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A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group

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Introduction

Suppose a young woman from another country appears at the border and asks for asylum, alleging she fears persecution based on her membership in a particular social group, the Romany People. Are the gypsies a social group within the meaning of refugee law? What about homosexuals? Women subjected to wife abuse? People with physical handicaps? Taxi drivers?

This article analyzes the social group concept in refugee law from a comparative perspective. In international law, refugees are those who can demonstrate a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. These criteria stem from the refugee definition adopted by the 1951 Geneva Convention Relating to the Status of Refugees (the Convention).¹ Because more than 100 states have become parties to the Convention² and have agreed to be bound by its refugee definition, the jurisprudence of other countries provides interesting points of comparison to the refugee definition that is evolving in United States law.

The article first briefly reviews the historical background to the Geneva Convention, focusing on the expansion of the refugee definition to include persecution based on membership in a social group. Next, it

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1. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

2. Poland became the 109th state party on September 20, 1991. REFUGEE REP. (U.S. Comm. for Refugees, Washington, D.C.), Sept. 30, 1991, at 5. See also M. J. BOWMAN & D. J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 125 (Supp. 1991); GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum, ed., 2d ed., 1992), 281-82; *Refugees*, Sept. 1990, at 6.

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examines the English language literature concerning the social group basis for refugee status. It then explores the meanings that different countries have given to persecution based on social group. The article emphasizes the relevant jurisprudence in Germany, Canada, and the United States, the three countries with the most developed decisional law concerning refugee status.³ The article concludes that approaches articulated in Germany and Canada can be instructive to decision-makers in the United States. In particular, it suggests that judges and asylum officers analyzing social group-based claims pay close attention to societal perceptions of the social group to which the asylum seeker belongs.

I. A Brief History of the Refugee Definition

A. International Agreements

International efforts to define the status of refugees date from the disintegration of the Russian and Turkish empires in the early twentieth century.⁴ The early international agreements relating to refugees tended to focus on particular refugee groups, such as Russians,⁵ Armenians,⁶ or, even more specifically, German refugees from the Saar.⁷ As the cataclysm of war approached during the 1930's, there were renewed

3. Asylum decisions in many Western European countries are committed to an administrative process with little or no judicial review. As a result, there are relatively few judicial opinions concerning asylum in those countries. In contrast, the asylum laws in Germany, Canada, and the United States provide for several layers of judicial review, which results in a much more extensive body of case law. See generally Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381, 384-85 (1990).

4. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 1 (1953).

5. *Id.* at 2. The Arrangement of 12 May 1926 defined Russian refugees as: "Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the USSR and who have not acquired another nationality." The Arrangement of 12 May 1926, 89 U.N.T.S. 47.

6. ROBINSON, *supra* note 4, at 2. Armenian refugees were defined in the Arrangement of 12 May 1926 as: "Person[s] of Armenian origin formerly subject[s] of the Ottoman Empire who [do] not enjoy or who no longer [enjoy] the protection of the Government of the Turkish Republic and who have not acquired another nationality." *Id.*

7. For example, the Constitution of the International Refugee Organization defined Saar refugees as "all persons who, having previously had the status of inhabitants of the Saar, have left the territory on the occasion of the plebiscite and are not in possession of national passports." The Constitution of the International Refugee Organization, Dec. 15, 1946, 18 U.N.T.S. 3 [hereinafter IRO Constitution]. In addition, a definition was provided for refugees of the Sudetenland as persons "having possessed Czecho-Slovak nationality and not now possessing any nationality other than German, [who] have been obliged to leave the territory . . . known as Sudetenland," formerly part of Czecho-Slovakia and that at that time incorporated in Germany. The term "refugee" was also applied to victims of Nazi persecution who had resided in Germany or Austria, including all Jews, foreigners, and stateless persons who "were detained in, or were obliged to flee from and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein." *Id.*

attempts to devise international agreements protecting the movement of refugees.⁸ Unfortunately, fewer and fewer governments signed each new agreement.⁹ With the advent of war in 1939, efforts to formalize new international refugee agreements halted.¹⁰ Consequently, in the aftermath of World War II the international community found itself ill-equipped to respond to the flood of post-war refugees.¹¹

8. A plan for the issuance of certificates of identity for refugees from the Saar was signed on July 30, 1935, followed by a July 4, 1936 provisional arrangement concerning the status of refugees coming from Germany, and the Convention Concerning the Status of Refugees Coming from Germany, signed on February 10, 1938. The February 10, 1938 Convention was made applicable to refugees from Austria by the international protocol of September 14, 1939. ROBINSON, *supra* note 4, at 2-3.

9. While 16 states signed the plan of July 30, 1935, only seven states signed the July 4, 1936 provisional arrangement, and only three signed the February 10, 1938 Convention and the September 14, 1939 protocol. ROBINSON, *supra* note 4, at 2-3.

10. No states signed conventions between September 14, 1939 and October 15, 1946. *Id.* at 3.

11. Prior to World War II the majority of international agreements relating to refugees dealt solely with the issuance of identity papers. ROBINSON, *supra* note 4, at 2. Other arrangements intended to address the legal status of refugees, though legally effective, were not of significant import because they were not widely accepted. *Id.* at 3. Despite increased need, the only international agreement to be signed in behalf of refugees at the end of World War II was the London Agreement of October 15, 1945. The London Agreement concerned the issuance of travel documents to refugees from Germany, Austria, and Spain, and to some smaller groups. In Germany and Austria the occupying powers established a special status for refugees, but in other countries little was done to regularize their status.

The Constitution of the International Refugee Organization (IRO) regulated the status of new categories of refugees. The IRO successfully made arrangements to regularize the status of refugees with Luxembourg, Italy and Belgium. France arranged to do so in regard to identity documents and work papers only. In other countries the IRO could only intervene in specific instances. IRO Constitution, *supra* note 7.

"The [IRO] was the first international organization created by the United Nations." HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION* 1 (1954). The IRO was established to meet the international crisis created by approximately one-and-a-half million persons who refused to return to countries of origin following World War II. *Id.* at 1. The need for an international effort was voiced at the San Francisco conference of May 7, 1945, at which the charter of the United Nations was drawn, by the UK delegate, who expressed concern for those displaced persons who had not been repatriated by the United Nations Relief and Rehabilitation Administration (UNRR) and the Intergovernmental Committee for Refugees (IGCR), or who were outside of their protection because they were under the mandate of the High Commissioner of the League of Nations. *Id.* at 29.

The IGCR was established at the intergovernmental conference of July 1938, which was called by President Roosevelt, and held at Evian-les-Bains, France, under the direction of the United States and Great Britain, to formulate a means to aid persons fleeing Germany in response to National Socialism which had been on the rise since 1933. *Id.* at 3, 11.

The Agreement Creating the United Nations Relief and Rehabilitation Administration, signed November 9, 1943 at the White House by forty-four Nations, established the UNRR. Its purpose was to supplement the programs of the allied military forces, and to help prisoners of war and "exiles" return home. *Id.* at 17.

Modelled to some extent after the UNRR and the IGCR, which dealt with the maintenance, care and repatriation of displaced persons, the IRO was also equipped to provide for large scale permanent resettlement. *Id.* at 2. The IRO operated for six years before it was succeeded by the United Nations High Commissioner for Refu-

The United Nations convened a conference of plenipotentiaries in Geneva in 1951 to consider an international agreement to provide legal protection to refugees.¹² This conference resulted in the 1951 Geneva Convention Relating to the Status of Refugees.¹³ The 1951 Convention, which has been signed by 109 governments to date,¹⁴ was the first international compact to adopt a universal refugee definition, rather than one tied to a particular national or ethnic group.¹⁵ The Convention defines as refugees those who face a well-founded fear of persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion."¹⁶

gees. It aided in the resettlement of approximately 1,620,000 refugees. GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 72 (1983). Its functions included repatriation, identification, registration, and classification of refugees; it provided legal and political protection, as well as transport, care and assistance in resettlement. *Id.* at 129. Its final Director General referred to it as "[t]he most successful example of large-scale international cooperation for humanitarian purposes in history." *Id.*

12. The conference was convened pursuant to a resolution by the United Nations Human Rights Commission. On the basis of this resolution, the Economic and Social Council, on March 2, 1948, adopted a resolution requesting the Secretary General of the United Nations to undertake a study of the existing situation in regard to the protection of stateless persons. U.N. Doc. E/1618,E/AC.32/5. As a result of this study, the Economic and Social Council adopted a resolution on August 8, 1949 appointing an Ad Hoc Committee consisting of 13 representative governments. The Ad Hoc Committee convened on January 16, 1950, and on February 16 completed its work and adopted a Draft Convention Relating to the Status of Refugees and a Protocol thereto Relating to the Status of Stateless Persons. U.N. Doc. E/1618, E/AC.32/5. A revised version of this draft was to be submitted to the General Assembly at its fifth session. U.N. Doc. E/1850,E/AC.32/8. However, the General Assembly decided instead to convene a conference of plenipotentiaries in Geneva, in order to permit non-members of the United Nations to participate in the final drafting of the document. ROBINSON, *supra* note 4, at 3-5.

13. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

14. The Convention was most recently signed by Poland on September 20, 1991. Poland was also the 109th state to sign the 1967 Protocol. REFUGEE REP., *supra* note 2. *See infra* note 15.

15. However, by its terms the Convention limits the definition of refugee to those persons affected by events occurring before Jan. 1, 1951. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, art. 1, at A(2), 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137. The scope of the definition was broadened by the Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 [hereinafter Protocol], which was drafted to protect persons who became refugees as a result of events occurring after January 1, 1951. Protocol, Jan. 31, 1967, art. 1. *See* G.A. Res. 2198, 21 U.N. GAOR Supp. (No. 16) at 48, U.N. Doc. A/6316 (1966). The Protocol changes the 1951 time deadline in Article 1 and incorporates Articles 2 through 34 of the 1951 Convention.

Four nations, Madagascar, Monaco, Mozambique, and Samoa, have signed the 1951 Convention only. Four nations, Cape Verde, Swaziland, the United States, and Venezuela, have signed the 1967 Protocol only. Ninety-nine other nations have signed both the 1967 Protocol and the 1951 Convention. UNHCR Manual, Annex I (rev. Jan. 4, 1989), *reprinted in* SAMUEL K. N. BLAY & B. MARTIN TSAMENYI, 2 *INTERNATIONAL JOURNAL OF REFUGEE LAW* 560 (1990).

16. Article 1 of the Convention provides:

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

This refugee definition is broader than the prior practice in two ways. It links refugee status to those who have a basis for fearing persecution rather than to a specific crisis or a specific nationality group. Moreover, it expands the reasons that warrant refugee status. It specifies five grounds: race, religion, nationality, political opinion, and membership in a social group. The first four grounds were present in the draft convention considered by the conference of plenipotentiaries.¹⁷ The fifth, membership in a particular social group, was introduced at the conference as an amendment by the Swedish representative.¹⁸ In support of his amendment the Swedish representative stated that "experience ha[s] shown that certain refugees ha[ve] been persecuted because they belonged to particular social groups. The draft [c]onvention [makes] no provision for such cases, and one designed to cover them should be accordingly included."¹⁹ Unfortunately, there is no further

(2) [As a result of events occurring before 1 January 1951] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

The Convention permits states to limit further the scope of the refugee definition by allowing them to choose between two definitions of "events occurring before 1 January 1951," explicitly stating that this term "shall be understood to mean either (a) 'events occurring in Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951.' " *Id.* at art. 1B(l)(a)(b). Only six countries adhere to the European limitation (Congo, Madagascar, Malta, Monaco, Paraguay, and Turkey). BOWMAN & HARRIS, *supra* note 2, at 171, Supp. at 125.

17. The General Assembly prepared a definition of the term "refugee" at its fifth session, at which it was also decided to convene the conference of plenipotentiaries responsible for the final drafting of the Convention. Resolution 429 (V), Annex. The Assembly recommended to the respective governments that they consider this definition when preparing the text of the Convention. ROBINSON, *supra* note 4, at 5. See also the draft prepared by the Ad Hoc drafting committee, Doc. E/1850/E/AC.32/8; ROBINSON, *supra* note 4, at 4 n.4.

Also, the recent antecedents had included four of these grounds. The IRO identified specific groups of refugees which would be protected, including victims of the Nazi, Fascist, or Quisling regimes that had opposed the United Nations. In addition, the IRO protected certain Jews, foreigners or stateless persons who had been victims of Nazi persecution and persons who had been considered refugees prior to World War II. GOODWIN-GILL, *supra* note 11, at 4. The IRO Constitution had also sought to protect other individuals who feared persecution due to race, nationality, or political opinion, Part I, § C, I(a)(i); one who feared persecution due to religion also demonstrated a valid basis for refugee status. U.N. Doc. E/REF/19 at 2 (ECOSOC, Apr. 11, 1946). See also U.N. Doc. E/AC.32/L/40 at 13 (Aug. 10, 1950); Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 40 n.9, 41 n.13 (1983).

18. A/CONF.2/SR.3 at 14. See ROBINSON, *supra* note 4, at 53 n.37; Helton, *supra* note 17, at 41 n.15; David Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*, 62 WASH. L. REV. 913, 925 (1987).

19. U.N. Doc. A/CONF.2/SR.3, at 14 (1951). The Swedish delegate was Sture Petren. Compton, *supra* note 18, at 925 n.89. Maureen Graves, *From Definition to*

record discussing the purpose or meaning of this term,²⁰ although the Italian representative had earlier favored the adoption of an "amplified" definition than that included in the draft Convention.²¹ Nonetheless, the conference adopted the amendment by a vote of fourteen to zero with eight abstentions.²² The record contains no comments on the vote.²³ The delegations appeared far more concerned with restricting the geographical and time limits of the refugee definition²⁴ than with discussing the categories of persecution.²⁵

B. National Legislation

By ratifying the Geneva Convention, states agree to abide by the refugee definition contained in the treaty. The Convention does not, however, require state parties to admit refugees to their territory.²⁶ The admission decision is left to state law. Many states have enacted the Convention refugee definition as part of their domestic legislation and have established the refugee definition as a criterion for admission to the country. A short survey of the asylum law in Europe and North America reveals the significant impact the Convention refugee definition has had.

In France, national legislation defines refugees using the precise terms of the Convention definition.²⁷ Those who can satisfy the refugee definition are entitled to remain in the country.²⁸ In Switzerland, the

Exploration: Social Groups and Political Asylum Eligibility, 26 SAN DIEGO L. REV. 739, 748 n.51 (1989).

20. See, e.g., A/CONF.2/SR.19-24. Compton, *supra* note 18, at 925 n.91. It is interesting to note that the United Nations Declaration of Human Rights, which the conference of plenipotentiaries viewed as one of the foundations for its work, Helton, *supra* note 17, at 41 n.16, forbids discrimination based on "national or social origin, property, birth or other status." U.N. Doc. A/811, art. 2.

21. U.N. Doc. E/AC.32/L.40, at 13 (1950); Graves, *supra* note 19, at 748 n.51.

22. A/CONF.2/SR.23 at 8. There were no negative votes cast. The record does not note which delegations favored the amendment and which delegations abstained. Compton, *supra* note 18, at 925 n.92. Article 1 of the draft convention, as amended to include persecution based on social group, then passed by a vote of twenty-two to zero, with one abstention. A/CONF.2/SR.23 at 10. See also Helton, *supra* note 17, at 42 n.17; Graves, *supra* note 19, at 748.

23. A/CONF.2/SR.23 at 8-10. Compton, *supra* note 18, at 925 n.92.

24. See *supra* notes 16-17.

25. See, e.g., A/CONF.2/SR.19-24; Compton, *supra* note 18, at 925.

26. The Convention does not require state parties to admit refugees or grant them asylum. It only requires states to grant certain rights to those refugees the states have decided to admit. See generally art. 4, 13-30. The Convention does limit to some extent the power a state has over refugees. Article 33 prohibits states from returning refugees to territories where they would face threats to their life or freedom due to their race, religion, nationality, political opinion or membership in a social group. Article 32 forbids the expulsion of refugees lawfully present in the country absent compelling reasons of national security or public order. Article 31 prohibits states from penalizing refugees who entered the country illegally, so long as they have come directly from a territory where their lives or freedom were threatened and they present themselves to the police immediately.

27. Loi du 25 juillet 1952 portant création d'un office français de protection des réfugiés et apatrides [Law of July 25, 1952 Creating the French Office of Protection for Refugees and Stateless Persons], art. 2, ¶ 2. [Law # 52-803].

28. *Id.*

refugee definition includes those who suffer serious prejudice due to their race, religion, nationality, social group, or political opinions.²⁹ The Swiss Asylum Act guarantees admission to those refugees who meet the definition.³⁰ In Denmark, the immigration statute provides that residence permits shall be issued to those aliens who fall within the provisions of the 1951 Refugee Convention.³¹ The statute further states that residence permits are available for aliens who do not fall within the terms of the Convention but "for reasons similar to those listed in the Convention or for other weighty reasons" should not be returned to their home country.³² In Canada, the Immigration Act of 1985 expressly includes the Convention refugee definition.³³ Additionally, Canada on occasion recognizes as refugees certain limited groups that do not satisfy the Convention definition.³⁴

The situation in Germany differs somewhat. Although the Federal Republic signed the Convention in 1951³⁵ and ratified it in 1953,³⁶ this

29. *Loi sur l'asile*, 5 Oct. 1979, FF 1979. II. 977, *Asylgesetz vom 5 Okt. 1979*, BBl 1979 II 1993 [Asylum Act], art. 3.

30. *Id.*

31. *Udlaendingsloven* [The Aliens Act], Act. No. 226, June 8, 1983, *as amended by* Act. No. 232, June 6, 1985; Act No. 574, Dec. 19, 1985; and Act No. 686, art. 7(1), Oct. 17, 1986).

32. *Id.* art. 7(2).

33. The Immigration Act expressly uses the term "Convention refugee" and defines "Convention refugee" as:

any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2), but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act.

Section 2(1), Immigration Act, R.S.C. 1985, c.I-2, *THE ANNOTATED IMMIGRATION ACT OF CANADA* (Frank N. Marrocco & Henry M. Goslett eds., 1993).

34. See Barbara Jackman, *Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA* 39-40 (Geoffrey Coll & Jacqueline Bhabha eds., 1992) (discussing discretionary administrative programs permitting admission based on relaxed criteria).

35. The Federal Republic of Germany formally signed the Convention on November 19, 1951. Multilateral Treaties Deposited With the Secretary General, U.N. Doc. ST/LEG/SER.E/6, 181 (1987).

