CIRCUMVENTING SHARI'A: COMMON LAW JURISDICTIONS' RESPONSE TO PERSECUTED SEXUAL MINORITIES' ASYLUM CLAIMS

On July 19, 2005, the international humanitarian community was horrified to learn that two teenagers had been publicly hanged in Mashhad, Iran for engaging in "homosexual acts."[1] Under Islamic law as practiced in Iran, engaging in homosexual sex is a capital offense.[2] According to independent sources inside Iran, the two teenagers had been imprisoned for fourteen months prior to their execution and subjected to severe beatings during this time.[3] Officially, the charges against the two youths included an alleged sexual assault of a third minor.[4] Sources within Iran, however, have suggested that officials fabricated the assault charge in an effort to mitigate international sympathy for the teenagers.[5] Both teenagers, Ayaz Marhoni, eighteen, and Mahmoud Asgari, sixteen, were minors at the time of their arrest.[6] As Iran is a signatory to two international treaties that prohibit minors from being executed, the teenagers' hangings violated international law.[7]

In light of increasing hostilities towards gays and lesbians[8] in Iran and other ultraconservative Islamist states, this Note examines the adequacy of common law jurisdictions' asylum policy to respond to the persecution of lesbians, gays, and other sexual minorities (hereinafter "sexual

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1. Doug Ireland, *Shame of Iran*, LA WEEKLY, Sept. 2, 2005, at 20. *See also* Jamie Doward, *Outcry at Plan to Deport Gay Iranian*, THE OBSERVER, Aug. 21, 2005, at 11.

2. *See* Ireland, *supra* note 1, at 11. An exiled Iranian gay rights group estimates that at least 4000 homosexuals have been executed by the Iranian government since 1979. Doward, *supra* note 1, at 11. In contrast, according to the U.S. Department of Justice's statistics, the United States has executed just over a thousand inmates on all death penalty charges over that same timespan. Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2004*, BUREAU JUSTICE STATISTICS BULLETIN, Nov. 2005, at 10–11.

3. Ireland, *supra* note 1, at 20.

4. *Iran Executes Two Gay Teens in Public Hanging*, UK GAY NEWS, July 21, 2005, http://www.ukgaynews.org.uk/Archive/2005july/2101.htm [hereinafter *Executes*]. Although the alleged victim has not been named in the official press, it has been reported that he was thirteen. *Id*.

5. *Id*. Under Islamic law, rape victims are also subject to prosecution. In this case the victim was never publicly identified or tried, suggesting that the allegation may have been trumped up by the state as a tactic to undercut public sympathy for the teens. *Id*. Iranian sources have speculated as to another alternative: the act, though consensual, might have been deemed criminal on account of the participants' young ages. *Id*. *See also* Ireland, *supra* note 1, at 20 (reporting additional evidence suggesting that the rape charges may have been invented by the state and arguing that the West should be critical of accepting such charges at face value).

6. *Executes*, *supra* note 4.

7. Ireland, *supra* note 1, at 20.

8. *See* discussion *infra* Part I.

minorities").[9] Part I of this Note introduces the extent to which sexual minorities have been persecuted under strict Islamic regimes and the response of the international humanitarian community. Parts II and III provide a general overview of asylum law in the United States and apply that framework to the claims for asylum by persecuted sexual minorities. Part IV compares the asylum jurisprudence in the United States with corresponding developments in other parts of the common law world. Part V hypothesizes as to how sexual minority asylum claimants would fare under the legal frameworks of three specific common law jurisdictions, and Part VI concludes with the suggestions this analysis provides for changes in U.S. asylum policy.

I. INTRODUCTION

Iran's recent public execution of gay teenagers has been widely condemned by the international humanitarian community. Public protests of the gay youths' hangings occurred in San Francisco, London, Paris, Dublin, Vienna, Stockholm, and the Hague.[10] Canada released a statement officially condemning the executions.[11] The governments of Sweden and the Netherlands suspended deportation of gay Iranians who had been refused asylum.[12]

Despite the official outcry in the West, the climate of fear among gays in Iran is palpable. The ultraconservative regime of Iranian President Mahmoud Ahmadinejad has accelerated persecution of sexual minorities, with sources suggesting that Ahmadinejad is "determined to step up the pace of repression and show that he will not knuckle under to Western protests."[13] Evidence has surfaced attesting to Ahmadinejad's commitment to persecuting sexual minorities, with the Iranian publication *Kayhan* reporting that two more men, Mokhtar N. and Ali A., both in their early

9. This term refers to the broad spectrum of individuals who are either self-identified or perceived as not conforming with orthodox sexuality. This term was selected in an effort to be as inclusive as possible and includes, but is not limited to, gays, lesbians, bisexuals, transgendered, and intersexed individuals. No negative value judgment is intended or implied from its use.

10. Ireland, *supra* note 1, at 20.

11. *Id*.

12. *Id*. *See also Sweden Must Halt Deportations to Iran After Hangings*, AGENCE-FRANCE PRESSE ENGLISH WIRE, July 22, 2005. Although Sweden offers asylum for refugees facing persecution based on sexual orientation, prior to the hangings, Swedish authorities had deported gay Iranian asylum seekers, claiming that the death penalty for sodomy in Iran was no longer in force. *Id*. *See also Swedish Rethink on Iran Gays*, GUARDIAN, Aug. 6, 2005.

13. Ireland, *supra* note 1, at 20.

twenties, were publicly hanged in the northern town of Gorgan.[14] Reportedly, the two men were executed for the crime of *lavat*, which Iran's penal code defines as penetrative sexual acts between adult men and punishes with the death penalty.[15] Human Rights Watch, an international humanitarian organization, further reported at least three other incidents in which Iran had persecuted sexual minorities between 2003 and 2005, including at least one report of men executed for homosexual sex.[16]

Iran is only one of several countries that have elected *Shari'a*, an Islam-based system of jurisprudence,[17] to govern all aspects of secular and religious life. In addition to Iran, Iraq, Mauritania, parts of Nigeria, Saudi Arabia, Sudan, the Republic of Chechnya, and Yemen also impose the

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14. *Iran: Two More Executions for Homosexual Conduct*, HUMAN RIGHTS NEWS (Human Rights Watch, New York, N.Y.), Nov. 22, 2005, http://hrw.org/english/docs/2005/11/21/iran12072.htm.

15. *Id*.

16. *Id*. The article catalogues further persecution of sexual minorities in Iran:

> In September 2003, police arrested a group of men at a private gathering in one of their homes in Shiraz and held them in detention for several days. According to Amir, one of the men arrested, police tortured the men to obtain confessions. The judiciary charged five of the defendants with "participation in a corrupt gathering" and fined them.
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> In June 2004, undercover police agents in Shiraz arranged meetings with men through Internet chatrooms and then arrested them. Police held Amir, a 21-year-old, in detention for a week, during which time they repeatedly tortured him. The judicial authorities in Shiraz sentenced him to 175 lashes, 100 of which were administered immediately. Following his arrest, security officials subjected Amir to regular surveillance and periodic arrests. From July 2005 until he fled the country later in the year, police threatened Amir with imminent execution.
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> On March 15, 2005, the daily newspaper *Etemaad* reported that the Tehran Criminal Court sentenced two men to death following the discovery of a video showing them engaged in homosexual acts. According to the paper, one of the men confessed that he had shot the video as a precaution in case his partner withdrew the financial support he had been providing in return for sex. In response to the man's confession, his partner was summoned to the authorities and both men were sentenced to death. As the death penalty was pronounced against both men, it appears to have been based on their sexual activity.

Id.

