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Paul O'Dwyer

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PAUL O'DWYER

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ABOUT THE AUTHOR: Paul O'Dwyer is a practicing immigration attorney in New York City. He has an LLB from National University, Ireland, and a degree of barrister-at-law, Kings Inns, Dublin, Ireland.

I. INTRODUCTION

In the last decade or so, a significant number of asylum applicants have based their claims for relief from deportation on sexual orientation.[1] Although all relevant courts have recognized the validity of such claims, there has been little or no meaningful guidance on what constitutes persecution on account of sexual identity for purposes of protection under the immigration laws. The few published federal courts of appeals decisions that have addressed this issue have varied widely according to the judicial district where the case was decided. These courts continue to articulate an artificial distinction between persecution on account of homosexual status or identity, which some circuits hold warrants protection, and punishment for homosexual acts, which some circuits hold does not warrant such protection.[2] As a result, the outcome of these claims depends, to an unacceptable extent, on the adjudicator's subjective opinions about sexual identity. Although personal subjectivity in asylum decisions is an increasingly common complaint among commentators, the outcome of cases involving issues on which many judges have strong personal opinions, such as sexual identity, are naturally more vulnerable.[3]

It is my thesis that until settled standards on this issue are established, one of the decisive factors in asylum claims based on sexual identity will continue to be the identity of the judge, rather than that of the applicant.[4] In the meantime, having such a claim heard before a tribunal that is historically sympathetic to such cases, rather than before one that is traditionally hostile to them, is a strategic decision to be addressed early in the litigation. However, when the choice of forum is outside of the applicant's control, it is important to be aware of the extent of judicial antipathy to these claims and to be prepared to address this concern early in the case.

In Part II of this article, I will review the general law regarding claims for protection based on a claimant's past persecution or fear of future persecution. Part III will address the procedural mechanisms for bringing a claim for protec-

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1. Such claims can be based on either sexual orientation or gender identity, or both. Therefore, for purposes of this article, the term "sexual identity" is a broader and more convenient term than "sexual orientation." I will refer to claims based on identity and orientation interchangeably throughout this piece.

2. *Compare In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (issuing order to dismiss appeal), *and* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (differentiating between status and conduct), *with* Maldonado v. U.S. Att'y Gen., 188 F. App'x 101 (3d Cir. 2006) (finding it unnecessary to differentiate between homosexual status and conduct).

3. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (formulating a statistical analysis of the multiple and arbitrary inconsistencies of adjudication in asylum-based law); Julia Preston, *Wide Disparities Found in Judging Asylum Claims,* N.Y. TIMES, May 31, 2007, at A1 (documenting the various approaches to asylum claim jurisprudence); *see also* Tod Robberson, *Asylum Seekers at the Mercy of Inconsistent Courts*, DALLAS MORNING NEWS, June 5, 2007, *available at* http://www/dallasnews.com/sharedcontent/dws/news/world/stories/060107dnintasylum.3ba274d.html (discussing the inconsistent application of analogous principles in the area of asylum law).

4. This is ironic, given that one of the precepts of the law in this area is the relevant identity of the persecuted and not that of the persecutor. *Pitcherskaia*, 118 F.3d at 647.

tion from persecution. In Part IV, I will review the history of agency and courts of appeals decisions involving asylum claims, and I will demonstrate that despite the apparent gains in protection for applicants in this area, it remains remarkably difficult to have such a case approved. In this section I will also undertake a brief analysis of how particular federal circuit courts of appeals have decided cases involving claims for protection.

In Part V of this article, I will conclude that the best way to address the problems identified is to ensure, to the extent possible and appropriate, that such claims are heard in sympathetic forums. This section will briefly review strategies other claimants have developed to represent their interests in protection-based claims, and assess how these strategies might best be employed to represent the interests of applicants seeking asylum due to persecution on account of sexual identity.

II. THE ORIGINS OF PROTECTION-BASED IMMIGRATION LAW

The substantive law of asylum in the United States finds its recent genesis in the United Nations Convention Relating to the Status of Refugees, which provided a clear definition of refugee status ("U.N. Refugee Convention").[5] The Protocol to the United Nations Convention Relating to the Status of Refugees ("U.N. Refugee Protocol"), which incorporated the U.N. Refugee Convention's basic provisions, was ratified by the United States in 1968.[6] U.S. immigration law has since adopted the U.N. Refugee Protocol's definition of refugee to define eligibility for asylum.[7] The text of the U.N. Refugee Protocol, therefore, remains the essence of asylum and related protection-based jurisprudence in the United States.[8] The essential difference between a refugee and an asylee is that refugee status is determined outside of the United States and that person is then admitted to the United States (or elsewhere) as a refugee, whereas a person seeks asylum from within the United States.[9]

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5. Convention Relating to the Status of Refugees, art. 1, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (*entry into force* Apr. 22, 1954) [hereinafter U.N. Refugee Convention].

6. DEBORAH V. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 2 (3d ed. 1999).

7. *Id.* at 4. In 1952, Senator Patrick A. McCarran spear-headed the McCarran-Walter Bill—passed into law as the Immigration and Nationality Act—and consolidated previous immigration laws into one statute and overruled outdated laws such as the Immigration Act of 1917, Pub. L. 64-301, § 19, 39 Stat. 874, 890 (1917) (repealed 1952). Congress passed the McCarran-Walter Bill over the veto of President Truman. Immigration and Nationality Act of 1952 (INA) Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). The statutory provisions governing such provisions changed rather frequently for the thirty-five years after World War II. Congress passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at various sections of 8, 22 U.S.C.). *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 158–69 (5th ed. 2003).

8. ANKER, *supra* note 6, at 2.

9. *Id.* For example, a refugee's status may be determined outside the United States at a refugee camp.

The U.N. Refugee Protocol defines a refugee as a person who is unable or unwilling to return to his or her country of nationality or habitual residence because of a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[10] Granting refugee status to such persons is known as the principle of non-refoulment, which means that a person who qualifies as a refugee should not be forcibly returned to his or her country of nationality or habitual residence.[11] As explained above, U.S. immigration law has adopted, verbatim, the U.N. Refugee Protocol's definition of refugee as set forth in the Immigration and Nationality Act ("INA").[12]

The principle of non-refoulment is available to three categories of claimants. The first category of claimants are individuals who meet the U.N. Refugee Protocol's definition of refugee as articulated in Section 101(a)(42)(A) of the INA.[13] Section 101(a)(42)(A) provides refugee protection to:

> [a]ny person who is outside any country of such person's nationality . . . 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.[14]

The second category of claimants are those individuals granted protection based upon their status as asylees:

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10. United Nations Protocol Relating to the Status of Refugees, art. I § 2, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Refugee Protocol] (incorporating and modifying the definition of a refugee from the U.N. Refugee Convention, *supra* note 5, at art. I § A(1)). In addition to refugees, protection from forced return to the country of origin is available to asylees and people granted withholding of removal. INA § 208, 8 U.S.C. § 1158(c)(1)(A) (1994 & 1997 Supp.); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)(A) (1994 & 1997 Supp.). Another basis for protection, not substantively discussed in this article, is deferral of removal—whereby a nation will not return an alien to another country where there are substantial grounds for belief that the alien would be tortured. Such claims are less common and operate on different legal principles than asylum or withholding claims, because there is no requirement that the torture be inflicted on account of a protected ground. *See* Foreign Affairs Reform and Restructuring Act of 1998, Div. G., § 2242, Pub. L. No. 105-277, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)) (implementing United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. III, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988) [hereinafter U.N. Torture Convention]).

11. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)(a); U.N. Refugee Convention, *supra* note 5, at art. 33. States shall not expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(a).

12. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1994 & 1997 Supp.); U.N. Refugee Protocol, *supra* note 10, at art. I(A)(2).

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

14. *Id.*

> The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) [of this title].[15]

The third category of potentially protected claimants are those granted withholding of removal status.[16] Section 241 of the INA provides that the attorney general "may not" remove a person from the United States to a country where he or she is likely to be persecuted on account of one of the protected grounds set forth in the U.N. Refugee Protocol.[17] In order to qualify for withholding of removal, a claimant must show that "it is more likely than not that [he or she] would be subject to persecution" in the country to which he or she would be returned.[18] This relief operates as a remedy for people who are procedurally ineligible for asylum or refugee status but who nonetheless fit the definition of a refugee.[19]

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15. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A); *see also* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)(A). This claim is filed within or at the borders of the United States. Unlike those who enter under refugee status, who do not reach U.S. soil until they have been processed, screened, selected, and provided with documents, applicants for asylum reach the territorial United States and then claim protection against involuntary return.

16. Also identified as "withholding of deportation." This is analytically similar to application for asylum. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

17. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

18. *Cardoza-Fonseca*, 480 U.S. at 430 (explaining that when an applicant seeks protection under withholding of removal, the applicant must show a clear probability "that it is more likely than not" that the claimant will be subject to persecution upon return—this standard does not apply when claimants seek protection under the asylum provisions of INA § 208).

