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A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution. . ."^{OSQ}

Leonard Birdsong

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**A LEGISLATIVE REJOINDER TO "GIVE ME YOUR GAYS,
YOUR LESBIANS, AND YOUR VICTIMS OF GENDER
VIOLENCE, YEARNING TO BREATHE FREE OF SEXUAL
PERSECUTION..."**

Leonard Birdsong[†]

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I. INTRODUCTION

In the last fifteen years there have been important advances in aspects of American immigration law that protect lesbian, gay, bisexual, and transgendered (LGBT) persons and women who may have been victims of gender-based violence in their home countries. Earlier immigration law legally excluded lesbian and gay men because the medical and psychiatric communities believed homosexuality was a disease.¹ We, as a country, are to be commended for now extending grants of asylum to those who may have experienced past persecution or who fear future persecution in their countries of origin because of their sexual orientation or victimization on account of gender violence. As this article will demonstrate, such types of persecution may be considered together and may be best described as “persecution based on sexual orientation.”

One such recent case, typical of many, started in 2003, and involved Gramoz Prestreshi, an eighteen year-old citizen of Kosovo who was stalked and beaten almost to death by a group of local thugs because he was a homosexual.² Prestreshi was laughed at and called names by the police to whom he reported his beating.³ In the hospital emergency room he was made to mop up his own blood.⁴ He had photographs taken of his injuries and complained to the press about the hostile environment homosexuals endure in Kosovo.⁵ His family later disowned him for his sexual orientation.⁶ He joined a gay rights organization and in 2007 was granted asylum in the United States on the grounds that his treatment in Kosovo amounted to persecution.⁷

1. See Alan G. Bennett, Note, *The “Cure” that Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279, 279 (1999) (citing Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 875 (1917)). In 1990, Congress removed this impediment from the law in the Immigration Act of 1990. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990). The statute simply eliminated “sexual deviants” from its list of classes of excludable aliens. *Id.*

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

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* On October 30, 2007, the author confirmed this story in a telephone interview with Todd Pilcher, an attorney with the Whitman-Walker Clinic in Washington, D.C. who assisted Prestreshi in obtaining asylum.

Although such grants of asylum are generally unknown to the American public, this law professor and author is one of many who, for the last few years, have taught and written about the phenomenon of grants of asylum on the grounds of sexual orientation and the problems involved in obtaining justice for victims of such persecution.⁸ My earlier article, "*Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution...*": *The New Grounds for Grants of Asylum*,⁹ consisted of an analysis of some of the problems of obtaining justice in our asylum system for persons such as Gramoz Prestreshi and other victims of persecution on the basis of sexual orientation. The analysis of those problems revealed the need for several solutions. First, it exposed the need for more consistency in defining and interpreting our asylum law. Second, the U.S. Department of Homeland Security (DHS)¹⁰ needs to better formulate policies that might guarantee uniformly just results in cases of those escaping persecution based on their sexual orientation. Finally, the U.S. Justice Department needs to provide more published opinions in sexual persecution cases as well as better-trained and more sensitive immigration judges.

The article was written from the point of view of an author who, earlier in his legal career, worked in the U.S. State Department and later, while in private practice, represented many different people in immigration court who sought asylum from various kinds of persecution.¹¹ A number of colleagues, students, and former students have found the article informative and interesting. Others did not care for the subject matter of the

8. In the late 1990s, two sets of helpful bibliographies on the subject were published. See Ronald I. Mirvis, *Political Asylum in the United States: A Selective Bibliography*, 54 THE RECORD 688 (1999); Elisa Mason, *The Protection Concerns of Refugee Women: A Bibliography*, 9 TEX. J. WOMEN & L. 95 (1999).

9. Leonard Birdsong, "*Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .*": *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357 (2008).

10. Created by a 2003 reorganization spurred by the September 11, 2001, terrorist attacks, this department inherited most of the functions formerly carried out by the Immigration and Naturalization Service (INS). Those functions are distributed among three DHS bureaus: CBP, ICE and USCIS. See DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *FORCED MIGRATION: LAW AND POLICY*, at x (2007).

11. The author served as a State Department Foreign Service officer with postings in Nigeria, Germany, the Bahamas, and Washington, D.C. during the late 1970s and 1980s. During the 1990s, while in private law practice in Washington, D.C., a part of his practice involved representing clients with asylum claims.

article and were surprised to find that “gays and lesbians” could be granted asylum in the United States. The most cogent criticism of the former article was directed at this author by a colleague who opined that I, as one who has done asylum work and now teaches about asylum trends, should be doing more to advance the law in this area. This may be true. What the earlier article did not do was to propose a solution to the problem by actually suggesting how our asylum law may be rewritten to provide uniform justice to those fleeing persecution because of their sexual orientations.

Thus, this article is a legislative rejoinder to my original article regarding how and why our asylum statute may be better rewritten or amended to ensure uniformity and justice to those fleeing persecution based on sexual orientation. Part II of this article provides a perspective on the foundation for asylum law.¹² Part III briefly explains a few of the problems in adjudicating asylum claims based on persecution on account of sexual orientation within the current state of the law and regulations.¹³ Part IV discusses the guidelines and proposed regulations for adjudicating asylum claims for women who may have been persecuted by non-state persecutors.¹⁴ Part V proposes five amendments to our asylum law at section 101(a)(42) of the Immigration and Nationality Act that will better provide justice to victims of persecution based on sexual orientation.¹⁵ They include: 1) a comprehensive definition of “persecution”; 2) a rule that “punitive intent” on the part of the persecutor is not a requirement for a finding of “persecution”; 3) a definition of “particular social group” that is in accord with the Ninth Circuit’s definition set out in the *Hernandez-Montiel* case; 4) recognition in accord with international standards that women may assert “persecution” on account of their gender as well as on the other current statutory grounds; and 5) a requirement that the Board of Immigration Appeals publish written opinions in cases granting asylum in sexual persecution and coercive population control cases. Part VI is my model legislation.¹⁶ The article concludes with the recommendation that the U.S. Congress implement the amendments set out herein.¹⁷

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part V.

16. See *infra* Part VI.

17. See *infra* Part VII.

II. THE FOUNDATION FOR ASYLUM

The foundation for our asylum law grew out of international norms for refugee protection derived from the 1951 United Nations Convention and the 1967 Protocol Relating to the Status of Refugees.¹⁸ The 1951 Convention provided protection for World War II refugees, many of whom had been refugees displaced because of Nazi atrocities.¹⁹ Future refugees were to be included in the 1967 Protocol.²⁰ The United States acceded to the Protocol in 1967, but Congress did not enact its own Refugee Act until 1980.²¹

Our government codified the Protocol in the Immigration and Nationality Act (INA) such that an applicant for asylum must be a refugee outside one's country of nationality and must meet the following requirements:²² 1) the applicant must have a "well-founded fear of persecution";²³ 2) the fear must be based on past persecution or the risk of future persecution;²⁴ and 3) the persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁵

The treaty and the law were of humanitarian concern, yet, for those of us who have worked in the U.S. State Department it has always been apparent that the United States adopted them, in part,

18. Under the 1951 Convention, the term "refugee" applies to:

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

Convention relating to the Status of Refugees, art. 1A(2), July 28, 1951, 189 U.N.T.S. 150, *reprinted in* GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 573 (3d ed. 2007).