17. *See generally* ZIAUDDIN SARDAR & ZAFAR ABBAS MALIK, INTRODUCING ISLAM 62–66 (Totem Books 2004) (2001) (providing an overview of *Shari'a* law and its sources, including the Qur'an and the Sunna). This Note does not attempt to evaluate Islamic law or compare it to other legal traditions. *Shari'a* is referenced only as a likely impetus for the persecution of sexual minorities in parts of the world, which may be responsible for the influx of sexual minority asylum seekers. Comprehensive treatment of Islamic law is beyond the scope of this Note. A growing body of Western scholarship has explored Islamic law. *See, e.g.*, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379 (2005) (analyzing an Islam-based system of jurisprudence, concluding that it can be reconciled with Western democratic and humanitarian ideals); Angelo Luigi Rosa, *Harmonizing Risk and Religion: The Utility of Shari'a-Compliant Transaction Structuring in Commercial Aircraft Finance*, 13 MINN. J. GLOBAL TRADE 35 (2004) (finding considerable promise in conducting financial transactions governed by *Shari'a*).

death penalty for same-sex sexual acts.[18] The increasingly realized threat of execution that awaits sexual minorities, who are denied asylum in the West and are deported back to their harshly repressive homelands, has left many extraordinarily desperate. In July 2005, a gay Iranian man, Hussein Nasseri, was found dead from a self-inflicted gunshot wound; near his body, authorities found papers documenting the final rejection of his appeal for asylum in the U.K.[19] Two years earlier, a similarly situated Iranian asylum seeker in Manchester, England doused his body with gasoline and set himself on fire rather than face return to Iran, where authorities had obtained documented evidence of his homosexuality.[20]

Despite mounting evidence of increasing persecution of sexual minorities in parts of the world, these vulnerable groups have not been universally welcomed into the West. After an Italian judge waived an expulsion order for a 24-year-old gay Senegalese immigrant after finding the immigrant risked persecution if returned to his home country, an Italian lawmaker vehemently criticized the ruling, arguing it "creat[ed] a paradise for gay illegal immigrants. . . . [P]oor Italy . . . [is now] the land of terrorists and illegal faggots."[21]

II. GENERAL OVERVIEW OF U.S. ASYLUM LAW

A. Two Standards—Grant of Asylum and Withholding of Removal

Under American law, an alien who is present in the United States may be granted asylum if that alien can be found to qualify as a "refugee."[22] A "refugee" is defined as an alien who is unable or unwilling to return to his or her home county due to feared or actual "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[23]

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18. Dave Ford, *Homeland Insecurity*, S.F. CHRON., June 22, 2003, at 18. *See also* Noah Adams, *Homosexuality Apparently Thriving in Pakistan Despite Severe Punishments* (National Public Radio broadcast Aug. 3, 2004) (reporting on severe punishments for gay men in some Islamic countries). Adams reports that "[i]n 1998, the Taliban killed at least three men for sodomy by bulldozing a brick wall over them." *Id*.

19. David Sapsted, *Gay Killed Himself Over Asylum Failure*, THE DAILY TELEGRAPH, Apr. 20, 2005, at 006.

20. Doward, *supra* note 1.

21. *Minister Slams Judge for Creating 'Gay Immigrants' Paradise*, ANSA ENGLISH MEDIA SERV., Feb. 3, 2005. The lawmaker's statements, however, were sharply criticized by other members of the Italian government, who characterized the remarks as "vulgar" and labeled the lawmaker's party as "the most homophobic in the history of the Italian Republic." *Id*.

22. 8 U.S.C. § 1158(a) (2000).

23. 8 U.S.C. § 1101(a)(42)(A) (2000).

To qualify for asylum, refugees must demonstrate what courts have articulated as a "well-founded fear of persecution."[24] Under this "well-founded fear" standard, asylum applicants must demonstrate that their fears are both "subjectively genuine and objectively reasonable."[25] An asylum applicant has been found to satisfy this "subjectively genuine" component via his or her own credible testimony demonstrating a personal fear of persecution.[26] The "objectively reasonable" component has been a more challenging barrier for asylum applicants to overcome; applicants can satisfy this component and create a rebuttable presumption that a well-founded fear of future persecution exists by making a factual showing of prior persecution.[27] Alternatively, an applicant can also satisfy the objective component of this standard by demonstrating a "reasonable possibility that he or she may suffer other serious harm . . . ."[28]

A resident alien who faces imminent removal from the United States may, in some circumstances, apply for a mandatory withholding of removal as a defensive action.[29] Qualification for this mandatory withholding requires the alien to meet a more stringent standard than necessary for a grant of asylum. The alien must demonstrate that, on account of his or her membership in a particular social group, the alien's life or freedom would be threatened upon return to his or her homeland.[30] Furthermore, courts have established that such future persecution must be "more likely than not to occur."[31] In operation, this stricter "more likely than not standard" can effectively prevent an applicant from establishing future persecution.[32]

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24. Duarte de Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir. 1999).

25. Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir. 2003) (citing *Duarte de Guinac*, 179 F.3d at 1159).

26. *See* Njuguna v. Ashcroft, 374 F.3d 765, 770 (9th Cir. 2003).

27. Establishing Asylum Eligibility, 8 C.F.R. § 208.13(b)(1) (2000). It may be difficult, however, for asylum applicants to provide evidence of past persecution aside from their own testimony.

28. 8 C.F.R. § 208.13(b)(1)(iii)(B) (2000). Often, applicants attempt to make this showing by news articles, statistics, official policy statements, etc., demonstrating the specific conditions in their countries of origin regarding discrimination based on sexual orientation. *See* International Gay and Lesbian Human Rights Commission, Download a Request for Documentation Form in order to obtain a Country Packet, http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=8 (last visited Sept. 4, 2006). A San Francisco based non-profit, the International Gay and Lesbian Human Rights Commission (IGLHRC) has helped asylum-seekers meet this requirement by offering claimants packets they have compiled with information on 144 countries around the world. *Id*.

29. 8 U.S.C. § 1231(b)(3) (2000).

30. Withholding of Removal, 8 C.F.R. § 208.16(b) (2000).

31. INS v. Cardoza-Fonesca, 480 U.S. 421, 446 n.30 (1987).

32. *See* Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 242 (2005).

B. Membership in a "Particular Social Group"

Both asylum and withholding of removal claims require the claimant to establish that their fear of persecution is logically related to their membership in a "particular social group."[33] The Immigration and Nationality Act (INA), from which this language originates, is silent as to its specific meaning; instead, interpretation of this language has been delegated to the Board of Immigration Appeals (BIA) and the federal courts.[34] *In re Acosta*[35] upheld the BIA's definition of "particular social group" as follows:

> [A] group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience . . . . [The characteristic] must be one 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.[36]

Later rulings on the subject focus on the "immutability" of the characteristics that define the social group.[37]

The circuit courts, which hear appeals of BIA decisions, have not universally adopted the "particular social group" definition proposed by *Acosta*. Several circuits—including the First, Third, Sixth, Seventh, Ninth, and Tenth—have explicitly adopted the *Acosta* definition,[38] specifically

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33. Immigration and Nationality Act, 8 U.S.C. § 110(a)(42)(A) (2000).

34. Landau, *supra* note 32, at 242-43.

35. *In re* Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

36. *Acosta*, 19 I. & N. Dec. at 233.

37. *See* Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985). Specifically, *Ananeh-Firempong* states that the "threat of persecution [must] arise out of characteristics that are essentially beyond the petitioner's power to change." *Id*. *See also* Gomez v. INS, 947 F.2d 660, 664. Specifically, the court in *Gomez* held that "a particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general." *Id*. *See also* discussion of *Gomez*, *infra* Part III.A.