19. Although the conceptual basis for protection under asylum and withholding are the same—a fear of persecution on account of a protected ground—the immigration benefits that are available are different. *Compare* INA § 208, 8 U.S.C. § 1158, *and* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), *with* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). *See also* THOMAS ALEXANDER ALEINIKOFF ET AL., *supra* note 7, at 847. Asylum is an affirmative immigration status and entitles the beneficiary to a refugee travel document, with which he or she can travel in or out of the United States and which other signatories to the U.N. Refugee Protocol and the U.N. Refugee Convention are obligated to recognize. *See* INA § 208(c)(1), 8 U.S.C. § 1158(c)(1). Asylees can claim derivative asylee status for immediate family members, without having to show that such family members qualify as refugees, and after a particular period of time, the asylee and derivatives are eligible to seek permanent residence based solely on their status as asylees. 8 C.F.R. § 1208.21(a). By contrast, persons granted withholding of removal are not considered to have any formal immigration status in the United States. On the contrary, they have been found removable or deportable, and the government has only agreed to withhold their removal or deportation to the country where they would be harmed. *See* 8 C.F.R. § 1209.1. Consequently, they are not entitled to return to the United States after foreign travel, their family members are not eligible for derivative relief, they are not eligible for permanent residence as a result of their withholding status, and they can (in theory, at any rate) be removed to third countries where they would not be harmed. *See id.*; *see also* INA § 241, 8 U.S.C. § 1231. Additionally, asylees may qualify for other non-immigration benefits, such as housing, education, and social welfare, on the basis of their asylee status, whereas there are no corresponding governmental benefits for people who have been granted withholding of removal. *See generally*

The defining concept in protection-based immigration law is that of a well-founded fear of persecution:[20]

> The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining categories . . . by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.[21]

Regarding the definition of "well-founded fear," the UNHCR Handbook provides as follows:

> To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.[22]

Regarding the definition of "persecution," the UNHCR Handbook provides as follows:

> There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.[23]

Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453 (1995).

20. Cigaran v. Heston, 159 F.3d 355, 357 (8th Cir. 1998) ("In the usual case, the critical inquiry is whether the applicant has a well-founded fear of future persecution upon return to his or her country. To establish such a fear, an applicant must demonstrate a fear that is both subjectively genuine and objectively reasonable.") (citing *Cardoza-Fonseca*, 480 U.S. at 430–31); Hamhezi v. INS, 64 F.3d 1240, 1242 (8th Cir. 1995); *see also* Immigration and Nationality Rule, 8 C.F.R. § 208.13(b)(2) (2007); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/IP/4//REV.1, ¶ 37 (1988) [hereinafter UNHCR HANDBOOK]. The UNHCR Handbook has been recognized by the United States Supreme Court as persuasive authority in interpreting the U.N. Refugee Protocol. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999); *Cardoza-Fonseca*, 480 U.S. at 437–39.

21. UNHCR HANDBOOK, *supra* note 20, ¶ 37.

22. *Id.* ¶ 38.

23. *Id.* ¶ 51.

Under U.S. immigration laws, an applicant is eligible for asylum if he or she has already suffered persecution on account of a protected ground without having to independently show a well-founded fear of persecution in the future.[24] In other words, a showing of past persecution creates a presumption of a well-founded fear of persecution.[25] This presumption can be rebutted if the government proves by a preponderance of the evidence either that country conditions have changed to such an extent that the person no longer has a well-founded fear of future persecution, or that the person can relocate safely within the country in question.[26]

Alternatively, if the applicant has not suffered past persecution, he or she can show a well-founded fear of future persecution.[27] This can be accomplished in two ways. First, a claimant can show that there is a pattern and practice of persecution of persons similarly situated to the applicant on account of one of the five protected grounds.[28] Second, a claimant can show that he would be singled out for persecution upon returning to his country of origin.[29] The Supreme Court has quantified this as a 10 percent chance of persecution if returned.[30] According to the UNHCR Handbook, a well-founded fear must include a subjective showing that the fear is genuine and an objective showing that this fear is not only genuine, but also reasonable under the circumstances.[31]

There are thus four main components of a claim for asylum-related protection: (1) a well-founded fear, (2) of persecution, (3) on account of, (4) a protected ground. Binding interpretations of these terms can be found in the UNHCR Handbook, in federal court decisions, agency decisions, agency memoranda, and agency operational guidelines. Additional guidance can be found in the decisions of other countries interpreting the U.N. Refugee Protocol's definitions, and in various commentaries.

III. THE PROCEDURAL MECHANISMS FOR RAISING A PROTECTION-BASED CLAIM

There are several layers of decision making within the asylum context. These can be divided into agency/administrative decisions and federal court decisions. In the agency/administrative context, there are two different agencies involved in the decision-making process: the Department of Homeland Security

24. 8 C.F.R. § 208.13(b)(1).

25. *Id.*

26. *Id.*

27. *Id.* § 208.13(b).

28. *Id.* § 208.13(b)(2)(iii). Recall that the five bases for protection-based claims are (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion. INA § 101(a)(42)(A), 8 U.S.C. § 101(a)(42)(A).

29. 8 C.F.R. § 208.13(b).

30. Ins v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

31. UNHCR HANDBOOK, *supra* note 20, ¶ 38.

("DHS"), and the Department of Justice ("DOJ").[32] Two agencies within DHS are involved in the asylum process: Citizenship and Immigration Services ("CIS") and Immigration and Customs Enforcement ("ICE").[33] Within the DOJ, there is the Executive Office for Immigration Review ("EOIR") comprised of the Immigration Court and the Board of Immigration Appeals ("BIA").[34] The Immigration Court has an adjudicatory role and the BIA hears appeals from the Immigration Court.[35]

Any person can apply for asylum by filing Form I-589 with the appropriate CIS service center.[36] An interview will then be scheduled with the local CIS asylum office.[37] After that interview, if the application is approved, the applicant will be granted asylum.[38] If the asylum application is not approved, the asylum officer will either refer the asylum claim to the Immigration Court, or, if the asylum seeker has valid immigration status in the United States, deny the asylum claim.[39]

When an asylum officer refers a case to the Immigration Court, the asylum applicant is served with a notice to appear in Immigration Court, which is equivalent to an accusatory instrument or a complaint.[40] At this time, the document is also filed with the Immigration Court in the EOIR.[41] Once an applicant

32. INA § 103, 8 U.S.C. § 1103; 8 C.F.R. § 2.1; 8 C.F.R. § 1003.1. On March 1, 2003, the functions of the former Immigration and Naturalization Service ("INS") were transferred to the newly-created Department of Homeland Security. The former INS was housed, so to speak, within the Department of Justice, along with the Executive Office for Immigration Review ("EOIR"). The EOIR is an agency within the DOJ, whose members are appointed by the attorney general. Homeland Security Act (HSA) Pub. L. 107-296, 116 Stat. 2134 (2002). *See* Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERP. REL. 601, 616 (2003).

33. HSA §§ 441, 451; INA §§ 103(a), 103(g); 8 CFR § 2.1.

34. 8 C.F.R. § 1003.1(a). Generally, the term "Immigration Court" is also used to refer to "Immigration Judge." The two serve the same procedural purpose. *Id.*

35. 8 C.F.R. § 1003.1(b).

36. *Id.* §§ 1208.3–1208.9. This applies to those who are in the United States legally or illegally, with some exceptions—such as alien crewmembers or people who enter the United States on a visa waiver program—who can only seek asylum in removal proceedings. 8 C.F.R. § 208(2)(c); 8 U.S.C. § 1158(b)(2).

37. There are seven asylum offices in the country: Texas, Los Angeles, Chicago, Virginia, Miami, Newark, and New York. Some of the offices have a large geographical jurisdiction and conduct asylum interviews in different circuit court jurisdictions. Ramji-Nogales et al., *supra* note 3, at n.13 (citing Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 340–44 (2005)).

38. 8 C.F.R. § 103.3. Decisions of asylum officers, are generally not transcribed, and they have no precedential value. 8 C.F.R. §§ 103.3(c), 1003.1(i).

39. *Id*. §§ 1003.1(a)(1)–(a)(2). Decisions by asylum officers are reviewed by a supervisory asylum officer within the regional asylum office before being released to the asylum applicant. In rare cases (e.g., if the case presents a novel issue of law), the case may be referred to CIS asylum headquarters before a decision is rendered. 8 C.F.R. § 103.4 (2007).

40. 8 C.F.R. §§ 103.3(c), 1003.1(i).

41. 8 C.F.R. §§ 1208.3, 1003.17(a), 1003.42(a). Immigration Court proceedings are generally known as "removal proceedings." Sometimes, the terms removal and deportation are used interchangeably; in some

is placed in removal proceedings, and assuming removability is established, he or she has an opportunity to assert a claim for protection from removal in more detail before an Immigration Judge ("IJ").[42] At the conclusion of the removal hearing, the IJ can either grant relief or deny relief and order the person removed (deported) from the United States.[43] The asylum hearing before the IJ is not an appeal of the asylum officer's decision but a de novo hearing.[44]

Decisions of an IJ may be appealed by either side to the BIA.[45] An appeal by the applicant constitutes an automatic stay of the IJ's decision until the appeal has been decided by the BIA.[46] The decisions of the BIA fall into two categories: precedential and non-precedential.[47] A BIA decision is precedential if it is selected for publication by the board, or if the attorney general designates the decision as a precedential decision.[48] The BIA has several options: (1) the BIA can affirm the decision of the IJ without opinion, (2) the BIA can adopt and modify the IJ's decision, (3) the BIA can issue its own decision granting or denying relief, or (4) the BIA can remand the case back to the IJ for further proceedings.[49]

Decisions of the BIA can be appealed via petition for review to the United States Circuit Court of Appeals having jurisdiction over the area in which the immigration court proceeding was held.[50] Decisions of the circuit courts are binding on the Immigration Courts in that circuit, and on the BIA's decisions reviewing Immigration Court decisions originating in that circuit.[51] Thus, the law applied by the BIA or an IJ can differ by federal circuit, where there is a split between the circuits, or where a particular issue has been decided in one circuit but not another.

