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# THE GAP BETWEEN ASYLUM IDEALS AND DOMESTIC REALITY: EVALUATING HUMAN RIGHTS CONDITIONS FOR GAY AMERICANS BY THE UNITED STATES' OWN PROGRESSIVE ASYLUM STANDARDS

*John A. Russ IV\**

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## INTRODUCTION

Two young men belonging to a right-wing group befriend and then attack an unsuspecting gay couple, stabbing to death one of the pair, in a country where dozens of gay people are murdered each year because of their sexual orientation.<sup>1</sup> Parents send their fourteen-year-old lesbian daughter to a mental institution for four years claiming she is “confused” about her gender, even though she says she is happy being female.<sup>2</sup> The nation’s largest “employer” routinely discharges gay men and lesbians when it discovers their sexual identity.<sup>3</sup> And in many parts of the country, same-sex sexual behavior is illegal and grounds for lengthy prison sentences.<sup>4</sup>

Ironically, this same nation that violates the human rights of its gay citizens in so many ways is also regarded as a relative oasis of tolerance by much of the world’s gay population; it has even begun accepting asylum claims based on sexual orientation. Between 1994 and 1996, the United States granted asylum to about sixty foreign nationals persecuted in their home countries because of their sexual orientation.<sup>5</sup> Although some emigrate from countries where the state executes gay people, others come from nations experiencing conditions similar to those in the United States, including widespread homophobia, persistent governmental discrimination, and a refusal by government entities to treat gay rights as human rights.<sup>6</sup>

The influx of gay asylum-seekers to the United States testifies to the progress gay Americans have made in improving the condition of sexual

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1. See Sue Anne Pressley, *Gays Fear Texas Slaying Reflects Trend: Anti-Homosexual Violence Has Risen Sharply, Advocacy Groups Say*, WASH. POST, Jan. 31, 1996, at A1. Throughout this piece, the terms *gay*, *same-sex*, and *sexual minorities* are meant to refer to people whose sexual identity differs from a heterosexual orientation, including gay men, lesbians, bisexuals, and transgender persons (those individuals whose true gender identity differs with their physical sex). The term *gay* is meant to describe the sexual orientation of both men and women.

2. See Carole Rafferty, *Gender Identity Problems: Gays Angered About Doctors Forcing Issue*, HOUSTON CHRON., Aug. 2, 1995, at 3.

3. See Shannon Minter, *United States*, in INTERNATIONAL GAY AND LESBIAN RIGHTS COMMISSION, UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN’S HUMAN RIGHTS 221 (1995) [hereinafter UNSPOKEN RULES] (discussing military’s policy of discriminating against gay service members).

4. See, e.g., ALA. CODE § 13-A-6-65(a)(3) (1996); FLA. STAT. ch. 800.02 (1996).

5. See, e.g., INTERNATIONAL GAY & LESBIAN HUMAN RIGHTS COMMISSION AND LAMBDA LEGAL DEFENSE & EDUCATION FUND, ASYLUM BASED ON SEXUAL ORIENTATION: A RESOURCE GUIDE, § IV, at 3 (1996) [hereinafter IGLHRC RESOURCE GUIDE] (representing statistics current through October 15, 1996). According to at least one newspaper account, by December, 1997, 125 people had been granted asylum to the U.S. based on their sexual orientation. See Julie Chao, *Chinese Gay Seeks Asylum in U.S.*, S.F. EXAMINER, Dec. 1, 1997, at A1.

6. For a general history of gay and lesbian social conditions, see generally FRANCIS MARK MONDIMORE, *A NATURAL HISTORY OF HOMOSEXUALITY* (1996); NEIL MILLER, *OUT OF THE PAST: GAYS AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* (1995).

minorities in this country, as well as the willingness of a growing number of “straight” business, government, and religious leaders to embrace the cause of gay rights.<sup>7</sup> Until eight years ago, when Congress amended its immigration laws,<sup>8</sup> the United States barred gay men and lesbians from immigrating here because of their sexual orientation.<sup>9</sup> That same year, the Board of Immigration Appeals (B.I.A.) affirmed an immigration judge’s ruling that stopped the deportation of a Cuban gay man who sought asylum after being exiled from his homeland because of his sexual orientation.<sup>10</sup> In 1994, Attorney General Janet Reno issued a directive designating this decision as precedent, including its principle that oppression based on sexual orientation constitutes “persecution because of membership in a social group” and therefore is potential ground for asylum.<sup>11</sup> Since then, immigration judges and officials have granted asylum to dozens of gay people.<sup>12</sup>

Moreover, at least nine other countries have granted asylum to people based on their sexual orientation, with Canada second only to the United States in the number of admissions.<sup>13</sup> The asylum-seekers’ homelands represent nations from five of the six inhabited continents; from Central and South America to the Middle East, from Africa to Eastern Europe to Southeast Asia, many gay men and a few lesbians have made the difficult journey to the relatively safe shores of the United States to escape far worse oppression in their home

7. See, e.g., J. Jennings Moss, *Dueling Champions: When Two Candidates Argue About Who Is More Gay-friendly, The Debate Highlights What Their Political Parties Have to Offer Gay Voters*. *ADVOCATE*, July 23, 1996, at 35 (discussing competing pro-gay Massachusetts candidates for U.S. Senator in 1996 election).

8. See Pub. L. No. 101-649, 104 Stat. 4978 (codified as 8 U.S.C. §§ 1101-1524 (1988 & Supp. II 1990)).

9. See Bettina Boxall, *Barriers to Asylum for Gays Are Falling: Rights: Persecution in Homeland is Recognized as Reason for Entry into U.S.*, *L.A. TIMES*, May 24, 1996, at A1.

10. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (affirming *In re Toboso-Alfonso*, A-23220644 (1986)). The original immigration judge denied asylum because of the claimants’ two convictions for crimes committed in the United States but found him eligible for “mandatory withholding of deportation” to Cuba because of the persecution he would face as a gay man if he was forced to return. See *id.*

11. Attorney General Order No. 1895-94 (June 19, 1994). See also David Tuller, *Lesbians, Gays Seek Asylum from Persecution Abroad*, *S.F. CHRON.*, Jan. 13, 1997, at A1 (arguing that “Reno’s decision made it easier for gay asylum-seekers . . . to win their cases by acknowledging that gays and lesbians were members of a recognized ‘social group’ that might be persecuted by foreign governments”). But see Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 *U.C.L.A. L. REV.* 1115, 1121 (1995) (arguing Reno’s directive “does not bind federal district and circuit courts that have their own definitions of a social group”).

12. See, e.g., William Branigin, *Gays’ Cases Help to Expand Immigration Rights; More Than 60 Homosexuals Claiming Persecution Have Been Granted Asylum in U.S.*, *WASH. POST*, Dec. 17, 1996, at A1.

13. See IGLHRC RESOURCE GUIDE, *supra* note 5, § IV, at 4-5. These other nations include Australia, Belgium, Canada, Ireland, Finland, Germany, the Netherlands, New Zealand, and the United Kingdom. See *id.* In January 1997, France also joined this list, by granting asylum to an Algerian gay man. See *Gay Algerian Wins*, *S.F. EXAMINER*, Jan. 28, 1997, at B10.

countries.<sup>14</sup>

Under international asylum law, governments grant protection to those groups persecuted on the basis of their race, religion, nationality, political opinion, or membership in a social group.<sup>15</sup> Modern asylum law partly represents a response to the horrors of Nazi atrocities, yet it has unfortunately taken many years for even a few countries to recognize gay people under these standards, even though gay people were one of the groups who suffered in Nazi concentration camps because of their identity.<sup>16</sup>

The progress in international standards calls attention, however, to the ways in which the "safe harbors" of the world, particularly the United States, fail to meet their moral and international obligations to uphold the rights of all their citizens, including gay people. Although in some areas and aspects of the law, the United States is strongly protective of the rights of sexual minorities, in others areas its shortcomings resemble those of countries whose conditions immigration judges have condemned as oppressive to gay people.<sup>17</sup> Sadly, a society's relatively tolerant attitudes about sexual conduct do not guarantee a safe environment for gay people.<sup>18</sup> This article plans to demonstrate that, despite the victory that gay asylum cases represent, the United States has not fully realized the principles behind these cases in its own domestic law.

Part I considers the abuses that lead people to flee their homeland for a new life in countries such as the United States. Part II looks closely at the history, policy, and law behind the recent development in United States asylum standards granting gay people refuge from persecution in other countries. Part III looks at the human rights violations gay people suffer in the United States and concludes that at least some conditions for gay Americans in this country

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14. See IGLHRC RESOURCE GUIDE, *supra* note 5, § IV, at 4-5. The following list represents the countries from which the United States has accepted gay asylum seekers, as well as the number of successful claims arising in each country (current through Oct. 15, 1996): Brazil (6), Colombia (6), Pakistan (6), Iran (5), Russia (5), El Salvador (4), Mexico (3), Eritrea (2), Guatemala (2), Nicaragua (2), Romania (2), Venezuela (2), Albania (1), Ethiopia (1), Chile (1), China (1), Honduras (1), Hong Kong (1), Jordan (1), Lebanon (1), Mauritania (1), Peru (1), Singapore (1), Togo (1), Turkey (1), and Yemen (1). See *id.*

15. See Chandler Burr, *Gimme Shelter; Among the Advances Threatened by the Outcome of the November Election Is a Little Known Success Story: Gay Political Asylum*, THE ADVOCATE, July 23, 1996, at 37.

16. See Ryan Goodman, Note, *The Incorporation of International Human Rights Standards Into Sexual Orientation Asylum Claims: Cases of Involuntary 'Medical' Intervention*, 105 YALE L.J. 255, 265 (1995).

17. See Gene Kramer, *Amnesty Starts Campaign to Fight Abuses against Gays: The Organization Says Texas and 5 Other U.S. States Apply Sodomy Laws Only to Homosexuals*, FORT WORTH STAR-TELEGRAM, Feb. 9, 1994, at 14 (announcing six-month campaign by Amnesty International focusing attention on violation of gay people's human rights in United States, particularly through state sodomy laws).

18. See, e.g., David Tuller, *Gay Brazilian Claims Persecution: Wins U.S. Asylum*, S.F. CHRON., July 29, 1993, at A13 (disclosing murders of gay men and existence of paramilitary death squads that target homosexuals and transvestites in Brazil).

might well constitute grounds for asylum in another nation, based on our own progressive asylum standard.

## I. PERSECUTING GAY PEOPLE: HUMAN RIGHTS VIOLATIONS THAT LEAD GAY PEOPLE TO FLEE THEIR HOME COUNTRIES

This section focuses on four major areas in which gay people suffer human rights abuses around the world: violations of their right to be free from violence, their right to personal self-fulfillment, their right against unjust imprisonment, and their right to be free from arbitrary discrimination.<sup>19</sup>

### A. *The Right to Be Free From Violence*

Protecting one's bodily integrity is arguably one of the most fundamental human rights, as the threat of violence can seriously chill the exercise of other rights, such as free speech or the right to assembly.<sup>20</sup> The Universal Declaration on Human Rights<sup>21</sup> preamble recognizes this point, lamenting the barbarity of World War II and observing that "the advent of a world in which human beings shall enjoy . . . *freedom from fear* and want has been proclaimed as the highest aspiration of the common people."<sup>22</sup>

Despite this basic principle, nations frequently violate gay people's right to be free from violence, either by committing acts of violence through their

19. See generally James D. Wilets, *International Human Rights Law & Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994), and ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* (1995) (examining in detail which provisions of human rights documents apply to various anti-gay abuses). A major problem that many gay people face is a feeling of isolation when the surrounding culture persistently devalues or stigmatizes homosexuality. Many are reluctant to be openly gay, making efforts to document and organize against anti-gay abuses more difficult.

20. See Charlotte Bunch, *Foreword*, in UNSPOKEN RULES, *supra* note 3, at viii (arguing that success of human rights struggle is undermined by denying rights of others). Until relatively recently, human rights groups had been reluctant to push for gay equality. See Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 90 (1996) (noting that even mainstream human rights organizations failed to identify gay issues as human rights concern until 1990s).

21. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS* 1156-60 (1996).

22. *Id.* at 1156. See also International Covenant on Civil and Political Rights, art. VI [hereinafter ICCPR], 16 Dec. 1966, 999 U.N.T.S. 302 (providing that "[n]o one shall be arbitrarily deprived of his life" and that "sentence of death may be imposed only for the most serious crimes"), reprinted in STEINER & ALSTON, *supra* note 21, at 1156. Article VII of ICCPR declares that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* Unlike the Declaration, state parties that sign the ICCPR are bound by its terms, "subject to such formal matters as reservations." *Id.* at 123. The United States recently became a party to this covenant. *Id.* at 754.

agents or by turning a blind eye to anti-gay conduct by non-state actors.<sup>23</sup> The most flagrant examples are countries such as Iran and Saudi Arabia, which execute individuals for engaging in gay sexual relations.<sup>24</sup> In Iran, for example, a religious judge can sentence a gay man to death for one act of sodomy.<sup>25</sup> Lesbians' "treatment" under the law is only slightly less severe—officials punish a lesbian sexual act with 100 lashes, and on the fourth offense, the women are stoned to death.<sup>26</sup> Although many human rights groups now believe that the death penalty *per se* violates human rights,<sup>27</sup> killing gay men and lesbians for consensual sexual behavior clearly constitutes excessive punishment; in effect, Iran can end the lives of gay people for the simple crime of falling in love and starting a relationship.<sup>28</sup>

Unofficial forms of state violence also threaten many gay people's safety, particularly violence committed by individual state actors such as police or military officers. Equally disturbing are reports of right-wing death squads murdering individuals deemed socially undesirable, including sexual minorities, often with the tacit approval or even participation of the police.<sup>29</sup>

State agents frequently use rape as a form of torture against both female *and* male gay prisoners.<sup>30</sup> For example, a Cameroon woman, who was seeking asylum in the United States, reported that prison guards repeatedly raped her

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23. See, e.g., WOMEN'S RIGHTS PROJECT, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL 3 (1991) (documenting Brazilian criminal justice system's failure to investigate and prosecute domestic violence against women).