19. *See* GOODWIN-GILL, *supra* note 18, at 19, 35.

20. *Id.*; Protocol relating to the Status of Refugees, Preamble, art. 1, para. 2, Oct. 4, 1967, 606 U.N.T.S. 267, *reprinted in* GOODWIN-GILL, *supra* note 18, at 588.

21. *See* The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)).

22. *See* Immigration & Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

23. *Id.* An alien will be considered a refugee if she has suffered persecution in the past on account of one of the statutory grounds or if she can show an objectively reasonable fear of such persecution in the future. *See* 8 C.F.R. § 208.16(b)(2) (2008). *See generally* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-28 (1987).

24. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

25. *Id.*

as tools that could be utilized in the Cold War fight against communism. In the 1980s, the expected profile of the successful candidate for asylum under the new law was generally a man who may have spoken out against and was forced to flee the stringent dictates of a communist or Marxist regime or a country whose politics the United States did not approve.²⁶ Much may be the same today. The most successful candidates for political asylum tend to be from countries that are communist and/or who have leaders and policies of which we do not approve.²⁷

Today, China is one of our greatest trading partners, but the leading country of origin for asylees to the United States.²⁸ China is still a communist country with coercive population policies.²⁹ As a result, in 1996, Congress expanded the definition of asylum to provide that forced abortion, involuntary sterilization or resistance to coercive population control programs were grounds for persecution on account of political opinion.³⁰ The Cold War is long over, yet asylum policy is often still used to fulfill our foreign policy objectives.³¹ In the case of China, Congress chose to amend

26. GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION IN THE GLOBAL REFUGEE CRISIS 20–23* (1993).

27. Recent statistics support this thesis. The total number of persons granted asylum in the United States increased to 26,113 in 2006, from 25,160 in 2005. The leading countries of origin of these asylees included China with 21.3 percent, Columbia with 11.4 percent, and Venezuela with 5.2 percent. When Haiti's 11.5 percent are factored into this calculus, these four countries accounted for nearly 50 percent of all grants of asylum for 2006. See KELLY JEFFERYS, DEPARTMENT OF HOMELAND SECURITY, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2006, at 4 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsyleeSec508Compliant.pdf.

28. *Id.*

29. See Thomas L. Hunker, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 FLA. ST. J. TRANSNAT'L L. & POL'Y 131, 131–32 (2005) (“[a]t the forefront of the controversy stands China’s so-called ‘one child’ policy”); see also Kyle R. Rabkin, Comment, *The Zero-Child Policy: How the Board of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U. L. REV. 965 (2007).

30. See INA § 101(a)(42)(B) which provides, in relevant part:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

31. See generally Hunker, *supra* note 29, at 141–42 (“[i]n the latter part of the

asylum law to show our disapproval of its human rights record with respect to the use of abortion and other such coercive population control measures.³² The increasing grants of asylum to citizens of Venezuela based upon their political opinion in opposition to that government is an implementation of our foreign policy reaction to the political excesses of the Hugo Chavez regime and his anti-American rantings.³³

Since grants of asylum in general are increasing, anecdotal evidence indicates that there has been a concomitant increase of such grants for persecution on account of sexual orientation or gender-based violence.³⁴ The DHS does not disclose a detailed record of the reasons for the grants of asylum, but legal advocacy groups such as the Whitman-Walker Clinic in Washington, D.C. and Immigration Equality in New York City have claimed to have secured grants of asylum for numerous LGBT persons in the last few years.³⁵

Grants of asylum based on persecution on account of sexual orientation began in 1990 when the Board of Immigration Appeals (BIA)³⁶ affirmed an immigration judge's (IJ's)³⁷ decision to withhold deportation of a gay Cuban marielito in the case of *In re*

20th Century, the push to topple communism resulted in the fall of the Berlin Wall . . . in addition, much of U.S. foreign policy reflected opposition to other major Marxist regimes . . . anti-communism influences U.S. asylum policies.”).

32. *See id.* at 143 (“[i]t shows that most of Congress viewed section 601 as a way to condemn Chinese human rights abuses . . .”).

33. *See* Tom Brown, *Venezuelans, Fleeing Chavez, Seek U.S. Safety Net*, REUTERS, July 16, 2007, <http://www.reuters.com/article/domesticNews/idUSN1127066720070716>.

34. Interview with Todd Pilcher, Attorney, Whitman-Walker Clinic (Oct. 30, 2007); Interview with Victoria Neilson, Attorney & Legal Director, Immigration Equality (Nov. 15, 2007). Both attorneys indicate that they have been involved with an increase of successful sexual persecution asylum claims over the last few years. *Id.*

35. *Id.* These are two of a number of organizations in the United States that provide legal representation for LGBT persons and/or women seeking asylum because of persecution on account of sexual orientation. *See* About Whitman-Walker Clinic: Our History, http://www.wwc.org/about_wwc/history.html (last visited Dec. 12, 2008); IMEQ Mission, <http://www.immigrationequality.org/template.php?pageid=8> (last visited Dec. 13, 2008).

36. The Board of Immigration Appeals is a component of the Executive Office for Immigration Review in the Department of Justice. *See* MARTIN ET AL., *supra* note 10.

37. The corps of immigration judges is a component of the Executive Office for Immigration Review in the Department of Justice. *See id.* at xi.

Toboso-Alfonso.³⁸ This was the first known instance in U.S. immigration law where a homosexual was cast as a member of a particular social group, namely that of Cuban gays, and permitted to allege successfully persecution on that basis so as to conform with the statutory definition found in the law.³⁹ The Immigration and Naturalization Service (INS) argued that homosexuality should not be considered a particular social group.⁴⁰ The BIA rejected this argument.⁴¹ Four years later, then Attorney General Janet Reno issued an order declaring that *Toboso-Alfonso* was to be considered precedent in all proceedings involving the same issue or issues.⁴²

It is salient to note that the case involved a male fleeing persecution from communist Cuba. The grant of asylum by the BIA and its subsequent precedent setting order by the Attorney General may have furthered our foreign policy objectives of showing our disapproval of Castro's human rights position in general, and specifically, with respect to his persecution of homosexuals. At the same time, the decision opened an avenue for all victims of sexual persecution wherein they could seek asylum in the United States. Whether such consequence was consciously desired is debatable.

