. SEXUAL ORIENTATION AND THE LAW, *supra* note 4, § 7.01(1)(2). *See generally* Immigration Act of 1917, ch. 29, § 3; Immigration and Nationality Act of 1952, ch. 477, § 403(13) (1952).

14. SEXUAL ORIENTATION AND THE LAW *supra* note 4, § 7.01(2) n. 26. *See generally* Immigration and Nationality Act, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965), *superseded by* Immigration Act of 1990, Pub. L. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990).

15. *See* SEXUAL ORIENTATION AND THE LAW, *supra* note 4, § 7.01(2) (citing Memorandum from Julius Richmond, Surgeon General and Assistant Secretary for Health, United States Department of Health, Education, and Welfare, to William Foege and George Lythcott (Aug. 2, 1979), quoted in Memo. Op. for the Acting Comm’r, Immigration and Naturalization Service, No. 79-85, 3 Op. Office of Legal Counsel 457, 458 (1979)). The American Psychological Association, the American Public Health Association, the American Nurses Association, and the Council of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses’ Association have endorsed this position of the American Psychiatric Association. *See* Carro, *supra* note 2 at 209 n.54.

16. Immigration Act of 1990, Pub. L. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990). Section 601 of the Act lists the “classes of excludable aliens” who are unable to obtain visas and “who shall be excluded from admission into the United States.” Unlike the previous Act, the 1990 Act does not list “sexual deviants” as one of the “excludable classes.” Thus, lesbians and gays are not excluded. *See* SEXUAL ORIENTATION AND THE LAW, *supra* note 4, § 7.01(1)(2).

17. H.R. CONF. REP. No. 101-955, at 128 (1990).

18. 136 CONG. REC. H12358-03, H12367 (daily ed. October 27, 1990) (Statement of Theodore Weiss).

ments for asylum.<sup>19</sup> These requirements are found within the definition of refugee as set out by the Refugee Act of 1980.<sup>20</sup>

A person will be considered a refugee within the meaning of the Act when the person has left her home country, a country where she was a resident, or if she has no nationality.<sup>21</sup> She must have fled that country because of past persecution *or* a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion.<sup>22</sup> Finally, she must no longer be willing to live in her home country because of this persecution.<sup>23</sup> Thus, if the person can prove past persecution or a well-founded fear of future persecution on the basis of one of five listed categories to an asylum officer, immigration court, or on appeal, then she will be eligible for asylum.<sup>24</sup> However, even if the applicant meets this statutory definition of "refugee," the adjudicator must decide in his or her discretion whether to grant asylum.<sup>25</sup>

#### B. IMMIGRATION COURT PROCEEDINGS, APPEAL AND REVIEW

To better understand the process that may lead to a successful asylum application, it is important to first understand the required legal procedure, including the complex system of immigration proceedings. The applicant must first present her application to an Immigration and Naturalization Services (INS) asylum officer.<sup>26</sup> The asylum officer may approve the ap-

19. See *SEXUAL ORIENTATION AND THE LAW*, *supra* note 4, § 7.01(2). See generally Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1988).

20. 8 U.S.C. § 1101(a)(42) states:

The term "refugee" means ... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

21. See 8 U.S.C. § 1101(a)(42)(A) (1988). Female pronouns will be used to identify asylum applicants throughout this article.

22. See *id.*

23. See *id.*

24. See *id.*

25. SILVERMAN, *supra* note 8, § 2.4.

26. See ARTHUR C. HELTON, 30TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE, 1021 PRAC. L. INST. 243, 261 (1997).

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plication or refer it to an immigration judge.<sup>27</sup> If the officer approves the application, asylum is awarded to the applicant.<sup>28</sup>

However, if the asylum officer does not approve the application, then the applicant must appear before an immigration judge in a hearing to gain his or her approval and to avoid deportation.<sup>29</sup> At the hearing, the INS will attempt to support its decision to refuse asylum.<sup>30</sup> The applicant will attempt to prove her case for asylum.<sup>31</sup> Both the applicant and the INS may present evidence for the record in support of their respective positions.<sup>32</sup> Neither state nor federal rules of evidence apply in immigration proceedings.<sup>33</sup> However, evidence presented must be relevant and conform to requirements of constitutional due process.<sup>34</sup>

If the applicant persuades the immigration judge that she meets the statute's asylum requirements, the judge will grant asylum for an indefinite time period.<sup>35</sup> In addition, the applicant's immediate family members who are still abroad may join her in the United States.<sup>36</sup> One year after being granted asylum, the applicant may apply to change her status to that of a permanent resident or she may retain asylum status.<sup>37</sup>

If, on the other hand, the immigration court rejects the applicant's asylum request, she may appeal her case to the Board of Immigration Appeals.<sup>38</sup> Only one BIA exists and it reviews all appeals from immigration courts throughout the United States.<sup>39</sup> The BIA will accept the appeal unless it is not sufficiently specific as to the facts or legal questions at issue.<sup>40</sup> For

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27. *See id.*

28. *See SILVERMAN, supra note 8, § 8.8.*

29. *See HELTON, supra note 26, at 262.*

30. *See id.* at 261.

31. *See id.*

32. *See id.*

33. *See HELTON, supra note 26, at 261.*

34. *See id.* at 261-262.

35. *See id.* at 262.

36. *See id.*

37. *See HELTON, supra note 26, at 262.*

38. *See id.* at 264.

39. *See SILVERMAN, supra note 8, § 2.5.*

40. *See HELTON, supra note 26, at 264.*

example, in a case where persecution is the legal issue, if the appeal does not clearly state that the immigration judge erroneously applied the definition of persecution in the lower court's decision, the BIA may dismiss the appeal.<sup>41</sup> The BIA has several options on review. It can reject the application on appeal, remand a case to the immigration judge with instructions to follow the appropriate course of action, or grant asylum directly.<sup>42</sup>

If the BIA rejects the application on appeal, the applicant may then bring her case to the Federal circuit court of appeals that has jurisdiction over the area from which the case originated.<sup>43</sup> The circuit court may then remand the case to the BIA with instructions for a ruling consistent with the Circuit Court's findings.<sup>44</sup> Furthermore, if 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.<sup>45</sup> As a result, circuit splits may arise because of inconsistent rulings among the circuit courts regarding the same legal issue.<sup>46</sup> The split between the Ninth and Fifth Circuits regarding the definition of persecution is an example of disagreement among the Circuit Courts.<sup>47</sup>

### C. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

In the past, one of the principal obstacles that faced lesbian and gay applicants when presenting an asylum application was the need to demonstrate that the persecution they suffered was on account of their "membership in a particular social group."<sup>48</sup> In 1990, the BIA first recognized gays and lesbians as members of a particular social group in *In re Toboso Alfonso*.<sup>49</sup>

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41. *See id.*

42. *See id.*

43. *See id.*

44. *See SILVERMAN, supra note 8, § 2.5.*

45. *See id.*

46. *See Pitcherskaia v. INS*, 118 F.3d 641, 648 n.9 (9th Cir. 1997).