38. *Ananeh-Firempong*, 766 F.2d at 626 (adopting *Acosta* standard, finding membership of a political group to be an immutable characteristic); Elien v. Ashcroft, 364 F.3d 392, 396-97 (1st Cir. 2004) (applying *Acosta* standard to exclude persons who voluntarily engage in illicit activities as part of a "social group"); Fatin v. INS, 12 F.3d 1233, 1239–41 (3d Cir. 1993) (hypothesizing that women who refuse to conform to cultural requirements for female dress even where the consequences may be severe could be defined as a "social group" under *Acosta*); Castellano-Chacon v. INS, 341 F.3d 533, 546–49 (6th Cir. 2003) (adopting the *Acosta* "immutable characteristic" standard and finding "tattooed youth" did not constitute a social group under this standard); Lwin v. INS, 144 F.3d 505, 510–12 (7th Cir. 1998) (adopting *Acosta* standard and finding that parents of Burmese student dissidents constitute a social group); Thomas v. Gonzales, 409 F.3d 1177, 1184–87 (9th Cir. 2005) (*en banc*) (embracing

noting its emphasis on the immutability of the social group's shared characteristics.[39]

The Second Circuit, however, has adopted what some critics have argued is a broader standard. Instead of following *Acosta*, the Second Circuit defines "social group" as any group "comprised of individuals who possess some fundamental characteristic in common that serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."[40] In defining "social group" this way, the Second Circuit centers its analysis on whether outsiders perceive an individual as a member of a social group (a seemingly subjective standard).[41] Critically, this definition would posit individuals within a "particular social group" even if outsiders were to *inaccurately* perceive them as a part of that group.[42] Scholars have noted that under this formulation of "particular social group," claimants may be able to gain asylum based on an "imputed" identity.[43] Claimants may not need to prove that they are in fact a member of a protected group;[44] instead, "they need only demonstrate that they face persecution because outsiders presume they are members of such a group."[45]

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the *Acosta* standard and holding that a family constitutes a social group); Niang v. Gonzales, 422 F.3d 1187, 1198–1200 (10th Cir. 2005) (adopting the *Acosta* standard and holding that female members of a tribe constitute a particular social group).

39. *Acosta*, 19 I. & N. Dec. at 233–34.

40. *Gomez*, 947 F.2d at 664.

41. Landau, *supra* note 32, at 244.

42. *Id*.

43. *Id*. at 243–44.

44. *Id*. Landau expounds on this idea:

> Under imputed identity, courts look not to the asylum seeker's identity but the persecutor's perceptions and motivations behind the persecution. If the persecutor perceives an individual to be a member of a particular social group and persecutes her on that basis, the applicant's actual identity is irrelevant—all that matters is the *persecutor's beliefs* . . . .
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> Imputed identity is most commonly found in cases of political opinion, but it is not limited to those cases. Courts have repeatedly interpreted the term "particular social group" to include sexual orientation and imputed sexual orientation, and the Second Circuit incorporates imputed identity into its very definition of particular social group.

Id. at 258.

45. *Id*. at 244. Relying on *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003), in which a heterosexual man was found to have been tortured on account of his persecutors' belief that he was homosexual, Landau notes that asylum applicants need not be members of a protected class in fact, but instead may have suffered persecution because others mistakenly believe they belong to the class. Landau *supra* note 32, at 258. Landau regards this as particularly critical in the context of asylum claims based on sexual-orientation. *Id*.

First, Landau notes that, following *Amanfi*, a theory of imputed gay identity allows litigators to bring claims on behalf of applicants even if, as is not uncommon for sexual minorities, particularly those from non-Western cultures, the applicant does not self-identify as homosexual. *Id*. at 262. Additionally, Landau stresses the importance of an imputed gay identity theory for gender non-

III. SEXUAL MINORITY CLAIMS FOR ASYLUM UNDER U.S. ASYLUM LAW

A. Success of Sexual Minorities' Asylum Claims

Gays, lesbians, and other sexual minorities have, for some time, been successful in establishing membership within a "particular social group" for the purpose of asylum designations. In 1990, in the landmark case of *In re Toboso-Alfonso*,[46] the BIA held that sexual orientation could constitute the defining characteristic of a "particular social group" for the purpose of asylum. The claimant, Toboso-Alfonso, was a gay Cuban man who had suffered severe and persistent abuse on account of his sexuality, both by members of the community and by the police.[47] Further, the judge's language designated Toboso-Alfonso as a member of the broad "particular social group" of "Cuban homosexuals," rather than the more specific "particular social group" of "Cuban gay men," suggesting that both gays and lesbians were encompassed in the scope of the decision.[48]

Although not binding precedent at the time, in 1994, Attorney General Janet Reno issued an order[49] mandating that the immigration system adopt *Toboso-Alfonso* as precedent in all cases addressing the issue of asylum

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conforming applicants. *Id*. Such applicants are subject to abuse very similar to that experienced by other sexual minorities; their persecutors frequently use homophobic slurs against such applicants such as "fag" or "dyke," which suggest that "from the persecutor's perspective, transgender identity and homosexual identity are synonymous." *Id*. at 260–61. Critically, this allows the attorney to utilize favorable precedent regarding gay and lesbian claimants on behalf of their gender non-conforming client while still respecting their client's personal self-identification. *Id*. at 262.

46. *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990). Toboso-Alfonso was subject to frequent and continued abuses by the Cuban government as a result of his sexual orientation. Beginning in 1967 and over the course of the next thirteen years, Toboso-Alfonso was required to report for a governmental inspection every two to three months. *Id*. at 820–21. On such occasions, he would be detained at the police station for several days for no discernable reason and without being charged. *Id*. As a result of one such detainment, he was sent to a forced labor camp for sixty days as a punishment for missing work. *Id*. at 821. Toboso-Alfonso was finally given an ultimatum by the chief of police: be imprisoned for four years for being a homosexual or leave for the United States. *Id*. The applicant testified that as he was leaving his hometown for the last time, bound for the United States, neighbors gathered to throw rotten eggs at him. *Id*.

47. *Id*. at 821.

48. *See id*. at 822. Indeed, courts later explicitly held that the language of this decision encompassed both gay male and lesbian female claimants. *See, e.g.*, Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 2000); Kimumwe v. Gonzales, 431 F.3d 319, 323 n.2 (8th Cir. 2005). Despite the breadth of these holdings, federal courts have produced only one published decision involving a lesbian woman's successful asylum claim. *See* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997). The unique issues facing lesbian women who make asylum claims on the basis of sexual-identity persecution may help explain the lack of case law in this area are discussed, *infra* Part III.B. *See also* Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417, 418–19 (2005).

49. Attorney General Order No. 1895-94 (June 19, 1994).

for sexual minorities.[50] In so doing, Reno essentially opened the door for asylum claims by persecuted sexual minorities.[51] As a result, it has been estimated that several thousand gays and lesbians have been granted asylum in the United States since that time.[52]

Following the precedent established by former Attorney General Reno, the federal circuit courts have also found sexual minorities to be members of a "particular social group" for the purpose of asylum claims. The Ninth Circuit, which was recently presented with a sexual orientation-based asylum claim for the first time, found the gay claimant to be a member of a "particular social group."[53] The court worded its holding narrowly, however, within the relatively unusual case facts. There the applicant was a refugee from Mexico, who, as a result of his same-sex attraction, outwardly manifested his sexuality and began dressing and acting like a woman, beginning at age twelve.[54] Hernandez-Montiel grew his hair and finger-nails long, wore women's clothing, took female hormones, and adopted the gestures and mannerisms of a woman.[55] As a result of his appearance, Hernandez-Montiel suffered horrific attacks by the Mexican police, including being raped at gunpoint by a police officer, before fleeing to the United States.[56] The Ninth Circuit held that Hernandez-Montiel was a member of a "particular social group," namely, "gay men with female sexual identities."[57] Given Hernandez-Montiel's very visible membership in this particular social group, the court held that he could reasonably fear harsh persecution were he forced to return to Mexico.[58]

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50. *Id*.

51. *Id*. *See also* Neilson, *supra* note 48, at 418.

52. Neilson, *supra* note 48, at 418. Neilson notes that neither the INS nor the Department of Homeland Security keeps statistics on the filing or granting of asylum cases based on the grounds claimed for asylum. *Id*. at 418 n.5. However, the previous Chair of the Board of Directors of the Lesbian and Gay Immigration Rights Task Force has estimated that approximately 2000 sexual orientation-based asylum claims had been filed as of the year 2000. *Id*., *citing* Christine Doyle, *Symposium Proceedings: Recent Developments in International Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 187–88 (2000).

53. *Hernandez-Montiel*, 225 F.3d at 1093.

54. *Id*. at 1087–88.

55. *Id*.