24. Countries that provide the death penalty for gay sex include Afghanistan, Kuwait, Iran, Mauritania, Saudi Arabia, the Sudan, and Yemen. See AMNESTY INTERNATIONAL, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION, back cover (1997). See also HEINZE, *supra* note 19, at 3 (reporting that in Iran, citizens are executed for engaging in "private, adult, mutually consensual homosexual acts" (citing IRAN PEN. CODE, §§ 139–142, 161)).

25. See Wilets, *supra* note 19, at 28–29. In one refugee case, an Iranian gay man's father reported the man's lover to the police to end their relationship. [Australian] Refugee Review Tribunal, N93/2240, at 16–17 (Feb. 21, 1994). The police sent the lover to prison, while the father threatened to turn in his son, as well. *Id.*

26. See Wilets, *supra* note 19, at 28–29.

27. See, e.g., STEINER & ALSTON, *supra* note 21, at 481 (quoting Statute of Amnesty International, which states opposition of Amnesty International to death penalty).

28. Cf. [Australian] Refugee Review Tribunal, No. N93/2240 (Feb. 21, 1994) (granting asylum to Iranian man whose lover was imprisoned, rather than executed, when his father reported his lover to authorities to break up relationship). In Iran, the testimony of four "witnesses" is needed for execution. See HEINZE, *supra* note 19, at 3. However, confessing to sodomy "four times" also proves the case under Islamic law. See *id.*

29. See generally Wilets, *supra* note 19, at 29–31.

30. See, e.g., [Canadian] Immigration and Refugee Board, No. T94-07129 (Aug. 14, 1995) (reporting Venezuelan male refugee's story of being raped by police officers); Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?*, 8 GEO. IMMIGR. L. J. 201, 220–21 (1994) (reporting torture and rape of Argentinean man by police because of his sexual orientation); Wilets, *supra* note 19, at 40 (reporting in Romania that "there have been frequent allegations of systematic rape and beatings of individuals imprisoned for sodomy").



after she was incarcerated for being a lesbian.<sup>31</sup> Although sexual violence against women reflects a world-wide problem of treating females as male property,<sup>32</sup> its use against gay people represents part of the dominant social ideology against homosexuality. Lesbians' very existence implicitly rejects the idea of sexuality based primarily on male pleasure; male prison guards might use rape as a way to assert their masculinity and power over these women.<sup>33</sup> Others may adopt the myth that sexual orientation is changeable and that lesbians would give up same-sex relationships if only they found the "right" man<sup>34</sup>—a rather strange claim since rape is really about violence and power, rather than sexuality.<sup>35</sup> As for the rape of men, at least one Canadian judge expressed doubt that male prison guards would rape a man in Latin America given the society's intolerance against gay people.<sup>36</sup> What the judge ignored was the phenomenon in some Latin American cultures in which only the so-called "passive" partner in same-sex male intercourse is considered gay. Consequently, some men who engage in same-sex conduct might not consider themselves "gay" because they do not perform what they consider the "female role."<sup>37</sup> Rape of gay men once again reflects an issue of power—the use of sexuality by state actors to degrade and punish gay people because of their sexual orientation.<sup>38</sup>

Besides rape and other forms of torture, many gay people suffer from another potentially fatal police vice: indifference in the face of widespread anti-gay violence. In Brazil, right-wing groups have murdered "more than 1,000 members of sexual minorities since 1980 . . . [O]n average, one anti-gay killing occurs every four days."<sup>39</sup> In fact, human rights groups have

31. See Tuller, *supra* note 11, at A7 (reporting story of refugee from Cameroon who was arrested twice and raped by prison guards for being lesbian).

32. See, e.g., WOMEN'S RIGHTS PROJECT, *supra* note 23, at 2 (reporting that domestic violence "exists in all regions, classes and cultures"); WOMEN'S RIGHTS PROJECT, DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN 2 (1992) (reporting that "more than 70 percent of women in police custody [in Pakistan] experience physical or sexual abuse at hands of their jailers").

33. See Shannon Minter, *Lesbians and Asylum: Overcoming Barriers to Access*, in IGLHRC RESOURCE GUIDE, *supra* note 5, at 13 (recounting story of Honduran lesbian raped because "[h]er persecutor expressly viewed her lesbianism as a violation of her prescribed role as a woman, and expressly articulated his intention to use her female gender as means of punishing her for violation").

34. Cf. MILLER, *supra* note 6, at 227 (reporting how Nazis forced gay men at one concentration camp to make regular visits to Nazi-established brothels to "cure" them of their homosexuality).

35. See McGoldrick, *supra* note 30, at 222.

36. See *id.*

37. See Tomás Almaguer, *Chicano Men: A Cartography of Homosexual Identity and Behavior*, in LESBIAN AND GAY STUDIES READER 257 (Henry Abelove et al. eds., 1993) (recounting that "[a]lthough stigma accompanies homosexual practices in Latin culture, it does not equally adhere to both partners. It is primarily the anal-passive individual . . . who is stigmatized for playing the subservient, feminine role").

38. See McGoldrick, *supra* note 30, at 221–23. In the case of one refugee from Argentina, the police raped and tortured him on multiple occasions until he repeatedly "begged for forgiveness" for being gay. See *id.*

39. Wilets, *supra* note 19, at 31.

documented at least a dozen "extermination groups, . . . including a São Paulo skinhead group with T-shirts reading 'Death to Homosexuals.'"<sup>40</sup> In other countries, particularly in Latin America, gay people, and others labeled socially undesirable, are frequent targets for violence and murder,<sup>41</sup> sometimes even with police involvement.<sup>42</sup> Because police are often unsympathetic or even hostile, many gay people choose not to report such violence. For example, Marcelo Tenorio, a Brazilian gay man granted asylum in the United States after being stabbed by an anti-gay group, failed to report the crime to local police because he feared their hostility.<sup>43</sup> This fear stems partly from many gay people's view of police officers as harassers who subject sexual minorities to arbitrary arrest, detention, or exile, even in countries where homosexual conduct is legal.<sup>44</sup> Those brave enough to report anti-gay crimes may face low prospects for seeing justice served; in Brazil, for example, police have made arrests in only 10 percent of anti-gay murder cases since 1980.<sup>45</sup> The grim reality of anti-gay violence in many nations is a sad commentary on the extremism of some hate groups and individuals. For many gay people, "freedom from fear" is far from reality.

### B. *Rights to Autonomy and Self-Actualization*

Article 22 of the Universal Declaration provides that "[e]veryone, as a member of society . . . is entitled to realization . . . of the economic, social, and cultural rights indispensable for his dignity and the *free development of his personality*."<sup>46</sup> For sexual minorities, this right means, at a minimum, to be free to recognize publicly their *identity* as gay people.<sup>47</sup> States and individual

40. James Brooke, *In Live-and-Let-Live-Land, Gay People Are Slain*, N.Y. TIMES, Aug. 12, 1993, at A4.

41. See Wilets, *supra* note 19, at 30 (reporting that in Colombia, very few perpetrators of "social cleansin" have been prosecuted and punished). In Peru, both left-wing and right-wing groups murder "sexual minorities, particularly transvestites . . . on a systematic basis." *Id.* at 41 There is also documentation of police participation in or indifference to anti-gay violence in Russia. See *id.*

42. See *id.* at 29 (reporting that some foreign governments "have been implicated in extra-judicial killings" or were passive about "stopping the killings or apprehending the perpetrators").

43. See Matter of Tenorio, No. A72-093-558, at 6 (Executive Office for Immigration Review [E.O.I.R.], July 26, 1993); see also Pamela Burdman & David Tuller, *Chinese Man Champions Gay Rights: He Visits S.F. on Tour to Raise Awareness*, S.F. CHRON., Jan. 11, 1997, at A13, A17 (reporting that "[g]angs often prey on homosexuals, who are unlikely to turn to police for help").

44. See Wilets, *supra* note 19, at 43.

45. See HEINZE, *supra* note 19, at 5.

46. STEINER & ALSTON, *supra* note 21, at 1159 (emphasis added).

47. See Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 3-112 (reporting that often American gay youths hide true feelings and "lead double life rather than confront situations too painful for them." See *id.* Wilets, *supra* note 19, at 73; LESBIANS, GAY MEN, AND THE LAW 155 (William B. Rubenstein ed., 1993) "Free expression plays a central role in the lives of lesbians and gay men because

families, however, have found at least three ways to violate that norm. Efforts include involuntary psychiatric treatment to “cure” a person of homosexuality, limiting gay people’s free speech on issues of sexual orientation, and forcing lesbians into unwanted marriages with men.

*1. Forced Psychiatric Treatment.* — The Universal Declaration makes clear that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>48</sup> The International Covenant on Civil and Political Rights (ICCPR) elaborates on this point by noting that “in particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>49</sup> Involuntary medical treatment used against gay people violates these norms, by subjecting them to “cruel, inhuman or degrading treatment” that many professionals agree does not work.<sup>50</sup> Although efforts to “cure” homosexuality pre-date World War II, Nazi doctors in the concentration camps performed a number of “experiments” to alter gay sexual identity; most of the “patients” died, either as a result of the treatment or from the camps’ abominable living conditions.<sup>51</sup> Although the number of gay “patients” may have been relatively smaller than those from other persecuted groups, the general principles against involuntary medical experiments on human beings should apply regardless of sexual orientation.

The so-called “good intentions” of those performing the experiments should not mask the oppression that their conduct represents. In the case of one Russian lesbian facing involuntary psychiatric treatment in her homeland,<sup>52</sup> the United States government argued against granting her asylum in part because the Russian government might honestly believe that it was helping her by using electroshock and other forms of “therapy” to end her homosexuality.<sup>53</sup> The

virtually all the milestones of lesbian and gay life—coming out, meeting other gay people, finding a lover, participating in a gay rights rally—depend upon the public identification of oneself as homosexual”). See also ROBERT A. BERNSTEIN, *STRAIGHT PARENTS, GAY CHILDREN: KEEPING FAMILIES TOGETHER* 114–45 (1995) (observing that many religious traditions, although not all, in U.S. still view homosexuality as sin).

48. STEINER & ALSTON, *supra* note 21, at 1157.

49. *Id.* at 1163 (quoting Article VII of ICCPR).

50. See Brief of the American Psychological Association, et al., in support of Respondents, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039), at 14–15 (noting that there is no reliable evidence that “sexual orientation is amendable to redirection or significant influence from psychological intervention” (quoting from Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 221, 224 (1994)); see also Goodman, *supra* note 16, at 277–80 (reporting on how involuntary psychiatric treatment on sexual minorities violates Nuremberg Code and 1975 Helsinki Accord).

51. See MILLER, *supra* note 6, at 227 (reporting that one doctor’s “treatment” for patients included castration and hormone injections); see also Goodman, *supra* note 16, at 265 (reflecting that Nazi atrocities shaped meaning of term ‘persecution’).

52. See *Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997). The original decision was *In re Pitcherskaia*, No. A-72143932 (June 13, 1994).

53. See Burr, *supra* note 15, at 37.

Ninth Circuit rejected such arguments, finding that “[t]he fact that a prosecutor believes the harm he is inflicting is good for his victim does not make it any less painful to the victim, or indeed, remove the conduct from the statutory definition of persecution.”<sup>54</sup> The Court observed that the definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem “offensive.” That the persecutor inflicts the suffering or harm in an attempt to elicit information . . . for his own sadistic pleasure . . . to “cure” his victim, or to “save his soul” is irrelevant. Persecution by any other name remains persecution.<sup>55</sup>

A nation’s so-called good intentions, therefore, should not mislead asylum courts into finding the absence of oppression, especially when the country’s motivations have less to do with science than with homophobia and traditional notions of gender-appropriate roles for the different sexes.<sup>56</sup> Every repressive regime believes it is doing what is best for its citizens, by silencing dissent or locking up “troublemakers” who challenge the ruling party’s legitimacy. Context is also relevant here: the former Soviet Union frequently used psychiatric treatment to silence dissent, by sending those who disagreed with the regime’s policies to these institutions to “cure” them of their supposed ailment.<sup>57</sup> Given this history of abusing the use of psychiatric institutions, the Ninth Circuit was well advised to reject the United States government’s narrow conception of persecution.

Around the world, even in countries where same-sex relationships are theoretically legal, gay men and particularly lesbians face the threat of various forms of torture masquerading as medical treatment. Since the 1930s in the former Soviet Union, “the psychiatric institutions have posed the greatest threat to lesbians,” including electroshock treatments and “drugs that severely alter . . . consciousness and cause . . . hallucinations.”<sup>58</sup> China has used electrodes and herbal “treatments” to “cure” gay people of their “disease.”<sup>59</sup> In Singapore, government officials have strapped gay people into chairs and used electric shocks whenever gay images appear on a screen in front of them,

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54. *Pitcherskaia*, 118 F.3d at 648. See also *Fearing Persecution, Russian Lesbian Seeks Asylum in U.S.*, CHI. TRIB., Dec. 12, 1996, at 2 [hereinafter *Fearing Persecution*].

55. See *Pitcherskaia*, 118 F.3d at 647. In fact, during the Middle Ages in Europe, heresy was considered a “disease” that Inquisition officials attempted to cure through their barbaric practices, just as some governments today view being gay as “curable.” See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY; GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNINGS OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 52–53 (1980).

56. See Goodman, *supra* note 16, at 282.

57. See *id.* at 287 (reporting that starting in the mid-1940s “a nationwide system of psychiatric hospitals [in Soviet Union] was assembled to house the politically and socially troublesome”).