36. The Federal Republic of Germany ratified the Convention on December 1, 1953. *Id.* The enabling legislation, Gesetz vom 1.9.53 [Law of Sept. 1, 1953], *Bundesgesetzblatt* [BGBl.] II 559, authorized the terms of the Convention to take effect on April 22, 1954 pursuant to the official notice given by the Federal Minister of Foreign Affairs on April 25, 1954, BGBl. II 619. See REINHARD MARX ET AL., *KOMMENTAR ZUR ASYLVERFAHRENSGESETZ* 15 (2d ed. 1987).

was not Germany's first post-war law concerning refugees. The Basic Law, or Constitution as it is commonly known, expressly guarantees a right of asylum to those persecuted for political reasons.³⁷ On its face the constitutional provision varies from the Convention refugee definition in two major respects. First, it affirmatively grants refugees a right to enter the country. Second, it guarantees asylum only to those subjected to political persecution; there is no mention of persecution based on other grounds. The German courts, however, have interpreted the constitutional grant of asylum to include persecution on account of race, religion, nationality, and social group, as well as persecution on account of political opinion.³⁸ Thus, the refugee definition contained in the Convention has been influential in determining the scope of refugees to whom German law provides the right of asylum.³⁹

In contrast to the situation in Germany, United States legislation in the post-war period did not contain a Convention-influenced refugee definition.⁴⁰ This changed in 1980 when the United States Congress

37. *Grundgesetz* [GG], art. 16, ¶ 2 ("Persons persecuted on political grounds shall enjoy the right of asylum.") This provision has triggered great debate in Germany as the number of asylum seekers has risen to close to 300,000 per year. As a consequence, the major political parties have decided to seek an amendment of this constitutional guarantee. On May 26, 1993, the Bundestag (lower house of Parliament) voted to amend the constitution to limit applicants from certain countries from filing requests for asylum. *Germany Acts on Asylum Law*, N.Y. TIMES, May 27, 1993, at A1. On May 28, the Bundesrat (upper house of Parliament) voted to amend the constitutional provision of asylum. As of July 1, 1993, asylum-seekers from countries deemed free of persecution will be prohibited from entering Germany. *Bonn Bars Asylum-Seekers*, N.Y. TIMES, May 29, 1993, at 3.

38. Judgment of July 2, 1980, *Bundesverfassungsgericht* [Federal Constitutional Court], *Bundesverfassungsgerichtsentscheidungen* (BVerfGE) [Federal Constitutional Court Decisions] 54, 341 (359).

39. Although influenced by the Convention definition, the German courts have not equated the constitutional guarantee of asylum with the Convention definition. For example, the courts have emphatically stated that the constitutional guarantee of asylum requires an objective standard of persecution while the term "well-founded fear of persecution" included in the Convention definition contains both a subjective and an objective element. See Walter Kälin, *Well-founded Fear of Persecution: A European Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA* 29 (Geoffrey Coll & Jacqueline Bhaba eds., 1992).

There are also other aspects in which the refugee definitions contained in the Convention and Constitution diverge. The important point is that although they are not identical, the Convention definition has played a significant role in the development of the asylum law of Germany.

40. In the 1950s United States law contained no general authorization to admit refugees. In response to specific refugee crises, such as the 1956 Hungarian Revolution, Attorneys General occasionally exercised their parole power under § 212(d)(5) of the Immigration and Nationality Act to admit refugee groups. Congress has also reacted on occasion to particular refugee crises by enacting legislation targeted at a specific group of refugees. See Congressional Review Service, *Review of U.S. Refugee Resettlement Programs and Policies* 7-11 (Comm. Print, Senate Comm. on the Judiciary, 1980); James L. Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 1982 MICH. Y.B. INT'L LEGAL STUD. 3 (1982); STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 830 (1992).

In 1965 Congress enacted a new immigration law that reserved 6% of all immigrant visas for refugees fleeing Communist-dominated countries, the Middle East,

enacted legislation revising the procedures that apply to refugees entering the United States.⁴¹ The Refugee Act of 1980 explicitly incorporates the basic terms of the Geneva Convention refugee definition: refugees are individuals with a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁴² Moreover, the legislative history of the Refugee Act of 1980 demonstrates that Congress intended to bring the United States refugee definition into conformity with the Geneva Convention definition.⁴³

The legislative history of the 1980 Refugee Act sheds little light on the social group aspect of the refugee definition, however. Similar to the situation at the conference in 1951, it appears that Congress did not focus on the social group concept and gave no explicit indication of its understanding of the purpose or meaning of this term. Indeed, the only direct comment was made in 1968 by President Johnson, when he sent the 1967 Protocol to the Senate for ratification: "The Protocol consti-

and catastrophic natural calamities. Pub. L. 89-236, § 3, 79 Stat. 911, 913 (Oct. 3, 1965). Since this legislation limited refugee admissions to a number inadequate to respond to the contemporary refugee crises and since the Attorney General still retained the parole power under INA § 212(d) referred to above, many refugees entered the United States during the 1960s and 1970s via parole. See LEGOMSKY, *supra*, at 830-832; Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12-20 (1981). Finally, in 1980, Congress passed a comprehensive refugee law strongly influenced by the 1951 Convention.

41. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The statute provides two paths for processing people fleeing persecution. Sections 207 and 209 of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1157-1159, provide for admission for those who apply from outside the United States. Section 208 of the INA provides for admission for those who are at or within the borders of the United States when they apply for refuge, 8 U.S.C. § 1158. Both processing routes require the individual seeking admission to satisfy the refugee definition set forth in § 101(a)(42) of the INA, 8 U.S.C. § 1101(a)(42). For a description of this provision, see *infra* note 43 and accompanying text. See also T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 693-708 (2d ed. 1991) (overview of statutory provisions).

42. 8 U.S.C. § 1101(a)(42)(A). Although not a verbatim incorporation of the Geneva Convention definition, the refugee definition of the Refugee Act of 1980 is very similar to that contained in the Geneva Convention. The Geneva Convention defines refugees as any person "persecuted for reasons of . . . membership in a particular social group," whereas the Refugee Act defines a "refugee" as a person persecuted or having a "well-founded fear of persecution on account of . . . membership in a particular social group." The United States adopted the legal standards embodied in the Geneva Convention when it became a party to the 1967 Protocol Relating to the Status of Refugees. The 1967 Protocol explicitly incorporated the refugee definition contained in the Geneva Convention which the United States did not sign. Article I.2. of the Protocol states: "[F]or the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of Article 1 of the Convention," with the limitation as to events occurring before January 1, 1951 excluded.

43. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). For example, the Conference Committee Report stated that the Refugee Act's definition of refugee was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." *Id.* at 437 (quoting S. Rep. No. 590, 96th Cong., 2d Sess., at 20 (1980)).

tutes a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties."⁴⁴

Nonetheless, despite the silence in the legislative history, in one important respect relevant to deciding the meaning of persecution based on social group the situation in 1980 was different from that in 1951. By 1980, almost thirty years had passed since the original inclusion of the social group term. In that time commentators had begun to sketch in the contours of the social group concept;⁴⁵ the Office of the United Nations High Commissioner for Refugees (UNHCR) had prepared a book that attempted to give meaning and guidance to the use of this concept;⁴⁶ and some courts in Europe had begun to identify categories of people persecuted based on membership in a social group.⁴⁷ Accordingly, although the United States Congress may not have articulated the meaning it intended for social group-based persecution, a substantial body of academic, administrative, and judicial interpretations of this term had developed, and Congress gave no indication that it intended to reject those developments.

II. Scholarly Interpretation

A. International Law Treatises

Despite a dearth of scholarly commentary on the social group concept, noted scholars have recognized the significance of this aspect of the refugee definition. Grahl-Madsen, in his classic two-volume scholarly treatment of international refugee law, describes the addition of the social group term as an afterthought.⁴⁸ He notes that the social group concept

44. 114 Cong. Rec. 24,628 (1968). The Senate ratified the Protocol, which contained the Geneva Convention refugee definition, in 1968. Later Congress enacted the Refugee Act of 1980, which was intended, in part, to implement the Protocol by expressly conforming the statutory refugee definition to the Convention/Protocol definition. See *supra* note 43. Thus, the Refugee Act of 1980 was based on, and intended to make explicit in domestic law, the United States' acceptance of the international law refugee definition.

45. See *infra* text accompanying notes 48-69.

46. OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/PRO/4 (1979) [hereinafter UNHCR HANDBOOK]. For a discussion of this *Handbook*, see *infra* text accompanying notes 70-78. For a discussion of whether Congress was aware of the *UNHCR Handbook* when it drafted the Refugee Act of 1980, see *Matter of Acosta*, Int. Dec. 2986 (BIA 1985) at 15 n.8.

47. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219-220 (1966) (noting four cases decided in the Federal Republic of Germany and one in Italy concerning the following social groups: textile manufacturers and dealers, *Ansbach Court*, Case 2531 II/56 (15 Jan. 1957); independent businessmen, *Ansbach Court*, Case 3008 II/57 (25 Nov. 1957); former royalist diplomats, *Ansbach Court*, Case 3017 II/57 (15 Oct. 1957); former capitalists, *Commissione Paritetica, Trieste Session* (9 to 26 Nov. 1960); and former royalist military officers, *Ansbach Court*, Case 2309 II/59 (23 Feb. 1960)).

48. *Id.* at 219.

is broader than race, religion, and ethnic background⁴⁹—although it can also include these categories—and asserts that the 1951 conference added the idea of social group in order to protect against persecution based on as yet unforeseen reasons.⁵⁰ In reviewing the five relevant grounds of persecution recognized by the 1951 Geneva Convention, Grahl-Madsen categorizes them in two groups: qualities beyond the control of individuals and qualities within their control.⁵¹ He assigns membership in a particular social group, along with race, nationality, and religious heritage, to the first category,⁵² political opinion and religious observance to the second.⁵³

The examples of pertinent social groups that he suggests, however, include groups in which membership is voluntary—members of clubs, societies, and associations—as well as groups in which membership may be said to be involuntary—the nobility, for example, or members of a linguistic or other minority.⁵⁴ His examples of particular social groups also include economic and occupational groups in which membership is at least theoretically voluntary, including landowners, civil servants, capitalists, businessmen, professional people, farmers, and workers.⁵⁵ Although one can surrender land, resign from the civil service, leave the farm, or decline to obtain professional training, Grahl-Madsen presumably views these as involuntary in the sense that individuals who have been part of such economic or occupational groups often continue to be identified with them.

For example, a government that persecutes landowners or civil servants will often persecute former landowners and former civil servants, as well as anyone currently in those groups.⁵⁶ Moreover, persecution of such groups often reaches the children and grandchildren, who obviously first became group members involuntarily.⁵⁷ Although mem-

49. *Id.*

50. *Id.*

51. *Id.* at 217.

52. *Id.*

53. *Id.*

54. *Id.* at 219.

55. *Id.*

56. For example, during the Cultural Revolution in China, the Red Guards categorized as “blacks” children whose families had formerly been landlords or wealthy peasants. “Blacks” and their families were beaten, harassed, had their homes raided and property destroyed. JUNG CHANG, *WILD SWANS* 294-300 (1991).

57. Two recent judicial opinions from the Federal Republic of Germany illustrate this point. In the first case, a Chinese man, orphaned at the age of five, testified that for years after the death of his parents and grandparents members of his agricultural collective frequently criticized, humiliated, and even beat him because members of his family had been landowners. Administrative Court of Bavaria, Judgment of Mar. 29, 1983, No. VR-China-X-167, at 2, 7-8. The court found his statements credible and granted him asylum.

In the second case, a Romanian woman from a prosperous family, whose father had been a bank director and whose husband had been a physician in the royal army, suffered persecution long after her father and husband both had died. Administrative Court of the Saarland, Judgment of Dec. 10, 1982, No. 10K-115/80, at 3-4. The court credited her allegations and granted her asylum. (Copies of opinions on file

bership in clubs, societies, and associations usually appears to be more transitory and fluid than membership in an economic group, perhaps Grahl-Madsen also views these truly voluntary activities as beyond the members' control. There, too, persecutors of the group may ignore the distinction between current and former members, and a one-time voluntary act, such as joining a social club, may be impossible later to change. A former club member, despite an intentional lapse of membership and the absence of any continued shared interests with the members of the social club, may still be perceived and persecuted as a club member. Although this explanation is plausible, Grahl-Madsen never explicitly articulates it, and his analysis ultimately fails to reconcile his claim that social group persecution is based on involuntary qualities with his inclusion of group memberships that seem to be within an individual's control.

Focusing on the apparent inconsistency between Grahl-Madsen's formulation and the examples he provides may, however, be misleading. His inclusion of groups which one can voluntarily reject or from which one can theoretically resign may suggest that people should not have to forsake certain activities. For example, one can argue that although one can theoretically surrender one's economic status and livelihood, one should not have to do so.⁵⁸ Under this reasoning, persecution of civil servants and persecution of the nobility are both persecution based on membership in a social group, although birth into the noble class is beyond the control of the individual in a way that becoming a civil servant is not. Although this interpretation of Grahl-Madsen's discussion of membership in a particular social group is more satisfying, a workable theory of social group-based persecution under this view would require a principle for determining which attributes an individual should not be asked to change.⁵⁹

Although Grahl-Madsen does not provide a coherent theory of social group-based persecution, his insight is important: persecution for reasons beyond one's control is obviously offensive. The converse, however, is not true. Punishing individuals for attributes or actions within their control does not necessarily involve punishment of blameworthy behavior. Ultimately, Grahl-Madsen's categories are incomplete

with the author.) See also NIEN CHENG, *LIFE AND DEATH IN SHANGHAI* 30-31 (1986) (pervasive discrimination in China against children of the educated and affluent).

58. See discussion of *Acosta*, *supra* note 46; see also *infra* notes 230-51 and accompanying text.

59. The *Acosta* opinion, *supra* note 46, suggests that individuals should not have to change traits fundamental to their identities or to their consciences. *Matter of Acosta*, Int. Dec. 2986, at 31 (BIA 1985). James Hathaway states that individuals should not have to sever their ties to voluntary social groups if the purpose of the group is fundamental to their human dignity. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 161 (1991). In turn, he looks to "core human rights" expressed in international law to determine rights and attributes fundamental to human dignity. *Id.* at 164-68.

because they do not distinguish when punishment for voluntary acts involves blameworthy behavior from when it does not.

Turning from Grahl-Madsen to Goodwin-Gill, another eminent scholar of international refugee law, one encounters a noticeable shift in the analysis of social group-based persecution. Goodwin-Gill suggests that the concept of particular social group includes "people in a certain relation or having a certain degree of similarity, or a coming together of those of like class or kindred interests."⁶⁰ In contrast to Grahl-Madsen, he expressly asserts that the "shared interests, values, or background" of a social group are likely to combine qualities over which individuals have no control with matters that they can control.⁶¹ He stresses the importance of recognizing groups based on "ethnic, cultural, and linguistic origin; education; family background; economic activity; shared values, outlook, and aspirations."⁶² Accordingly, his concept of social group includes groups that are based solely on an accident of birth, such as ethnic and linguistic origin and family background, as well as groups defined by factors that may involve a good deal of individual choice, such as economic activity, education, and shared aspirations.

Goodwin-Gill also emphasizes the importance of societal attitudes toward subsets within that society,⁶³ noting that widely shared perceptions often indicate the existence of a persecuted social group.⁶⁴ He does not limit his view of pertinent societal attitudes to official government views of the group, but he acknowledges that treatment of the group by state authorities is particularly relevant.⁶⁵ Although Goodwin-Gill's focus on sub-groups within a society leads him to discuss social minorities as self-conscious units bound together by shared physical or cultural traits that are held in low esteem by dominant members of society,⁶⁶ his approach does not conclude that social groups invariably constitute a numerical minority. He suggests, for example, that in certain societies women may be a persecuted social group despite being a

60. GOODWIN-GILL, *supra* note 11, at 30.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Goodwin-Gill refers to the following criteria identifying social minorities:

(1) Minorities are subordinate segments of complex state societies; (2) minorities have special physical or cultural traits which are held in low esteem by the dominant segments of the society; (3) minorities are self-conscious units bound together by the special traits which their members share and by the special disabilities which these bring; (4) membership in a minority is transmitted by a rule of descent which is capable of affiliating succeeding generations even in the absence of readily apparent special cultural or physical traits; (5) minority peoples, by choice or necessity, tend to marry within the group.

GOODWIN-GILL, *supra* note 11, at 30 n.45 (quoting SIMPSON & YINGER, *RACIAL AND CULTURAL MINORITIES* 17 (1965)).

numerical majority.⁶⁷ Goodwin-Gill concludes that a comprehensive definition of social group is likely to be impossible, and argues that any attempt at a definition should be open-ended so that it could expand to include different groups suffering persecution.⁶⁸ No matter what verbal formulation is selected, he favors focusing on two critical elements: (1) the factors that unify the putative group and (2) the factors that distinguish it from the rest of the population and make it the target of persecution.⁶⁹

A third important source interpreting the social group term is the *Handbook on Procedures and Criteria for Determining Refugee Status*.⁷⁰ The Office of the United Nations High Commissioner for Refugees published the *Handbook* in 1979, almost thirty years after the 1951 Refugee Convention.⁷¹ Although not privy to the views of the drafters of the refugee definition contained in the Convention, the authors of the *Handbook* were able to explain the components of the Convention definition by drawing on the knowledge gained by the High Commissioner's Office over twenty-five years.⁷² Their efforts were exhaustive: they investigated the practices of signatories to the Convention in determining refugee status, the literature concerning refugee status, and the views developed by UNHCR legal staff members during a quarter century of monitoring the application of the refugee definition.⁷³ The work that the authors devoted to the *Handbook*, as well as their vantage point from the legal division of the High Commissioner's Office, has led U.S. courts and administrative tribunals to view the *Handbook* as a "significant source of guidance" regarding the legal definition of a refugee.⁷⁴

In light of the cumulative effort devoted to articulating the terms of the refugee definition, the *Handbook's* definition of social group is notable for its breadth and simplicity. The *Handbook* describes a particular social group as a group of people of "similar background, habits or social status."⁷⁵ The *Handbook* does not explicitly address the issue of involuntary versus voluntary group membership. The attributes it lists, however, are broad enough to cover both situations. For example, the

67. GOODWIN-GILL, *supra* note 11, at 31 n.46. Cf. David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988) (arguing that women who are persecuted on account of their sex should be eligible for asylum in the United States and that the framework for granting asylum is already in place).

68. GOODWIN-GILL, *supra* note 11, at 30.

69. *Id.* at 30-31.

70. UNHCR HANDBOOK, *supra* note 46.

71. Matter of Acosta, Int. Dec. 2986, at 221 n.8 (BIA 1985) (noting that the Handbook was published in September 1979, after the drafting of the U.S. Refugee Act of 1980).

72. UNHCR HANDBOOK, *supra* note 46.

73. *Id.*

74. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (quoting Zavala-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir. 1986)); see also Hernandez-Ortiz v. INS, 777 F.2d 509, 567 n.7 (9th Cir. 1985); Matter of Acosta, Int. Dec. 2986, at 22 (BIA 1985) (calling the UNHCR Handbook a "useful tool").

75. UNHCR HANDBOOK, *supra* note 46, para. 77.

background of individuals may include their family lineage, yet it may also include the training and education that they pursued.