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circumstances, the terms removal, deportation, and exclusion can have different legal meanings, but they all relate to legal proceedings to determine whether or not a person is legally entitled to remain in the United States. *Id.* § 1208.1(a).

42. *Id.* § 1208.4(b)(3)(i).

43. *Id.*

44. 8 C.F.R. § 1003.42(d).

45. *Id.* § 1003.1(d)(1).

46. *Id.* § 1003.6.

47. *Id.* § 1003(d)(1).

48. *Id.* § 1003(d).

49. *Id.*

50. INA § 235(b)(1), 8 U.S.C. § 1252(b)(2). Certain agency determinations, such as those that relate to the timeliness of an asylum application and some other determinations, including those of a discretionary nature, are either not subject to federal court review, or their review is extremely limited. INA §§ 212(a)(3)(B)(i), 237(a)(4)(B), 8 U.S.C. §§ 1158(a)(3), 1158(b)(2)(D), 1252(a)(2); *see* Immigration Equality, Immigration Basics: Sources of Law, http://immigrationequality.org/manual_template.php?id=1065#D_2 (last visited Oct. 26, 2007).

51. *See* Immigration Equality, *supra* note 50.

IV. SEXUAL-IDENTITY-BASED PROTECTION CLAIMS IN U.S. IMMIGRATION LAW

This section will first examine the early cases that granted protection on the basis of sexual identity and then examine some of the more recent significant federal court decisions, which have both granted and denied protection. In particular, this discussion will illustrate the arbitrary nature of these decisions and how the artificial distinction between homosexual status and homosexual identity, articulated even in the early cases granting protection, enables different outcomes in cases with analogous factual circumstances.

A. Persecution on Account of Sexual Orientation Becomes a Basis For Protection in United States Asylum Law

In 1990, sexual orientation was recognized as a basis for protection from removal. The premise of this recognition is based on the acceptance of sexual orientation as an immutable characteristic. With this recognition, homosexuals are classified as members of a particular social group for protection purposes.[52]

The case that established this basis for protection was the 1990 case of *Toboso-Alfonso*, which involved a gay man from Cuba who had been paroled into the United States as part of the 1980 Mariel boat lift.[53] As a defense to a subsequent deportation charge, Toboso-Alfonso sought asylum, asserting both past persecution and a well-founded fear of future persecution on account of his sexual orientation, if returned to Cuba.[54]

Specifically, Toboso-Alfonso claimed that the Cuban government registered and maintained files on all homosexuals in Cuba and for thirteen years, every two or three months, he had been required to appear for a hearing before the Cuban police, which consisted of a physical examination followed by questions regarding his sex life and sexual partners.[55] He further claimed that after these hearings he was often detained in the police station for three or four days without being charged with any criminal offense.[56] Toboso-Alfonso also claimed that the actions against him were not in response to specific *conduct* on his part, such as engaging in homosexual acts, but resulted from his *status* as a homosexual because it was a criminal offense in Cuba to simply be a homosexual.[57]

He also claimed that he was given the choice by the local police chief of either leaving to the United States, as part of the Mariel boat lift, or going to jail for

52. Recall that there are five bases for protection-based asylum claims of persecution or well-founded fear of future persecution on account of (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion. INA § 101(a)(42)(A), 8 U.S.C. § 101(a)(42)(A).

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

54. *Id.* at 820.

55. *Id.*

56. *Id.* at 821. It is unclear from the decision if this detention was considered to be part of this hearing or examination, or if it was separate and apart from it.

57. *Id.*

four years for being homosexual.[58] Unsurprisingly, he opted to leave for the United States.[59] On the day he was to leave, neighbors showed up to throw eggs and tomatoes at him.[60] This situation became so grave that the police changed the time of his departure from the afternoon to 2:00 a.m.[61] Toboso-Alfonso provided various items of documentary evidence of the Cuban government's detention, incarceration, and violence against homosexuals in Cuba.[62]

The IJ credited Toboso-Alfonso's testimony and claims, and made two findings.[63] First, the IJ found that homosexuality was an immutable characteristic, and that Toboso-Alfonso was therefore a member of a particular social group for protection purposes.[64] Second, the IJ found that he had been persecuted in the past and had a well-founded fear of persecution in the future because of his homosexuality.[65] Thus, the IJ granted his request to withhold deportation to Cuba.[66]

The government appealed this decision to the BIA.[67] The appeal did not challenge the finding that homosexuality was an immutable characteristic, but instead challenged the finding that homosexuals were a particular social group for asylum purposes.[68] The government argued that "socially deviated behavior, i.e. homosexual activity, is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well."[69]

The BIA rejected that argument in a brief two-part analysis.[70] First, the BIA found that Toboso-Alfonso had been targeted by the Cuban government, because of his *status* of being a homosexual, not because of any specific homosexual *acts*.[71] The BIA explained that there was no evidence that his homosexual

58. *Id.* at 820.

59. *Id.* at 821.

60. *Id.*

61. *Id.*

62. *Id*.

63. *Id.* at 822.

64. *Id.*

65. *Id.*

66. *Id.* Toboso-Alfonso was ineligible for asylum based on his criminal record. *Id.*

67. *Id.*

68. *Id.* Not every social group qualifies for protection under the immigration law. *Cf. In re* C-A, 23 I. & N. Dec. 951 (B.I.A. 2006) (finding that a group of non-criminal informants is not a "particular social group").

69. *Toboso-Alfonso,* 20 I. & N. Dec. at 822.

70. *Id.*

71. *Id.*

status could change in the eyes of the Cuban government—in other words, his homosexuality was an immutable characteristic.[72]

The BIA then addressed the question of whether Toboso-Alfonso had a well-founded fear of future persecution.[73] It found that the threat of four years incarceration did not relate to any specific acts he had committed, but instead was related to the Cuban government's desire to force Cuban homosexuals to leave Cuba.[74] Here the BIA apparently drew a distinction between *homosexual status* and *homosexual acts*.[75] The BIA noted that Toboso-Alfonso was not "simply" a case involving the enforcement of laws against particular homosexual acts, nor "simply" a case of assertion of "gay rights."[76]

This decision leaves room for speculation: Would the Board's decision have been different if Toboso-Alfonso was threatened with imprisonment for four years for having sex with his boyfriend? Or actively campaigning for gay rights? The language of the decision certainly suggests that the BIA would have been less sympathetic to a claim of persecution on account of those homosexual acts rather than homosexual status.[77] Such a distinction between acts and status is illusory, however, and is not applied to protection claims that do not relate to sexual orientation. It is never argued, for example, that people who claim religious persecution are not persecuted for belonging to a particular religion, but for praying or attending services. Indeed, it can be well argued that merely being visible as a homosexual, intentionally or otherwise, is a homosexual act. As we shall see, however, judges still fall back on this artificial distinction in order to justify denials of relief to lesbian, gay, bisexual, and transgender ("LGBT") applicants.

In 1994, Attorney General Janet Reno designated the decision in *Toboso-Alfonso* as a precedential decision, meaning that homosexuality was established as a particular social group for asylum purposes, an interpretation of the INA that has been accepted by all federal courts.[78] Since then, there have been scores of decisions from the courts of appeals regarding sexual-identity-based claims, but only a few of these are actually reported (precedential) decisions. The decisions considered here are *Pitcherskaia v. INS*,[79] *Hernandez-Montiel v. INS*,[80] and *Ornelas-Chavez v. INS*,[81] all from the Ninth Circuit; *Maldonado v. U.S.*

72. *Id.*

73. *Id.* at 823.

74. *Id.*

75. *Id.*

76. *Id.* at 822.

77. *Id.*

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

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

80. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

81. Ornelas-Chavez v. INS, 458 F.3d 1052 (9th Cir. 2006).

Att'y Gen.,[82] from the Third Circuit; and *Kimumwe v. Gonzales*,[83] from the Eighth Circuit.