The seminal case with respect to women who are victims of sexual persecution was decided in 1995 in the case of *In re Fauziya Kasinga*.⁴³ In *Kasinga*, the BIA reversed an immigration court's denial of asylum for a young Togolese woman who fled her homeland to escape female genital mutilation (FGM).⁴⁴ The BIA made very detailed and specific findings, but its most interesting findings surrounded the adoption of the following standard: "[T]he practice of female genital mutilation, which results in

38. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 823 (1990); Robert C. Leitner, Note and Comments, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 686 (2004). Fidel Armando Toboso said that because he was gay, he was sentenced to sixty days in a forced labor camp. *Toboso-Alfonso*, 20 I. & N. Dec. at 821. Later, at the time of the Mariel boatlift, he was threatened by the Cuban government that if he did not leave Cuba immediately he would have to serve four years in prison for being a homosexual. *Id.*

39. *In re Toboso-Alfonso*, 20 I. & N. Dec. at 822-23.

40. *Id.* at 821.

41. *Id.* at 822-23.

42. Att'y Gen. Order No. 1895-94 (June 19, 1994).

43. 21 I. & N. Dec. 357 (1996).

44. *Id.* at 358; see also Irena Lieberman, *Women and Girls Facing Gender-Based Violence and Asylum Jurisprudence*, 29 HUM. RTS. 9, 9-10 (2002).

permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution."⁴⁵ Thus, in very particular and finite cases, women fleeing female genital mutilation may be granted asylum in the United States based on a reasonable fear of persecution. The BIA immediately designated the decision as precedent to be followed by all 179 immigration courts in the country.⁴⁶

III. STATUTORY AND REGULATORY PROBLEMS

As stated in my earlier article, problems and inconsistencies prevail in asylum adjudications for those persecuted on account of sexual orientation for a number of reasons, including: A) lack of a settled definition for certain statutory words, such as "persecution" and "social group"; B) a split in circuit decisions with respect to the necessity for a finding of punitive intent in the meaning of persecution in asylum cases; and C) the lack of precedent and published asylum decisions.

A. *Statutory Terms: Unsettled Definitions*

1. *Persecution*

Under both asylum and withholding of deportation, the claimant must show that she has been "persecuted" in the past or will be "persecuted" in the future if forced to return to the country of origin.⁴⁷ Unfortunately, the statutes do not offer a definition of

45. *Fauziya Kasinga*, 21 I. & N. Dec. at 357. The court also found that "[y]oung women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group' within the . . . Immigration and Nationality Act." *Id.*

46. *Id.* at 358 ("A fundamental issue before us is whether the practice of female genital mutilation ("FGM") can be the basis for a grant of asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (1994) . . . [w]e find that FGM can be a basis for asylum.").

47. The applicable standard of proof is higher in a withholding of removal than in an asylum grant. *Prela v. Ashcroft*, 394 F.3d 515, 519 (7th Cir. 2005). In order to obtain withholding of removal the claimant must show a clear probability of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). The showing for asylum is only a well-founded fear of persecution. 8 U.S.C. § 1158(b)(1)(B) (2006). Asylum and withholding of removal appear nearly identical but have important differences. Asylum is subject to the discretion of the Attorney General of the United States. *Id.* § 1158(b)(1)(A). Withholding of removal, if proven, is a mandatory form of relief. *Pierre v. Rivkind*, 825 F.2d 1501, 1504 (11th Cir. 1987).

“persecution.”⁴⁸ The Ninth Circuit has utilized a broad definition of persecution as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.”⁴⁹ The First Circuit has held that a brief detention on several occasions did not rise to the level of persecution.⁵⁰ Rather, persecution encompasses threats to life or freedom, but it must be more than mere harassment or annoyance.⁵¹

The Third Circuit limits persecution to “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.”⁵² The Ninth Circuit reminds us that persecution must be inflicted either by the government or by groups that the national government was unwilling or unable to control.⁵³ Where the source of the persecution is personal hostility, it is considered outside of the realm of persecution for statutory purposes and asylum is denied.⁵⁴ This limitation on persecution is particularly disadvantageous to women who are victims of gender violence in cultures where conditions for many women are “generally harsh,” and their basic rights are likely to be violated.⁵⁵

The asylum statute must first be amended to provide a definition of “persecution” that will provide guidance for those seeking relief from persecution.

Analysis of persecution requires IJs, the BIA, and the courts to decide the motive of the persecutor. The Supreme Court held in *INS v. Elias-Zacarias* that a claimant is not required to provide direct proof of the persecutor’s motivations, but a claimant must produce

A person granted asylum may be eligible for permanent residency in the U.S. after one year as an asylee. 8 U.S.C. § 1159(b). Withholding of removal guarantees only that the person will not be forcibly returned to his or her country of origin and does not preclude the possibility of being removed to a third country. *Id.* § 1231(b). If removal proceedings are already underway, the applicant can apply for asylum or withholding only by presenting a defensive application that is heard exclusively by the IJ. 8 C.F.R. § 208.4(b)(3) (2008).

48. See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (defining “refugee,” but failing to qualify “persecution”); see also INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

49. *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (quoting *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)).

50. See *Fesseha v. Ashcroft*, 333 F.3d 13, 19 (1st Cir. 2003). In this case, the woman was only detained, not imprisoned, was held for only twenty-four hours, and was never harmed. *Id.* at 16.

51. See *Li Wu Lin v. INS*, 238 F.3d 239, 243–44 (3d Cir. 2001).

52. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

53. See *McMullein v. INS*, 658 F.2d 1312, 1317–18 (9th Cir. 1981).

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

55. *Fatin*, 12 F.3d at 1240.

some evidence of the persecutor's motive, whether direct or circumstantial.⁵⁶ Yet, the question remains, does persecution require a punitive intent? Circuit courts have split on this question.⁵⁷ The Ninth Circuit has decided that a broader standard than mere intent to punish should be utilized in sexual minority cases.⁵⁸

a. Punitive Intent: The Ninth Circuit

In 1992, Alla Pitcherskaia, a thirty-five-year-old Russian national, claimed asylum in the U.S. on the ground that she was persecuted in Russia because she was a lesbian.⁵⁹ Her claim for asylum was denied.⁶⁰ On appeal to the BIA, her claim was again denied on the ground "that even if her testimony is essentially credible," she failed to meet her burden of establishing eligibility for relief under the Act.⁶¹ The BIA majority found that Pitcherskaia had not been persecuted because "although she had been subjected to involuntary psychiatric treatments, the militia and psychiatric institutions intended to 'cure' her, not to punish her, and thus their actions did not constitute 'persecution' within the meaning of the Act."⁶²

The issue on appeal to the Ninth Circuit was whether the INA requires an applicant to prove that the persecutor "harbored a subjective intent to harm or punish" when persecuting the victim.⁶³ The court found the BIA's interpretation of persecution to be arbitrary, capricious, and manifestly contrary to the statute, which allowed the court to overrule the BIA's definition and impose another.⁶⁴ The court noted that neither the Supreme Court nor

56. 502 U.S. 478, 483–84 (1992).

57. Monica Saxena, *More than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims*, 12 MICH. J. GENDER & L. 331, 347–49 (2006).

58. *See id.* at 346–47 (2006) (citing *Pitcherskaia v. INS*, 118 F.3d 641, 643 (9th Cir. 1997)).