In an attempt to provide a context for examining claims of persecution based on membership in a social group, the *Handbook* suggests that members of a social group may become targets of persecution when the government lacks confidence in the group's loyalty.⁷⁶ Similarly, members of a social group may face serious threats if the government views the "political outlook, antecedents or economic activity" of the group's members or the "very existence of the social group" itself as an obstacle to government policies.⁷⁷ Thus, the *Handbook* expressly indicates that persecution based on membership in a social group may be combined with persecution based on political opinion. This corresponds with the *Handbook's* warning that social group persecution often overlaps with persecution premised on other grounds.⁷⁸

A decade after the publication of Goodwin-Gill's treatise and the *UNHCR Handbook*, James Hathaway, a Canadian scholar, published an important new work on refugee law⁷⁹ that proposes what might be viewed as a moderate approach to the concept of social group. After noting the sparse contemporaneous explanation for this addition to the refugee definition in 1951, Hathaway describes cases that essentially render the term redundant by equating social group with notions of race, religion, nationality, or political opinion.⁸⁰ He contrasts that view with the "safety net" approach, which views any collection of persons who share some similarity of background as a social group.⁸¹

Hathaway rejects both approaches. He discounts the first approach because he concludes that the delegates to the 1951 Refugee Conference would not have adopted the amendment adding social group as a ground of persecution covered by the Refugee Convention if they had viewed social group as merely superfluous.⁸² He discounts the second because, although "seductive from a humanitarian perspective, . . . it largely eliminates the need to consider the issue of a linkage between fear of persecution and the civil or political status" of the refugee appli-

76. *Id.* para. 78.

77. *Id.* para. 78.

78. *Id.* para. 77. The *Handbook* expressly states: "A claim to fear of persecution under [the] heading ['membership of a particular social group'] may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality." *Id.* Obviously, refugees can simultaneously rest their fear of persecution on several of the different categories listed in the 1951 Geneva Convention.

79. HATHAWAY, *supra* note 59.

80. *E.g.*, Obertz Belfond, 10 I.A.C. 208, 222 (1975) ("[e]ither the [social] group must be political . . . or be a religious sect . . . [or] a racial minority"). See also Guy Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of State and the Protection Function of the Office of the UNHCR*, 1980 MICH. Y.B. INT'L STUD. 291, 297 (1980).

81. See I. Foighel, *Legal Status of the Boat People*, 48 NORDISK TIDSSKRIFT FOR INTL. RET. 217, 222 (1979) (social group category added as safety net to cover those with legitimate claim to refugee status though not included in other categories in refugee definition); Helton, *supra* note 17, at 41 (social group category is catch-all to include all bases for persecution relied on by a despot).

82. HATHAWAY, *supra* note 59, at 157-58.

cant.⁸³ The intent of the drafters of the Refugee Convention was just the opposite, according to Hathaway: they expressly chose to distinguish between those whose fear was due to their civil or political status and those whose fear was due to some other reason.⁸⁴ Furthermore, Hathaway concludes that the drafters acted with a glance backward at history. They intended the refugee definition to encompass known forms of harm, not to encompass as yet unanticipated forms of abuse.⁸⁵

The middle ground approach set forth by Hathaway echoes the approach suggested by the United States Board of Immigration Appeals in *Matter of Acosta*.⁸⁶ As Hathaway defines the term, three types of groups can give rise to claims of persecution based on membership in a particular social group:

(1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded . . . are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.

. . . [The] linkage between this standard and fundamental norms of human rights correlates well with the human rights-based definition of "persecution." Most important, the standard is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection.⁸⁷

As examples of groups based on innate and immutable characteristics, Hathaway points to gender-based groups.⁸⁸ For example, he concludes that "single women living in a Moslem country without the protection of a male relative" is a cognizable social group, pointing out that group members cannot control gender or the absence of male relatives, and that choice of marital status is a fundamental human right that no one should be required to relinquish.⁸⁹ To the concern that gender is a trait shared by huge numbers of people, he responds that race, religion, nationality, and political opinion are also characteristics shared by very large groups.⁹⁰ As another example of social groups bound

83. *Id.* at 159.

84. *Id.*

85. *Id.*

86. *Matter of Acosta*, Int. Dec. 2986 (BIA 1985). For a fuller discussion, see *infra* notes 230-51 and accompanying text.

87. HATHAWAY, *supra* note 59, at 161.

88. *Id.* at 162-63.

89. *Id.* at 162, referring to *Incirciyan*, Immigration Appeal Board Decision, M87-1541X, Aug. 10, 1987. See *infra* note 208.

90. He does not address one issue that can be said to distinguish gender from the other bases. Approximately 50% of the population of every country in the world are women and, thus, in some way is categorized by gender. No other race, religion, nationality, or political belief is so widespread. As a result the social group of women has potentially many more members than a group based on race or religion.

together by a fundamental, immutable characteristic, Hathaway points to homosexual and bisexual men and women.⁹¹

Hathaway also considers families as particular social groups.⁹² It is unclear whether Hathaway views families as groups defined by an unalterable characteristic—the accident of birth—or as groups bound together in an association so fundamental to their human dignity that they should not be required to change their membership. His reference to the protection accorded under international law to the family as the fundamental unit in society⁹³ suggests the latter analysis, but his examples of family members persecuted because they are perceived to be surrogates for their kin⁹⁴ suggests the former. Perhaps he views family members as social groups that fall into both or even all three social group categories.⁹⁵

In his examination of social class,⁹⁶ Hathaway concludes that a social class organized around a changeable characteristic that is unlikely to be fundamental to human dignity or integrity may fall outside the concept of social group. He illustrates his point by describing a privileged social class—the large landowners, let us say—which resists renouncing its privilege. The landowners can renounce their extensive land holdings, which are not innate and immutable, and which are not protected by core human rights norms. If the same people were continually denounced as members of the landed gentry even after renouncing their land, however, they would constitute a social group because their past status is something beyond their power to change.⁹⁷

More provocatively, Hathaway suggests that the poor as a class might constitute a particular social group in light of the fact that poverty is a condition that people often cannot voluntarily renounce.⁹⁸ He further asserts that a technically voluntary economic class—peasant landowners in poor countries, for example—may also constitute a social group if membership in the class is the only means of ensuring food and

91. HATHAWAY, *supra* note 59, at 163.

92. *Id.* at 164-65.

93. *Id.* at 164, citing Universal Declaration of Human Rights, art. 16(3) G.A. Res. 217A(III), U.N. Doc. A810 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 23(1), 999 U.N.T.S. 171.

94. HATHAWAY, *supra* note 59, at 165 (referring to cases involving siblings of political activists (Bernarda Lucia Ramirez Cordero, Immigration Appeal Board Decision M79-1211, Dec. 12, 1980) and children of activists (Askall Asnake, Immigration Appeals Board Decision M80-1020, Feb. 23, 1981)).

95. See *supra* text accompanying note 85. It is certainly possible to hypothesize three different scenarios featuring persecution against family members based on: (1) their relationship by blood (innate, immutable characteristic) to others deemed disloyal; (2) their voluntary participation in the past in the privileges enjoyed by the family even though they have renounced those privileges (*e.g.*, royal family; children of nobility; landed gentry); and (3) their continued voluntary participation in their family (an association so fundamental to human dignity that they should not be obliged to abandon it).

96. HATHAWAY, *supra* note 59, at 166-67.

97. *Id.* at 166.

98. *Id.* at 167.

shelter⁹⁹ because group members should not be forced to renounce the core human right of basic subsistence.¹⁰⁰ Although Hathaway comes close to eroding the line between refugees and economic migrants, a distinction clearly drawn by the *UNHCR Handbook*,¹⁰¹ there is a distinction between Hathaway's poverty-based social group and economic migrants. Economic migrants are persons who voluntarily leave their countries exclusively for economic reasons.¹⁰² In contrast, Hathaway's version of the poor and peasant landowners as social groups is linked to the other requirements of refugee status: they must have a well-founded fear of persecution for membership in their group. Consequently, they must prove at least three elements in addition to poverty: membership in a social group, fear of persecution, and persecution based expressly on that membership.

In sum, Hathaway views social class as a status that might fall within any of the three criteria he has proposed to define the social group concept. Class designations such as caste may be immutable; other class identities can be changed but continue to stigmatize their members even though they have voluntarily renounced the class privilege; and some social class designations can be renounced only at the cost of core human rights.

The last category of social groups that Hathaway examines is voluntary associations.¹⁰³ In essence, he suggests that there is a presumption against voluntary associations as social groups because the abuse that membership may trigger can be halted by the decision to disassociate from the group.¹⁰⁴ The presumption is overridden, however, when membership in the voluntary association is a matter of conscience or human dignity or otherwise a fundamental human right.¹⁰⁵ Thus, recreational clubs would likely fall outside the definition,¹⁰⁶ but students—who are pursuing the basic right to an education¹⁰⁷—would fall within it. Similarly, groups categorized by profession or employment would fall within the social group concept, based on the basic right to choose an occupation,¹⁰⁸ as would trade unions, based on the basic rights to

99. *Id.*

100. *Id.* See, e.g., Universal Declaration of Human Rights, *supra* note 93, at art. 25(1): "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care"

101. UNHCR HANDBOOK, *supra* note 46, paras. 62-64.

102. *Id.* para. 62 ("If [a person] is moved exclusively by economic considerations, he is an economic migrant and not a refugee.").

103. HATHAWAY, *supra* note 59, at 167-69.

104. *Id.* at 167-68. For example, gender, sexual orientation, family, class and caste are generally beyond the individual's control.

105. *Id.* at 168.

106. *Id.*

107. Universal Declaration of Human Rights, *supra* note 93, at art. 26; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 13, 993 U.N.T.S. 3.

108. Universal Declaration of Human Rights, *supra* note 93, at art. 23(1); International Covenant on Economic, Social, and Cultural Rights, art. 6.

associate freely¹⁰⁹ and to seek just working conditions.¹¹⁰

B. Commentary on United States Law

In addition to scholars who have examined the status of refugees in international law, commentators in the United States have discussed and analyzed the social group provision included in the Refugee Act of 1980. Generally, they have contended that the statutory refugee definition, including the social group provision, should be interpreted broadly.¹¹¹ They note that the purposes underlying the Refugee Act of 1980 were generous: to expand the recognition of refugees and to standardize the refugee processing procedures.¹¹² Arthur Helton, a noted refugee advocate, argues that it is significant that the refugee definition refers to social group, rather than to ethnic group, minority group, or cultural group. He points out that social group is broader than the other terms. For example, people who lack a common ancestry do not comprise an ethnic group; economic classes, such as the bourgeoisie, are not typically perceived as a minority group; and individuals with transitory common interests or goals do not constitute a cultural group.¹¹³ Nonetheless, the term social group can encompass all these sets of people. Accordingly, he concludes that the choice of the term "social group" demonstrates an intent to formulate a broad, inclusive refugee definition.

109. Universal Declaration of Human Rights, *supra* note 93, at art. 23(4); International Covenant on Economic, Social, and Cultural Rights, art. 8; International Covenant on Civil and Political Rights, *supra*, note 93, at art. 22(1).

110. Universal Declaration of Human Rights, art. 23(1); International Covenant on Economic, Social, and Cultural Rights, art. 7.

111. See Helton, *supra* note 17; Graves, *supra* note 19; Carolyn Patty Blum, *Refugee Status Based on Membership in a Particular Social Group: A North American Perspective*, in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA, *supra* note 34. Blum also discusses persecution based on social group in her article *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327 (1986), but her main focus is on the standard of proof required for proving a well-founded fear of persecution. Neal, *supra* note 67, has focused on women as a social group. He, too, takes an expansive approach, although his focus throughout remains on women. It should be noted, however, that despite his comments on women as a social group, Neal more specifically examines persecution against a subset of women—women who deviate from social norms about women's roles. *Id.*

112. Graves, *supra* note 19, at 744-45. The Refugee Act of 1980 expanded the refugee definition by removing limitations based on the geographical origins of those seeking asylum and the governmental political ideologies of the countries from which they fled. Prior to the passage of the Act, the pattern was for the United States to generously protect persons fleeing left wing governments, but to deny protection to persons fleeing right wing "friendly" governments. Congress repealed geographic restrictions that limited refugee status, in addition to adding the broader definition of "refugee." See *supra* note 42 and accompanying text. See *supra* note 41 for discussion of new refugee processing provisions.

113. Helton, *supra* note 17, at 43-44.

Helton argues from a silent legislative record in advancing this view of the framers' intent.¹¹⁴ As noted earlier,¹¹⁵ the discussions of the term "social group" by the framers of the refugee definition in the 1951 Geneva Convention resound in near total silence. Faced with this impediment, Helton turns to other nearly contemporaneous treaties to see what light they may shed on the meaning of "particular social group." He contrasts the 1951 refugee definition with that of groups protected by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹¹⁶ Article II of the Genocide Convention refers to the elimination or persecution of racial, ethnic, national, and religious groups.¹¹⁷ The terms of the Genocide Convention have been interpreted not to apply to political, economic, social, and cultural groups.¹¹⁸ Scholarly authors have criticized the Genocide Convention as too narrow in scope.¹¹⁹

According to Helton, the sequence of the conventions is important. The Refugee Convention added social group to its definition of protected groups several years after the adoption of the Genocide Convention by the General Assembly and after criticism of its narrow scope. Helton infers from this that the drafters of the Refugee Convention intended to avoid the mistakes of the Genocide Convention by formulating a broad definition of refugee. Helton may be correct, but at best the evidence he relies on is inconclusive. The General Assembly adopted the Genocide Convention in 1948 and it came into force in 1951.¹²⁰ The scholarly criticisms of the scope of the Genocide Convention on which Helton relies were not published until 1959 and 1974, respectively, long after adoption of the Geneva Convention. We do not know whether the representatives at the 1951 conference were acquainted with any criticism of the Genocide Convention, and whether the representatives were responding to the perceived inadequacies of the Geneva Convention is lost to history.¹²¹

114. Helton's argument addresses the original formulation of the refugee definition as expressed in the 1951 Convention. *Id.* at 42-44. This formulation is relevant to the meaning of the 1980 United States legislation because the U.S. statute was intended to conform U.S. law to the international refugee law specified in the 1967 Protocol, which in turn incorporated the 1951 Convention's refugee definition.

115. See *supra* notes 17-25 and accompanying text.

116. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 227.

117. "[G]enocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group" *Id.* art. II.

118. Helton, *supra* note 17, at 42 n.20 (citing PETER NICHOLAS DROST, *THE CRIME OF STATE: BOOK II, GENOCIDE* 122 (1959)).

119. Helton, *supra* note 17 (citing FRANK J. MOORE, *THAILAND, ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 64 (1974)).

120. BOWMAN & HARRIS, *supra* note 2, at 146.

121. Apart from the provisions of the Genocide Convention, Helton's argument for an expansive refugee definition rests on a dictionary definition. To define cultural group, Helton refers only to the AMERICAN COLLEGE DICTIONARY (1967): those who store "the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another." Helton also refers to definitions

Helton also examines groups that have been the focus of United Nations concern as examples of social groups that the refugee definition would potentially protect: slaves, workers, migrant workers, unemployed workers, trade unions, women, children, families, the elderly, the young, the adopted, the illegitimate, the illiterate, and the disabled.¹²² Although these groupings of individuals might indeed qualify as social groups under the refugee definition, none of the United Nations resolutions and declarations discussing the groups Helton lists focuses on refugees.¹²³

Similarly, Helton also argues for inclusion of social groups mentioned in judicial opinions in the United States in a non-refugee context: blacks, Mexican-Americans, Native Americans, women, homosexuals, and linguistic groups.¹²⁴ He suggests that these groups are easily identifiable because they possess immutable characteristics and have historically been oppressed in the United States.¹²⁵ Further, Helton lists social

included in various United Nations documents. To define minority group, Helton relies on U.N. Doc. E/CN.4/Sub 2/384/Add.5 at 7: "[a] group numerically inferior to the rest of the population of the State . . . whose members—being nationals of the State— . . . possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity, direction towards preserving their culture, traditions or language."

To define ethnic group, Helton relies on U.N. Doc. E/CN.4/Sub. 2/416 at 19, quoting J. MASSIAH, *ETHNIC STRUCTURE OF THE WEST INDIES I*: a "descent group, differentiated by language, culture, style, national origin, kinship ties and religious belief." All of these sources are dated many years after the 1951 conference. Whether the representatives in Geneva in 1951 considered, and rejected as too narrow, the ethnic and cultural group categories and consciously selected the social group concept as broader and more desirable is not known. The legislative history remains inconclusive. Accordingly, Helton's strongest argument is that a "plain meaning" statutory interpretation analysis suggests that a broad interpretation should be given to social group. The "plain meaning" of such a vague term, however, is not obvious.

122. Helton, *supra* note 17, at 44-45. Helton has compiled this list from U.N. resolutions and declarations passed 15 to 25 years after the 1951 Refugee Convention.

123. For example, Helton refers to the U.N. Covenant on Civil and Political Rights, *supra* note 93; the U.N. Covenant on Economic, Social and Cultural Rights, *supra* note 107; the Declaration of the Rights of the Child, G.A. Res. 1386 (XIV) 14 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4354 (1959); Question of the Elderly and the Aged Resolution, 26 U.N. GAOR Res. 2842, *adopted* Dec. 18, 1971; and the International Year for Disabled Persons Resolution, 31 U.N. GAOR Res. 31/123, *adopted* unanimously Dec. 16, 1976.

124. Helton, *supra* note 17, at 48-50. Helton does not refer to decisions concerning refugee status; rather he identifies groups that have relied on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to challenge discriminatory acts. *Id.* There is no requirement that an individual articulate membership in a social group as a basis for an equal protection challenge.

125. *Id.* at 48. While race and sex are generally seen as immutable, sexual preference and linguistic group may be perceived as within a person's power to change. In a recent case concerning an asylum-seeker from Iran, a court in the Federal Republic of Germany noted that there is an extensive debate about the immutability of sexual preference. Administrative Court of Wiesbaden, Judgment of Apr. 26, 1983, No. IV/IE 06244/81, at 9 (opinion on file with author). For a recent discussion of the contemporary American debate concerning the immutability of sexual preference, see Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24-37.

groups mentioned by United States courts that share neither immutable characteristics nor a history of oppression: the educated, the wealthy, the poor, the permanent residents of a geographical area, those who share sporting interests, those who share recreational interests, those who share political goals, and those who share a particular view of morality.¹²⁶ Analyzing this list leads Helton to contend that American courts accept the proposition that there are an infinite number of social groups, and that recognition of groups by courts is limited only by "convenience."¹²⁷

In making this assertion, Helton overstates his claim. The social groups he mentions have, by and large, not been recognized by the courts to have any claim to legal entitlement. More often than not, the cases cited by Helton include dicta in which the courts refer to sets of people such as the "educated and uneducated,"¹²⁸ the "rich and poor,"¹²⁹ the "social groups within a sailing club,"¹³⁰ "summer campers,"¹³¹ and "social groups composed of moral delinquents."¹³² It is far-fetched to suggest that courts would view members of these groups as refugees, entitled to enter and live permanently in the United States. Furthermore, U.S. courts expressly have concluded that, in the context of the refugee definition, there are not an infinite number of social groups. Indeed, the administrative and judicial decisions¹³³ interpreting social group-based refugee claims have been strongly criticized for adopting a very constricted definition of social group.¹³⁴

Helton also notes that the U.S. Immigration and Naturalization Service (INS) deems former South Vietnamese soldiers and former refugee

In the German case mentioned above, the court ultimately rejected the government's argument that the asylum-seeker would not fear persecution in Iran if he refrained from homosexual activity. The court considered the government's argument as unacceptable as an admonition to refrain from practicing a religion. *Id.* Furthermore, in light of the death penalty for homosexual activity in Iran, the court considered it likely that the mere identification of the asylum-seeker as a homosexual might jeopardize his life. *Id.* at 8. See *infra* notes 177-78.

126. Helton, *supra* note 17, at 49-50.

127. *Id.* at 50.