In *Pitcherskaia v. INS*, the applicant was a Russian lesbian who claimed she had been detained by the militia in Russia on a number of occasions on account of her sexual orientation, interrogated, pressed to identify other gays and lesbians, and beaten on one occasion.[84] Her ex-girlfriend was sent to a psychiatric institution, while Pitcherskaia was threatened with forced psychiatric institutionalization unless she attended outpatient "therapy sessions."[85] The stated goal of these "therapy sessions" was to change her sexual orientation.[86] As a result, she left Russia and came to the United States and applied for asylum and withholding of deportation.[87]

The IJ denied Pitcherskaia's application and she appealed.[88] On appeal, the BIA found that, even assuming her credibility, she was not entitled to asylum because the militia in Russia had intended by its actions to cure her of her sexual orientation rather than to punish her, and so its actions did not constitute persecution.[89]

Pitcherskaia appealed again, and the Ninth Circuit Court of Appeals granted her appeal and reversed the BIA's ruling on the issue of persecution and punishment.[90] The court ruled that whether the motive of the persecutor was to punish, cure, or save Pitcherskaia's soul, was not legally determinative.[91] On the contrary, the relevant inquiry was whether the persecutor was motivated by the identity of the victim, not whether the motivation was to cure the person or to change his or her orientation.[92] The court then vacated the BIA's decision and remanded it to the BIA for consideration of the claim under the correct standard of inquiry for motive.[93] Significantly, the focus of the decision was on whether forced psychological treatment to change Pitcherskaia's status was persecution, and not on any homosexual acts she engaged in. In reality, of course, it was Pitcherskaia's acts, including having a girlfriend and associating with other lesbians, that established her status as a lesbian.

82. Maldonado v. U.S. Att'y Gen., 188 F. App'x 101 (3d Cir. 2006).

83. Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005).

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

85. *Id.*

86. *Id.* at 645.

87. *Id.* at 643.

88. *Id.* at 645.

89. *Id.*

90. *Id.* at 646.

91. *Id.*

92. *Id.* at 647.

93. *Id.* at 646–48.

Two additional cases from the Ninth Circuit rely on somewhat different reasoning to reach similar conclusions: *Hernandez-Montiel v. INS*[94] and *Ornelas-Chavez v. INS.*[95] Both cases involved claims by gay men from Mexico claiming past persecution on account of their sexual identity.

In *Hernandez-Montiel v. INS*, the claimant was a gay man from Mexico who, at the age of twelve, had begun dressing and otherwise behaving as a woman—he later began taking female hormones, presumably to develop and enhance his female characteristics.[96] He experienced repeated problems at his school on account of his sexual identity, and was thrown out of his home by his parents.[97] He was attacked with a knife and required one week of hospitalization when he was fourteen years old.[98] His sister placed him into a counseling program where he was forced to cut his hair and nails.[99] In addition, the counselors at the program forced him to stop taking female hormones.[100] He was detained and strip-searched by the police on several occasions on account of his sexual identity, and he was sexually assaulted by the police on two of these occasions.[101] In 1994, the claimant left Mexico and came to the United States, and in 1995 he applied for asylum.[102]

At his immigration court hearing, he provided expert witness testimony to the effect that while it was acceptable in Latin America for unmarried men to be the active partner in homosexual sexual activity, men who were perceived to assume the passive role in such activity were considered "gay men with female sexual identities."[103] He argued that these men were ostracized and subject to gay bashing and police abuse.[104] Finally, he claimed that "gay men with female sexual identities" were likely to become the scapegoats for Mexico's economic and political problems.[105]

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94. *Hernandez-Montiel*, 225 F.3d 1084.

95. *Ornelas-Chavez*, 458 F.3d 1052.

96. *Hernandez-Montiel*, 225 F.3d at 1087–88.

97. *Id.* at 1088.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1089. This was the claimant's second attempt to flee to the United States. *Id.* at 1088–89.

103. *Id.*

104. *Id.*

105. *Id.* Whatever support there may be for the notion that unpopular minorities are often targeted when a country experiences political or economic difficulties, it stretches credulity to argue that gay men who are perceived to take the passive role in sexual intercourse are particularly blamed for such problems. The credit given this expert testimony, when contrasted with the rejection of relevant expert testimony on mistreatment of gay men with HIV in Venezuela by the Eleventh Circuit, in *Paredes v. U.S. Att'y Gen.*, 219 F. App'x 879 (11th Cir. 2007), underscores the highly subjective nature of asylum decisions.

The IJ found that Hernandez-Montiel was a member of a particular social group, namely, gay men who wanted to dress as women, but also found that this was not an immutable characteristic, and denied relief.[106] The BIA upheld the IJ's decision, finding that he failed to establish that his decision to dress as a female was an immutable characteristic, and held that the "tenor of [his] claim [was] that he was mistreated because of the way he dressed [as a male prostitute] and not because he is a homosexual."[107] Hernandez-Montiel appealed to the Ninth Circuit.[108]

The Ninth Circuit's review of the case turned on the question of whether "gay men with female sexual identities" in Mexico constituted a particular social group and if so, whether Hernandez-Montiel was a member of that group.[109] The court answered both questions in the affirmative.[110]

In its analysis, the court reviewed the contours of membership in a particular social group as a concept within asylum law.[111] The BIA, in its determination regarding Hernandez-Montiel, applied the definition set forth in *Matter of Acosta* requiring that such a particular social group possess a common immutable characteristic.[112] The court then examined the broader interpretation of the particular social group category as defined by the Ninth Circuit.[113] The Ninth Circuit's more flexible approach is based on a "voluntary associational relationship."[114]

The court then came up with a new, hybrid definition of a "particular social group" as one united by either a voluntary association or an immutable characteristic.[115] The court found that sexual orientation and sexual identity were immutable characteristics, applying the BIA's test in *Acosta* rather than its own new, hybrid definition for social group membership.[116] The court also recognized that the BIA's decision in *Toboso-Alfonso* established sexual orientation as a particular social group for protection purposes, finding that dress and appearance

106. *Hernandez-Montiel*, 225 F.3d at 1089.

107. *Id.* at 1089–90. Hernandez-Montiel apparently testified at his hearing that he had once been convicted of prostitution. *Id.* at 1090.

108. *Id.* at 1087.

109. *Id.*

110. *Id.*

111. *Id.* at 1091–92.

112. *Id.* (citing *In re* Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985)). This definition has also been adopted by the First, Third, and Seventh Circuits.

113. *Id.* (citing Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1995)).

114. *Id.* ("We are the only circuit to suggest a 'voluntary associational relationship' requirement" and explaining "that a 'particular social group' is one united by a *voluntary association*, including a former 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.") (emphasis added).

115. *Id.* at 1093.

116. *Id.*

were outward manifestations of sexual identity, and that in this case the appropriate social group was "gay men with female sexual identities" in Mexico.[117] The court insisted that this group was not persecuted because they dressed as females, or engaged in homosexual acts, but because they were perceived to assume the passive role in homosexual sexual relationships and manifested their sexual identities through feminine dress, long hair and fingernails.[118] The court then found that Hernandez-Montiel was a member of this particular social group, that his membership in this particular social group was an immutable characteristic, and that he had been persecuted for this reason.[119] The court vacated the denial of asylum and remanded the case back to the BIA for further proceedings consistent with its opinion.[120]

Inherent and problematic in the court's findings is the implication that gay men who do not have female sexual identities are not persecuted in Mexico, and that it is only acceptable to admit openly to engaging in homosexual acts if one is perceived to take the active rather than the passive role in such activity.[121] This is not now, and was not then, the case either in Mexico—as evidenced by the many Mexican sexual orientation and asylum claims approved by the Ninth Circuit—or in the United States. And with all due respect to the Ninth Circuit, which has repeatedly shown itself to be sympathetic to sexual identity claims and claimants, there was no need to make any findings in this case beyond that of Hernandez-Montiel's homosexual identity. In other words, it would have been sufficient to find that Hernandez-Montiel was persecuted because he was a highly visible gay man, rather than because of his mode or manner of visibility. Effeminate gay men are targeted for abuse because they are visible as gay men, not because they are effeminate. There are no reports of cases involving persecution of effeminate heterosexual men.

In *Ornelas-Chavez v. Gonzales,* the Ninth Circuit again focused its attention on the issue of persecution of effeminate gay men in Mexico.[122] The *Ornelas-Chavez* decision does not discuss how the claimant identified himself, but explains that he suffered a great deal of abuse in Mexico on account of his "homosexuality and female sexual identity."[123]

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117. *Id.* at 1093–95.

118. *Id.* at 1094. Oddly, the court held that the claimant was not "simply a transvestite who dresses in clothes of the opposite sex for psychological reasons." The rest of the decision conveys the clear impression that the claimant is entitled to protection precisely because he dressed in women's clothes for psychological reasons. *See id.*

119. *Id*. at 1099.

120. *Id.*

121. *Id.* at 1089.

122. *Ornelas-Chavez*, 458 F.3d at 1052.

123. *Id.* at 1054. On this point, the "homosexuality and female sexual identity" discussed in *Ornelas-Chavez,* 458 F.3d at 1052, is distinct from the "homosexual female sexual identity" perceived in *Hernandez-Montiel,* 225 F.3d at 1093.