58. Masha Gessen, *Russia*, in *UNSPOKEN RULES*, *supra* note 3, at 171–73.

59. See Willets, *supra* note 19, at 40.

so they would associate these images with pain.<sup>60</sup> In Brazil, families can take their under-age daughters for “psychological treatments and behavior-modifying shock therapy without any legal recourse,” even though in 1985 the country’s medical profession removed homosexuality from its list of “psychological disturbances.”<sup>61</sup> The danger of these treatments is widespread across the world (and sadly it still occurs in the United States, as well).<sup>62</sup> As one author eloquently stated, a person’s basic identity is violated by these sorts of intrusive treatments:

For many lesbian and gay persons located across the earth, this very day is ridden with well-founded fear—the surge of electric voltage through every bit of muscle, skin, and bone; the reprehensible taste of toxic regurgitant forced down the throat; the burning-alive sensation of an antipsychotic drug overdose; or the final terror-stricken thought before the first lobotomal cut. With this awareness, they share a profound knowledge of the human ability to transgress the fundamental rights of innocents. If any of these people can make it to our shores, our laws must offer them safe haven.<sup>63</sup>

2. *Free Speech as Self-Defining Act.* — Another aspect of developing oneself as a person is to hold and express opinions on topics of importance to oneself. However, many governments target pro-gay speech for punishment or special prohibitions. Both the Universal Declaration and the ICCPR recognize freedom of expression as a basic human value.<sup>64</sup> Unlike the United States Constitution, however, the ICCPR also tolerates greater restrictions on free speech in the interests of “public health or morals”<sup>65</sup>—a provision that has allowed some governments, including Finland, to censor pro-gay speech they do not like.<sup>66</sup> This provision represents a serious obstacle to reform in many countries, where the government may “freeze” in place various forms of sexual inequity—for example, patriarchal attitudes, homophobia—based on a desire to maintain traditional standards of morality.

“Coming out of the closet” inherently conveys a political statement about

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60. See Goodman, *supra* note 16, at 273.

61. Miriam Martinho, *Brazil*, in UNSPOKEN RULES, *supra* note 3, at 16.

62. See *infra* Part III.B.1.

63. Goodman, *supra* note 16, at 289.

64. See STEINER & ALSTON, *supra* note 21, at 1159, 1166 (quoting Article 19 of Universal Declaration and Article XIX of ICCPR).

65. *Id.* at 1166.

66. See, e.g., Helfer & Miller, *supra* note 20, at 71–72 (discussing *Hertzberg v. Finland*, in which United Nations Human Rights Committee allowed Finnish Broadcast Company to prohibit pro-gay radio and television broadcasts in the interest of public morality (citing Comm. No. 14/61. U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, at 161, U.N. Doc. A/37/40 (1982))).

the existence of gay people that acts as a counterweight to society's silence or stereotypes about sexual minorities.<sup>67</sup> Despite this fact (or possibly because of it), governments have frequently cracked down on gay people organizing and have censored discussions of homosexuality in the interests of "morality."<sup>68</sup> Respecting gay people's basic rights, however, requires that they be able to speak out about their lives, freely and openly.

3. *Prohibitions Against Compulsory Marriage.* — Besides compelling children to attend psychiatric treatment, families sometimes try to "change" their offspring's sexual orientation by forcing them into marriages with people they do not love. The ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) all make clear that anyone entering marriage must do so only by her own voluntary choice.<sup>69</sup> Clearly, forced marriages violate all three documents.

Just as parents misguidedly believe that psychiatric treatment can "cure" a person of his or her sexual orientation, others believe that marriage—or sexual relations, in general, with a member of the opposite sex—will return their children to the "straight" and narrow path. In some cases, cultural and economic pressures influence gay people, particularly lesbians, to enter straight marriages.<sup>70</sup> Often, this situation reflects a wider social problem of women's economic dependence on their families because of discrimination in education and the workplace and the social pressures brought to bear on women who choose to remain single.<sup>71</sup> In other cases, women face physical violence if they fail to marry according to their families' wishes. One Iranian lesbian's family beat her severely and threatened to turn her over to the police if she did not marry a man; "her husband, upon discovering her sexual identity, began to rape her on a regular basis. [She] cannot leave Iran, because Iranian law requires married women to present their husbands' official permission in order to leave the country."<sup>72</sup> The right to marry is one of the most basic of rights, yet some

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67. Cf. Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 271 (1995) (discussing inherent political implications of "coming out" as a gay person).

68. See, e.g., Bev Clark, *Zimbabwe*, in UNSPOKEN RULES, *supra* note 3, at 239 (reporting that Zimbabwean government banned *Penguin Book of Lesbian Short Stories* and other pro-gay publications); Barbara Fröhlich, *Austria*, in UNSPOKEN RULES, *supra* note 3, at 11 (reporting that Articles 220 and 221 of Austrian Code prohibit producing pro-gay literature or forming pro-gay groups).

69. See STEINER & ALSTON, *supra* note 21, at 1188 (quoting Article 16 of CEDAW), 1177 (quoting Article 10 of ICESCR), 1167 (quoting Article XXIII of ICCPR).

70. See Cath, *India*, in UNSPOKEN RULES, *supra* note 3, at 78 (stating that "marriage is an expected duty" and "inescapable for the majority of Indian women").

71. *Id.* at 84 (reporting that autonomous, unmarried women in India are seen as outsiders and "are told they are not 'real women' and are asked when they will be married").

72. Vahme-Sabz, *Iran*, in UNSPOKEN RULES, *supra* note 3, at 93.

families use marriage as weapon to suppress gay people's identity.

### C. *The Right to Be Free from Unjust Imprisonment*

The danger of imprisonment is but another potential risk sexual minorities face in many countries, including about twenty states in the United States.<sup>73</sup> Imprisoning gay people for consensual, adult sexual relations in their own homes violates international standards by punishing them for exercising their right to privacy.

Both the Universal Declaration and the ICCPR make clear that individuals enjoy a right to privacy.<sup>74</sup> Proponents of traditional morality claim that gay sexuality does not fall under the privacy norms of these documents, just as other "private" acts—such as cruelty to animals—are still illegal even if they occur in the home.<sup>75</sup> In the United States, the Supreme Court in *Bowers v. Hardwick* rejected a plea to use the right to privacy to strike down sodomy laws as applied to homosexual individuals.<sup>76</sup> International courts, however, have taken a different view of same-sex relationships—one drawing upon the many similarities between same-sex love and the protected relationships of heterosexual couples, rather than lumping gay sexuality with other forms of traditionally forbidden "private" acts.<sup>77</sup>

The United Nations Human Rights Committee ruled in 1994 that the Australian state of Tasmania violated its citizens' rights by criminalizing same-sex sodomy.<sup>78</sup> *Toonen v. Australia* found that this law violated gay people's right to privacy under the ICCPR's Article 17, as well as Article 2's provisions against sex discrimination.<sup>79</sup> The court declined to decide whether, for purposes of Article 2, discriminating on the basis of sexual orientation constituted an "other status" as listed in the article; rather, it held that sexual

73. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 47, at 80.

74. Article 12 of the Declaration provides that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence," see STEINER & ALSTON, *supra* note 21, at 1158, while Article XVII of the ICCPR contains similar language, see *id.* at 1166 (providing that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation"). In addition, the ICCPR makes clear that, even if a person can lawfully be jailed, she must "be treated with humanity and with respect for [her] inherent dignity." *Id.* at 1164 (quoting Article X of ICCPR).

75. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1397 n.6 (D.C. Cir. 1984).

76. 478 U.S. 186, 190 (1986).

77. See *id.* at 195–96 (linking same-sex sodomy with "adultery, incest, and other sexual crimes"). But see Edwin Yoder, *Rights: Polygamy Bogus Parallel to Gays*, PHOENIX GAZETTE, May 27, 1996, at B5 (arguing that forbidden sexual behavior such as "polygamy . . . is practice, not inclination" like homosexuality).

78. See *Toonen v. Australia*, reprinted in 1 Int'l Hum. Rts. Rep. 97 (No. 3, 1994).

79. See *id.* See also James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in the United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33, 36 (1995).

orientation could be included as part of sex discrimination.<sup>80</sup> The court also noted that although the law had not been enforced for ten years, its very existence still created problems for gay people, including the constant threat of arrest.<sup>81</sup> In short, this international body recognized that privacy includes “adult consensual sexual activity in private” and that states attempting to criminalize such behavior intrude on a person’s inherent rights to shape their consensual intimate relations as they see fit.<sup>82</sup>

Even so, many nations still criminalize same-sex conduct, often targeting men.<sup>83</sup> As the example of executions in Iran demonstrates, punishment for violating these laws can be harsh. Cuba, for example, at one time had “camps” for quarantining gay people and those with AIDS.<sup>84</sup> Still other nations have imposed lengthy prison terms, robbing people of years of their lives for the “crime” of falling in love, and subjecting them to unhealthy, violent prison conditions.<sup>85</sup> Until 1993, when the new Russian government decriminalized sodomy, between 600 and 1,200 gay men were sent to prison each year in the Soviet Union.<sup>86</sup> Even in countries that either lack sodomy laws or do not enforce them, police often harass gay people by rounding them up and inventing other charges against them, creating “an atmosphere of fear.”<sup>87</sup> Penalties in the United States can reach twenty years or even life-imprisonment,<sup>88</sup> although these laws are generally underenforced.<sup>89</sup> In fact, opponents of gay asylum might try to use the presence of sodomy laws in the United States to argue against allowing in gay refugees—ignoring the fact that the United States has an obligation to provide sanctuary to those suffering from persecution. Part II considers ways to reconcile the existence of state sodomy laws with the United States’ international obligations to asylum seekers.<sup>90</sup>

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80. See STEINER & ALSTON, *supra* note 21, at 546.

81. See *id.* See also Helfer & Miller, *supra* note 20, at 70 (“[T]he Committee recognizes that one of the most pernicious consequences of sodomy laws is their threat to the dignity of individuals.”).

82. See STEINER & ALSTON, *supra* note 21, at 547.

83. See Rachel Rosenbloom, *Introduction*, in UNSPOKEN RULES, *supra* note 3, at xiii (reporting that “over 50 countries in the world . . . currently prohibit same-sex relations,” and that in practice, many of these laws target gay men rather than lesbians).

84. See MILLER, *supra* note 6, at 494.

85. See Cath, *supra* note 70, at 80 (reporting that in India unnatural [sexual] offences can carry terms of imprisonment for life or alternatively for 10 years and a fine (citing INDIA PEN. CODE § 377)).

86. See MILLER, *supra* note 6, at 484–85.

87. See *id.* at 501 (reporting that even after dictatorship ended in 1980s, Argentinean police still would raid gay bars and hold patrons overnight for questioning).

88. See *Bowers v. Hardwick*, 478 U.S. 186, 188 & n.1 (1986); see also Park, *supra* note 11, at 1144–45.

89. See *Lesbian/Gay Life After Hardwick in LESBIANS, GAY MEN, AND THE LAW*, *supra* note 47, at 153–54.

90. See *infra* Part II.D.2.



*D. The Right to Be Free from Discrimination or Other Legal Disabilities*

In both the United States and internationally, the principle of “equal protection,” that the government should not discriminate against its citizens based on irrelevant characteristics such as race, is generally recognized as an important human rights principle.<sup>91</sup> The Fourteenth Amendment to the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>92</sup> Federal and state governments have also passed civil rights laws that apply to private actors in commercial transactions.<sup>93</sup> Likewise, the Universal Declaration makes clear that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>94</sup>

Like many of the fundamental rights listed in both international and domestic law, anti-discrimination principles touch upon the dignitary aspects of human existence. Even if a person is not jailed or tortured for an individual characteristic that is irrelevant to their worth as a human being,<sup>95</sup> she may suffer a loss of dignity and respect from the experience of discrimination.<sup>96</sup> Similarly, she may find her access to the needed goods, services, and benefits of society unfairly limited because of that characteristic.<sup>97</sup>

Sexual orientation arguably constitutes an “other status” under the Universal Declaration because, like race and sex, it is a fundamental characteristic of human beings that is irrelevant to their worthiness to participate fully in society.<sup>98</sup> In addition, the Human Rights Committee in

91. See, e.g., Willets, *supra* note 19, at 48. “Equal protection is the principle that all individuals have the right to have the laws of a specific jurisdiction apply to them in the same manner as those laws are applied to other similarly situated individuals. Non-discrimination is the principal that instruments of the state or private parties shall not discriminate among individuals based upon arbitrary criteria.” See *id.*

92. U.S. CONST. amend. XIV.

93. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 1311 (1997); Unruh Civil Rights Act, CAL. CIV. CODE § 51 (1997).

94. STEINER & ALSTON, *supra* note 21, at 1156 (citing Article 2 of Universal Declaration).

95. Cf. *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 33 (D.C. App. Ct. 1987) (plurality opinion) (concluding that one’s sexual orientation does not reflect “upon individual merit”).

96. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (referring to racial and sex-based discrimination as “stigmatizing injury”); *Georgetown Univ.*, 536 A.2d at 37 (discussing dignity interests of gay people to be free from discrimination).

97. See *Georgetown Univ.*, 536 A.2d at 32 (observing that “[e]very individual should have an equal opportunity to participate fully in the economic, cultural and intellectual life” of society).

98. See Brief of the American Psychological Association, *supra* note 50, at 3 (noting that “homosexuality . . . implies no impairment in judgment, stability, reliability, or general social or vocational capabilities”) (quoting *Resolution of the American Psychiatric Association* (Dec. 15, 1973), reprinted in

*Toonen* declared that the word “sex” under the ICCPR’s Article 2—a provision similar to the Declaration’s anti-discrimination language—included sexual orientation, without reaching the question whether gay identity might constitute an “other status.”<sup>99</sup> Despite the positive language in the Committee’s decision, every country in the world discriminates in one way or another against gay people, through sodomy laws targeting only gay men and lesbians,<sup>100</sup> to long-standing practices or policies barring sexual minorities from certain jobs,<sup>101</sup> to denying gay parents the right to raise their children,<sup>102</sup> to prohibiting gay couples from legally marrying, thereby denying them the economic and social benefits available to straight married couples.<sup>103</sup>

Many nations who persecute gay people often point to long traditions of condemning gay sexuality,<sup>104</sup> sometimes quoting ancient religious texts for support—despite, in many cases, using questionable translations and interpretations of the original materials.<sup>105</sup> Like anti-Semitism in Christianity’s early history, anti-gay animus often reflects “the confusion of religious beliefs with popular prejudice,” which subsequently influences religious doctrine: Certain textual prohibitions (such as those against gay sexual conduct) are read literally, “while comparable precepts affecting the majority are relaxed or reinterpreted.”<sup>106</sup>

Gay equality is also closely linked to gender oppression—another form of

131 AM. J. PSYCHIATRY 497 (1974)).

99. See STEINER & ALSTON, *supra* note 21, at 547–58; cf. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion) (noting that prohibiting gay couples from marrying constituted sex discrimination because men are allowed to marry women while women are not permitted to do so solely because of their sex).