47. *See id.*

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

49. *Id.*



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Fidel Armando Toboso-Alfonso came to the U.S. from Cuba as part of the Mariel boat lift of 1980.<sup>50</sup> In his application, Toboso-Alfonso claimed that the Cuban Government repeatedly detained, incarcerated, and tortured gays.<sup>51</sup> He told the court how he had suffered numerous detentions simply because he was gay.<sup>52</sup> Further, Toboso-Alfonso supported his claims with newspaper articles and a 1985 report from Amnesty International detailing the persecution of gays in Cuba.<sup>53</sup>

While the Board did not grant asylum to Toboso-Alfonso, BIA Judge Robert Brown refused to have him returned to Cuba because he found that Toboso-Alfonso's homosexuality qualified him as a member of a particular social group that was subject to persecution.<sup>54</sup> He was "a member of a particular group of persons who share a common, immutable characteristic, and ... this characteristic is one which members of the group either cannot change or should not be required to change because it is fundamental to their individual identity or consciences."<sup>55</sup> One of the court's factual findings was that people are not able to easily change their sexual orientation.<sup>56</sup> By recognizing Toboso-Alfonso's homosexuality as an immutable characteristic, the judge distinguished this court's finding from past holdings and allowed for the possibility that future gay and lesbian applicants would qualify as "a particular social group."<sup>57</sup>

50. See *Toboso-Alfonso*, 20 I. & N. Dec. at 820. Thousands of Cubans fled their country during this mass exodus. See *id.*

51. See *id.* at 821.

52. See *id.*

53. See *id.*

54. See *Toboso-Alfonso*, 20 I. & N. Dec. at 823. Judge Robert Brown did not grant him asylum because Toboso-Alfonso had been convicted for drug possession while in the U.S. The judge did not consider it to be a "particularly serious crime" but used his discretion in not awarding asylum. *Id.*

55. *Toboso-Alfonso*, 20 I. & N. Dec. at 822, citing characteristics of "immutability" in *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985). The American Psychiatric Association removed homosexuality from its list of mental illnesses in 1973. The majority of social and behavioral scientists believe that sexual orientation, be it gay, lesbian or heterosexual, is an immutable characteristic and "highly resistant to change." Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 613 n.55 (1993) (citing a long list of sources and studies on the subject).

56. See *Toboso-Alfonso*, 20 I. & N. Dec. at 822-823.

57. See *id.* at 819.

In 1993, *In re Tenorio* laid the foundation for the official recognition of gays and lesbians as members of a particular social group by all U.S. immigration courts.<sup>58</sup> The Judge granted asylum to Marcelo Tenorio because of his sexual orientation-based persecution.<sup>59</sup> Although immigration judge decisions cannot set legal precedent, this case was ground-breaking because it was the first immigration court decision to award asylum by acknowledging that gays and lesbians were members of a particular social group.<sup>60</sup> Tenorio had been persecuted and feared future persecution by paramilitary groups in Brazil that targeted gays.<sup>61</sup> While living in Rio de Janeiro, a group of men attacked, beat, and stabbed Tenorio after he had left a gay bar.<sup>62</sup> They threatened him with worse treatment if he returned to the bar.<sup>63</sup> As a result of this persecution, Tenorio left Brazil and came to the United States.<sup>64</sup> He feared he would be killed if he returned to his country.<sup>65</sup>

In *In re Tenorio*, the Judge followed the *Toboso-Alfonso* decision by finding gays and lesbians to be members of a particular social group.<sup>66</sup> Judge Leadbetter found that gays and lesbians share a common trait that is fundamental to their identity and it is arguably an immutable characteristic.<sup>67</sup> The Judge also noted an Immigration and Refugee Board of Canada ruling in which the Canadian court found that even if sexual orientation were a “voluntary condition,” it would still be a condition so fundamental to a person’s identity that a claimant should not be forced to change it.<sup>68</sup> The *Tenorio* court’s recognition of lesbians and gays as a “particular social group” made it

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58. *In re Tenorio*, No. A72-093-558 (Immigr. Ct., San Francisco July 26, 1993), reprinted in REFUGEE LAW AND POLICY 713-720 (Karen Musalo et al. eds., 1997).

59. *See id.* at 720.

60. *See* Wade Lambert, *Asylum Given to Gay Man*, WALL ST. J., Aug. 2, 1998.

61. *See Tenorio*, *supra* note 58, at 714-716.

62. *See id.* at 713-714.

63. *See id.*

64. *See id.* at 714.

65. *See Tenorio*, *supra* note 58, at 714.

66. *Id.* at 720.

67. *See id.* at 719. *See also* Lambert, *supra* note 60.

68. *Id.* (citing Immigration and Refugee Board (Refugee Division) of Canada, T91-04459 at 5 (April. 9, 1992)).

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easier for gays and lesbians to be granted asylum in future cases.<sup>69</sup>

Following the *Tenorio* and *Toboso-Alfonso* decisions, in June 1994, U.S. Attorney General Janet Reno issued a directive (hereinafter "Reno Directive") to U.S. immigration courts to adopt the holding of *In re Toboso-Alfonso* as precedent.<sup>70</sup> The Reno Directive set the standard for immigration courts and officially recognized that U.S. immigration courts may grant asylum to gays and lesbians on account of their persecution as members of a particular social group.<sup>71</sup> Attorney General Reno found that the publication of the *Toboso-Alfonso* decision would provide useful guidelines for immigration judges in evaluating cases involving gay and lesbian asylum applicants.<sup>72</sup> As a result of the Reno Directive, official precedent established that gays and lesbians qualified for asylum on the basis of membership in a particular social group.

D. WELL-FOUNDED FEAR OF FUTURE PERSECUTION OR PAST PERSECUTION

In addition to proving membership in a particular social group, lesbian and gay asylum applicants face the challenge of demonstrating persecution.<sup>73</sup> Although Congress has lifted the ban on gay and lesbian immigrants and courts have now recognized gays and lesbians as members of a particular social group, a homosexual applicant still must prove either (1) a well-founded fear of future persecution, or (2) actual past per-

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69. See Lambert, *supra* note 60.

70. See *Toboso-Alfonso*, 20 I. & N. Dec. at 819 n.1 (citing Att'y Gen. Order no. 1895-94 (June 19, 1994)). Janet Reno declared *Toboso-Alfonso* as "precedent in all proceedings involving the same issue or issues." Reno further stated in her memo:

This case held that an individual, who has been identified as homosexual and persecuted by his or her government for that reason alone, may be eligible for relief under the refugee laws on the basis of persecution because of membership in a particular social group. I have examined the case and conclude that it represents an appropriate application of the law to the facts as described in the opinion.

