More than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims

Monica Saxena

Voting Rights Project

Follow this and additional works at: https://repository.law.umich.edu/mjgl

Part of the Human Rights Law Commons, Immigration Law Commons, and the Sexuality and the Law Commons

Recommended Citation


Available at: https://repository.law.umich.edu/mjgl/vol12/iss2/3

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.¹

INTRODUCTION • 332

I. PERSECUTION OF SEXUAL MINORITIES: A WORLDWIDE PHENOMENON • 333
   A. Legally Sanctioned Persecution Because of Sexual Minority Status • 333
   B. Persecution by the Government for Mixed Motives • 334
   C. State Silence Equals Complicity in Persecution • 335

II. THE REFUGEE CONVENTION: HISTORY AND SUBSEQUENT STATE PRACTICE SUGGEST A LIBERAL INTERPRETATION OF ASYLUM LAW • 336
    A. History • 336
    B. The Western Influences Pervasive in the Drafting of the Geneva Convention Suggest a Flexible Interpretation of the Geneva Convention • 337
    C. Textual Interpretations of the Convention and State Practices Suggest that Refugee Status Should Be Granted for Persecution of Sexual Minorities Regardless of the Intent to Punish • 338

III. U.S. ASYLUM LAW: CONTEMPORARY STANDARDS • 340

* 2005–2007 Equal Justice Works Fellow, Voting Rights Project, Lawyers’ Committee for Civil Rights Under Law; J.D., The University of Michigan Law School, 2005; A.B., Smith College, 1998. This Article is dedicated to Northeastern University School of Law Professor Libby Adler who reminds me to be fearless in the face of abstractions while keeping one eye on the real and imperfect world.

A. Who Qualifies for Refugee Status? • 341
   1. Sexual Minorities and Asylum Law: Getting in Because You Are Gay • 342
   2. The Refugee Convention and U.S. Supreme Court Precedent • 344
B. Persecution: Early Definitions • 344
C. The Circuit Split: Does Persecution Require Punitive Intent? • 346

IV. An International Human Rights Context • 349
A. International Alternatives • 350
   1. Shah and Islam: Serious Harm and the Failure of State Protection Constitute Persecution • 350
   2. Horvath: Persecution Equals the Unavailability of State Protection • 352
B. Shifting the Focus to the Sufficiency of State Protection • 352
   1. Persecution as a Result of Failure of Government Protection • 353
   2. Integrating the “Sufficiency” or “Effectiveness” State Protection Standards into U.S. Asylum Law • 354

Conclusion • 357

Introduction

Until recently sexual minorities, those who identify as lesbian, gay, bisexual, or transgender, were invisible in modern refugee law. Facing harassment, abuse, and torture because of the way they choose to love, many sexual minorities are forced to flee their countries and seek refuge in the United States. Sexual minority asylum is particularly curious because, while U.S. law increasingly recognizes claims by gays seeking asylum based on anti-gay persecution, the American legal standards applicable to asylum are ill-equipped to deal with the unique challenge faced by sexual minorities. Under U.S. laws, whether one qualifies for asylum often pivots on the question of whether the persecutor intended to harm the potential asylee.

This Article asserts that the requirement in U.S. asylum law that requires an asylee to make a showing of persecutory intent is overly and especially restrictive in claims made by sexual minorities. This Article proposes that the U.S. adopt the asylum standards of New Zealand and Canada, where the focus is on the failure of government protection as opposed to a focus on persecutory intent. Such standards
are consistent with both the realities of persecution that sexual minorities encounter and the original impetus behind the Refugee Convention. Part I examines the different forms of persecution against sexual minorities. Part II outlines the history of the Refugee Convention, including various political influences that suggest a liberal interpretation of Convention standards. Part III discusses the current split among the circuit courts regarding whether punitive intent is required to show persecution, and argues that requiring such a showing is especially detrimental to sexual minority asylum claims. Part IV proposes an alternative standard based on New Zealand and Canadian law and argues that this standard more closely coincides with the original meaning of international refugee law.

I. PERSECUTION OF SEXUAL MINORITIES: A WORLDWIDE PHENOMENON

Worldwide, countries punish homosexuality as a violation of culture, public health, or morality. Indeed, it was not until the spring of 2003 that the U.S. Supreme Court abolished a Texas prohibition that criminalized same-sex sodomy. Abroad, the laws and punishments for engaging in homosexual behavior can be much more severe than they had been in the United States. The persecution of homosexuals falls into three categories: (A) legally sanctioned persecution because of sexual minority status in the form of case law, statutes, and codes that punish based on sexual conduct; (B) mixed-motive persecution in which the government persecutes sexual minorities for their sexuality but claims it is for an unrelated ground; and (C) government silence or failure to protect individual rights in the face of private persecution of sexual minorities.

A. Legally Sanctioned Persecution Because of Sexual Minority Status

The most extreme form of persecution of homosexuals occurs when the government legislates the punishment of individuals for their sexual lives. This can be in the form of laws against sodomy, legal prohibitions against same-sex marriage, or laws criminalizing only female sexual minorities.

Consider, for an example, Iran's laws and the case of Asylum Applicant 29. As a teenager, Applicant 29, an Iranian female, discovered she was gay. She started a secret affair with a fellow student. When her partner's parents learned of the relationship, her partner was committed to an institution and subjected to shock therapy treatments to cure her of homosexuality. The two women subsequently fled Iran because the punishment for a third conviction of homosexual behavior was death.

The case of Applicant 29 is merely one example of a global phenomenon of government-sanctioned violence against gays. Additional examples further illustrate the problem:

- Cuba: Homosexuality is illegal for both sexes. Article 303–9 of the Penal Code allows for one year of imprisonment for homosexuals who make "scandalous" displays of public affection.
- India: Male homosexuality is illegal and can result in a sentence of life imprisonment.
- Jamaica: Homosexuality is illegal for men under the Jamaican Penal Code. Convicted homosexuals can face up to ten years of imprisonment.

Such sanctioned and encouraged punishment continues to be a reality for many sexual minorities across the globe and often is not recognized for what it is: persecution on account of sexuality.