59. *See Pitcherskaia*, 118 F.3d at 643. In her trial, Pitcherskaia recounted that she had been arrested several times for such things as failing to procure required permits for a gay-rights protest. *Id.* at 644. She stated that she suffered further harassment through forced psychiatric counseling designed to "cure" her homosexuality. *Id.*

60. *Id.* at 645.

61. *Id.*

62. *Id.* at 643.

63. *Id.* at 646.

64. *See id.* at 647.

the Ninth Circuit had ever required an asylum applicant to show that her persecutor had the intention of inflicting harm or punishment.⁶⁵ The court found that the term “punishment” implied that the perpetrator believed the victim did some wrong or committed a crime—the perpetrator took action in retribution.⁶⁶ Persecution, on the other hand, only required that the persecutor caused the victim suffering or harm.⁶⁷

Although many asylum cases involved situations where the persecutor had a subjective intent to punish, the court concluded that punitive intent was not required to establish persecution.⁶⁸ In clarifying the new legal standard, the court stated that the definition of persecution is objective.⁶⁹ The court reversed the BIA’s order and remanded the case to the BIA for reconsideration in light of the opinion.⁷⁰

b. Punitive Intent: The Fifth Circuit

In *Pitcherskaia*, the Ninth Circuit recognized persecution as the infliction of suffering or harm in a way regarded offensive to a reasonable person.⁷¹ In contrast, the Fifth Circuit finds persecution only when the perpetrator acts with intent to punish the victim.⁷² In *Pitcherskaia*, the Ninth Circuit expressly rejected this punitive intent requirement,⁷³ which the Fifth Circuit adopted in the 1994 decision of *Faddoul v. INS*.⁷⁴

The Fifth Circuit affirmed the BIA’s denial of Faddoul’s asylum claim and held that persecution required both a showing of the infliction of harm *and* intent to punish on one of the five

65. *Id.* at 648.

66. *Id.* at 648.

67. *Id.*

68. *Id.*

69. *Id.* at 647.

70. *Id.* at 648.

71. *See id.* at 647.

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

73. 118 F.3d at 648 n.9.

74. 37 F.3d at 187. Joseph Faddoul was a thirty-three-year-old man of Palestinian ancestry who was born and raised in Saudi Arabia. *Id.* He alleged that he was persecuted by the Saudi Arabian practice of *jus sanguinis*, which grants citizenship rights only to residents of Saudi Arabian ancestry. *Id.* He alleged further that as a non-citizen living in Saudi Arabia he would be unable to own property or businesses or attend the university and, as a result, this constituted persecution. *Id.*

protected grounds set out in the statute.⁷⁵ In *Faddoul*, the court noted that the claimant received the same rights and was subject to the same discrimination as a Saudi-born Egyptian.⁷⁶ The court found no evidence that Faddoul had ever been arrested, detained, interrogated, or harmed because of his ancestry.⁷⁷

This distinction in definitions of persecution is especially important to sexual minorities. In many countries, LGBT persons may be abused because of their sexuality, yet, the specific intent to punish is not always present, as in *Pitcherskaia*.

c. Punitive Intent: The Seventh Circuit

In *Sivaankaran v. INS*,⁷⁸ the Seventh Circuit adopted a position that may lie between the Fifth and Ninth Circuits. The court ruled that an asylum claimant could demonstrate persecution by a showing of either the persecutor's motivation to punish or, more generally, the infliction of harm for one of the five protected grounds of the statute.⁷⁹ The court's use of the word "punishment" indicates that, unlike earlier holdings, punitive intent is not necessary to satisfy the "infliction of harm" requirement.⁸⁰ The Seventh Circuit, following a 1970 case from the Sixth Circuit (which has yet to address the question of punitive intent), employs a dictionary definition of persecution.⁸¹

Nations have human rights laws to protect their citizens, as well as the citizens of other nations.⁸² If nations were allowed to

75. *Id.* at 188.

76. *Id.* at 189.

77. *Id.* at 188–89.

78. 972 F.2d 161 (7th Cir. 1992).

79. *Id.* at 165 n.2 ("Persecution" is not defined in the Act, but we have described it as 'punishment' or 'the infliction of harm' for political, religious, or other reasons that are offensive.')

80. See Saxena, *supra* note 57, at 349.

81. See, e.g., Zalega v. INS, 916 F.2d 1257, 1260 (7th Cir. 1990) (citing Berdo v. INS, 432 F.2d 824, 846 (6th Cir. 1970)).

No doubt "persecution" is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience. But there is nothing to indicate that Congress intended section 243(h) to encompass any less than the word "persecution" ordinarily conveys – the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1685 (1965).

Berdo, 432 F.2d at 846.

82. See Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

torture their own people to “cure” sexual orientation, it is impossible to know where they will draw the line.⁸³ The inclusion of a punishment requirement in the determination of whether to grant asylum based on persecution should not be feasible in all circuits.⁸⁴

Justice requires that the asylum statute be amended to make clear that a “punitive intent” need not be required to prove a claim for persecution.

2. *Social Group*

To be eligible for asylum, refugees must belong to a particular social group if they do not qualify under the other protected categories of race, religion, nationality, or political opinion. In 1994, the Attorney General designated the *Toboso-Alfonso* case as precedent for the proposition that homosexuals who had been persecuted in their countries of origin could be recognized as a particular social group in all proceedings involving issues of persecution involving the same issue or issues.⁸⁵

Until 2001, there had been two seemingly conflicting standards for defining a “particular social group.” The first was the standard derived from the BIA in its 1985 case of *In re Acosta*.⁸⁶ The BIA held that

“persecution on account of membership in a particular social group” [meant] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.⁸⁷

Acosta’s claim for asylum on this ground was denied because his

83. See generally Saxena, *supra* note 57.

84. *Id.*

85. Att’y Gen. Order No. 1895-94 (June 19, 1994).

86. 19 I. & N. Dec. 211 (1985). In *Acosta*, the BIA upheld the IJ’s denial of asylum to a thirty-six-year-old man from El Salvador who was in deportation proceedings. *Id.* at 213. Among his claims for asylum was that he was a member of a particular social group: a group of young taxi drivers in the capital city of San Salvador in the taxi cooperative known as COTAXI who feared persecution at the hands of guerrillas who wanted to disrupt the public transportation system of the country. *Id.* at 216–17.

87. *Id.* at 233.

membership in a taxi cooperative was not an immutable trait.⁸⁸

In 1986, the Ninth Circuit Court of Appeals departed from the *Acosta* standard in *Sanchez-Trujillo v. INS*.⁸⁹ The court rejected the petitioner's claim of asylum and held that

the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.⁹⁰

The Ninth Circuit in *Hernandez-Montiel v. INS*⁹¹ reconciled the *Acosta* and the *Sanchez-Trujillo* definitions of a particular social group into one expansive standard, holding "that a 'particular social group' is one united by a voluntary association, . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."⁹²

88. *Id.* at 235. The court indicated that *Acosta* could leave the cooperative, change jobs, and move to another part of the country and would not be a possible target of guerilla persecution. *Id.*

89. 801 F.2d 1571 (9th Cir. 1986). *Sanchez-Trujillo* involved a claimant from El Salvador who feared return to his homeland because he believed he might be drafted by the government there to fight against the guerillas. *Id.* at 1573. In deportation proceedings *Sanchez-Trujillo* sought asylum on the ground he would be persecuted if deported to El Salvador on account of the fact he was a member of a "particular social group" consisting of young, urban, working-class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador." *Id.*

90. *Id.* at 1576.