56. *Id*. at 1088.

57. *Id*. at 1095. The court's choice in framing the applicant's social group this way, as "gay men with female sexual identities in Mexico," may have been strongly influenced by expert testimony given on the applicant's behalf. The court noted the "helpfulness" of applicant's expert's testimony in its analysis. *Id*. at 1094. The expert testified that gay men with female sexual identities are a "separate social entity" within Latin American culture, and that this subgroup may be particularly ostracized and at risk for police abuse, above and beyond other gay groups. *Id*.

58. *Id*. at 1097–99. Indeed, visibility remains especially critical for courts to find persecution based on membership in a sexual minority social group. For a considerably broader discussion of this issue, see Jenni Millbank, *Gender, Visibility and Public Space in Refugee Claims on the Basis of*

The holding in *Hernandez-Montiel* has been upheld by the Ninth Circuit.[59] In *Reyes-Reyes v. Ashcroft*,[60] the court evaluated an asylum application by a female-identified El Salvadoran man whose dress and mannerisms made him the target of particularly severe persecution.[61] In El Salvador, when the applicant was only thirteen years old, he was abducted by a group of men, driven to a remote location, and raped.[62] Ruling on the applicant's claim, the court reaffirmed that "gay men with female sexual identities" are a separate entity in Latin American society[63] and constitute a "particular social group" for the purposes of asylum.[64]

In *Hernandez-Montiel* and *Reyes-Reyes*, the Ninth Circuit left some question as to how expansively it had defined "particular social group."[65] Dispelling any suggestion that its holdings in the two cases were to be narrowly construed, the court made clear the breadth of its holding in *Karouni v. Gonzales*: "[T]hough the issue presented in *Hernandez-Monteil*

Sexual Orientation, 1 SEATTLE J. FOR SOC. JUST. 725 (2003) (arguing that lesbian asylum claimants face particular obstacles to their applications as a result of cultural constraints on their behavior that limit their visibility); Fadi Hanna, Note, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L. J. 913 (2005) (noting a decision, on appeal at the time of this writing, in which a gay man's asylum claim was denied for lack of sufficiently visible outward indicators of his sexuality).

59. *See* Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004).

60. *Id*. at 785.

61. *Id*.

62. *Id*.

63. *See Hernandez-Montiel*, 225 F.3d at 1093. For more on this widely-documented Latin American cultural phenomenon, see, e.g., DON KULICK, TRAVESTI: SEX, GENDER AND CULTURE AMONG BRAZILIAN TRANSGENDERED PROSTITUTES (1998); ANNICK PRIEUR, MEMA'S HOUSE, MEXICO CITY: ON TRANSVESTITES, QUEENS, AND MACHOS (1998).

64. *Reyes-Reyes*, 384 F.3d at 785.

65. The specific breadth to which the court construed "particular social group" in *Hernandez-Montiel* was likely further obfuscated by the special concurrence entered by Circuit Judge Brunetti, who specifically disparaged the "broad reasoning used by the majority in reaching its conclusion." *Hernandez-Montiel*, 225 F.3d at 1099 (Brunetti, J., concurring). The concurrence supported only the conclusion that "gay men with female sexual identities constitute a particular social group for asylum purposes." *Id*. *See* Hanna, *supra* note 58, at 914–15.

> [T]he BIA recently denied the asylum application of a thirty-three-year-old gay man, Jorge Soto Vega, adopting in full the opinion of the immigration judge (IJ). While accepting that Soto Vega was homosexual, the IJ reasoned that he was not stereotypically gay enough to objectively fear identification as such, remarking that "I didn't see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays." . . .
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> Jorge Soto Vega freely admitted his homosexuality in both the United States and his native Mexico but, in the eyes of the IJ, skillfully concealed his orientation on a day-to-day basis—in essence, by acting "normal" rather than "queer." . . .
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> The case employs elements of the reasoning used in the landmark decision *Hernandez-Montiel v. INS*, in which the Ninth Circuit distinguished between subsets of the Mexican homosexual population.

Id.

was narrowly cast to encompass only 'gay men with female sexual identities in Mexico,' *Hernandez-Monteil* clearly suggests that *all* alien homosexuals are members of a 'particular social group' within the meaning of the INA."[66] Given this clear statement, the Ninth Circuit has provided social group membership for all alien homosexuals seeking asylum in the United States.[67]

While the Ninth Circuit's progressive construction of "particular social group" is favorable to sexual minority asylum seekers, the Third Circuit's interpretation may be even broader.[68] In *Amanfi v. Ashcroft*, an asylum claimant advanced the original argument that he faced persecution not on account of his sexuality, but on his persecutors' belief that he was a homosexual.[69] The applicant, a Christian, heterosexual man from Ghana, was kidnapped, along with another man, and held captive.[70] The applicant observed that a bloody idol had been situated in the room where the two men were being held and that other ritual preparations had been performed. As a result, the applicant came to believe that he and his co-captive were being readied for a human sacrifice.[71] Knowing that his captors would find homosexuals to be unfit for sacrifice, the applicant convinced the other captive to engage in a homosexual act with him in an attempt to frustrate his captors' intentions.[72] When the applicant's captors returned and discovered what the two men had done, they took them both to a police station and denounced them as homosexuals.[73] The police then publicly beat and tortured the two men.[74] The applicant managed to escape from the police and traveled to the United States on a fraudulent passport.[75] The Third Circuit held that, although the applicant was not a

66. Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (citations omitted). Until this relatively recent decision, and given the extremely limited number of precedential decisions in this area of law, BIA decisions had followed this narrow construction of "particular social group," excluding gay men, particularly from Latin America, who did not exhibit female sexual identities. *See, e.g.*, Hanna, *supra* note 58 (arguing that the BIA has adopted elements of these decisions to deny asylum to a gay man with a male sexual identity).

67. *See supra* note 65. *Karouni* thus directly rebuts Brunetti's special concurrence in *Hernandez-Montiel*, reaffirming that, following *Toboso-Alfonoso*, gay men and lesbian women constitute a "particular social group" for the purposes of asylum claims. To some extent, this recent decision may alleviate some of the concerns raised by Hanna, *supra* note 58.

68. *See* Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

69. *Id*. at 721.

70. *Id*. at 722–23.

71. *Id*. at 723. Applicant, though Christian and not a practitioner of traditional religious practices, had relatives who familiarized him with the native religious beliefs practiced in his homeland.

72. *Id*.

73. *Id*.

74. *Amanfi*, 328 F.3d at 723.

75. *Id*. The other captive held with applicant, however, did not fair nearly so well. According to

homosexual, the fact that his persecutors believed that he was qualified him as a member of a "particular social group" when this belief formed the basis of his persecution.[76] The court remanded the applicant's claim for further proceedings consistent with their holding.[77]

These circuit court holdings provide robust support for gay applicants to claim membership in the "particular social group" of persecuted homosexuals. Following the very recent *Karouni* decision, the Ninth Circuit in particular has explicitly eliminated any doubt that all alien homosexuals constitute a protected class when facing persecution.[78] Additionally, in making a direct statement in *Karouni* that the holdings in *Hernandez-Monteil* and *Reyes-Reyes* applied to alien homosexuals generally, the Ninth Circuit eliminated any lingering doubt that other gay subgroups, such as lesbian women or masculine-identified bisexual men, could also meet the standard for group membership.

Although the *Karouni* decision expanded on earlier, more limited definitions of "particular social group" applicable to sexual minorities, these earlier definitions may be useful for transsexual or gender-non-conforming applicants attempting to seek asylum. Following these decisions, critics have derived two avenues by which transsexual claimants could make successful claims. First, following *Hernandez-Monteil* and *Reyes-Reyes*, transsexual behavior could be argued to be a manifestation of homosexual identity in cases where applicants self-identify as homosexuals.[79] Second, the imputed identity theory argued in

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the applicant's testimony, the co-captive died as a result of beatings he received at the hands of the police. *Id*. The court details the abuse the two men received and the claimant's escape from the police:

> At the station, the police informed the public that Amanfi and Kojo were homosexuals, and Amanfi stated that a "big crowd" came to look at them because they were naked and he feared that he would be attacked. He explained that he knew from witnessing prior public torture of homosexuals that his life was endangered.
>
> Amanfi averred that the police beat him and Kojo daily until Kojo died when he fell and a policeman "stepped on his testicles." After more than two months of such treatment in police custody, Amanfi managed to escape when the station was largely empty due to the need for police coverage at polling places on an election day.