Queer Resources Directory, Memorandum from Janet Reno (last modified Sept. 13, 1995) <http://mother.qrd.org/qrd/www/world/immigration/reno.html>.

71. See *id.*

72. See *id.*

73. See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1988).

secution.<sup>74</sup> Proving persecution is usually the most difficult element for an asylum applicant to meet.<sup>75</sup>

### 1. *Well-Founded Fear of Future Persecution*

Proof of a well-founded fear of future persecution is one means of showing persecution.<sup>76</sup> This requires the applicant to demonstrate that she subjectively fears she will be persecuted if she returns to her home country.<sup>77</sup> She must also prove this fear is objectively reasonable.<sup>78</sup> Thus, an applicant must establish both a subjective and an objective component in order to meet the well-founded fear requirement.<sup>79</sup>

#### a) Subjective Fear of Persecution

First, in finding a well-founded fear of future persecution, the judge must examine the applicant's subjective mental state.<sup>80</sup> An immigration judge needs to confirm that fear exists in the mind of the applicant.<sup>81</sup> "Fear is a subjective state of mind, therefore evaluation of the applicant's opinions, feelings, and experiences is essential to a proper adjudication of the claim."<sup>82</sup> Further, nonverbal as well as verbal conveyances of fear play an important role in establishing an applicant's credibility and subjective fear.<sup>83</sup> Hence, an immigration judge should observe an applicant's demeanor closely while she gives testimony at her asylum hearing.<sup>84</sup> If the judge concludes that the applicant genuinely fears returning to her home country,

74. *See id.*

75. *See SILVERMAN, supra note 8, § 3.1.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See SILVERMAN, supra note 8, § 3.1.*

80. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-431 (1987).

81. *See id.*

82. SILVERMAN, *supra* note 8, § 3.1 (citing ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE, BASIC LAW MANUAL, 27 (March 1991)).

83. *See SILVERMAN, supra note 8, § 3.1.*

84. *See id.*

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the applicant will have satisfied the requirement of the “subjective” component.<sup>85</sup>

## b) Objective Fear of Persecution

However, subjective fear alone is not sufficient to establish an asylum claim based on fear of future persecution.<sup>86</sup> Immigration judges rely strongly on the objective component when determining whether an applicant has a legitimate fear of future persecution.<sup>87</sup> The BIA ruled in *In re Mogharrabi* that an applicant satisfies the objective requirement if she can show that a reasonable person in similar circumstances would fear future persecution.<sup>88</sup> An applicant must present objective evidence to support her position.<sup>89</sup> Further, the court will consider whether her home country has a history of persecuting people in similar circumstances.<sup>90</sup> Evidence of a country’s treatment of gays and lesbians usually consists of a compilation of official and non-governmental sources.<sup>91</sup> The applicant will attempt to present documentation of the persecution of lesbian and gay men in her country.<sup>92</sup> For example, U.S. State Department reports can be used, as well as reports made by lesbian and gay human rights associations.<sup>93</sup> Therefore, a well-founded fear can be based on what has happened to others who are similarly situated.<sup>94</sup> Further, specific evidence, such as eyewitness accounts of threats of persecution, may be valuable evidence as well.<sup>95</sup>

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85. See *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

86. See *id.*

87. See SILVERMAN, *supra* note 8, § 3.1.

88. See *Mogharrabi*, 19 I. & N. Dec. at 445.

89. See *id.* at 441.

90. See *id.* at 446.

91. See SILVERMAN, *supra* note 8 at § 13.4.

92. See *id.*

93. See *Pitcherskaia v. INS*, 118 F.3d 643 (9th Cir. 1997); Amici Curiae Brief in support of Alla K. Pitcherskaia at 22-23, *Pitcherskaia v. INS*, 118 F.3d 643 (9th Cir. 1997) (No. 95-70887), reprinted in ASYLUM BASED ON SEXUAL ORIENTATION: A RESOURCE GUIDE § I.C at 45 (Sydney Levy, ed., The International Gay and Lesbian Human Rights Commission and Lambda Legal Defense Fund, 1996) [hereinafter “IGLHRC Resource Guide”].

94. See *Mogharrabi*, 19 I. & N. Dec. at 446.

95. See *id.* at 448.

However, documentation and other corroborative evidence are, at times, difficult to obtain.<sup>96</sup> Few countries record human rights violations against lesbians and gays.<sup>97</sup> This lack of documentation is often the result of the underlying homophobia that permeates many countries.<sup>98</sup> Further, the applicant often cannot return to her country to obtain evidence because of the existing threat that brought her to apply for asylum in the first place.<sup>99</sup> Therefore, the applicant's testimony alone may suffice if it is credible, persuasive, and specific.<sup>100</sup> If the applicant's testimony is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the fear," then her testimony is credible.<sup>101</sup> The immigration judge uses her own discretion to determine if the applicant's testimony has met these requirements.<sup>102</sup> Each case is assessed independently on its own particular merits.<sup>103</sup>

If the applicant meets the subjective and objective requirements of a well-founded fear of future persecution, then the applicant will have proven persecution in her case.<sup>104</sup> As a result, the applicant meets one of the statutory requirements for asylum.<sup>105</sup>

#### c) Standard for a Well-founded Fear of Future Persecution

In 1987, the U.S. Supreme Court, in *INS v. Cardoza-Fonseca*,<sup>106</sup> clarified the standard by which courts will determine if an applicant has a well-founded fear of future persecution. Although the Court did not attempt to define a well-founded fear, it ruled that the well-founded fear standard re-

96. *See id.* at 445.

97. *See* Nicole LaViolette, *Proving a Well-Founded Fear, The Evidentiary Burden in Refugee Claims Based on Sexual Orientation*, reprinted in IGLHRC Resource Guide, *supra* note 93, § I.D at 5.

98. *See id.* at 6.

99. *See Mogharrabi*, 19 I. & N. Dec. at 444.

100. *See id.* at 445.

101. *Id.*

102. *See id.* at 446.

103. *See Mogharrabi*, 19 I. & N. Dec. at 446.

104. *See SILVERMAN*, *supra* note 8, § 3.1.

105. *See id.*

106. 480 U.S. 421 (1987).

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quires a lesser degree of proof than a clear probability standard.<sup>107</sup> By its ruling, the Court lessened the applicant's burden.<sup>108</sup> Under this new standard, an applicant may prove that she has a well-founded fear of persecution even when there is less than a 50% chance that persecution will actually take place.<sup>109</sup> Furthermore, the Court stated in dicta that even if an applicant can show that she has only a 10% chance of being "shot, tortured, or otherwise persecuted," then she has a well-founded fear of the event happening.<sup>110</sup> The Court held that an immigration court should rely on objective evidence and the subjective persuasiveness of the applicant's testimony in order to meet this standard.<sup>111</sup>

## 2. *Past Persecution—Threats to "Life and Freedom" and other Forms of Past Persecution*

In addition to a well-founded fear of future persecution, an applicant may be granted asylum because she has suffered past persecution.<sup>112</sup> When past persecution has threatened an asylum applicant's "life or freedom," it is presumed that one or the other would again be threatened if the applicant returned to her country.<sup>113</sup> Hence, she will attempt to prove that the past harm she suffered constituted a "threat to her freedom or life."<sup>114</sup> Similar to proving a well-founded fear of future persecution, the applicant may prove past persecution by presenting subjective and objective evidence of past events.<sup>115</sup> The judge will examine documented evidence and persuasive testimony in order to determine if past persecution occurred.<sup>116</sup>

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107. *See id.* at 431.