91. 225 F.3d 1084 (9th Cir. 2000). *Hernandez-Montiel* was a native of Mexico who filed for asylum on the ground that he was persecuted in Mexico on account of his homosexuality and his female sexual identity, a particular social group. *Id.* at 1088. He testified at trial that at the age of eight he realized he was attracted to people of his same sex and began dressing and behaving as a woman at the age of twelve. *Id.* at 1087-88. He faced numerous reprimands from family and school officials because of his sexual orientation, and was also abused and sexually assaulted by Mexican police officers. *Id.* at 1088. He subsequently fled to the United States where the IJ denied his asylum claim, and the BIA denied his subsequent appeal. *Id.* The BIA classified his particular social group as "homosexual males who dress as females" and found that he did not sufficiently establish that the abuse he suffered in Mexico was a result of his membership in a particular social group. *Id.* The basis of his claim "was that he was mistreated because of the way he was dressed (as a male prostitute) and not because he was a homosexual . . . [he] failed to show that his decision to dress as a female was an immutable characteristic." *Id.* at 1090.

92. *Id.* at 1093 (emphasis in original).

Hernandez-Montiel defines “particular social group” in a way that embraces individuals who are actually persecuted—even if they fail to qualify for asylum under the statute’s other enumerated categories.⁹³ Such a standard provides a mechanism that meets the needs of those who do not fit neatly into a particular racial or religious group, but who are still persecuted on account of something immutable and fundamental to their persons.

The Ninth Circuit held that it was not just *Hernandez-Montiel*’s dress that was critical for the particular social group requirement.⁹⁴ Instead, it found that his female sexual identity was so basic to him that either he could not change it or should not be required to change it.⁹⁵ The implication of such a standard is readily apparent in asylum claims based on sexual orientation or gender violence.

The asylum statute should be amended to define “particular social group” in a way that embraces individuals who are actually persecuted, even if they fail to qualify for asylum under the statute’s other enumerated categories. Thus, it would provide a mechanism that meets the needs of those who do not fit neatly into a particular racial or religious group but who are still persecuted on account of something immutable and fundamental to their persons.

B. *Lack of Precedent and Published Opinions*

The lack of published decisions by United States IJs tends to make any analysis of trends within the system problematic. Both the claimant and the government can appeal an IJ’s trial decision to the BIA.⁹⁶ The U.S. Attorney General has the authority to designate as precedent or overrule any decision made at the BIA level.⁹⁷ If unsatisfied with the BIA’s decision, the claimant can then appeal to the relevant federal circuit court, whose decision will be binding on the BIA in that circuit.⁹⁸

“The [Executive Office for Immigration Review] is authorized to publish its decisions selectively and thereby establish

93. *Id.* at 1099 (“We hold that the BIA’s decision denying Geovanni asylum on statutory grounds is fatally flawed as a matter of law . . .”).

94. *See id.* at 1094.

95. *Id.* at 1093–94.

96. *See* 8 C.F.R. § 3.1 (1992).

97. Stuart Grider, *Sexual Orientation as Grounds for Asylum in the United States – In re Tenorio*, 35 HARV. INT’L L.J. 213, 215 (1994).

98. *Id.*

precedential value for individual BIA level rulings at its discretion."⁹⁹ The practical result of this discretion is that few BIA decisions are released.¹⁰⁰

One scholar has reported that only about fifty of the four thousand decisions made each year by the BIA are actually published. A vast majority of these published cases are decisions where asylum is denied, which creates a system in which it is nearly impossible for the [claimant], or the [IJ], to discern clear standards necessary to establish a successful asylum claim.¹⁰¹

This author believes, as do others, that the lack of published decisions is deliberate. Because we have no substantial body of published opinions and few precedential decisions, lawyers for asylum claimants are seldom able to establish, prior to trial, how and why their clients' asylum claims may be decided. It is this author's further opinion, based upon experience in immigration court, that the few evidentiary and other standards that have been established clearly by published precedent or recent administrative guidelines are sometimes ignored by IJs.¹⁰²

IV. GUIDELINES, REGULATIONS, AND "FLOODGATE" PROBLEMS FOR WOMEN

The *Kasinga* decision, discussed in the introduction of this

99. *Id.*

100. *Id.*

101. *Id.*

102. I recounted a similar situation in my previous article. Birdsong, *supra* note 9, at 381. In *Ali v. Ashcroft*, the Ninth Circuit overturned a decision by an IJ denying asylum to a Somali woman who had been raped by militia men of a rival clan. 394 F.3d 780 (9th Cir. 2005). The men invaded the woman's home and killed her brother-in-law, who had tried to prevent the rape. *Id.* at 783. The IJ found her ineligible for asylum on the ground that she could not establish past persecution because "the sole motivation for the murder, detention, and robbery . . . 'was shown to clearly be simply to steal, and in case of the rape to take gratification from the helpless condition of the respondent.'" *Id.* at 784.

The Ninth Circuit found that the IJ was incorrect when it held that the rape was for sexual gratification. *Id.* at 787. The court held that "[s]erious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall [into] this rule." *Id.* (quoting Memorandum from Phyllis Coven, Office of Int'l Affairs, U.S. Dep't of Justice, Consideration for Asylum Officers Adjudicating Asylum Claims from Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995)). This particular rule was from a 1995 memorandum to all INS and asylum officers adjudicating claims from women. Either the IJ had not read this important set of guidelines or ignored them.

article, designated FGM as a form of persecution and found that young Togolese women who had not undergone such process and opposed it could be “a particular social group.”¹⁰³ Despite that decision, as this article will demonstrate, claims by women seeking asylum as a result of gender-based violence have not always fared well. A number of such cases of women seeking asylum from persecution involved women who had been abused by husbands or significant other male figures in their lives who had no connection to the government.¹⁰⁴ Criticism abounds that granting women asylum based upon such perceived “domestic abuse” on the ground that they comprise a “particular social group” would open the “floodgates” of millions of abused women seeking asylum in the United States.¹⁰⁵

It is this author’s opinion, again, based upon experience in immigration court, that there will not be a flood of abused women seeking asylum on domestic abuse grounds. The main reason is the fact that millions of women worldwide who may be so abused will unlikely have the resources or wherewithal to make it to the U.S. to make such asylum claims. Further, the Act already provides that the filing of frivolous applications of asylum can result in permanent ineligibility for any other immigration benefits under the Act.¹⁰⁶

103. *In re Kasinga*, 21 I. & N. Dec. 357 (1996).