Specifically, Ornelas-Chavez was raped repeatedly as a child by male family members, family farm workers, and apparently, by a friend of his father with the father's encouragement.[124] He reported this sex abuse by older men to a teacher, who did nothing in response.[125] His father arranged to have him detained by a local police officer for several hours on account of his homosexuality.[126] While detained, the police officer threatened to detain him again and for longer if he found him involved again with other men.[127] In addition, Ornelas-Chavez was repeatedly threatened and beaten by his co-workers, and even after leaving for two years his co-workers tried to smother him with a pillow when he returned.[128] During this time, the police stabbed two of his gay acquaintances to death and shoved sticks into their rectums.[129] Ornelas-Chavez moved to another part of Mexico, where he lived relatively peacefully for five years until his father showed up, attacked him, and broke his nose with a bottle.[130]

As a result, he left Mexico and came to the United States where he sought protection.[131] The IJ denied asylum because the application had not been filed in a timely manner, and denied withholding of removal and relief under the U.N. Torture Convention. The decision was upheld by the BIA on the basis that a single six-hour detention by the police several years earlier did not constitute persecution, and that the rest of the claim failed in the absence of any showing that the other incidents of harm had been reported to government authorities.[132]

On appeal, the Ninth Circuit found that Ornelas-Chavez was not required to have reported the numerous incidents of harm to the authorities because he had shown that it would have been futile to have done so.[133] The court held that he had been persecuted in the past, reversed the denial of asylum, and remanded back to the BIA for further proceedings consistent with its opinion.[134]

In a stinging dissent, Circuit Judge Diarmuid O'Scannlain castigated the majority for extending protection to Ornelas-Chavez, pulling perverse conclusions from the allegations of abuse.[135] O'Scannlain argued, for example, that the

124. *Ornelas-Chavez*, 458 F.3d at 1052.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1054. His superiors took no action against the co-workers. *Id.*

129. *Id.*

130. *Id.* at 1054–55.

131. *Id.* at 1055.

132. *Id.* An asylum applicant is required to show that the government of the country in question is unable or unwilling to provide protection from the harm suffered in the past or feared in the future. 8 C.F.R. § 208.16(b)(l)(i) (2007).

133. *Ornelas-Chavez*, 458 F.3d at 1058.

134. *Id.*

135. *Id.* at 1061 (O'Scannlain, J., dissenting).

attempt to smother Ornelas-Chavez was not torture, it was only mere attempted torture, which did not qualify for protection under the Act.[136] Presumably, if he had been smothered, O'Scannlain's exacting legal test would have been satisfied.[137] O'Scannlain applied a crude statistical test, his own estimate of the gay population of Mexico divided by the number of reported anti-gay murders in Mexico, to determine if Ornelas-Chavez was "more likely than not" to be persecuted if returned.[138] No other reported decisions in the asylum context have even contemplated this type of do-it-yourself calculation to determine whether or not an applicant has met his burden. The sheer vehemence and scornful tone of the dissent stands in stark contrast to the vulnerability of the applicant and the vicious nature of the harm he suffered.

B. Asylum Denied: The Homosexual Activity Versus Homosexual Status Distinction

Two additional cases from different circuits that base their decisions on the status versus acts distinction warrant attention: *Maldonado v. U.S. Att'y Gen.*,[139] decided by the Third Circuit Court of Appeals, and *Kimumwe v. Gonzales*,[140] decided by the Eighth Circuit Court of Appeals.

In *Maldonado v. U.S. Att'y Gen.*, the Third Circuit vacated a finding that the applicant had not been persecuted in Argentina on account of his sexual orientation, where the IJ and the BIA had found that he was not persecuted for being gay, but instead for frequenting gay clubs.[141] In this case, the applicant had been detained and harassed by the police in Argentina at least twenty times over a number of years while leaving gay clubs.[142] In one such incident, Maldonado was detained at a police station for six hours, where he was told he needed "a hot iron bar stuck up [his] ass," and that "faggots deserve to die."[143] In another incident Maldonado was again apprehended by police while leaving a gay club, beaten with a stick, held overnight, and then had to bribe the police into returning his belongings.[144] It bears repeating that these were two of twenty such incidents.[145]

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136. *Id.* at 1068–69. Surprisingly, neither the BIA's decision nor the Ninth Circuit's decision addressed whether the correctional officers, who beat and tried to kill Ornelas-Chavez, ought to be considered government authorities.

137. *See id.*

138. *See id.* at 1069.

139. *Maldonado v. U.S. Att'y Gen.*, 188 F. App'x 101 (3d Cir. 2006).

140. *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005).

141. *Maldonado,* 188 F. App'x at 101.

142. *Id.* at 103.

143. *Id.*

144. *Id.*

145. *Id.*

At the Immigration Court hearing, the government did not dispute Maldonado's allegations, but argued that they were not inflicted "on account of" his membership in a particular social group, i.e., homosexuals, but instead on account of his leaving gay clubs late at night, i.e., homosexual acts.[146] The IJ and then the BIA agreed with the government.[147] The Third Circuit solidly rejected this argument, finding that it was "a distinction without a difference" and that the fact that the police targeted Maldonado while leaving gay discos and made disparaging remarks about his sexual orientation made it clear that he was targeted on account of his sexual orientation.[148] While the court's decision is welcome, it is appalling that this issue even found its way to the court of appeals in the first place. Noteworthy about this decision is that, like in *Pitcherskaia* and *Ornelas-Chavez*, the court in *Maldonado* found it unnecessary to differentiate between homosexual status and homosexual conduct, and in fact rejected such an analysis.[149]

Meanwhile, in *Kimumwe v. Gonzales*, William Jonathan Kimumwe was not so lucky in his asylum claim.[150] There, the Eighth Circuit upheld a finding that, far from having been persecuted in Zimbabwe on account of his sexual orientation, the applicant had been justly punished for "luring" heterosexuals into sexual relationships with him, that numerous other instances of harm simply did not constitute persecution, and that there was, bizarrely, insufficient evidence of persecution of homosexuals in Zimbabwe.[151] When he was twelve years old, Kimumwe was caught having sex with a male student in his school, and was expelled as a result.[152] When he was fifteen years old, Kimumwe and another male student got drunk and had sex.[153] The other student then complained to the school authorities that Kimumwe had gotten him drunk and taken advantage of him.[154] As a result of the student's complaint, Kimumwe was detained by the police for two months with no criminal charges brought against him.[155] According to the majority opinion, Kimumwe was unclear about the reason for this detention.[156] The dissent noted that Kimumwe had testified that he had been

146. *Id.* at 104.

147. *Id.* at 101.

148. *Id.* at 104.

149. *Id.* at 103–04.

150. *Kimumwe*, 431 F.3d at 323 (denying claims for asylum and withholding of removal).

151. *Id.* at 322–23.

152. *Id.* at 320–21.

153. *Id.* at 321.

154. *Id*. at 321–23. There was no suggestion that the sexual activity was non-consensual or that the other male student's intoxication made him unable to resist. *Id.*

155. *Id.* at 321.

156. *Id.* Courts do not engage in fact-finding in petitions for review; instead, they are limited to determining if the fact finding of the court below was supported by substantial evidence. However, in this case, the

told he was being detained because he was gay.[157] Regardless, all the evidence indicated that the reason behind the detention was on account of the specific homosexual conduct with the embarrassed "straight" student, as there was no evidence that Kimumwe had done anything else to warrant two months imprisonment.[158] Significantly, there was no suggestion that the recalcitrant "straight" student had gone to jail.[159]

In addition, during the short time he lived in Zimbabwe, local authorities chased Kimumwe and made disparaging remarks, while neighbors spat at him, threw stones at him, beat him, and on one occasion shocked him with an electric wire.[160] In December 1998, Kimumwe left Zimbabwe after the president, Robert Mugabe, declared homosexuality illegal.[161] Mugabe publicly referred to homosexuals as "sodomites and perverts" who were "worse than dogs and pigs" and who had "no rights at all."[162] As if all that were not enough, Mugabe also stated that Zimbabwe would do "everything in its power" to combat homosexuality, which he described as "an abomination."[163]

The Immigration Court denied Kimumwe's asylum application, the BIA upheld the denial, and the Eighth Circuit upheld the BIA.[164] The Eighth Circuit found that while the two-month imprisonment could constitute persecution, it did not constitute persecution in this case because Kimumwe was imprisoned not because of his homosexual status, but because he had, in the court's own highly-charged language, "lured" another boy of the same age into a consensual same-sex sexual encounter.[165] Thus, the court used the artificial distinction between homosexual activity and homosexual status to deny relief.[166] In fact, it can be fairly said that in this case Kimumwe was denied asylum on account of his homosexual activity.[167]

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recitation of the relevant facts by the majority is significantly different from that of the dissent, thus illustrating how the courts of appeals, despite the prohibition on fact-finding, marshal the facts in a particular case in a manner that supports the agenda of the decision. *See id.* at 324 (Heaney, J., dissenting).

157. *Id.* at 324 (Heaney, J., dissenting).

158. *Id.*

159. *See id.*

160. *Id*. at 322 (majority opinion).

161. *Id.* at 321.

162. *Id.* at 324–35 (Heaney, J., dissenting) (citations omitted).

163. *Id.* (citations omitted).

164. *Id.* at 321 (majority opinion).

165. *Id.*

166. *Id.*

167. *See id.* at 324 (Heaney, J., dissenting).