128. *Id.* at 49 n.69 (citing *Fay v. New York*, 332 U.S. 261 (1947) (challenge to jury selection process that resulted in jury pool in which professionals were disproportionately represented and manual laborers were totally missing)).

129. *Id.* at 49 n.70 (citing *South Cutler Bay, Inc. v. Metropolitan Dade County*, 349 F. Supp. 1205, 1207 (S.D. Fla. 1972) (challenge by real estate developer to local building moratorium)).

130. *Id.* at 49 n.73 (citing *Cohan v. United States*, 198 F. Supp. 591, 597 (E.D. Mich. 1961) (yacht club member's suit to recover excise taxes on club charges)).

131. *Id.* at 50, n.74 (citing *Uphaus v. Wyman*, 364 U.S. 388, 407 (1960) (Black, Jr. dissenting) (challenge to judgment of civil contempt for refusing to produce names of persons attending summer camp for use in investigation of "subversive persons" within the state)).

132. *Id.* at 50 n.75 (citing *Besig v. United States*, 208 F.2d 142, 145 (9th Cir. 1953) (obscenity trial of two Henry Miller novels, *Tropic of Cancer* and *Tropic of Capricorn*)).

133. See, e.g., *Matter of Acosta*, Int. Dec. 2986 (BIA 1985); *infra* notes 230-51; *Sanchez-Trujillo v. INS*, 801 F.2d 1511; *infra* notes 268-87. It must be noted, however, that these decisions were issued after Helton published his article.

134. See, e.g., *Graves*, *supra* note 19, at 770-86.

workers in Indochina as presumptively entitled to refugee status.¹³⁵ Although persecution of these two groups could be categorized as persecution based on social group, it is more likely that this persecution is based on a political opinion imputed to those groups.¹³⁶ Similarly, Helton mentions the presumptive eligibility of Catholics and ethnic Chinese. In terms of the refugee definition, these two groups seem to fall more clearly into the religion, race, and nationality bases of persecution than into the social group category. Although there can be overlap between the social group concept and the religion, race, and nationality concepts,¹³⁷ the social group concept is most useful when it refers to some basis for persecution that is not already covered by concepts of race, religion, nationality, and/or political opinion.

After reviewing United Nations documents and United States judicial and administrative opinions, Helton examines the sociological literature. He posits four types of social groups: statistical, societal, social, and associational.¹³⁸ Statistical groups consist of individuals who share a common characteristic, such as blue eyes or great height, but who lack any consciousness of solidarity.¹³⁹ For Helton, the absence of a shared consciousness removes statistical groups from the refugee definition unless the persecuted characteristic is a covert method of persecution based on race or ethnic background.¹⁴⁰

135. Helton, *supra* note 17, at 50.

136. Persecution of military members and refugee workers might be animated by the regime's perception that these group members possessed a political opinion opposed to the regime's. United States law includes within the refugee definition those who are persecuted based on political opinions they do not hold but that the persecutor incorrectly ascribes to them. "[I]t is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does . . ." *Hernandez v. Ortiz*, 777 F.2d 509, 517 (9th Cir. 1985). *See also* *Laza Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. filed 1992).

This doctrine of imputed political opinion recognizes that persecution often occurs based on general inferences, which may be wrong in particular circumstances. Broad inferences about a group's loyalty to the regime, although quasi-political in nature, often are the basis for persecution based on membership in a particular social group. For example, the *UNCHR Handbook* states:

Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

UNHCR HANDBOOK, *supra* note 46, para. 78.

137. It is expected that such overlap will often occur. *Id.* para. 77. *See supra* note 78.

138. Helton, *supra* note 17, at 51 n.85.

139. *Id.* at 51.

140. *Id.* To illustrate this last point, persecution in Vietnam against children with blue eyes would most likely be a tacit act of racial persecution; children with blue eyes are likely to have been sired by western fathers and to be despised because of their parentage. Similarly, it is likely that persecution of tall people in Burundi would fall heavily on one distinct descent group in the society, the Tutsi, and would thus function as a cover for persecution that is based on ethnic background. Graves, *supra* note 19, at 782 n.256 (news reports of fighting between Tutsi (tall) and Hutu

The second type of social group identified by Helton, the societal group, consists of people who involuntarily share certain immutable characteristics such as race, sex, or linguistic background.¹⁴¹ Even though these group members may vary enormously among themselves, they share a consciousness of solidarity with others in their group, stemming from the treatment the group receives from society at large.¹⁴² For example, the history of racial discrimination in the United States makes it likely that African-Americans, whether nuclear physicists or unskilled laborers, will share a perception that they belong to a distinct societal group.¹⁴³

Social groups per se are voluntary and members do not necessarily share similar immutable characteristics.¹⁴⁴ Groups are based on shared interests, which might be recreational, educational, cultural, geographical, and so on. Opera subscribers would fall into this category, as would passengers on the same ship, classroom groups, friendship groups, and neighborhood groups.¹⁴⁵ Helton believes that members of these groups would fall within the refugee definition if their groups faced persecution.

Associational groups are those that pursue a common goal. They differ from social groups per se in that associational groups are formed to achieve a common purpose rather than merely to share a social interaction.¹⁴⁶ Again, membership is voluntary and group members share interests, but they do not necessarily share similar immutable characteristics.¹⁴⁷ Helton identifies trade unions, universities, and the League of Women Voters as prototypical associational groups,¹⁴⁸ and thinks that these groups also fit within the social group category in the refugee definition.

(short)). See generally NEW ENCYCLOPAEDIA BRITANNICA (1986) (bloody uprising in 1972 by the Hutu, who are short and stocky, 6 MICROPAEDIA [READY REFERENCE], at 177, against the dominant Tutsi, who are tall. 12 MICROPAEDIA [READY REFERENCE], at 72).

141. Helton, *supra* note 17, at 51.

142. *Id.* at 52.

143. Although the example is one that would be included under the racial category of persecution for purposes of the refugee definition, the same analysis would apply to a non-racial societal group. For example, in the small African nation of Burundi, two primary societal groups can be identified, the Tutsi and the Hutu. Both groups are diverse, but each group shares a perception that they belong to a distinct societal group. Blaine Harden, *Burundi Killings' Roots Lie in Tribal Hatreds*, WASH. POST, Aug. 21, 1988, at A25.

144. Helton, *supra* note 17, at 52.

145. *Id.* Helton includes kinship groups in this category. This seems incorrect in that individuals have no control over the families into which they are born. Kinship falls more appropriately into the second category, the societal group. To the extent that a kinship group does not include all those of the same kinship, but rather includes only that portion of the kinship group that chooses to interact together, then it may satisfy the social group per se definition.

146. *Id.*

147. *Id.*

148. *Id.* at 52.

Helton argues for an extremely broad reading of the social group provision in the Refugee Act of 1980. He contends that "[m]embership in virtually any group should be sufficient;"¹⁴⁹ "the contours of a social group for purposes of refugee status are limited only by the imagination of the persecutor."¹⁵⁰ Helton qualifies this statement, however, by indicating that the social group term in the refugee statute contemplates a legally identifiable group.¹⁵¹ In this context, "legally identifiable" means a group that is not merely a statistical artifact. A legally identifiable group would either possess a particular attitude about society or be perceived in a particular way by society at large.¹⁵²

Interestingly, Helton approvingly discusses a potential refugee social group that does not appear to fit within the societal, social, or associational groups he sets forth. This group consists of Salvadoran urban working-class males of military age who have neither served in the military nor expressed overt support for the government.¹⁵³ The individuals in this group involuntarily share certain characteristics, but they are not immutable. Society at large does not treat them similarly. It is unlikely they share a consciousness of solidarity. Accordingly, they do not form a societal group. Similarly, they are too diverse to form a social group based on shared interests, and they lack a common purpose that might bring them together into an associational group. Instead, they appear to comprise a statistical group: individuals who share a common characteristic but lack any consciousness of solidarity. As there is no evidence that the poor treatment accorded to urban working-class males of military age is a covert attempt to punish people for their race, religion, or nationality, it seems that this group does not satisfy the social group category in the refugee definition.

Other academic commentary in the United States also has urged a broad interpretation of the social group provision of the Refugee Act of 1980. For example, Maureen Graves reviews both ordinary usage of the term "social group" and its treatment in sociological literature, and con-

149. *Id.* at 60.

150. *Id.* at 66.

151. *Id.* at 61.

152. *Id.* In discussing the concept of a legally identifiable group, Helton reasons by analogy from jury exclusion cases. A jury pool that excludes individuals with names beginning with "T", "U", and "V" is deemed not to constitute a legally identifiable group because there is no evidence that these individuals possess a different attitude toward the law than those whose names begin with other letters. *Id.* at 60 n.128 (citing *Krause v. Chartier*, 406 F.2d 898 (1st Cir. 1969)). See also *United States v. Butera*, 420 F.2d 564, 572 (1st Cir. 1970). In contrast, a rule excluding women from the jury pool affects a legally identifiable group. Helton, *supra* note 17, at 61 nn.135-36 (citing *Duren v. Missouri*, 439 U.S. 357 (1979)). Although a wide range of attitudes toward criminal law will be found among women, excluding all women will tend to exclude some attitudes that are more common among women than among men.

153. *Id.* at 62 (discussing the administrative proceedings in the case later appealed to the Ninth Circuit as *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)). See *infra* note 268.

cludes that it is impossible to fashion a satisfactory definition.¹⁵⁴ She argues that the best that can result—an “amorphous, all-inclusive” definition—is not useful.¹⁵⁵ Eschewing attempts to formulate a general definition, Graves focuses on particular examples of social groups discussed in a non-refugee context. She points to social groups identified in U.S. government documents: the urban middle class, officer corps, peasants, police, youth, ethnic Chinese, and Buddhist monks.¹⁵⁶ She notes that these groups were not identified in a refugee context, but rather were designated in a Pentagon commissioned psychological study that attempted to identify social groups in Cambodia that would be susceptible to American pressure.¹⁵⁷ Graves also reviewed some of the sociological literature. She lists social groups identified by sociologists according to the following factors: “kin, family, ethnic, territorial, age, sex, political, governmental, language, religious, residential, class, occupational, recreational, propinquity, business, nationality, scientific, charity, insurance, educational, honorary, and learned.”¹⁵⁸

On the basis of these government and sociological studies, Graves emphasizes that some of the groups are voluntary, others not; some are cohesive, others not; some are homogeneous, others not; some involve immutable characteristics, others not; some involve characteristics central to the members’ identities, others not.¹⁵⁹ Declining to limit the social group concept in refugee law to groups characterized by involuntary membership and immutable characteristics, Graves assumes that all the social groups identified by sociologists and Pentagon studies fall within the refugee definition. Because these sources present a great variety of potential social groups, Graves concludes that it is impossible to develop a precise definition of “social group” for refugee decisions.¹⁶⁰ Instead she advocates a “broad, literal interpretation of ‘social group.’”¹⁶¹ She does not explain what this interpretation should be,¹⁶² but indicates that the agency and courts should turn away from attempts to formulate abstract definitions and instead recognize social groups on a case by case basis. In recommending ad hoc decision-making about

154. Graves, *supra* note 19, at 787-89.

155. *Id.* at 790 n.305.

156. *Id.* at 789 n.297.

157. *Id.* The study was commissioned in 1959. Studies to identify “promising” social groups have also been conducted by the Pentagon with respect to groups in Egypt, Burma, China, Iran, Iraq, Laos, Syria, Thailand, and Vietnam. *Id.*

158. *Id.* at 790 n.305 (quoting R. BIERSTEDT, *THE SOCIAL ORDER* 258 (1957)).

159. *Id.* at 789-92.

160. *Id.* at 789. Furthermore, Graves argues that courts and administrative tribunals lack the sophistication and expertise to analyze and apply many social group definitions.

161. *Id.* at 795.

162. Graves instructs the courts to “[adhere] to the statutory meaning of ‘social group.’” *Id.* at 796. This is an empty phrase because there is no legislative history to indicate what Congress intended this statutory term to mean. Accepting the premise that Congress intended to broaden the refugee definition in 1980 does not logically delineate which groups of potential refugees Congress envisioned as entitled to protection due to persecution based on membership in a social group.

social groups, she apparently is confident that the judges will "know them when they see them."¹⁶³

III. Jurisprudential Developments

Due to the vagueness of the social group term and the dearth of illuminating legislative history, there have been fewer refugee status claims based on social group than on other grounds, such as political opinion,¹⁶⁴ and there are relatively few decisions in the United States and Europe addressing the particular social group term. Furthermore, most of the decisions that deal with social group claims also involve claims of persecution based on religion or political opinion, and the great majority of judicial decisions that discuss social group issues actually base their conclusions on the religion and political opinion claims.¹⁶⁵ Although these decisions give little attention to the meaning of the term social group, administrative and judicial tribunals in several countries have grappled with the tasks of defining this term and applying it to asylum seekers. These decisions provide comparisons and contrasts that are instructive.

A. Germany

During the past decade, German courts have reviewed a growing number of cases in which individuals claimed asylum based on persecution suffered due to their membership in a social group.¹⁶⁶ The factual situations giving rise to these claims varied dramatically. In the early 1980s a funeral home operator and his wife claimed the Polish authorities harassed, extorted, and arrested them due to their involvement in

163. Cf. *Jacobellis v. United States*, 378 U.S. 184 (1964) (Stewart, J., concurring). In despair at the difficulty of defining "hard-core pornography," Justice Stewart said, "[p]erhaps I could never succeed in intelligibly doing so. But I know it when I see it" *Id.*

164. See Blum, *supra* note 111, at 348 (categorizing Ninth Circuit cases by basis of persecution). Blum's review indicates that most asylum seekers in the Ninth Circuit rely on persecution based on political opinion; relatively few rely on persecution based on social group. As the Ninth Circuit decides approximately 60% of the immigration cases heard by federal courts of appeals, STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 234 (1987), the cases received by Blum are unlikely to constitute an isolated phenomenon.

165. Although political opinion as a basis of persecution appears to be more easily identified and defined than persecution based on social group, the term "political opinion" has generated its own definitional problems. For example, in *Matter of Acosta*, Int. Dec. 2986 (BIA 1985), the Board of Immigration Appeals (BIA) ruled that a taxi driver, persecuted for not obeying a general strike called by the guerrillas, was not persecuted for his political opinion. The BIA held that the political motive of the guerrillas to disrupt society by a general strike triggered the guerilla activity against the taxi driver, and that this political motive did not constitute persecution on account of political opinion. *Id.*

166. For a discussion of the asylum process in Germany and the judicial opinions interpreting membership in a particular social group, see Fullerton, *supra* note 3.

private enterprise.¹⁶⁷ The couple argued that, although private economic activity had not been criminalized, the state deemed entrepreneurs disloyal to and insufficiently controlled by the regime, and consequently targeted them for persecution. The court granted asylum in Germany based on persecution due to membership in the particular social group of owners of private businesses.

In contrast, a German court denied asylum to a woman from India who claimed she was persecuted because she had married out of caste and because she was a member of a women's rights organization.¹⁶⁸ The court found credible the applicant's story of being disowned, defamed, and threatened with death by stoning and fire, but it concluded that this persecution could not be attributed to the government. Although the opinion was somewhat opaque, the court appeared to agree that the asylum seeker was perceived as a member of two social groups, the group of women who marry men of another (and lower) caste, and the group of women active in women's rights organizations. The court also believed that she had suffered persecution. The court concluded, however, that the government was not implicated in the persecution carried out by private citizens.¹⁶⁹ The court acknowledged that the authorities had failed to protect the applicant, but decided that the lack of police protection was probably due to inefficiency, mismanagement, and corruption. Accordingly, the court denied asylum because the applicant could not prove that the government inaction was due to her membership in a particular social group.

In addition to these somewhat unusual claims of persecution, German courts have adjudicated asylum claims based on persecution for membership in more traditional social groups. For instance, the grandson of prosperous landowners in pre-revolutionary China¹⁷⁰ and the daughter of landed gentry in pre-revolutionary Romania¹⁷¹ were both granted asylum in Germany. Similarly, members of the Baganda people in Uganda, who could show there was great resentment of the Baganda and terror directed at them, established their claims for asylum based on

167. Judgment of March 29, 1985, No. 17 K 10.343/83, *Verwaltungsgericht Gelsenkirchen* [Gelsenkirchen Administrative Court].

168. Judgment of January 4, 1985, No. AN 1269-XII/79, *Verwaltungsgericht Ansbach* [Ansbach Administrative Court].

169. In interpreting the term "persecution," which is a key part of the definition of "refugee" contained in the 1951 Geneva Convention Relating to the Status of Refugees, the *UNHCR Handbook* notes: "Persecution is normally related to action by the authorities of a country Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." *UNHCR HANDBOOK*, *supra* note 46, para. 65.

170. Judgment of March 29, 1983, No. AN 419-I/78 (XVI), *Verwaltungsgericht Ansbach* [Ansbach Administrative Court].

171. Judgment of December 10, 1982, No. 10 K 115/80, *Verwaltungsgericht Saarland* [Saarland Administrative Court].

their social group.¹⁷² Kurdish and Afghani women whose husbands were active opponents of the regime also successfully claimed asylum if they provided evidence that the authorities often subjected family members to severe treatment in order to flush out their opponents. The women were seen as individuals persecuted on the basis of their family membership.¹⁷³

Although the German judicial opinions discussed above examine the asylum claims based on social group, the courts did not attempt to define a social group for purposes of the asylum process. Rather, the courts reached their decisions based on an intuitive sense of persecution based on membership in a social group.¹⁷⁴ Two German courts, however, have attempted to articulate standards for evaluating social group claims. The Administrative Court of Hannover reviewed an asylum claim submitted by a former government official from Ghana.¹⁷⁵ The applicant admitted that he had illegally sold government-owned fertilizer to farmers at inflated prices and then fled Ghana after the leaders of a coup began investigating corruption by former officials. He claimed he would be persecuted in Ghana for his membership in the social group composed of corrupt officials. He bolstered his creative, perhaps brazen, claim by noting that the new government had selected a relatively harmless groups of offenders, denied them appropriate legal proceedings, subjected them to disproportionate penalties, and proclaimed a "holy war" against them. He argued that although the corrupt activity was illegal, those accused of non-violent, economic crimes were being scapegoated for political ends. He asserted that in this setting the relatively small group targeted constituted a particular social group.

While the court treated seriously the allegations of irregular legal proceedings and disproportionate penalties, the court did not agree that

172. Judgment of April 7, 1983, No. 15 K 15316/80, *Verwaltungsgericht Köln* [Cologne Administrative Court]; Judgment of November 29, 1983, No. AN 185 XIII/79 (XIX), *Verwaltungsgericht Ansbach* [Ansbach Administrative Court].

173. Judgment of July 2, 1985, No. 9 C. 35.84, *Bundesverwaltungsgericht* [Federal Administrative Court] (Kurdish woman in Turkey); Judgment of February 21, 1985, No. AN 19 K 84 C.837, *Verwaltungsgericht Ansbach* [Ansbach Administrative Court] (Afghanistanian woman); Judgment of May 14, 1985, No. 20 A 10046/84, *Oberverwaltungsgericht Nordrhein-Westfalen* [North Rhine-Westphalia Administrative Appeals Court] (Afghanistanian couple).