104. See Victoria Neilson, Symposium: *Globalization, Security & Human Rights: Immigration in the Twenty-First Century: Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL’Y REV. 417, 434 (2005) (“This harm, especially at the hand of one’s own family, has not traditionally warranted protection by the legal system . . .”).

105. See Neilson, *supra* note 104, at 443:

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

See also Ashcroft Re-considers Clinton-Era Asylum Rule, The Dan Stein Report, Mar. 3, 2003, <http://www.steinreport.com/archives/001682.html>; Stephen M. Knight, *Seeking Asylum From Gender Persecution: Progress Amid Uncertainty*, 79 Interpreter Releases 689, 695 (May 13, 2002).

106. See INA § 208(d)(6) (“If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on

At least one scholar has advocated that our asylum law should be amended to allow for a sixth statutory ground for persecution based on gender (along with race, religion, nationality, political opinion or member of a particular social group).¹⁰⁷ This new ground would benefit women seeking asylum from persecution from non-state sponsored situations such as sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, extreme domestic violence, honor killings, and forced prostitution.

Interest in such an amendment has gained little traction, and this article does not espouse the need for a sixth ground. Instead, there has been a growing recognition in the international community that women should be allowed to seek asylum from gender-based violence based on cultural and societal norms of certain countries.¹⁰⁸ Such recognition first appeared in guidelines issued by the U.N. High Commissioner for Refugees (UNHCR) in 1985.¹⁰⁹ A leading scholar in the area, Karen Musalo, recently explained it best:

[B]eginning in 1985, UNHCR began to issue different directives or guidance to countries as to how they could take that definition [of refugee] and actually not see obstacles arising from the definition, but rather, analyze how if you apply that definition in a fair way consistent with international human rights norms, women would actually come within the definition of refugee.

One of the things that the UNHCR did in a series of pronouncements . . . was to suggest that individual countries issue their own guidelines to guide their adjudicators on how to understand the refugee definition, in a gender-sensitive context.¹¹⁰

In 1993, Canada was the first country to issue guidelines for adjudicating claims that would protect women fleeing gender-based

such application.").

107. See Elizabeth A. Hueben, *Domestic Violence and Asylum Law: The United States Takes Several Remedial Steps in Recognizing Gender-Based Persecution*, 70 UMKC L. REV. 453, 466 (2001).

108. See *id.* at 463–64 (“Proposed new rules in the United States dealing with asylum claims of women aim to establish guidelines . . . [t]he proposed rules restate that ‘gender can form the basis of a particular social group.’”).

109. See U.N. High Comm’r for Refugees, *Guidelines on the Protection of Refugee Women* (1991), available at <http://www.unhcr.org/publ/PUBL/3d4f915e4.pdf>.

110. Symposium, *Panel One—Empowering Survivors with Legal-Status Challenges*, 22 BERKELEY J. GENDER L. & JUST. 304, 305 (2007).

persecution,¹¹¹ and the United States followed in 1995 with its own guidelines for women.¹¹² It was not long after the United States adopted its guidelines that the *Kasinga* case was decided, in which the BIA found that the ground of a particular social group could be interpreted to include claims defined by gender.¹¹³

Later in 1995 came the gender violence case that continues to cause controversy with respect to how we apply asylum law to women who are subjected to extreme domestic abuse. In *In re R-A*—a Guatemalan woman, Rodi Alvarado Pena, sought asylum in the United States.¹¹⁴ She fled her country to escape a husband who, for at least ten years, had abused her, beaten her, broken a window and a mirror with her head, kicked her in her vagina when she was pregnant, raped and sodomized her, and had threatened to kill her if she ever left him.¹¹⁵ The police would not help her.¹¹⁶ The IJ found her testimony credible and granted asylum on the grounds that she was a member of “a particular social group,” i.e., Guatemalan women who have been involved with Guatemalan male companions, who believe that women are to live under male domination.¹¹⁷

Despite the earlier *Kasinga* decision, in 1999 the BIA reversed the IJ’s decision and such reversal was affirmed by the Attorney General.¹¹⁸ The BIA held that Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination is not a particular social group.¹¹⁹ Absent from this group’s makeup is a voluntary associational relationship that is of central concern in the Ninth Circuit.¹²⁰ *In re R-A* has had a tortured history and is a primer for

111. See IMMIGRATION & REFUGEE BOARD OF CANADA, GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Nov. 13 1996), http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm.

112. See generally Phyllis Coven, *Immigration and Naturalization Service Gender Guidelines: Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, 7 INT’L J. REFUGEE L. 700 (1995).

113. See *Symposium—Empowering Survivors*, *supra* note 110, at 307.

114. 22 I. & N. Dec. 906, 907 (2001).

115. *Id.* at 908.

116. *Id.* at 909.

117. *Id.* at 911. The IJ found that such a group was cognizable and cohesive, as members shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practiced male domination through violence. *Id.* at 911–17.

118. *Id.* at 906.

119. *Id.* at 919–20.

120. *Id.* at 918. The court concluded:

why abused women have more trouble obtaining asylum under the statute than LGBT persons.¹²¹

Musalo summarizes the tortured history of the *In re R-A* case:

[I]n 1999 a majority of the BIA—the same body that had granted Ms. Kassindja’s case three years earlier—reversed the immigration judge’s grant of asylum to Rodi Alvarado. The BIA attempted to distinguish the two cases to justify the grant in one case and the denial in the other.

The ongoing ambivalency [sic] on the issue of gender asylum became apparent approximately eighteen months after the BIA’s decision when the Department of Justice (DOJ) issued proposed asylum regulations to address claims of gender persecution. The preamble to the regulations explicitly states that their purpose is [to] remove “certain barriers that the *In re R-A* decision seems to pose” to claims for asylum based on domestic violence. Within a little more than a month of issuing the proposed

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

Id. at 927.

121. *Cf. Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991). Earlier, in 1991, a Salvadoran woman had been denied political asylum as not being in a cognizable particular social group. *Id.* at 662. Carmen Gomez had been born in El Salvador and lived there until she was eighteen. *Id.* Between the ages of twelve and fourteen she was raped and beaten by guerilla forces on each of five occasions. *Id.* After living in the U.S. for almost a decade, she pled guilty to a sale of a controlled substance, served time in jail, and was placed in deportation proceedings. *Id.* She claimed asylum on the ground of fear of persecution because she was a member of a particular social group: women who have been previously battered and raped by Salvadoran guerillas. *Id.* The IJ denied her claim of asylum, and the BIA affirmed. *Id.* at 663. The Second Circuit Court of Appeals dismissed her petition on the ground that Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics—other than gender and youth—that would-be persecutors could identify them as members of the purported group. *Id.* at 664.