Id.

76. *Id.* at 727–30. Further, the Ninth Circuit, in a recent, unpublished opinion, has specifically upheld the "imputed gay identity" theory advanced by *Amanfi*. Pozos v. Gonzales, 141 Fed. App'x 629, 632 (9th Cir. 2005). In *Pozos*, although the applicant "maintain[ed that] he is not a homosexual," *id.* at 633 (Kozinski, J., dissenting), the court found he was perceived to be homosexual and, as a result, had suffered physical abuse by the police. *Id*. at 632 (majority opinion). Therefore, the applicant was eligible for asylum. *Id*.; *but see id.* at 633 (Kozinski, dissenting) (refusing to grant applicant's claim on an imputed identity theory). Aside from *Pozos*, no other reported cases have applied an "imputed identity" theory to sexual minority claimants.

77. *Amanfi*, 328 F.3d at 730.

78. *See Karouni*, 399 F.3d at 1172.

79. For considerably more detailed treatment of this option, see Victoria Neilson, *Uncharted*

Amanfi may also be useful to transsexual applicants. Even if transsexual applicants do not self-identify as homosexuals, their dress and mannerisms may cause them to be perceived by others as homosexuals.[80] In this way, any persecution they have suffered could be argued to be a response to their imputed homosexual identity, thus permissible as grounds for asylum.[81]

B. Still-existing Challenges Faced by Sexual Minorities in U.S. Asylum Claims

Despite generally positive precedents in American law for asylum claims by sexual minorities, critics have faulted the immigration and asylum system for perpetuating the same sorts of biases that have traditionally worked against sexual minorities in other arenas. In particular, critics have argued that the U.S. asylum system should concern itself with ameliorating systemic biases against lesbian and gender-conforming gay male claimants.

First, lesbian asylum claimants may be disadvantaged relative to their gay male counterparts in establishing asylum claims due to different cultural expectations for women.[82] On account of their gender, the type of

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Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims, 32 FORDHAM URB. L. J. 265 (2003). Neilson references the court's decision in *Hernandez-Montiel*:

> The court reasoned that, "Geovanni's female sexual identity must be fundamental, or he would not have suffered this persecution and would have changed years ago." The court conflated his "female sexual identity" with his sexual orientation in concluding that "this case is about sexual identity, not fashion. . . . Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women." In classifying Hernandez-Montiel's female appearance as a manifestation of his sexual orientation, it no longer mattered whether he was persecuted because he was gay or because he dressed as a woman. By placing both characteristics under the established sexual orientation ground for asylum, the court was able to offer Hernandez-Montiel relief based on his suffering for either or both aspects of his identity.
>
> Reading (not very hard) between the lines of the Hernandez-Montiel decision, it is apparent that the applicant was a transgender individual . . . .
>
> Hernandez-Montiel is an important bridge to other cases involving claims by individuals who push the boundaries of sexual identity. Hernandez-Montiel's case was made somewhat easier by the fact that he identified as a gay man. Many transgender individuals do not self-identify as homosexual, however, and therefore would not feel comfortable defining their social group as "same sex sexual orientation with opposite sex sexual identities" as Hernandez-Montiel did. The question remains open then as to how an adjudicator would decide a case in which the applicant's claim is based solely upon transgender identity.

Id. at 280–81 (internal citations omitted). *See also* Landau, *supra* note 32, at 259–62.

80. *See* Neilson, *supra* note 79, at 281; *see also* Landau, *supra* note 32, at 260–62.

81. *See* Landau, *supra* note 32, at 262.

82. *See* Jenni Millbank, *Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation*, 1 SEATTLE J. FOR SOC. JUST. 725, 725–26 (2003).

persecution experienced by lesbians is much more likely to occur in private, as opposed to public, spheres.[83] This is especially true for women in developing countries, where traditional views as to what constitutes appropriate behavior for women may place limits on their access to the public sphere.[84]

This limitation arguably has two effects on lesbian asylum claimants. First, lesbian claimants may have more difficulty in establishing the (required) connection between the persecution they have experienced and the state.[85] Second, if women's activities are limited to the private sphere, lesbian claimants may have little to no contact with other non-family lesbian women.[86] As a result, these claimants may have difficulty establishing their "lesbianism" in the face of marginal experience in relationships with other women.[87]

In addition to biases facing lesbian claimants, gender-conforming claimants may face similar systemic obstacles. Perhaps relying too closely on *Hernandez-Monteil* and *Reyes-Reyes*, BIA hearings have increasingly required applicants to be visible as gay or lesbian to establish the potential for sexuality-based persecution.[88]

The BIA, in *In re Vega Soto*,[89] denied a Mexican gay man's claim for asylum, believing that he did not appear stereotypically gay enough to reasonably fear future persecution.[90] The court noted in its decision that it was unable to "see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things society assesses to gays."[91] In ruling against Soto Vega, the court seemed to limit the "particular social group" to those gays who personify stereotypes.[92]

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83. *Id*. at 726–28.

84. *Id*.

85. *Id*. at 727–28. Millbank notes that lesbian women more often experience persecution by their family members rather than by the state. As an example, Millbank notes a Bolivian lesbian's report of being harassed and sexually assaulted by her male relatives. *Id.* (citing RRT Reference N98/23425 (Refugee Rev. Trib., Austl. Apr. 28, 1999)). Because these attacks were made by family members and not state officials, the Australian tribunal deciding the claim found the persecution the claimant experienced was a private matter that affected only a family and not a "particular social group" for purposes of asylum. *Id*.

86. *See* Neilson, *supra* note 48, at 437.

87. *Id*.

88. *See* Hanna, *supra* note 58, at 916–17.

89. No. A-95880786 (B.I.A. Jan. 27, 2004), *cited in* Hanna, *supra* note 58, at 914.

90. Hanna, *supra* note 58, at 914–15.

91. *Id*. at 914, citing *In re* Soto Vega, No. A-95880786 (Immigr. Ct. Jan. 21, 2003), at 3.

92. Hanna, *supra* note 58, at 919–20.

The decision *In re Soto Vega* has several troubling implications. First, the decision overlooks the possibility that fear of persecution may lead lesbians and gay men to avoid enacting stereotypes.[93] Some empirical evidence suggests that gays in repressive societies have abandoned marked gay behavior in fear of discovery.[94] In fact, fear-inspired avoidance of gay traits or acts has been held to be a form of persecution in and of itself.[95] Further, in holding that individual sexual minorities can visibly manifest their sexual-orientation differently, being either more or less visible through their appearance and mannerisms, the decision contradicts the view that, for the purposes of asylum law, the construction of "particular social groups" is a fundamentally immutable classification.[96]

C. Impact of U.S. Legal Barriers to Sexual Minority Asylum Applicants' Unification with Their Same-Sex Partners

In addition to the systemic biases that face sexual minority applicants for asylum individually, immigration jurisprudence in the United States, fueled by the general hostility in American law towards recognition of same-sex relationships, is also inhospitable towards the families of sexual minority claimants.[97] If an asylum applicant has been granted asylum or withholding of removal in the United States,[98] after maintaining his or her status for one year, such an individual may apply to become a lawful permanent resident of the United States.[99] Individuals who have successfully achieved designation as lawful permanent residents can then petition the BIA to obtain visas allowing their foreign spouses to come to

93. *Id*. at 917–18.

94. *Id*. Hanna describes this behavior as homosexual covering, "the process by which gay individuals alter their conduct by, for example, displaying only gender-typical traits to allow others to ignore their sexual orientation." *Id*. at 915, citing Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002). Hanna speculates that sexual minorities may experience proportionately greater pressure to cover in cultures where persecution towards gays and lesbians is particularly severe. Hanna, *supra* note 58, at 917.