B. Persecution by the Government for Mixed Motives

Even when the government does not have explicit laws prohibiting homosexuality, gays and lesbians are still susceptible to violence because of their sexual orientation. Sometimes the government punishes the gay man or woman for his or her sexuality under the pretext of another rea-

3. To protect asylum applicants from further torture, they are referred to by case number as opposed to name or other identifying information. See Case Summary 29 available at http://cgrs.uchastings.edu/law/search.php.
4. Id.
5. Id.
6. Id.
7. Id.
9. Id.
10. Id.
This abuse, though not explicitly characterized as such, is often persecution because of the sexual minority status of the victims.

For example, in December 2000, Mexican prisoner and gay man Luciano Rodriguez Linares was taken from his cell for a drug test. Instead of drawing blood with a syringe, officers put fingers in his anus to draw blood. One officer told him, "If that's what you want, I'll give it to you."12

C. State Silence Equals Complicity in Persecution

In many situations, government silence in the face of private persecution is akin to state-sanctioned persecution. For example, Italian Minister of Foreign Affairs Rocco Buttiglione described homosexuality as a sin, yet the Italian government did not sanction him in any way. In the fall of 2004, Buttiglione was the leading candidate to become Italy's Representative of Justice and Home Affairs to the European Commission. In his confirmation hearings, Mr. Buttiglione said that if a legislative proposal were contrary to his moral principles, he would oppose it. Only after much protest by gay and human rights groups did Buttiglione withdraw himself from consideration for the nomination. Even though Buttiglione's nomination was ultimately unsuccessful, his story underscores a larger problem faced by gays and lesbians living under governments that do not affirmatively act in the face of such discrimination: such an attitude allows free license to those seeking to persecute gays and lesbians because they know the government will likely not prosecute or punish them for their actions.

The persecution is intensified when sexual minorities seek government protection and are further abused by government officials. When Katya Ivanova went to a Russian police station in 1997, police sexually

12. Id.
13. Id.
16. ILGA Files, supra note 14.
17. Id.
18. Amnesty International Publications supra note 1, at 6 (noting that "[o]fficial acquiescence allows LGBT violence to thrive"), 23–24 (discussing police brutality and noting that "[w]hen the victim belongs, or is perceived to belong, to a marginalized social group, officers are often able to act secure in the knowledge that their behaviour will not be investigated thoroughly, or indeed at all").
harassed her when she tried to file a complaint against her neighbors who assaulted her because she was gay. Over a period of months Ivanova was repeatedly called to the police station to discuss her case, and then raped. She feared more serious repercussions if she did not comply, saying, "I pray that I am granted asylum so that my nightmare can finally end."

Government silence or retaliatory action in the face of continuing abuse of sexual minorities is persecution and should be recognized as such.

II. The Refugee Convention: History and Subsequent State Practice Suggest a Liberal Interpretation of Asylum Law

The Geneva Convention on the Status of Refugees was initially drafted as a response to the overwhelming number of World War II refugees. Its history and text, and subsequent state practices suggest that the Convention was meant to be interpreted broadly and in response to changing circumstances. This section outlines the history of the Geneva Convention, focuses on the political factors that were influential in its drafting, and proposes that these same factors suggest a broad interpretation of Convention protections because the Convention is modeled on protecting individual rights. The section concludes with examples of regional refugee agreements, modeled on the Geneva Convention, that widen the category of protected individuals and show how these agreements imply a wider understanding of what constitutes a cognizable harm for granting asylum.

A. History

Article 1(A)(2) of the Geneva Convention on the Status of Refugees outlines the specific factors that must be established for refugee status. The Article does not explicitly include sexual orientation, but the historical influences underlying the Convention suggest that it should be recognized as a protected category. The Convention applies to a person who, "owing to a well-founded fear of being persecuted for reasons

19. Id. at 23.
20. Id.
of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”

Influences present in the drafting of the Convention can be traced to the early twentieth century and suggest a certain political bias that favors a broad interpretation. Europe, in particular, had a tradition of welcoming immigrants who did not want to move to the New World, because such individuals were seen as contributors to commerce and the intellectual life of the native community. The concept of refugee only became politically salient following the population displacements in the aftermath of two major political upheavals: (1) the 1917 Russian Revolution and subsequent civil war in which one million people fled Russia, and (2) the Turkish government's efforts to ethnically cleanse the country of its two million Armenians during World War I. Following these major population displacements, both the U.S. and European governments realized that they would have to respond to forced relocation with normative standards, and thus began drafting the Geneva Convention.

B. The Western Influences Pervasive in the Drafting of the Geneva Convention Suggest a Flexible Interpretation of the Geneva Convention

Prior to the Geneva Convention, no international obligation existed to protect those who were denied state protection from their home governments. Because of this absence of obligation, many non-European governments balked at assuming guardianship for individuals who were not their legal responsibility. Over time, however, refugee status began to be perceived as an individual right for persons trying to escape from injustice in or incompatibility with their home states.

25. Id.
27. Id. (discussing how socialist states wanted to limit refugee status and make those seeking what is not termed political asylum to seek refuge in states sympathetic to their political views, whereas the Western world wanted asylum to be based on a personalized evaluation of whether a state was limiting an individual's freedom or liberty).
because of their beliefs or actions. This specific Western-oriented conceptualization informed the drafting of the Geneva Convention insofar as refugee status was based on racial and religious human rights violations that were common in the Eastern world, and not socio-economic human rights violations which were more common in the Western world.

C. Textual Interpretations of the Convention and State Practices Suggest that Refugee Status Should Be Granted for Persecution of Sexual Minorities Regardless of the Intent to Punish

The same influence that pervaded the drafting of the Convention in 1951 suggests granting asylum for sexual minority abuse regardless of the intent to punish, because many actions such as sexual assault by police officers and laws criminalizing homosexual behavior are violations of individual rights. It may be beyond the scope and spirit of the Convention to grant asylum for all forms of abuse against sexual minorities, but refugee status should be given to those who suffer the most egregious forms of abuse, or abuse that is deemed to be persecutory. The earlier examples illustrate this point.

Recommendation E of the Convention reads:

THE CONFERENCE, EXPRESSES the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to person in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.