100. See Kramer, *supra* note 17, at 14.

101. See MILLER, *supra* note 6, at 491 (reporting that some gay people beginning in the 1970s were “not permitted to work at places where they could come into contact with minors,” including schools); Jelica Todosijevic, *Serbia*, in UNSPOKEN RULES, *supra* note 3, at 181 (“Discrimination against lesbians [in employment in Serbia] is particularly strong in professions that involve work with children.”); Willets, *supra* note 19, at 113 (noting that employment discrimination exists throughout world).

102. See Martinho, *supra* note 61, at 18 (“Many lesbian mothers live with the constant fear of losing custody and are thus vulnerable to blackmail or extortion from their ex-husbands.”).

103. See *Ruling Favors Whistle-blowers; Court Limits Gag Orders*, CINCINNATI ENQUIRER, Jan. 14, 1998, at A2 (noting that at least 25 states have passed laws to prevent gay marriages from being recognized in their state) [hereinafter *Ruling Favors Whistle-blowers*].

104. See *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (asserting that to hold that act of homosexual sodomy is protected as a fundamental right would be contrary to moral teaching).

105. See, e.g., MICHAEL S. PIAZZA, HOLY HOMOSEXUALS: THE TRUTH ABOUT BEING GAY OR LESBIAN AND CHRISTIAN 25–45, 46 (2d ed. 1995) (discussing Biblical passages often used to condemn homosexuality and concluding that Bible does not support condemnation of lesbian and gay Christians). Of course, some religious groups have been supportive of gay rights. See, e.g., Anson Mak et al., *Hong Kong*, in UNSPOKEN RULES, *supra* note 3, at 70–71 (discussing support for lesbians by Hong Kong Women’s Christian Council, whose founder explained that siding with marginalized people is at the heart of Christianity).

106. BOSWELL, *supra* note 55, at 6–7.

persecution often justified with appeals to religious tradition. Like gender, sexual orientation is a fundamental part of a person's identity and is unrelated to her "fitness" to participate fully in society. In many countries, hostility toward gay men is directly linked to misogynist attitudes devaluing both women in general and men who adopt so-called "feminine" roles during sexual intercourse.<sup>107</sup>

However, some countries or their subdivisions, including several states in the United States,<sup>108</sup> have passed laws outlawing discrimination based on sexual orientation—the most powerful example being the new South African Constitution's prohibition against such discrimination.<sup>109</sup> Courts in some nations, including the United States, have also recognized that discrimination against gay people can violate equal protection principles.<sup>110</sup> This change represents a welcome development in these countries, explaining in part why gay people in other parts of the world might see nations such as the United States as a new land of opportunity and hope.

## II. UNITED STATES ASYLUM LAW: GAY PEOPLE AS A PERSECUTED "SOCIAL GROUP"

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.<sup>111</sup> Asylum and human rights doctrines are intertwined in that how a country defines persecution reflects its beliefs about what constitutes human rights violations. For gay people, asylum protection based on sexual orientation represents a recognition of their basic rights as human beings.

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107. See *id.* at 157.

108. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 47, at 262.

109. See SOUTH AFRICAN CONSTITUTION, ch. 2, § 9(3), available at Constitution of the Republic of South Africa, <<http://www.polity.org.za/govdocs/bills/sacon96.html#CHAP2>> (visited Mar. 30, 1997) (providing that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation"); see also MILLER, *supra* note 6, at 514 (reporting how South Africa became first country to include protections for gay people in its constitution); cf. Martinho, *supra* note 61, at 18 (reporting that although some Brazilian cities and states have enacted anti-discrimination laws, enforcement has been difficult).

110. See generally *Romer v. Evans*, 116 S. Ct. 1620 (1996); see also John Gallagher, *Friends in High Places?*, *ADVOCATE*, Jan. 21, 1997, at 55 (discussing *Evans*'s impact on hopes of gay rights activists for further advances in U.S. federal courts).

111. In fact, the Universal Declaration itself recognizes the right to asylum as a fundamental right. See STEINER & ALSTON, *supra* note 21, at 1158 (citing Article 14 of Universal Declaration).

*A. The Law of Asylum in the United States*

The United States has prided itself as a safe “haven” for those seeking oppression and tyranny from around the world.<sup>112</sup> Millions of immigrants have come to its shores looking for a better life, and, in some cases, escaping the threat of violence and even death in their home countries because of their beliefs or identity.<sup>113</sup> At the same time, our government has also tried to limit the number of immigrants and has tempered its compassion by putting the burden on the fleeing asylum seeker to prove the danger of persecution.<sup>114</sup>

The recent trend—here and abroad—of accepting gay immigrants under asylum laws, then, reflects an evolution in international asylum norms recognizing the humanity of gay people and the legitimacy of their desire to escape oppression.<sup>115</sup> The Universal Declaration establishes that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>116</sup> Since 1948, two major documents have elaborated on defining the standards used in judging refugees’ claims—both of which the United States has ratified and adopted into its law.<sup>117</sup> The 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees spell out the standards for granting asylum.<sup>118</sup> Under the terms of these agreements, a refugee is a person who has fled her home country, has a well-founded fear of being persecuted “for reasons of race, religion, nationality, membership in a

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112. *See id.* at 1155 (“United States has been a self-proclaimed ‘haven’ for refugees from other countries for essentially all of its history.”); *see also* Matter of Tenorio, A72-093-558, at 6 (E.O.I.R., July 26, 1993) (reporting that “[r]espondent . . . stated that he came to the United States because he knew that he could live his gay lifestyle in San Francisco with freedom.”).

113. For a history of U.S. immigration trends and policy, *see* RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW: CASES & MATERIALS 10-16 (2d ed. 1992).

114. *See* AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-2, 6-14 (4th ed. 1996) (noting “balancing act continues between a policy of compassion to persons facing persecution and a policy of controlling the flow of persons seeking shelter in the United States”).

115. *See* Tuller, *supra* note 11, at A7 (reporting that “the development reflects growing awareness that in many countries gays are harassed, beaten up, imprisoned, and even executed and that such treatment clearly contributes persecution under the terms of asylum law”).

116. STEINER & ALSTON, *supra* note 21, at 1158 (quoting Article 14 of Universal Declaration). The Universal Declaration also provides, however, that “[i]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes.” *Id.* Some states could attempt to argue that sodomy laws are generally applicable, non-political statutes meant to deter crime rather than punish political behavior. As the *Toonen* decision demonstrates, however, these laws implicate and violate individuals’ rights to privacy under international agreements such as the ICCPR. *See id.*

117. *See* Goodman, *supra* note 16, at 258 (noting that “[b]oth the Convention and the Protocol became binding U.S. law through initial ratification in 1968 and further congressional enactments in 1980”).

118. *See generally* THE REFUGEE CONVENTION, 1951 (Weis ed., 1995); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONVENTION RELATING TO THE STATUS OF REFUGEES OF 28 JULY 1951 AND PROTOCOL RELATING TO THE STATUS OF REFUGEES OF 31 JANUARY 1967 (1969).

particular social group, or political opinion,” and is unwilling to return.<sup>119</sup> The United Nations High Commissioner for Refugees, through a letter by counsel, has interpreted these provisions to include individuals persecuted for their sexual orientation,<sup>120</sup> including those facing criminal sodomy laws.<sup>121</sup> Under this view, gay identity constitutes a “social group” worthy of protection from persecution in other countries.<sup>122</sup>

In 1980, the United States adopted the U.N. Protocol’s definition of “refugee” and committed itself to the principle that it would not return any one “to a country where their life or freedom would be threatened.”<sup>123</sup> The language of the statute tracks that of the international agreements, defining a refugee as “a person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to . . . 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.”<sup>124</sup> Under this law, those fleeing oppression have two avenues to pursue a claim for entry into the United States, either applying for refugee status in their home country or seeking political asylum status if they are already in the United States.<sup>125</sup> Granting asylum is a discretionary function,<sup>126</sup> although the government must withhold deportation of any individual if returning him to his home country will place him in danger of further persecution.<sup>127</sup>

Under United States asylum law, applicants must prove that they have either suffered from “actual past persecution”<sup>128</sup> or that they have “a well-

119. See, e.g., Letter from Scott Busby, Associate Legal Counselor, UNHCR, to Noemi E. Masliah, at 1 (Mar. 2, 1995) (regarding eligibility for asylum based on sexual orientation) [hereinafter *Letter from Scott Busby to Noemi Masliah*]; see also Wilets, *supra* note 19, at 108 (quoting Protocol Relating to the Status of Refugees).

120. See *Letter from Scott Busby to Noemi Masliah*, *supra* note 119, at 3 (stating that “in the opinion of UNHCR, . . . lesbians and gay men who can show that they have well-founded fear of persecution due to their sexual orientation fall within refugee definition found in the 1951 Convention/1967 Protocol Relating to the Statute of Refugees”).

121. See *id.* at 2 (noting that “possible punishments of life imprisonment or death are clearly excessive in relation to the offense of sodomy” and pointing out that laws criminalizing consensual homosexual relations are arguably directed at characteristic which is protected under refugee definition - namely, membership in particular social group of gay men and lesbians. Thus “criminal sanctions directed at persons because of their sexual orientation may be viewed as persecutory.”).

122. See Wilets, *supra* note 19, at 107-08.

123. FRAGOMEN & BELL, *supra* note 114, at 6-4 to -5; see also Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) [hereinafter U.N. Handbook].

124. 8 U.S.C. § 1101(a)(42)(A) (1997).

125. See FRAGOMEN & BELL, *supra* note 114, at 6-6 to -7.

126. See *Matter of Tenorio*, A72-093-558, at 3 (E.O.I.R., July 26, 1993).

127. See McGoldrick, *supra* note 30, at 210 (stating that “withholding of deportation is a mandatory relief from the courts where a deportable alien shows a clear probability of persecution based on the same criteria”); see also 8 U.S.C. § 1253(h) (1997).

128. FRAGOMEN & BELL, *supra* note 114, at 6-15. “An applicant must then show that the severity of the past persecution provides compelling reasons not to return.” See *id.* (citing 8 C.F.R. § 208.13(b)(1)).

founded fear of future persecution.”<sup>129</sup> The nature of the persecution can vary: threats against the applicant’s life or freedom due to one of the listed categories (e.g., race or religion) clearly constitute persecution, while fear of criminal punishment generally does not, unless it is a severe sanction for a minor crime or represents punishment for exercising a basic right.<sup>130</sup> In between lies a whole range of oppressive behavior that may or may not constitute persecution: for example, discrimination based on a person’s membership in a social group can be persecution, although “discrimination of an economic nature is more difficult to characterize” because it may not be “politically motivated.”<sup>131</sup> Opponents of gay asylum could argue that, *Toonen* notwithstanding, states have the right to criminalize same-sex behavior and therefore gay people are simply trying to escape generally applicable criminal laws.<sup>132</sup> However, excessive punishments in relation to “minor” crimes can be grounds for persecution, such as imprisoning gay people for decades or executing them for same-sex sexual conduct.<sup>133</sup>

Besides demonstrating persecution, the applicant must also show that she has a “well-founded fear” of persecution—that is, “if a reasonable person in the same circumstances would fear persecution were he or she to be returned to his or her native country.”<sup>134</sup> Although the persecutor need not be a government agent,<sup>135</sup> the applicant must show that the persecution is nationwide in scope.<sup>136</sup>

However, ill-treatment alone is not enough to win asylum: applicants must show that it is on one of the grounds listed in the statute, namely on account of

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129. *Id.* at 6-14 (citing 8 C.F.R. § 208.13(b)); *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 & 431 n.11 (1987) (defining “well-founded fear”).

130. *See* FRAGOMEN & BELL, *supra* note 114, at 6-10 to -11 (arguing that “[f]ear of criminal punishment for criminal conduct does not constitute persecution, unless the putative criminal conduct is really expression of political or religious belief”).

131. *Id.* at 6-10.

132. *Cf.* Park, *supra* note 11, at 1143 (noting that “[c]ourts have held that punishment for violation of a generally applicable criminal law is not persecution. . . . It should be recalled that a refugee is a victim—or potential victim—of injustice, not a fugitive from justice”).

133. *See* discussion *infra* Part II.D.2.

134. FRAGOMEN & BELL, *supra* note 114, at 6-13. This standard does not mean that the applicant must show a “clear probability” that she will be persecuted. *See id.* at 6-12 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

135. *See id.* at 6-23 (citing *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992)); *see also* Park, *supra* note 11, at 1138. Once the persecutor’s power to persecute has been established, asylum claims recognize three types of “persecutions”: (1) “government complicity,” meaning the persecution occurs as a result of government’s inability or unwillingness to protect victims of wide-spread crime targeted towards one of the enumerated categories of refugees; (2) official persecution, meaning the actors of persecution are government agents; and (3) persecutions that rise to the level of persecution. *See id.*

136. *See* FRAGOMEN & BELL, *supra* note 114, at 6-14 (noting that courts have found that where persecution is by governmental groups, or by non-governmental groups that operate nationwide, the showing is satisfied); *see also* Park, *supra* note 11, at 1137-38 (reporting that “isolated outbreaks of anti-gay and lesbian hate crimes . . . alone may not establish persecution without further evidence that the threats will be carried out or that danger of violence persists”).

“race, religion, nationality, membership in a particular social group, or political opinion.”<sup>137</sup> In this context, many gay people suffer persecution specifically because of their sexual orientation—that is, because of their membership in a “particular social group,”<sup>138</sup> that of gay people.

Articulations of what constitutes a social group vary,<sup>139</sup> yet this threshold question is an important one for gay applicants.<sup>140</sup> The Ninth Circuit, in *Sanchez-Trujillo v. INS*, rejected finding that draft-age, working-class urban El Salvadoran men constituted a social group because they were not a cohesive, homogenous group. Rather, they “naturally manifest[ed] a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings.”<sup>141</sup> The court defined social groups as including “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.”<sup>142</sup> At least one United States circuit court,<sup>143</sup> in a case that has since been vacated and remanded by the Supreme Court in light of *Evans*,<sup>144</sup> doubted whether gay people existed as a group because people cannot tell if someone is gay simply by looking at her.<sup>145</sup> Ironically, the circuit court used its inability to find a group to apply the lowest level of scrutiny to a referendum forbidding anti-discrimination laws for gay men and lesbians,<sup>146</sup> despite the fact that the majority of voters clearly viewed gay people as a group deserving of this special legal disability; the law prevented gay people, and gay people only, from lobbying for a type of law

137. 8 U.S.C. § 1101(a)(42)(A) (1997).