108. *See id.* Prior to *Cardoza-Fonseca*, courts interpreted the standard to be a "clear probability." The clear probability standard required a 50 percent chance or more probability that the applicant would be persecuted if she returned to her country.

109. *See id.*

110. *INS v. Cardoza Fonseca*, 480 U.S. 421, 431 (1987).

111. *See Mogharrabi*, 19 I. & N. Dec. at 443-444.

112. *See* 8 U.S.C. § 1101 (a) 42 (A) (1988).

113. *See SILVERMAN*, *supra* note 8, § 3.5.

114. *Id.*

115. *See id.*; *see also* discussion, *supra* Part II.D.1.

116. *See id.*

Further, even if the past persecution did not constitute a threat to the applicant's life or freedom, an applicant may argue that the harm nevertheless qualifies as persecution.<sup>117</sup> The Ninth Circuit ruled in *Desir v. Ilchert*<sup>118</sup> that persecution encompasses more than the statutory term of "threat to life or freedom." For example, the withdrawal of all economic opportunities or "a deliberate imposition of substantial economic disadvantage" may constitute persecution.<sup>119</sup> In *Gonzalez v. INS*,<sup>120</sup> the Ninth Circuit found that a Nicaraguan had suffered from economic persecution. The government confiscated her property, took away her ration card, and forced her to liquidate her business.<sup>121</sup> As a result, the court found that the applicant had suffered from an economic deprivation equivalent to persecution.<sup>122</sup> Thus, even if the applicant cannot show that her past persecution was so extreme as to constitute a "threat to her life or freedom," she may still prove that she suffered from past persecution if she can prove substantial economic deprivation.<sup>123</sup>

However, even if the applicant successfully proves past persecution, the statute allows an immigration judge to use her own discretion and require the applicant to show a well-founded fear of future persecution as well.<sup>124</sup> Although past persecution is presumed to include a well-founded fear of future persecution, this is a rebuttable presumption.<sup>125</sup> To overcome the presumption, the INS bears the burden of showing, by a preponderance of the evidence, that conditions in the applicant's home country have changed significantly so that the applicant no longer has a well-founded fear of being persecuted if she returns there.<sup>126</sup> If the immigration judge finds significant changes have occurred, she may deny the application on the

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117. See SILVERMAN, *supra* note 8, § 3.5.

118. 840 F.2d 723 (9th Cir. 1988).

119. SILVERMAN, *supra* note 8, § 3.5 (citing *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996)).

120. See *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996).

121. See *id.*

122. See *id.*

123. See SILVERMAN, *supra* note 8, § 3.5.

124. See 8 C.F.R. § 208.13(b)(1)(i) (1998).

125. See *id.*

126. See *id.*



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basis that the applicant does not meet the statutory requirements for a refugee.<sup>127</sup>

#### E. CASE LAW DISAGREEMENT REGARDING THE DEFINITION OF PERSECUTION

A dilemma exists for immigration courts, the BIA and circuit courts because the Immigration and Nationality Act does not define persecution.<sup>128</sup> Courts have used two competing definitions of persecution in asylum case law that differ as to the requirement of "punitive intent."<sup>129</sup> Courts that follow the first definition that requires punitive intent generally exclude applicants who cannot show their persecutor has a subjective intent to punish.<sup>130</sup> This definition focuses upon the persecutor's intention.<sup>131</sup> Those that follow the alternative definition, which lacks this punitive intent requirement, allow for "offensive" treatment to be deemed persecution.<sup>132</sup> Following this meaning, a judge considers the victim's suffering while the persecutor's intent is irrelevant. Federal courts of appeals defer to the BIA's definition unless the court disagrees with the Board's interpretation.<sup>133</sup> Because federal circuit courts have disagreed over this definition, the application of law regarding persecution differs among the circuits.<sup>134</sup> Further, the Supreme Court has not ruled on the appropriate definition of persecution with regard to intent.

In 1987, the BIA held that to find persecution, "harm or suffering must be inflicted upon the victim in order to punish her for possession of a belief or characteristic the persecutor seeks to overcome."<sup>135</sup> Hence, under this definition, an applicant must prove that the persecutor possessed a motive to punish in order for persecution to exist.<sup>136</sup> The Fifth Circuit Court of Ap-

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127. 8 U.S.C. § 1101 (a)(42)(A) (1988).

128. *Id.*

129. *See Pitcherskaia*, 118 F.3d at 648 n.9.

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

131. *See id.*

132. *Pitcherskaia*, 118 F.3d at 647.

133. *See id.* at 646.

134. *See id.* at 647.

135. *Mogharrabi*, 19 I. & N. Dec. at 223.

136. *See id.*

peals followed this BIA assessment that a persecutor must have a punitive intent.<sup>137</sup>

However, in the 1996 case of *In re Kasinga*,<sup>138</sup> the BIA revisited the “punitive intent” requirement for purposes of asylum eligibility and held that forms of persecution exist that do not entail punitive intent but cause the victim to suffer nonetheless. Thus, using this second definition, the BIA found that female genital mutilation, regardless of the persecutor’s intent, was a form of persecution and expressly held that a subjective, punitive, or malignant intent was not required for harm or suffering to constitute persecution.<sup>139</sup> Similarly, the Ninth Circuit addressed the requirement of “punitive intent” in the 1997 case of *Pitcherskaia v. INS*.<sup>140</sup>

### III. *PITCHERSKAIA v. INS*: THE NINTH CIRCUIT’S DEFINITION OF PERSECUTION.

#### A. FACTS AND PROCEDURAL HISTORY

Alla K. Pitcherskaia grew up in a family targeted by the Russian government.<sup>141</sup> Her father was an artist who had been arrested and imprisoned for distributing anti-government literature.<sup>142</sup> He ultimately died in prison.<sup>143</sup>

Beginning at age 27, Pitcherskaia repeatedly suffered police-enforced, involuntary psychiatric treatment because she was a lesbian.<sup>144</sup> Pitcherskaia’s girlfriend was forced into a psychiatric institution for more than four months because she was a lesbian.<sup>145</sup> While institutionalized, her girlfriend was

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137. *Faddoul*, 37 F.3d at 188.