The BIA further held that there was no indication that Gomez would be singled out for further brutalization. *Id.* at 665. The court indicated it did not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution, but found that Gomez had not demonstrated that she was any more likely to be persecuted than any other young woman. *Id.*

regulations, then Attorney General Janet Reno took the unusual step of exercising her authority to review the decision in *In re R-A*. She vacated the denial of asylum, and sent the case back to the BIA, instructing it to reconsider the case when the proposed regulations were issued as final.¹²²

The aforementioned “proposed regulations,”¹²³ first proposed in December 2000, have yet to be finalized because finalization became more complicated under the Homeland Security Act, which required reorganization of immigration functions.¹²⁴ They were proposed at the end of the Clinton administration, and it is now almost the end of the Bush administration. Bureaucratic infighting and opposition by a number of groups with competing interests may keep the proposed regulations from ever being finalized. Alvarado’s status still remains in limbo while she awaits a final end to her odyssey.

The main problem with the proposed regulations appears to be that they make it more difficult for women like Rodi Alvarado to obtain asylum than under the current case law. Existing case law recognizes that once an asylum applicant proves she was persecuted, she must demonstrate that such persecution was “on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹²⁵ Thus, she must establish the persecutor’s frame of mind. At present it is only necessary for her to establish that at least one of the protected categories was one of the motivations, even if it appears that a persecutor had mixed motives for inflicting the persecutory harm.¹²⁶ Under the proposed

122. Karen Musalo, *The Center for Children, Families, and the Law Interdisciplinary Conference: "Welcome to America: Immigration, Families, and the Law": Protecting Victims of Gendered Persecution: Fear of Floodgates or Call To (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 125 (2007) (internal citations omitted).

123. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

124. Musalo, *supra* note 122, at 128. "Whereas prior to the reorganization, the regulations were within the sole jurisdiction of the DOJ, they are now within the joint jurisdiction of the DOJ and the DHS, which means that both agencies will need to reach some consensus on the regulations before they can be finalized." *Id.* "In the meantime, the . . . [DHS], formerly the INS, which had appealed the original grant of asylum to Rodi Alvarado and opposed her claim for eight years, changed its position, filing a brief in February 2004 in which it argued that she was eligible for recognition as a refugee." *Id.* at 126.

125. 8 U.S.C. § 101(a)(42)(A).

126. *See Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (*en banc*) (holding that “the applicant must produce evidence from which it is reasonable to believe that

regulations, she must show that the "protected characteristic is central to the persecutor's motivation" for persecution.¹²⁷

Although this would be a difficult evidentiary bar to hurdle, another commentator reminds us:

In fact, the proposed rule stresses that applicants may rely on circumstantial evidence demonstrating "patterns of violence in the society against individuals similarly situated to the applicant" in order to establish motive. The INS reasons that this evidence may reflect a country's societal norms and demonstrate the relevant legal system's support for the persecutory conduct. According to the INS, this societal context may help reveal an abuser's belief that he possesses the authority to batter and control his victim "on account of" of her inferior position in the relationship.¹²⁸

Notwithstanding the thorny concerns presented by *In re R-A*, recent cases cited below demonstrate that persecution of LGBT persons,¹²⁹ as well as persecution of women who are victims of

the harm was motivated, at least in part, by an actual or implied protected ground") (quoting *In re T-M-B*, Interim Dec. No. 3307 (BIA Feb. 20, 1997)). See also *Borja*, 175 F.3d at 736 (citing *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995) ("persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated ground, the requirements have been satisfied.")).

127. Procedures for Asylum and Withholding of Removal, 65 Fed. Reg. 76,597-98 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

128. Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 224 (2002) (internal citations omitted).

129. See, e.g., Press Release, Columbia Law School Sexuality and Gender Law Clinic Secures Grant of Asylum for Lesbian from Turkmenistan (May 1, 2007), http://www.law.columbia.edu/media_inquiries/news_events/2007/may07/sexuality_law. In May 2007 a lesbian from the former Soviet republic of Turkmenistan was granted asylum. The woman, whose name is being withheld because of fears of reprisal by the Turkmenistan government against family members still in the country, had entered the U.S. on a tourist visa and then applied for refugee status. Although there is no specific law against lesbians in Turkmenistan, they are discriminated against in employment with few ever getting jobs. In some cases, in the mostly Muslim country, lesbians are forced by their families into marriages.

See also *Shahinaj v. Gonzalez*, 481 F.3d 1027 (8th Cir. 2007) (involving an Albanian homosexual who was beaten by police when he reported election fraud in an Albanian election); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (wherein an "outed" gay, Shi'ite Muslim man from Lebanon, afflicted with AIDS, was able to reverse an IJ's finding that his fear of future persecution was not well-founded); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005) (involving a Mexican homosexual man who was forced to perform oral sex on a high-ranking Mexican police officer); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003) (wherein the court remanded back to the BIA the case of a Ghanaian man who did not

gender violence, has become increasingly accepted as grounds for legal asylum in the United States.¹³⁰ It is often easier for LGBT persons to obtain asylum because homosexuals have been certified as a “social group” for purposes of asylum and usually not required to make a case by case showing of their status. As *In re R-A* demonstrates, it is much more difficult for women who are persecuted by domestic partners or family members to show that they are persecuted “on account” of membership in a definite, distinct social group. The *In re R-A* situation can be remedied by adoption of my fourth proposed amendment recommendation set forth herein.

V. PROPOSED SOLUTIONS

In asylum law, guidelines and regulations provide precedent for decisions. Guidelines are prevalent but informal and do not carry the force of law. Regulations are stricter and are normally codified in Title 8 of the Code of Federal Regulations.¹³¹ Implementing regulations often entails long and arduous policy disputes as well as extended time for comment and criticism by interested parties and groups. Indeed, the policy disputes over *In*

identify himself as homosexual but feared persecution in Ghana because there was evidence that his persecutors imputed to him membership in a “particular social group” as a homosexual).

130. See, e.g., *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005) (involving a Somali woman whose brother-in-law was shot and killed in her home while she was being raped by members of a militia group of a rival clan who opposed Ali's political beliefs); *Zubeda v. Ashcroft*, 333 F.3d 463 (2d Cir. 2003) (involving a claim of asylum by a twenty-eight year-old woman from the Democratic Republic of the Congo where she was raped and imprisoned by soldiers during that country's civil war in 2000. The Third Circuit vacated and remanded the BIA's order denying asylum and withholding of asylum for providing only a minimal analysis of Zubeda's claims of degrading treatment or punishment under the Convention Against Torture); *Shoafara v. INS*, 228 F.3d 1070 (9th Cir. 2000) (wherein the claimant, an Ethiopian woman of Amharic ethnicity petitioned for review of her denial of asylum by the BIA. The Ninth Circuit held that her rape by a government official of Tigrean ethnicity, who was her boss, was motivated at least in part by the applicant's Amharic ethnicity, and that she was persecuted on account of her nationality and remanded the case to the BIA); *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997) (involving a Bulgarian woman who claimed asylum based on past persecution on an account that she was sexually assaulted by a state security officer, causing her to flee Bulgaria. The Seventh Circuit vacated and remanded her BIA denial of asylum on the ground that she may have been persecuted because of her Macedonian nationality).