138. See McGoldrick, *supra* note 30, at 207.

139. See Stuart Grider, *Sexual Orientation as Grounds for Asylum in the United States In re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993), 35 HARV. INT'L L. J. 213, 217 (1994).

[F]ederal courts and the BIA in the United States . . . have developed two seemingly mutually exclusive concepts of cognizability. Under its “*Acosta test*,” the BIA has recognized a particular social group where there exists an “immutable characteristic” shared by the group members, while the Ninth Circuit, with its “*Sanchez-Trujillo test*,” has recognized a particular social group where there exists a ‘voluntary association’ among the group members.

*Id.*

140. See Park, *supra* note 11, at 1122 (arguing that “the most significant challenge to gay men and lesbians in establishing successful asylum claim [is] due to internally confused judicial guidelines of what constitutes a ‘social group’”).

141. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1577 (9th Cir. 1986).

142. *Id.* at 1576. For a criticism of this test, see Park, *supra* note 11, at 1129 (noting that “[c]ases following the *Sanchez-Trujillo test* illustrate that its approach can be unduly restrictive,” since many “social groups” will also have certain differences in lifestyle, cultures, or politics which would cause them to fail the cognizability test).

143. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

144. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 116 S. Ct. 2519 (1996).

145. See *Equality Foundation of Greater Cincinnati, Inc.*, 54 F.3d at 267 (arguing that persons having homosexual “orientation” do not comprise “an identifiable class”).

146. See *id.* at 268.

that other groups, such as racial minorities or women, could win for themselves.<sup>147</sup> As at least one author has observed, “[m]ajorities . . . create minorities in one very real sense, by deciding to categorize them.”<sup>148</sup>

Even under *Sanchez-Trujillo*, however, courts can find that sexual minorities do come together in voluntary associations, seeking out other gay people for support as well as friendship, romance, and love:

[O]penly gay men and lesbians are “closely affiliated,” as they generally tend to form tightly knit communities, sharing many similar interests and socializing with one another. In many respects, the homosexual community and movement exhibit similar lifestyle choices and embrace common goals, satisfying the “cohesive and homogeneous” requirement.<sup>149</sup>

As we will see, asylum courts have recognized that gay people constitute a particular social group, despite other identity differences, such as race or class, that sexual minorities possess.<sup>150</sup>

The Board of Immigration Appeals’ (B.I.A.) decision in *In re Acosta* expressed another approach: defining social groups as “a group of persons all of whom share a common, immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>151</sup> As noted earlier, gay people do not choose their sexual orientation, with a growing body of biological evidence supporting this common intuition among gay people. Even if sexual orientation could, like race or sex, be changed through arduous and painful medical procedures, gay people should not be forced to give up their identity simply to avoid persecution, just as members of racial minorities are not told to change their skin color or pass as white to avoid oppression.

Some commentators believe that the term “social group” under international agreements was meant to be a “broad, residuary category” to allow countries flexibility to respond to new crises or developments.<sup>152</sup> In that spirit, the U.N.

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147. An argument can be made that the fact the government views and attempts to injure persecuted individuals as members of a “group” demonstrates that such a group exists. See, e.g., *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (discussing fundamental characteristic that serves to distinguish members of group in eyes of persecutor).

148. BOSWELL, *supra* note 55, at 59.

149. Park, *supra* note 11, at 1131.

150. See *infra* text accompanying notes 220–22.

151. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

152. Park, *supra* note 11, at 1123–24 (noting that “U.N. Protocol similarly did not clearly define ‘social group’ although some commentators have suggested that drafters intended phrase to be a broad, residuary category for group victims of persecution”).



Human Rights Committee has interpreted social group to include gay people.<sup>153</sup> This development represents part of a trend to recognize other groups traditionally ignored under human rights law as legitimate applicants for asylum, including women escaping genital mutilation or those opposed to their society's restrictions on women's rights.<sup>154</sup> Asylum courts in the United States and abroad have not only accepted that gay people constitute a social group for refugee purposes but have also found a wide range of state and non-state behavior to constitute persecution—including conduct that is also widespread in the United States.

### B. *The History of United States Gay Asylum Cases*

The extension of asylum principles to sexual minorities represents not only a tremendous victory for gay refugees to this country but also symbolizes a dramatic shift in this nation's policy toward gay immigrants. Surprisingly, gay asylum has received relatively little attention from anti-gay groups in the United States, perhaps because the issue shows gay people in a sympathetic light—as the victims of hatred and violence.<sup>155</sup>

In 1967, the Supreme Court upheld Congress' policy of excluding any gay person from this country for having a "psychopathic personality,"<sup>156</sup> despite the dissent's concern that such a term was "too vague" and could be "freely used . . . to mean only an unpopular person."<sup>157</sup> In 1990, the Congress removed this phrase from the statute so that it would no longer be used to bar gay people's entry into this country.<sup>158</sup> That year also marked an equally important development: the first time the B.I.A. recognized that persecuting gay people as gay people violated international human rights.

The story of Fidel Toboso-Alfonso's efforts to gain refugee status based on his sexual orientation began with the Mariel boatlift of 1980, in which thousands of Cubans fled (or were forced to leave) their native home.<sup>159</sup> While

153. See *Letter from Scott Busby to Noemi E. Masliah, supra* note 119, at 2 (noting that gay men and lesbians can be "appropriately viewed as members of particular social group within meaning of 1951 Convention/1967 Protocol refugee definition," to the extent they are target for persecution based on their sexual orientation).

154. See *Burr, supra* note 15, at 37 (referring to B.I.A. decision on June 13, 1996, granting asylum to Togolese woman).

155. See *id.* at 38.

156. *Boutilier v. INS*, 387 U.S. 118, 120 (1967).

157. *Id.* at 125 (Douglas, J., dissenting).

158. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. §§ 1101-1524 (1988 & Supp. II 1990)); see also Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 772, 810 (1993) (expressing concern that gay people who engage in consensual sex outside the privacy of their own home might still be excludable under "crimes of moral turpitude exception").

159. See *In re Toboso-Alfonso*, A-2322064, at 1 (1986).

still in Cuba, Toboso-Alfonso suffered frequent incarcerations, as well as verbal and physical abuse by local officials because of his sexual orientation. Shortly before the boatlift, government agents approached him and "advised that he either depart the country or face four years incarceration;" Toboso-Alfonso understandably chose to join the other refugees in their trip to America.<sup>160</sup>

While in the United States, however, Toboso-Alfonso was charged and convicted of burglary and drug possession. The INS subsequently attempted to deport him, at which time he requested political asylum. In a groundbreaking ruling, Judge Robert Brown held that the applicant legitimately feared that Cuban officials would persecute him if returned to his home country because of his membership in a social group—that of homosexuals. The court found that gay people "share a common, immutable characteristic (i.e., homosexuality), and that this characteristic is one which members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."<sup>161</sup> Although Congress at the time still banned gay people from immigrating to this country, the court found that Congress did not intend that gay people likely to suffer persecution in their homelands should be returned to those conditions. Although the court declined to exercise its "discretionary" power of awarding asylum because of the applicant's criminal conduct, it did order mandatory withholding of deportation, to prevent Toboso-Alfonso's return to certain imprisonment and further harassment.<sup>162</sup> The B.I.A. affirmed the decision in 1990; it noted, however, that the government had "not challenged the immigration judge's finding that homosexuality is an "immutable" characteristic. Nor is there any evidence or argument that once registered by the Cuban government as homosexual, that that characterization is subject to change."<sup>163</sup> In 1994, Attorney General Janet Reno declared the case "as precedent in all proceedings involving the same issue or issues."<sup>164</sup>

Over the next two years, immigration courts accepted over sixty asylum claims based on sexual orientation. Many of these decisions are unpublished, but a review of two asylum cases provides a look at some of the issues raised in these proceedings, particularly what constitutes "persecution."

In 1993, Judge Philip Leadbetter granted asylum to a Brazilian gay man who suffered persecution not at the hands of the government but by one of the

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160. *See id.* at 3.

161. *Id.* at 2-3, 5.

162. *See id.* at 6, 8.

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

164. *See generally* Attorney General Order No. 1895-94, *supra* note 11.

right-wing groups that frequently attack sexual minorities in Brazil.<sup>165</sup> While still living in Rio de Janeiro, Marcelo Tenorio was leaving a gay discotheque when a group of men began shouting slurs at him. The men beat and then stabbed him, leaving a twenty-centimeter cut on his chest; they also threatened him with worse treatment if he returned to the gay bar.<sup>166</sup> Tenorio failed to report the crime to the police, out of fear either that they would do nothing or that they themselves might have been involved.<sup>167</sup> His fears were well-placed: although same-sex conduct has been legal in Brazil since 1821, police regularly harass, detain, and physically abuse gay citizens and rarely bring charges against non-state actors who commit anti-gay crimes, including homicide.<sup>168</sup>

The immigration court believed Tenorio's testimony and found that gay people constituted a social group, based on "a voluntary associational relationship among [its] members" as well as "a common characteristic that is fundamental to their identity . . . [and] is arguably an immutable characteristic."<sup>169</sup> This approach combined the standards for defining social groups from *Sanchez-Trujillo* with *In re Acosta*. The court observed that the Immigration and Refugee Board of Canada had found that, even if sexual orientation was somehow "a voluntary condition, it is one so fundamental to a person's identity that a claimant ought not to be compelled to change it."<sup>170</sup> The judge granted asylum, observing that "[a]nti-gay groups appear to be prevalent in Brazilian society and continue to commit violence against homosexuals, with little official investigation and few criminal charges being brought against the perpetrators."<sup>171</sup>

Alla Pitcherskaia, on the other hand, failed to convince an immigration judge that her home country's attempts to "cure" her of her lesbian identity constituted persecution.<sup>172</sup> Pitcherskaia said she was arrested three times because she is a lesbian and was forced to attend "counseling" about her sexual orientation; her lover fared far worse, being involuntarily "institutionalized and given electroshock" therapy.<sup>173</sup> The INS made two alternative arguments: First, that the conditions in Russia had changed since the days of the Soviet Union's frequent abuse of psychiatric institutions to punish dissenters, and

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165. *Matter of Tenorio*, A72-093-558 (E.O.I.R., July 26, 1993). The case is currently on appeal. *See* Willets, *supra* note 19, at 109-10 (discussing case).

166. *See Matter of Tenorio*, A72-093-558, at 4-5.

167. *See id.* at 6.

168. *See id.* at 8.

169. *Id.* at 14.

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

171. *Id.* at 15-17.

172. *See Burr*, *supra* note 15, at 37.

173. *See Fearing Persecution*, *supra* note 54, at 2.

second, that a country whose intentions are to “cure” a person’s sexual orientation, rather than punish her, had the authority to do so and did not violate international human rights standards.<sup>174</sup> Gay people, however, like everyone else, should be free from involuntary medical and psychiatric “treatment.” Fortunately for Pitcherskaia, the Ninth Circuit reversed, agreeing that good intentions should not mask persecution.<sup>175</sup>

Both cases demonstrate that persecution can come in different forms—for example, as the aggressive violence of non-state actors or as the allegedly “benevolent” conduct of state parties. Other countries have also recognized that persecution against sexual minorities—or even those just perceived to be gay—manifests itself in a variety of ways, as we will see in the next subsection.

### C. *Gay Asylum in Other Nations*

The United States is not the only country to recognize claims based on sexual orientation. Through January 1997, nine other nations have recognized over sixty gay asylum claims, with Canada and Australia leading the way (with at least thirty-eight and fourteen accepted claims, respectively).<sup>176</sup> Like applicants to the United States, asylum-seekers in these other countries have personal histories reflecting a wide range of persecution, from violence and imprisonment to other forms of oppression.

The story of an Iranian man seeking asylum in Australia represents the extreme end of such persecution, as well as the role families can play in creating human rights abuses.<sup>177</sup> While the applicant was still in Iran, his father listened in on a telephone conversation between him and his lover; the father then threatened to turn the couple over to the police. A few days later the lover was arrested and sent to prison; the father also threatened to turn his son in as well if he did not give up being gay.<sup>178</sup> Deciding the case prior to *Toonen*, the Australian tribunal ruled that even though Iran might be able to punish homosexual conduct, the applicant faced a serious threat of being sent to jail if deported, as well as mistreatment at the hands of his jailers.<sup>179</sup> The tribunal

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174. See Tuller, *supra* note 11, at A7 (arguing that “the INS, in ruling against her, argued that Russia no longer persecuted gays and lesbians and that the intent of forced psychiatric treatment was not to harm the individual”).

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

176. See IGLHRC RESOURCE GUIDE, *supra* note 5, § IV, at 4–5; *Gay Algerian Wins*, *supra* note 13, at B10. Canada was one of the earliest countries to accept a gay asylum applicant when it granted an Argentinian man asylum in January 1992. See *Canada Grants Gay Asylum*, SACRAMENTO BEE, Jan. 14, 1992, at A11.

177. See [Australian] Refugee Review Tribunal, N93/2240 (Feb. 21, 1994).

178. See *id.* at 16–17.

179. See *id.* at 19–21.

subsequently granted asylum.

Although most applicants such as the Iranian man are those who self-identify as gay, government agents might also persecute straight individuals because of the *perception* that they are gay. In Canada, a court granted asylum to a Ukrainian heterosexual man who had been raped by other men and therefore feared that he would be perceived as gay if he returned to his home country.<sup>180</sup> Because of this perception (as well as his pro-Russian views), the applicant feared he would stand out for mistreatment by the police, since homosexual conduct was illegal at the time. Interestingly, the persecutors' perceptions were key to the court's decision to grant asylum: Even though the applicant himself was not gay, his status as a man raped by other men meant that society would view his sexual orientation differently.<sup>181</sup> This approach acknowledges that a person's membership in a social group may have as much to do with other people's perceptions as that person's self-identification as a member.