138. I. & N. Dec. no. 3278 (BIA 1996).

139. *See id.*

140. *See Pitcherskaia v. INS*, 118 F.3d 643 (9th Cir. 1997).

141. *See id.*

142. *See id.*

143. *See id.* at 6.

144. Brief for Pitcherskaia at 6, *Pitcherskaia v. INS*, 118 F.3d 643 (9th Cir. 1997) (No. 95-70887), reprinted in *ASYLUM BASED SEXUAL ORIENTATION: A RESOURCE GUIDE* § I.C at 6 (Sydney Levy, ed., The International Gay and Lesbian Human Rights Commission and Lambda Legal Defense and Education Fund, 1996).

145. *See Pitcherskaia*, 118 F.3d at 644.

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forced to undergo electroshock treatment, along with a variety of other “therapies.”<sup>146</sup> This was done in an effort to change her sexual orientation.<sup>147</sup> When Pitcherskaia visited her detained girlfriend, the clinic registered her as a “suspected lesbian.”<sup>148</sup> Clinic officials also told her she must receive treatment at her local clinic every six months to cure her of her lesbianism.<sup>149</sup> The “treatments” included sedation and psychotropic medication, as well as electroshock therapy.<sup>150</sup> When Pitcherskaia refused to submit to “treatment,” the police found her and forcibly took her to the clinic.<sup>151</sup> She was assigned to a psychiatrist who told her to love men.<sup>152</sup> Further, he wanted Pitcherskaia to fix what he called her “wrong sexuality.”<sup>153</sup>

Pitcherskaia submitted herself to eight of these “treatment” sessions, and although she denied being a lesbian in order to protect herself, she was diagnosed by the clinic as having “slow growing schizophrenia,” a medical term used to label lesbians and gays by Russian authorities.<sup>154</sup> The attending psychiatrist prescribed sedatives and tried to hypnotize her as part of the “treatment.”<sup>155</sup>

In 1990, and again in 1991, the Russian militia arrested Pitcherskaia while she was in the home of gay friends and imprisoned her for the night.<sup>156</sup> She also received several “Demands for Appearance” because the militia wanted to interrogate her further regarding her sexual orientation.<sup>157</sup>

Pitcherskaia entered the U.S. with a tourist visa on March 22, 1992 when she was 30 years old.<sup>158</sup> Soon after her arrival in

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146. *See id.*

147. *See id.*

148. *Id.*

149. *See Pitcherskaia*, 118 F.3d at 644.

150. *See id.*; *see also* Brief for Pitcherskaia, *supra* note 144, at 6.

151. *See Pitcherskaia*, 118 F.3d at 644.

152. *See* Brief for Pitcherskaia, *supra* note 144, at 6.

153. *Id.*

154. *See Pitcherskaia*, 118 F.3d at 644.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See Pitcherskaia*, 118 F.3d at 643; Brief for Pitcherskaia, *supra* note 144, at 5.

the U.S., Pitcherskaia received two additional "Demands for Appearance" which were sent to her mother's home in Russia.<sup>159</sup> Since she did not answer these demands, Pitcherskaia feared the Russian authorities would follow through with past threats and forcibly institutionalize her if she returned home.<sup>160</sup>

On June 2, 1992, after her mother warned her that the Russian militia was still looking for her, Pitcherskaia applied for asylum in this country.<sup>161</sup> She claimed she feared persecution in Russia because of her father's and her own anti-Communist political activities.<sup>162</sup> The Immigration and Naturalization Service Asylum Office in San Francisco conducted Pitcherskaia's interview and concluded that her statements regarding her past persecution in Russia were credible.<sup>163</sup> However, using its discretionary authority, the INS found that she had failed to establish a well-founded fear of future persecution and thus denied her application for asylum.<sup>164</sup> As she had over-stayed her tourist visa, the INS placed her in deportation proceedings.<sup>165</sup>

Before completion of her deportation proceedings, Pitcherskaia again requested asylum.<sup>166</sup> In her new application, she made the additional claim that she had been persecuted because of her opinions as a lesbian activist and her membership in a particular social group, Russian lesbians.<sup>167</sup> She also claimed a well-founded fear of future persecution.<sup>168</sup>

Pitcherskaia's application was again denied after the second hearing before the immigration judge.<sup>169</sup> The judge concluded, "based upon the entire record, including the Court's observa-

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159. *See Pitcherskaia*, 118 F.3d at 645.

160. *See id.*

161. *See Pitcherskaia*, 118 F.3d at 643; Brief for Pitcherskaia, *supra* note 144, at 4.

162. *See Pitcherskaia*, 118 F.3d at 643.

163. *See id.*

164. *See id.*

165. *See id.*

166. *See Pitcherskaia*, 118 F.3d at 643.

167. *See id.*

168. *See id.*

169. *See Pitcherskaia*, 118 F.3d at 645.

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tion of the demeanor of the respondent as well as her witness while testifying and after consideration of the arguments of counsel," Pitcherskaia had not proved her case for asylum.<sup>170</sup> Therefore, she did not meet the requirements of asylum, nor was she granted a withholding of deportation.<sup>171</sup>

## B. THE BIA'S HOLDING

Following this rejection, Pitcherskaia followed the normal procedural process and appealed her case to the BIA.<sup>172</sup> In a Two to one decision, the majority found that her forced psychiatric treatment did not amount to persecution.<sup>173</sup>

In reaching its decision, the majority relied on the prior BIA holdings in *In re Mogharrabi* and *In re Acosta*.<sup>174</sup> Both cases stated the standard for proving persecution included an "intent to punish."<sup>175</sup> In those cases, the courts concluded that an applicant may establish that she has a well-founded fear of persecution if she proves that: (1) the persecutor seeks to overcome a belief or characteristic of the victim by using punishment of some sort; (2) the persecutor is aware that the victim possesses the characteristic sought to be overcome; (3) the persecutor is able to punish the victim; and (4) the persecutor desires to punish the victim for possessing the characteristic sought to be overcome.<sup>176</sup> Here, the majority of the BIA focused on the fourth element and required Pitcherskaia to prove that the Russian authorities intended to punish her because she was a lesbian.<sup>177</sup> The Board ruled that because the Russian militia intended to "cure" her of her lesbianism, the forced "treatments" and confinement were not intended as punishment.<sup>178</sup> Because there was no intent to punish, the BIA concluded that there was no persecution.<sup>179</sup> The Board found that, without

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170. *Id.*

171. *See id.*

172. *See Pitcherskaia*, 118 F.3d at 645. *See also* discussion *supra* Part II.B.

173. *See Pitcherskaia*, 118 F.3d at 645.

174. *See id.* at 647.

175. *See id.* at 647.

176. *See id.*

177. *See Pitcherskaia*, 118 F.3d at 645.