131. See *Aliens and Nationality*, 8 C.F.R. §§ 1.1 *et seq.* (2008).

re R-A have lasted almost a decade.¹³²

It is my suggestion that the proposed regulations be abandoned altogether as a failed experiment. My solution is to appeal directly to the U.S. Congress and suggest that it amend and clarify the basic Act to reflect much of what the asylum law is intended to do. That is, to provide humanitarian relief to those fleeing persecution in their home countries whether it be from persecution based on racial, religious, nationality, social group, political, or sexual grounds. The amendments suggested herein should make it less burdensome for LGBT persons and women who are victims of gender violence to obtain justice in asylum claims. Thus, such an amendment will well serve to clarify the law for all asylum seekers.

The Refugee Act has now been a part of the INA for almost thirty years.¹³³ Excluding the 1996 amendment recognizing coercive population measures as a form of persecution based on political opinion,¹³⁴ little has been done to modernize the statute in light of world humanitarian concern regarding persecution of sexual minorities. Aspects of a number of court decisions which have interpreted our asylum law should be codified into the INA.

Despite the problems I have raised in this and my earlier article, it is my opinion, after having represented in immigration court many persons fleeing persecution, that most immigration judges use the best of their abilities to reach a just asylum result. The statute, regulations, and guidelines, however, often do not provide enough guidance, and in some cases provide conflicting guidance. I propose changes to our asylum statute by adding five additional subsections to the general asylum provisions found in INA § 101(a)(42) that will:

- Define "persecution" (by synthesizing the holdings of the Ninth and Third Circuits) as: *The objective infliction of suffering or harm which is subjectively experienced upon those who differ, including, but not limited to threats to life, confinement, torture and economic restrictions so severe that they constitute a real threat to life or freedom;*
- Further provide that there be no required showing of punitive

132. See *supra* text accompanying notes 123–27.

133. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

134. See Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1101(a)(42)) (expanding the definition of refugee to include those persecuted for resistance to coercive population control methods).

intent within the meaning of persecution in order to obtain asylum. The approach of the Seventh Circuit should be adopted, which provides: *“Persecution” may be demonstrated by either showing the persecutor’s motivation to punish or, more generally, the infliction of harm on account of the five statutory grounds;*

- Define “particular social group” pursuant to the definition set out by the Ninth Circuit in *Hernandez-Montiel* as: *A group of persons united by a voluntary association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that the members either cannot or should not be required to change it. The group is recognized to be a societal faction or is otherwise a recognized segment of the population in question; members view themselves as members of the group; and the society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society;*
- The statute should recognize, in line with existing international and current U.S. guidelines for adjudicating women’s claims, that an asylum applicant may assert that she has suffered persecution on account of her gender as well as on the other statutory grounds: *The Attorney General shall consider claims of asylum to women whose claims arise from persecution based upon gender-based violence that is non-state sponsored such as, but not limited to, sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, extreme domestic violence, honor killings, and forced prostitution;*
- Provide that the Attorney General: *vis-à-vis the BIA, publish written opinions of each asylum case wherein claims of asylum are granted on grounds of sexual orientation, gender-based violence and coercive population control measures.*

It is my suggestion that these amendments be added to the current INA §101(a)(42) as part of the general provisions for terms and concepts in the Act.

VI. THE MODEL LEGISLATION¹³⁵**A Bill**

To amend the Immigration And Nationality Act of 1952, as amended, so as to provide clear and definitive definitions regarding all refugees fleeing persecution for political and other types of humanitarian harms.

Be it enacted by the Senate and House of Representative of the United States of America in Congress Assembled, That the Immigration And Nationality Act, as amended INA § 101(a)(42) (8 U.S.C. § 1101(a)(42)), is amended by adding at the end of Part A the following subsections:

Sec. (42) Definitions:

For the purposes of this Act the following definitions, principles and rules are to be applied:

(1) Persecution is the objective infliction of suffering or harm which is subjectively experienced or that will be experienced in the future upon those who differ including, but not limited to threats to life, confinement, torture and economic restrictions so severe that they constitute a real threat to life or freedom.

135. INA §101(a)(42), 8 U.S.C. §1101(a)(42) currently provides in full:

(42)The term "refugee" means (A) 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determination under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(2) Persecution may be demonstrated by showing by direct or circumstantial evidence the persecutor's motivation to either punish or, more generally, the infliction of harm on account of the statutory grounds set out in Part A of this section. Punitive intent is not a necessary requirement for a finding of persecution under this Act.

(3) A particular social group is a group of persons united by a voluntary association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that the members either cannot or should not be required to change it; such group may also be recognized as a societal faction or is otherwise a recognized segment of the population in question; members view themselves as members of the group; and the society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

The Act will be further amended by adding after Part B of Section (42) two new subsections as follows:

C. For purposes of determination under this Act, claims that arise from persecution based upon gender-based violence that is non-state sponsored such as, but not limited to, sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, extreme domestic violence, honor killings, and forced prostitution shall be assessed to determine whether the instance or instances of such harm amounts to persecution on the basis of the general principles set out herein.

D. The Attorney General of the United States through the Board of Immigration Appeals shall publish written opinions of each asylum case granted wherein such claims are made on grounds of sexual orientation and/or gender-based violence in Part A and Part C of this section, or are granted on grounds of any coercive population program as provided in Part B of this section.

VII. CONCLUSION

“The principle of asylum—allowing foreign nationals into one's country because they are persecuted in their homelands—rests upon an understanding that human beings possess certain ‘rights’ that all nations must respect.”¹³⁶ The U.S. Congress has

136. John A. Russ, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum*

made choices with respect to our asylum law. We have chosen to grant asylum to those from foreign countries who can show that they have been persecuted on account of race, religion, nationality, political opinion or their status in a particular social group. Grants of asylum on account of such persecution recognize the basic human rights that all human beings deserve.

Asylum and human rights doctrines are intertwined in that how a country defines persecution reflects its beliefs about what constitutes human rights violations.¹³⁷ Persecution of LGBT persons, as well as persecution of women who are victims of gender violence, has become increasingly accepted as grounds for legal asylum in the United States. For persecuted LGBT persons and women subjected to persecution because of their gender, such asylum protection represents recognition of their basic rights as human beings.¹³⁸

I urge Congress to implement the recommendations that I have set out herein and to amend the INA with respect to asylum. Such an amendment will better allow justice to be served in our immigration courts with respect to LGBT persons, women victims of gender violence who seek asylum from sexual persecution, and all others seeking asylum from persecution. As a humanitarian nation, we should not be ashamed to paraphrase the words of Emma Lazarus by saying: Give me your gays, your lesbians and your victims of gender violence yearning to breathe free of sexual persecution; "I lift my lamp beside the golden door."¹³⁹

Standards, 4 U.C. DAVIS J. INT'L & POL'Y 29, 46 (1998).

137. *Id.*

138. The 1948 Universal Declaration of Human Rights at Article 14 recognizes: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." See GOODWIN-GILL, *supra* note 18, at 564.

139. In 1903, the following poem by Emma Lazarus was inscribed at the base of the Statue of Liberty:

"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!"