The issue of transgendered applicants—individuals born with one sex but who believe their true gender identity is the opposite—has also arisen in a few cases. In Canada, an immigration board granted asylum to a Venezuelan individual born as a man but who adopted a female identity.<sup>182</sup> Because this person's documents identified her as male, encounters with authorities frequently created dangerous situations for her. While in Venezuela, police officers raped the applicant, imprisoned her, and forced her to pay half of her earnings for “protection;” on one occasion, her house was set ablaze by an arsonist, shortly after an officer told her that she was mentally ill and should leave the country.<sup>183</sup> As in so many cases, police refused to investigate.<sup>184</sup> The court granted her asylum, finding that her gender identity as a woman was an immutable characteristic, and that persecution based on that status violated international norms.<sup>185</sup>

At least two cases in the United States have granted asylum based on a person's transgendered identity<sup>186</sup> or on the grounds of imputed homosexuality.<sup>187</sup> The United States has also granted asylum to at least five

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180. See *Dykon v. Canada*, Federal Court of Canada, Trial Division, at 1 (M.E.I., Sept. 1994)

181. See *id.* at 3 (stating that “persecutors were persecuting the applicant because they perceived he was a homosexual and it is totally irrelevant as to whether he was in fact a homosexual or not”).

182. See [Canada] Immigration & Refugee Board, T94-07129, at 1 (Aug. 14, 1995).

183. See *id.* at 2–3.

184. See *id.*

185. See *id.* at 5.

186. See IGLHRC RESOURCE GUIDE, *supra* note 5, § IV, at 3.

187. See *id.*

individuals (both gay and straight) with HIV.<sup>188</sup> Like their counterparts in other countries, United States asylum courts have begun to recognize that persecution based on social biases related to sexual identity or status can come in many forms.

#### D. *Rationale For and Against the New Policy*

1. *The Arguments.* — From a gay rights perspective, *Toboso-Alfonso* and its progeny represent a welcome development in United States asylum law. These decisions recognize that depriving gay people of their universal human rights because of their sexual orientation violates developing international standards as reflected in decisions such as *Toonen*. They also validate the rather basic principle that gay people are human beings deserving of protection against persecution and violence—a point arguably lost in the attacks on gay people by their more vehement opponents. These cases recognize, as did *Romer v. Evans*, that attempts to set aside gay people as a class for special disabilities reflects societal prejudice that is an impermissible grounds for disparate treatment.<sup>189</sup> They are a victory for compassion and uphold the United States' obligation against sending people back to nations where they will suffer persecution.

Although opponents of gay equality have not generally focused on this development, some conservatives have spoken out against this new line of cases. Undoubtedly some opponents' motivation may simply be general animus against gay people—they are unhappy with the progress made in this country by gay rights advocates and do not want the United States to admit more people who “violate” their religious or social principles regarding sexual morality.

A few groups who favor greater restrictions on immigration in general also oppose the new development. One opponent feared that “an overwhelming flood of asylum seekers” would come to the United States, fraudulently claiming to be gay.<sup>190</sup> His argument, however, is supported by neither the facts nor commonsense—only a few dozen gay cases out of thousands of asylum claims have been granted so far, and few straight immigrants would risk

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188. See *Matter of xxx*, A71-498-940 (E.O.I.R., Oct. 31, 1995); see also *Branigin*, *supra* note 12, at A1 (reporting Togolese case in which man was granted asylum based on his HIV-positive status, noting that he faced ostracism and lack of medical care in his home country and that hospitals there also turned away AIDS sufferers).

189. See *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996).

190. Tuller, *supra* note 11, at A7 (quoting Dan Stein, Executive Director of Federation for American Immigration Reform in Washington, D.C., “[t]he fact that there is gay bashing [in another country] doesn't mean that every gay person there should qualify for asylum in this country. . . . Plus, there's a fraud problem.”).

homophobia and ostracism from United States citizens or their fellow nationals by declaring themselves to be gay.<sup>191</sup> Another critique claims “sympathy” for gay applicants but maintains that they should stay in their home countries to fight for reform<sup>192</sup>—a rather dubious argument that could apply to any asylum seeker and that ignores the virulent homophobia present in many societies that makes “coming out” as a gay person a potentially fatal undertaking.

Others point to the fact that a few individuals, including one straight man, have been allowed into this country despite having the HIV virus; these critics claim that such exceptions violate the United States’ ban on entry by individuals who are HIV-positive.<sup>193</sup> As the *Toboso-Alfonso* judge noted, however, Congress arguably did not intend across-the-board bans on certain groups from entering this country to produce injustice in individual cases where the applicant faces certain persecution if returned to her homeland.<sup>194</sup> International law clearly requires that nations not return individuals to any place where their lives or freedom are unjustly threatened.<sup>195</sup>

2. *The Problem of Reconciling State Sodomy Laws with United States Asylum Law.* — One final objection of critics to gay asylum might be the seeming inconsistency in granting asylum to applicants persecuted in part for activity—i.e., sodomy—that is illegal in some states in the United States. In 1986, the United States Supreme Court refused to invalidate a Georgia sodomy law as applied to a gay man under its right to privacy jurisprudence.<sup>196</sup> Because states can criminalize gay sexual behavior under current federal constitutional law,<sup>197</sup> a potential problem arises: Can a person claim asylum if the persecution they face consists solely of a long prison term under a country’s sodomy laws?<sup>198</sup> Most gay people facing persecution also suffer from real or threatened violence in addition to state punishments, but theoretically asylum courts might be confronted by the growing rift between international standards overturning sodomy laws and the United States

191. See Vahme-Sabz, *supra* note 72, at 93 (reporting that “social hostility and violence towards Iranian lesbians . . . reaches beyond national borders into immigrant communities abroad”).

192. See Mitchell Landsberg, *U.S. Opening Some Doors to Victimized Gays, Lesbians: Homosexuals Being Granted U.S. Asylum*, AUSTIN AM. STATESMAN, Jan. 4, 1997, at A19.

193. See Branigin, *supra* note 12, at A1.

194. See *In re Toboso-Alfonso*, A-23220644, at 6 (1986).

195. See FRAGOMEN & BELL, *supra* note 114, at 6-4 to 6-5 (noting that the U.S. adopted “the Protocol’s principle of *nonrefoulement*, an absolute obligation on signatory nations not to return persons to a country where their life or freedom would be threatened”).

196. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

197. Some states have struck down their sodomy laws based on state constitutional principles. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

198. See Park, *supra* note 11, at 1143-45 (noting that United Nations Handbook on Refugees does not consider “generally applicable criminal law” as persecution (citing U. N. Handbook, *supra* note 123, subpara. 56 (1988))).

Supreme Court's jurisprudence in *Bowers*.

Some of these asylum courts have resolved the conflict by allowing principles of compassion and equity to guide decisions for individual cases, even if the asylum-seeker could have been excluded under the old ban on gay people<sup>199</sup> or under the current ban on HIV-positive immigrants.<sup>200</sup> In fact, the Clinton administration has explicitly recognized that humanitarian concerns should govern in discretionary asylum cases involving HIV-positive immigrants.<sup>201</sup> As the first gay asylum case noted, at a time when gay people were still barred from immigrating, "[t]hrough Congress may have intended to exclude homosexuals from entering the United States, there is no indication that Congress ever sought in the past, or would seek at the present time, to condemn homosexuals to a life of suffering and persecution solely as a result of their sexual orientation."<sup>202</sup> Given that gay people rarely suffer from the threat of long imprisonment alone, asylum judges can use this notion of compassion to ensure that no gay man or lesbian is returned to persecution simply because some states in the United States *might* imprison them for violating sodomy laws. Of course, a more satisfying solution would be for the United States to bring its law in conformity with international standards—by abolishing these laws all together.

Even absent a nationwide change, however, asylum judges should recognize that the disparate treatment of gay sexuality by the states should not dictate nationwide asylum law. Although some communities still criminalize same-sex conduct, others provide protections to gay people against discrimination, and some even recognize gay relationships through domestic partnership laws.<sup>203</sup> An immigration judge must be wary, therefore, of refusing asylum to an applicant in California, where state law protects gay people against

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199. See *In re Toboso-Alfonso*, A-23220644, at 6 (1986).

200. See *Matter of xxx*, A71-498-940 (E.O.I.R., Oct. 31, 1995) (recognizing HIV-positive asylum seeker as member of persecuted social group).

201. Letter of General Counsel David A. Martin, to All Region Counsel, regarding *Seropositivity for HIV and relief from deportation* (Feb. 16, 1995). The letter, however, says it "does not purport to recognize a new class of elements for relief from deportation" and indicates that asylum be granted only "when permitted by statute." *Id.* At least one Republican lawmaker has said that granting any asylum cases to HIV-positive applicants violates the Congressional ban on allowing people with AIDS or the HIV virus to immigrate to this country. *Increased Asylum*, *ADVOCATE*, Feb. 4, 1997, at 12.

202. *In re Toboso-Alfonso*, A-23220644, at 6; see also Wilets, *supra* note 19, at 43 (stating that "[s]ince international law prohibits the refoulement of individuals who face persecution . . . countries are obligated under international law to grant asylum to sexual minorities facing abuse in their home countries").

203. Jonathan Curiel, *The Little City that Could: Risking Tens of Millions of Dollars, San Francisco Forces Big Business to Offer Domestic Partner Benefits*, *ADVOCATE*, Mar. 18, 1997, at 26, 30 (quoting city council supervisor's aide as saying city would not "use tax dollars on companies that don't offer domestic-partner benefits").



discrimination,<sup>204</sup> because another state still criminalizes same-sex sodomy. In fact, in the context of adultery, courts have not permitted the existence of some state laws against this practice to “defeat . . . the requirement of a uniform federal standard” for immigration to this country.<sup>205</sup> Likewise, asylum law should not vary based on the location of the applicant.

In addition, many of these laws criminalize sodomy regardless of the gender of the participants,<sup>206</sup> yet few critics seem to worry that straight applicants might violate state criminal sodomy laws through consensual sexual behavior. Arguably, if the law applies only to gay people, it may violate equal protection norms under international agreements, by targeting one social group for more severe punishment for acts that another group can legally commit.<sup>207</sup> In fact, according to one author who studies American sexual practices, 75 to 80 percent of adults engage in oral sex,<sup>208</sup> a practice that is illegal under many sodomy laws.<sup>209</sup> This statistic suggests that anti-gay animus rather than concern about the proper enforcement of criminal laws motivates some of the attacks on gay asylum applicants.<sup>210</sup>

In addition, this “problem” of reconciling sodomy statutes with asylum law rests on a faulty assumption: that gay people are defined exclusively by their sexual conduct. Although clearly many gay people express themselves sexually in ways that constitute sodomy under some state laws, a person can be gay without ever committing an act of sodomy and thereby violating a state’s criminal law.<sup>211</sup> Being gay involves emotions and sexual feelings that

204. See *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 733–34 (Ct. App. 1983) (holding that Unruh Civil Rights Act applies to sexual orientation discrimination).

205. Cf. Minter, *supra* note 158, at 814.

206. See *id.* at 802 (reporting that majority of states with sodomy laws in theory apply them to straight and gay people, although in practice they enforce them “disproportionately” against gay men and lesbians).

207. See Kramer, *supra* note 17, at 14.

208. The researcher also reported that 25 percent of adults engaged in anal sex. Joseph P. Kahn, *Why It’s Never Too Late to Learn About . . . Uh . . . Sex*, GREENSBORO NEWS & REC., Mar. 31, 1996, at D10 (reviewing research of Dr. Derek Polonsky and his book, *Talking About Sex*).

209. See Minter, *supra* note 158, at 801 (reporting that “most [sodomy statutes] focus on oral-genital and/or anal-genital contact”).

210. See *id.* at 772. In the immigration context, exclusion based on a person’s conviction for “crimes involving moral turpitude” applies, at least in theory, to both straight and gay people. *Id.* Some courts have interpreted the exclusion to include “only acts ‘harmful to the public,’” which they have interpreted not to apply to private, consensual homosexual activity but rather to more “public” sexual behavior. See *id.* at 810. This distinction, at least one author has argued, “ignores the extent to which public heterosexual activity is not in fact subject to the same surveillance and prosecution as homosexual activity.” *Id.* at 817.

211. See Brief of the American Psychological Association, *supra* note 50, at 10. However, some advocates criticize drawing distinctions between celibate and sexually active gay people; winning legal victories only for those who forgo physical intimacy accomplishes very little in recognizing that gay love is as valid as the love between a straight couple. See, e.g., Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 55 (1996).

Disaggregating homosexual status and homosexual conduct might secure for gay people the dubious right to say ‘I am homosexual,’ but *not* the right to engage in conduct that might give evidence of

no state has (or could) criminalize; in fact, many young people realize they are gay before they ever engage in what the state calls "sodomy."<sup>212</sup> Furthermore, persecution based on sexual orientation does not require that a person actually engage in homosexual acts. For example, as noted earlier, Canada granted asylum to a male Ukrainian applicant who was raped by other men. Although he himself was not gay, his fellow Ukrainians viewed him as "homosexual" because of the attack and persecuted him as a gay man.<sup>213</sup> Like the Ukrainian case, persecution against gay people may have more to do with perception and prejudice rather than the victim's actual conduct.

Implicitly, Attorney General Janet Reno's affirmation of the principles of the gay asylum cases<sup>214</sup> represents a rejection of the type of limited view of asylum law that penalizes applicants based on the state in which they apply. International law forbids the United States from repatriating anyone who will suffer persecution in their home countries. In short, a compassionate approach is most consistent with international asylum standards. Immigration courts should not use sodomy convictions in an applicant's home country as grounds for denying asylum and forcing them back to a life of persecution—particularly when international groups increasingly recognize sodomy convictions themselves to be violations of individuals' basic human rights.<sup>215</sup>

### *E. A New Danger for Gay Applicants*

Despite the objections of some opponents, for now gay asylum seems secure from critics' desire to reverse course. Even so, Congress has imposed a new limit on the rights of asylum seekers in general that could have a very negative impact on the lives of gay refugees: Applicants must now apply for asylum within one year of entering this country.<sup>216</sup> Many potential applicants in this country before the new law passed faced an April 1, 1997, deadline to file their claim.<sup>217</sup> This new requirement poses a serious burden for many gay

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that identity, such as holding hands in public, marrying, or engaging in sexual acts with a same-sex partner.