States have followed this mandate in two ways. First, acting in concert with other U.N. member states, they have expanded the definitions of the five protected categories to protect more forms of behavior, suggesting that the grounds for asylum protection under the Geneva

28. Id.
29. HATHAWAY, supra note 24, at 5. Also because prior to the 1967 Protocol which removed all geographical and temporal restrictions, refugee protection was only available to those fleeing their homes from an event occurring in Europe: World War II, the Convention is properly characterized as Eurocentric.
30. See discussion supra Part I.a.
Convention are flexible. For example, in 1977, U.N. member states attempted to draft a convention on territorial asylum. Although they were ultimately unable to reach consensus, there was an affirmative vote among the 92 participating member states to expand the protection under persecution for political opinion to include persecution incurred as a result of opposing colonialism or apartheid. Moreover, there was consensus that grounds for asylum should include persecution as a result of foreign domination or alien occupation. The idea that persecution for political opinion includes persecution for opposing colonialism or apartheid is the same type of ideology that drove the expansion of persecution of a particular social group to include persecution for homosexuality. The consensus that asylum should be granted for alien occupation or foreign domination suggests that the role ruling governments play in an individual’s persecution is important. Following this line of reasoning, persecution could be evaluated not using the intent to punish, but the failure of state protection. This standard has been adopted by other countries as discussed below.

States have also taken cues from Recommendation E when negotiating regional refugee protection arrangements. The first such arrangement was in 1969 by a group of African states collectively known as the Organization of African Unity. The Organization drafted a convention to address specific refugee problems among African nations and adopted the Geneva Convention definition of refugee status, with a caveat that included asylum regardless of the fear of persecution for man-made disasters.

A more recent convention adopted by ten Latin American states to address those fleeing generalized violence and oppression also recognizes that harm can be indeterminate. The 1984 Cartagena Declaration on Refugees gave refugee protection to those who “... have fled their

32. Their efforts were a direct response to the Convention’s failure to include any obligation beyond non-refoulment or the duty to avoid return of a refugee to a country where the refugee faces a genuine risk of serious harm. See also R. Plender, Admission for Refugees: Draft Convention on Territorial Asylum, 15 SAN DIEGO L. REv. 48 (1977) (discussing that states insisted that they be able to retain their right to determine who was granted admittance and who was allowed to permanently resettle within their border).
33. Id.
34. HATHAWAY, supra note 24, at 13–15.
35. Id.
37. Id.
country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which have seriously disturbed public order.” As of 2005, more than half of Latin American states have incorporated the expanded refugee definition of the Cartagena Declaration into their laws.

These agreements are significant for two reasons. First, both agreements were drafted in response to changing political and social conditions. Increasingly, sexual minorities worldwide are a political and social presence that advocates for equal rights. Their visibility may result in both exposing sexual minority persecution that was previously hidden, and creating a backlash that hastens increased persecution against sexual minorities. In either instance, the social conditions have changed to such an extent that there is precedent for amending current asylum protections to better address the needs of sexual minorities. Second, both the African Unity Convention and the Cartagena Declaration emphasize the generalized nature of the harm instead of focusing on the individual intent. Given the unique nature of persecution against sexual minorities discussed earlier, and that these contemporary interpretations of the Geneva Convention widen the category of who receives protection, some form of expanded protection (sans intent requirement) for sexual minority persecution is requisite.

III. U.S. Asylum Law: Contemporary Standards

Current U.S. asylum law does not incorporate such an expanded definition. As a result, a semantic conflict exists among the circuits regarding the definition, leaving many sexual minorities are left vulnerable to continued persecution. This section outlines the general requirements for asylum under U.S. law and then examines the historical developments in recognizing claims for refugee status based on sexual minority persecution. Finally, it explores the current split among the circuit courts as to whether an applicant trying to establish persecution must show that his or her persecutor acted with punitive intent.

39. Id.
Under the Immigration and Nationality Act (INA), asylum is granted at the discretion of the Attorney General. To qualify for asylum a person first must meet the legal definition of a refugee. Section 101(a)(42)(A) INA defines a refugee as:

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

Neither gender nor sexual orientation is a statutorily designated group in the INA. Thus, both women and sexual minorities attempt to meet asylum requirements under the "particular social group" category. What constitutes a particular social group? Because the INA has no specific definition of "particular social group", federal courts have looked to the Board of Immigration Appeals (BIA). The most influential decision interpreting whether a person qualifies for asylum as a member of a particular social group is a 20-year-old BIA decision, Matter of Acosta.

In Matter of Acosta, the BIA held that particular social groups shared a common immutable characteristic, stating:

The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should

44. Id. at 54.
not be required to change because it is fundamental to their individual identities or consciences.\textsuperscript{45}

The First, Third and Seventh Circuits subsequently adopted \textit{Acosta}'s immutability test.\textsuperscript{46} In 1998, the Ninth Circuit adopted a broader standard when it held that a particular social group could be defined by either a voluntary associational relationship among group members, or an innate characteristic fundamental to identities or characteristics of its members.\textsuperscript{47} This broader definition, more favorable to sexual minorities, is echoed in the Circuit's later asylum decisions.\textsuperscript{48}

1. Sexual Minorities and Asylum Law:
Getting in Because You Are Gay

The ability of sexual minorities to qualify for asylum under the particular social group category has been a relatively recent legal phenomenon, and as gay rights expand in other areas, the time for a broader definition of asylum is ripe. In \textit{Tobosco-Alfonso}, a 1990 case, the BIA upheld the grant of asylum to a Cuban gay man, and in doing so, recognized Cuban gay men as a persecuted social group.\textsuperscript{49}

Fidel Armando Tobosco said that because he was gay, he was sentenced to 60 days in a forced labor camp for missing one day of work.\textsuperscript{50} Threatened that if he did not leave immediately he would have to serve

\textsuperscript{45} Id. at 54–55.
\textsuperscript{46} See Ananeh-Firemoong v. INS, 766 F.2d 621, 626 (1st Cir. 1985) (holding that pursuant to \textit{Acosta}, family relations can be a particular social group); Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993)(holding that pursuant to \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984), the court was bound to accept the \textit{Acosta} standard because the BIA definition was a permissible construction of the Refugee Act and because Congress had not directly spoken to the issue); Lwin v. INS, 144 F.3d 505, 511–12 (7th Cir. 1998) (recognizing parents as a particular social group because they share a common immutable characteristic).
\textsuperscript{47} Compare Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that of central concern in determining particular social group was the presence of "voluntary association") \textit{with} Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) ("We thus hold that a 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.")
\textsuperscript{48} See Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (considering both Sanchez-Trujillo and Hernandez-Montiel and holding a family may constitute a particular social group for refugee status).
four years in the penitentiary for being a homosexual, Tobosco was forced to flee his native Cuba for the United States that very same day.\textsuperscript{51} The Immigration and Naturalization Service (INS) argued that homosexuality should not be considered a particular social group because recognition would give credence to socially deviant behavior and this was not within the scope of the Refugee Act.\textsuperscript{52} The BIA rejected this view and held that the INS had failed to show that homosexuality was not an immutable trait.\textsuperscript{53}