174. To an American lawyer trained in the common law tradition that honors precedent and *stare decisis*, many of the German judicial opinions in this area seem both delphic and conclusory. The opinions seem to repeat the facts, review the expert opinions, analyze the legal arguments presented by both sides, and then leap to a conclusion. A discussion of the reasoning process that led to the conclusion is often missing. A realization that the German legal system is a predicated on written legal codes, that *stare decisis* is not important, and that the precedential value of judicial decisions by trial courts is almost non-existent makes one realize why the decisions often are conclusory. There is relatively little need for or value placed on well-reasoned and carefully analyzed trial court opinions in the German system. These opinions have very few ramifications that extend beyond the particular litigants before the court.

175. Judgment of June 6, 1984, No. 1 OVGA 91/82 As, *Verwaltungsgericht Hannover* [Hannover Administrative Court].

corrupt government officials formed a social group within the meaning of the Geneva Convention. The court focused on two elements: (1) was there a substantial degree of homogeneity among the individuals in the group? (2) was there some degree of inner structure in the group? The court concluded that individuals who did not necessarily even know each other, and whose only similarity to each other was that they had committed economic crimes, did not satisfy either of the requirements.¹⁷⁶

The Administrative Court of Wiesbaden rejected the approach outlined by the Hannover court when it grappled with an asylum claim filed by a homosexual man from Iran.¹⁷⁷ The asylum seeker had not suffered persecution in the past. Raised in Iran in the Islamic tradition, he had been allowed several times to depart freely from Iran and return at his convenience. The regime did not know his sexual orientation. He was concerned, nevertheless, that the Iranian government might learn about his homosexuality and imprison or even execute him for ignoring religious laws. The Federal Refugee Office¹⁷⁸ in Germany rejected this asylum claim due to lack of persecution in the past and lack of evidence that the Iranian government was likely to learn of the asylum seeker's sexual orientation.

The Wiesbaden court reversed the agency's decision. After concluding that homosexuals are severely persecuted in Iran and that, consequently, the asylum seeker would likely face persecution there, the court examined whether homosexuals from Iran constitute a particular social group within the meaning of the Geneva Convention. The court expressly rejected the idea that group members must know one another or belong to an organization. Instead the court emphasized two issues: First, whether the general population views this collection of people as a group; second, whether an objective observer of society would say that the general population treats this group as undesirable. Looking at the prejudice expressed against homosexuals in Iran, the pejorative labels

176. The court did state that in certain circumstances individuals accused of crimes could constitute a particular social group within the meaning of the 1951 Geneva Convention. A group of insignificant and harmless criminals who were treated in a flagrantly illegal manner and subjected to greatly disproportionate punishment as a means of diverting the public's hostility from the government to the scapegoated group might satisfy the social group definition. *Id.* at 10.

177. Judgment of April 26, 1983, No. IV/I E 06244/81, *Verwaltungsgericht Wiesbaden* [Wiesbaden Administrative Court].

178. Under the current refugee processing system in Germany, the Federal Office for the Recognition of Foreign Refugees [*Bundesamt für die Anerkennung Ausländischer Flüchtlinge*] is the agency that evaluates asylum applications. Decisions by the Federal Office can be appealed to the local Administrative Court [*Verwaltungsgericht*]. There are certain limited appeals from the Administrative Court to the Administrative Appeals Court [*Oberverwaltungsgericht or Verwaltungsgerichtshof*], and from there to the Federal Administrative Court [*Bundesverwaltungsgericht*]. For a general description of the asylum process, see Fullerton, *supra* note 3, at 391-94. The German asylum procedure will soon change dramatically, however. On May 28, 1993 the German Parliament voted to amend the constitution to limit drastically the opportunities to apply for asylum. *Bonn Bars Asylum Seekers*, N.Y. TIMES, May 29, 1993, at 3. See *supra* note 37.

used to describe them, and the harsh treatment they suffer, the court found that Iranian society perceives homosexuals as a pariah group, and ruled that homosexuals in Iran constitute a particular social group within the meaning of the 1951 Geneva Convention.

In summary, the two German courts that attempted to define the social group term formulated two very different tests. The Hannover court focused on the internal structure of the putative group, whereas the Wiesbaden court focused on external perceptions—society's view of the group in question. Because the role of precedent is not significant in the German legal system, neither of the two trial courts attempted to explain why its approach and rationale differed greatly from that proffered by its sister court. Nor did the courts try to distinguish the facts of the cases in order to synthesize the legal standards they had articulated. Thus, the two different analytical approaches to the social group term in the refugee definition co-exist in German judicial jurisprudence.

B. Canada

There are a number of decisions in Canada recognizing persecution based on membership in a particular social group. Administrative tribunals rendered the majority of the decisions, but there are also a few reported judicial opinions. For example, in 1979 the Federal Court of Appeal reviewed a claim filed by a young man from Chile who claimed he had been persecuted for his membership in a sports club at his secondary school.¹⁷⁹ Government authorities detained the applicant and interrogated him about his activities as president of the club. Despite the applicant's protest that the club was strictly a group engaged in athletic activities, the officials described the club as one that supported socialism and accused him of joining the club for political motives. The applicant also stated that his brother had been politically active and feared that his family relationship by itself might lead to persecution.

The court found the applicant credible and concluded that he had a well-founded fear of persecution. The court then addressed, in a conclusory fashion, whether the basis for this persecution was the applicant's membership in a particular social group. The applicant had raised two possible social groups: (1) the sports club and (2) his family. The court was uncomfortable with the notion that immediate family might satisfy the social group term in the refugee definition and seemed relieved that the sports club provided a convenient alternate basis. Without articulating the basis for its hesitation over the family relationship, the court simply stated: "[T]here can be no doubt that the 'Sports Club' was a 'social group' as the term is used in the definition."¹⁸⁰

179. *Astudillo v. Minister of Employment and Immigration*, 31 Nat'l Rep. 121 (Oct. 5, 1979).

180. *Id.* Canadian law incorporates the Geneva Convention refugee definition. See *supra* note 33.

A decade later the Federal Court of Appeal revisited the social group issue in a case involving a member of the Irish National Liberation Army (INLA), who had fled Northern Ireland after defecting from that organization.¹⁸¹ After becoming a member of the INLA, a paramilitary organization dedicated to unifying Ireland, he was assigned to guard two hostages, the young sister and step-father of an imprisoned INLA member. When it appeared the imprisoned man had provided evidence for the government, the INLA sentenced the hostages to death. The asylum seeker helped the hostages escape, for which he was sentenced to death by the INLA. He escaped to Canada where he sought refugee status.¹⁸²

The court struggled with this case. Its difficulty stemmed from the applicant's prior participation in terrorist activity. This triggered an extended analysis of other elements of the refugee definition, in particular the requirement that an asylum seeker is unable or unwilling to avail himself of the protection of his homeland.¹⁸³ The majority concluded that although the INLA constituted a social group, a terrorist organization is not the sort of social group encompassed by the Geneva Convention refugee definition.¹⁸⁴ The dissent pointed out that the social group in question was not the INLA; it was, more precisely, former members of the INLA.¹⁸⁵ The dissent argued that, when the focus shifted to former

181. *Re Attorney-General of Canada and Ward*, 67 D.L.R. 4th, 1 (Mar. 5, 1990) (MacGuigan, J.A., dissenting in part).

182. He alleged that the INLA kidnapped him, tortured him, and sentenced him to death. He then escaped and sought protection in the Republic of Ireland, where he was imprisoned for his role in the original hostage-taking. When he was released after two years and nine months, the Irish police supplied him with a passport and airline tickets for Canada. *Id.* at 5.

183. For elements of the refugee division, see *supra* note 33.

184. The *Ward* case was decided based on Canadian immigration legislation that lacked provisions excluding from refugee status certain categories of people who otherwise satisfied the refugee definition. Accordingly, individuals believed to have committed war crimes, crimes against humanity, and serious non-political crimes outside the country of refuge, could seek admission if they could show they had a well-founded fear of persecution. In contrast, Article 1F of the Geneva Convention provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

On January 1, 1989, Canadian law was amended to add these exclusion clauses to the refugee definition applied in Canada. The Canadian refugee definition now expressly excludes "any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof . . ." See *supra* note 33. Consequently, today in Canada asylum seekers' former persecution of others would on its face preclude them from satisfying the refugee definition.

185. *Ward*, 67 D.L.R. 4th, at 20 (MacGuigan, J.A., dissenting in part).

INLA members, the nature of the INLA's activities was not directly relevant to the claim before the court.

With so much focus on the moral culpability of terrorists and terrorist-turncoats, neither the majority nor dissent placed great emphasis on the preliminary question: What constitutes a particular social group? Nonetheless, both did, in passing, proffer a standard. After referring to the *UNHCR Handbook*¹⁸⁶ interpretation of "social group," the majority somewhat surprisingly relied on a dictionary to conclude that a social group is a number of persons who are "associated, allied, combined."¹⁸⁷ The dissent indicated that a social group is one that has members "united in a stable association with common purposes."¹⁸⁸ The dissent further described the INLA as a "non-natural" social group, using that awkward term to highlight that the INLA is a group that does not share an innate characteristic such as race or nationality. It then voiced a plea for a flexible definition:

There is in fact nothing absolute about social groups, particularly non-natural social groups. They may have ideologies, but some members may not adhere to them, belonging rather for reasons of prestige, or fear, or some other non-ideological reason. Such groups may have membership initiations or fees or lists, but many camp-followers may be drawn to their side and be perceived as members by the world, but yet not be members in the way others are. Such groups may be terrorist in intent, but nevertheless they may contain within their ranks those who are less given to violence and even those who are dedicated to non-violence and universal pacifism. Perhaps, above all, membership may be regarded as indelible and forever, but some may drift away, or even break off suddenly for reasons of principle. Should those who were briefly active in the Communist Party in the thirties in a time of depression and despair be permanently categorized as members of a subversive group? The concept of social group should not, in my opinion, be wielded like a broad-sword to lop off all individualizing circumstances within an arbitrarily designated circumference. In a world fractured by racism and religion, politics and poverty, reality is too complex to be thus limited by conceptual absolutes.¹⁸⁹

Although eloquent, and a useful backdrop for asylum decisions, this analysis provides no standard to guide decision-makers reviewing claims of persecution based on membership in a particular social group.

In late 1992 the Federal Court of Appeal re-examined the social group concept and, in dicta, offered another view of this term.¹⁹⁰ The refugee candidate was a woman from Trinidad and Tobago who claimed she had been abused by her husband for years. Her complaints to the police had been unavailing. After 15 years of this marriage, she fled to Canada and sought asylum based on her persecution due to her mem-

186. See *supra* note 46.

187. SHORTER OXFORD DICTIONARY, second meaning. *Ward*, 67 D.L.R. 4th, at 8.

188. *Id.* at 18. The dissent does not indicate the source of this definitional test for the term social group.

189. *Id.* at 19.

190. *The Minister of Employment and Immigration v. Marcel Mayers*, A-544-92 (Nov. 5, 1992).

bership in the social group of Trinidadian women subject to wife abuse.¹⁹¹ At issue before the Federal Court of Appeal was whether there was some evidence to support the tribunal below, which had concluded that this applicant might satisfy the refugee definition.¹⁹²

The court began its analysis of the meaning of "social group" in refugee law by first reviewing its prior decision in *Ward*, which it found did not set forth a workable test for social group claims. The court next examined scholarly commentary on the term, some of the case law in the United States,¹⁹³ and administrative practice in Canada. The court then offered its own statutory construction:

The phrase 'social group' has a broad meaning in its ordinary, dictionary sense but it is, in the statute, modified by 'particular.' It seems to me that the adjudicator could readily have decided that, even if a 'social group', women, constituting as they do about half of humanity, cannot aptly be described as a 'particular social group.' He might equally, on that basis and in my view correctly, have decided that Trinidadian women do not constitute a particular social group. Neither of those decisions require more than construing the statute according to the ordinary meaning of its words.

It is otherwise as to 'Trinidadian women subject to wife abuse.' There is presently no judicial or other authority upon which the adjudicator was obliged to rely that would lead him to a concluded opinion whether, as a matter of law, they are a particular social group . . . [T]o construe the statute with a view to that determination requires the weighing of credible evidence in the form of foreign jurisprudence and learned commentary. A question may be posed for the future: since, in this context, persecution must be feared by reason of membership in a particular social group, can fear of that persecution be the sole distinguishing factor that results in what is at most merely a social group becoming a particular

191. The government defined the social group at issue as "Trinidadian women subject to wife abuse." The asylum seeker agreed with that formulation, but also offered two alternative views of the social group in question: "women" and "Trinidadian women." *Id.* at 2.

192. The procedural posture of this case was somewhat unusual and it colored the court's analysis. The case had initially been reviewed by a two-member "credible basis panel." This tribunal consisted of an adjudicator and a member of the Canadian Immigration and Refugee Board. *Id.* at 1. The adjudicator concluded that the applicant was a credible witness and that there was some evidence that she would satisfy the refugee definition. He did not address the specific statutory terms or the definition of membership in a particular social group. The other member of the tribunal, the Refugee Board member, reached the opposite conclusion on both issues. He found the applicant not to be credible and concluded that her claim of persecution did not fall within the statutory definition. *Id.* at 1.

Under Canadian legislation the favorable decision of one member of the credible basis panel is conclusive. Immigration Act, R.S.C. 1985, c. 1.7, s. 46.01(6). Because the applicant was in a special group of backlog cases, the favorable decision of one member of the panel authorized her admission to Canada. Immigration Act, c. 8(2). See *Marcel Mayers*, A-544-92, at 1 n.3. As a result, the Federal Court of Appeal could not review the issues de novo, but was limited to deciding whether there was some evidence to support the adjudicator's conclusion.

193. The court looked only at *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

social group?¹⁹⁴

The court concluded by stating that:

[T]he adjudicator cannot be said to have erred in law by implicitly concluding that the Refugee Division might find "Trinidadian women subject to wife abuse" to be a particular social group. . . . That is not to say that the Refugee Division would be right if it so decided but only that the . . . tribunal had not the authority to pursue the questions.¹⁹⁵

With this delphic utterance, the Federal Court of Appeal affirmed the decision below. The language is so opaque, and the procedural posture of the case so convoluted,¹⁹⁶ that it is difficult to predict what effect this opinion will have on the development of the social group concept in Canadian jurisprudence.

In addition to the Federal Court of Appeal decisions discussed above, there are many other Canadian decisions involving persecution based on membership in a particular social group. The Immigration and Refugee Board¹⁹⁷ has been quite active, recognizing the refugee status of Freemasons in Cuba,¹⁹⁸ members of the capitalist class,¹⁹⁹ members of the landlord class,²⁰⁰ Salvadoran farmers living in areas of military operations by both government and guerrilla forces,²⁰¹ draft-evaders and deserters from military forces whose actions have been condemned by the international community,²⁰² and Tamils from Sri Lanka.²⁰³ In addition, the Immigration and Refugee Board, and its predecessor the Immigration Appeal Board,²⁰⁴ have recognized social groups defined by family background,²⁰⁵ gender,²⁰⁶ and sexual orienta-

194. *Marcel Mayers*, A-544-92, at 11-12.

195. *Id.* at 13.

196. *See supra* note 192.

197. In the late 1980s Canada revised its refugee determination process. The new process channeled all claims to refugee status in Canada to the Convention Refugee Determination Division of the Immigration and Refugee Board (IRB). Bill C. 55, cl. 19 (codified at Immigration Act sec. 71.1). The Immigration and Refugee Board also supersedes the Immigration Appeal Board (IAB), which under earlier legislation reviewed appeals from denials of refugee status. Carolyn Patty Blum, *Refugee Status Based on Membership in a Particular Social Group: A North American Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA* 93 n.69 (Jacqueline Bhabba & Geoffrey Coll eds., 1992).

198. CRDD T89-03344, Feb. 5, 1990.

199. CRDD T89-00106, June 7, 1989.

200. CRDD T89-02116, May 23, 1989.

201. CRDD T89-02579, Dec. 8, 1989.

202. CRDD T89-03954, Mar. 16, 1990.

203. IRB Decision M89-01213, June 1989, R.L.R.U. Cat. Sig.10240; IRB Decision M89-00407, July 1989, R.L.R.U. Cat. Sig. 10147; IRB Decision M89-01225, July 1989, R.L.R.U. Cat. Sig. 10017, *cited in* HATHAWAY, *supra* note 59, at 163 n.189.

204. The Immigration Act of 1976, ch. 52, § 70(1), 1976-1977 S.C. at 1233, provided those applicants denied refugee status with a right to seek a redetermination before the Immigration Appeal Board (IAB).

205. *E.g.*, CRDD T90-02208, Aug. 16, 1990; CRDD T90-02209, Aug. 16, 1990; CRDD T89-01691, Jan. 8, 1990; CRDD C89-00036, June 16, 1989; CRDD C89-00037, June 16, 1989; CRDD M89-00971, June 13, 1989; CRDD M89-00972, June

tion.²⁰⁷ For example, the Board has deemed single women living in a Moslem country without the protection of a male relative,²⁰⁸ homosexual men from Argentina and Russia,²⁰⁹ and young men of eligible age for military duty who are subject to mistreatment after indiscriminate recruitment²¹⁰ to be members of persecuted social groups. Most recently, the Minister for Education and Immigration reversed the Immigration and Refugee Board and granted asylum to a Saudi woman who claimed persecution based on her sex.²¹¹ She asserted that she feared persecution based on her membership in the social group of emancipated women: those who refused to wear the veil, who attempted to travel alone, and who tried to pursue a university education in the field of their choice.²¹²

Although all of these decisions are interesting, none contains analysis of the elements that define a particular social group. In recognition of this omission, the Immigration and Refugee Board has released a position paper containing an analytical framework to guide decision-makers who review claims of persecution based on membership in a social group.²¹³ The Board's analysis looks to the internal cohesiveness of the group and to external perceptions of the group.²¹⁴ The suggested framework proposes a two-part test for determining the existence of a social group. Each part of the test, in turn, has multiple sub-parts.

The test first inquires whether the alleged social group is defined by an internal characteristic.²¹⁵ The organizing characteristic of the particular group might be innate, such as race, gender or kinship. Alternatively, the shared characteristic might be immutable, though not innate. For example, group members might share a common *past* economic or social status—a status that cannot be changed. Another shared internal characteristic might be one that is fundamental to the members' identity

13, 1989; CRDD M89-00425, Apr. 13, 1989; CRDD M89-00131, Apr. 7, 1989; CRDD M89-00146, Feb. 27, 1989.

206. CRDD M89-01959, Sept. 8, 1989; CRDD M89-01225, July 11, 1989; CRDD T89-00587, June 16, 1989; CRDD M89-00638, May 3, 1989.

207. CRDD T91-04459, Apr. 9, 1992; CRDD M91-12609, June 2, 1992.

208. *In re Incirciyan*, No. M87-1541X and M87-1248, Aug. 10, 1987 (Immigration Appeal Board).

209. *See supra* note 207.

210. *In re Valladares Escotes*, No. T87-9024X, July 29, 1987 (Immigration Appeal Board). Although the IAB recognized the existence of a bona fide social group within the meaning of the refugee definition, the IAB did not find the applicant credible and, as a result, denied his application for refugee status.