*Id.* Arguably, however, winning protection for gay *status* may provide the wedge for later opening of the door to protecting gay conduct.

212. See Brief of the American Psychological Association, *supra* note 50, at 10.

213. *Dykon v. Canada*, [1994] M.E.I. 1.

214. See Attorney General Order, *supra* note 11.

215. See, e.g., Toonen v. Australia, *reprinted in* 1 Int'l Hum. Rts. Rep. 97 (No. 3, 1994), in STEINER & ALSTON, *supra* note 21, at 545-48.

216. See Tuller, *supra* note 11, at A7.

217. See Roger Doughty, *Give Them Shelter: New Immigration Laws May Unfairly Deny Asylum to Gay and Lesbian Refugees*, RECORDER, Jan. 29, 1997, at 4. This deadline has been extended until April 1, 1998. 62 F.R. 10312, 10316.

immigrants reluctant to talk about their sexual orientation with government officials, particularly when their home country's government agents are often the reason they felt compelled to leave.<sup>218</sup> Sadly, the new, pro-gay jurisprudence of the last few years may be seriously undermined for many applicants by this procedural rule that ignores the realities of homophobia and gay people's frequent reluctance to discuss the type of persecution that brought them to this country. Ironically, the promise that gay asylum cases represent may be limited significantly by an unfair procedural rule.

### III. HOW THE UNITED STATES MEETS—AND DOES NOT MEET—ITS OWN DEVELOPING ASYLUM STANDARDS

Although the United States is a mecca for many gay refugees, it also suffers from many human rights violations found in other parts of the world. The contrast between the United States asylum laws' progressive standards and the reality of gay life in this country raises an interesting question: Would a person coming to the United States from a country with conditions *identical* to those of the United States be eligible for asylum based on his or her sexual orientation? To answer this question, this Part first considers the disturbing similarities between the United States' human rights record and violations discussed in Part II. It concludes by assessing the ways that United States practice falls short of United States asylum principles, even if the progress American gay rights activists have achieved makes the United States a relatively desirable refuge for sexual minorities. An immigration judge applying United States asylum standards to United States conduct might well find that gay people face persecution in this country, although the growing responsiveness by some government entities to gay people's concerns may persuade such a judge the remedies exist in this country to rectify these wrongs.

To qualify for asylum under international standards, courts must find that an applicant is persecuted based on one of several categories, including membership in a social group. As courts here and elsewhere have recognized, gay people constitute a social group based on their sexual orientation.<sup>219</sup> Gay people can meet that standard in at least two ways. First, they constitute a voluntary associational group with a common characteristic fundamental to their identity—namely, their sexual orientation.<sup>220</sup> Gay Americans frequently gather together in major cities seeking refuge from intolerance by forming

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218. *See id.*

219. *See, e.g., Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (invalidating referendum prohibiting anti-discriminatory laws for "a class we shall refer to as homosexual persons or gays and lesbians").

220. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

communities for support and protection. Second, they share a “common, immutable characteristic . . . that the members of the group either cannot change or should not be required to change”<sup>221</sup>—a description that also applies to their sexual orientation. Sexual identity is an important aspect of individuals’ emotional make-up that influences their major life decisions about dating, relationships, and long-term companionship.

Our theoretical gay applicant must also show that he or she has suffered from persecution based on social group membership or that he or she has “a well founded fear of future persecution.”<sup>222</sup> In the United States, gay people have good reason to fear deprivations of their most basic rights, including their rights to be free from violence, violations of their autonomy, unjust imprisonment, and discrimination.

### A. *Anti-gay Violence in America*

Although gay people do not face the death penalty in the United States,<sup>223</sup> the problem of anti-gay violence—whether committed or tolerated by the police—still poses a serious threat to sexual minorities. The National Lesbian and Gay Task Force reported that in 1994, at least fifty-nine people were killed in “anti-gay homicides”—about one murder every six days—while at least 2,000 incidents of anti-gay violence occurred in nine major United States cities.<sup>224</sup> Another study, done in 1995, reported over 2,200 incidents of anti-gay violence as well as twenty-five “gay-related” murders; of the 707 cases reported to the police, only 16 percent resulted in arrest, compared to a national average of 45 percent.<sup>225</sup> Even in relatively tolerant communities such as San Francisco, gay people face the threat of violence because of their visibility.<sup>226</sup> Despite America’s status as an oasis of tolerance for some gay asylum-seekers, these statistics paint a grim picture for sexual minorities living in the United

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221. *In re Acosta*, 19 I. & N. Dec. 211, 213 (B.I.A. 1985).

222. FRAGOMEN & BELL, *supra* note 114, at 6-14.

223. In the United States’ early history, however, same-sex behavior was punishable by death. See *Plymouth Colony Sodomy Statutes and Cases*, in LESBIANS, GAY MEN, AND THE LAW, *supra* note 47, at 47.

224. See Pressley, *supra* note 1, at A1 (citing increase from 30 anti-gay homicides in 1992 to 59 in 1994).

225. See Associated Press, *Study: NY Leads Anti-Gay Violence*, NEWSDAY, Mar. 13, 1996, at A26; see also David Tuller, *Gay Hate Crimes Down Slightly: Number of Bay Area Incidents Dips; National Figure Goes Up*, S.F. CHRON., Mar. 12, 1997 (reporting survey by National Coalition of Anti-Violence Programs).

226. See Diana Walsh, *Six U.S. Cities Report Decline in Gay Bashing: Survey Shows Fewer Incidents, But They’re More Severe*, S.F. EXAMINER, Mar. 8, 1994, at A9 (suggesting connection between increased visibility and anti-gay violence).

States.<sup>227</sup>

Gay Americans, like sexual minorities everywhere, often confront indifferent or hostile police<sup>228</sup> and public officials.<sup>229</sup> Some judges dismiss "queer"-bashing as less serious than other crimes,<sup>230</sup> and police themselves are sometimes involved in acts of violence.<sup>231</sup> A few police departments in the United States have tried to promote better relations with—and more protection for—sexual minorities.<sup>232</sup> Given widespread homophobia in society, however, many closeted gay people are reluctant to report anti-gay attacks because it could lead to discrimination at work or ostracism by family members if the true nature of the attack becomes known.<sup>233</sup>

In short, being openly gay in America means being a potential target for hate violence, especially with hostile religious and political figures portraying sexual minorities as deviant and even less than human.<sup>234</sup> Although the United States may not be as violent against sexual minorities as some other countries such as Brazil,<sup>235</sup> where a gay person is assassinated every few days, gay Americans still face a serious threat of violence because of their sexual orientation, with a reduced chance that justice will ever be served. An immigration judge could easily find that American gay people have a well-grounded fear of physical violence across this nation.

227. See generally Minter, *supra* note 3, at 216–17, 222 (reporting various studies showing increased violence against gay Americans); Pressley, *supra* note 1, at A1 (reporting that victims are often reluctant to report anti-gay nature of crime to police).

228. See Minter, *supra* note 3, at 217 (reporting that police in U.S. sometimes do not investigate crimes against lesbians and gay men, and indeed are themselves a common source of violence against lesbians and gays).

229. See *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (finding that gay student could sue school officials for ignoring his pleas for protection against other students' anti-gay harassment).

230. See *id.* (quoting Dallas judge Jack Hampton as saying that he "put[s] prostitutes and queers at the same level . . . and I'd be hard-put to give somebody life for killing a prostitute").

231. See Wilets, *supra* note 19, at 41 (alleging that police violence against sexual minorities is well-documented).

232. See Jim Herron Zamora, *Cops Reach Out to Gays*, S.F. EXAMINER, Nov. 3, 1996, at C1 (reporting that San Francisco police officials "are considering requiring all officers to attend a sensitivity training class" to improve police relations with gay community).

233. See JACK LEVIN & JACK McDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 70 (1993).

234. See, e.g., Annie Gowen, *Holy Hell: Fred Phelps, Clergyman, Is on a Crusade. It's Mean and Cruel and Filled with Hate. Can He Be Stopped? Should He Be? A Matter of Legal Rights . . . And Moral Wrongs*, WASH. POST, Nov. 12, 1995, at F1 (reporting story of Kansas clergyman whose family pickets funerals of AIDS victims and who frequently uses words such as "fag" and "sodomite" to describe gay people).

235. See Wilets, *supra* note 19, at 31.

*B. Violating American Gay People's Rights to Autonomy and Self-Actualization*

1. *Forced Psychiatric Treatment of Children.* — Although homosexuality today is no longer classified as a disease,<sup>236</sup> the United States' medical profession has a history of attempting to alter gay people's identity through alleged therapies and other "cures."<sup>237</sup> Presumably, adults who seek therapy now do so voluntarily,<sup>238</sup> yet some parents continue to institutionalize their underage gay children, sometimes under the guise of "gender-identity disorder."<sup>239</sup> As one newspaper account described it:

[a]ccording to psychiatrists, gender identity disorder is a problem five times as common in boys as in girls. It may begin as early as 2 years of age, when parents may observe in their son a strong preference for the stereotypical games and pastimes of girls. He may enjoy playing with Barbie dolls or girls and in school avoid rough-and-tumble games and sports.<sup>240</sup>

Although professionals distinguish this "disorder" from sexual orientation, some former child patients claim that their only "problem" was their gay identity, rather than confusion about their sex: As one young woman recounted:

I felt like I was being tortured, violated the whole time I was there. . . . They tried to change who I was, my sexual orientation, my values, my beliefs, everything. They said that I didn't know what it was to be a man and what it meant to be a woman, and they were going to show me.<sup>241</sup>

In addition to confinement for children, some gay adults voluntarily choose to enter "conversion" therapies, many of them by religious organizations that

236. "[H]omosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities. . . ." Goodman, *supra* note 16, at 273 (quoting American Psychiatric Ass'n, *Position Statement on Homosexuality*, 150 AM. J. PSYCHIATRY 686, 686 (1993)).

237. Jonathan Ned Katz, *Treatment, in LESBIANS, GAY MEN, AND THE LAW*, *supra* note 47, at 57–58 (listing treatments including drug therapies, shock treatment, aversion therapy, psychoanalysis, and even, until 1951, lobotomy).

238. *But see id.* at 59 (arguing that one is not always the best judge of one's own feelings).

239. Rafferty, *supra* note 2, at 3 (recounting stories of young children sent to mental institutions for "gender identity disorder," when in fact their sole "problem" was being gay); *see also* Minter, *supra* note 3, at 223 (stating that lesbian youth are "extremely vulnerable to forced psychiatric confinement by parents, school officials, . . . juvenile courts, many of whom receive lesbian youth as 'confused' or 'deviant'").

240. Rafferty, *supra* note 2, at 3.

241. *Id.*

promise to change one's sexual orientation through religious faith.<sup>242</sup>

The issue of forced medical treatment for children raises difficult human rights questions. On the one hand, parents have the right to "ensure the religious and moral education of their children in conformity with their own convictions."<sup>243</sup> On the other hand, gay children have rights as well<sup>244</sup>—particularly to be free from intrusive medical treatments that do not work and that force them to give up a fundamental aspect of their identity. Although balancing parents' rights against children's may be a difficult task from which courts might wish to shy away, institutionalization for sexual orientation is one area where the state should intrude to prevent parents from damaging their children's long-term emotional health, just as the state intervenes to prevent child abuse.

2. *Gay People's Free Speech Rights.* — Even in the United States, government officials and state universities have attempted to ban pro-gay clubs from organizing, although courts have frequently struck down such efforts as violating the First Amendment's free speech clause.<sup>245</sup> One area where many courts have failed to see the free speech implications of coming out is the military context, in which several circuits have ruled that the statement "I am gay" is not protected speech.<sup>246</sup>

The intensity of government officials' desire to silence pro-gay speech can go to absurd extremes: In 1996, Salt Lake City tried to ban all student high school groups rather than allow one gay club.<sup>247</sup> As this example illustrates, many elected government officials still refuse to recognize gay people's basic

242. See generally Lili Wright, *The Straight Truth: No One Knows If Gays Can Change*, SALT LAKE TRIB., May 12, 1996, at A1 (discussing conversion therapy, counseling, and other methods of changing homosexual behaviors). Despite the assertion in the headline that "no one knows," most mainstream medical professional organizations in the U.S. reject the idea that these therapies can stop a person from feeling attraction for members of the same sex, regardless of whether people modify their sexual behavior.

243. STEINER & ALSTON, *supra* note 21, at 1166 (quoting Article XVIII of ICCPR).

244. See *Tinker v. Des Moines*, 393 U.S. 503, 512 (1969) (noting that children have rights to free speech, including in the classroom); STEINER & ALSTON, *supra* note 21, at 1166 (quoting Article XVIII of ICCPR, which provides that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt religion or belief of his choice"). Beliefs about sexual orientation should also be considered a protected opinion under the ICCPR.

245. See, e.g., *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (ruling in favor of gay students' free speech rights); *Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (ruling in favor of gay students' free speech rights); *Gay & Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548 (M.D. Ala. 1996) (ruling in favor of gay students' free speech rights). *But see State ex rel. Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974) (allowing Secretary of State of Ohio to refuse to incorporate nonprofit pro-gay-rights corporation).

246. See, e.g., *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d. 454 (7th Cir. 1989).

247. Louis Sahagun, *Salt Lake City Schools Forbid All Social Clubs; Action Targets Gay and Lesbian Group*, HOUS. CHRON., Feb. 22, 1996, at A9.

free speech rights and the role these rights play in their pursuit of self-fulfillment.

3. *The Pressure to Enter Straight Marriages.* — Although women in the United States enjoy more autonomy and independence than women in many other nations, some American lesbians (and gay men) undoubtedly feel pressure from families to “go straight” by marrying someone of the opposite sex. Although a voluntary decision by a gay person to enter a straight marriage may not violate human rights norms, it does offer a sad commentary on the level of intolerance in society that pressures some gay people to go to extremes to hide their true identity—making them more concerned about pleasing family members and religious leaders than the happiness of either themselves or their new spouses.