178. *See id.*

179. *See id.*

such punishment, persecution was not present.<sup>180</sup> Without proof of persecution, Pitcherskaia's asylum application lacked foundation.<sup>181</sup>

Further, the BIA did not find that Pitcherskaia possessed a well-founded fear of future persecution. The majority noted the symbolic 1993 repeal of the anti-sodomy law of the Russian Penal Code.<sup>182</sup> The BIA concluded that this change of law in the former Soviet Union made it unlikely that Pitcherskaia would be intentionally persecuted in the new Russian Republic.<sup>183</sup>

Because she could not prove past or future persecution, Pitcherskaia's asylum application was rejected. However, the BIA allowed Pitcherskaia the option of voluntary departure rather than subjecting her to immediate deportation.<sup>184</sup>

Chairman Schmidt dissented.<sup>185</sup> First, he concluded that Pitcherskaia was eligible for asylum as a member of a particular social group because she was a Russian lesbian.<sup>186</sup> He further disagreed with the majority's conclusion that an asylum applicant must prove that her persecutor had an "intent to punish."<sup>187</sup> Finally, he rejected the majority's conclusion that the situation for gays and lesbians in Russia had improved.<sup>188</sup>

Chairman Schmidt most likely relied on Pitcherskaia's presentation of documents showing the continued persecution of lesbians and gays in Russia.<sup>189</sup> For example, Pitcherskaia presented Department of State Country Reports for 1992, 1994, and 1995 that demonstrated the uninterrupted use of involun-

180. *See id.*

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

182. *See id.*; Amici Curiae Brief in support of Alla K. Pitcherskaia, at 27, *Pitcherskaia v. INS*, 118 F.3d 643 (9th Cir. 1997) (No. 95-70887) *reprinted in* ASYLUM BASED ON SEXUAL ORIENTATION, A RESOURCE GUIDE § I.C (Sydney Levy, ed., The International Gay and Lesbian Human Rights Commission and Lambda Legal Defense and Education Fund, 1996).

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

184. *See id.*

185. *See id.*

186. *See id.*

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

188. *See id.*

189. *See id.*

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tary psychiatric treatment against lesbians by Russian authorities.<sup>190</sup> Those documents indicated that, even though the Russian anti-sodomy provision had been repealed, the Russian militia continued to have the legal means to harass, arrest, and detain lesbians and gay men under the vague, catch-all provisions in the Russian Criminal Code known as "hooliganism" laws.<sup>191</sup> In addition, Pitcherskaia presented evidence of numerous documented instances of police harassment of gay men and lesbians, including beatings, arbitrary searches, and armed intimidation by the Russian militia.<sup>192</sup> Further, Pitcherskaia presented evidence that the Russian Ministry of Justice continues to keep lists of known gays and lesbians in order to monitor and track them.<sup>193</sup> As a result, the BIA's dissenting judge indicated that he would have granted Pitcherskaia asylum.<sup>194</sup>

After the BIA rejected her application, Pitcherskaia appealed to the United States Court of Appeals for the Ninth Circuit.<sup>195</sup> She argued and submitted her appeal on December 11, 1996.<sup>196</sup>

#### C. THE NINTH CIRCUIT'S ANALYSIS

The issue on appeal was whether the Immigration and Nationality Act requires an applicant to prove that the persecutor "harbored a subjective intent to harm or punish when persecuting the victim."<sup>197</sup>

Persecution is a legal question reviewed de novo.<sup>198</sup> Normally, federal courts of appeal follow the BIA's interpretations because the Act does not define persecution.<sup>199</sup> However, if the

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190. See Amici Curiae Brief, *supra* note 182, at 22-23.

191. See *id.* at 27-28.

192. See *id.* at 23. For example, in 1993, for no apparent reason, uniformed policemen attacked and severely beat two lesbians outside a gay disco in St. Petersburg.

193. See *id.* at 24-25.

194. See *Pitcherskaia*, 118 F.3d at 645.

195. See *id.* at 641.

196. See *id.*

197. *Pitcherskaia*, 118 F.3d at 643.

198. See *id.* at 646.

199. See *id.*

circuit court finds the BIA's interpretation to be "arbitrary, capricious, or manifestly contrary to statute," the court can overrule this definition and impose another.<sup>200</sup>

Here, the Ninth Circuit found the BIA's definition of persecution to be contrary to the statute.<sup>201</sup> The court stated, "Pitcherskaia claims that the BIA had applied an erroneous legal standard by insisting that an intent to punish is a necessary element of persecution."<sup>202</sup> The court agreed with Pitcherskaia and found that the BIA had erred in requiring Pitcherskaia to prove punitive intent.<sup>203</sup> Further, in support of its decision, the 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.<sup>204</sup>

The court found that the term "punishment" implied that the perpetrator believed the victim did some wrong or committed a crime.<sup>205</sup> As a result, the perpetrator then took action in retribution.<sup>206</sup> Persecution, on the other hand, only required that the perpetrator caused the victim suffering or harm.<sup>207</sup> 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.<sup>208</sup>

In clarifying this new legal standard, the court stated that the definition of persecution is objective.<sup>209</sup> The court wrote "[w]e have defined persecution as the infliction of suffering or harm upon those who differ ... in a way regarded as offensive."<sup>210</sup> Since the existence of persecution is an objective

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200. *Id.*

201. *See Pitcherskaia*, 118 F.3d at 647.

202. *Id.* at 646.

203. *See id.*

204. *See id.*

205. *Pitcherskaia*, 118 F.3d at 647.

206. *See id.* at 647.

207. *See id.* at 647-648.

208. *See id.* at 646.

209. *See Pitcherskaia*, 118 F.3d at 646.

210. *Id.* at 647.



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determination, it is thus defined by what a reasonable person would consider "offensive."<sup>211</sup> It is irrelevant that "the person inflicts suffering or harm in an attempt to elicit information, for his own sadistic pleasure, to 'cure' his victim, or to save his soul."<sup>212</sup> The court analogized to the dark acts of the Spanish Inquisition.<sup>213</sup> Even though the inquisitors believed they were saving misguided believers through the infliction of pain, they were, in fact, persecuting their victims.<sup>214</sup> The court concluded that an act was persecution if a reasonable person would find it offensive.<sup>215</sup>

The Ninth Circuit reiterated that either a victim's past persecution or a well-founded fear of future persecution may provide eligibility for a grant of asylum.<sup>216</sup> However, the court did not address Pitcherskaia's claims of whether she had established the requisite subjective and objective components of a well-founded fear of persecution.<sup>217</sup> This was left to be decided on remand.<sup>218</sup> Thus, the Ninth Circuit sent Pitcherskaia's case back to the BIA and required it to apply the proper definition of persecution, as stated in its decision.<sup>219</sup> The Ninth Circuit did not address whether Pitcherskaia had established a legitimate claim of asylum under the correct definition of persecution.<sup>220</sup> As of the time of this writing, the BIA has not yet returned its decision regarding Pitcherskaia's asylum status.

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211. *Id.*

212. *Id.*

213. *See Pitcherskaia*, 118 F.3d at 647 n.8.