211. Decision of Bernard Valcourt, Minister of Employment and Immigration, Jan. 29, 1993; Clyde H. Farnsworth, *Anti-Woman Bias May Bring Asylum*, N.Y. TIMES, Feb. 2, 1993, at A8; Clyde H. Farnsworth, *Saudi Woman Who Fled Predicts Crackdown*, N.Y. TIMES, Feb. 7, 1993, at 19.

212. *See supra* note 211.

213. Preferred Position Paper, "Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution," Immigration and Refugee Board, Ottawa, Canada, Mar. 1992.

214. *Id.* at 8.

215. *Id.* at 10.

or to their human dignity. The religious affiliation of the group members might fall into this category.

The standard also examines any existing external perceptions of the group.²¹⁶ The test queries whether those outside the group perceive the group as threatening danger—a perceived danger that may, but does not have to, be political. The standard also inquires into external perceptions about the very existence of a group. If the government believes that certain individuals form a group, but no group exists, and persecutes them for their alleged membership, the individuals could claim persecution based on membership in a particular social group.

In summary, the Immigration and Refugee Board's position paper suggests a dual approach to determine the existence of a social group within the meaning of the 1951 Geneva Convention. Courts and other tribunals should ask whether the members of the alleged group are bound together by an internal characteristic that is innate, immutable, or fundamental to the members' identity or human dignity.

Decision-makers should not limit themselves to internal group characteristics, however. They should also examine external perceptions. If forces in a society mistakenly believe that a group exists, and act on that belief, any persecution that follows would be deemed persecution based on membership in a social group. Similarly, if forces in society correctly believe that a group exists, but incorrectly attribute dangers and threats to the group, any resulting persecution would constitute persecution due to membership in a social group.

From a comparative perspective, the Canadian Board's approach echoes the approach taken by the German courts. Although there is no indication that the Board is familiar with the German judicial opinions described above, the Board's focus on both internal group characteristics and external perceptions of purported groups, joins the two standards suggested by the German courts. Importantly, the Board's analysis expressly views the two standards—the internal group characteristic and the external perception of the group—as alternative options. Each standard is sufficient on its own to define a social group within the meaning of refugee law. Furthermore, the sub-parts of the Board's standard are also alternative options. An applicant for refugee status only needs to satisfy one of the sub-categories of either of the two prongs of the test in order to prove a social group that meets the refugee law definition.

C. United States

In the United States, only a small number of asylum seekers base their claims on persecution due to membership in a particular social group. Nonetheless, their claims have been premised on persecution based on membership in a great variety of social groups: taxi drivers in El

216. *Id.*

Salvador,²¹⁷ the military in Guatemala,²¹⁸ the educated elite in Ghana,²¹⁹ hereditary chiefs of the Esubete people in Nigeria,²²⁰ young working class males of military age in El Salvador,²²¹ the social circle of Imelda Marcos in the Philippines,²²² large landowners in the Philippines,²²³ cheesemakers in El Salvador,²²⁴ families,²²⁵ women previously

217. *Matter of Acosta*, Int. Dec. 2986 (BIA 1985).

218. *Arriaga-Barrientos v. INS*, 925 F.2d 1177 (9th Cir. 1991), *superseded by* *Arriaga-Barrientos v. INS*, 937 F.2d 411 (9th Cir. 1991). The applicant claimed that his former service in the military would trigger persecution by both the guerrillas and the military. The court concluded that the military was not a social group within the meaning of the refugee definition. The claim was essentially based on fear of persecution for political opinion.

219. *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

220. *Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992). The asylum seeker was a hereditary chief of the Esubete, a sub-tribe of the Yoruba. He feared persecution by a faction of the Esubete. The immigration judge concluded that the applicant feared persecution due to his membership in a social group, the Esubete royal family, but that he had failed to show that the government was unable or unwilling to protect him from the persecution. The BIA ruled that the fear of persecution was based on a personal dispute, not on membership in a social group. The Fifth Circuit concluded that the Esubete royal family might constitute a social group, but that the asylum seeker's fear was not based on his membership in the social group, but rather based on his failure to accept a position of leadership in the group.

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

222. *Rodriguez v. INS*, No. 91-70226, 1992 WL 116029 (9th Cir. May 29, 1992). The asylum seeker alleged persecution based on her membership in the inner social circle of Marcos and based on her membership in the Blue Ladies, a group that assisted Imelda Marcos in social and philanthropic activities. The court concluded that the Blue Ladies constituted an identifiable social group, but that Marcos' inner circle was too amorphous to constitute an identifiable social group. Moreover, the alleged harassment failed to rise to the level of persecution.

223. *Gatchalian v. INS*, No. 90-70204, 1991 WL 92349 (9th Cir. May 31, 1991) (asylum seeker, while manager of relative's large farm in Philippines, received threats from New Peoples Army; court ruled applicant failed to show reasonable possibility of persecution).

224. *Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990). An asylum seeker made campesino cheese, which is attractive to guerrillas because it is resistant to spoilage. He provided cheese when guerrillas demanded it, and feared persecution by the government. The BIA concluded cheesemakers do not constitute a social group. The First Circuit affirmed the decision, finding no likelihood of persecution by government). *Contra* Case No. A26-201-249, Executive Office for Immigration Review (EOIR), Baltimore, Md., Nov. 2, 1983 (asylum granted to cheesemaker who sold cheese to guerrillas when other cheesemakers in vicinity had been murdered).

225. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (rejecting young urban working-class males of military age as cognizable social group; describing in dicta a family as the quintessential social group). Courts reviewing claims of persecution based on family membership have tended to disagree. *See, e.g., Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991) (rejecting Guatemalan woman's claim of persecution due to family membership where her cousin had been kidnapped and her uncle killed; held that Congress did not intend to grant refugee status based on family membership). *See also De Valle v. INS*, 901 F.2d 787 (9th Cir. 1990) (Salvadoran woman's claim that she belonged to social group consisting of military deserters' family members was rejected because the group members were not closely affiliated and did not form a discrete group); *Sarabia-Chica v. INS*, 908 F.2d 977 (9th Cir. 1990) (Salvadoran woman alleged persecution based on membership in her family, which included many who had been killed for their political activities; court ruled she was eligible for asylum based on political opinion grounds and did not reach her

raped and beaten by guerrilla forces,²²⁶ and homosexual men.²²⁷ Many of the opinions, however, fail to analyze the concept of membership in a social group and focus instead on other aspects of the asylum claim. For example, they base their conclusions on issues such as the reasonable likelihood of persecution, the credibility of the asylum seeker, and the political opinion of the applicant.

Five reported decisions do struggle to define "social group" under the refugee definition. Each decision is flawed, but for different reasons. Examining them together reveals conflicts in the U.S. jurisprudence in this area. In *Matter of Acosta*,²²⁸ the Board of Immigration Appeals (BIA)²²⁹ reviewed an asylum claim by a Salvadoran taxi driver. Mr. Acosta had driven a taxi in San Salvador, where he helped organize and manage COTAXI, a cooperative of taxi drivers.²³⁰ The cooperative ran into trouble with the guerrillas in El Salvador, who planned a series of work stoppages in their efforts to overthrow the Salvadoran government.²³¹ Despite anonymous requests to COTAXI to cease work,²³² Acosta and his taxi cooperative decided to keep working. COTAXI was threatened with retaliation, and taxis were seized and burned. Worse, five COTAXI drivers were killed in their taxis. Three of them were co-founders and officers of COTAXI. Each of the three had received an anonymous threatening note before his death.²³³ Acosta himself found

social group claim); *Olmedo-Carrillo v. INS*, 908 F.2d 977 (9th Cir. 1990) (Salvadoran man who claimed persecution due to his membership in his family, his group of friends, and a consumer cooperative failed to show a reasonable possibility of persecution).

226. *Gomez v. INS*, 947 F.2d 660 (2nd Cir. 1991) (women who have previously been raped and beaten by guerrillas do not constitute a social group because they are not a recognizable and discrete group).

227. In *Matter of Toboso*, A23 220 644 (Feb. 3, 1986), *aff'd* *Matter of Toboso*, No. A23 220 644 (BIA Mar. 12, 1990) (homosexuals in Cuba suffer pattern of discrimination and persecution due to common immutable characteristic).

228. Int. Dec. 2986 (BIA 1985).

229. The Board of Immigration Appeals (BIA) is the administrative appeals tribunal within the United States Department of Justice, with jurisdiction over decisions entered by immigration judges. The BIA is a creature of regulation, promulgated pursuant to the Attorney General's power to hear appeals from exclusion decisions by immigration judges, 8 U.S.C. § 226(b) (1988). Regulations provide that deportation decisions may be appealed to the BIA. 8 C.F.R. § 242.21. See ALEINIKOFF & MARTIN, *supra* note 41, at 91-93, for an overview of the BIA's role.

230. *Matter of Acosta*, Int. Dec. 2986, at 8 (BIA 1985). Acosta testified by affidavit that he and several others founded COTAXI in 1976. Acosta held COTAXI managerial positions between 1978 and 1981; from 1979 to early 1981, he was general manager. COTAXI, a cooperative organization designed to help its members purchase their own taxicabs, was one of five taxi cooperatives in San Salvador. Many other taxi cooperatives flourished throughout the country of El Salvador. *Id.*

231. *Id.* at 8-9. Although the immigration judge hearing Acosta's case concluded that a large part of Acosta's testimony was self-serving and not worthy of belief, the BIA rejected the judge's reasoning and found Acosta credible. *Id.* at 10.

232. COTAXI members believed the anonymous requests came from anti-government guerrillas, because the guerrillas attempted to damage the economy of El Salvador by disrupting small businesses in the transportation industry. *Id.* at 8.

233. The opinion does not describe the text of the notes. The opinion states that one of the three founders of COTAXI killed in their cabs stated, before he died, that

death threats in his taxicab,²³⁴ and was assaulted in his cab. He decided to flee for his life.

After arriving in the United States, Acosta sought asylum based on his membership in a particular social group and based on his political opinion.²³⁵ Specifically, he claimed that he feared persecution by the guerrillas²³⁶ based on his membership in the social group "comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador."²³⁷ The BIA rejected Acosta's claim. Putting aside for the moment the BIA's questionable ruling that persecution for refusal to participate in a general strike does not constitute persecution based on political opinion,²³⁸ it is important to note that the BIA did not appear

"three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him." *Id.* at 8. This statement reveals no indication that the abductors were going to kill him because he was a member of COTAXI, but rather because he owned a car that they wanted to take. It was not clear from the opinion whether questioning by the immigration judge or by the attorneys present at the hearing revealed that some portion of this dying declaration indicated that the abduction was targeted at COTAXI.

234. He received the notes over a two-month period. The first one stated, "Your turn has come, because you are a traitor." The second note stated, "You are on the black list." The third note stated, "We are going to execute you as a traitor." The first and third notes were addressed to "the manager of COTAXI." *Id.* at 9.

235. *Id.* at 29.

236. Although the more typical asylum seeker alleges that he suffers persecution by the government, both the 1951 Geneva Convention and the 1980 Refugee Act of the United States recognize persecution by a non-government group that the government knows about and is unwilling or unable to control. For example, the *UNHCR Handbook*, which states criteria for determining refugee status under the 1951 Convention, specifies that in addition to persecution by "the authorities of a country [persecution] may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." *UNHCR Handbook*, *supra* note 46, para. 65. United States law is in accord. *E.g.*, *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984), *as amended on denial of reh'g and of reh'g en banc*, 767 F.2d 1277 (9th Cir. 1985) (asylum seeker who refused to join guerillas or army had well-founded fear of persecution from both sides due to his neutrality).

237. *Matter of Acosta*, Int. Dec. 2986, at 29 (BIA 1985).

238. *Id.* at 32. In stating that Acosta could escape persecution "either by changing jobs or cooperating in work stoppages," *id.* at 32, the BIA gave a very cramped reading to the term "persecution on account of political opinion." When Acosta refused to join the strike called by the guerrillas, he expressed a political opinion. He also may have been expressing a desire to earn money, but surely he "voted with his cab" against the guerrillas when he went to work during the general strike called by the guerrillas. That Acosta acted on his resolve, rather than writing about it or speaking about it, certainly does not preclude him from obtaining refugee status when he flees persecution based on his political opinion. *See also* *Bolanos-Hernandez*, 749 F.2d at 1324, for a discussion of circumstances in which neutrality, or the decision not to ally oneself to a political viewpoint, constitutes a "political opinion" within the meaning of the United States refugee law.

If the BIA's comment about escaping persecution by cooperating with the potential persecutor were taken seriously, this view would effectively repeal the "political opinion" category of refugees. Most governments and other political groups that engage in persecution based on political opinion will desist from persecution if the

to doubt Acosta's testimony.²³⁹ Rather, the BIA accepted the credibility of Acosta's evidence but concluded that Acosta's participation in the taxi cooperative did not constitute membership in a particular social group.

In order to reach that conclusion, the BIA grappled with the definition of "particular social group." Noting that there has been little explanation of this term in either U.S. or international law, the BIA noted that the other four bases of persecution recognized under the refugee definition—race, religion, nationality, and political opinion—are less vague than membership in a particular social group. Accordingly, the BIA decided to turn for guidance in interpreting the "particular social group" to *ejusdem generis*, the canon of statutory construction that directs that general words included in a list of more specific words be construed in a manner consistent with the more specific words.²⁴⁰

Analyzing the four specific bases of persecution, the BIA concluded that each of them describes persecution targeted at a characteristic that "either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."²⁴¹ Inaccurately labeling both alternatives as immutable characteristics,²⁴² the BIA held that a particular social group is a group of individuals who share a "common immutable characteristic":

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction

dissident effectively repudiates his past disagreement with the persecutor and cooperates with the persecutor in the future. Therefore, all political dissidents would be able to escape persecution if they only cooperated in the approved political actions. The BIA seems to indicate that individuals must do what they can to avoid persecution, including acting contrary to their beliefs.

If one argues that the protection afforded by the Refugee Act of 1980 for those persecuted on account of their political opinion mandates that political dissidents need not cooperate with their would-be persecutors, then one must explain why Acosta is not a political dissident. Surely, the fact that he was not a well-known political figure should not preclude him from obtaining refugee status when he flees persecution on account of his political opinion.

239. Most of the evidence consisted of testimony by Acosta. This raised the issue of the extent to which the testimony was self-serving. The immigration judge concluded that Acosta's testimony was sufficient to prove that he was a founder and member of COTAXI, but insufficient to prove that Acosta had suffered death threats and assaults. Although the immigration judge did not find that Acosta lacked credibility, he rejected much of Acosta's testimony as self-serving. *Matter of Acosta*, Int. Dec. 2986, at 10 (BIA 1985). The BIA reversed this ruling. Emphasizing that there had been no finding that Acosta lacked credibility, the BIA pointed out that his testimony had been detailed, logically consistent, and supported by objective evidence from other sources that corroborated Acosta's membership in COTAXI and the threats made by the guerrillas to public transportation. In these circumstances, the BIA found that Acosta's testimony was worthy of belief. *Id.*

240. *Id.* at 30. This is the doctrine of *ejusdem generis*, meaning "of the same kind". See 2 A. C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.17 (4th ed. 1972).

241. *Matter of Acosta*, Int. Dec. 2986, at 30-31 (BIA 1985).

242. Immutable means "unchangeable; not subject to variation in different cases." OXFORD ILLUSTRATED DICTIONARY 421 (2d ed., 1975).

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 not be required to change because it is fundamental to their individual identities or consciences.²⁴³

Thus, the BIA adopted a two-pronged approach to the interpretation of "particular social group." For purposes of U.S. asylum law, a particular social group consists either of individuals who share an immutable characteristic or share a characteristic that is not immutable but is so fundamental to their identity that they should not have to change that characteristic.

Having articulated this test for "particular social group," the BIA attempted to apply this test to the facts in the *Acosta* case. The BIA first categorized Acosta as a member of a taxi cooperative that refused to strike. The BIA did acknowledge that the guerrillas in San Salvador persecuted taxi cooperatives, including COTAXI, that did not participate in work stoppages. Despite acknowledging that Acosta was a member of a recognizable group that had been subjected to persecution, the BIA concluded the group to which Acosta belonged did not constitute a particular social group within the meaning of the Refugee Act of 1980. The BIA stated that being a taxi driver was not immutable; the drivers could change jobs. The BIA also said that refusing to take part in work stoppages was not immutable; the drivers could always cooperate with the strike. "It may be unfortunate," said the BIA, "that [Acosta] either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice."²⁴⁴

The BIA mischaracterized Acosta's claim. The seriousness of Acosta's potential plight and the complexity of this aspect of refugee law deserve more reflective analysis. Contrary to the BIA's implication, Acosta did not claim that either international or United States law guarantees individuals the unqualified right to work at the job of their choice.²⁴⁵ Acosta simply testified that by carrying out the job he had managed to find in an economy suffering from high unemployment²⁴⁶

243. *Matter of Acosta*, Int. Dec. 2986, at 31 (BIA 1985). In analyzing "particular social group" the BIA reviewed the history of this term in the Geneva Convention, *supra* note 12, and Protocol, *supra* note 15, and examined the work of commentators who have discussed the legal definition of refugee. Finding the evidence inconclusive, the BIA turned to the *ejusdem generis* doctrine, as a tool of interpretation. This doctrine instructs that general terms used in an enumeration with specific terms should be construed in a manner consistent with the specific terms. *Matter of Acosta*, Int. Dec. 2986, at 30 (BIA 1985).

244. *Id.* at 32.

245. There is no indication that anyone other than members of the BIA raised this "right to a job of his choice" claim. The claim is so unpersuasive that it is difficult to imagine Acosta raising it.

246. El Salvador experienced unemployment rates as high as 50%-60% into the early 1980s. 4 MICROPAEDIA [READY REFERENCE] 414, THE NEW ENCYCLOPAEDIA

he had received serious death threats from a group that apparently had no difficulty in making such threats come true. The BIA's evaluation of Acosta's particular social group claim was narrow and elitist, and the BIA vividly demonstrated how cramped an interpretation is possible under its proposed definition.

The BIA's application of the "immutable" and the "fundamental to identity or conscience" aspects of its "particular social group" definition reveals serious problems with its approach. The lens through which the BIA examined Acosta's claim for "immutable" characteristics was a narrow one. Despite the BIA's explanation that the immutable aspects of a particular social group may extend beyond characteristics determined at birth to include elements of an individual's personal history, such as former military leadership or former land ownership, the BIA did not extend its analysis far into Acosta's past. Specifically, the BIA did not consider Acosta's past as a founder of a taxi cooperative that defied the calls for work stoppages and his past as a driver who refused to comply with the strikes called by the guerrillas.²⁴⁷ Clearly, a taxi driver can no more change his past than can a former military leader or a former land owner.²⁴⁸

More significantly, the BIA did not apply to Acosta's testimony the "matter of conscience" aspect of its social group definition. The BIA did not even examine whether members of a work cooperative might find that their membership is fundamental to their identities and to their views of themselves as members of society. This failure of examination by the BIA demonstrated a significant class bias in the BIA's view of social group. For example, the BIA decided in *Acosta* that taxi drivers resisting work stoppages can be required to change their views and actions when faced with threats of persecution, but it is difficult to imagine that the BIA would come to the same conclusion if the facts indicated that doctors throughout the city of San Salvador were routinely persecuted for practicing medicine.²⁴⁹ Similarly, if lawyers in San Salva-

BRITANNICA (15th ed. 1986). See also UNITED STATES GOVERNMENT, *EL SALVADOR: A COUNTRY STUDY* (Richard A. Haggerty ed., 1988) (30% unemployment and 20% underemployment in early 1980s).