95. Hanna, *supra* note 58, at 918, citing Appellant S39/2002 v. Minister for Immigration & Multicultural Affairs (2003), 2003 A.L.R. 112, 117 (Austl.).

96. Hanna, *supra* note 58, at 919–20.

97. *See, e.g.*, Bonnie Miluso, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 GEO. WASH. INT'L L. REV. 915 (2004).

98. *See supra* Part II.A.

99. Blythe Wygonik, Comment, *Refocus on the Family: Exploring the Complications in Granting the Family Immigration Benefit to Gay and Lesbian United States Citizens*, 45 SANTA CLARA L. REV. 493, 502 (2005), citing RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAWS: CASES AND MATERIALS 41–42 (3d ed. 2000).

the United States.[100] Same-sex spouses of lawful permanent residents, however, are excluded from this provision; in effect, grants of asylum to sexual minority applicants have the perverse effect of separating them from their families.[101]

While the INA[102] does not specifically define "spouse," the federal Defense of Marriage Act (DOMA)[103] has limited the meanings of "marriage" and "spouse" within the context of rulings, regulations, or interpretations by agencies of the United States.[104] As a result, the BIA must interpret "marriage" within the context of the INA to mean "a legal union between one man and one woman as husband and wife,"[105] and "spouse" to mean "a person of the opposite sex who is a husband or wife."[106] DOMA, therefore, explicitly prevents lawful gay or lesbian permanent residents from obtaining the visas necessary for their same-sex spouses to come to the United States.[107]

In addition to the burden this exclusionary policy places on sexual minority asylum applicants and their families, it may have a broader effect on the American landscape. Gay and lesbian professionals faced with the prospect of separation from their same-sex partners after their emigration to the United States are choosing instead to relocate to other jurisdictions to ensure the preservation of their families.[108]

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100. 8 U.S.C. § 1151(b)(2)(A)(i) (2000), cited in Sara A. Shubert, Comment, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immigration Act*, 74 TEMP. L. REV. 541, 541 (2001). In fact, Congress' ostensible basis for its immigration policy is a desire to keep families unified. *See* Christopher A. Dueñas, Note, *Coming to America: The Immigration Obstacles Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 814 (2000).

101. The problem is made all the more poignant because the INS does recognize, although somewhat limitedly, same-sex partners. *See* Shubert, *supra* note 100, at 551. Foreign nationals residing in the United States on non-immigrant visas are allowed to obtain visitor visas for their same-sex partners under B-2 status, which permits visitors for pleasure. *Id*. These visas allow a same-sex partner of a non-immigrant worker to live in the United States throughout his or her partner's residency here. *Id*. An asylum claimant who has been designated a lawful permanent resident, by contrast, cannot obtain such a visa.

102. 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

103. 1 U.S.C. § 7 (2000).

104. *Id*.

105. *Id*.

106. *Id*.

107. Even prior to the enactment of DOMA, federal courts had held that same-sex marriages do not confer the right to petition for a spouse's visa under immigration law. Adams v. Howerton, 673 F.2d 1036, 1039–41 (9th Cir. 1982).

108. *See* Dueñas, *supra* note 100, at 832. Canada, with its federal recognition of same-sex marriage, has become an increasingly popular immigration destination for gay and lesbian couples. *Id*. Critics have dubbed this phenomenon Canada's "gay gain." *Id*.

IV. COMPARATIVE DEVELOPMENTS IN GLOBAL ASYLUM LAW FOR SEXUAL MINORITIES

Although in many ways American asylum jurisprudence is highly progressive, especially as it relates to claims by sexual minorities, a comparison with the asylum law of other jurisdictions is illustrative of further advances in policy that the United States could strive to emulate.

A. Canada

Canada's progressive asylum policies lead the world in inclusiveness for sexual minorities. On January 6, 1992, two hearing judges of Canada's Immigration and Refugee Board granted asylum to an Argentinean homosexual fearing persecution in his homeland on account of his sexual orientation.[109] In doing so, Canada became the first jurisdiction in North America to offer sexual orientation-based asylum.[110] Critics believe that this decision, recognizing sexual minorities as constituents of a persecuted social group, set an important international precedent and may have influenced the later American acceptance of this same idea.[111]

Importantly, from the initiation of its gay asylum jurisprudence, Canada has accepted sexuality as an immutable characteristic that either cannot be changed, or should not be made to change.[112] In 1995, in the strongest terms, Canada explicitly abandoned the policy—common in other countries' application of sexual minority asylum—that rejected asylum applicants who could avoid persecution by hiding their identity as a sexual minority.[113] In so doing, Canadian courts paved the way for the Ninth Circuit Court of Appeals to come to the same conclusion in *Hernandez-Montiel*.[114]

Perhaps most significantly, Canada formally includes gay and lesbian couples in its immigration and asylum law.[115] In many countries, and the

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109. Brian F. Henes, Comment, *The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes*, 8 TEMP. INT'L & COMP. L.J. 377, 387 (1994) (citing Moira Welsh, *Fear of Persecution Helps Gay Argentine Win Refuge*, THE TORONTO STAR, Jan. 11, 1992, at A3).

110. Henes, *supra* note 109, at 387. Before Canada, mainland European countries had paved the way for this idea, with both the Netherlands and Germany granting asylum to homosexual claimants who had been persecuted due to their sexuality in the late eighties. *Id*. at 383–85.

111. *Id*. at 387.

112. Catherine Dauvergne & Jenni Millbank, *Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh*, 25 SYDNEY L. REV. 97, 115 (2003).

113. *Id*.

114. *Id*. at 115–16.

115. Nicole La Violette, *Coming Out to Canada: The Immigration of Same-Sex Couples Under*

United States in particular,[116] even if a sexual minority claimant is granted leave to reside in the country, he or she is unable to sponsor his or her same-sex partner's application for residency.[117] For many sexual minorities, a grant of asylum has the perverse and cruel effect of permanently separating them from their loved ones and imposing a barrier to their partners' admission.[118] Even before gay and lesbian couples achieved recognition for their families when Canadian courts found that same-sex marriages were constitutional,[119] Canada had interpreted provisions of its immigration and asylum regulations to grant rights to same-sex partners.[120]

Prior to federal recognition in Canada of same-sex marriages, Canada empowered its visa officers with the discretion to admit the same-sex partners of lawful permanent residents on "humanitarian and compassionate grounds."[121] While this discretion has allowed access to the country for the same-sex partners of permanent Canadian residents for many years,[122] this provision was felt to "lack transparency, and . . . [to] result in arbitrariness and inconsistency."[123] Canada moved to resolve this policy problem with its adoption of the Immigration and Refugee Protection Act (IRPA)[124] on June 28, 2002.[125] IRPA offers recognition of "common law partners"[126] within its family classification, offering same-

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the Immigration and Refugee Protection Act, 49 MCGILL L.J. 969, 971 (2004).

116. *See* discussion *supra* Part III.C.

117. *See id*.; *see also* Dueñas, *supra* note 100, at 815–16.

118. Shubert, *supra* note 100, at 549–51.

119. Halpern v. Toronto (City), [2003] 65 O.R.3d 161 (finding that the Civil Marriage Act, a bill submitted by the Canadian government that extended marital rights to same-sex couples in Canada, was constitutional); *see also* Wygonik, *supra* note 99, at 502.

120. La Violette, *supra* note 115, at 976–80. La Violette recognizes that such policies are not perfect; in particular La Violette notes that, despite well-intentioned policies, discrimination still affects same-sex couples in the application of cohabitation requirements. *Id*. at 1002. La Violette argues that the Canadian immigration authorities should recognize the way near-universal discrimination and persecution faced by sexual minorities changes their relationships and be careful not to force conformity with heterosexual relationship models. *Id*. at 1003. *See also* Miluso, *supra* note 97, at 932–33.