C. Claims Based Solely on Well-Founded Fear of Future Persecution

The aforementioned decisions relate to claims where the claimant has experienced some form of past persecution.[168] However, there are few reported courts of appeals cases that have upheld a grant or reversed a denial of sexual-identity-based protection solely on a well-founded fear of future persecution, where the applicant does not have a showing of past persecution.[169] This may be due, at least in part, to the limited nature of appellate review in protection-based claims.[170] The BIA and the courts of appeals are prohibited from engaging in fact-finding in the course of an appeal.[171] Their role is solely limited to determining whether or not the factual findings and/or legal conclusions of the lower courts are correct or incorrect—using the appropriate standard of review.[172] Review of factual findings, such as whether or not the evidence in a particular case shows that a person has a well-founded fear of future persecution, is extremely deferential.[173]

One case that vacated a finding that the applicant did not show a well-founded fear of future persecution is *Karouni v. Gonzales*, a Ninth Circuit case involving a gay man from Lebanon.[174] The Ninth Circuit's decision is instructive for two reasons. First, the court found that the IJ and the BIA erred in finding that the evidence failed to show that homosexuals did not have a well-founded fear of future persecution in Lebanon.[175] Second, the court rejected the dichotomy between homosexual conduct and homosexual orientation, upon which the IJ had relied to deny relief. The court found "no appreciable difference" between "being persecuted for being a homosexual and being persecuted for engaging in homosexual acts."[176] Unfortunately, this reasoning evaded the Eighth Circuit in Kimumwe's case.[177] Additionally, this decision is not reconcilable with *Abdul-Karim v. Ashcroft*, decided by the Ninth Circuit one year earlier.[178] In *Abdul-Karim*, the Ninth Circuit held that the evidence at that time indicated

168. *See Maldonado*, 188 F. App'x 101; *Kimumwe*, 431 F.3d 319; *Ornelas-Chavez*, 458 F.3d 1052; *Hernandez-Montiel*, 225 F. 3d 1084; *Pitcherskaia*, 118 F.3d 641.

169. *See, e.g.*, Yeoh v. Gonzales, No. 04-74613, slip op. at 1 (9th Cir. 2006) (vacating a denial of asylum and remanding for consideration of whether or not evidence of selective enforcement of laws against homosexuals in Singapore was sufficient to show a well-founded fear of future persecution).

170. 8 C.F.R. § 1003.1(d)(3) (2007).

171. *Id.*

172. *Id.*

173. *Id.*

174. Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

175. *Id.* at 1179.

176. *Id.* at 1173.

177. *Kimumwe*, 431 F.3d 319.

178. Abdul-Karim v. Ashcroft, 102 F. App'x 613 (9th Cir. 2004).

that homosexuals in Lebanon did not have a well-founded fear of persecution.[179] One possible explanation for the irreconcilable decisions may be the different evidentiary records in each case.[180] On the other hand, it does little to instill faith in the integrity of the adjudication process when the same court can reach opposite conclusions regarding conditions for homosexuals in the same country at the same time, particularly when most of the country condition information is publicly available and in many instances is a matter of public record.

In claims for protection alleging a well-founded fear of future persecution, without an evidentiary showing of past persecution, decisions almost inevitably turn on the sufficiency of background evidence of country conditions.[181] A repeated refrain from decisions of the courts of appeals is essentially that evidence of societal hostility, and even police harassment and detention of gays, does not rise to the level of persecution.[182] Of course, it goes without saying that a determination of when background country condition evidence shows a well-founded fear of future persecution is essentially fact-driven. It is therefore inevitable that two adjudicators may look at the same set of "borderline" facts and reach different conclusions.[183] The same ought not be true, however, of claims where the background evidence is clear and persuasive, and there is no question about the applicant's membership in the particular social group at issue. Yet adjudicators can and consistently do reach opposite conclusions based on near-identical and conclusive evidence. This is not a complaint unique to LGBT asylum seekers, but is reported across the board.[184] Yet the fact that the rulings in all asylum decisions are inconsistent should only heighten the concern that LGBT asylum seekers will be even more vulnerable to adjudicators' own subjective views on sexual identity issues generally.

In a review of fifty-six protection based claims involving sexual identity from the courts of appeals over the last eight years, thirty-five were denied because of either lack of evidence, credibility, or procedural reasons.[185] Denials in-

179. *Id.* at 615.

180. The IJ found that Abdul-Karim's testimony was not credible and that he had unreliable documentation. *Id.*

181. *See* Paredes v. U.S. Att'y Gen., 219 F. App'x. 879 (11th Cir. 2007) (explaining how various equities can affect the outcome of a claim that is based solely on a well-founded fear of future persecution on account of sexual orientation and status as a gay man with HIV).

182. *Id.*; Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005).

183. *Compare Abdul-Karim*, 102 F. App'x 613 (affirming denial of a gay man's application for lack of well-founded fear of future persecution in Lebanon), *with Karouni*, 399 F.3d 1163 (holding that the applicant, a gay man, did have a well-founded fear of future persecution in Lebanon).

184. *See* Chris Hedges, *Agency Struggles With Asylum Policy in Gender Abuse Cases*, N.Y. TIMES, Mar. 12, 2000, at 48; Susan Sachs, *The Nation: Fears of Rape and Violence; Women Newly Seeking Asylum*, N.Y. TIMES, Aug. 1, 1999, at 4; *Fleeing to Asylum, And Going Nowhere*, N.Y. TIMES, July 8, 1996, at B1.

185. Unscientific study conducted by the author in a review of fifty-six protection-based claims. A comprehensive list of cases is on file with the author, however, specific cases referenced herein are cited below.

clude a Ninth Circuit case denying asylum to a gay man from Mexico for lack of evidence of persecution of gay men in Mexico,[186] despite six similar cases being granted by the Ninth Circuit between 2000 and 2006, each finding a well-founded fear of future persecution in Mexico.[187] The Ninth Circuit also denied asylum to a gay man from Lebanon in 2004, ruling that the claimant had no fear of future persecution, despite reaching the opposite conclusion in a similar case a year later.[188] Of the twenty-one claims not denied, most were remanded for a new hearing, while others were vacated and reversed.[189]

Assuming that a remand can be considered a victory,[190] well over half of the LGBT protection cases at the court of appeals level were denied, mostly for lack of evidence or on credibility grounds.[191] Furthermore, similar applications were

186. Contreras v. Ashcroft, 75 F. App'x 691, 692 (9th Cir 2003).

187. Ornelas-Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006); Vega v. Gonzales, 183 Fed. App'x 627 (9th Cir. 2006); Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005); Pozos v. Gonzales, 141 Fed. App'x 629 (9th Cir. 2005); Pena-Torres v. Gonzales, 128 Fed. App'x 628 (9th Cir. 2005); Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

188. *Abdul-Karim*, 102 F. App'x 613; *Karouni*, 399 F.3d 1163.

189. *See* Morett v. Gonzales, 190 Fed. App'x 47 (2d Cir. 2006) (vacating and remanding); Maldonado v. U.S. Att'y Gen., 188 Fed. App'x 101 (3d Cir. 2006) (vacating and remanding); Rezhdo v. U.S. Att'y Gen., 187 Fed. App'x 193 (3d Cir. 2006) (vacating and remanding); Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003) (remanding for further proceedings); Grijalva v. Gonzales, 212 Fed. App'x 541 (6th Cir. 2007) (vacating and remanding withholding claim); Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (remanding for new hearing); Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (remanding for new hearing); Labas v. Gonzales, 231 Fed. App'x 587 (9th Cir. 2007); Loya-Loya v. Gonzales, 153 Fed. App'x 441 (9th Cir. 2005) (vacating and remanding), *dismissed by*, Loya-Loya v. Gonzales, 168 Fed. App'x 835 (9th Cir. 2006); Ornelas-Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006) (vacating and remanding); *Vega*, 183 Fed. App'x at 627–29 (vacating and remanding); Yeoh v. Gonzales, No. 04-74613 (9th Cir. 2006) (vacating and remanding); Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005) (vacating and remanding); Comparan v. Gonzales, 144 Fed. App'x 673 (9th Cir. 2005) (vacating and remanding); *Karouni*, 399 F.3d at 1163 (vacating and remanding); Pena-Torres v. Gonzales, 128 Fed. App'x 628 (9th Cir. 2005) (vacating and remanding); Pozos v. Gonzales, 141 Fed. App'x 629 (9th Cir. 2005) (vacating and remanding); Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (vacating and remanding); Martinez v. INS, 72 Fed. App'x 564 (9th Cir. 2003) (vacating and remanding); Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) (remanding for further findings); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (vacating, reversing, and remanding); *see also*, INS v. Ventura, 537 U.S. 12, 16 (2002) (holding that courts of appeals cannot grant asylum; instead, they must remand the case back to the agency for the attorney general to exercise his discretion).

190. A remand is a victory only to the extent that the denial is vacated and the case is remanded for further fact-finding; the case can still be denied by the BIA or the Immigration Court, unless it is remanding with specific instructions to make a particular finding. *See* discussion *supra* Part III.