Four years later, the INS reversed its position in \textit{Tobosco-Alfonso} and formally recognized sexual minorities as a particular social group.\textsuperscript{54} Though the INS position represented a landmark change in asylum law, it had little to no precedential or persuasive value in the U.S. federal court system.\textsuperscript{55} \textit{Tobosco-Alfonso} was limited to relevant circumstances, and the INS never appealed the case at the circuit level. All of this changed with a June 19, 1994, mandate by the Clinton Administration, when Attorney General Janet Reno issued an order declaring that \textit{Tobosco-Alfonso} was to be considered precedent in all proceedings involving the "same issue or issues."\textsuperscript{56}

Because asylum proceedings are confidential, it is difficult to estimate with any precision the effect of Attorney General Reno's mandate. News reports indicate, however, that more than sixty homosexuals filed successful asylum claims in the two years following Reno's order.\textsuperscript{57}

Although Attorney General Reno's mandate can thus be considered a victory for sexual minorities seeking asylum because of persecution based on their sexuality, sexual minorities still face the legal hurdle of a circuit split as to whether they must show their persecutors intended to punish them. The U.S. Supreme Court will hopefully address this issue in the near future, as it has weighed in on a number of pressing refugee questions in the past.

\begin{itemize}
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} See Jennifer Warren, Asylum OK'd on Basis of Homosexuality, L.A. Times, Mar. 25, 1994 at A3.
  \item \textsuperscript{56} Attorney General Order No. 1895-94, June 19, 1994.
\end{itemize}
2. The Refugee Convention and U.S. Supreme Court Precedent

The Refugee Convention has given rise to some issues which have been debated at length in U.S. courts and clarified the U.S. asylum standard. One issue that is especially relevant to the present analysis is what constitutes a well-founded fear of persecution.

B. Persecution: Early Definitions

In *INS v. Cardoza-Fonseca*, the Court decided that both the victim's subjective interpretation and the external objective factors were relevant to the inquiry into what demonstrates a well-founded fear of persecution. Cardoza-Fonseca involved a thirty-eight-year-old Nicaraguan woman who claimed asylum on the basis of her political opposition to the Sandinistas. The Court held that, even if the actuality of persecution was one in ten, such statistics indicated a "well founded fear of persecution" and as such, the focus of the test was on the applicant's subjective beliefs. Cardoza-Fonseca's mixed subjective-objective use is relevant to sexual minority asylum claims because use of subjective, or victim-interpretation, criteria suggests that even when a country's intention is not to persecute, such actions can still be deemed persecutory. For example, as discussed in Part B of this section, sometimes countries abuse homosexuals in order to cure them, not to punish them.

Cardoza-Fonseca was a precursor to *Elias-Zacarias v. INS*. In the latter case, the Supreme Court elaborated on the subjective element of the Cardoza-Fonseca persecution standard and inadvertently set the groundwork for the current circuit split regarding intent. In January 1987, eighteen-year-old Elias-Zacarias was at home with his parents in Guatemala when two masked and armed men knocked at the door and pressured Elias-Zacarias and his parents to join the anti-guerrilla revolutionaries. When Elias-Zacarias and his parents refused, the guerrillas

---

58. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (holding that a well-founded fear is a fear that is both genuine and objectively reasonable. To be objectively reasonable, there must be some reasonable possibility of persecution, but persecution does not have to be more likely than not).
59. *Id.* at 424.
60. *Id.* at 431.
62. *Id.*
warned that they would continue their harassment of the family.\footnote{Id.} Fear-
ning for his safety, Elias-Zacarias fled his home and entered the United
States.\footnote{Id.} He was immediately arrested upon his arrival.\footnote{Id.}

Both the immigration judge and the BIA denied Elias-Zacarias asylum.\footnote{66. See 502 U.S. 478; Elias-Zacarias v. U.S. INS, 921 F.2d 844 (9th Cir. 1990).} The BIA first concluded that the guerrillas did not engage in forced recruitment.\footnote{65. Id.} Thus, the Board ruled that Elias-Zacarias was not reasonable in thinking that the guerrillas' statements that he should "think [the guerrillas' recruitment offer] over well" and the guerrillas' promises of continued threats were persecution.\footnote{64. Id.} The Ninth Circuit reversed, holding that the guerrillas did practice forced recruitment, and therefore Elias-Zacarias was reasonable in perceiving their statements as threats.\footnote{67. 502 U.S. 478 at 480.}

The INS appealed to the Supreme Court, arguing that Elias-
Zacarias had failed to produce evidence of the state of mind of the guer-
rillas as required under the Convention, because his state of mind was not relevant to the guerrillas' attempt to recruit him.\footnote{70. Reply Brief for Petitioner, INS v. Elias-Zacarias, 502 U.S. 478 (1990) (No. 90-1342). In its brief to the Court, INS argued that, "... where the applicant is punished for conduct without regard to his opinion, the punishment is for his act, not his opinion. It is the motivation for imposing harm that distinguishes persecution from all other forms of oppression." In an amicus brief, the U.N. High Commissioner for Refugees (UNHCR) disagreed, and argued that the statutory language "on account of political opinion" only required there be some nexus between the persecutors' political opinion and the feared persecution, and that requiring a showing of the persecutor's intent or state of mind went beyond the scope of the Convention.\footnote{72. Id.} The Supreme Court ultimately agreed with the INS position. Writing for the majority, Justice Scalia held that, although the Convention

\begin{quote}
64. Id.
65. Id.
66. Id.
68. 921 F.2d at 851.
69. 502 U.S. 478 at 480.
70. 921 F.2d 844 at 851–52.
72. Id.
73. Brief Amicus Curiae of the Office of the United Nations High Commissioner For Refugees in Support of Respondent, INS v. Elias-Zacarias, 502 U.S. 478 (1990) (No. 90-1342) (noting, "Nowhere does the definition of 'refugee' or the established analytic framework for determining refugee status contemplate that a showing of persecutorial intent is necessary to establish this nexus. Moreover, the conscious refusal to join a guerrilla group is a political act that places an individual in opposition to his recruiters and manifests an essentially political opinion.")
\end{quote}
did not require Elias-Zacarias to provide direct proof of the guerrillas' motivations in threatening him because motive was a critical part of the refugee definition, he must produce some evidence of his persecutors' motive whether direct or circumstantial. 74 Specifically, the Court held that because the phrase "persecution on account of" referred to the opinions held by the persecuted (and not the perpetrator) Elias-Zacarias had to show more than a generalized political motive in the guerrillas' recruitment efforts. Instead, to establish persecution, Elias-Zacarias would have to prove that he was being recruited for his political opinions. 75