247. The BIA focused instead on the possibility that Acosta might find a job in another city, noting that there was no evidence that the persecution of taxi drivers in San Salvador existed throughout the country. *Matter of Acosta*, Int. Dec. 2986, at 33-34 (BIA 1985).

248. It is possible that the BIA failed to consider Acosta's past due to a failure of proof by Acosta that the guerrillas continued to persecute members of COTAXI after they stopped driving their cabs. The tenor of the BIA's opinion, however, implied that the past experience of something as common as a taxicab driver did not rise to the level of the past experience of a military leader or a land owner.

249. This is not unimaginable. One of the notorious excesses of the Cultural Revolution in China was the condemnation of doctors, many of whom were sent to the remote countryside where they were ordered to live like peasants. See CHANG, *supra* note 56, at 425-27. In a similar vein, when the Khmer Rouge took over Cambodia in 1975, it exiled all city-dwellers to the countryside and persecuted the professional and educated classes. WILLIAM SHAWCROSS, *SIDESHOW: KISSINGER, NIXON AND THE DESTRUCTION OF CAMBODIA* 368 (1979). See generally FRANÇOIS PONCHAUD, *CAM-*

dor risked death by practicing law or university professors were threatened with death for holding classes, it is hard to imagine the BIA blithely saying that it is unfortunate that these groups of individuals have to change jobs, but they have no right under international law to do the work of their choice.²⁵⁰ Undoubtedly, doctors, lawyers, and professors all are in occupations that require more training than that necessary for taxi drivers. More education and training does not guarantee, however, more commitment to work. Nor is more highly skilled and more highly paid work necessarily more fundamental to one's identity. The testimony recounted in the *Acosta* opinion does not indicate whether Acosta saw his work as fundamental to his identity. His actions as a founder and active member of the COTAXI cooperative suggest that for him his work may have been more than "just a job." Whether or not this is so, the BIA's failure to inquire into the significance of Acosta's membership in COTAXI to his self-definition essentially omitted the "fundamental to identity" prong from the BIA's particular social group definition.²⁵¹

In *Ananeh-Firempong v. INS*,²⁵² the First Circuit took a more generous approach to claims of persecution based on membership in a particular social group. Beatrice Ananeh-Firempong had come to the United States from Ghana as a student. She overstayed her student visa²⁵³ and, in 1982, was found deportable. In opposing deportation, she claimed that she would face persecution on account of her social group if she were sent back to Ghana.²⁵⁴ She alleged that she would be persecuted

BODIA: YEAR ZERO (1978); U.S. GOVERNMENT, CAMBODIA: A COUNTRY STUDY 46-51 (1990).

250. Of course, neither international nor United States law guarantees the right to the job of one's choice, but that begs the question of whether doctors persecuted for being doctors, lawyers persecuted for being lawyers, engineers persecuted for being engineers, and so on, can constitute a social group within the meaning of the Refugee Act of 1980.

251. Another disturbing aspect of *Acosta* is the cavalier way in which individuals are told to avoid persecution by giving up a job in a society where unemployment is rampant and bedrock poverty abounds. If significant other employment opportunities are available, this admonition might be tolerable. When giving up your job leads to malnutrition and penury, the cost of avoiding persecution is too high. See *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969) (under predecessor statute to Refugee Act of 1980, loss of job can constitute persecution).

252. 766 F.2d 621 (1st Cir. 1985).

253. United States immigration law provides that certain non-citizens can obtain student visas to come to the United States on a temporary basis. 8 U.S.C. § 1101(a)(15)(F) (1988). To be eligible for student visas, applicants must have a foreign residence that they have no intention of abandoning and must intend to leave the United States when they finish their course of study. Students who remain in the United States after their student visas expire have violated the immigration law and are deportable. 8 U.S.C. § 125(a)(9)(A) (1988). See *Shahla v. INS*, 749 F.2d 561 (9th Cir. 1984) (alien's admission that he had not departed the United States when his authorization lapsed is clear and convincing evidence of deportability).

254. After being found deportable, the applicant asked the INS to reopen her case to allow her to seek relief from deportation under 8 U.S.C. § 125(h) (1988), the statutory provision that forbids deportation to countries where the alien's life or freedom would be threatened due to race, religion, nationality, political opinion, or

for belonging to the following social groups: the Ashanti tribe,²⁵⁵ the educated class of professionals and business people,²⁵⁶ and those associated with the recently overthrown government.²⁵⁷ The evidence presented by Ananeh-Firempong indicated that she came from a well-educated family in Ghana. Her father was a headmaster of a school system in Ghana. He owned his own house in Ghana, had substantial savings, and lived in a prosperous neighborhood. In addition, he had been a close friend of the former head of government. Indeed, he had been an active and prominent member of the Convention Peoples Party, the party in control prior to the *coup d'état* by Rawlings in 1981.²⁵⁸ Ananeh-Firempong testified that in 1982, in the aftermath of two *coup* attempts against Rawlings, her parents were placed under house arrest, their telephone service was disrupted, their mail was intercepted, and their bank account was seized. She testified that a government soldier had severely beaten her nephew who was staying at her parents' house. She introduced evidence that the government viewed professionals and business people as disloyal, and as likely sympathizers with the overthrown government. She indicated that the Rawlings government similarly viewed the Ashanti as suspect.

In order to decide whether Ananeh-Firempong had stated a claim that her life or freedom would be threatened in Ghana on account of membership in a social group, the First Circuit had to define social group. The court turned for guidance to the *Handbook on Procedures and*

social group. The immigration judge granted the motion to reopen. The Board of Immigration Appeals reversed, stating that applicant failed to present a prima facie case she would face persecution if deported to Ghana. The First Circuit, in turn, reversed the BIA, concluding she had presented a prima facie case. Ananeh-Firempong, 766 F.2d at 622.

255. The opinion refers to the Ashanti "tribe." Others refer to this group as the Ashanti people, noting that tribes are groups of "primitive or barbarous clans," OXFORD ILLUSTRATED DICTIONARY 907 (2d ed., 1975), whereas the Ashanti are heirs of a sophisticated and complex civilization. The Ashanti empire occupied a region in western Africa from the Togo Mountains in the east to the Komé River in the West in the 18th and 19th centuries. Their famous king Osei Tutu came to power in the 1670s and established his capital in Kumasi. The traditional Ashanti political structure included villages that were, in turn, grouped in territorial divisions. The chief of the capital village served as the paramount chief of the territorial division. Similarly, the paramount chief of the national capital Kumasi served as chief of the Ashanti state. 1 MICROPAEDIA [READY REFERENCE] 620-21, NEW ENCYCLOPAEDIA BRITANNICA (1986).

256. Precise language in the opinion is "professionals, business people, and those who are highly educated." Ananeh-Firempong, 766 F.2d at 623.

257. The applicant's father was a close friend of Dr. Hilla Limann, the former head of state. He had named his daughter Nkurumah after Kwame Nkruma, the founder of Dr. Limann's Convention Peoples Party. The applicant's father had held many posts in the party.

258. Flight Lieutenant Jerry Rawlings, the current leader of Ghana, first came to power in a coup on June 4, 1979. Rawlings remained in power for three months after the 1979 coup. He returned to power in a coup on December 31, 1981. He has remained in power since that time. 1993 WORLD ALMANAC AND BOOK OF FACTS 757 (1993).

Criteria for Determining Refugee Status,²⁵⁹ which states:

A "particular social group" normally comprises persons of similar *background, habits or social status*. . . . Membership of [*sic*] such a particular social group may be at the root of persecution because there is *no confidence in the group's loyalty to the Government* or because the *political outlook, antecedents* or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.²⁶⁰

Based on the elements set forth in the *UNHCR Handbook*, the court concluded that Ananeh-Firempong had adequately alleged a fear of persecution due to her membership in particular social groups. The court emphasized that Ananeh-Firempong had described persecution of people who shared her background and social status, and had presented evidence that the Rawlings government in Ghana distrusted the loyalty of the prosperous, well-educated elite. The court did not specify which of the three social groups in which Ananeh-Firempong claimed membership—the Ashanti people, the educated elite, the friends of the overthrown government—constituted a social group within the meaning of the refugee definition. The court's emphasis on background and social status indicated that it believed membership in the Ashanti and membership in the prosperous class of society both were important. The court's emphasis on political outlook and antecedents indicates that it also viewed friends of the former president as a social group within the meaning of the refugee definition. Although vague about its view of the precise social groups involved, the court expressly noted that the fears of persecution voiced by Ananeh-Firempong arose from characteristics beyond her power to change. In terms of the *Acosta* definition of social group, Ananeh-Firempong faced danger due to immutable characteristics. The social class and political milieu into which she was born, the educational advantages and economic status previously enjoyed by her family, and the tribal background of her forebears were all matters beyond her control.

The facts asserted by Ananeh-Firempong, if true, present a compelling case for refugee status. Is it, however, a claim of persecution based on political opinion masquerading as persecution based on social group? Ananeh-Firempong's family was very active in the political party now out of favor. Also, the prosperous elite to which her family belonged had supported the out-of-favor party, and accordingly was viewed as potentially disloyal to the Rawlings government. Thus, it seems likely that at least two of the alleged social groups, the educated elite and the friends of the overthrown government, received harsh treatment because of their perceived political beliefs.²⁶¹ To what extent

259. UNHCR HANDBOOK, *supra* note 46.

260. *Id.* paras. 77-78 (emphasis added by the court).

261. Persecution based on a political opinion that the victim does not hold constitutes persecution based on political opinion within the meaning of the refugee definition, so long as it is the persecutor's mistaken view of the victim's political opinion

the Ashanti were persecuted due to their perceived political views is unclear from the opinion. There is an implication that the Rawlings government also considered the Ashanti politically suspect,²⁶² but this issue was left for development on remand.

Of course, individuals often may fear persecution for more than one reason, and it is not surprising that persecution for political opinion and for membership in a social group overlap. Indeed, that is often likely to be the case,²⁶³ as the *Handbook's* interpretation of particular social group demonstrates. Although the *Handbook* suggests that persons of similar background, habits, or social status—as opposed to people of similar political views—are likely to be considered a social group, the *Handbook* explains that persecution based on membership in a social group frequently occurs because the government lacks confidence in the group's loyalty or perceives the group's political outlook or economic activity as an obstacle to government policies.²⁶⁴ Thus, the *Handbook* gives a political cast to the social group term.

This political dimension is not restricted to the social group category of persecution. This type of political dimension also applies to the other bases for refugee status: race, religion, and nationality. Although the political dimension is often not explicitly acknowledged, people persecuted on account of race, religion, or nationality generally become targets for persecution because the persecuted group as a whole—whether it be a racial, religious, or ethnic group—is perceived by the government as unreliable or disloyal.²⁶⁵

What is perhaps unusual about Ananeh-Firempong's case is that, in addition to persecution in which the political implications are somewhat subtle, she alleges persecution based on overt political opinion: her father was active in the party that ruled the country before its overthrow by Rawlings. From an American point of view, this is classic political

that motivates the persecution. See discussion of imputed political opinion, *supra* note 136.

262. The Ashanti ancestry is described in the same paragraph as the prosperous elite considered by the Rawlings government to be politically suspect. Ananeh-Firempong, 766 F.2d at 623.

263. The *UNHCR Handbook* specifically states that persecution based on social group often overlaps with persecution based on political opinion. *UNHCR Handbook*, *supra* note 46, para. 77.

264. *Id.* para. 78. See *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992).

265. Governments' underlying motives for persecuting the victimized group may vary. For example, sometimes governments persecute those deemed unreliable because they are viewed as inferior, which is how the Nazis described the Jews and Gypsies which they exterminated. See generally GERALD REITLINGER, *THE FINAL SOLUTION* (1953). Sometimes governments persecute those deemed unreliable because they are viewed as apostates from the "true" religion and thus likely to have allegiances to institutions and principles different from those controlled by the state. This appears to have been the fate of the Baha'i community in Iran in the 1980s. See UNITED STATES GOVERNMENT, *IRAN: A COUNTRY STUDY* 127 (Helen Chapin Metz ed., 1989). Fierce persecution of religious leaders and groups occurred in Cambodia in the 1970s under the Khmer Rouge. See *CAMBODIA: A COUNTRY STUDY*, *supra* note 249, at 55.

opinion; there is no need to reach further and examine allegations of persecution based on social group. Nonetheless, if the allegations about Ananeh-Firempong's family's political prominence are disregarded, as they may be when she presents evidence on remand to support her claim, her other bases of persecution remain. Her Ashanti ancestry and her social status, though they perhaps have political implications, do not depend on evidence pertaining to expression of any political opinion. Whether the educated elite and the Ashanti support the overthrown government, and whether the Rawlings government believes them to be disloyal may be irrelevant. The crucial point is whether evidence supports the claims that the Ashanti are persecuted for being Ashanti and the elite are persecuted for their social status. In this respect, the claim of persecution based on membership in a social group, as opposed to political opinion, is important to Ananeh-Firempong's attempt to demonstrate that she fits within the refugee definition. Social group and political opinion are not simply redundant.

It is possible, of course, to hypothesize persecution without any concern about political opinion. For example, a government could decide to persecute all handicapped individuals, no matter what their political loyalty, in an attempt to "improve" society. Clearly, persecution in such a situation should be deemed persecution based on membership in a social group, rather than persecution based on political opinion. In the real world, however, persecution focused on members of a social group is likely to implicate political opinion. Although the social group may have no explicit political identity or loyalty, the motivation for persecution of that group probably is that there "is no confidence in the group's loyalty to the government."²⁶⁶ Despite this implicit political dimension, proving that the group was persecuted for its political opinion might be difficult. Thus, the concept of social group is a needed one; it fills a noticeable gap in the categories of victims of persecution.²⁶⁷

In 1986 the Ninth Circuit addressed the definition of particular social group in *Sanchez-Trujillo v. I.N.S.*²⁶⁸ Luis Alonzo Sanchez-Trujillo and Luis Armando Escobar-Nieto, citizens of El Salvador, sought asylum in the United States. Sanchez-Trujillo testified that he had been a member of a Catholic youth organization, and that the priest who headed the

266. UNHCR HANDBOOK, *supra* note 46, para. 78.

267. Although many "gaps" remain, in that there are many types of persecution that do not fall within the refugee definition set forth by the Geneva Convention, such as persecution based on private motivation or persecution endemic to bystanders of civil wars, the social group concept fits closely with the other four categories recognized by the Geneva Convention. As mentioned in the text, in some ways social group can be seen as a kind of "implicit political opinion" category. Seen in this manner, it bears a resemblance to the nationality, race, and religion categories of persecution, as well as to the political opinion category. Thus, social group closes a gap in terms of types of persecution that were well-recognized in the late 1940s and early 1950s by the drafters of the Geneva Convention.

268. 801 F.2d 1571 (9th Cir. 1986).

organization disappeared for a month and reappeared with bruises on his face after demonstrations near the church. In addition, Sanchez-Trujillo alleged that government officials stopped him briefly four times, asked him to produce identification, and searched him for weapons. He was never arrested. After fleeing El Salvador and entering the United States, Sanchez-Trujillo participated in an organization protesting conditions in El Salvador.²⁶⁹

Escobar-Nieto testified that men in a vehicle with government license plates attacked him one night in San Salvador, beat him, robbed him, and released him. Other than robbery, there was no apparent motive for this beating. He also testified that he had been at two demonstrations that government forces violently dispersed, but had not been involved in the violence.

Both Sanchez-Trujillo and Escobar-Nieto alleged that they faced persecution as members of the particular social group comprised of "young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador."²⁷⁰ In addition, both claimed that they feared persecution based on political opinion.²⁷¹ The immigration judge ruled that neither Sanchez-Trujillo nor Escobar-Nieto had presented sufficient evidence of a well-founded fear of persecution.²⁷² The Board of Immigration Appeals affirmed the immigration judge's ruling.²⁷³ The BIA specifically held that young, urban, working class males without military service did not constitute a particular social group within the meaning of the Refugee Act of 1980.²⁷⁴

269. The court characterized his association with the organization as brief, and gave no indication that Sanchez-Trujillo had participated in public protests or had otherwise become known as a member of this unnamed group. *Id.* at 1573.

270. *Id.*

271. Sanchez-Trujillo maintained that he feared persecution due to imputed political opinion. *Id.* See *supra* note 136, for a discussion of imputed political opinion. Presumably, he meant that his participation in the Catholic youth organization and/or in the protest organization in the United States might be seen by Salvadoran government officials or right-wing vigilantes as an expression of disloyalty to the Salvadoran regime.

Originally he had also claimed that he feared persecution based upon religious belief, due to his membership in the Catholic youth organization, but he abandoned this argument on appeal. *Sanchez-Trujillo*, 801 F.2d at 1573 n.2.

272. The applicants claimed they had a well-founded fear of persecution, which entitled them to asylum, 8 U.S.C. § 1158(a) (1988), and that their lives and freedom would be threatened if they were sent back to El Salvador, which entitled them to withholding of deportation, 8 U.S.C. § 1253(h) (1988). The immigration judge denied both claims. In affirming, the BIA acknowledged and applied a more generous standard of proof to the asylum claim than to the withholding of deportation claim. *Matter of Sanchez and Escobar*, Int. Dec. 2996, (BIA 1985). Although this case preceded the Supreme Court's ruling in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which articulated different burdens of proof for asylum and withholding of deportation, the standards of proof applied here were consonant with the Supreme Court's subsequent ruling.

273. The BIA ruled that the applicants failed to satisfy their burden of proof. The BIA granted voluntary departure of 30 days. *Sanchez-Trujillo*, 801 F.2d at 1573.

274. *Id.*

In reviewing the BIA decision, the Ninth Circuit grappled with the phrase "particular social group." The Ninth Circuit examined legislative history,²⁷⁵ United States case law,²⁷⁶ and the *UNHCR Handbook*²⁷⁷ for assistance in defining this term. Finding none of these sources helpful, the court embarked on its own statutory construction. The court's initial premise was that the social group category is a broad and flexible one, but one circumscribed by a "practical appreciation of the reasonably limited scope of the term 'refugee.'" ²⁷⁸ In light of this "practical appreciation," the court decided that a particular social group must be more than a recognized demographic category. For example, a group of males taller than six feet would constitute a group, but not a particular social group within the meaning of the Refugee Act of 1980.²⁷⁹ The court paid special attention to the adjectives "particular" and "social," and concluded that they required some associational relationship. Thus, the court defined a particular social group:

people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.²⁸⁰

In light of its definition, the court concluded that the immediate members of a family would comprise a particular social group. The court viewed a family as a "small, readily identifiable group" that would have common interests and "fundamental affiliational concerns."²⁸¹ The court contrasted a family with the particular social group alleged by the plaintiffs: young, working class, urban males of military age who have never served in the military or otherwise expressed support for the government of El Salvador. According to the court, these men—like the six-footers—constitute a group, but not a particular social group. Rather than a small, readily identifiable group, they are a "major segment of the population of an embattled nation."²⁸² Rather than a cohesive or homogeneous group, they are a group of disparate individuals

275. The court described the legislative history as "generally uninformative on this point." *Id.* at 1575.

276. Noting that there is a "dearth of judicial authority construing the meaning of 'particular social group,'" the court discussed solely the *Ananeh-Firempong* case. It concluded that "[w]hatever the merits of the First Circuit's decision under the circumstances of that case, the decision provides no guidance as to the outer limits of the 'social group' category." *Id.* at 1575 n.6.