### C. *State Sodomy Laws and Unjust Imprisonment*

In about twenty states, gay people still face the possibility of long prison sentences for engaging in consensual behavior between adults,<sup>248</sup> despite a growing recognition by international tribunals and human rights groups that sodomy laws violate citizens’ right to privacy. Although in the United States the ICCPR is non-self-executing—that is, it does not create a cause of action in United States courts—America still has an obligation to follow its provisions and principles.<sup>249</sup> In fact, the Human Rights Committee has “expressed its concern about United States noncompliance with *Toonen* in its comments on the initial report by the United States to the Committee.”<sup>250</sup> Although the United States may claim that criminal law is traditionally set by individual states, its willingness to establish nationwide criminal drug laws in the name of protecting the national good suggests that it is willing to “interfere” with state law when it believes the goal is important enough. Arguably, bringing the country into compliance with its international human rights obligations is also a goal worthy of a nationwide standard, as these rights should not depend on where a person lives. By allowing states to continue outlawing same-sex conduct, the United States is in violation of its international human rights obligations.

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248. LESBIANS, GAY MEN, AND THE LAW, *supra* note 47, at 80.

249. Wilets, *supra* note 19, at 41–42.

250. *See id.* at 33–34.



*D. The Right to Be Free from Discrimination or Other Legal Disabilities*

In defining persecution, international law recognizes discriminatory acts as potential grounds for asylum if the victim lacks “adequate legal recourse” in her home country to seek protection of her rights.<sup>251</sup> Arguably, the United States, through its court system, has allowed gay people to vindicate their rights against discrimination in at least some cases—a major recent example being the Supreme Court’s decision in *Romer v. Evans*, invalidating a state referendum that prohibited localities from enacting anti-discrimination laws in favor of gay people.<sup>252</sup> Although gay Americans have thus met with some success in vindicating their rights in courts,<sup>253</sup> they still face discrimination in many aspects of their lives, in some cases with courts enforcing or upholding such violations. In states without anti-discrimination laws protecting them, gay people can lose their jobs if their employers discover their sexuality.<sup>254</sup> Some states continue to use sexual orientation as a basis to deny parents access to their children<sup>255</sup> or to deny gay couples the right to adopt.<sup>256</sup> The military continues to remove gay soldiers from its ranks<sup>257</sup>—a policy that a number of federal appellate courts have upheld.<sup>258</sup> In every state in the Union, gay people are unable to enjoy the benefits of matrimony, including automatic rights to guardianship in the case of incapacitation, to inheritance, and to a host of economic and social benefits that government bestows on married couples.<sup>259</sup> Only Hawaii is even close to recognizing same-sex marriage, after a protracted battle in the courts and the legislature.<sup>260</sup>

251. See *Letter from Scott Busby to Noemi Masliah*, *supra* note 119, at 2.

252. See *Romer v. Evans*, 116 S. Ct. 1620 (1996).

253. See *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (finding that gay student had cause of action against his school for failing to protect him from anti-gay harassment); see also cases cited *supra* note 245.

254. See David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24 (reporting that gay people in most places can still lose their jobs for being gay); see also Minter, *supra* note 3, at 220–21 (citing statistics that show that two-thirds of gay corporate employees have observed “hostility toward gay people on the job”).

255. See, e.g., *Bottoms v. Bottoms*, 249 Va. 410 (1995) (denying custody to lesbian mother).

256. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 47, at 510–36.

257. See Minter, *supra* note 3, at 221 (discussing U.S. government’s discrimination toward gays and lesbians in military).

258. See cases cited *supra* note 246.

259. LESBIANS, GAY MEN, AND THE LAW, *supra* note 47, at xix. One such benefit is the ability of U.S. citizens to bring their non-citizen spouses to this country; gay couples from different countries may face difficulty staying together over the long term if one partner fails to qualify to immigrate because of the U.S. government’s failure to recognize “married” gay couples. Wilts, *supra* note 19 at 104 (stating that sexual minorities are unfairly excluded from rights afforded by family reunification laws because foreign same-sex partners of U.S. citizen are not considered family members).

260. John Gallagher, *Marriage, Hawaiian Style: In the Aloha State, Legal Same-sex Marriage Is Almost a Reality for the First Time Ever. Where Do We Go From Here?*, ADVOCATE, Feb. 4, 1997, at 22.

The existence of some success in Hawaii, however, points to a fundamental difference between the lives of gay people in the United States and of sexual minorities in many other countries. Although violence and discrimination plague sexual minorities in America as everywhere else, at least the hope if not always the reality exists that legal challenges are available to address injustices. The fact that at least ten states have passed anti-discrimination laws also bodes well for gay people pursuing their rights,<sup>261</sup> although anti-discrimination laws alone are not enough when sexual minorities continue to face persistent threats of violence and intimidation.<sup>262</sup> Despite the persistence of discrimination against gay Americans, the potential for leading a more open and fulfilling life attracts sexual minorities from around the world to come and live in our society.<sup>263</sup>

### *E. How a Judge Might Rule on an Asylum Case from the United States*

The increasing visibility of the gay community in the United States has made it a target for both official and unofficial forms of persecution. Dozens of gay people are murdered each year because of their sexual orientation.<sup>264</sup> Gay youth may suffer forced institutionalization to "cure" their sexual orientation. The threats of incarceration or discrimination keep many gay people hidden in the closet.

In fact, these conditions are similar to those in countries from which many gay asylum applicants have fled. Fidel Toboso-Alfonso left Cuba because of frequent harassment by the police, including physical and verbal abuse and frequent incarcerations.<sup>265</sup> In the United States, in addition to sodomy statutes police often use "public morality" laws against loitering and solicitation to harass gay people.<sup>266</sup> Even in cosmopolitan cities such as Los Angeles, police

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261. See Dan Freedman, *Job-bias Bill Up for Hearing; Gay Rights Groups Hope for Smooth Start But Expect Tough Time in Senate*, S.F. EXAMINER, Oct. 22, 1997, at C20; Edward Iwata, *Companies Take Lead in Providing Rights, Benefits to Gay Employees*, SAN DIEGO UNION-TRIB., May 20, 1996, at C2.

Even the U.S. Senate came close to passing an anti-discrimination bill for gay people. John E. Yang, *Senate Passes Bill Against Same-Sex Marriage: In First Test on Hill, Measure to Prohibit Employment Discrimination Is Defeated*, 50-49, WASH. POST, Sept. 11, 1996, at A1 (reporting that on same day Senate passed anti-gay Defense of Marriage Act, the Senate narrowly defeated bill to add sexual orientation to Civil Rights Act of 1964).

262. See Martinho, *supra* note 61, at 18.

263. See Park, *supra* note 11, at 1117.

264. See Associated Press, *supra* note 225, at A26 (reporting 25 anti-gay murders in 1995); Pressley, *supra* note 1, at A1 (reporting 59 anti-gay murders in 1994).

265. See *In re Toboso-Alfonso*, A-2322064, at 3 (1986).

266. See Minter, *supra* note 158, at 804.

have been known to use excessive force against gay rights protestors.<sup>267</sup> In another asylum case, Marcelo Tenorio emigrated from Brazil following a brutal, violent attack by unknown anti-gay assailants.<sup>268</sup> Sadly, widespread violence targeted against gay people is also reported in this country's major population centers—over 2,000 times each year.<sup>269</sup> The 1997 bombing of a lesbian bar in Atlanta is but a recent example of anti-gay prejudice manifesting itself in acts of violence.<sup>270</sup> Although police in some United States communities have tried to combat anti-gay hate crimes, a history of mistrust and abuse remains, with many incidents still unreported. An asylum judge in another country could well find the violence that plagues gay Americans amounts to persecution under international asylum law, given the parallels between the United States and countries in Latin America, for example, where anti-gay violence is widespread.

One potential difference between the situation in the United States and the rest of the world is the growing responsiveness to the gay community by some members of the government. This receptiveness by some officials to gay people represents an advance unknown in many other nations. A few members of both political parties have begun to court gay voters,<sup>271</sup> although even supposedly gay-friendly politicians have turned their back on gay people for the sake of political expediency.<sup>272</sup> At least ten states have passed laws protecting gay people against discrimination;<sup>273</sup> others have added sexual orientation to the list of characteristics that trigger harsher sentences for hate-based violent crimes.<sup>274</sup> Courts have also begun to recognize gay people's claims to equal protection under the law,<sup>275</sup> suggesting that gay Americans have an avenue to seek redress in this country that is unavailable in many other nations.

Culturally and socially, conditions in the United States have improved relative to its own history and to conditions in other parts of the world. Public opinion has begun to turn in gay people's favor—55 percent of voters support national legislation that would prohibit employment discrimination against gay

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267. See *The High Cost of Protesting*, ADVOCATE, Mar. 18, 1997, at 18 (reporting settlement agreement between gay protester and Los Angeles Police Department).

268. See *Matter of Tenorio*, A72-093-558, at 4-5 (E.O.I.R., July 26, 1993).

269. See Pressley, *supra* note 1, at A1.

270. See Tziviva Gover, *Hate That Goes Boom in the Night: The Bombing of a Lesbian Bar in Atlanta Has Left Gays and Lesbians Bracing for More Violence*, ADVOCATE, Apr. 1, 1997, at 41.

271. See Moss, *supra* note 7, at 35.

272. Doug Struck, *Gay Support for Clinton Less Fervent; Some Activists Won't Attend His Second Inauguration*, WASH. POST, Jan. 6, 1997, at B1 (noting many gay people feel ambivalent toward President Bill Clinton following his first term).

273. See Freedman, *supra* note 261, at C2.

274. See, e.g., John Sanko, *Gays Back 'Hate Crimes' Law; Judiciary Panel Supports Penalties on Attacks for Disabled, Homosexuals*, ROCKY MOUNTAIN NEWS, Jan. 28, 1997, at 20A.

275. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996).

people.<sup>276</sup> Media images of gay men and lesbians in the popular cultural have begun to present more positive images and characters<sup>277</sup>—though the old stereotypes have not disappeared, either.<sup>278</sup> In the Senate, a measure to add sexual orientation to the Civil Rights Act of 1964 almost passed in 1996, losing by only one vote.<sup>279</sup> Gay Americans seem to be on a winning streak on a number of important fronts.

Despite the potential for progress, the possibility of backlash remains very real. Efforts by the Clinton administration to reverse the military's ban on gay servicemembers backfired, leading to a codification of the ban in a Congressional statute.<sup>280</sup> The Congress and at least twenty-five states have also passed preemptive laws to prevent recognition of same-sex Hawaiian marriages—despite the fact that Hawaii has yet to recognize one gay marriage.<sup>281</sup> The Religious Right remains well-organized and fervently opposed to any further advancement by gay rights advocates.<sup>282</sup> For sexual minorities, America today is a land of hope—but also one of fear.

Thus far, none of the successful applicants to the United States have come from nations that grant asylum to gay immigrants because of their sexual orientation.<sup>283</sup> Although this alone cannot act as a “seal of approval” for conditions in Western countries like the United States, it may reflect that gay people in more tolerant countries are unwilling to leave their homelands for an uncertain future among strangers in another nation. Although life for American gay people is still filled with the potential for many violations of basic human rights norms, at least some segments of the government have become increasingly responsive to addressing gay people's concerns and protecting them from persecution from both state and non-state actors. This possibility might make a judge in another country reluctant to grant asylum to an American emigrant, although the prevalence of violence in this country

276. Carla Marinucci, *Gays Focus on Job Protection, Disappointed Leaders' Agenda Shorter as Clinton Begins Second Term*, S.F. EXAMINER, Feb. 2, 1997, at A2. Another survey found that 67 percent of Californians favored “providing domestic partners the same family benefits—including medical power of attorney and conservatorship—as married heterosexuals.” Kenneth J. Garcia, *Californians Accepting Gay Rights, But Poll Finds Opposition to Same-sex Marriages*, S.F. CHRON., Mar. 3, 1997, at A1. The poll also found, however, that Californians opposed legalizing gay marriage. 56 to 38 percent. *Id.*

277. See RAYMOND MURRAY, *IMAGES IN THE DARK: AN ENCYCLOPEDIA OF GAY AND LESBIAN FILM AND VIDEO* vii–xii (1996).

278. Alan Frutkin, *Gibson Straight Up: Nine Lesbian and Gay Filmmakers Tell in an Exclusive Interview What Really Happened on Their Day with Mel Gibson*, ADVOCATE, Mar. 4, 1997, at 43 (reporting claim by Gay and Lesbian Alliance Against Defamation that 1995's Oscar-winning Best Picture *Braveheart* “featured one of the most negative gay portrayals in recent film history”).

279. Yang, *supra* note 261, at A1.

280. See Struck, *supra* note 272, at B1.

281. *Ruling Favors Whistle-blowers*, *supra* note 103, at A2.

282. See John Gallagher, *Silent But Deadly: The Religious Right Hasn't Disappeared. They're Quietly Doing Their Nastiest Work Behind the Scenes*, ADVOCATE, Mar. 4, 1997, at 26.

283. See IGLHRC RESOURCE GUIDE, *supra* note 5, § IV, at 3.

would certainly give any sympathetic judge sufficient reason to rule the other way. Safeguarding an individual's life and liberty is at the heart of international asylum law; American gay men and lesbians could justifiably claim that the United States still has far to go in protecting their basic human rights and living up to its own asylum standards.

### CONCLUSION

Although the United States fares far better than many other countries in its treatment of sexual minorities, gay people continue to face the threat of persecution in this country, particularly with the persistence of laws against same-sex sexual conduct in violation of international norms. Violence against gay men and lesbians persists in many parts of the country, and many remain in the closet lest they encounter ostracism and discrimination.

Despite these real problems, however, many gay refugees from around the world recognize that the United States offers a relatively better existence than their home countries do. The admission of gay people through America's asylum laws has generally occurred below the media radar. For the applicants themselves, the admission policy can be the difference between life and death: a chance to start a new existence, free from at least some of the most dangerous conditions confronting sexual minorities around the world.

The lessons of this century counsel strongly in favor of recognizing the humanity of all individuals, regardless of the differences used to separate us. Gay people, like all human beings, deserve the chance to live life to the fullest—free from fear of violence and hatred. International human rights law requires this; United States law and practice should, as well.