This mandate of the Supreme Court—that the persecutors' motive is crucial to an asylum claim—has created much confusion within the BIA and circuit courts. The Court was not explicit in delineating what type of evidence is required to meet this standard. 76 As a result, in interpreting the exact meaning of "persecute," circuits have split as to whether the definition requires punitive intent or just a desire to hurt or harm the applicant, not necessarily to punish. With regards to sexual minorities, the question of whether punitive intent is required is especially pertinent because often the intent of the perpetrator is difficult to prove. This is for two reasons: first, the perpetrator is most likely absent from any asylum hearing, and second, as exhibited by the Linares situation where police officers sexually abused a gay man under the ruse of drawing blood for a drug test, the perpetrator can offer a non-protected reason for their actions. 77

C. The Circuit Split: Does Persecution Require Punitive Intent?

A leading Ninth Circuit case on this question of punitive intent exemplifies why a broader standard is needed to adequately protect sexual minorities. In 1992, thirty-five-year-old Alla Pitcherskaia, a Russian national, claimed asylum in United States. 78 Pitcherskaia claimed that she had been under Russian surveillance since the age of fourteen because her father, an artist and political activist, had been arrested and jailed for distributing anti-Communist literature. 79 As she grew older, Pitcherskaia was arrested three times, one of which was for failing to procure re-

74. 502 U.S. at 483–84.
75. Id. at 482
77. See supra note 11, at 4.
78. Pitcherskaia v. INS, 118 F.3d 641, 643 (9th Cir. 1997).
79. Id. at 644.
quired government permits for a gay-rights protest.\textsuperscript{80} Pitcherskaia's harassment by the government continued, including forced psychiatric counseling to "cure" her of her homosexuality.\textsuperscript{81} About one year before she left Russia, Pitcherskaia was arrested by the KGB and questioned about her participation with Coming Out, a gay political organization that advocated repealing a Russian statute criminalizing homosexual sodomy.\textsuperscript{82} On a visit to the United States, after learning that one of her former co-workers had been murdered by the Russian mafia, Pitcherskaia sought to remain in the United States.\textsuperscript{83}

An immigration judge denied Pitcherskaia's application for asylum and dismissed her appeal, finding that her fear of continued forced psychiatric treatment sessions did not constitute persecution because the government sought to cure her, not punish her.\textsuperscript{84}

On appeal to the Ninth Circuit, Pitcherskaia argued that the \textit{Elias-Zacarias} motive requirement was binding on her case only insofar as Pitcherskaia had to prove that the Russian government's actions were undertaken on account of one of the five protected grounds in the Convention.\textsuperscript{85} The Justice Department and the INS did not address the \textit{Elias-Zacarias} motive requirement, but did note that under Ninth Circuit precedent persecution was interpreted to require "unique punishment," meaning punishment based on one of the five original Convention grounds.\textsuperscript{86} The Ninth Circuit held that the definition of persecution was objective, and that although many asylum cases involved persecutors with a subjective punitive or malignant intent, this was not essential for a showing of persecution.\textsuperscript{87}

In its ruling, the Ninth Circuit made two statements that are seemingly curious in light of the Supreme Court's position in \textit{Elias-Zacarias}. First, the court states, "Neither the Supreme Court nor this court has

\begin{itemize}
\item \textsuperscript{80} Petitioner's Reply Brief, Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997), 1996 WL 33418857.
\item \textsuperscript{81} 118 F.3d at 645.
\item \textsuperscript{82} Brief for Respondent at 9, Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (No. 95-70887), 1996 WL 33418857.
\item \textsuperscript{83} Id. at 12.
\item \textsuperscript{84} Id. at 18–19.
\item \textsuperscript{85} Petitioner’s Reply Brief at 5–6, Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (No. 95-70887), 1996 WL 33418856.
\item \textsuperscript{86} Brief for Respondent at 23, Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (No. 95-70887), 1996 WL 33418857 (citing Abedini v. INS, 971 F.2d 188, 192 n.1 (9th Cir. 1993)).
\item \textsuperscript{87} Pitcherskaia, 118 F.3d 641 at 647 ("We have defined persecution as the infliction of suffering or harm upon those who differ in a way regarded as offensive," citing Sangha v. INS, 103 F.3d 1482 (9th Cir. 1997)); Sagermark v. INS, 767 F.2d 645, 649 (9th Cir. 1985).
\end{itemize}
construed the Act as imposing a requirement that the alien prove that her persecutor was motivated by a desire to punish or inflict harm.

The court cited a BIA decision in which a Togolese woman fleeing from forced female genital mutilation was deemed a refugee despite her persecutor's benevolent intentions. Also, the court noted that persecution is objective in the sense that "it turns not on the subjective intent of the persecutor, but rather on what a reasonable person would deem offensive." Why did the INS in Pitcherskaia not press the Elias-Zacarias motive requirement? Is it because the Court did mean "on account of" to not require punitive intent? One interpretation is that the holding of Elias-Zacarias is not so broad as to require motive to punish, but only that motive be shown insofar as there was intent to persecute based on one of the five protected grounds. Such an interpretation would deflect the persecution question away from intent and focus on the actual harm to the persecuted person. This interpretation, however, has yet to be adopted as the majority position in any jurisdiction. The consequence is that sexual minorities are often left unprotected under the Convention.