121. Dueñas, *supra* note 100, at 831–32.

122. Miluso, *supra* note 97, at 932–33 (citing EGALE CANADA, EGALE SUBMISSIONS TO HOUSE OF COMMONS STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION RE: IMMIGRATION REGULATIONS pt. III.A.1 (Feb. 2002), http://www.egale.ca/index.asp?lang=E&menu=1&item=934).

123. Miluso, *supra* note 97, at 932.

124. Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 28 (Can.), *cited in* Miluso, *supra* note 97, at 918 n.23.

125. Miluso, *supra* note 97, at 932.

126. "'A person who is cohabitating with a person in a conjugal relationship, having so cohabitated for a period of at least a year.'" Thomas v. Canada (Att'y Gen.) [2004] F.C. No. 812 (quoting the Employment Insurance Act, 1996 S.C., ch. 23, § 29(c) (Can.)) (*cited in* Wygonik, *supra* note 99, at 516 n.171).

sex partners who meet the cohabitation requirements of "common law partners" the same immigration rights as married couples.[127]

Additionally, Canada's very recent formal recognition of same-sex marriages has further expanded immigration rights for sexual minorities. In 2003, the Ontario Court of Appeal decided that denying the rights, responsibilities, and benefits of marriage to same-sex partners was unconstitutional.[128] This decision followed decisions from courts in two other provinces, the British Columbia Court of Appeal[129] and the Quebec Superior Court,[130] which likewise concluded that prohibitions on same-sex marriages were unconstitutional.[131] In the wake of these decisions, other Canadian provinces have begun issuing marriage licenses to same-sex couples.[132] Additionally, the Canadian Supreme Court evaluated the constitutionality of the Civil Marriage Act, legislation that would extend civil marriage rights to same-sex couples throughout Canada, and concluded that it was constitutional.[133] On July 20, 2005, the Civil Marriage Act passed into law, legalizing same-sex marriage in Canada.[134]

As a result of this legislative acceptance of same-sex marriage, immigration rights for sexual minorities in Canada have further expanded. Although, under IRPA, a lawful resident could sponsor his or her same-sex "common law partner" for immigration, this classification required that the couple had lived together continuously for one year.[135] Same-sex couples who are married under the Civil Marriage Act can effectively eliminate the cohabitation requirement.[136] Marriage confers an additional benefit to same-sex couples: where a conjugal partner can only immigrate conditioned on his or her being in a relationship with a Canadian citizen or a permanent Canadian resident, a spouse can be included as a dependent of an individual who is currently applying to immigrate.[137]

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127. *Id*. For a significantly more in depth discussion of IRPA, see La Violette, *supra* note 115. La Violette argues that, despite Canada's progressive formal recognition of same-sex partners for immigration purposes in IRPA, the legislation assesses the genuineness of the same-sex relationships under traditional heterosexual models, imposing subtle but needless barriers that frustrate the policy's stated goals. *Id*. at 998–99.

128. Halpern v. Canada (Att'y Gen.), [2003] 225 D.L.R.4th 529, 573 (Can.).

129. EGALE Canada Inc. v. Canada (Att'y Gen.), [2003] 225 D.L.R.4th 472.

130. Hendricks v. Quebec (Att'y Gen.), [2002] R.J.Q. 2506.

131. Wygonik, *supra* note 97, at 516–17.

132. *Id*. at 517 (listing Yukon, Manitoba, Nova Scotia, Saskatchewan, and Newfoundland/Labrador).

133. *Reference re* Same-Sex Marriage, [2004] 3 S.C.R. 698.

134. 2005 S.C., ch. 33, § 1-4.

135. *See* Wyognik, *supra* note 97.

136. La Violette, *supra* note 115, at 994.

137. *Id*.

In sum, Canada's immigration jurisprudence as applied to sexual minorities is extraordinarily progressive, particularly in formally accommodating same-sex couples within its framework. Although critics have found its inclusion of sexual minorities and their partners less than perfect, Canada represents an excellent model for future innovations in U.S. immigration law.

B. Australia

Like Canada, Australia has long accepted gays, lesbians, and other sexual minorities within the rubric of "persecuted social group" for asylum claims.[138] Disappointingly, it was only within the last several years that Australia recognized that sexuality was an "immutable" characteristic,[139] which either could not or should not be changed to avoid persecution.

Prior to 2003, Australia had followed a "discretion" standard for asylum claims regarding sexual minorities.[140] Sexual minority asylum applicants were held to only have a well-founded fear of persecution if they acted out their sexuality openly.[141] If courts concluded that applicants could hide their sexuality by acting "discretely," their claims for asylum were denied.[142] In so holding, Australia rejected the jurisprudence of the rest of the common law world, which had earlier concluded that an individual's sexuality is an immutable and unchangeable characteristic.[143]

In late 2003, Australia's highest court of appeals explicitly rejected this "discretion" standard, granting asylum to a same-sex Bangladeshi couple, and bringing its jurisprudence in line with the rest of the common law world.[144]

Since its rejection of the "discretion" standard, Australia has made significant strides in accommodating sexual minorities in its immigration

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138. *See* Kristen L. Walker, *Sexuality and Refugee Status in Australia*, 12 INT'L J. REFUGEE L. 175, 179–81 (2000).

139. Christopher N. Kendall, *Lesbian and Gay Refugees in Australia: Now That 'Acting Discreetly' Is No Longer an Option, Will Equality Be Forthcoming?*, 15 INT'L J. REFUGEE L. 715, 723 (2003).

140. Dauvergne & Millbank, *supra* note 112, at 98–99.

141. *Id*.

142. *Id*.

143. *Id*. at 115–16. Specifically, Dauvergne and Millibank cite *Hernandez-Montiel*, 225 F.3d at 1094 (holding that sexual identity was a trait that cannot or should not be changed) and *Verwaltung Weisbaden* No IV/I E 06244/81 (Unreported, 26 April 1983), as summarized in Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381, 408–10 (1990) (holding that general consensus supports conception of homosexuality as an immutable characteristic).

144. Kendall, *supra* note 139, at 717.

and asylum law. Like Canada, Australia now officially recognizes same-gender partner immigration, allowing for a "Partner Interdependency Visa."[145] According to Australia's Department of Immigration Multicultural Affairs (DIMA), interdependent relationships include, but are not limited to, same-sex couples in which both individuals are at least eighteen years old.[146] Concerned with fraud, the "Partner Interdependency" subclass of visas does impose a "genuine relationship requirement,"[147] mandating that the couple can objectively establish the existence of their relationship.[148] These restrictions very closely mimic the spouse category of traditional visas.[149] Specifically, in order for their relationship to qualify as interdependent, same-sex partners must meet three requirements:

> First, both partners must be at least eighteen years old. Second, the partners must "have a mutual commitment to a shared life." In other words, the relationship must be exclusive of any other spousal or interdependent relationships. Finally, the couple must have been in the relationship for the entire year immediately preceding their application.[150]

In evaluating the genuineness of an interdependent partnership, DIMA regards the cohabitation requirement as the most important of the three factors.[151] Implicitly recognizing the special obstacle a cohabitation requirement would present to certain same-sex couples, DIMA may waive this requirement where applicants can demonstrate "compelling or compassionate circumstances" which merit such a waiver.[152] DIMA has

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145. Miluso, *supra* note 97, at 930 (citing Australian Migration Regulations, 1994, reg. 1.09A (Austl.)).

146. Miluso, *supra* note 97, at 930.

147. *Id*.

148. *Id*.

149. *Id*.

150. Dueñas, *supra* note 100, at 828.

151. *Id*. Dueñas also lists residual factors that influence DIMA's evaluation of the genuineness of a interdependent partnership. Specifically,

> [K]nowledge of each other's personal circumstances; financial aspects of the relationship, such as any joint ownership of real estate, joint bank accounts or other major assets; the nature of the household including living arrangements such as joint residential receipts or joint household accounts; the social aspects of the relationship, provided in statements (i.e., statutory declarations) by parents, family members, relatives, friends and other interested parties; joint membership of organisations or joint participation in sporting, social or other activities; and joint travel.