277. Characterizing the *Handbook* as a "significant source of guidance," the court found that the *Handbook* provided "little assistance in arriving at a workable definition of 'particular social group.'" *Id.* at 1576.

278. *Id.*

279. *Id.* The court concluded that these individuals would not comprise a particular social group even if they could show that they were at greater risk of persecution than the general population. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 1577.

with "different lifestyles, varying interests, diverse cultures, and contrary political leanings."²⁸³

Clearly, young working class urban males of military age in El Salvador do not comprise a small homogenous group. The court's own definition, however, refers to close affiliation and common interest, not small size and homogeneity. Specifically, the court's definition refers to a "common characteristic that is fundamental to their identity as a member of that discrete social group."²⁸⁴ The court never discusses the common characteristics of the purported social group in this case, however, nor analyzes whether any of those characteristics are fundamental to their group identity. Rather the court leaps to the conclusion that this group of young, working class, urban males is not a particular social group. The lack of application of the principles enunciated by the court to the facts of the case renders the *Sanchez-Trujillo* opinion unsatisfactory. Had the court attempted to apply its definition to the facts, it might have concluded that its definition needed to be refined.

A closer look at the court's proffered social group definition reveals three elements: (1) voluntary associational relationship; (2) common characteristic (or impulse or interest); and (3) a characteristic fundamental to their group identity. An examination of the young, working-class, urban males group in light of the court's analysis is revealing. Certainly, in terms of the court's second factor, young working-class urban males of military age have common characteristics: age, sex, social status, and geographical location.

Whether these characteristics are fundamental to their group identity, as the court's third factor requires, depends on one's perception of the relevant group as well as the evidence of the risk to the group. Although for most of their lives these young, working-class, urban men may not have viewed their age, location, and social status as particularly central to their identity, the fact that the confluence of these factors now puts them in a group that is at great risk of death may well have transformed these characteristics into central ones. Clearly, these characteristics once thought to be peripheral may now appear overwhelmingly important; a present consciousness of these factors and the risk they entail may have led to the development of a sense of solidarity or shared identity with others in the Salvadoran population who possess these characteristics. In other words, over an individual's lifetime different characteristics may be more or less central at different times. The court's requirement of common characteristics central to group identity does not specify that the centrality be constant throughout all stages of life.²⁸⁵ Consequently, one could easily conclude that these characteristics are fundamental to that particular social group. Thus, the lack of

283. *Id.*

284. *Id.* at 1576.

285. If it did, many groups intuitively thought of as social groups in the refugee context would fail to satisfy the refugee definition. For example, the economic class one is born into, or the league of voters one belongs to, or the religion one practices

common characteristics is not the attribute that prevents the group of young, working-class urban males from constituting a particular social group under the court's definition.

Rather, the absence of any voluntary association binding the group members together is the definitional problem. Indeed, the lack of the court's first listed factor, voluntary association, is what makes the young, working-class, urban males seem like the six-footers—a group existing in society, but not a "particular social group." A closer look at this factor indicates that voluntary association should not be a necessary prerequisite to finding persecution based on social group. Although the court suggested that the immediate members of a family would constitute a typical social group, the very factor that excludes the six-footers and the young, working-class, urban males, would preclude a family from constituting a particular social group.²⁸⁶ Family members are involuntarily related to each other; children, siblings, and cousins have no say over the family into which they are born. Furthermore, family members may or may not voluntarily associate together. Although many family members choose to associate together, certainly there are numerous instances when individuals choose not to associate with other family members.

The questionableness of the "voluntary association" element of the Ninth Circuit's definition renders the definition itself suspect. Close analysis of the other two elements reveals that they are not useful in distinguishing "groups" from "particular social groups," since the "common characteristic . . . fundamental to [group] identity" factors are circular descriptions. Whatever characteristics define the group will always be common characteristics shared by the group. Furthermore, the characteristics used to define the group will always be fundamental to the group members, at least insofar as their membership in that particular social group is concerned. As explained above, although young, working-class, urban males are a very disparate group of individuals, their age, sex, social status, and geographical location are common characteristics that are the crux of their identity as group members.

In fact, the Ninth Circuit's hesitation about defining as a particular social group a large, heterogeneous group of people who do not know each other is understandable. Unfortunately, the court's intuitive

may be crucial to one's sense of identity and purpose during some stages of life and peripheral during others.

286. In contrast to voluntary association, the second requirement, possessing a common characteristic, is more easily satisfied by members of a family. The issue is from whose perspective this common characteristic is to be observed. From within a family, the family members may seem diverse and even disconnected. Indeed, family members may believe that they have little in common with other members of the same family. From outside the family, the perception is different. The outside world generally views family members, no matter how disparate, as sharing a common characteristic: common parentage or ancestry. This common characteristic also satisfies the third requirement. Lineage or family heritage is very often viewed as fundamental to identity. Certainly, it is fundamental to the identity of a family as a particular social group.

response to the facts did not yield a satisfactory definition. Voluntary association, in itself, is not sufficient. Moreover, it should not be a necessary element of proof. The refugee definition should encompass social groups that include members whose association with each other is involuntary. For example, persecution of members of a family due to their family relationship should be recognized as persecution of a particular social group. Similarly, the refugee definition should encompass some social groups whose members may not even associate with each other. Persecution of the former land-owning class should be recognized as persecution of a particular social group, whether the land-owners associated with each other or not. History shows that members of particular social groups have been persecuted despite group members' lack of interest in associating with each other. The Nazi persecution of non-religious Jews totally assimilated into German society is only one vivid example.²⁸⁷

In 1990 another panel of the Ninth Circuit examined an application for asylum based on persecution due to membership in a particular social group. The social group asserted in *De Valle v. INS*²⁸⁸ was composed of families of military deserters. De Valle explained that her husband had been in the Salvadoran army for six years. She said that he was forced by his military commanders to participate in massacres of civilians in 1981. During that same year he was shot at by unknown gunmen while he was off-duty, but wearing a military uniform. Shortly after that incident, Mr. De Valle refused to obey the command that he return to duty. Stating that he neither wanted to participate in future violence against civilians nor to be a target of guerrilla sympathizers, he and his wife fled to the United States.

The case before the Ninth Circuit involved only the wife's claim for asylum. Mrs. De Valle argued that she would be persecuted for her political opinion as well as her membership in a particular social group. She asserted that Salvadorans would conclude from her husband's desertion that he possessed anti-government political opinions and that she, as his wife, would also be deemed to hold the same political opinions. She also claimed that she would be persecuted as a member of a disloyal social group, the families of deserters from the military. The court rejected both claims, essentially ruling that she had failed to produce credible evidence to substantiate her fear of persecution. The court went further, however, and added that family members of deserters do not constitute a social group within the meaning of the Refugee Act of 1980.²⁸⁹ The court relied heavily on the reasoning in *Sanchez-Trujillo*,²⁹⁰ inquiring whether the purported social group was a closely

287. See WILLIAM S. ALLEN, *THE NAZI SEIZURE OF POWER* 209-13 (1965); see generally *THE FINAL SOLUTION*, *supra* note 265.

288. 901 F.2d 787 (9th Cir. 1990).

289. *Id.* at 793.

290. 801 F.2d 1571 (9th Cir. 1986), discussed *supra* in text accompanying notes 268-87.

affiliated group with common impulses or interests, who voluntarily associated with each other in a manner that identified them as members of a discrete social group.²⁹¹ The court stated:

The social group in which De Valle claims membership—families of deserters—is by no means closely affiliated or discrete. While there may be some common impulse of interest that, at a high level of generality, ties the families of deserters together, the differences between such families far outweigh the similarities.

... [S]uch a group 'does not exemplify the type of 'social group' for which the immigration laws provide protection from persecution' because '[i]ndividuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings.' Family members of deserters, like young urban males, are ... a diverse, fragmented segment of the population. As we have stated before, '[m]ajor segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status.'²⁹²

In sum, the Ninth Circuit again was disturbed by the size and the heterogeneity of the asserted social group. The differences in lifestyles, beliefs, and interests that existed within the group seemed too extreme. Neither this court nor the *Sanchez-Trujillo* court asked whether Salvadoran society, or important segments of it, perceived this heterogeneous collection of people as a particular social group. Inquiring into the external perception of the putative group might have proved helpful. Returning to the Nazi example mentioned before, there is no doubt that there were wide variations in terms of lifestyles, beliefs, and interests among Jewish families in Germany in the 1930's. There is also no doubt that the Nazi regime perceived the Jewish people, no matter their differences, as a group to exterminate.

Most recently, the Second Circuit has addressed the social group issue in reviewing an asylum claim filed by a Salvadoran woman fighting deportation from the United States.²⁹³ Unfortunately, the case involved facts that portrayed the plaintiff in a less than sympathetic light, which may have diminished the court's willingness to take a serious look at the definition of social group. Carmen Gomez entered the United States illegally in 1979 at the age of eighteen. For nine years she worked at various jobs, which, by the end, included selling cocaine. In 1989 she was convicted of three drug felonies and sentenced to prison.²⁹⁴ At her

291. *De Valle*, 901 F.2d at 793.

292. *Id.* at 793.

293. *Gomez v. INS*, 947 F.2d 660 (2nd Cir. 1991).

294. She was originally indicted for criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. Later she was indicted on two additional counts of criminal sale of a controlled substance in the third degree. Still later she was indicted for criminal possession of a controlled substance in the third, fourth, and seventh degrees. She pleaded guilty to criminal sale of a controlled substance in the fifth degree and to two counts of criminal sale of a controlled substance in the third degree. *Id.* at 662.

deportation hearing, Gomez conceded deportability due to illegal entry but contested deportability as an aggravated felon. She declined to designate a country to which she could be deported. After the government requested that El Salvador be designated as the destination, Gomez for the first time applied for asylum in the United States.²⁹⁵

Gomez alleged that she had been raped and beaten five times between the ages of twelve and fourteen by guerillas in El Salvador. She asserted that she belonged to the social group of women who have been beaten and raped by Salvadoran guerrillas and that members of this group are singled out for persecution in El Salvador. The court rejected her claim, stating that she had failed to show that she was any more likely to be persecuted than any other woman.²⁹⁶ Essentially, Gomez lost her case because she failed to convince the court that she had a well-founded fear of persecution. Although it was not necessary to analyze additional elements of the refugee definition, the court went on to discuss social group:

The phrase 'particular social group' has been defined to encompass 'a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.' 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. Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.²⁹⁷

The court stated that Gomez had produced no evidence that there were traits other than youth and gender that could identify members of the particular social group upon which Gomez based her claim. Accord-

295. *Id.*

296. The court opinion is silent on the evidence submitted by Gomez. From this silence I infer that the only evidence supporting the assertion that women who had been beaten and raped years ago were likely to be beaten and raped now was Gomez's own testimony. There is no requirement that an asylum applicant submit corroborating evidence to bolster her testimony, and the applicant's own testimony, if consistent and believable, can be sufficient. *Matter of Mogharrabi*, Int. Dec. 3028 (BIA 1987); *Bianco Comarribas v. INS*, 830 F.2d 1039, 1041-43 (9th Cir. 1987); *Carrajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *M.A. A26851062 v. INS*, 858 F.2d 210, 214 (4th Cir. 1988). The facts of Gomez's case, however, raise some obvious concerns about whether it was likely she would face persecution in the 1990s in El Salvador. For example, she claimed she was brutalized repeatedly between the ages of 12 and 14. She remained in El Salvador for four more years, however, and apparently was not brutalized during that time. Furthermore, she had been in the United States for 12 years at the time of her deportation hearing. Consequently, sixteen years had elapsed since the prior attacks on her. This meant that Gomez not only had the burden of proving the existence of a social group of women raped and beaten by Salvadoran guerrillas, but also the burden of proving that sixteen years later she would still be perceived as a member of that group and would be persecuted due to her membership in the group.

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

ingly, the court concluded that if members of the particular group could not be identified, individuals in the group could not be persecuted for their membership in the group. In reaching this conclusion the court took care to indicate that repeated attacks on women can give rise to a well-founded fear of persecution:

Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman.²⁹⁸

Although it may have been dicta, the Second Circuit's analysis of social groups is important. It may be, at base, a rehash of the *Sanchez-Trujillo* formulation, but it goes farther. For the first time in United States jurisprudence a court has expressly stated that external perceptions are as important in defining social groups as an innate or fundamental trait that might bind some groups together. Furthermore, the court went beyond "the eyes of the persecutor," which one might argue is always implicitly part of the decision to target a particular group; the court explicitly stated that "the eyes of the outside world in general" may tell us which collection of individuals constitutes a social group and which does not. The absence of any proof on this issue doomed Gomez's asylum claim. Although the Second Circuit did not state so in precise words, the thrust of its decision in *Gomez* is that neither internal traits nor external perception bind together into a social group young Salvadoran women who have been repeatedly brutalized by guerrillas. The women do not know each other, do not share common interests, and do not have similar lifestyles. Moreover, society at large does not perceive these women as a social group.

The *Gomez* court does not call upon jurisprudence in other countries in its efforts to interpret the social group term. It does, however, propose an analysis that is similar to the interpretive approaches that appear in both German and Canadian jurisprudence. These approaches recognize that it is too narrow to focus only on the internal structure and common interests, background, and status of the alleged social group. Although those are useful starting points, the perception by society of the existence of a social group—whatever combination of similar and dissimilar individuals comprise it—is equally important. If the *Gomez* approach to social group is a precursor of U.S. case law developments, the social group definition in the United States will be more in line with that in other countries.

A comparative perspective also highlights some important differences. In the United States, the reasoning in *Sanchez-Trujillo*, which is repeated and emphasized in other cases such as *De Valle* and *Gomez*, practically reads out of the social group term any group that is even partially

298. *Id.*

defined by broad-based characteristics such as youth or gender. Neither Canadian nor German cases evidence the same disfavor. As a practical matter, the governments of all three countries will be troubled if they think that huge portions of a country undergoing a civil war can claim asylum based on persecution due to membership in a particular social group. Although the Germans and Canadians surely have this very real concern, they have not allowed it to influence the development of the social group concept. They have not disqualified large groups from the refugee definition merely due to their size. Rather they have recognized that other elements of the refugee definition will narrow the pool of those who have claims to refugee status. Refugee applicants must prove a well-founded fear of persecution, and persecution is not the same thing as discomfort or danger. Moreover, applicants must prove that the persecution is due to their *membership* in a particular social group.²⁹⁹ It is not sufficient in strife-torn countries to show that some members of a social group may face persecution. The refugee definition requires a link between the membership in the group and the persecution that the applicants fear. Recognizing that the refugee definition has built-in limits perhaps would allow the United States case law concerning social groups to develop in a less distorted manner. This would be another step in the right direction and would bring United States decisional law more in line with other countries' interpretations of persecution based on membership in a particular social group.

Conclusion

This review of the Refugee Convention, national refugee legislation, scholarly commentary, and judicial opinions in three countries indicates that the social group concept is still unsettled in refugee law. The national approaches to claims of persecution based on membership in a particular social group vary significantly. The German courts have identified three pertinent social group criteria: the homogeneity of the group, the inner structure of the group, and the perceptions of the general population as to the existence of a discrete and undesirable group.

299. This does not mean that asylum seekers must show that they have been or will be singled out for persecution. Rather it means that members of the social group fear persecution based on their membership, not based on random violence or based on reasons unrelated to membership in the group. It is, of course, unnecessary for an asylum seeker to prove an explicit policy mandating persecution of members of a social group. An implicit policy suffices and can be inferred from persecution of other members of the group if there appears to be no basis for persecution other than their social group.

INS v. Elias Zacarias, 112 S. Ct. 812 (1992), is not to the contrary. In that case, the Court stated that an asylum seeker who based his claim on political opinion must show via direct or circumstantial evidence (1) that he had a political opinion and (2) that he had a well-founded fear that the guerrillas would persecute him because of that political opinion, not because of some other reason. *Id.* Applying that reasoning to the social group setting, asylum seekers must show (1) that they are members of a particular social group and (2) that they have a well-founded fear that they will be persecuted for membership in that social group. *Id.*

It is unclear whether the German courts view the external perception element as an alternative to the homogeneity and internal structure elements or as an additional requirement. If the latter, the cumulative effect of these three criteria may reduce the types of groups that fall within the social group concept. If, however, the external perceptions constitute an alternative criterion, a wider array of groups of individuals will be encompassed by the social group aspect of the refugee definition.³⁰⁰

In Canada, the Immigration and Refugee Board analyzes social group claims in a manner similar to the "alternative" German approach. The Board first asks whether the group is defined by an internal characteristic that is innate, immutable, or fundamental to the members' identity or human dignity. The Board also examines whether there are external perceptions that this is a group that is threatening or dangerous. A group that satisfies any one of the elements of the standard satisfies the social group concept.

The U.S. approach to social group, because it is articulated in judicial decisions issued by different federal judicial circuits, is more variable than that of Germany and Canada. The *Acosta* standard, which emphasizes common immutable characteristics or characteristics that are so fundamental to identity that they should not have to be changed, will pose a major hurdle to many groups. The *Acosta* analysis is partly subsumed in the Canadian approach, but there is an important difference. *Acosta* searches only for immutable characteristics or concerns fundamental to identity; in Canada the analysis extends further and inquires into society's perceptions of the group.

Under *Ananeh-Firempong*, asylum seekers need to prove that they are members of groups consisting of people who share similar backgrounds, habits, or social status. There is no express acknowledgement that external perceptions of the group are relevant, nor is there an explicit requirement of fundamental or immutable characteristics.

Sanchez-Trujillo and *DeValle* require a voluntary associational relationship and common characteristics (or impulses or interests) that are fundamental to group identity. They reject groups comprised of individuals of "different lifestyles, varying interests, diverse cultures, and contrary political leanings."³⁰¹ They do not inquire into immutable traits or to general societal views of the group in question.

Most recently, *Gomez* acknowledges that a social group must be perceived as a recognizable and discrete group in society whose members possess a common characteristic that distinguishes them in the eyes of the outside world. This echoes a portion of the German and the Cana-

300. See *supra* text accompanying notes 174-78, for a discussion of the lack of synthesis of the German cases. Whatever the approach applied by the courts reviewing asylum claims, the much more important issue is the approach taken by the Federal Office for the Recognition of Foreign Refugees, *supra* note 178, which is the administrative agency that initially rules on asylum applications filed in Germany.

301. *Sanchez-Trujillo*, 801 F.2d at 1576.

dian analyses, and makes it possible for a broader array of social groups to be recognized under the refugee definition.

This comparison of the social group definitions posited by German, Canadian, and U.S. law illustrates the difficulties asylum seekers have in relying on this aspect of the refugee definition. Furthermore, it demonstrates that the refugee jurisprudence in Germany, Canada, and the United States contains important similarities and differences. To the extent the United States jurisprudence continues down the path recently started in *Gomez* and takes into account the external perception of a social group, the similarities are likely to increase and the differences diminish.