Other circuits have adopted the INS position. The Fifth Circuit's most recent elaboration of the Elias-Zacarias motivation standard was in 1994. In INS v. Faddoul, Elias Joseph Faddoul alleged that he was persecuted by the Saudi Arabian practice of jus sanguinis, granting citizenship rights only to residents of Saudi Arabian ancestry. Specifically, Faddoul alleged that as a non-citizen living in Saudi Arabia he would be unable to own property or businesses or attend certain schools, and this constituted persecution.

The Fifth Circuit affirmed the BIA's denial of Mr. Faddoul's asylum application and held that persecution required both a showing of the infliction of harm and intent to punish on one of the five protected Convention grounds. For sexual minorities, this is especially pertinent. As discussed earlier, while sexual minorities may be abused because of

88. Sagermark, 767 F.2d at 646.
89. Id. (citing Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996)).
90. Id. at 647 (internal quotations omitted).
91. See Gustavo Tecun-Florian v. INS, 207 F.3d 1107 at 1112 (9th Cir. 2000) (Ferguson, J., dissenting).
92. INS v. Faddoul, 37 F.3d 185 (5th Cir. 1994).
93. Id. at 188.
94. Id. at 187.
95. Id. at 188 ("While the INS does not prove a precise definition of persecution, we have construed the term as requiring a showing by the alien that harm or suffering will be inflicted upon her in order to punish her for possessing a belief or characteristic a persecutor sought to overcome" (citing Guevara v. Flores, 786 F.2d 1242, 1249 (5th Cir. 1986) (internal quotations marks omitted)).
their sexuality, the specific intent to punish is not always present, as in Pitcherskaia.

The Seventh Circuit has adopted a position in between that of the Fifth and Ninth Circuits. In Sivaainkaran v. INS, the court ruled that an asylum applicant could demonstrate persecution by a showing of either the persecutor's motivation to punish or, more generally, the infliction of harm for one of the five protected Convention grounds. Whether this test requires a specific intent to punish is debatable. The specific use of the term "punishment" suggests that, for the second requirement, "infliction of harm" punitive intent is not required. Earlier Seventh Circuit rulings offer some guidance on the question. In Osaghae v. INS, cited by the Sivaainkaran court, punitive intent was explicitly required for a showing of persecution. In contrast, Zalega v. INS, also cited in Sivaainkaran, defined persecution as "the infliction of suffering or harm upon those who differ (in race religion or political opinion) in a way regarded as offensive." The Seventh Circuit's definition comes from a 1970 case in the Sixth Circuit, a jurisdiction that has yet to address the question of punitive intent and uses the Webster's Dictionary definition of persecution.

Until the Supreme Court addresses the issue, many sexual minorities remain vulnerable to deportation and continued persecution. In the meantime, excepting the Ninth Circuit, the INS can invoke the Elias-Zacarias punitive intent requirement in cases before not only the Fifth and Seventh Circuits, but also in all other circuits that have not directly addressed the question.

IV. An International Human Rights Context

While the question of whether persecution requires punitive intent remains unresolved, many sexual minorities remain vulnerable to persecution and limited in their access to refugee protections under the Convention. Other countries with more expansive definitions of

96. 972 F.2d 161, 165 (7th Cir. 1992).
98. 942 F.2d 1160, 1163 (7th Cir. 1991).
99. 916 F.2d 1257 (7th Cir. 1990).
100. Id. at 1260. (internal quotation marks omitted).
101. Id. (citing Berdo v. INS, 432 F.2d 824, 846–47 (6th Cir. 1970).
persecution grant asylum to persecuted sexual minorities in accord with the intent of Convention.

Two active refugee courts, the United Kingdom's House of Lords and New Zealand's Refugee Status Appeals Authority, have established that refugee status pivots on surrogacy, the failure of state protection.\(^{102}\)

This section focuses on international standards for granting asylum and concludes with the suggestion that the U.S. adopt the New Zealand and Canadian standards, under which the sufficiency or effectiveness of state protection is the crucial factor in determining refugee status, because it is most in accord with the original impetus for the Refugee Convention.

\section*{A. International Alternatives}

\subsection*{1. Shah and Islam: Serious Harm and the Failure of State Protection Constitute Persecution}

\textit{Shah and Islam}, a 1999 House of Lords ruling, is a benchmark case in the legal development of the failure of state protection.\(^{103}\) The case involved two Pakistani women who sought asylum in the United Kingdom.\(^{104}\) The women claimed that because of false adultery charges, they would be subject to both criminal proceedings and private violence if they returned to Pakistan.\(^{105}\) Pakistani law allows for death by stoning or flogging for any woman found guilty of sexual immorality. A panel of the House of Lords found both women met the definition of persecution under the Convention.\(^{106}\) The House held that the violence the women faced was layered.\(^{107}\) First, if forced to return to Pakistan, they would face violence from their husbands.\(^{108}\) The House defined this as a quasi-private element.\(^{109}\) The second aspect of persecution would be that the women would not be able to seek protection from the state.\(^{110}\) Indeed, they would be subject to state-imposed punishment, a more

\begin{thebibliography}{99}
\bibitem{102} Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 74665/03 at 53, \textit{available at} http://www.refugeecaselaw.org.
\bibitem{104} \textit{Id.}
\bibitem{105} \textit{Id.}
\bibitem{106} \textit{Id.}
\bibitem{107} \textit{Id.}
\bibitem{108} \textit{Id.}
\bibitem{109} \textit{Id.}
\bibitem{110} \textit{Id.}
\end{thebibliography}
public element of violence. Moreover, in the case of Mrs. Islam, the House found that the legal and social conditions that existed in Pakistan and left her unprotected against violence by men were discriminatory against women. For the purpose of the Convention, this discrimination was the critical element in the persecution. Thus the House held that, while the state-imposed punishment was important, the failure of state protection was pivotal in asylum analyses. The House ruled that persecution comprised serious harm and the failure of state protection. In asking the question, “Why won’t the state protect you?” the Shah and Islam standard shifts the focus of the asylum claim away from the intent of the persecutor and towards the inaction of the state in protecting the applicant from persecution.