191. *See* Kibuuka v. Gonzales, 178 Fed. App'x 24 (1st Cir. 2006); Galicia v. Ashcroft, 396 F.3d 446 (1st Cir. 2005); Zhong Xing Zhan v. Gonzales, 217 Fed. App'x 86 (2d Cir. 2007); Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d Cir. 2006); Li v. Gonzales, 163 Fed. App'x. 91 (2d Cir. 2006); Ni v. U.S. Att'y Gen., 157 Fed. App'x 455 (2d Cir. 2005); Ozmen v. U.S. Att'y Gen., 219 Fed. App'x 125 (3d Cir. 2007); Suherwanto v. U.S. Att'y Gen., 230 Fed. App'x 211 (3d Cir. 2007); Duarte v. U.S. Att'y Gen., 209 Fed. App'x 153 (3d Cir. 2006); Satkauskas v. U.S. Att'y Gen., 176 Fed. App'x 271 (3d Cir. 2006); Sewidjaja v. U.S. Att'y Gen., 198 Fed. App'x 265 (3d Cir. 2006); Rosal-Olavarrieta v. Gonzales, 134 Fed. App'x 593 (3d Cir. 2005); Parker v. Ashcroft, 112 Fed. App'x 860 (3d Cir. 2004); *Grijalva*, 212 Fed. App'x at 541 (denying asylum but vacating and remanding withholding claim); Safadi v. Gonzales, 148 Fed.

both granted and denied at the same time in the same circuit.[192]

Of the twenty-one cases with positive outcomes,[193] fourteen were decided in the Ninth Circuit[194] (which also denied eleven such cases),[195] three were decided in the Third Circuit[196] (which also denied seven such cases),[197] two were decided in the Eighth Circuit[198] (which also denied three such cases),[199] one was decided in the Second Circuit[200] (which also denied four such cases),[201] one was decided in

App'x 372 (6th Cir. 2005); Ali v. Gonzales, 160 Fed. App'x 485 (7th Cir. 2005); Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005); Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005); Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004); Maquiling v. Gonzales, 221 Fed. App'x 668 (9th Cir. 2007); Santoso v. Gonzales, 231 Fed. App'x 611 (9th Cir. 2007); Badalian v. Gonzales, 148 Fed. App'x 638 (9th Cir. 2005); *Abdul-Karim*, 102 Fed. App'x at 613; Burog-Perez v. INS, 95 Fed. App'x 886 (9th Cir. 2004); Cornejo-Merida v. Ashcroft, 116 Fed. App'x 900 (9th Cir. 2004); Lin v. Ashcroft, 99 Fed. App'x 810 (9th Cir. 2004); Tan v. Ashcroft, 108 Fed. App'x 538 (9th Cir. 2004); Contreras v. Ashcroft, 75 Fed. App'x 691 (9th Cir. 2003); Kvartenko v. Ashcroft, 33 Fed. App'x 262 (9th Cir. 2002); Pondoc Hernandez v. INS, 244 F.3d 752 (9th Cir. 2001); Mockeviciene v. U.S. Att'y Gen., 237 Fed. App'x 569 (11th Cir. 2007); Paredes v. U.S. Att'y Gen., 219 Fed. App'x 879 (11th Cir. 2007); Rico v. U.S. Att'y Gen., 229 Fed. App'x 847 (11th Cir. 2007); Tavera Lara v. U.S. Att'y Gen., 188 Fed. App'x 848 (11th Cir. 2006); Rico v. U.S. Att'y Gen., 154 Fed. App'x 875 (11th Cir. 2005).

192. *Compare Abdul-Karim*, 102 F. App'x 613 (affirming denial of application for lack of well-founded fear of persecution in Lebanon), *with Karouni*, 399 F.3d 1163 (holding that there is a well-founded fear of persecution in Lebanon).

193. *See Morett*, 190 Fed. App'x 47; *Maldonado*, 188 Fed. App'x 101; *Rezhdo*, 187 Fed. App'x 193; *Amanfi*, 328 F.3d 719; *Grijalva*, 212 Fed. App'x 541; *Nabulwala*, 481 F.3d 1115; *Shahinaj*, 481 F.3d 1027; *Labas*, 231 Fed. App'x 587; *Loya-Loya*, 153 Fed. App'x 441; *Ornelas-Chavez*, 458 F.3d 1052; *Vega*, 183 Fed. App'x 627; *Yeoh*, No. 04-74613; *Boer-Sedano*, 418 F.3d 1082; *Comparan*, 144 Fed. App'x 673; *Karouni*, 399 F.3d 1163; *Pena-Torres*, 128 Fed. App'x 628; *Pozos*, 141 Fed. App'x 629; *Reyes-Reyes*, 384 F.3d 782; *Martinez*, 72 Fed. App'x 564; *Hernandez-Montiel*, 225 F.3d 1084; *Pitcherskaia*, 118 F.3d 641.

194. *Labas*, 231 Fed. App'x 587; *Loya-Loya*, 153 Fed. App'x 441; *Ornelas-Chavez*, 458 F.3d 1052; *Vega*, 183 Fed. App'x 627; *Yeoh*, No. 04-74613; *Boer-Sedano*, 418 F.3d 1082; *Comparan*, 144 Fed. App'x 673; *Karouni*, 399 F.3d 1163; *Pena-Torres*, 128 Fed. App'x 628; *Pozos*, 141 Fed. App'x 629; *Reyes-Reyes*, 384 F.3d 782; *Martinez*, 72 Fed. App'x 564; *Hernandez-Montiel*, 225 F.3d 1084; *Pitcherskaia*, 118 F.3d 641.

195. *Maquiling*, 221 Fed. App'x 668; *Santoso*, 231 Fed. App'x 611; *Badalian*, 148 Fed. App'x 638; *Abdul-Karim*, 102 Fed. App'x 613; *Burog-Perez*, 95 Fed. App'x 886; *Cornejo-Merida*, 116 Fed. App'x 900; *Lin*, 99 Fed. App'x 810; *Tan*, 108 Fed. App'x 538; *Contreras*, 75 Fed. App'x 691; *Kvartenko*, 33 Fed. App'x 262; *Pondoc Hernandez*, 244 F.3d 752.

196. *Maldonado*, 188 Fed. App'x 101; *Rezhdo*, 187 Fed. App'x 193; *Amanfi*, 328 F.3d 719.

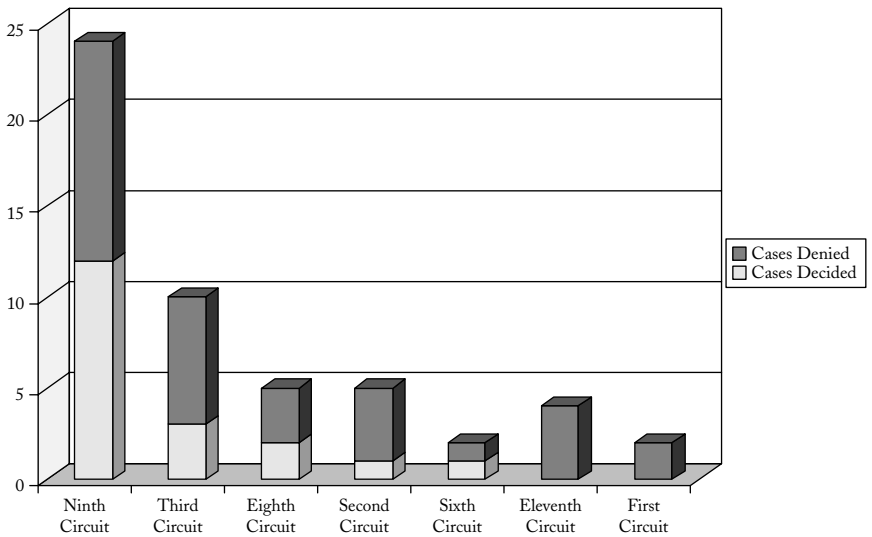
197. Ozmen v. U.S. Att'y Gen., 219 Fed. App'x 125 (3d Cir. 2007); Suherwanto v. U.S. Att'y Gen., 230 Fed. App'x 211 (3d Cir. 2007); Duarte v. U.S. Att'y Gen., 209 Fed. App'x 153 (3d Cir. 2006); Satkauskas v. U.S. Att'y Gen., 176 Fed. App'x 271 (3d Cir. 2006); Sewidjaja v. U.S. Att'y Gen., 198 Fed. App'x 265 (3d Cir. 2006); Rosal-Olavarrieta v. Gonzales, 134 Fed. App'x 593 (3d Cir. 2005); Parker v. Ashcroft, 112 Fed. App'x 860 (3d Cir. 2004).

198. *Nabulwala*, 481 F.3d 1115; *Shahinaj*, 481 F.3d 1027.

199. Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005); Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005); Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004).

200. *See* Morrett v. Gonzales, 190 F. App'x 47 (2d Cir. 2006) (finding that a gay man from Venezuela showed past persecution and a well-founded fear of future persecution).

the Sixth Circuit[202] (which also denied one such case),[203] none were decided in the Eleventh Circuit (which denied five such cases),[204] and none were decided in the First Circuit (which denied two such cases).[205]



The numbers of these cases decided are too low for meaningful statistical analysis, yet it bears noting that for the circuits that have granted appeals in these cases, the remand rates are actually higher than the overall remand rates in those circuits during 2004 and 2005. However, this does not necessarily imply that immigration judges in the courts that comprise these circuits are necessarily more conservative than immigration judges in other states; variables include the likelihood that there are probably more sexual-identity-based claims filed in the major urban areas (New York, Miami, San Francisco, Los Angeles) that are located within these circuits, and thus, more such cases are likely to be decided, denied, and appealed.[206] In addition, judges in those circuits may well be more

201. ZhongXingZhan v. Gonzales, 217 Fed. App'x 86 (2d Cir. 2007); Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d Cir. 2006); Li v. Gonzales, 163 Fed. App'x. 91 (2d Cir. 2006); Ni v. U.S. Att'y Gen., 157 Fed. App'x 455 (2d Cir. 2005).