Id.

152. *Id*.

recognized the existence of such circumstances where discriminatory laws in the country where the applicants lived did not permit cohabitation.[153]

In thus having removed its "discretion" standard for sexual minority asylum applicants, Australia has tacitly recognized that the sexual identities of gays and lesbians are immutable characteristics that either cannot or should not be altered.[154] In doing so, Australia has brought its immigration and asylum jurisprudence in line with the Western world.[155] Furthermore, in taking steps to accommodate the same-sex partners of gay and lesbian asylum applicants, Australia has progressed considerably towards a holistic policy, which removes barriers that had kept sexual minorities from being treated similarly to other persecuted groups.

V. COMPARATIVE ANALYSIS OF A HYPOTHETICAL SEXUAL-ORIENTATION PERSECUTION CLAIM

In an effort to determine the comparative responsiveness of the asylum and immigration law in the United States, Canada, and Australia to the needs of a claimant persecuted on account of their status as a sexual minority, this Note analyzes a hypothetical claim under the legal precedents discussed above, in Parts III and IV.

Abdurrashid is a nineteen year-old residing in a developing nation that has exceedingly strict law that applies religious rules for both secular and religious disputes. The government strongly condemns homosexuality, arresting and punishing gays and lesbians. Recently, these governmental crackdowns have become more intense, with gay men taken into custody, tried, and executed.

Abdurrashid grew up in an affluent upper middle class family. His family is traditional and observant of the strict religious laws that govern individuals of both sexes. For some time Abdurrashid has been attracted to other men but has attempted to conceal these feelings from his family, whom he believes would react violently if they knew.

Abdurrashid has had an intimate relationship with another young man, Tawfiq, a classmate since childhood, for several years. The two young men are extremely devoted to each other and have vowed to remain committed for the rest of their lives. Despite the intensity of their feelings for each other, cultural regulations on behavior make it impossible for the

153. *Id*.
154. Kendall, *supra* note 139, at 723.
155. *Id*.

two unrelated men to live together; Aburrashid has a small apartment, while Tawfiq lives with his family in his father's home.

Within the past year, Abdurrashid and Tawfiq have begun secretly meeting with a clandestine group of other gay men. Over the course of the last several months, the two have attended several small, private gatherings. One such gathering, unattended by either Abdurrashid or Tawfiq, was raided by the police. All the men in attendance were jailed, tortured, and interrogated in hopes that they would provide names of other homosexuals. One of the detained men did not return from police custody; Abdurrashid believes he was killed. Tawfiq later learned from one of his friends, who had been arrested, that he and Abdurrashid had been "outed" to the police as homosexuals.

Two days later, members of the police arrived at Abdurrashid's apartment. The police attempted to arrest him, ordering him to confess to his crime of homosexuality and to disclose the names of other men he knew to be gay. An armed neighbor and another friend prevented Abdurrashid's arrest, but as the police left, they threatened him with homophobic slurs.

Abdurrashid believed that both he and Tawfiq were in serious danger if they remained in their homeland. Abdurrashid convinced Tawfiq to flee the country immediately. Given their haste to leave, Tawfiq was unable to obtain documents necessary to procure a visa. After the two escaped their homeland together, they were forced to separate, with Tawfiq temporarily staying with distant cousins in a European country, where he has dual-citizenship.

A. Claim in the United States

If Abdurrashid managed to escape his homeland for the United States, he would have a cognizable claim for asylum. Evidence of the police threats and the raid on Abdurrashid's apartment would support his fear of future persecution. Additionally, the police officers' use of anti-gay slurs and their targeting of known gays could establish that the basis for this persecution was Abdurrashid's membership in the "particular social group" of alien homosexuals, which the court recognized in *Karouni*.[156]

Assuming that Abdurrashid was able to obtain asylum within the United States, he and Tawfiq would be unable to be together. After attaining asylum, if Abdurrashid were to maintain that status for one year,

156. 399 F.3d 1163 (9th Cir. 2005); *see* discussion *supra*, Part III.A.

he could then apply to become a lawful permanent resident of the United States. Permanent residents with opposite-sex spouses may petition the BIA to obtain a visa which would allow their foreign spouse access to the country. Because both legislative and judicial interpretation have excluded same-sex partners from the definition of "spouse," Tawfiq would likely be unable to enter the United States.

B. Claim in Canada

As in the United States, Abdurrashid has a strong claim for asylum in Canada as a persecuted sexual minority. Because Canada has long recognized gays and lesbians as a "particular social group" whose persecution constitutes an asylum claim, Abdurrashid's story would likely establish his asylum claim.

Unlike in the U.S., under favorable Canadian law, Abdurrashid and Tawfiq have the possibility of being together. After Abdurrashid has successfully obtained asylum, IRPA would allow him to sponsor Tawfiq for immigration, subject to Tawfiq's meeting the requirements for "common law partner," notably the requirement that they had cohabitated together throughout the previous year.

This otherwise significant obstacle can be overcome now that same-sex marriages have been accepted by Canadian courts and legislators. Because Canada will marry individuals who are not Canadian citizens, if Tawfiq could obtain a visa to visit the country, the two men could be married. As the spouse of Abdurrashid, an individual currently applying to immigrate, Tawfiq could be included as a dependent.

In this way, Canadian immigration and asylum law, coupled with Canada's progressive approach to same-sex marriage, may offer Abdurrashid not only asylum, but the potential to be together with Tawfiq.

C. Claim in Australia

As in Canada and the United States, Australian law recognizes sexual minorities such as Abdurrashid and Tawfiq as part of a "particular social group" whose persecution can form the basis for an asylum claim. Following its recent rejection of the "discretion" standard, Australian courts have recognized that sexual identity is an immutable characteristic that either cannot or should not be altered to avoid persecution. As a result, Abdurrashid's claim for asylum has a good chance of success.

Australia's recognition of same-sex partner immigration, and specifically the availability of a "Partner Independency Visa," may offer

Abdurrashid and Tawfiq the possibility of being together. The Australian agency controlling immigration has included same-sex partners within its definition of interdependent partners. The claimant partners meet the "genuine relationship requirement," which considers cohabitation to be a major factor of genuineness. However, Australian law also recognizes the difficultly this requirement presents to certain same-sex couples and allows waiver if the applicants can demonstrate "compelling or compassionate circumstances." The conditions in their repressive homelands may meet such criteria.

Disappointingly for Abdurrashid and Tawfiq, however, Australian law only makes partnership interdependency visas available when one of the two same-sex partners is an Australian (or New Zealand) citizen.[157] Unlike Canada, Australia has not yet recognized marriages for same-sex couples, limiting Abdurrashid's options for bringing Tawfiq with him to the country.

VI. CONCLUSIONS

Although the United States has been highly receptive to the asylum claims of persecuted sexual minorities—particularly in light of the recent *Karouni* decision's explicit inclusion of alien gays and lesbians as members of a "particular social group" for asylum claims—the American immigration system still falls short of ideal protection for sexual minorities, especially in contrast to the jurisprudence in other common law nations. In particular, the American system has notable and specific biases leveled against lesbian claimants whose experiences, more likely to be "private" than similarly situated gay men, may disadvantage their claims. Additionally, American immigration law should be cognizant of systemic challenges facing gender-conforming gay male asylum claimants, who, lacking outward signifiers of homosexuality, may have difficulty establishing their objective fear of future persecution.

Taking a cue from other common law jurisdictions, American asylum law would also greatly benefit from a recognition and acceptance of not only sexual minority applicants, but also their same-sex partners.[158] Overall, however, the United States and other common law jurisdictions

157. Dueñas, *supra* note 100, at 828.

158. Importantly, consistency and fairness in the American system could also be significantly improved if decisions by the BIA were more readily available and published more frequently; with electronic publishing an increasingly available option, implementing such a scheme would be highly feasible. *See* Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 698–99 (2004).

have made significant progress in the area of asylum for sexual minorities and could provide essential support for claimants at risk in increasingly volatile and inhospitable cultural climates.

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