214. *See id.* During oral arguments, Judge Betty Fletcher forced the INS attorney to concede that the tortures and murders of the Inquisition were persecution even though its purpose was to save souls. Carol Ness, *INS Loses Case over Russia's Treatment of S.F. Woman*, SAN FRANCISCO EXAMINER, June 25, 1997.

215. *See Pitcherskaia*, 118 F.3d at 647.

216. *See id.* at 645.

217. *See id.* at 648.

218. *See id.*

219. *See Pitcherskaia*, 118 F.3d at 648.

220. *See id.*

#### IV. THE FIFTH CIRCUIT'S REQUIREMENT OF PUNITIVE INTENT

Despite the reasonableness of the Ninth Circuit's definition of persecution, disagreement exists among the Circuits regarding this legal issue.<sup>221</sup> While the Ninth Circuit recognizes persecution as the infliction of suffering or harm in a way regarded as offensive to a reasonable person, the Fifth Circuit finds persecution only when the perpetrator acts with the intent to punish the victim.<sup>222</sup> In *Pitcherskaia*, the Ninth Circuit expressly rejected the Fifth Circuit's punitive intent requirement as adopted in the latter's 1994 decision in *Faddoul v. INS*.<sup>223</sup>

*Faddoul* sets out the Fifth Circuit's definition of persecution. Elias Faddoul was a thirty-three year old man of Palestinian ancestry who was born and raised in Saudi Arabia.<sup>224</sup> The Saudi government restricted the travel rights of Palestinians and other non-Saudis.<sup>225</sup> Further, the government excluded non-citizens from all schools of higher education.<sup>226</sup> Faddoul applied for asylum in the U.S. claiming persecution because Saudi Arabia denied Palestinian residents, even those born within its borders, the right to own property or a business, attend a Saudi university, marry a Saudi citizen, or travel within Saudi Arabia without written permission.<sup>227</sup> As a result, Faddoul claimed that the Saudi government persecuted him because of his Palestinian ancestry.<sup>228</sup>

The Fifth Circuit disagreed, concluding that all non-Saudis, regardless of their origin, do not receive the full rights of Saudi citizens.<sup>229</sup> The fact that Saudi law grants citizenship only to those of Saudi ancestry did not show particularized persecution

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221. See *Pitcherskaia v. INS*, 118 F.3d at 643, 648 n.9 (9th Cir. 1997).

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

223. *Pitcherskaia*, 118 F.3d at 648 n.9.

224. See *Faddoul*, 37 F.3d at 187.

225. See *id.* at 188.

226. See *id.* at 189.

227. See *id.* at 187.

228. See *Faddoul*, 37 F.3d at 188-189.

229. See *id.*

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against Palestinians.<sup>230</sup> Further, the court's definition of persecution required "a showing by the alien that harm or suffering will be inflicted upon him in order to punish him for possessing a belief or characteristic a persecutor sought to overcome."<sup>231</sup> Under this standard, for persecution to exist, the Saudi government would have to intentionally single out Palestinians and punish them with discriminatory treatment.<sup>232</sup>

However, the court noted that Palestinians born in Saudi Arabia receive the same rights and are subject to the same discrimination as, for example, Saudi-born Egyptians.<sup>233</sup> The court maintained that Faddoul could not prove persecution without demonstrating the Saudi government's clear intention to punish Palestinians by depriving them of education, property and travel rights.<sup>234</sup> The court found no evidence that the government had ever arrested, detained, interrogated, or harmed Faddoul to punish him because of his ancestry.<sup>235</sup> Thus, the court did not find the required punitive intent necessary for persecution to exist.<sup>236</sup> As a result, the court affirmed the BIA's denial of Faddoul's asylum application.<sup>237</sup>

## V. THE LEGAL EFFECTS OF A "PUNITIVE INTENT" REQUIREMENT

The adoption of a particular definition of persecution by a court can have a meaningful effect on the outcome of an asylum case.<sup>238</sup> If the Fifth and Ninth Circuit Courts had exchanged positions in *Faddoul* and *Pitcherskaia* regarding the punitive requirement, their holdings in the respective cases might have

230. *See id.* at 188.

231. *Id.*

232. *See Faddoul*, 37 F.3d at 188.

233. *See id.* at 189.

234. *See id.* 188, 189.

235. *See id.* at 188.

236. *See id.* at 188, 189.

237. *See Faddoul*, 37 F.3d at 193. In addition, the court found that the Saudi government's treatment of Faddoul did not amount to persecution because, "the decision to bestow or deny citizenship is deeply-rooted in national sovereignty and must be left to the individual nation's discretion." *Id.* at 189.

238. Compare generally *Pitcherskaia v. INS*, 118 F.3d. 641 (9th Cir. 1997), with *Faddoul v. INS*, 37 F.3d. 185 (5th Cir. 1994).

been different. The Ninth Circuit's definition of persecution could have facilitated the finding of persecution in Faddoul's circumstances. The Ninth Circuit, as stated in *Pitcherskaia*, did not require the persecutor to possess an "intent to punish the victim."<sup>239</sup> Faddoul would not have had to prove that the Saudi government intended to punish Palestinian residents by refusing to grant them full citizenship rights. Thus, in Faddoul, under the Ninth Circuit's definition, although the applicant would still need to prove that he had been persecuted because he was Palestinian, he would not have had to prove that the Saudi government intended to punish him. The government's lack of a subjective intent to punish would have been irrelevant to finding persecution.<sup>240</sup>

Moreover, the Fifth Circuit's requirement of punitive intent could preclude a finding of persecution where the Ninth Circuit's definition would allow for it. For example, if the Ninth Circuit had required punitive intent in *Pitcherskaia*, the court probably would have affirmed the BIA's decision to deny Pitcherskaia's asylum application. If the court had required punitive intent, it probably would have affirmed the BIA's holding and rejected the notion that Pitcherskaia's "treatment" was persecution because the Russian authorities claimed that they were attempting to "cure" Pitcherskaia of her lesbianism, not punish her. As a result, the court probably would not have found persecution in Pitcherskaia's case.

## VI. THE NINTH CIRCUIT'S DEFINITION OF PERSECUTION FOR PURPOSES OF ASYLUM IS CORRECT AND SHOULD BE ADOPTED BY ALL CIRCUIT COURTS

The legal issue of punitive intent for purposes of asylum clearly divides the circuits.<sup>241</sup> This division should end and all courts should agree that punitive intent is not a requirement for persecution. The Ninth Circuit's holding in *Pitcherskaia* has eliminated punitive intent as a required element of perse-

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239. *Pitcherskaia*, 118 F.3d at 647.

240. *See id.*

241. *Pitcherskaia v. INS*, 118 F.3d 641, 648 n.9. (9th Cir. 1997).