On a practical level, this is logical and more in alignment with both the original intent and subsequent interpretations of the Convention. During asylum proceedings, the persecutor is not present. Thus, an asylum judge must rely on the applicant’s testimony and corroborating evidence to determine why the persecutor acted the way he or she did. Because of the nature of asylum claims, where most often the victims have fled their home country, it is illogical to require such evidence. It is difficult, if not impossible, to produce such evidence because applicants are unable to bring it with them. Also, as discussed earlier, the Convention came from an understanding that asylum should be granted when there is a violation of individual rights. Looking at the failure of state protection focuses more on the effect on the victim and less on the persecutor’s state of mind. Finally, regional refugee agreements modeled on the Convention suggest a standard where asylum should be granted based on political or social conditions of sexual minorities regardless of the origin or intent of the persecution.

When considering the worldwide nature of discrimination based on sexual orientation, the Shah and Islam standard is adequate to protect many sexual minorities because it grants asylum protections where the government affirmatively imposes punishment for sexuality. Although Elias-Zacarias could also seemingly protect sexual minorities in this type of situation, because evidence of the government’s motives and intent could be the black letter law, this is not the interpretation adopted by U.S. courts. In contrast, the Shah and Islam standard explicitly expands the protection to those sexual minorities who, for practical

111. Id.
112. Id.
113. Id.
114. See supra pp. 6–8.
115. See supra pp. 21–22.
reasons, cannot get evidence of intent, or who face persecution by private actors from whom the government fails to provide protection. Ultimately, however, the Shah and Islam standard is under-protective. Query what happens when the intent of the government is not explicit in the form of anti-gay laws, or is not masquerading as some other legal prohibition. This is where Shah and Islam does not go far enough to protect sexual minorities. It leaves vulnerable the scores of sexual minorities who are persecuted because they are gay; they are not eligible for asylum because the government can offer a plausible alternative explanation for their treatment.

2. Horvath: Persecution Equals the Unavailability of State Protection

A more recent House of Lords case clarified the Shah and Islam standard and in doing so extended the protections afforded to sexual minorities. In Horvath v. Secretary of State for the Home Department, a gypsy claimed persecution by skinheads. The court ruled that persecution, as understood in the Convention, “implied a failure by the state to make protection available against the ill-treatment or violence which had been suffered at the hands of the persecutors.” The court later noted that the failure of state protection is central to any asylum claim.

Horvath’s dictum underscores a concern specific to the case of sexual minorities. While the Horvath standard does broaden the parameters of cognizable asylum claims, it is still not enough because the standard pivots on the availability of state protection. Many times, especially for the persecution of sexual minorities, even though state protection may be available in theory, it is not a viable option in practice. The case of Katya Ivanova, discussed earlier, is only one example of many where the availability of government protection is a mere façade.

B. Shifting the Focus to the Sufficiency of State Protection

As illustrated above, for some cases of violence against sexual minorities, both the Elias-Zacarias intent-based standard and weighing the availability of the government protection are insufficient to fully address the unique characteristics of gay persecution. Limiting the persecution

---

117. Id. (emphasis added).
118. Id. (citing Hathaway, supra note 24, at 135).
119. See Amnesty International Publications supra note 1, at 23.
inquiry to intent is not only ambiguous, but hinges the asylum claim on evidence that is often unavailable. Using the Horvath standard is also inadequate because it does not account for the situations where state protection is available only in theory, not in practice.

To date, New Zealand and Canada are two countries that have adopted the most progressive standards for determining persecution. Both have adopted the two-tiered persecution standard first articulated in Shah and Islam, but allow for a more expansive view of failure of state protection by focusing on the effectiveness of such protection.

1. Persecution as a Result of Failure of Government Protection

In the New Zealand case of D.G. of Wellington v. Refugee Status Appeals Authority, the asylum applicant alleged that because of her Chinese heritage, she was subjected to physical and verbal harassment from native Indonesians. The New Zealand High Court held that the appropriate benchmark for persecution was the seriousness of the harm, and that under this test the actions against the applicant were not persecution. Specifically, the Court defined persecution as "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection." Unlike Horvath, there is no evaluation of the availability of state protection, but rather a more general inquiry into whether the state protection worked.

In its more recent articulation in 2003, the Refugee Status Appeals Authority reaffirmed the D.G. of Wellington standard and further emphasized the importance of the surrogacy principle in evaluating asylum claims. Specifically, the Authority held that "central to the definition of the term refugee is the concept of state protection, with the result that the phrase 'being persecuted' must be interpreted within the wider framework of the failure of state protection." The standard thus sounds almost identical to that in Shah and Islam and Horvath. The critical difference is that in Horvath, the threshold for evaluating surrogacy was whether a government protection system was available. Consequently, under Horvath, even if asylum applicants have a well-founded fear of persecution, the applicants can be returned to their home country.

121. Id.
122. See id.
In contrast, the New Zealand Appeals Authority has held that a failure of state protection is the baseline for granting asylum unless the state protection system is sufficient to render the harm not serious or well-founded. The Supreme Court of Canada, in *Canada (Attorney General) v. Ward*, similarly held that persecution includes situations where the state tolerates the persecution of citizens or is unable to protect individuals from such behavior.

These two decisions recognize that the sufficiency of state protection is crucial. Whereas under *Horvath* all that matters is the existence of a state protection system. Thus, a pro-forma system that was not really protective would prove fatal to an asylum claim. Neither Pitcherskaia's forced psychiatric counseling nor the sexual assaults of Katya Ivanova and Luciano Linares would be deemed persecutory pursuant to *Horvath*. Even though state protection in these cases was mostly fictitious, the fact that it existed would satisfy *Horvath*. For sexual minorities, the consequence of a more holistic asylum approach evaluating the effectiveness (New Zealand) or sufficiency (Canada) of state protection can be monumental. This standard recognizes the reality of persecution against sexual minorities and acknowledges that many state protections for sexual minorities are merely symbolic.

2. Integrating the “Sufficiency” or “Effectiveness” State Protection Standards into U.S. Asylum Law

The international asylum standard of looking at the sufficiency of state protection is a better alternative to protect persecuted sexual minorities than the current motivational requirement in a majority of U.S. courts. Legal history, however, suggests that the adoption of such a standard seems unlikely. The American embrace of international law, and specifically the Geneva Convention, has been uneven. In the U.S. Su-

---

124. Refugee Status Appeal Authority New Zealand, Refugee Appeal No. 71427/99 at 66, available at www.refugeecaselaw.org ("In our view the proper approach to the question for state protection is to inquire whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness, or as it is understood in New Zealand, to below the level of a real chance of serious harm").