202. Grijalva v. Gonzales, 212 Fed. App'x 541 (6th Cir. 2007) (denying asylum but vacating and remanding withholding claim).

203. Safadi v. Gonzales, 148 Fed. App'x 372 (6th Cir. 2005).

204. Mockeviciene v. U.S. Att'y Gen., 237 Fed. App'x 569 (11th Cir. 2007); Paredes v. U.S. Att'y Gen., 219 Fed. App'x 879 (11th Cir. 2007); Rico v. U.S. Att'y Gen., 229 Fed. App'x 847 (11th Cir. 2007); Tavera Lara v. U.S. Att'y Gen., 188 Fed. App'x 848 (11th Cir. 2006); Rico v. U.S. Att'y Gen., 154 Fed. App'x 875 (11th Cir. 2005).

205. *See* Kibuuka v. Gonzales, 178 Fed. App'x 24 (1st Cir. 2006); Galicia v. Ashcroft, 396 F.3d 446 (1st Cir. 2005).

206. *See* GARY J. GATES & JASON OST, THE GAY AND LESBIAN ATLAS 25 (2004) (noting that California, New York, and Florida are three of the top four states with the highest concentration of same-sex couple

liberal on immigration issues, and thus more likely to remand a case than judges in the other circuits.[207] Nevertheless, it is a sobering thought that, with the exception of the Ninth Circuit, the odds of being successful on a petition for review in a sexual-identity-based protection claim are extremely slim; that is even more so considering that petitions for review are likely filed only in cases that are thought to have a significant likelihood of success.

V. STRATEGIES AND SOLUTIONS FOR SEXUAL-IDENTITY-BASED PROTECTION CLAIMS IN U.S. IMMIGRATION LAW

As we have seen, an important factor in sexual-identity-based protection claims is the particular circuit in which the case may be the subject of a petition for review. Although the conventional wisdom is that the federal courts are more likely to provide protection to individual rights, both procedurally and substantively, than agency adjudicators, this is clearly not the case when it comes to petitions for review of asylum cases generally and claims based on sexual identity in particular.[208] Many federal judges are simply not well disposed toward immigration claims, and the lack of prescribed, objective standards allows judges to indulge their own prejudices and stereotypes regarding LGBT applicants.[209]

Bearing this in mind, a petition for review of denial of an application for protection based on sexual identity, where there is no past persecution, is extremely unlikely to be granted.[210] Furthermore, only cases involving fairly egregious harm (such as sexual assault or significant physical harm requiring medical treatment) at the hands of or with the active acquiescence or involvement of the police or militia will be considered past persecution—thus raising a rebuttable presumption of a well-founded fear of future persecution.

To maximize the likelihood of success, therefore, attorneys should persist in arguing that whatever harm has been suffered by the applicant constitutes past

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households); *see also* Ramji-Nogales et al., *supra* note 3, at n.32 (citing Schoenholtz, *supra* note 37, at 340–44).

207. Ramji-Nogales et al., *supra* note 3, at n.32 (citing Schoenholtz, *supra* note 37, at 340–44).

208. *Id.* at 66–67.

209. *See generally* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 2009–10 (2006). Although set in the context of constitutional law, Professor Goldberg's argument for greater transparency in judicial opinions that respond to issues of social change is highly analogous to asylum law. Professor Goldberg notes that "[b]ecause the current fact-based model enables courts to sidestep stare decisis constraints, the case law regarding a given social group often appears to have a random quality, with no overarching theory to explain why burdens are sustained in some areas but not in others." *Id.*

210. Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005) (holding that the claimant had no fear of future persecution and explaining that "[although] evidence exits in the record to support [the claimant's] alleged fear of persecution, we cannot say it is so compelling"); Kimumwe v. Gonzales, 431 F.3d 319, 323 (8th Cir. 2005) (finding that the claimant had not experienced past persecution on account of his sexual orientation nor had the claimant established a well-founded fear of persecution in the future on account of his sexual orientation).

persecution, which is "the infliction of suffering or harm upon those who differ in a way regarded as offensive" that "includes more than threats to life and freedom" and "encompasses a variety of forms of adverse treatment, including non-life threatening violence and physical abuse" and other "non-physical forms of harm."[211] There is no requirement that an applicant claiming past persecution demonstrate permanent or serious injury.[212]

One court has held that the harm suffered by a child must be evaluated from the perspective of that child, rather than that of an adult, in an asylum application.[213] This decision is potentially useful to claims for protection based on sexual orientation. A lot of the harm that LGBT people suffer occurs during childhood, adolescence, and early adulthood—often times in the context of family violence.[214] Also, the cumulative effect of repeated incidents of harm, which individually may not constitute persecution, may constitute persecution, and the court must evaluate this cumulative effect in its past persecution analysis.[215] Because many sexual-identity-based claims are not based on one specific incident but often on a lifetime of low grade acts of humiliation, inflicted with the sole intention of causing suffering and with no other legitimate purpose, it is important that the cumulative effect of these acts be considered in deciding asylum claims.

The nature of a particular type of persecution may also be unique to sexual orientation claims. Many times, applicants may not consider what they have suffered to be sufficiently egregious to merit mention in the context of their asylum claim. Even instances of "mere" discrimination, if fully explored, can reveal more significant evidence of persecution. Discrimination itself, and social ostracism, if sufficiently pervasive and severe, can also rise to the level of persecution,

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211. Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006); HATHAWAY, THE LAW OF REFUGEE STATUS 112 (1991).

212. Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) (citing *In re* O-Z & I-Z, 22 I. & N. Dec. 23, 25–26 (B.I.A. 1998)).

213. Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006) (vacating finding that there had been no past persecution and remanding for consideration of the cumulative effect of harm from the perspective of a small child).

214. A study conducted in 2000 found that 33 percent of gay men and 34 percent of lesbians report suffering physical violence from family members as a result of their sexual orientation. ROB WORONOFF, RUDY ESTRADA & SUSAN SOMMER, OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE xii (2006), *available at* http://www.cwla.org/programs/culture/outofthemargins.pdf (citing GROSS, L., AURAND, S. & ADDESSA, R., THE 1999–2000 STUDY OF DISCRIMINATION AND VIOLENCE AGAINST LESBIAN WOMEN AND GAY MEN IN PHILADELPHIA AND THE COMMONWEALTH OF PENNSYLVANIA (2000)); *see also* Jennifer M. Heidt, Brian P. Marx & Sari D. Gold, *Sexual Revictimization Among Sexual Minorities: A Preliminary Study*, 18 J. TRAUMATIC STRESS 533 (2005) (noting that 63 percent of gay, lesbian, and bisexual participants in the study reported some form of sexual assault, and that nearly 40 percent reported sexual re-victimization, "defined as contact or penetrative sexual assault reported in both childhood and adulthood").

215. Poradisova v. Gonzales, 420 F.3d 70, 79–80 (2d Cir. 2005); Chand v. INS, 222 F.3d 1066, 1073–74 (9th Cir. 2000).

but this will require detailed and conclusive evidence, and not merely the applicant's own opinion, regardless of how well-informed it may be. For example, if a person is subjected to offensive name calling every time he or she walks down the street, as happens to many gay men, lesbians, and transgender people, is this persecution or "mere" harassment? Does this name calling carry with it an implicit threat of violence? What would happen if the harassers were confronted? Would physical violence likely ensue? It is important, therefore, to ensure that every single harmful incident or series of incidents that has been inflicted on an asylum applicant be fully explored.

VI. CONCLUSION

It is not possible, or even desirable, to have a bright-line rule for determining what does and what does not constitute persecution within the meaning of the INA. However, it ought to be possible to establish that certain incidents may constitute persecution—yet a repeated refrain from the courts of appeals is that certain incidents, such as police raids on gay bars, the arbitrary short-term detention of gay people, and discrimination, will not constitute persecution. According to these decisions, only a showing of lengthy detention or physical injury will suffice. This is a higher standard than that imposed on other asylum applicants.[216] Until then, LGBT cases before the federal courts will continue to face a glass ceiling, requiring a far greater quantum of proof for persecution than for other cases. Despite the poor reputation of the immigration courts and asylum offices as being arbitrary and hostile to asylum seekers, they have proven themselves far more receptive to sexual-orientation based protection claims than the federal courts. LGBT asylum applicants should, therefore, be very skeptical of the likelihood of success before the federal courts.

Additionally, just as the safety of gay men, lesbians, and transgender people varies from country to country, it also varies markedly from federal circuit to federal circuit. What may constitute persecution in the Ninth, Second, or Third Circuit can be completely unremarkable in the Eighth or Eleventh Circuit, and attorneys and their clients should be prepared for this. Until the principles applied to the evaluation of LGBT asylum claims in the federal courts become more standardized, applicants should pay careful attention to the jurisdiction before filing an asylum application. In the meantime, this question of jurisdiction will remain a significant determinative factor in the outcome of a claim for protection.

216. *See Edimo-Doualla*, 464 F.3d at 283.