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cution, while the Fifth Circuit continues to require “intent to punish the victim” as a prerequisite to persecution.<sup>242</sup> This author proposes that the Ninth Circuit’s definition of persecution should be the standard used by all courts that rule on asylum applications because the definition focuses upon the victim’s deprivation, harm or suffering rather than the persecutor’s intent. Because the Ninth Circuit does not follow the Fifth Circuit’s definition of persecution, Alla Pitcherskaia does not have to establish her persecutor’s intent to punish on remand.<sup>243</sup> Pitcherskaia may prove persecution on remand by showing that the Russian authorities harmed her because she was a lesbian, and did so in a manner that a reasonable person would consider “offensive.”<sup>244</sup> In other words, she must show that her detention, “treatment,” and receipt of threats of electroshock therapy were persecution by a reasonable person’s standard.<sup>245</sup>

The Ninth Circuit’s position on “punitive intent” is supported by the BIA’s decision in *In re Kasinga*.<sup>246</sup> In *Kasinga*, the BIA awarded asylum to Fauziya Kasinga after concluding that “punitive” or “malignant” intent was not a necessary element of persecution.<sup>247</sup> Kasinga, a Togolese woman, sought asylum in order to avoid female genital mutilation (FGM), a common practice in her country.<sup>248</sup> Kasinga, who came to the U.S. in 1994, had not yet been mutilated, and feared that her tribe would subject her to FGM upon her return to her country.<sup>249</sup> U.S. State Department Reports confirmed that over 50 percent of Togolese women may have been victims of the extremely painful and harmful procedure of FGM.<sup>250</sup> The BIA agreed with the applicant that FGM is a “severe bodily invasion” even if done with “subjectively benign intent.”<sup>251</sup> Hence,

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242. *Id.*

243. *See id.* at 648 n.9.

244. *Pitcherskaia*, 118 F.3d at 647.

245. *See id.* at 647.

246. I. & N. Dec. 3278 (B.I.A. 1996).

247. *In re Kasinga*, I. & N. 3278.

248. *See id.*

249. *See id.*

250. *See Kasinga*, I. & N. Dec. 3278.

251. *Id.*

even though Kasinga's tribe did not possess an intent to punish her, the BIA found that Kasinga could be subjected to offensive harm if she were returned to Togo.<sup>252</sup>

In *Pitcherskaia*, as noted, the Ninth Circuit agreed with the BIA's definition of persecution in *In re Kasinga*.<sup>253</sup> Although many asylum cases involve actors who had a subjective intent to punish their victims, this subjective "punitive" intent should not be required to show that harm constituted persecution.<sup>254</sup> Pitcherskaia's persecutors believed that their "treatment" and confinement was "good for" her.<sup>255</sup> However, this did not make their actions any less painful.<sup>256</sup> This treatment and therapy was clearly "offensive" to Pitcherskaia and would be to any reasonable person.<sup>257</sup> The court stated that the masking of physical and mental torture as "cures" and "treatments" ignored human rights laws.<sup>258</sup> Here, Pitcherskaia's "treatment" clearly constituted persecution.<sup>259</sup>

Moreover, Alla Pitcherskaia will not have to prove punitive intent on remand because the Ninth Circuit's definition must be applied.<sup>260</sup> The Fifth Circuit's punitive intent standard is subjective and thus more difficult to prove than an objective definition.<sup>261</sup> To prove punitive intent, an applicant has to enter into the mind of the perpetrator and divine his thoughts, motivations and goals in order to prove persecution.<sup>262</sup> In contrast, the Ninth Circuit's standard can objectively measure a persecutor's acts by what a reasonable person would consider to be offensive.<sup>263</sup> Further, under the Fifth Circuit's definition of persecution, Pitcherskaia would probably have already been

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252. *See id.*

253. *See Pitcherskaia*, 118 F.3d at 646.

254. *See id.*

255. *Id.* at 648.

256. *See id.*

257. *See Pitcherskaia*, 118 F.3d 641.

258. *See id.* at 648.

259. *See id.* at 648.

260. *See Pitcherskaia*, 118 F.3d at 647.

261. *See id.*

262. *See id.*

263. *See id.*

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deported to Russia where the authorities may have forced her to undergo electroshock "therapy."<sup>264</sup>

Lesbians and gay men, like all human beings, should not have to tolerate any form of involuntary subjugation because the persecutor may not have punitive intent in mind. This would be a devastating definition of persecution for asylum applicants such as Pitcherskaia, Kasinga and others who have suffered from offensive harm but have been unable to prove an intent to punish. Persecutors can easily deny or manipulate their true intent. Their motives may even be benign, although the result is harmful.<sup>265</sup> Thus, under the punitive intent standard, the asylum applications of lesbians, gay men and other victims who have suffered from benign persecution could be denied. These applicants could be deported to countries where they may be subjected to offensive suffering, harm or even death. Therefore, the Ninth Circuit's definition of persecution, one that does not require punitive intent, should be the uniform standard for U.S. asylum law.

## VI. CONCLUSION

Historically, the United States has benefited from its tradition of providing a refuge for those who flee intolerance. When U.S. law denies asylum for the victims of persecution, it rejects this country's legacy. Lesbians and gay men around the world continue to suffer from different forms of persecution because of their sexual orientation. When these men and women attempt to escape harm by applying for asylum in the U.S., the law and the INS still present legal barriers.

However, U.S. law has slowly progressed in a manner more favorable to their successful asylum application. To facilitate this progress, all Federal Circuit Courts of Appeals should uniformly adopt a definition of persecution that allows lesbians, gay men and other applicants to escape benign persecution.

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264. Compare generally *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), with *Faddoul v. INS*, 37 F.3d 185 (5th Cir.1994).

265. *In re Kasinga*, I. & N. Dec. 3278.

This form of persecution causes as much offensive harm to its victim as punitive persecution. The Ninth Circuit summarized the truthful reality clearly and correctly: "Persecution by any other name remains persecution."<sup>266</sup> Asylum law should protect all who are persecuted, regardless of the form persecution may take.

*Alan G. Bennett\**

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266. *Pitcherskaia v. INS*, 118 F.3d 643, 647 (9th Cir. 1997).

\* Golden Gate University School of Law, J.D. Candidate, Class of 2000; B.A., Political Science, University of Arizona; M.A., International Administration, School for International Training. This article is dedicated to Ana Claudia Pereira whose courage inspired its writing. I would like to thank my editors Christine Gregson, Steve Williams and Steve Rosenberg, my friends Kim Harvey and Vanessa Lawton, as well as my advisors Roberta Simon, Mark Silverman, Susan Rutberg, Kris Ogilvie and Dale Freeman. Without their help, this article would never have been published. I would also like to thank Joan Howarth, my Constitutional Law Professor, whose class constantly reminded me why I came to law school in the first place. Finally, I am sincerely grateful to my friend and lover, Lawrence Nicholls, as well as my parents, Paul and Janet Bennett for their love, support and understanding.