126. The U.S. uses an adequacy of state protection standard, but this is only part of the asylum refugee calculus. See *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999). ("The adequacy of state protection is obviously an essential inquiry in asylum cases. But its bearing on the "on account of" test for refugee status depends on the facts of the case and the context in which arises").

127. *See*, e.g., Richard Falks remarks on U.S. Nuclear Policy: "The U.S. has dismissed international law-from the failure to observe the Geneva Conventions with respect to
preme Court, the debate over the influence of international law has become increasingly prominent as those who favor an internationalist approach clash with those who believe such an influence will ultimately dilute Constitutional protections.  

Arguably, this idea of isolating American law is most pronounced in the immigration context because of the very purpose of immigration law—keeping a nation’s borders intact. Called the sovereignty principle, this theory suggests that domestic immigration law is the least susceptible to the influence of international law because American government is founded on the principle of national sovereignty.  

Despite these concerns over maintaining a sovereign legal system, the tension inherent in current U.S. asylum law cannot be ignored. As the 2004 Lawrence v. Texas decision illustrates, the judiciary is open to literally rewriting legal precedent and protecting sexual minorities under prisoners in Guantanamo and Abu Ghrab to the defiant attitude of the White House with respect to recourse to wars of choice,” available at wagingpeace.org/articles/2004/06/00_ong charting-new-course.htm.  

128. Warren Richey, What influence international law has in US Courtrooms, The Christian Science Monitor, Mar. 28, 2005, available at http://www.csmonitor.com/2005/0328/p02s02-usju.html (“Others warn that treaties may empower international tribunals to take actions that change key areas of U.S. law. They say such changes undermine the constitutional powers of Congress and the president, and erode other government safeguards enacted by the founding fathers”). Compare Roper v. Simmons, 543 U.S. 551, 604 (2005) (O’Connor, J., dissenting) (“over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency”), with id. at 624 (Scalia, J., dissenting) (“[m]ore fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws from most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself”). See also Atkins v. Virginia, 536 U.S. 304, note 21 (2002) (Stevens, J.) In discussing whether the execution of mentally retarded individuals violated the Eighth Amendment prohibition against cruel and unusual punishments the Court cited an amicus brief filed by the European Union (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).  


130. See Laura S. Adams, Divergence and the Dynamic Relationship between Domestic Immigration Law and the International Human Rights, 51 Emory L.J. 983, 997 (2002) (noting that “Yet, sovereignty is at its height in the immigration context. The plenary power doctrine, which has been extensively criticized by scholars but not overturned by the courts, give Congress virtually unlimited power to regulate immigration because that right is inherent in sovereignty. Indeed the power to exclude—and therefore to regulate—aliens is a fundamental attribute of sovereignty”).
the Equal Protection rubric. Failure to extend such protection to sexual minorities seeking asylum is not only hypocritical, it is antithetical to America's historical and cultural commitment to providing a safe haven from oppressive government.

Inevitably, even if the U.S. were to adopt Ward's liberal sufficiency of state protection standard, the U.S. asylum system might be highly susceptible to jeopardizing the claims of persecuted sexual minorities. In addition to the question of preserving Constitutional protections, the potential for political backlash would be unpredictable. Not only might the rights of sexual minorities be attacked, but the legitimacy of both international law and the American legal system may be called into question. First, international law in the United States may be undermined, as those opposing equal rights attack the new interpretations. Second, the judiciary itself would be vulnerable in such actions, as its interpretation powers are usurped by Congressional legislation.

Such objections, though valid, do not foreshadow the fatality of a realignment of U.S. asylum law to its international counterparts. First, such criticisms can be leveled at any international influence on U.S. laws. Reacting to criticism by refusing to change asylum law would be both counterproductive and bad public policy because these concerns will exist in perpetuity. Instead, the U.S. should reassess its sovereignty in an increasingly interconnected world. Second, by deliberately ignoring the unique challenges posed by sexual minorities seeking asylum, the U.S. denies the most basic of human rights:

Lesbian and gay rights belong on the human rights agenda because if we tolerate the denial of rights to any minority, we undermine the whole protective framework of human rights by taking away its central plank—the equal rights and dignity of all human beings. When governments ignore their responsibility towards one sector of society, then no one's human rights are safe.

131. 539 U.S. 558 (2003) (overruling the 1986 decision Bowers v. Hardwick which held that there was no federal right to engage in sodomy and holding the correct question, unasked in Bowers, was whether the right to liberty under the Due Process Clause gives two consenting adults the right to engage in private conduct without government interference).
132. Ward, supra note 125.
133. Id.
Ignoring the rights of sexual minorities makes all of society vulnerable to human rights abuses.

CONCLUSION

The persecution faced by sexual minorities is unlike other forms of persecution because it is often in disguise. Thus, the dilemma faced by persecuted sexual minorities seeking refugee status in the U.S. is complex. Not only must these individuals deal with the usual hurdles of asylum law, but sexual minorities must also meet a motivational requirement that fails to comprehend their unique status as persecuted persons. Since the U.S. Supreme Court has not considered the issue, whether persecutors must exhibit intent to punish or whether persecution can be established absent such a showing is an open question. Currently, only asylum applicants in the Ninth Circuit are not required to meet this often untenable legal requirement, a requirement which can be acutely more difficult for sexual minorities because of the ambiguities involved in proving the exact reason for abuse against them.

International law offers guidance to fairly evaluate the need for asylum based on the unique characteristics of sexual minority persecution. The surrogacy principle first articulated in Shah and Islam and subsequently clarified in Horvath focuses on state protection, not the individual act of the persecutor. Inquiring into the availability of state protection, however, is not protective enough for sexual minorities. Often, even if state protection systems are available, they may only be available in theory.

Of all the standards discussed, D.G. of Wellington and Canada (Attorney General) v. Ward offer the most suitable protection for sexual minorities because such protection recognizes that many state protection systems are flawed and only offer protection in the abstract. More generally, unlike the U.S. standard, which requires a showing of the persecutor's intent, the New Zealand and Canadian standards are more fair to and protective of sexual minorities because often such intent is difficult, if not impossible, to prove. The U.S. adoption of such a standard would be more protective of sexual minorities. This is in accord with the original promise of refugee law and the exigencies of international human rights. §

135. Supra note 103.
136. Supra note 116.
137. Supra note 120.
138. Supra note 125.